

[J-1-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN, BAER, JJ.

MILLER ELECTRIC COMPANY	:	No. 26 WAP 2004
	:	
v.	:	Appeal from the Order of Superior Court
	:	entered August 25, 2003 at No. 1420
TATE DEWEESE AND JUST-MARK,	:	WDA 2002 quashing the appeal from the
INC.	:	Order of the Court of Common Pleas of
	:	Allegheny County entered July 10, 2002 at
v.	:	No. AR 95-4332.
	:	
BIRMINGHAM BISTRO, INC.	:	
	:	
APPEAL OF:	:	
BIRMINGHAM BISTRO, INC.	:	ARGUED: March 7, 2005

OPINION

MR. JUSTICE EAKIN

DECIDED: OCTOBER 17, 2006

Appellant Birmingham Bistro, Inc. appeals from the order of the Superior Court quashing its appeal as untimely. We reverse.

Just-Mark, Inc., the general contractor at a construction site owned by Tate DeWeese, hired appellee Miller Electric Company as a subcontractor to perform the electrical work. Miller received partial payment, but a balance of \$14,371.53 existed at the time the project was finished. Miller filed a complaint against Just-Mark, Inc. to recover that balance; DeWeese was named as an additional defendant.

After unsuccessful attempts to serve DeWeese at his last known home address, Miller petitioned for permission to serve DeWeese by first class mail at the offices of JTD-Grandview, Inc., of which DeWeese was president. The trial court granted Miller's petition,

and the signed return receipt indicated the complaint was served and accepted at that address. After 20 days, a ten-day default notice was issued, and default judgment was entered November 21, 1995, against DeWeese and in favor of Miller in the amount of \$15,177.17.¹

Over the next several years, Miller unsuccessfully attempted to collect on its judgment. DeWeese was also the president of Birmingham Bistro, Inc., the appellant in this case. In 2001, Miller instituted garnishment proceedings against Birmingham. Miller asserted it was entitled to attach property held by Birmingham and to garnish compensation and benefits paid by Birmingham to DeWeese. The trial court disagreed and entered a verdict in favor of Birmingham February 14, 2002, finding Birmingham's assets were exempt from garnishment. The following day, Birmingham filed a motion for attorney's fees, citing 42 Pa.C.S. § 2503(3), which expressly entitles a garnishee "who is found to have in his possession or control no indebtedness due to or other property of the debtor" to collect "a reasonable counsel fee as part of the taxable costs of the matter." Id.

On February 26, 2002, Miller filed a motion for post-trial relief which encompassed several motions for judgment notwithstanding the verdict, a motion to compel, and a motion for attorney's fees. The court never entered an order disposing of Miller's post-trial motion, which was thus deemed denied on June 26, 2002, 120 days after it was filed, pursuant to Pa.R.C.P. 227.4. Rule 227.4 states the prothonotary shall, upon praecipe of a party:

(1) enter judgment upon the verdict of a jury or the decision of a judge following a trial without jury, if

¹ The Pennsylvania Rules of Civil Procedure provide "every pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading" Pa.R.C.P. 1026. The Rules also provide that before the prothonotary may enter default judgment against a party, the party seeking default judgment must give the opposing party and his attorney of record, if any, ten days notice of its intention to file a praecipe for entry of judgment by default. Id., at 237.1(a)(2).

* * *

(b) one or more timely post-trial motions are filed and the court does not enter an order disposing of all motions within one hundred twenty days after the filing of the first motion. A judgment entered pursuant to this subparagraph shall be final as to all parties and all issues and shall not be subject to reconsideration

Pa.R.C.P. 227.4(1). On June 27, 2002, Birmingham filed a praecipe to enter judgment on its verdict and the prothonotary entered final judgment in favor of Birmingham that day.

The trial court entered an order July 10, 2002, denying Birmingham's February 15 motion for attorney's fees. On August 8, 2002, Birmingham filed a notice of appeal from the July 10 order. Miller moved to quash the appeal as untimely, arguing the notice of appeal was filed more than 30 days after the final judgment on June 27, 2002. The Superior Court granted Miller's motion and quashed the appeal. The court concluded the judgment entered June 27, 2002 was the final appealable order in the case, and thus Birmingham's August 8 notice of appeal was untimely, as it was filed more than 30 days after final judgment.² Miller Electric Company v. DeWeese, et al., No. 1420 WDA 2002, unpublished memorandum at 7 (Pa. Super. filed August 25, 2003). We granted review to consider the propriety of the order quashing the appeal and to consider the rules governing this aspect of post-trial procedure.

This case presents a procedural conundrum in that the prothonotary entered judgment in Birmingham's favor June 27, 2002, but the trial court did not deny Birmingham's motion for attorney's fees until July 10, 2002. The Superior Court determined the 30-day appeal period began with the entry of judgment. However, Birmingham initially

² An appeal will lie from the final order in the case. "Except as prescribed in subdivisions (d) [regarding right to appeal from orders of Superior Court and Commonwealth Court] and (e) [regarding criminal orders] of this rule, an appeal may be taken as of right from any final order" Pa.R.A.P. 341(a).

had no reason to appeal from the June 27 judgment in its favor, as it did not become an aggrieved party until the denial of its motion for attorney's fees two weeks later.

Birmingham argues its notice of appeal was timely since a motion for attorney's fees under 42 Pa.C.S. § 2503(3) is not a post-trial motion, and therefore, is not disposed of by entry of final judgment. It survives, and remains outstanding, such that the 30-day period for appeal should begin to run on the date of the order disposing of it; it is this order from which the appeal lies. We agree. A motion for fees under § 2503(3) is not a post-trial motion, and the entry of judgment on June 27 did not dispose of Birmingham's motion.

The Superior Court relied on two cases in quashing Birmingham's appeal. In Freidenbloom v. Weyant, 814 A.2d 1253 (Pa. Super. 2003), the plaintiff filed a praecipe to discontinue the action, and the defendant filed a motion for attorney's fees under § 2503(9),³ 36 days later. Freidenbloom, at 1256. The Freidenbloom court determined the motion was untimely, citing 42 Pa.C.S. § 5505 for the proposition that a trial court retains jurisdiction to act on a motion for attorney's fees that is filed within 30 days after final resolution of a case. The court stated:

A trial court's jurisdiction generally extends for thirty days after the entry of a final order:

Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed.

42 Pa.C.S. § 5505. After the 30 day time period, the trial court is divested of jurisdiction. A praecipe to discontinue a case constitutes a final resolution of

³ Section 2503(9) states, "[a]ny participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith" shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter. 42 Pa.C.S. § 2503(9).

all issues. Further, a praecipe for discontinuance has the same effect as a judgment entered in favor of the defendant. Thus, since a praecipe for discontinuance constitutes a final resolution of the case and has the effect of a final judgment, a trial court may consider a petition for fees filed within a period of 30 days after the filing of the praecipe. In summary, requests for counsel fees under 42 Pa.C.S.A. § 2503 are part of the principal claim and must be determined as part of that claim.

Freidenbloom, at 1255 (citations and footnote omitted). Since the defendant filed his motion for fees beyond the 30-day period in which the trial court retained jurisdiction, the court held the trial court lacked the authority to act on it. The Superior Court vacated the trial court's order granting the motion, deeming it a "nullity." Id., at 1256.

We find Freidenbloom inapposite. Freidenbloom stands for the proposition that a praecipe to discontinue constitutes a final judgment, and that a trial court may only act on a motion for fees that is filed within 30 days from final judgment. Here, however, the motion for fees was filed prior to the entry of judgment; Freidenbloom does not address whether the entry of judgment is dispositive of a motion for fees filed prior to judgment.

The second case relied upon by the Superior Court is First National Bank of Northeast v. Gooslin, 582 A.2d 1054 (Pa. Super. 1990). Defendant Gooslin pledged a dredge to the bank as collateral for a loan; when he defaulted, the bank obtained judgment and placed a levy on the dredge. When Wilcke claimed ownership of the dredge, the bank commenced an action in interpleader; Wilcke filed a petition to recover storage and maintenance costs for the dredge. The trial court ultimately issued an order finding Wilcke was the rightful owner, but did not rule on Wilcke's petition for costs. Neither party appealed from the court's order. More than three months later, Wilcke filed a second

petition requesting storage and maintenance costs, and added a request for attorney's fees under § 2503(5).⁴

The trial court denied both claims as waived. The Superior Court agreed that Wilcke waived his claim to storage and maintenance costs since he "fail[ed] to seek a modification of the trial court's Order [naming him as the owner], or to file an appeal therefrom" First National Bank, at 1055-56. With regard to attorney's fees, Wilcke argued he was statutorily entitled under § 2503(5), and therefore had a distinct cause of action which could not be waived as part of the underlying action. The Superior Court disagreed; even assuming Wilcke's entitlement to fees was compulsory, it concluded such a right could nevertheless be waived. First National Bank, at 1056 & n.1. As he failed to assert his claim for fees in his original action, it was waived. Id., at 1056. The court opined:

It is settled law that counsel fees cannot be sued for separately from the principal claim. "Separate suits constitute an impermissible splitting of but one cause of action." Goldberg v. Goldberg, 306 Pa. Super. 504, 506, 452 A.2d 838, 839 (1982) Wilcke's contention that he had an absolute right to recover counsel fees pursuant to 42 Pa.C.S.A. § 2503(5) does not alter our conclusion that he cannot recover counsel fees in this action.... It is axiomatic that finality of judgment extends not only to matters actually determined but also to matters which could properly have been raised and determined therein.

Id., at 1056.

Relying on both First National Bank and Freidenbloom, the Superior Court determined a cause of action for attorney's fees cannot exist independent of the principal claim, and therefore, the final order for purposes of appeal was the order entering judgment in favor of appellant. Miller Electric, at 3-5. The court stated:

⁴ Section 2503(5) provides, "[t]he prevailing party in an interpleader proceeding in connection with execution upon a judgment" shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter. 42 Pa.C.S. § 2503(5).

Applying the rationale expressed by this Court in First National Bank and Freidenbloom, we conclude that the judgment entered on June 27, 2002 constituted the final order/judgment in this case, and that the trial court's July 10, 2002 Order did not constitute a final appealable order. See Freidenbloom, 814 A.2d at 1255 (holding that finality of judgment extends not only to matters actually determined, but to matters which could properly have been raised and determined therein). In accordance with Freidenbloom, we recognize that the trial court retained the authority to act on Birmingham's Motion for counsel fees for thirty days after the entry of its final judgment. However, the trial court's July 10, 2002 Order denying Birmingham's Motion did not alter the finality of the June 27, 2002 judgment, nor did it extend the time period for filing an appeal from that judgment. Because Birmingham's appeal was not filed within 30 days from the June 27, 2002 judgment, it is untimely, and we are without jurisdiction to address Birmingham's underlying claims.

Id., at 6-7 (footnote omitted) (emphasis added).

We agree that the judgment entered June 27, 2002 was the final judgment in the underlying garnishment action, but we cannot say it was the final order with regard to the motion for fees. The Superior Court reasoned that because a suit for counsel fees cannot exist apart from the underlying cause of action, appellant's motion for attorney's fees could not survive beyond the entry of final judgment. The court thus concluded the motion was disposed of as part of the June 27 judgment; while the trial court retained jurisdiction for 30 days to modify the final judgment, the appeal period had nevertheless begun.

Freidenbloom held a trial court may consider a petition for fees filed within 30 days of the entry of final judgment. Freidenbloom, at 1255. Appellant's motion for attorney's fees was filed months prior to the entry of judgment, and we disagree that Freidenbloom restricts the period of time a trial court may act on a motion for fees filed pursuant to § 2503(3). Section 2503(3) dictates that a garnishee found to have in his possession no indebtedness due "shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter" 42 Pa.C.S. § 2503(3). Taxable costs are generally payable incident to a final judgment, i.e., after termination of the action by discontinuance or final disposition. Novy v. Novy, 188 A. 328, 331 (Pa. 1936). Here, the prothonotary entered judgment June 27,

2002; however, appellant's status as the prevailing party was not perfected until 30 days later when the time for appeal expired. In cases where one or both parties appeal from the judgment, the final determination as to whether a garnishee "wins" an action, in the sense that he is found to have no indebtedness due, will depend on the outcome of the appeal.

The requisites for an appealable order are set forth in Pa.R.A.P. 301. The Official Note following Rule 301 points out that the 1986 amendment to Rule 301 deleted reference to reduction of an order to judgment as a prerequisite for appeal in every case. "This deletion does not eliminate the requirement of reduction of an order to judgment in an appropriate case. Due to the variety of orders issued by courts in different kinds of cases, no single rule can delineate the requirements applicable in all cases." Pa.R.A.P. 301, Official Note. We believe the claim for attorney's fees in the instant case is among the type of claims the Rules Committee considered when it deleted the requirement that all verdicts or decisions be reduced to judgment before an appeal may be taken. Here, the trial court entered its verdict in appellant's favor, and therefore, entry of judgment was not necessary—but it would have been, had the verdict been in appellee's favor. In that instance, the entry of judgment in favor of appellee would have been necessary before appellee could execute the garnishment. But because the trial court determined appellee was not entitled to garnishment from appellant, the verdict left no outstanding liability between the parties, and no further steps were necessary.

The Commonwealth Court has held that in a case where the entry of judgment is not required, the appeal period begins on the date of the order from which the appeal lies, rather than from the entry of judgment. See Mansfield Hospitality Limited Partnership v. Board of Assessment Appeals of Tioga County, 680 A.2d 916, 918 (Pa. Cmwlth. 1996) ("In cases where an entry of judgment is not required, the time within which to file an appeal begins with the entry of the order from which the appeal lies.") (citing Eachus v. Chester County Tax Claim Bureau, 612 A.2d 586 (Pa. Cmwlth. 1992) (when judgment need not be

entered, judgment is nullity and appeal period commences with entry of order from which appeal lies)). We believe this approach is the most appropriate under the circumstances presented by this case.

We conclude the trial court's July 10 order is the order from which appellant's appeal lies. Because we have determined a motion for attorney's fees filed under § 2503(3) is not a separate suit for fees, but rather, a matter that is connected but ancillary to the underlying action, we conclude appellant's motion for fees was not disposed of by the June 27 judgment. To the extent that Freidenbloom and First National Bank contradict our holding in this regard, they are hereby overruled. Thus, where a garnishee succeeds in securing a verdict in its favor, yet is subsequently denied its entitlement to attorney's fees under § 2503(3) by order of court, the garnishee may appeal within 30 days of the date of the denial, regardless of when final judgment was entered. Since appellant's notice of appeal was filed within 30 days of the trial court's order denying its motion for attorney's fees, the Superior Court's order quashing appellant's appeal is hereby vacated and appellant is granted the right to appeal from the trial court's denial nunc pro tunc.

Order reversed. Jurisdiction relinquished.

Madame Justice Newman and Mr. Justice Saylor join this opinion.

Mr. Justice Castille did not participate in the consideration or decision of this case.

Former Justice Nigro did not participate in the decision of this case.

Mr. Chief Justice Cappy files a concurring opinion.

Mr. Justice Baer files a dissenting opinion.