IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert C. Eckenrode, Appellant	:	
v.	:	No. 1448 C.D. 2007
	:	Submitted: November 30, 2007
Pittsburgh Water and Sewer Authority	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE, JAMES GARDNER COLINS, Senior Judge[1]
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY FILED: February 6, 2008

Robert C. Eckenrode (Appellant) appeals from an order of the Court of Common Pleas of Allegheny County (trial court), dated June 28, 2007, which dismissed Appellant's challenge of a water bill and entered judgment in favor of the Pittsburgh Water and Sewer Authority (the Authority). We now affirm.

Appellant owns numerous rental properties, including rental property located at 352 South Bouquet Street in the Oakland section of Pittsburgh (the Property). The Property consists of a three-(3-)story building, with one (1) apartment on each of the second and third floors. Appellant uses the first floor as a workshop and storage area for employees who maintain his various properties. The Property contains five (5) bathrooms, two (2) kitchens and ten (10) bedrooms.

[1] The decision in this case was reached prior to the date that Judge Colins assumed the status of senior judge.

In March 2005, Appellant received a water bill for the Property from the Authority indicating the use of 334,000 gallons of water over a three-(3-) month period for a charge of $3,041.81. Appellant requested an exoneration hearing before the Water Exoneration Hearing Board (the Board) of the Authority, contending that the high meter reading must have been in error. A hearing was held before the Board on July 19, 2005, and exoneration was denied by the Board. Appellant then appealed the matter to the Authority, and on September 13, 2005, the Authority upheld the recommendation that no exoneration be issued.

Appellant appealed the matter to the trial court, and a two-(2-)day trial was held on May 8 and 11, 2006.

Appellant presented the testimony of William Green, (R.R. at 28a-45a), and Christopher Medina, (R.R. at 45a-59a), who are both employed by Appellant to perform maintenance of Appellant's rental properties. They testified that each work day, they would punch in and out of work in the first floor of the Property. They then leave the premises during the day to work at various job sites, occasionally returning to pick up additional materials that may be needed. Both Messers. Green and Medina testified that they were unaware of any water leaks or flooding at the Property between December of 2004 and the beginning of March of 2005.

Appellant testified on his own behalf. (R.R. at 59a-105a). He stated that he was not certain how many students lived in the apartments from December 1, 2004, through March 28, 2005, because the tenants did not always inform him of guests living with them. He estimated that between 8 to 15 students lived in the apartments during that time period.

Appellant stated that he believes that he received an estimated water bill in January, 2005, so he called the Authority to have someone come out to get an actual reading from the meter. The meter was located outside the Property, and the Authority was delayed in having someone read the meter due to ice. After a couple of months, the Authority read the meter and sent Appellant a bill for 334,000 gallons of water. Appellant stated that he believed that the Authority put a new meter in on or about March 1, 2005. He stated that during the week after the new meter was installed, only 2,000 gallons of water were used. He further stated that he had not made any repairs to the Property since he repaired a leaking toilet in early 2004, which is discussed below.

Appellant testified that he had previously received a high bill in the amount of $420 for 75,000 gallons of water, which he had attributed to a leaking toilet. The bill was for the period from January 1, 2004, through February 2, 2004. Appellant discovered the leak after he received the high water bill. During the time period of the leaking toilet, Messers. Green and Medina were in and out of the first floor of the Property, and they did not alert Appellant to the sound of any unusual water noise in the building during that time period.

Appellant also introduced the testimony of Julie Quigley, who is employed as a Customer Service Manager for the Authority. (R.R. at 105a-148a). Excluding the water reading of 75,000 gallons in early 2004, Ms. Quigley testified that the highest water reading prior to the reading at issue was a reading of 27,000 gallons that occurred in 2003. Ms. Quigley explained that the meter installed at the Property is located in a crock placed in the ground, and that the readings of water usage are sent by radio frequency to a receptor unit on a nearby telephone pole, then relayed to the Authority. The Authority has used the remote meter readings

since 1999, and the system is designed so that any malfunction will cause the device to shut down rather than to send a false reading.

Ms. Quigley testified that her records reflect that the Authority estimated a reading for the Property on January 9, 2005, and again on February 8, 2005. At some point in time, Appellant contacted the Authority and requested an actual reading of the meter. On February 28, 2005, a plumber for the Authority performed an actual reading. The records of the Authority reflect that the plumber found no evidence of a leak, and the remote device was functioning properly.

On or about March 7, 2005, also upon Appellant's request, the meter was removed by the Authority and a new meter installed. The original meter was then tested at the Authority facilities. The test results revealed that the meter's accuracy was 97.67%, just under 100%. The meter was running slightly low, which indicated that it was recording less gallons than the customer was actually using. Appellant was sent a letter, dated March 31, 2005, informing him of the test results. Ms. Quigley further testified that she has never seen a meter that had a defect or a fault which corrected itself so that a subsequent reading would be correct.

Ms. Quigley clarified that the water bill for 334,000 gallons pertained to the period from December 10, 2004, through March 7, 2004. In the months after the meter was changed, Appellant received water bills for 17,000 and 12,000 gallons per month.

The Authority introduced the testimony of George Biedrzycki, a meter-repairman employed by the Authority. (R.R. at 140a-157a). He testified that he tested the meter with a low water flow, a medium water flow and a high water flow. His visual inspection of the meter revealed no flaws and his testing

revealed no evidence that the meter was defective, damaged or in any other way unreliable or inaccurate. He noted that an error rate of 97.67% benefits the customer. He testified that he believed that the meter was scrapped after he tested it.

By order dated June 28, 2007, the trial court entered an order dismissing the appeal and entering judgment for the Authority in the amount of $3,041.01. The trial court found, in part, that Appellant: was unable to prove actual water consumption since he had no personal knowledge and none of the students who occupied the Property testified; failed to produce any evidence that the water meter servicing the Property was broken or otherwise defective; failed to rebut the Authority's testimony that the meter accurately read the water consumption; failed to produce any testimony from former tenants or any other evidence that the water consumption on the Property had been "normal" or "customary" during the relevant period. The trial court further found that the testimony of Messers. Green and Medina that they heard no water running during the relevant time period was entitled to no appreciable weight since they did not hear any water running during the incident involving the toilet leak in February 2004. The trial court inferred that they could not hear water running from either of the two upstairs apartments while in the downstairs storage area. In sum, the trial court found that Appellant was unable to offer any competent testimony as to actual water consumption during the relevant period, and he presented no convincing testimony that the water meter at issue was either broken or defective. Additionally, the trial court concluded that Appellant's failure to call witnesses on the critical issue of water consumption raised an unfavorable inference. Appellant appealed the trial court's order to this Court.

On appeal,[2] Appellant argues that the trial court committed an error of law when it accepted Appellant's failure to call tenants as witnesses as an adverse inference. Additionally, Appellant argues that the trial court committed an error of law by requiring Appellant to prove that there was no over-consumption, unattended running water or leaks in Appellant's apartments.

First, Appellant argues that that the trial court erred when it applied an adverse inference against Appellant for his failure to call as witnesses tenants of the Property. The trial court issued the following conclusion of law regarding this adverse inference:

> 3. Appellant failed to call any of the Property tenants or occupants to testify as to their water consumption during the Relevant Period, or even that their water consumption during the Relevant Period had not deviated from prior periods. There was no explanation given by the Appellant for his failure to call any of the tenants or occupants to testify regarding actual water consumption or usage. There having been no satisfactory explanation for his failure to call actual tenants or occupants of the Property to testify as to their water consumption during the Relevant Period, the Court therefore finds that Appellant's failure to call any of the tenants to testify on this critical issue raises an unfavorable inference. Ferne v. Chadderton, 69 A.2d 104, 363 Pa. 191 (1949).

(Trial court opinion at p. 9, attached to Appellant's brief).

This Court has explained that the missing witness rule provides that "where evidence which would properly be part of a case is within the control of the

[2] Our standard of review is limited to determining whether the trial court abused its discretion, rendered a decision with lack of supporting evidence, or clearly erred as a matter of law. Commonwealth v. Tobin, 828 A.2d 415 (Pa. Cmwlth.), petition for allowance of appeal denied, 576 Pa. 726, 841 A.2d 533 (2003).

party whose interest it would naturally be to produce it, and without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him." Marriott Corporation v. Workers' Compensation Appeal Board (Knechtel), 837 A.2d 623, 631 (Pa. Cmwlth. 2003). We have explained that the inference afforded by the missing witness rule "is permitted only where the uncalled witness is peculiarly within the reach of and knowledge of only one of the parties." Allingham v. Workmen's Compensation Appeal Board (City of Pittsburgh), 659 A.2d 49, 53 (Pa. Cmwlth. 1995), petition for allowance of appeal denied, 543 Pa. 717, 672 A.2d 310 (1996). The burden is on the party asserting the adverse inference to make a showing that the witness is within the control of the party. Lawrence Kempner, formerly by Stephen Feldman, Pennsylvania Trial Guide Evidence §13.15 (4th rev. ed. 2004).

Appellant contends that the mere fact that a party does not call a witness should not result in an adverse inference except where the party fails to call a witness within its control. Appellant argues that the tenants are not within his control, so no adverse inference should have been accepted by the Court. Appellant takes the position that because the trial court erred in applying an adverse inference, the trial court committed reversible error and a new trial should be granted.[3]

[3] Appellant also states that the trial court should have afforded it an adverse inference against the Authority for failing to produce the water meter at trial, since the water meter was in the Authority's control, it would have been in the interest of the Authority to produce it to establish its accuracy, and there was no explanation for the Authority's failure to produce it. In Pennsylvania, the doctrine of spoliation provides that a party may not benefit from its own destruction or withholding of evidence. Duquesne Light Company v. Woodland Hills School District, 700 A.2d 1038 (Pa. Cmwlth. 1997), petition for allowance of appeal denied, 555 Pa. 722, 724 A.2d 936 (1998). The doctrine attempts to compensate those whose legal rights are impaired by the destruction or withholding of evidence by creating an adverse inference against

(Footnote continued on next page…)

The Authority counters that Appellant failed to call his own tenants to testify to their water usage, and it was naturally in his interest to do so since no one else could establish normal water consumption. Moreover, Appellant failed to provide an adequate explanation. Finally, the Authority states that the uncalled tenants were peculiarly within Appellant's knowledge and reach, and his failure to produce any of the tenants raises enormous doubts about his claims.

Under the circumstances of this case, we cannot agree that the former tenants of Appellant were peculiarly within the control of Appellant such that

---

(continued…)

the party responsible for the destruction or withholding. Id. It permits the jury to infer that the "spoiled" evidence would be unfavorable to the position of the spoliator. Id.

The Authority contends that Appellant waived this issue because he failed to raise it during trial or in his concise statement of matters complained. Interestingly, we note that in the concise statement of matters complained, Appellant stated that the Authority's actions regarding the removal and testing of the meter may amount to spoliation. However, Appellant did not specifically identify the issue of spoliation among the five (5) numbered "issues complained of." This raises an interesting question of whether Appellant preserved that issue in his concise statement of matters complained. However, we note that Appellant did not include this issue in the portion of his brief to this Court, entitled "statement of questions involved," nor did he set it forth in an argument with any citations. Instead, he again mentions it in passing. Such failure to include the issue in the "statement of questions involved" or to develop it in an argument with any citations constitutes a waiver. See Pa. R.A.P. 2116; see also Coraluzzi v. Commonwealth, 524 A.2d 540 (Pa. Cmwlth. 1987) (ordinarily, no point will be considered which is not set forth in the statement of questions involved or suggested thereby); Rapid Pallet v. Unemployment Compensation Board of Review, 707 A.2d 636 (Pa. Cmwlth. 1998) (holding that arguments not properly developed are deemed waived).

Appellant may have been entitled to the benefit of the doctrine of spoliation had he requested that the Authority make the meter available to him for inspection, raised the issue during trial by requesting the favorable inference and properly preserved the issue for appeal. However, there is nothing in the record that suggests that Appellant took those steps, nor does Appellant assert such in his brief. Under these circumstances, we cannot conclude that the trial court erred in not applying the doctrine of spoliation.

Appellant's failure to call them as witnesses should result in the imposition of an adverse inference. The relevant time period in this case is from December, 2004 through March, 2005. This matter went to trial before the trial court in May, 2006. At that point in time, there was no evidence that Appellant had maintained any relationship, contractual or otherwise, with the former tenants of the Property such that he had any ability to control them. This Court has held that the missing witness rule did not apply when an employer fails to call a former employee as a witness. Peugeot Motors of America, Inc. v. Stout, 456 A.2d 1002 (Pa. Super. 1983). If an employer's failure to call a former employee does not give rise to the missing witness rule because the employer no longer exercises control over the former employee, we cannot conclude that a landlord's failure to call a former tenant somehow results in the imposition of an adverse interest. In general, an employee is far more within the control of an employer than a tenant is within the control of a landlord. Hence, we logically cannot conclude that failure to call a former employee does not result in the imposition of an adverse inference yet the failure to call a former tenant does.

Regardless, we must agree with the Authority that the error on the part of the trial court was harmless. See Hart v. W.H. Stewart, Inc., 523 Pa. 13, 564 A.2d 1250 (1989) (an evidentiary ruling which does not affect the verdict will not provide a basis for reversal). While Appellant's failure to call former tenants did not result in the imposition of an adverse inference pursuant to the missing witness rule, it nevertheless resulted in a failure of proof by Appellant. The trial court found the testimony of the witnesses employed by the Authority to be credible as to the accuracy of the water meter, and Appellant did not present any convincing evidence that there was no overuse of water during the relevant time period. The

only evidence presented by Appellant on this critical issue came from the testimony of the two (2) maintenance employees that they did not hear any water running, which testimony the trial court determined was not entitled to any appreciable weight because they failed to detect the leak at the Property in February, 2004. Under these circumstances, the error was harmless.

Second, Appellant argues that the trial court erred when it required Appellant to prove that there was no over-consumption, unattended running water or leaks in Appellant's apartments. In support of this argument, Appellant simply reiterates that his employees established that there were no leaks in the Property, and that without the opportunity to examine the water meter he could not establish his burden of proof.

As to this issue, Appellant again failed to cite any legal authority in his brief as required by Pa. R.A.P. 2119, and he failed to advance an intelligible argument. Although this Court has considered the merits of cases where defects in the brief will not preclude meaningful appellate review, see Roseberry Life Insurance Company v. Zoning Hearing Board of the City of McKeesport, 664 A.2d 688 (Pa. Cmwlth. 1995), we cannot do so in this instance because Appellant has not provided a legal basis to explain how the trial court erred when it required some proof that there was no overuse of water.

Accordingly, we must affirm the order of the trial court.

JOSEPH F. McCLOSKEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert C. Eckenrode, Appellant	:	
v.	:	No. 1448 C.D. 2007
Pittsburgh Water and Sewer Authority	:	

O R D E R

AND NOW, this 6th day February, 2008, the order of the Court of Common Pleas of Allegheny County is hereby affirmed.

_____

JOSEPH F. McCLOSKEY, Senior Judge