

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Regina Williams	:	
	:	
v.	:	
	:	
Housing Authority of	:	
The City of McKeesport,	:	No. 1040 C.D. 2010
Appellant	:	Submitted: December 3, 2010

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: January 4, 2011

The Housing Authority of the City of McKeesport (Authority) appeals from the May 5, 2010 order of the Court of Common Pleas of Allegheny County (trial court) granting the appeal of Regina Williams (Williams) and admitting her into the public housing program provided by the Authority. There are four issues before the Court: (1) whether the trial court erred in granting Williams the right to appeal *nunc pro tunc*, (2) whether the trial court erred by holding that a certain electric bill did not belong to Williams, (3) whether the trial court erred by holding that Williams' alleged history of rent deficiency could not support the hearing officer's decision to deny her housing, and (4) whether the trial court erred by holding that the hearing officer's decision was not in accordance with the law because it did not reference the admissions policy of the Authority. For reasons that follow, we vacate the order of the trial court, and remand for proper determination as to whether the trial court had

jurisdiction to hear Williams' appeal, specifically whether Williams should have been granted the right to appeal *nunc pro tunc*.

On March 10, 2009, Williams applied to the Authority for public housing. On October 27, 2009, the Authority notified Williams that she was rejected from the low-income public housing program. Williams appealed to the Authority and a hearing was held on November 19, 2009. On December 12, 2009, the Authority denied Williams' appeal. Williams did not file a timely appeal from the December 12, 2009 denial. The trial court, however, granted her leave to file an appeal *nunc pro tunc* on February 26, 2010, and she filed her appeal that same date. The trial court held a conference on April 14, 2010, and on May 5, 2010, it granted Williams' appeal, ordering that she be admitted into the low-income housing program. The Authority then appealed to this Court.

The Authority first argues that the trial court erred in granting Williams the right to appeal *nunc pro tunc*. "Where the trial court permits an untimely appeal to be filed *nunc pro tunc*, our review is limited to determining whether the trial court abused its discretion or committed an error of law." *Puckett v. Dep't of Transp., Bureau of Driver Licensing*, 804 A.2d 140, 143 n.6 (Pa. Cmwlth. 2002).

We note that, in general: "both trial and appellate courts have jurisdiction to determine whether an appeal *nunc pro tunc* should be granted." *Towey v. Lebow*, 980 A.2d 142, 144 (Pa.Super. 2009). Beyond the initial *nunc pro tunc* determination, however, it is well settled that the failure to timely appeal an order divests appellate courts of jurisdiction to determine the merits of an appeal, absent some showing of fraud, breakdown in adjudicatory operations or some other extraordinary circumstances. *See Sidkoff, Pincus, Greenberg & Green, P.C. v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 521 Pa. 462, 555 A.2d 1284 (1989). In *Puckett*

v. *Department of Transportation*, this Court offered the following explanation as to the evolution of the standard employed for appellate *nunc pro tunc* determinations.

As a general rule, an appeal *nunc pro tunc* will be granted in civil cases only where the appeal was untimely filed due to fraud or a breakdown in the court's operations. However, that standard has been relaxed where a litigant's right to appeal has been lost due to 'extraordinary circumstances.' Each case, however, is limited to the unique and compelling factual circumstances of that particular case.

The courts of this Commonwealth have addressed the issue of whether extraordinary circumstances existed such that allowance of an appeal *nunc pro tunc* was appropriate on numerous occasions. *See* [*Commonwealth v. Stock*, 545 Pa. 13, 679 A.2d 760 (1996)] (appeal *nunc pro tunc* was appropriate in criminal context where litigant requested attorney to file appeal; however, attorney failed to file timely appeal); *Cook v. Unemployment Compensation Board of Review*, 543 Pa. 381, 671 A.2d 1130 (1996) (appeal *nunc pro tunc* was appropriate where hospitalization of litigant during the running of the appeals period resulted in the non-negligent late filing of appeal); *Bass v. Commonwealth*, 485 Pa. 256, 401 A.2d 1133 (1979) (appeal *nunc pro tunc* was appropriate to avoid a litigant's loss of her day in court where the failure of a litigant's attorney to file a timely appeal was non-negligent and the delay was minimal); [*Walker v. Unemployment Compensation Board of Review*, 461 A.2d 346 (Pa. Cmwlth. 1983)] (appeal *nunc pro tunc* was appropriate where post office failed to forward referee's decision resulting in untimely filing of appeal). While the holdings in those cases expand the general rule for granting an appeal *nunc pro tunc*, implicit in each of those holdings is a finding that the litigant himself did not act in a negligent manner.

Puckett, 804 A.2d at 143 (citations omitted). What is clear, then, is that where a court is asked to make a determination as to whether to grant a litigant the right to file an untimely appeal *nunc pro tunc*, the finding that such untimeliness is the result of

some fraud, a breakdown in adjudicatory operations or some other extraordinary circumstance is, in fact, a jurisdictional prerequisite to the granting of the right to appeal *nunc pro tunc*.

Here, the record is devoid of any statement whatsoever as to why the underlying appeal was not timely filed. Williams' application for leave to file an appeal *nunc pro tunc* did not offer a reason for her failure to file a timely appeal, and the trial court's opinions did not address the issue. The only stated reason for the trial court's grant of Williams' request to appeal *nunc pro tunc* is that the Authority failed to oppose Williams' motion. Any failure to oppose a motion, however, is not sufficient to confer appellate jurisdiction where none exists.

Without a determination as to existence of fraud or a breakdown of adjudicatory operations, and without a finding as to some other extraordinary circumstance, the granting of the right to appeal *nunc pro tunc* was premature. The trial court's order is, therefore, vacated, and the matter is remanded for a proper determination as to whether the trial court can grant Williams' motion seeking the right to appeal *nunc pro tunc*. This court will not address the merits of Williams' appeal at this time, as it is not clear that Williams' appeal was properly before the trial court to begin with.

Accordingly, the trial court's order admitting Williams into the public housing program provided by the Authority is hereby vacated, and the matter is remanded for proceedings consistent with this Court's Opinion.

JOHNNY J. BUTLER, Judge

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	:	
v.	:	
	:	
Housing Authority of	:	
The City of McKeesport,	:	No. 1040 C.D. 2010
Appellant	:	

ORDER

AND NOW, this 4th day of January, 2011, the May 5, 2010 order of the Court of Common Pleas of Allegheny County is hereby vacated. The matter is remanded to the Court of Common Pleas for proceedings consistent with this Court's Opinion.

Jurisdiction relinquished.

JOHNNY J. BUTLER, Judge