

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Theodore Bailey	:	
	:	
	:	
v.	:	No. 265 C.D. 2012
	:	Submitted: September 21, 2012
Tax Review Board of the City	:	
of Philadelphia,	:	
	:	
Appellant	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: November 8, 2012

This matter is an appeal by the City of Philadelphia (City) from an order of the Court of Common Pleas of Philadelphia County in a statutory appeal by appellee Theodore Bailey (Bailey) from a decision of the Tax Review Board of the City of Philadelphia (the Board). This order vacated all charges levied by the City against Bailey for demolition of a property owned by him as a result of the City’s failure to appear at a scheduled argument on Bailey’s appeal. For the reasons that follow, we reverse and remand.

In 2006, the City Department of Licenses and Inspections demolished Bailey’s property at 3020 Ruth Street (“the Property”) for alleged imminently dangerous conditions. (December 13, 2011 Hearing Transcript (December 13, 2011 H.T.) at 2-4, Reproduced Record (R.R.) at 21a; Court of Common Pleas Brief

of Bailey, R.R. at 14a.) Bailey appealed to the Board the bills that he received from the City for that demolition, which totaled over \$14,000, contending that the demolition was premature and that he was in the process of repairing the Property in response to the violation notices when the demolition was done. (Notice of Board Decision, R.R. at 34a; December 13, 2011 H.T. at 2-3, 7-8, R.R. at 21a, 22a; Court of Common Pleas Brief of Bailey, R.R. at 14a-15a.) The Board held a hearing on the matter, and, on May 8, 2009, mailed a decision reducing the amount that Bailey owed the City to \$6,000. (Notice of Board Decision, R.R. at 34a; December 13, 2011 H.T. at 3, 7, R.R. at 21a, 22a.)

On June 5, 2009, Bailey timely filed a statutory appeal from the Board's decision to the Court of Common Pleas and a motion to proceed in forma pauperis. (Docket Entries at 2, R.R. at 2a-3a; June 5, 2009 Notice of Appeal to Court of Common Pleas.) On June 5, 2009, the court issued its standard Case Management Order, ordering Bailey to serve his appeal papers upon the Board, the Board stenographer, and others. (Docket Entries at 2, R.R. at 2a; Case Management Order, R.R. at 36a.) In a June 19, 2009 letter, the Board advised Bailey that, as appellant, he was required to request and pay for a transcript of the Board hearing from the stenographer. (City Motion for Reconsideration Ex. D, R.R. at 47a.) Bailey's motion to proceed in forma pauperis was dismissed on July 7, 2009 for failure to properly complete the petition and supporting affidavit. (Docket Entries at 3, R.R. at 3a.)

On August 4, 2009, the court issued a Scheduling Order, setting deadlines for the Board to transmit its Certified Record, for briefing, and for oral argument. (Docket Entries at 3, R.R. at 3a; City Motion for Reconsideration Ex. E, R.R. at 49a.) Bailey filed a two-page hand-written brief on November 2, 2009, but

did not order the transcript of the Board hearing. (Court of Common Pleas Brief of Bailey, R.R. at 14a-15a; January 26, 2010 Hearing Transcript (January 26, 2010 H.T.) at 3-4, R.R. at 17a.) Because there was no transcript of the Board hearing, the Board did not file its record and the City did not file a brief. (Docket Entries at 3, R.R. at 3a-4a; January 26, 2010 H.T. at 3-4, R.R. at 17a.)

On January 26, 2010, when the case came before the court for oral argument, the City called to the court's attention the fact that Bailey had never ordered the transcript of the Board hearing and that, as a result, the Board had not been able to produce its findings of fact and conclusions of law. (January 26, 2010 H.T. at 3-4, R.R. at 17a.) The court at that argument ruled that for his appeal from the Board's decision to proceed, Bailey was required to order the transcript of the Board hearing and provide it to the City within thirty days. (January 26, 2010 H.T. at 4-5, R.R. at 17a-18a.) The court specifically instructed Bailey:

THE COURT: Well, I'm going to order that the transcript be filed within thirty days from today's date and give this a date two months out please.

* * *

MS. BROWN [for the City]: And, Your Honor, for clarity of the record, who is ordering that transcript?

THE COURT: It would have to be the appellate [sic] —

MS. BROWN: Thank you.

THE COURT: without an [in forma pauperis] order. Do you understand that, sir?

MR. BAILEY: No, sir.

THE COURT: You have to order the transcript of the proceedings before the Tax Review Board and provide them to the City within thirty days.

MR. BAILEY: So, I have to go to the Tax Review Board and order the transcript and then give them a copy.

THE COURT: Yes, that's correct.

MR. BAILEY: Okay. Thank you.

(January 26, 2010 H.T. at 4-5, R.R. at 17a-18a.)

Despite the court's ruling and instruction to Bailey that he was required to order the transcript of the Board hearing, Bailey did not order the transcript of the Board hearing and took no further action in his appeal. (Docket Entries at 3-4, R.R. at 4a; City Motion for Reconsideration Ex. F, R.R. at 51a.) For almost two years, between January 26, 2010 and November 2011, the matter lay dormant. (Docket Entries at 3-4, R.R. at 4a.) In late November 2011, the case was relisted for oral argument on December 13, 2011 and notice of this argument date was sent to both Bailey and the City. (Docket Entries at 4, R.R. at 4a.)

On December 13, 2011, Bailey appeared for the argument, but the City failed to appear. (Court of Common Pleas Opinion at 2, R.R. at 9a; December 13, 2011 H.T. at 2, 9, R.R. at 21a, 22a.) This argument was before a different judge, who was unaware of the January 26, 2010 order that Bailey obtain the transcript of the Board. (Court of Common Pleas Opinion at 1-2, R.R. at 8a-9a; December 13, 2011 H.T., R.R. at 20a-23a.) At the December 13, 2011 argument, the court heard Bailey's arguments, his unsworn factual contentions concerning the demolition of the Property and his unsworn version of what transpired at the Board hearing, and made no attempt to contact the City's counsel to obtain her

appearance or ascertain why she was not there. (December 13, 2011 H.T., R.R. at 20a-23a.)

Based on the December 13, 2011 oral argument, the court issued an order on December 22, 2012, vacating and discharging all charges levied by the City against Bailey for demolition of the Property on the grounds that after “notice directing them to file briefs and appear, ... the Tax Review Board failed to file its brief, failed to file its findings of fact and conclusions of law, and failed to make oral argument at the hearing of which it was duly notified.” (Court of Common Pleas Order, R.R. at 7a.) After this order was entered on January 3, 2012 and notice was sent to the parties pursuant to Pa. R.C.P. No. 236 on January 4, 2012, the City on January 13, 2012 filed a motion for reconsideration. (Docket Entries at 4, R.R. at 4a-5a; City Motion for Reconsideration, R.R. at 24a-55a.) In its motion for reconsideration, the City contended that its counsel had not received notice of the December 13, 2011 argument and pointed out that the absence of a certified record, findings of fact and conclusions of law from the Board and the City’s failure to file a brief were a result of Bailey’s failure to order the transcript of the proceedings from the Board. (City Motion for Reconsideration, R.R. at 25a-26a, 29a-32a, 51a.) When the Court of Common Pleas did not rule on its motion for reconsideration before the appeal deadline, the City timely appealed. (Docket Entries at 4, R.R. at 5a; Notice of Appeal.)¹

Our standard of review on this appeal is whether the court below abused its discretion. *Williams v. School District of Philadelphia*, 870 A.2d 414, 416 n.2 (Pa. Cmwlth. 2005); *Shin v. Brennan*, 764 A.2d 609, 610 (Pa. Super. 2000).

¹ The court denied the motion for reconsideration after the City filed this appeal. (Docket Entries at 5, R.R. at 5a.)

The City argues that the court's granting of judgment against it for a single inadvertent failure to appear was an abuse of discretion, particularly where the City, as appellee, did not have the burden to proceed in the appeal. We agree.

It is well established that before granting judgment against a party as a sanction for counsel's failure to appear at a scheduled argument or hearing, a court must consider the following factors: (1) whether the failure to appear was part of a pattern of improper behavior, misconduct or abuse; (2) whether the failure to appear was inadvertent; (3) whether the court attempted to contact counsel; (4) whether the opposing party would be prejudiced by the delay; and (5) whether lesser sanctions would be sufficient. *Williams*, 870 A.2d at 416-17; *Thompson v. Houston*, 839 A.2d 389, 391 (Pa. Super. 2003); *Shin*, 764 A.2d at 611-12. These requirements also apply to hearing and ruling on a case *ex parte* when one of the parties fails to appear. *Williams*, 870 A.2d at 415-17 (holding an *ex parte* trial and entering judgment based on that *ex parte* proceeding was reversible abuse of discretion where counsel's failure to appear was not part of any pattern of nonattendance or misconduct and no attempt was made to contact counsel). Where the failure to appear is inadvertent, there is no other misconduct, no attempt is made to contact counsel, and there is no showing that the delay from counsel's absence prejudiced the other party, it is an abuse of discretion to grant judgment against the absent party or rule against the absent party on the basis of an *ex parte* hearing. *Williams*, 870 A.2d at 416-17; *Shin*, 764 A.2d at 611-12.

Here, the only finding by the Court of Common Pleas concerning the City's failure to appear was that the City's counsel received adequate notice of the December 13, 2011 argument because the entry of notice on the docket supports a presumption that counsel received the notice. (Court of Common Pleas Opinion at

4-5, R.R. at 11a-12a.) The court in its opinion did not conclude that counsel's absence was anything other than an accidental, inadvertent mistake and did not find that the City had failed to attend any other court proceedings. No attempt was made to contact the City's counsel when she did not appear at the December 13, 2011 argument. (December 13, 2011 H.T., R.R. at 20a-23a.) Moreover, the record shows that the City attended the prior proceeding in the case, the January 26, 2010 argument. (January 26, 2010 H.T., R.R. at 17a-18a.)

While the court noted that the Board had failed to file its record and that the City had not filed a brief in accordance with the deadlines set in the Case Management Order (Court of Common Pleas Opinion at 1-2, R.R. at 8a-9a), the record shows that these deficiencies were caused by Bailey's failure to order the Board hearing transcript, and not by the Board or the City. (January 26, 2010 H.T., R.R. at 17a-18a.) The City's failure to appear also caused no delay that could prejudice Bailey. Bailey, at the time of the December 13, 2011 argument, had still not taken the necessary step for his appeal to proceed, ordering the transcript. The City's failure to appear therefore did not delay his right to have his appeal heard. Because the record showed nothing more than a single, inadvertent failure to appear, no pattern of misconduct by the City and no prejudice to Bailey, it was an abuse of discretion for the court to grant judgment against the City. *Williams*, 870 A.2d at 416-17; *Shin*, 764 A.2d at 611-12.

Indeed, the Board's failure to file its record and the City's failure to file a brief could not support the court's vacating of the Board's decision, even if they were not excused by Bailey's failure to order the transcript of the Board hearing. The City was the appellee in this statutory appeal. Judgment cannot be granted against an appellee by default or for failure to file a brief or respond to

appellant's arguments, even where the appellee's failure is unjustified. *Zoning Board of Adjustment v. Willits Woods Associates*, 534 A.2d 862, 865 (Pa. Cmwlth. 1987); *Civil Service Commission of City of Philadelphia v. Wenitsky*, 521 A.2d 80, 82 (Pa. Cmwlth. 1987); *Civil Service Commission v. Rogers*, 520 A.2d 1264, 1265-66 (Pa. Cmwlth. 1987); *Civil Service Commission of City of Philadelphia v. Farrell*, 513 A.2d 1123, 1125 (Pa. Cmwlth. 1986). Likewise, a statutory appeal cannot be sustained as a sanction for a local agency's failure to transmit its record, even where the delay is serious and unjustified. *Philadelphia Zoning Board of Adjustment v. University City Housing Co.*, 551 A.2d 405, 406-07, 408 (Pa. Cmwlth. 1988); *Willits Woods Associates*, 534 A.2d at 865-66.

In its opinion, the Court of Common Pleas also characterizes its order as a ruling on the merits of the appeal, and not solely as a sanction for the City's failure to appear. (Court of Common Pleas Opinion at 2-3, 5-6, R.R. at 9a-10a, 12a-13a.) The court's order, however, cannot be sustained as a ruling on the merits for two reasons. First, because the Board held a stenographically recorded hearing in this matter (City Motion for Reconsideration Ex. D, R.R. at 47a; Court of Common Pleas Brief of Bailey, R.R. at 14a), the court was required to hear the appeal on the record certified by the Board, not on new evidence from Bailey. Section 754(b) of the Local Agency Law, 2 Pa. C. S. § 754(b); *SSEN, Inc. v. Borough Council of Borough of Eddystone*, 810 A.2d 200, 206-07 (Pa. Cmwlth. 2002); *City of Philadelphia v. Board of License & Inspection Review*, 590 A.2d 79, 84-86 (Pa. Cmwlth. 1991). The fact that the Board had not transmitted the record does not permit the Court of Common Pleas to treat the appeal as lacking a complete record and hear evidence where, as here, the absence of the record was caused by the party who filed the statutory appeal and no further effort was made

by the court to obtain the certified record from the Board after that party's failure. *City of Philadelphia v. Board of License & Inspection Review*, 590 A.2d at 85. Second, the court in fact heard no evidence at all on which it could make a decision on the merits. None of Bailey's assertions and arguments at the December 13, 2011 oral argument were sworn testimony and his brief was unsworn and unverified.

For the foregoing reasons, we reverse the order of the Court of Common Pleas and remand this matter for the court to relist Theodore Bailey's appeal from the May 8, 2009 decision of Tax Review Board of the City of Philadelphia for argument. On remand, the court may address both the City's contention that the appeal should be dismissed for failure to prosecute and whether sanctions, short of judgment on the statutory appeal, should be imposed on the City for failure to appear at the December 13, 2011 oral argument. If the appeal proceeds, the court shall address the obtaining of the Board record and hear the appeal on the record certified by the Board.

JAMES GARDNER COLINS, Senior Judge

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	:	
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	:	
Appellant	:	

ORDER

AND NOW, this 8th day of November, 2012, the order of December 22, 2011 of the Philadelphia County Court of Common Pleas is reversed, and this matter is remanded to said court for the court to relist Theodore Bailey's appeal from the May 8, 2009 decision of Tax Review Board of the City of Philadelphia for argument and further proceedings consistent with this opinion.

Jurisdiction relinquished.

JAMES GARDNER COLINS, Senior Judge