

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

IRIS B. ZEBROOK,)	
)	
Appellant,)	
)	
)	C.A. No. 01A-10-007 JRS
v.)	
)	
)	
SONIA VERMA,)	
)	
Appellee.)	

ORDER

On appeal from the Court of Common Pleas. Affirmed.

Date Submitted: May 20, 2002

Date Decided: August 27, 2002

This 27th day of August, 2002, upon consideration of the appeal of Iris Zebrook (“Ms. Zebrook”) from the decision of the Court of Common Pleas, it appears to the Court that:

1. Sonia Verma (“Ms. Verma”), the Appellee, brought a civil action against Ms. Zebrook in the Justice of the Peace Court No. 13 for the return of a down payment made in connection with the purchase of real estate. The Justice of the Peace Court entered a judgment in favor of Ms. Verma by an Order dated May 23, 2001, after a trial on May 18, 2001.

2. Ms. Zebrook filed a Notice of Appeal in the Court of Common Pleas on June 1, 2001. A certified copy of the record, including the transcript from the trial in the Justice of the Peace Court, was filed on June 25, 2001.

3. There is no question that Ms. Zebrook filed her notice of appeal within fifteen days after the judgment was entered in the Justice of the Peace Court as required by the applicable Court rule and statute.¹ Ms. Zebrook did not, however, file the certified record until 24 days after she filed her notice of appeal, thus failing to comply with the Court of Common Pleas Civil Rule 72.3.² She did attempt to comply with the rule by requesting on June 1, 2001 (the same day she filed her notice of appeal) that a transcript be produced. Ms. Zebrook claims that she was waiting to receive a call from the Justice of the Peace Court that the transcript was ready to be picked up and that the Justice of the Peace Court never made such a call. When

¹ Court of Common Pleas Civil Rule 72.3(b). Rule 72.3(b) provides: “When an appeal de novo is permitted by law, an action is commenced in the Court of Common Pleas by the appellant filing with the Clerk of the Court a notice of appeal within the time prescribed by statute for the filing of an appeal. If no time is prescribed by statute, the notice of appeal shall be filed within 15 days from the entry of final judgment, order, or disposition from which an appeal is permitted by law.” *See also* 10 Del. C. § 9571 (b) (appeal should be taken within 15 days of “the final order, ruling, decision or judgment” from which the appeal is taken). It is uncontroverted from the record filed with the Superior Court that a notice of appeal was filed by Ms. Zebrook and stamped by the Court of Common Pleas on June 1, 2001, within 15 days from the Justice of the Peace Court's judgment on May 21, 2001 (*see* Justice of the Peace Civil Docket - Court 13, page 3).

² Rule 72.3(b) provides: “The appellant shall file a certified copy of the record of the proceedings below, not including the evidence, within 10 days of the filing of the notice of appeal.”

counsel for Ms. Zebrook called the Justice of the Peace Court to inquire about the availability of the transcript, he was told that it had been prepared and was ready.³

4. Ms. Verma filed a Complaint on Appeal and a Motion to Dismiss Appeal on July 18, 2001, citing Rule 72.3(b). The Court of Common Pleas denied Ms. Verma's motion on August 10, 2001. On reargument, however, the Court of Common Pleas granted Ms. Verma's motion to dismiss on the ground that Ms. Zebrook had not complied with Rule 72.3(b). It is from the Order dismissing her appeal that Ms. Zebrook appeals to this Court.

5. Cases appealed to this Court from the Court of Common Pleas "shall be reviewed on the record and shall not be tried *de novo*."⁴ "[T]his Court 'must limit its scope of review to correcting errors of law and ascertaining whether the trial judge's factual findings are adequately supported by the record and are the product of an orderly and logical deductive process,'" when considering an appeal.⁵ "[T]he issue on appeal is not whether this Court would have reached the same conclusion or even agrees with it, but whether the reasoning of that court was logical and the decision is

³ There is a dispute as to whether the Justice of the Peace Court notified Ms. Zebrook's counsel on June 5, 2001 to inform him that the transcript was ready. In the Court's view, it is not necessary to resolve this factual controversy in order to decide this appeal.

⁴Del. Code Ann. tit. 11, §5301(c) (2001).

⁵*State v. Blank*, Del. Super., No. 9712011730, Slights, J. (June 26, 2001)(Order at 4)(citations omitted).

sufficiently supported both legally and factually by the court’s findings.”⁶

6. The statute governing appeals to the Court of Common Pleas is 10 Del. C.

§ 9571, which states:

(a) From any final order, ruling, decision or judgment of the court in a civil action there shall be the right of appeal to the Court of Common Pleas of the State in the county in which said order, ruling, decision or judgment was rendered.

(b) The appeal shall be taken within 15 days of the final order, ruling, decision or judgment.

(c) The appeal shall be a trial de novo.

(d) The Court of Common Pleas shall establish appeal procedures and supersedeas bond requirements by rule.

7. Pursuant to subsection (d) of the statute, the Court of Common Pleas established appeal procedures in May of 1993 when it adopted Rule 72.3. As stated, this rule requires that a notice of appeal be filed “within 15 days from the entry of final judgment,” and that the certified record of the proceedings below be filed within 10 days thereafter.

8. Ms. Zebrook claims that Rule 72.3 does not require the filing of a transcript to perfect an appeal. She emphasizes that the original rule required the filing of both

⁶*Id.*

the notice of appeal and the certified transcript of record within fifteen days of the judgment in the lower court.⁷ When the rule was changed, however, the requirement for filing the certified record was moved to the second paragraph of the rule and the deadline was extended by 10 days. According to Ms. Zebrook, this amendment reflects the intent of the Court of Common Pleas to invoke the jurisdiction of the court upon the filing of the notice of appeal alone.

9. Ms. Verma urges the Court to adopt a liberal reading of Rule 72.3. According to Ms. Verma, when the rule directs that the certified record “shall” be filed within 10 days of the filing of the notice of appeal, there can be no excuse for failing to comply; the failure to file the transcript should result in a dismissal of the appeal. Indeed, the Supreme Court of Delaware has held that the failure to file the certified record as directed should result in dismissal, basing its decision upon established case law and the existing statute governing Justice of the Peace Court appeals.⁸ To reach its decision, the Court examined the legislative history of 10 *Del.*

⁷ The rule governing appeals, prior to May 1993, read as follows: “In appeals where the action is tried de novo, an action is commenced in the Superior Court by the appellant filing with the Prothonotary a praecipe and a certified transcript of the record within 15 days of the date of the judgment below...” Del. Ct. Common Pl. Civ. R. 72 (1971) (amended 1995). When the rule was changed to transfer these appeals from the Superior Court to the Court of Common Pleas, the transcript requirement was moved to a separate paragraph from the praecipe requirement.

⁸ *Lenape Associates v. Callahan*, Del. Supr., No. 171, Moore, J. (October 26, 1992) (failure to submit a transcript with the praecipe was a violation of 10 Del. C. § 9571) (ORDER); *see also Williams v. Singleton*, 160 A. 2d 376, 378 (Del. 1960) (same).

C. §9571, and concluded that the statute was enacted with the intent to require a n appellant to file the certified record before the appeal was perfected.⁹

10. Immediately following the Supreme Court’s decision in *Lenape*, the General Assembly passed the current version of the statute, which omitted any reference to the filing of the certified record and allowed the Court of Common Pleas to establish other guidelines related to the appeal process. The legislative history clearly indicates the General Assembly’s intent to avoid divestiture of the appellate court’s jurisdiction (then, the Superior Court) when a supersedeas bond was not posted within the appeal time. The synopsis reads:

“These changes are considered desirable. The present requirements are outdated and confusing... ..the Act is intended to make clear that failure to post a supersedeas bond within the appeal time from any court, will not automatically divest the ...Court of jurisdiction. Rather, bond requirements will be dealt with by Rule...”¹⁰

11. It is not clear whether the Court of Common Pleas based its decision to dismiss the Justice of the Peace appeal for lack of jurisdiction. This Court will not read the decision as such, and finds that while Ms. Zebrook’s failure timely to file the certified records does, indeed, violate that court’s rules regarding appeal procedures,

⁹ *Lenape, supra*, Order at 3.

¹⁰ S.B. 88, 136th Gen. Assem., Reg. Sess. (Del. 1991); 68 Del. Laws 53.

it cannot be considered enough to divest the Court of Common Pleas from having jurisdiction to hear the appeal. The Court of Common Pleas agreed that procedures in that Court routinely permitted persons to file the transcript within ten days of receipt of a dunning letter.¹¹ It is obvious from that fact alone that the Court has interpreted its own rule as permitting jurisdiction beyond the ten days which it requires for filing the certified record. Additionally, using the Supreme Court's reasoning in *Lenape*, this Court has reviewed the legislative history of the revised statute, 10 Del. C. 9571, and has determined that it was the intent of the General Assembly to change the statute to permit jurisdiction even where all aspects of the appeal were not complete (so long as the notice of appeal is timely filed).

12. It can only be assumed that the Court of Common Pleas properly retained jurisdiction, despite the lateness of the filing of the transcript. It is within the right of that Court, however, to determine whether there was excusable neglect in failing to comply with court rules. Where there is no excusable neglect, the court may

¹¹ It is the procedure of the Court of Common Pleas to send a dunning letter to appellant's counsel, giving them ten days from receipt of the letter to file the transcript. The dunning letter indicates that if no transcript is filed within ten days of its receipt, the Court will dismiss the appeal *sua sponte*. See Appellant's Opening Brief, Exhibit B at 5-7 (February 22, 2002). Despite these established procedures, the Court of Common Pleas did not send a dunning letter to Ms. Zebrook. Ms. Zebrook, however, ultimately filed the transcript, although untimely, under Rule 72.3(b).

dismiss the appeal¹².

13. When a party who seeks relief has made active efforts to comply with the rules of the Court, the party should not be procedurally barred from presenting her appeal.¹³ Ms. Zebrook contends that there was excusable neglect, claiming that she made active efforts to comply with Rule 72.3 by requesting that a transcript of the proceedings before the Justice of the Peace Court be prepared. She then relied on the Justice of the Peace Court 13 clerk's promise to call when the transcript was ready to be picked up. While the transcript seems to have been prepared within the necessary ten days for Ms. Zebrook to file it timely, Ms. Zebrook claims not to have received a call from the Justice of the Peace Court. She also acknowledges, however, that she did not initiate contact with the court until well after the deadline had passed. Under these circumstances, Ms. Zebrook argues that any failure to comply with Rule 72.3 resulted from excusable neglect. Accordingly, she urges the Court to reverse the dismissal of her appeal.

14. Ms. Zebrook has not established excusable neglect. Had Ms. Zebrook contacted the court and asked for the transcript at any time prior to the deadline's

¹² Del. Ct. of Common Pleas Civil Rule 6 (b).

¹³ *Latocha v. D.O.W.*, Del. C. Pl., 1999 WL 1847335 (March 29, 1999) at 1, (quoting *Mullins v. Dover Downs, Inc.*, Del. Super. 1998 WL 278402 (Jan. 7, 1998)).

passing, there is no evidence that she would have missed her deadline. It is not the responsibility of the Court to file the certified record, it is the responsibility of the Appellant. “Excusable neglect is not to be characterized as mere carelessness or negligence, but ‘that neglect which might have been the act of a reasonably prudent person under the circumstances.’”¹⁴ A reasonably prudent appellant would have been aware of her deadline and would have sought the transcript at least by that deadline or sought relief from the court in advance of the deadline’s expiration.

15. Accordingly, the decision in the Court of Common Pleas is AFFIRMED as to its dismissal of the appeal because excusable neglect cannot be found to warrant an extension of time under Rule 72.3.

IT IS SO ORDERED.

Judge Joseph R. Slights, III

Original to Prothonotary

cc: John R. Weaver, Jr., Esquire
George A. Brancati, Esquire

¹⁴ *Id.*