NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

BRIAN MCKENNAS Appellant v. ANGELIA MCKENNAS Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1834 MDA 2012

Appeal from the Order Entered September 18, 2012
In the Court of Common Pleas of Wyoming County
Civil Division at No(s): 2010-435

BEFORE: MUNDY, OLSON AND STRASSBURGER,* JJ.

MEMORANDUM BY OLSON, J.: **FILED DECEMBER 06, 2013**

Appellant, Brian McKennas, has attempted to appeal from the order entered on September 18, 2012. We quash this untimely appeal.

The trial court has thoroughly and ably explained the underlying facts of this case. We quote, in part, from the trial court's factual summary:

> [Appellant] and Angelia McKennas, [now known as] Angelia Smith [(hereinafter "Ms. Smith")], were married on December 23, 2004[,] in Wyoming County, Pennsylvania. The parties separated on January 22, 2010. [Appellant] filed a [c]omplaint for [d]ivorce on April 19, 2010 on the ground[] that the marriage was irretrievably broken. Counsel for [Ms. Smith] then filed a [m]otion for [a]ppointment of [a] [m]aster, which was granted on July 20, 2010. A Master's hearing was scheduled for November 17, 2010.
>
> [On October 18, 2010 (which was prior to the Master's hearing),] counsel for [Ms. Smith] sent a letter to counsel

*Retired Senior Judge assigned to the Superior Court.

for [Appellant. Attached to the letter was] a proposed Marital Settlement Agreement and a list of items that [Ms. Smith] agreed to give to [Appellant. As is relevant to the case at bar, the October 18, 2010 list declared that the following belonged to Appellant:

> Outdoor wood furnace and all firewood
>
> Fire extinguisher from garage
>
> Two [] foldable chairs
>
> All building supplies in garage
>
> Couch[,] television[, television] stand, chair[,] and two [] end tables from living room
>
> Penny collection
>
> Computer desk and chair
>
> Deer feeder
>
> Two [] oak island chairs
>
> Silverware, pots and pans, cooking utensils[,] and dishes

List, 10/18/10, at 1.]

[However, a]fter speaking to her client, counsel for [Ms. Smith] realized that the list attached to her letter was incorrect and [that the list] contained items that [Ms. Smith] was not willing to turn over to [Appellant]. As a result[], counsel for [Ms. Smith] sent another letter to counsel for [Appellant,] dated October 26, 2010[, which contained] a revised list of items that [Ms. Smith] agreed to give to [Appellant. The revised list declared that the items enumerated above belonged to Ms. Smith – and not to Appellant.]

The Master's hearing was held on November 17, 2010 [and, during this hearing,] numerous stipulations were placed on the record[. The stipulations included] the following:

> And finally, the parties stipulate that there is a list of personal items of personal property which is attached to a proposed Marital Settlement Agreement[1] included in [Ms. Smith's] pretrial statement and that they both agree that the items of personal property as listed on those exhibits shall control the manner of distribution for said items and that each party, once the distribution is complete, shall become the sole and exclusive owners of each and every item of personal property therein listed.
>
> Unfortunately for [Ms. Smith], however, she never reviewed the list [that was] attached to the proposed Marital Settlement Agreement[– and the] list that was attached was the original list that was enclosed with [Ms. Smith's] letter dated October 18, 2010, rather than the revised list attached to the October 26, 2010 letter.
>
> The Master's Report was issued on April 8, 2011. [Within the report, the Master declared that "the items of personal property set forth on [the list] shall control the manner of distribution for said items and that subsequent to distribution, the [party] possessing such items shall retain same free and clear of any claims or offsets by the other [party]." Master's Report, 4/8/11, at 4]. . . .
>
> A Decree in Divorce was entered on [July 1, 2011,[2]] whereby the April 8, 2011 Master's Report together with the [t]ranscript of [p]roceedings dated November 17, 2010 were deemed to survive the Decree, subject to enforcement as an [o]rder of [the trial c]ourt.

Trial Court Opinion, 11/30/12, at 1-3 (internal citations omitted).

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[1] The parties never signed the proposed Marital Settlement Agreement.

[2] Although the divorce decree was dated June 30, 2011, the decree was entered into the docket on July 1, 2011.

On August 1, 2011, Ms. Smith filed a self-titled "Motion for Declaratory Judgment" at the same docket number as the divorce action.[3] According to Ms. Smith's filing, Ms. Smith "never agreed that [Appellant] could retain" the following items:

> A. Outdoor wood furnace and all firewood
>
> B. Fire extinguisher from garage
>
> C. Two [] foldable chairs
>
> D. All building supplies in garage
>
> E. Couch, television[, television] stand, chair[,] and two [] end tables from living room
>
> F. Penny collection
>
> G. Computer desk and chair
>
> H. Deer feeder
>
> I. Two [] oak island chairs
>
> J. Silverware, pots and pans, cooking utensils[,] and dishes

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[3] ***But see*** Pa.R.C.P. 1601(a) ("[a] plaintiff seeking only declaratory relief shall commence an **action** by filing a **complaint** captioned 'Action for Declaratory Judgment.' **The practice and procedure shall follow, as nearly as may be, the rules governing the civil action**.") (emphasis added). However, since Ms. Smith titled her pleading a "Motion for Declaratory Judgment" – and since Appellant neither filed preliminary objections to the pleading nor complained, **at any point**, as to the muddled, disordered, and absolutely erroneous procedure followed in this case – we shall also refer to the pleading as a "motion."

Ms. Smith's "Motion for Declaratory Judgment," 8/1/11, at 2. Ms. Smith thus requested that the trial court "issue a Declaratory Judgment," ordering that Ms. Smith "be permitted to retain" the above list of items. ***Id.*** at 3.

Also on August 1, 2011, the trial court issued a rule to show cause upon Appellant as to why Ms. Smith's "Motion for Declaratory Judgment" should not be granted.[4] Trial Court Order, 8/1/11, at 1. On September 7, 2011, Appellant responded to the rule by filing a *pro se* document titled "Opposition to [Ms. Smith's] Motion for Declaratory Judgment." Within this filing, Appellant noted that the parties had agreed to a particular "list of personal items of personal property" – and, according to that list, Appellant owned the items that Ms. Smith was now claiming. Appellant's "Opposition to [Ms. Smith's] Motion for Declaratory Judgment," 9/7/11, at 2. Moreover, Appellant noted that, in fashioning its equitable distribution recommendation, the Master declared that Appellant owned the subject items; the trial court then approved the Master's equitable distribution recommendation and decreed that the equitable distribution award survived the divorce decree and that the award was "subject to enforcement as an [o]rder of . . . [c]ourt." ***Id.*** at 2; Divorce Decree, 7/1/11, at 1.

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[4] We note that neither party has ever claimed that the trial court erred when it applied the rules for petition practice to Ms. Smith's self-titled "Motion for Declaratory Judgment." ***See*** Pa.R.C.P. 206.1-206.7.

On September 13, 2011, the trial court held a hearing on Ms. Smith's request for declaratory relief. As the trial court explained: "[a]fter hearing testimony from [Ms. Smith, the trial c]ourt attempted to globally resolve the matter. The [trial c]ourt successfully was able to have the parties agree to the distribution of everything but the outdoor wood furnace, [the] firewood[,] and the building supplies." Trial Court Opinion, 11/30/12, at 3.

Towards the end of the September 13, 2011 hearing, the trial court informed the parties that it intended to issue a post-hearing order and finally decide Ms. Smith's "Motion for Declaratory Judgment." N.T. Trial, 9/13/11, at 45-46. The trial court also noted, on the record, that Ms. Smith and Appellant were simply not cooperating with one another and that the two were having difficulty complying with the terms of the equitable distribution order. Specifically, the trial court observed, the equitable distribution order required Appellant to transfer his ownership interest in the marital home to Ms. Smith and further required Ms. Smith to pay Appellant $17,109.43 in cash – yet, Appellant had still not transferred the deed to Ms. Smith and Ms. Smith had still not tendered the necessary payment to Appellant. As a result, the trial court stated that it "fe[lt] the need to see this through so we can get the deed signed, we can get your check, we can get the personal property moved and all that." ***Id.*** at 46. The trial court's exchange with the parties was as follows:

> [Trial Court]: Alright. Now the two of you don't get along[,] I understand that. I feel the need to see this through so we can get the deed signed, we can get your check, we can get

> the personal property moved and all that. Okay. . . . Because you wake up in the morning you think about this, right?
>
> [Appellant]: Well, I live too close to this is the problem.
>
> [Trial Court]: Alright, but it's on your mind and it's open.
>
> [Appellant]: Yes.
>
> [Trial Court]: It's on your mind. It's open. So it wears on the two of you. Stressful, right?
>
> [Ms. Smith]: Very.
>
> [Trial Court]: Okay. So we need to fix it. So once I get a decision on these [items] then and the two of you can do exceptions and you can appeal to whatever the case may be but once I make a decision on these [items] I think I need to bring the two of you back here in front of me and we'll [set up] a plan after the appeal period runs we'll [set up] a plan when we're going to get all the materials out of the house, furniture exchanged, the deed signed, the check over to you and get all it done. Do the two of you agree on that?
>
> [Appellant]: Yes.
>
> [Ms. Smith]: Yes.
>
> [Trial Court]: Do you understand what I'm saying? So if I make a decision and I send it out there then you guys will continue not to do anything for months because you're not able to function together. So I think I need to bring you back here and we'll sit down together and we'll figure out how everything is going to happen to get it done. Okay.

Id. at 46-48.

The hearing concluded and, on June 7, 2012, the trial court entered the following order:

AND NOW, this 7th day of June, 2012, after hearing upon [Ms. Smith's] Motion for Declaratory Judgment, upon partial agreement by the parties[,] and by court determination,

IT IS ORDERED that the following disputed items of personal property shall be distributed as follows:

a) The outdoor wood furnace being considered a "fixture" shall remain at the former marital residence in possession of [Ms. Smith]. This includes all firewood located with said furnace.

b) The fire extinguisher from the garage shall be transferred to [Appellant].

c) The two [] foldable chairs shall be transferred to [Ms. Smith].

d) The building supplies shall be transferred to [Ms. Smith].

e) The [couch], television[, television] stand, chair and two [] end tables from the living room shall be transferred to [Appellant].

[f)] The penny collection shall be retained by [Ms. Smith] and she shall provide payment in the amount of [$400.00] to [Appellant].

g) The computer desk and chair shall be transferred to [Ms. Smith].

h) The deer feeder shall be transferred to [Appellant].

i) The oak island chairs shall be transferred to [Ms. Smith].

j) The dishes, pots, pans[,] and silverware shall be divided equally between the parties.

IT IS FURTHER ORDERED that the transfer [of] personal property shall be scheduled through the Wyoming County Sheriff's Office based upon officer availability and shall occur within [60] days from the date of this order. All costs

> for the Wyoming County Sheriff's Department for supervision shall be divided equally between the parties.
>
> IT IS FURTHER ORDERED that this matter shall be scheduled for settlement conference with respect to all remaining matters on the 29th day of August, 2012, at 10:00 a.m., Courtroom No. 2, Wyoming County Courthouse, Tunkhannock, Pennsylvania.

Trial Court Order, 6/7/12, at 1-2.

The trial court's June 7, 2012 order thus pronounced the ownership of all of the contested items and finally decided Ms. Smith's request for declaratory relief. Moreover, although the trial court's June 7, 2012 order scheduled a "settlement conference with respect to all remaining matters," the only "remaining matters" in the case were those relating to the trial court's self-imposed mission to "see this through so we can get the deed signed, we can get your check, we can get the personal property moved and all that." N.T. Trial, 9/13/11, at 46. In other words, and true to the trial court's stated intent at the September 13, 2011 hearing, the trial court's June 7, 2012 order finally decided Ms. Smith's request for declaratory relief and then scheduled an August 29, 2012 settlement conference – which was "**after the appeal period r[an]**" on the declaratory relief order – so that the trial court could **help** the parties **comply** with the already entered equitable distribution order. Trial Court Order, 6/7/12, at 1-2; N.T. Trial, 9/13/11, at 47.

On June 27, 2012, Appellant filed a self-titled "petition for reconsideration" with the trial court. Within this filing, Appellant claimed

that the trial court erred when it granted Ms. Smith declaratory relief, as "no appeal was taken [from the divorce decree] and absent the proving of fraud at the Master's Hearing [the trial court] lack[ed] the authority to change the agreement reached at the Master's Hearing . . . which [is] incorporated in [the d]ivorce [d]ecree of [July 1,] 2011." Appellant's "Petition for Reconsideration," 6/27/12, at 1.

The trial court did not "expressly grant" reconsideration of its June 7, 2012 order. Instead, on June 27, 2012, the trial court issued a rule to show cause upon Ms. Smith, as to why Appellant's petition for reconsideration should not be granted. Trial Court Order, 6/27/12, at 1. The order reads:

> AND NOW, this 27th day of June, 2012 upon the attached petition a rule to show cause is granted upon [Ms. Smith] to show why [Appellant's] Petition [for Reconsideration] should not be granted.
>
> Hearing upon the rule returnable is set for the 29th day of August, 2012. At 10:00 [a.m.].

Trial Court Order, 6/27/12, at 1.

On August 29, 2012, the parties appeared as scheduled. The trial court then held a hearing, wherein both Appellant and Ms. Smith testified.

On September 4, 2012, the trial court entered an order declaring, in relevant part:

> IT IS ORDERED that these three items, the furnace, the wood[,] and [the] building materials[,] shall not be transferred or alienated by either party pending [the trial] court's final order in this matter.

> IT IS FURTHER ORDERED with respect to the deed, both parties shall execute the deed on this date and said deed shall be held in escrow until such time as the payment check in the amount of $17,109.43 is successfully transferred.

Trial Court Order, 9/4/12, at 1.

On September 18, 2012, the trial court entered an order declaring that Appellant's "motion for reconsideration" was "denied." Trial Court Order, 9/18/12, at 1.

Within the trial court's later-filed Rule 1925(a) opinion, the trial court explained why it granted Ms. Smith declaratory relief and why it declared that Ms. Smith owned the outdoor wood furnace, the firewood, and the building supplies.[5] ***See*** Trial Court Opinion, 11/30/12, at 4. As the trial court explained, there was an ambiguity in the equitable distribution order, which required interpretation. Specifically, the trial court explained, the equitable distribution order awarded Ms. Smith the marital home; however, the order also purported to award Appellant certain indispensable fixtures to the home. ***Id.*** According to the trial court, this "ambiguity" needed to be resolved in Ms. Smith's favor. The trial court reasoned:

> The testimony of record, together with the appraisals of the marital home that were obtained by both parties, reflect that the outdoor wood furnace is the primary source of heat for the home's radiant floor heat. The testimony further

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[5] The "building supplies" consist of the "remaining building supplies for the [marital] home[,] such as tile and siding." Trial Court Opinion, 11/30/12, at 4.

> reflects that the building materials at issue in this matter consist of remaining building supplies for the home such as tile and siding. The outdoor furnace and the building supplies should be considered fixtures to the home and[,] as such, must remain in the possession of [Ms. Smith].
>
> . . . [Thus,] the outdoor wood furnace is a fixture to the home, as it is utilized for the radiant floor heating in the home; [] the wood that remains at the home is for the outdoor wood furnace; and [] the building supplies that remain are specific to the home and as such belong with [Ms. Smith] as she has exclusive possession of the home.

Id.

Appellant filed a notice of appeal on October 17, 2012. While the appeal was pending before this Court, we issued a rule to show cause upon Appellant and directed that Appellant show cause as to why the current appeal was timely. Appellant responded and claimed:

> On June 7, 2012, the [t]rial [c]ourt entered an [o]rder on [Ms. Smith's] Motion for Declaratory Judgment granting [Ms. Smith's] Motion as to three [] items that remain in dispute[:] 1. an Outdoor Wood Furnace, 2. Building Supplies and 3. Firewood. On June 27, 2012, [Appellant] filed a Petition for Reconsideration of the [t]rial [c]ourt's [o]rder of June 7, 2012. . . . The [t]rial [c]ourt granted [r]econsideration of the June 7, 2012 [o]rder on June 27, 2012 and set a Reconsideration Hearing for August 29, 2012. Therefore[,] the [t]rial [c]ourt did grant reconsideration within 30 days of the appealable order of June 7, 2012.

Appellant's Response, 4/23/12, at 1 (internal citations omitted).

Appellant then claimed that, since the trial court "granted reconsideration" of "the appealable order of June 7, 2012," the final order in this case was entered on September 18, 2012 – when the trial court "denied" the petition for reconsideration. ***Id.*** at 1-2.

Since Appellant responded to our rule to show cause order, we discharged the rule by order entered on May 2, 2013. However, within our May 2, 2013 order, we notified Appellant that "[t]he merits panel may revisit the [timeliness] issue and may find that the appeal is defective." Order, 5/2/13, at 1. We now quash this untimely appeal.[6]

At the outset, we agree with Appellant that the trial court's June 7, 2012 order constituted an appealable order. ***See*** Appellant's Response, 4/23/12, at 1-2. As was explained above, the June 7, 2012 order completely disposed of Ms. Smith's request for declaratory relief and pronounced the ownership of every contested item in the case. Further, even though the June 7, 2012 order scheduled a "settlement conference" for August 29, 2012, the purpose of the conference was **not** to decide or settle any justiciable controversy. Certainly, the June 7, 2012 order decided all of the pending claims in the case. Rather, the trial court scheduled the August 29, 2012 conference to **help the warring parties comply with** the (already entered) equitable distribution order. As the trial court explicitly stated:

> once I make a decision on these [items] I think I need to bring the two of you back here in front of me and we'll [set up] a plan **after the appeal period runs** we'll [set up] a

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[6] Although neither party has questioned the timeliness of this appeal, the "timeliness of an appeal implicates the jurisdiction of an appellate court and may be raised *sua sponte*." ***Cresswell v. Pa. Nat'l Mut. Cas. Ins. Co.***, 820 A.2d 172, 181 (Pa. Super. 2003).

> plan **when we're going to get all the materials out of the house, furniture exchanged, the deed signed, the check over to you and get all it done**.

N.T. Trial, 9/13/11, at 47 (emphasis added).

Thus, since the June 7, 2012 order granted Ms. Smith declaratory relief and disposed of all claims and of all parties in this case, the June 7, 2012 order constituted the final, appealable order in this case. ***See*** 42 Pa.C.S.A. § 7532 (under the Declaratory Judgments Act, an affirmative or negative declaration "shall have the force and effect of a final judgment or decree"); ***see also*** Pa.R.A.P. 341(b)(1) and (2) ("[a] final order is any order that: (1) disposes of all claims and of all parties; or (2) is expressly defined as a final order by statute"). Appellant's notice of appeal – which was filed on October 17, 2012 – is thus presumptively untimely.

Although Appellant acknowledges that the June 7, 2012 order constituted an appealable order – and that he did not file his notice of appeal in this case until October 17, 2012 – Appellant claims that the appeal period was tolled because, on June 27, 2012, the trial court "granted [r]econsideration of the June 7, 2012 [o]rder." Appellant's Response, 4/23/12, at 1. Appellant's assertion is, however, false. Indeed, as was explained above, the trial court's June 27, 2012 order simply **issued a rule to show cause** upon Ms. Smith and directed Ms. Smith to show cause as to why Appellant's petition for reconsideration should not be granted. Trial Court Order, 6/27/12, at 1. The trial court did not expressly grant reconsideration of the June 7, 2012 order – and, thus, the trial court's rule

to show cause order did not toll the 30-day appeal period. ***See*** Pa.R.A.P. 1701(b)(3); Pa.R.A.P. 903(a). As we have explained:

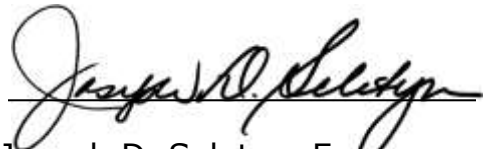
> It is by now well known that the mere filing of a petition requesting reconsideration of a final order of the trial court does not toll the normal 30-day period for appeal from the final order. . . . There is only one way for the trial court to toll or stay the appeal statute and thus to "retain control" once a petition for reconsideration has been filed. As stated in the Rules of Appellate Procedure, the 30-day period may only be tolled if that court enters an order "expressly granting" reconsideration within 30 days of the final order. Pa.R.A.P. 1701(b)(3)(i), (ii)[,] and Note thereto. . . . There is no exception to this Rule, which identifies the only form of stay allowed. A customary order and rule to show cause fixing a briefing schedule and/or hearing date, or any other order except for one "expressly granting" reconsideration, is inadequate.

Cheathem v. Temple Univ. Hosp., 743 A.2d 518, 520-521 (Pa. Super. 1999) (some internal citations omitted).

Here, since the trial court did not "expressly grant" reconsideration of its final, June 7, 2012 order, the applicable 30-day appeal period was never tolled. As such, Appellant's October 17, 2012, notice of appeal was manifestly untimely. We do not have jurisdiction over this appeal.

Appeal quashed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/6/2013