

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Kevin Gasiorowski and Christie	:	
Gasiorowski,	:	
	:	
Appellants	:	
	:	
v.	:	
	:	
	:	
City of Pittsburgh Zoning Board of	:	
Adjustment, City of Pittsburgh,	:	No. 1752 C.D. 2009
2300 Josephine Street Land Trust	:	Submitted: December 11, 2009

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER

FILED: January 29, 2010

Kevin and Christie Gasiorowski (the Gasiorowskis) appeal the August 5, 2009 order of the Court of Common Pleas of Allegheny County (trial court) affirming the decision of the City of Pittsburgh Zoning Board of Adjustment (Board) which denied and dismissed a protest appeal filed by the Gasiorowskis. There are two issues before the Court: (1) whether the trial court erred in affirming the denial of the Gasiorowskis' appeal without substantial evidence to support its findings, and (2) whether the trial court erred in affirming the Board's failure to grant the filing of the appeal *nunc pro tunc*. For reasons that follow, we affirm the order of the trial court.

2300 Josephine Street Land Trust (Trust) owns an art glass facility which includes a large warehouse structure located at 2300 Josephine Street (Property). A portion of the Property is located in an urban industrial (UI) district, and a portion is located in a hillside district. The Trust sought approval to construct a residence to the rear of the existing warehouse. On December 4, 2006,

the City of Pittsburgh's Zoning Administrator issued a letter indicating his determination that the proposed construction would be an accessory use that is appropriate, incidental, and subordinate to the primary use of the lot.

On February 6, 2007, the Trust filed an application for an occupancy and building permit which was granted in June of 2007. On July 24, 2007, the Gasiorowskis observed construction on the Property. On August 14, 2007, Christie Gasiorowski appeared at the City of Pittsburgh's Zoning Office (Zoning Office) with a completed protest appeal from the decision of the Zoning Administrator; however, no appeal was filed at that time. A protest appeal was filed by the Gasiorowskis on February 22, 2008. A hearing was held on April 3, 2008, and on June 26, 2008, the Board denied the appeal and dismissed it as untimely. The Gasiorowskis appealed the decision of the Board to the trial court. The trial court held a hearing on February 25, 2009. On August 5, 2009, the trial court affirmed the Board's decision. On September 3, 2009, the Gasiorowskis appealed to this Court.¹

The Gasiorowskis argue that the trial court erred in affirming the denial of their appeal without substantial evidence to support its findings. Specifically, the Gasiorowskis contend there is no evidence in the record that could reasonably be relied on to conclude that the protest appeal was not perfected. We disagree. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Coal Gas Recovery, L.P. v. Franklin Twp. Zoning Hearing Bd.*, 944 A.2d 832, 838 n.9 (Pa. Cmwlth. 2008).

¹ Where the trial court has taken additional evidence, this Court must review whether the trial court has committed an error of law or an abuse of discretion. *Coal Gas Recovery, L.P. v. Franklin Twp. Zoning Hearing Bd.*, 944 A.2d 832 (Pa. Cmwlth. 2008). "An abuse of discretion occurs when the findings are not supported by substantial evidence in the record." *Id.* at 838 n.9.

Here, as stated above, Christie Gasiorowski testified that she went to the Zoning Office on August 14, 2007, but she did not file her appeal. The trial court found: “[The Gasiorowskis] failed to file because they would not prevail and did not want to ‘donate \$500 to the city without a hearing.’” *Kevin Gasiorowski and Gasiorowski v. City of Pittsburgh Zoning Board of Adjustment*, (C.P. Alleg., No. SA 08-000848, filed August 6, 2009) (*Gasiorowski*), slip op. at 3, Finding of Fact No. 11 (quoting Notes of Testimony, February 25, 2009, at 35).²

The Gasiorowskis contend that because Christie Gasiorowski testified that when she went to the Zoning Office to file her appeal, Cledea Klingensmith, the filing clerk Ms. Gasiorowski encountered at the Zoning Office on August 14, 2007 refused to accept her appeal, the appeal should be considered perfected. The Gasiorowskis emphasize the fact that Ms. Gasiorowski’s testimony was corroborated by Linda Gigliotti, a co-worker who accompanied Ms. Gasiorowski to the Zoning Office, as well as Brendan R. Schubert, a Zoning Code Administrative Officer. However, the fact finder is free to reject a witness’ testimony. *Stancavage v. Dept. of Transp., Bureau of Driver Licensing*, ____ A.2d ____, (Pa. Cmwlth. No. 127 C.D. 2009, filed November 17, 2009). Clearly, the trial court was not persuaded by the above testimony. Instead, the court chose to credit the testimony of Ms. Gasiorowski regarding her not wanting to donate \$500 to the City, and the testimony of Ms. Klingensmith, that she had never refused to accept an appeal, or told someone filing a protest appeal that they would not get a hearing because they were late. R.R. at 129a. There is no dispute as to whether the appeal was actually filed that day. It was not. Thus, there is relevant evidence

² This quotation is actually on p. 36 of the hearing transcript.

that a reasonable mind might accept as adequate to support the trial court's conclusion that the appeal was not perfected.

Moreover, as to the *nunc pro tunc* issue, this Court has held:

An appeal *nunc pro tunc* may be allowed, only where delay in filing the appeal was caused by extraordinary circumstances involving fraud or some breakdown in the administrative process, or non-negligent circumstances related to the appellant, his counsel or a third party. One seeking permission to file an appeal *nunc pro tunc* has the burden of establishing that (1) the appeal was filed within a short time after learning of and having an opportunity to address the untimeliness; (2) the elapsed time period is of very short duration; and (3) appellee is not prejudiced by the delay.

J.C. v. Department of Public Welfare, 720 A.2d 193, 197 (Pa. Cmwlth. 1998) (citation omitted). As properly found as a fact by the trial court: "Despite being placed on notice that the timeliness of the appeal was essential, [the Gasiorowskis] did not perfect their appeal until February 22, 2008." *Gasiorowski*, slip op. at 3, Finding of Fact No. 12. They waited a full six months after the alleged encounter at the Zoning Office to attempt to perfect their appeal, rather than immediately challenging the actions of the Zoning Office's personnel in the Court of Common Pleas. Clearly an appeal filed six months after the appeal period has run is untimely and not filed within a short time of having an opportunity to address the untimeliness. The Zoning Office personnel cannot be held responsible for the Gasiorowskis' failure to diligently pursue their appeal. Accordingly, the trial court did not err in denying the Gasiorowskis' statutory appeal for untimeliness.

For all of the above reasons, the order of the trial court is affirmed.

JOHNNY J. BUTLER, Judge

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ORDER

AND NOW, this 29th day of January, 2010, the August 5, 2009 order of the Court of Common Pleas of Allegheny County is affirmed.

JOHNNY J. BUTLER, Judge