NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

IN THE SUPERIOR COURT OF PENNSYLVANIA

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS INDENTURE TRUSTEE FOR AMERICAN HOME MORTGAGE INVESTMENT TRUST 2007-2, MORTGAGE BACKED NOTES, SERIES 2007-2,

Appellant

v.

LARRY TURK A/K/A LARRY I. TURK AND PATRICIA TURK A/K/A PATRICIA E. TURK,

Appellees

No. 1208 MDA 2011

Appeal from the Order of June 10, 2011,
in the Court of Common Pleas of York County,
Civil Division at No. 2008-SU-006282-06

BEFORE: BOWES, LAZARUS and COLVILLE*, JJ.

DISSENTING MEMORANDUM BY BOWES, J.: **FILED MAY 14, 2013**

I disagree with my learned colleagues that this appeal should be quashed solely because the verdict was not reduced to judgment by praecipe of either party as required by Pa.R.A.P. 301. Instead, I would reconsider our prior decision in light of ***Newman Development Group of Pottstown, LLC v. Genuardi's Family Markets, Inc.***, 52 A.3d 1233 (Pa. 2012), as we have

* Retired Senior Judge assigned to the Superior Court.

been directed to do, and since I find ***Newman*** to be controlling herein, I would proceed to address the merits of this appeal.

The defect relied upon by the majority to quash this appeal is a technical one that can be expeditiously resolved. One option, and the one I advocate, is to follow our High Court's lead in ***McCormick v. Northeastern Bank of Pennsylvania***, 561 A.2d 328, 330 n.1 (Pa. 1989), and, "in the interests of judicial economy," "regard as done that which ought to have been done." ***See Commonwealth v. Allen***, 420 A.2d 653, 654 n.3 (Pa.Super. 1980). We did just that in ***Hawkey v. Peirsel***, 869 A.2d 983, 986 (Pa.Super. 2005), and reviewed an appeal in the absence of a properly entered judgment where "the order from which a party appeals was clearly intended to be a final pronouncement on the matters discussed." ***Johnston the Florist, Inc. v. TEDCO Const. Corp.***, 657 A.2d 511, 514 (Pa.Super. 1995) (*en banc*). I believe this is in keeping with the liberal construction of our appellate rules "to secure the just, speedy and inexpensive determination" of appeals. Pa.R.A.P. 105(a). We are authorized to *sua sponte* "disregard the requirements or provisions of any of these rules in a particular case," ***id***., with the exception not implicated instantly of enlarging the time for filing "a notice of appeal, a petition for allowance of appeal, a petition for permission to appeal, or a petition for review." Pa.R.A.P. 105(b).

Herein, our Supreme Court was undoubtedly aware that judgment had not been entered, as the majority decision of this Court pointed out that defect. ***Deutsche Bank National Trust v. Turk***, ***L. & P.***, 48 A.3d 480 n.2 (Pa.Super. 2012) (unpublished memorandum). Yet, our Supreme Court overlooked this point, granted allowance of appeal, and subsequently remanded to this Court with the direction to reconsider this appeal in light of its decision in ***Newman***, ***supra***. Ironically, in ***Newman***, as herein, the appellant filed a notice of appeal from the verdict of the trial court upon remand.[1] Neither this Court nor the Supreme Court suggested in that instance that the appeal should be quashed for lack of jurisdiction based upon the absence of entry of a formal judgment on the verdict.

Our second option is to retain jurisdiction and remand with a direction to the parties to praecipe for judgment on the verdict. We have long held that appellate jurisdiction may be perfected after an appeal notice has been filed upon the docketing of a final judgment. ***Johnston the Florist, Inc.***, ***supra***. This is in keeping with the policy evidenced in Pa.R.A.P. 902, favoring remand of the matter to the lower court so that the omitted

[1] In its verdict, the ***Newman*** trial court ordered that judgment be entered in favor of Newman, but stated further that it considered "this Verdict to be appealable." Verdict, 2/25/10, filed 3/1/10. Newman appealed from the verdict; there is no indication that either party filed a praecipe for entry of judgment prior to the filing of the appeal.

procedural step may be taken, thus enabling appellate courts to reach the merits.

The majority does not afford the parties the opportunity to correct the formal defect, perhaps because it previously pointed out that the appeal was premature and the situation was not rectified. I am inclined to attribute the failure to enter judgment to oversight rather than refusal as in ***Bonavitacola v. Cluver***, 619 A.2d 1363 (Pa.Super. 1993). Moreover, if we remand, one of the parties will inevitably praecipe the prothonotary to enter judgment, and a subsequent appeal will ensue. I believe that we unnecessarily expend judicial resources by quashing the within appeal from an order which, except for the entry of judgment, was clearly intended to be a final pronouncement.

Our Supreme Court's decision in ***Newman*** removes the only other obstacle to merits review. ***Newman*** dealt with proceedings upon remand to the trial court for the recalculation of damages after a non-jury trial and an appeal. The trial court did not receive any new evidence; rather, it recalculated the damages. Genuardi Markets did not file Pa.R.C.P. 227.1 post-trial motions and instead appealed from the verdict. This Court found all issues waived and quashed the appeal, holding that Rule 227.1 post-trial motions were required to preserve issues for appeal. ***See Newman Development Group of Pottstown, LLC v. Genuardi's Family Market,***

Inc., 18 A.3d 1182 (Pa.Super. 2010). The Supreme Court reversed, holding that a proceeding that does not involve the receipt of evidence is not a trial, and that Pa.R.C.P. 227.1's post-trial motion procedure was inapplicable.

In the instant case, we remanded to the trial court for consideration of the applicability of UCC Article 3 upon its finding that Deutsche Bank did not possess the note. It merely involved application of the law to the facts as previously determined. The trial court relied upon written submissions and oral argument upon remand; no evidence was adduced. The trial court confirmed its original decision and re-entered a verdict in favor of the Turks. Like Genuardi Markets, Deutsche Bank did not file post-trial motions pursuant to Pa.R.C.P. 227.1, and instead appealed directly to this Court. We quashed the appeal, citing our decision in ***Newman*** for the proposition that all claims were waived for failure to preserve them in a post-trial motion.

The procedural posture and the facts of the within case are indistinguishable from those in ***Newman*** and the Supreme Court's reversal in that case compels reversal herein. We should proceed to the merits. Hence, I dissent.