

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Edward Nelson, :  
 :  
 Appellant :  
 :  
 : No. 818 C.D. 2012  
 :  
 v. :  
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 : Argued: December 10, 2012  
 :  
 Jerry W. Geake, Upper Mt. Bethel :  
 Township Board of Supervisors, :  
 Northampton County Election :  
 Division :  
 :

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY JUDGE McCULLOUGH

FILED: January 14, 2013

Edward Nelson (Nelson) appeals from the judgment entered on April 18, 2012, following the March 16, 2012 order and opinion of the Court of Common Pleas of Northampton County (trial court), which granted the preliminary objections of Jerry W. Geake (Geake), the Northampton County Election Division (County Election Division), and Upper Mt. Bethel Township Board of Supervisors (Board) (collectively, Defendants) to Nelson's complaint alleging counts for quo warranto relief and a violation of the Pennsylvania Election Code.<sup>1</sup> We quash the appeal because it was untimely filed.

On December 21, 2011, Nelson filed a complaint against Defendants challenging the validity of the substitute nomination petition adding Geake's name as

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<sup>1</sup> Act of June 3, 1937, P.L. 1333, as amended, 25 P.S. §§2600-3591.

a Republican candidate for a position on the Board. The trial court accurately summarized the facts as alleged in the complaint as follows:

On May 11, 2011, a primary election was held in which Republican and Democratic candidates were nominated for two open positions on the [Board], which positions were to be filled in the general election the following November. Four candidates presented their names for the Democratic nominations: [Geake], Loren Rabbat, [Nelson], and Jeffrey Fritchman. Only one candidate, Larry Hallett, presented his name for the Republican nomination. The election results were such that Loren Rabbat received the highest number of Democratic votes, with [Nelson] receiving the second highest number of votes and Geake the third. Larry Hallett received the highest number of Republican votes, and Loren Rabbat received the second highest number of Republican votes, by way of write-in votes, despite not having presented herself as a Republican candidate. Following the primary election, Loren Rabbat and [Nelson] were named the two Democratic nominees for the Board, and Larry Hallett and Loren Rabbat were named as the two Republican nominees for the Board. On July 25, 2011, Loren Rabbat withdrew her name as a Republican candidate for the Board, while remaining a Democratic candidate. At some time following the primary election, but prior to August 28, 2011, Geake changed his party affiliation from Democratic to Republican.

On August 18, 2011, the Northampton County Republican Executive Committee (NCREC) held a special meeting, at which it nominated Geake as a Republican candidate for the general election, replacing Loren Rabbat after her withdrawal. Shortly thereafter, a substitute nomination certificate was filed with the [County Election Division], adding Geake's name as a Republican candidate in the general election. Therefore, [Nelson] and Loren Rabbat appeared as the Democratic nominees on the general election ballot, and Geake and Larry Hallett appeared as the Republican nominees.

On November 8, 2011, the general election was held, the result of which was that Larry Hallett received the highest number of votes, Geake received the second highest number

of votes, [Nelson] received the third highest number of votes, and Loren Rabbat received the least votes. On November 28, 2011, Larry Hallett and Geake were certified as the newly elected supervisors on the Board, to commence six-year terms beginning in January 2012.

On an unknown date following the filing of Geake's substitute nomination certificate but prior to the general election, [Nelson] attempted to file an objection to the substituted nomination certificate with the [County] Election Division. [Nelson] was allegedly told by an employee of the [County] Election Division that he could not challenge the nomination until such time as the election results were certified.

(Trial court op. at 1-3; see Complaint, ¶¶ 1-33, R.R. at 11a-15a.)

In count I of his complaint, Nelson asserted a quo warranto claim. Nelson averred that Geake provided a false statement in the "Candidate's Affidavit" attached to the substituted nomination certificate by stating that he did not previously present himself as a candidate in the election for the positions on the Board. Nelson further averred that Loren Rabbat was not a "candidate" for the Republican nomination at the primary election because she was registered as a Democrat at the time of the election. Based upon these allegations, Nelson sought quo warranto relief, contending that: the Republican party could not file a substitute nomination certificate when Loren Rabbat withdrew as a Republican candidate; the substitute nomination of Geake is a nullity; and Geake has no legal right to the office of [the Board] because his nomination as a Republican candidate is null and void. (R.R. at 15a-18a.)

In count II, Nelson asserted a violation of the Election Code. Nelson averred that the substitute nomination certificate naming Geake as a Republican candidate contravened sections 922 and 979 of the Election Code, 25 P.S. §§2882

and 2939.<sup>2</sup> As part of his claim, Nelson conceded that under the Election Code, an objection to a substitute nomination certificate must be made within three days of the filing of the certificate, but contended that he should be permitted to raise his Election Code claim nunc pro tunc on the ground that the employees of the County Election Division told him that he could not file an objection until after the election results were certified. (R.R. at 18a-23a.)

Defendants filed preliminary objections individually but raised two identical objections. Defendants claimed that Nelson's complaint, filed approximately four months after Geake filed his certificate, was time barred by section 982 of the Election Code, 25 P.S. §2942, which mandates, without exception, that any challenge to a substitute nomination certificate be filed within three days of the filing of the certificate.<sup>3</sup> Defendants also asserted that Pennsylvania law does not permit a person to contest a substituted nomination nunc pro tunc. The Board raised a third preliminary objection separately, contending that it was not a proper party to the action. In their preliminary objections, all Defendants requested as relief that the trial court dismiss Nelson's complaint in its entirety and enter judgment in their favor. (R.R. at 41a, 51a-52a, 56a-57a.)

On March 16, 2012, the trial court entered an order and opinion granting Defendants' preliminary objections. In doing so, the trial court found that Nelson's

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<sup>2</sup> In pertinent part, section 922 of the Election Code states that "[c]andidates of the various political parties for nomination ... who receive a plurality of votes of their party electors ... at the primary election ... shall be candidates of their respective parties." Section 979 of the Election Code permits a political party to make a substitute nomination, when a candidate dies or withdraws after a nomination, "[p]rovided, however, that no substitute nomination certificate shall nominate any person who has already been nominated by any political party or by any other political body for the same office."

<sup>3</sup> Section 982 states that "[a]ll substituted nomination certificates may be objected to, as provided in section 977 of this act, except objections to substituted nomination certificates must, in any case, be filed within three (3) days after the filing of the substituted nomination certificate: Provided, however, that no objections as to form and conformity to law, shall be received after the day on which the printing of ballots is started." 25 P.S. §2942.

“action cannot be maintained against any party....” (Trial court op. at 4.) Specifically, the trial court concluded that Nelson’s claims were barred by section 982 of the Election Code and that Pennsylvania law does not permit the filing of an Election Code challenge nunc pro tunc. Due to its disposition, the trial court dismissed the Board’s third preliminary objection as moot. Id. at 4-8.

On April 18, 2012, Defendants praeciped for entry of judgment and the prothonotary entered judgment on that same date. On April 27, 2012, Nelson filed a notice of appeal with this Court.

Before addressing the merits, we must determine whether Nelson’s appeal was timely filed.

The timely filing of a notice of appeal is a jurisdictional prerequisite to appellate review. Thorn v. Newman, 538 A.2d 105, 107 (Pa. Cmwlth. 1988). Generally, a notice of appeal must be filed within 30 days after the entry of the final order from which an appeal is taken, or 10 days if the matter arises under the Election Code, and an appellate court cannot enlarge the time for filing an appeal. Pa. R.A.P. 105(b), 903(a) and 903(c)(1)(ii). To determine what order constitutes the appealable order in any particular proceeding, this Court, in the absence of express statutory directive, must decide what order constitutes the “final order” of the proceeding. Pa. R.A.P. 341(a). A final order is defined, in pertinent part, as any order that “disposes of all claims and of all parties.” Pa. R.A.P. 341(b). Stated more elaborately, a “final order is one that ends litigation, puts litigants out of court, or precludes a party from presenting the merits of his claim.” Pittsburgh Board of Public Education v. Pennsylvania Human Relations Commission, 820 A.2d 838, 841 (Pa. Cmwlth. 2003).

We recognize that an order granting preliminary objections and dismissing a complaint cannot be reduced to a judgment via praecipe because such an order is already final and appealable, post-trial practice does not apply to situations

where a complaint is dismissed at the pre-trial stage, and there is no Rule of Civil Procedure that authorizes the entry of judgment following the grant of preliminary objections. Pa. R.C.P. No. 227.1, Note; Pa. R.C.P. No. 227.4. In any event, it is well-settled that an order granting preliminary objections and dismissing a complaint is a final, appealable order that triggers the appeal period; the fact that a judgment is erroneously entered at a later date does not toll the time in which to file an appeal. United States National Bank v. Johnson, 506 Pa. 622, 629-631, 487 A.2d 809, 813-14 (1985); accord Carroll Township Authority v. Municipal Authority of Monongahela, 518 A.2d 337, 340 n. 2 (Pa. Cmwlth. 1986). See also Old Forge School District v. Highmark, Inc., 592 Pa. 307, 316, 924 A.2d 1205, 1211 (2007); Colville v. Allegheny County Retirement Board, 888 A.2d 21, 25 n. 7 (Pa. Cmwlth. 2005); In re Estate of Rossi, 511 A.2d 219, 221 (Pa. Super. 1986). If an aggrieved party fails to file a notice of appeal within the prescribed time period, barring exceptional circumstances not present here, the appeal will be quashed as untimely. Sahutsky v. H.H. Knoebel Sons, 566 Pa. 593, 601 n. 3, 782 A.2d 996, 1001 n. 3 (2001); Schofield v. Department of Transportation, Bureau of Driver Licensing, 828 A.2d 510, 512 (Pa. Cmwlth. 2003).

Here, on March 16, 2012, the trial court entered an order and opinion granting Defendants' preliminary objections. The March 16, 2012 order did not expressly state that the complaint was dismissed. However, the accompanying opinion stated that Nelson's "action cannot be maintained against any party" and, thus, the order disposed of "all claims and all parties." Additionally, in both its order and opinion, the trial court dismissed the Board's third preliminary objection as moot due to its disposition. The Board's outstanding preliminary objection provided an independent basis to dismiss the Board from the case, and the only way the trial court could find that the preliminary objection was moot was if its order dismissed the complaint in its entirety. Consequently, the trial court's March 16, 2012 order had

the obvious effect of dismissing Nelson’s complaint, despite the fact that the order never said “complaint dismissed,” and constituted the final, appealable order. Although Defendants thereafter praeciped for the entry of judgment, this did not alter the finality of the March 16, 2012 order. Because Nelson filed his notice of appeal on April 27, 2012, or 42 days after the entry of the final order in this case, his appeal is patently untimely. Therefore, this Court is constrained to quash the appeal for want of jurisdiction.<sup>4</sup>

Appeal Quashed.

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PATRICIA A. McCULLOUGH, Judge

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<sup>4</sup> Even if Nelson’s appeal had been timely filed, we would conclude that his arguments lack merit. In his brief, Nelson concedes that the trial court properly dismissed his Election Code claim in count II and that he was not entitled to file such a claim nunc pro tunc. However, Nelson contends that Defendants did not specifically file a preliminary objection to his quo warranto claim in count I and that the trial court erred by dismissing it sua sponte.

Here, Defendants’ preliminary objections acknowledged that Nelson’s complaint was an action in quo warranto, recognized that it was not expressly limited to Nelson’s Election Code Claim, and requested that Nelson’s entire complaint be dismissed. Consequently, Defendants’ preliminary objections encompassed Nelson’s quo warranto claim, and the trial court did not dismiss it sua sponte. Further, Nelson cannot recast what is essentially an Election Code claim into a quo warranto claim because the Election Code is the sole and exclusive remedy for violations of its provisions. In re Jones, 505 Pa. 50, 65, 476 A.2d 1287, 1294-95 (1984); Brunwasser v. Fields, 487 Pa. 283, 294, 409 A.2d 352, 357 (1979). Nelson’s allegations that Loren Rabbat was not a “candidate” for the Republican Party and that Geake misstated that he did not run as a candidate in the election are nothing more than alleged violations of sections 922 and 927 of the Election Code and a challenge to Geake’s right to be a substitute candidate. As a result, Nelson’s averments are completely dependent upon violations of the Election Code and fall within the purview of section 982’s procedure and remedy for challenging a substituted nomination certificate. Because Geake failed to avail himself of the remedy provided in section 982, he cannot reassert his claim as one in quo warranto. In re Jones.

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Jerry W. Geake, Upper Mt. Bethel	:
Township Board of Supervisors,	:
Northampton County Election	:
Division	:

**ORDER**

AND NOW, this 14<sup>th</sup> day of January, 2013, Nelson's appeal from the judgment entered on April 18, 2012, is hereby quashed.

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PATRICIA A. McCULLOUGH, Judge