IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Joseph Pilchesky,	:	
Appellant	:	
	:	
v.	:	No. 2366 C.D. 2008
	:	SUBMITTED: May 8, 2009
University of Scranton, Inc.	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED:** September 14, 2009

Appellant, Joseph Pilchesky, proceeding *pro se*, challenges the sale by the Redevelopment Authority of the City of Scranton (Authority) of the William T. Schmidt Sports Complex to the University of Scranton (University), a private institution. The facility is a 10.8-acre recreational facility located in the City of Scranton (the City) and more commonly referred to by local residents as the South Side Sports Complex (South Side). South Side's development was completed through use of HUD[1] and Project 70[2] funds. The "Urban Renewal Plan of the

[1] United States Department of Housing and Urban Development

[2] Project 70 Land Acquisition and Borrowing Act, Act of June 22, 1964, P.L. 131, 72 P.S. §§ 3946.1—3946.22. Section 2 of this Act provides, *inter alia*:

. . . .

(Footnote continued on next page…)

Redevelopment Authority of the City of Scranton, covering the South Side Flats Project A/K/A Project R-6," as amended and adopted by the City in January of 1961, explicitly referred to the parcel known as South Side as a "public park" by designating it as such on the accompanying map. In March 1977, the Council of the City of Scranton (City Council) passed Resolution No. 23 of 1977, resolving that South Side's basketball court be known as "Jay Archer Basketball Court"; that its baseball field be known as "Jim Regan Baseball Field"; and that the softball field be known as "Joe Butler Softball Field." In November 1977, City Council passed Resolution No. 115 of 1977, resolving that South Side be known as the "William T. Schmidt Sports Complex."

In December 2002, the Mayor of the City forwarded an Ordinance, File of the Council No. 92 of 2002, to City Council, asking that it approve the transfer of South Side to the Authority. The ordinance, which was passed on December 9, 2002, provides in relevant part that "it is in the best interest of the City of Scranton to transfer the parcels of land which together comprise the South

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(continued…)

> (4) The rapid growth of population in Pennsylvania's urban and suburban areas requires the acquisition of lands for recreation, conservation and historical purposes before such lands are lost forever to urban development or become prohibitively expensive.
> (5) The Commonwealth of Pennsylvania must act to acquire and to assist local governments to acquire lands that are available and appropriate for such purposes so that they and the lands previously dedicated to recreation, conservation and historical use may be so preserved.

72 P.S. § 3946.2. Section 20 of the Act, 72 P.S. § 3946.20, affords that "lands acquired under the act are to be used for recreation, conservation and historical purposes, and if the political subdivision fails in this duty, it may be required to reimburse the Commonwealth the funds used to acquire the land." *White v. Township of Upper St. Clair*, 799 A.2d 188, 199 (Pa. Cmwlth. 2002).

Side Sports Complex to the Redevelopment Authority of the City of Scranton;" "the Redevelopment Authority of the City of Scranton is willing to receive the Property and oversee the maintenance and operation of the Sports Complex;" and "the Mayor and other appropriate City Officials are hereby authorized to transfer the properties which together comprise the South Scranton Sports Complex to the Redevelopment Authority of the City of Scranton and are also hereby authorized to execute any and all documents necessary to effectuate and complete this transfer." *See* Supplemental Reproduced Record (Supp. R.R.) at 33b.

In July 2003, the Authority and the University entered into a Memorandum of Understanding (MOU) providing for the conveyance of South Side to the University. This agreement included the provision that "[t]he University agrees to fully perform all terms and conditions of legislation (PA Senate Bill 850) with respect to conveyance of the Complex to the University." *See* Supp. R.R. at 35b. On December 23, 2003, the Governor of Pennsylvania signed Senate Bill 850 into law as Act 52 of 2003. The Act expressly removed the restrictions relating to sale of the property which were imposed due to receipt of funds through the Commonwealth pursuant to the Project 70 Land Acquisition and Borrowing Act.

No less than seven cases challenging the sale of South Side have been filed. The seven actions are: (1) *Vutnoski v. Redevelopment Authority of Scranton*,[3] 2003-CV-1488 (Lackawanna County); (2) *M-7 Political Action*

[3] On December 30, 2003, *Vutnoski v. Redevelopment Authority of the City of Scranton* (*Vutnoski)* was filed in the Court of Common Pleas of Lackawanna County (common pleas). *Vutnoski* alleged a violation of the Donated or Dedicated Property Act, Act of December 15, 1959, P.L. 1772, 53 P.S. §§ 3381-3384 (Count I), and Ultra Vires act by the Authority (Count II), and failure to follow proper redevelopment procedures (Count III). Pilchesky attempted to intervene in this case, but was denied permission to do so. Thereafter, common pleas granted the **(Footnote continued on next page…)**

Committee v. Redevelopment Authority of Scranton[4] (Lackawanna County); (3) *Pilchesky v. Redevelopment Authority of Scranton*, 2005-CV-5205 (Lackawanna County); (4) *Pilchesky v. University of Scranton*, 2007-CV-103 (Lackawanna County); (5) *Pilchesky v. Rendell*,[5] 77 M.D. 2007 (Commonwealth Court); (6) *Pilchesky v. Redevelopment Authority of Scranton*,[6] 80 M.M. 2007 (Supreme Court King's Bench); and (7) *Pilchesky v. Redevelopment Authority of Scranton*,[7] 2008-CV-7706 (Lackawanna County). The actions at issue in this appeal are *Pilchesky*

(continued…)

Authority's motion for judgment on the pleadings and dismissed the complaint. This court affirmed common pleas. *See Vutnoski v. Redevelopment Authority of the City of Scranton*, 941 A.2d 54 (Pa. Cmwlth. 2006).

[4] This action, which Pilchesky filed as president of the political action committee, was dismissed by Judge James Walsh because he no longer had jurisdiction over the matter in light of the appeal of *Vutnoski v. Redevelopment Authority of the City of Scranton* to the Commonwealth Court.

[5] On February 7, 2007, Pilchesky filed a complaint challenging the transfer of South Side. *Pilchesky v. Rendell* was filed in the Commonwealth Court's original jurisdiction against Governor Rendell, various members of the General Assembly (collectively the Commonwealth Defendants), City Council, Mayor Doherty and the University. The petition asserted that Act 52 is ultra vires by virtue the common law doctrine set forth by the Pennsylvania Supreme Court in *Board of Trustees of Philadelphia Museum v. Trustees of the University of Pennsylvania*, 251 Pa. 115, 96 A. 123 (1915), referred to as the Public Trust Doctrine of 1915. *See Pilchesky v. Rendell*, 932 A.2d 287, 288 (Pa. Cmwlth. 2007) *affirmed* 596 Pa. 473, 946 A.2d 92 (2008). Pilchesky also demanded injunctive relief to prevent any private use of South Side, which relief the Commonwealth Court denied and the Supreme Court affirmed. The Commonwealth Court sustained the preliminary objections of the Commonwealth Defendants finding that the Public Trust Doctrine of 1915 did not apply in light of the legislative enactments concerning the complex. *See id.* Thereafter, the Commonwealth Court transferred the case to common pleas for resolution of the preliminary objections of City Council, Mayor Doherty and the University. *Id.*

[6] On May 29, 2007, Pilchesky filed a King's Bench Petition with the Supreme Court asserting that the conveyance of South Side by the Authority to the University violated the Public Trust Doctrine. Following voluminous briefing by the University, Pilchesky withdrew his petition.

[7] On November 10, 2008, Pilchesky filed another action against the Authority, the University and the City challenging the sale and transfer of South Side and alleging a violation of the Public Trust Doctrine. This action is currently pending in common pleas.

v. Redevelopment Authority of Scranton, 2005-CV-5205 and *Pilchesky v. University of Scranton*, 2007-CV-103.

Appellant filed *Pilchesky v. Redevelopment Authority of the City of Scranton* in common pleas at case number 2005-CV-5205 (the 05 Action). Pilchesky asserted that the sale of South Side to the University was illegal and in violation of the Public Trust Doctrine. The Authority filed preliminary objections asserting that Pilchesky lacked standing to challenge the sale of South Side. Pilchesky then filed an amended complaint for declaratory judgment and, thereafter, the Authority filed preliminary objections to the amended complaint. Pilchesky then filed preliminary objections to the Authority's preliminary objections and the Authority filed an answer to Pilchesky's preliminary objections. On April 25, 2006, Pilchesky filed a petition and a rule to show cause why he should not be allowed to file a second amended complaint for declaratory judgment. On December 8, 2006, common pleas granted the Authority's preliminary objections and dismissed Pilchesky's complaint for lack of standing. Pilchesky filed a motion for reconsideration which common pleas denied. Pilchesky then appealed to the Commonwealth Court. On January 28, 2008, the Commonwealth Court found that Pilchesky had the requisite standing and remanded to common pleas for further proceedings. Thereafter, the 05 Action was consolidated with the case Pilchesky filed against the University, 2007-CV-103.

On January 5, 2007, Appellant filed a complaint and request for injunctive relief, *Pilchesky v. University of Scranton*, at case number 2007-CV-103 (the 07 Action). The 07 Action contained four counts that challenged the sale of South Side to the University and alleged a violation of the Public Trust Doctrine. The University filed preliminary objections. Pilchesky then filed an amended

complaint on February 28, 2007. The University again filed preliminary objections and in response thereto Pilchesky filed preliminary objections to the University's preliminary objections. Common pleas held a hearing on Pilchesky's request for injunctive relief and thereafter, on December 4, 2007, denied Pilchesky's petition for injunctive relief. In addition, common pleas ordered a stay of the University's preliminary objections pending the outcome of Pilchesky's appeal to the Commonwealth Court in the 05 Action.

Following remand of the 05 Action, on March 14, 2008, Pilchesky filed a petition and rule to show cause why dockets 05-CV-5205 and 07-CV-103 should not be consolidated, why indispensible parties should not be added to the action, and why the Plaintiff should not be allowed to file a second amended complaint. On April 24, 2008, Judge Mazzoni of common pleas issued an order denying Pilchesky's request to amend the complaint, but permitting consolidation of the 05 Action and the 07 Action.[8] *See* Supp. R.R. at 432b. The requests to add indispensible parties and amend the Complaint were withdrawn and, thus, rendered moot. The 05 Action and the 07 Action were ultimately consolidated at 05-CV-5205 as a result of the April 24, 2008 order.

Pilchesky filed a second amended complaint in the 07 Action against the University on June 4, 2008. *See* Supp. R.R. at 458b. The second amended complaint alleged that the University's private use of South Side violated the Public Trust Doctrine. On June 6, 2008, Pilchesky filed a rule to show cause why he should not be allowed to add the City and the University as an indispensible

[8] On January 21, 2009, Pilchesky also filed a petition and a rule to show cause why common pleas order dated April 24, 2008 (consolidation order) in the 05 Action and 07 Case, should not be vacated *nunc pro tunc*. Following the filing of answers by the Authority and the University, Pilchesky filed a praecipe to withdraw the rule to show cause.

parties to the 05 Action. On August 28, 2008, Judge Mazzoni denied Pilchesky's request to add the University and the City as indispensible parties and to add an additional count. *See* Supp. R.R. at 622b.

On June 24, 2008, the University filed a third set of preliminary objections. The University filed a brief in support of preliminary objections in a timely manner. The University's preliminary objections and brief in support thereof assert that Pilchesky's claim must fail for two reasons. First, the Public Trust Doctrine of 1915 as it relates to South Side is superseded by the enactment of Act 52 because the General Assembly has the authority to alter or abolish, by statute, any aspect of common law. Second, the University contends that Pilchesky's claim is barred by *res judicata* as the subject matter of this dispute has been fully and fairly litigated in both *Vutnoski* and *Rendell*.

Pilchesky's brief in opposition to the University's preliminary objections to the second amended complaint was due on September 15, 2008, and a hearing was scheduled for October 15, 2008. Pilchesky failed to file a brief in opposition to preliminary objections, but rather, on September 23, 2008, filed a praecipe to withdraw the complaints in both the 05 Action and the 07 Action. In the praecipe to withdraw the complaints, Pilchesky asserted that common pleas refusal to add the University as an indispensible party to the 05 Action created an issue of defective jurisdiction, which would inevitably lead to the dismissal of the 05 Action. Further, Pilchesky asserted a litany of alleged abuse and prejudice perpetrated upon him by common pleas including: judicial intimidation and incompetence, intentional procedural mismanagement, "road-blocking the Plaintiff's case by either failing to act or acting improperly as to deter him, frustrate him and prejudice him," assignment of visiting Judge Thomson and entry

of defective orders. Pilchesky stated that he intended to file another action following the discontinuance of the 05 Action and the 07 Action.

On September 19, 2008, the University served Pilchesky with a motion to dismiss and notified him that the motion would be presented to common pleas on September 25, 2008. Following a hearing on September 25, Judge Thomson took the motion to dismiss under consideration. On October 1, 2008, the court administrator notified both Pilchesky and the University that Judge Thomson would hear oral argument on the University's motion to dismiss on November 10, 2008. The University filed a brief in support of its motion to dismiss in a timely manner on October 14, 2008. Pilchesky's response was due on October 28, 2008. On November 7, 2008, Pilchesky filed a response asserting that the motion to dismiss could not be granted because he had withdrawn the case. Judge Thomson conducted the scheduled hearing, which Pilchesky did not attend. On November 10, 2008, Judge Thomson dismissed the case against the University (07 Action) with prejudice.[9] Pilchesky filed a motion for reconsideration, which common pleas denied. This appeal challenges the November 10, 2008 order of common pleas.

Pilchesky alleges that common pleas dismissal of his complaint with prejudice was an abuse of discretion because: (1) the University did not file a proper petition to strike off the discontinuance; and (2) the filing of the praecipe to discontinue the 05 Action and the 07 Action mooted all pending motions.

A discontinuance is the exclusive method of voluntary termination of an action by the plaintiff prior to commencement of trial. *See* Pa. R.C.P. No.

[9] Common pleas struck off the discontinuance as to the University only. The University was the sole defendant in the 07 Action. Pilchesky's discontinuance of the 05 Action against the Redevelopment Authority continues in effect as the Redevelopment Authority did not petition common pleas to strike off the discontinuance of the 05 Action.

229(a). "Discontinuances are granted by leave of court only, but standard practice in this Commonwealth has been to assume such leave in the first instance." *See Fancsali v. University Health Ctr.*, 563 Pa. 439, 444, 761 A.2d 1159, 1161 (2000). A court upon petition and after notice, may strike off a discontinuance in order to protect the rights of any party from unreasonable inconvenience, vexation, harassment, expense or prejudice. *See* Pa. R.C.P. No. 229(c). The decision to strike off a discontinuance is addressed to the court's discretion and "the party complaining on appeal has a heavy burden." *Fancsali*, 563 Pa. at 445, 761 A.2d at 1162; *Vartan v. Reed*, 677 A.2d 357, 362 (Pa. Cmwlth. 1996) (citations omitted) ("This Court will not reverse the trial court's order striking a discontinuance absent an abuse of discretion."). To determine whether a party is prejudiced by a discontinuance this court may consider the length of time for which the case has been pending, the effort and expense a party has incurred in discovery, and the disadvantage imposed by the passage of additional time on the parties ability to litigate the claim. *Francsali*, 563 Pa. 439, 445, 761 A.2d at 1164-65.

Pilchesky asserts that the University failed to file a properly styled petition to strike off the discontinuance as required by Pa. R.C.P. No. 229(c), failed to comply with Pa. R.C.P. No. 206.1 and Pa. R.C.P. No. 206.2 regarding petitions and answers and that the University was required to follow the rule to show cause procedure provided by Pa. R.C.P. No. 206.6 in order to properly move common pleas to strike off the discontinuance. He further alleges it was improper for the University to request that common pleas strike off the discontinuance in its brief in support of its motion to dismiss.

The University filed a motion to dismiss on September 19, 2008. The motion itself does not seek to strike off the discontinuance, but rather only

requested that common pleas sustain the University's preliminary objections to the second amended complaint.[10] The University's brief in support of its motion to dismiss requested for the first time that Pilchesky's discontinuance be stricken off. In addition, the motion to dismiss and brief in support thereof both assert that the University's preliminary objections should be sustained because Pilchesky failed to file a brief in opposition to the preliminary objections as required by Lackawanna County Rule of Civil Procedure 211(f).[11] Common pleas could have refused to consider the request to strike off the discontinuance as procedurally defective, but in its discretion chose to request briefing on the issue and conduct a hearing.

We find that Pilchesky's assertion that common pleas erred in striking off the discontinuance because University improperly moved common pleas to the strike off the discontinuance is without merit. We note that "[p]rocedural rules are not ends in themselves but means whereby justice, as expressed in legal principles, is administered." *Beaver v. Penntech Paper Co.*, 452 Pa. 542, 545, 307 A.2d 281, 282 (1973). Rule 126 of Pennsylvania Rules of Civil Procedure provides:

> The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

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[10] The motion to dismiss could not have requested that common pleas strike off the discontinuance as Pilchesky did not file the praecipe to discontinue until four days later on September 23, 2008.

[11] Lackawanna County Rule of Civil Procedure 211(f) provides that if a party fails to timely file and serve a brief in opposition to a motion, that party may be deemed not to oppose the motion.

Rule 229(c) permits a court to strike off a discontinuance "upon petition after notice." Although the University did not file a formally styled petition to strike off the discontinuance, the University did move common pleas to strike off the discontinuance in its properly filed and served brief in support of the motion to dismiss. The University's brief in support of the motion to dismiss sufficiently notified Pilchesky of the University's request to strike off the discontinuance and more than adequately explained the University's reasons for seeking to strike off the discontinuance. Pilchesky had the opportunity to oppose the University's request by showing that the discontinuance did not constitute unreasonable inconvenience, vexation, harassment, expense or prejudice. As a dispositive motion was pending and a hearing was already scheduled, the request to strike off the discontinuance in its brief in support of the motion to dismiss served judicial economy without prejudicing Pilchesky. We conclude that the University's failure to follow the proper local petition procedure did not affect the substantive rights of any of the parties.

Pilchesky also asserts that common pleas was without jurisdiction to schedule and hold hearings and to take under consideration the University's motion to dismiss. As a general rule, the discontinuance of an action ends all obligations of the parties or the court to respond to or rule upon any pending motions. *See Pennsylvania Standard Practice 2d*, § 39:31. Despite entry of the discontinuance, the trial court proceeded to set a hearing and briefing schedule for the University's motion to dismiss. All filings in the 07 case should have ceased until the University moved common pleas to strike off the continuance. However, once the University moved common pleas to strike off the continuance all parties were required to respond to filings and attend scheduled hearings. *See Pennsylvania*

Standard Practice 2d, § 229(a):9 (entry of a discontinuance is subject to the control of the trial court, because the discontinuance can be stricken off on a motion or petition by a defendant). Once the trial court strikes off a discontinuance, the case is returned to its prior status and all pending motions are reinstated. A party, who ignores communications from the court, fails to attend scheduled hearings and fails to address an issue raised by an opponent does so at his own peril.

Finally, we turn to whether common pleas erred in dismissing Pilchesky's complaint with prejudice. Common pleas dismissed the 07 Action pursuant to Lackawanna County Local Rule 211(c) because Pilchesky failed to file a brief in opposition to the University's preliminary objections. Pilchesky was required to file his brief on or before September 15, 2008, and failed to do so, thus, rendering the University's preliminary objections unopposed. He did not file the discontinuance until eight days later on September 23, 2008. Subsequent to striking off the discontinuance, it was well within common pleas' discretion to dismiss Pilchesky's action. For nearly six years, Pilchesky has comprehensively litigated the issue of the transfer and sale of South Side against numerous Commonwealth Defendants, local municipal officials and private entities. In the 07 Action, Pilchesky has filed no less than three complaints against the University, an emergency petition for injunctive relief, two petitions to add indispensible parties, and a motion to consolidate. Pilchesky has also filed a King's Bench petition against the University, which he subsequently abandoned after the University completed extensive briefing, and the University was also a defendant in *Pilchesky v. Rendell*. The University properly and timely responded to all of Pilchesky's filings only to be faced with a discontinuance after a dispositive

motion had been served upon Pilchesky. We conclude that based on the extensive history of litigation surrounding this issue that common pleas did not err in deeming the University's preliminary objections unopposed and consequently, dismissing Pilchesky's complaint with prejudice.[12]

BONNIE BRIGANCE LEADBETTER,
President Judge

[12] We note that this Court did not consider the merits of the University's preliminary objections in reaching its conclusion.

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v.	:	No. 2366 C.D. 2008
	:	
University of Scranton, Inc.	:	

O R D E R

AND NOW, this 14th day of September, 2009, the order of Court of Common Pleas of Lackawanna County in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge