NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

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	IN THE SUPERIOR COURT OF PENNSYLVANIA 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.

MEMORANDUM BY COLVILLE, J.: **FILED MAY 14, 2013**

This is an appeal from an order entered on June 10, 2011. We quash this appeal.

This matter has a long and tortured history that can be summarized in the following manner. In December of 2008, Appellant Deutsche Bank National Trust Company, as Indenture Trustee for American Home Mortgage Investment Trust 2007-2, Mortgage-Backed Notes, Series 2007-2 ("Deutsche Bank") filed a complaint in foreclosure against Appellees Larry

*Retired Senior Judge assigned to the Superior Court.

and Patricia Turk (the "Turks"). A bench trial commenced on March 23, 2010. On March 31, 2010, the trial court entered a decision in favor of the Turks. Deutsche Bank filed a motion for post-trial relief, which the trial court denied. Judgment was entered on May 27, 2010.

Deutsche Bank appealed the judgment. ***Deutsche Bank v. Turk***, 24 A.3d 453 (Pa. Super. 2011) (unpublished memorandum) ("***Turk I***"). In ***Turk I***, Deutsche Bank first claimed that the trial court erred by holding that it failed to establish ownership of the Mortgage and Note. This Court initially concluded that the trial court erred in finding that Deutsche Bank did not establish ownership of the Mortgage. However, before considering whether Deutsche Bank factually established ownership of the Note, we addressed Deutsche Bank's second issue, namely, "[W]hether the presumption that the note follows the mortgage applies[?]" ***Id.*** at 11 (footnote omitted).

> In addressing this issue, we, in part, stated,
>
> > We must conclude the parties intended to transfer ownership of the Mortgage separately from the Note because the evidence indicates diverging ownership of the Note and Mortgage. Therefore, we cannot apply the presumption that the note follows the mortgage. Deutsche Bank's second issue fails.

Id. at 13 (footnote omitted). We, thus, determined that Deutsche Bank was required to factually prove ownership of the Note in order to be entitled to foreclose.

The trial court ruled that Deutsche Bank did not establish ownership of the Note. In addressing this ruling, we offered the following discussion:

> In determining what rights Deutsche Bank had to the Note, the trial judge omitted consideration of the Uniform Commercial Code, Article 3, which governs negotiable instruments and is codified in Pennsylvania at 13 Pa.C.S.[A.] § 3101 *et seq*. ("UCC Article 3"). Many of the cases cited by the parties and the trial judge refer to UCC Article 3 and the common law predating its adoption. ***E.g. In re Evanovich's Estate***, 408 A.2d at 1094 (applying 1890 Pennsylvania case); ***Adams v. Madison Realty & Dev., Inc.***, 853 F.2d 163 (3d Cir. 1988) (applying old versions of Article 3 from Connecticut, New Hampshire, and New Jersey). Deutsche Bank offered evidence, namely originals of the Note and Allonge, which would have been dispositive of the Note's ownership if the trial judge had applied UCC Article 3. The trial judge, however, never applied UCC Article 3.
>
> We acknowledge Deutsche Bank could have presented a more persuasive and coherent argument for their ownership of the Note. Nevertheless, the trial judge erred in not applying UCC Article 3 to determine ownership of the Note. Because we do not sit as fact-finders, we are unable to make the required findings to properly dispose of the case.
>
> Accordingly, we remand and direct the trial judge to apply UCC Article 3 to the evidence in the record. By way of guidance, we believe the key issue is whether Deutsche Bank was entitled to enforce the Note under 13 Pa.C.S. § 3301. Attention should be paid to Deutsche Bank's proffer of originals of the Note and Allonge. If Deutsche Bank is entitled to enforce the Note, it is entitled to judgment in the matter.

Turk I at 14-15) (footnotes omitted).

The manner in which this Court disposed of Deutsche Bank's second issue rendered the bank's third issue moot. In the end, this Court vacated the judgment, remanded for further proceedings, and relinquished jurisdiction.

On remand, the parties submitted briefs in support of their positions, and the trial court held oral argument on May 24, 2011. The court subsequently issued the following order:

> AND NOW, to wit, this 10th day of June 2011, upon consideration of the remand issue presented by the Superior Court and after oral argument and review of the briefs submitted, it is ORDERED and DECREED that a verdict be entered in favor of [the Turks] and against [Deutsche Bank]. . . .

Trial Court Order, 06/10/11.

On July 8, 2011, Deutsche Bank filed a notice of appeal wherein it stated its intent to appeal the June 10th order. In its brief to this Court, Deutsche Bank asked us to consider one question, namely,

> Did the Trial Court err by failing to properly apply 13 Pa.C.S. § 3301 *et. seq.* ("UCC Article 3") – as mandated by this Court's February 11, 2011 decision remanding this matter – in determining that [Deutsche Bank] failed to establish ownership of the note at issue, where Deutsche Bank was assigned the note, has possession of the note, the note is indorsed in blank, and thus under UCC Article 3 Deutsche Bank is the holder of the note?

Deutsche Bank v. Turk, 48 A.3d 480 (Pa. Super. 2012) ("***Turk II***") (unpublished memorandum at 7) (quoting Deutsche Bank's Brief at 2).

Turk II, however, did not reach the merits of this issue. Instead, relying on this Court's decision in ***Newman Development Group of Pottstown, LLC v. Genuardi's Family Market, Inc.***, 18 A.3d 1182 (Pa. Super. 2011) ("***Newman I***"), we quashed the appeal. In short, because Deutsche Bank did not file post-trial motions after the trial court rendered its verdict on remand, ***Newman I*** required the Court to quash the appeal. In

Turk II, this Court noted that the appeal was premature because judgment had yet to be re-entered. ***Turk II*** at 12 n2. However, given our conclusion that ***Newman I*** required that we quash the appeal, this Court declined to take any steps to correct the lack of a final judgment.

Deutsche Bank petitioned our Supreme Court for allowance of appeal. The Supreme Court granted the petition. ***Deutsche Bank National Trust Company, as Indenture Trustee for American Home Mortgage Investment Trust 2007-2, Mortgage-Backed Notes, Series 2007-2 v. Larry Turk a/k/a Larry I. Turk and Patricia Turk a/k/a Patricia E. Turk***, 2013 WL 68355, 1 (Pa. 2013). In addition to granting allowance of appeal, the Supreme Court vacated this Court's order (***Turk II***) and remanded the matter to this Court for reconsideration in light of the Supreme Court's holding in ***Newman Development Group of Pottstown, LLC v. Genuardi's Family Markets, Inc.***, 52 A.3d 1233 (Pa. 2012) ("***Newman II***").

Newman II overruled this Court's decision in ***Newman I***. Essentially, ***Newman II*** held that a party cannot be faulted for failing to file post-trial motions following a remand proceeding that amounts to less than a trial. As applied to this case, ***Newman II*** instructs us that we cannot fault Deutsche Bank for failing to file post-trial motions subsequent to the verdict that followed the less-than-trial-like remand proceeding that occurred in this case. We, however, quash the appeal on a different basis.

It is a well-established principle of law that an appeal is premature if filed from a verdict and the entry of judgment does not occurr. ***See***, ***e.g.***,

Dennis v. Smith, 431 A.2d 350, 350-51 (Pa. Super. 1981) ("No judgment on the verdict has ever been entered. In the absence of the entry of such judgment, this appeal is premature.") (citations omitted). When Deutsche Bank filed the current appeal, it knew or should have known that it could not appeal the June 10th order, which entered a verdict against Deutsche Bank and in favor of the Turks, until judgment was entered on the verdict. Despite this Court bringing this oversight to the parties' attention in ***Turk II***, which was filed on April 17, 2012, as of the date this Memorandum was authored, no judgment had been entered regarding the June 10th verdict. For this reason, we quash the appeal. ***See Dennis***, 431 A.2d at 351 (quashing the appeal because judgment had not been entered on the verdict).

This conclusion does not end our discussion, as we find it necessary to respond to the dissent. We recognize that ***McCormick v. Northeastern Bank of Pennsylvania***, 561 A.2d 328, 330 n.3 (Pa. 1989), suggests that we simply could overlook the fact that an appealable judgment has not been entered in this case. We, however, also recognize that "the law of this Commonwealth has long recognized that the entry of judgment is a jurisdictional matter." ***Johnston the Florist, Inc. v. TEDCO Const. Corp.***, 657 A.2d 511, 514 (Pa. Super. 1995) ("***Johnston***").

In ***Johnston***, this Court held:

> Based upon the clear jurisdictional imperative that judgment be entered as a prerequisite to the exercise of judicial review, we conclude that, in all such cases, there is no authority for this court to review the merits of such an appeal even in the face of a refusal by the parties to enter judgment. To the extent that

> ***Bonavitacola v. Cluver***, 422 Pa.Super. 556, 619 A.2d 1363 (1993), *alloc. den.,* 535 Pa. 652, 634 A.2d 216, would permit appellate review in the interest of judicial economy when the parties have refused to enter judgment, it is specifically disapproved.

Id. at 515 (footnote omitted).

This Court nonetheless will consider the merits of an appeal if judgment is entered after the appellant files a notice of appeal, as was the case in ***Johnston***. A judgment has yet to be entered in this case.

The Court also will consider the merits of an appeal when a party has filed a praecipe to enter judgment, but for some reason, judgment never was entered, as was the case in ***Hawkey v. Peirsel***, 869 A.2d 983, 986 (Pa. Super. 2005). None of the parties in this case filed a praecipe to enter judgment.

Lastly, like the dissent, opinions from this Court do cite to ***Johnston*** for the proposition that the Court should review the merits of 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.'" Dissenting Memorandum at 2 (quoting ***Johnston***, 657 A.2d at 514). The dissent overlooks the context in which the ***Johnston*** court utilized this language.

As ***Johnston*** explains, in ***Bonavitacola***, *supra*, "a panel of this Court decided that it would not quash an appeal from an order denying post-trial motions, and would instead, in the interest of judicial economy, decide the merits of an appeal lying from the interlocutory order." ***Johnston***, 657 A.2d

at 514. Importantly, the ***Johnston*** court explained the reasoning behind the ***Bonavitacola*** court's decision by quoting the following portion of ***Bonavitacola***:

> As long as **the order from which a party appeals "was clearly intended to be a final pronouncement on the matters discussed** in the opinion [accompanying the order], . . . the appeal is properly before us and . . . we have jurisdiction to address the parties' claims." ***Murphy v. Murphy***, 410 Pa.Super. 146, 152, 599 A.2d 647, 650 (1991), *allocatur denied,* 530 Pa. 633, 606 A.2d 902 (1992). The rationale behind treating this appeal as one from an entered judgment is to allow the appeal which is in progress to proceed, economizing judicial resources. [***McCormick v. Northeastern Bank of PA***, 522 Pa. 251, 561 A.2d 328 (1989); ***Summit Fasteners v. Harleysville Nat'l. Bank***, 410 Pa.Super. 56, 599 A.2d 203 (1991), *allocatur denied,* 530 Pa. 633, 606 A.2d 902 (1992)]. ***See also Murphy v. Murphy***, [599 A.2d at 650]. Were we to quash an appeal from an order which, except for the entry of judgment, is otherwise final, we would expend judicial resources in the decision to quash, one of the parties would inevitably praecipe the prothonotary to enter judgment, and a subsequent appeal would be permitted to follow. ***See McCormick***, *supra*, *522 Pa. 251, 561 A.2d 328, citing* ***Commonwealth v. Allen***, 278 Pa.Super. 501, 505 n. 3, 420 A.2d 653, 654 n. 3 (1980).

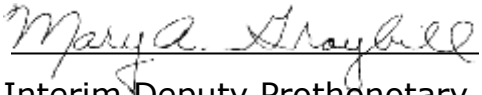
Johnston, 657 A.2d at 514 (quoting ***Bonavitacola***, 619 A.2d at 1367) (emphasis added).

The language quoted and relied upon by the dissent originated in ***Bonavitacola*** and only was reproduced in ***Johnston*** to explain the rationale behind the ***Bonavitacola*** court's decision to consider the merits of the appeal despite the absence of the entry of an appealable judgment. ***Johnston*** was an *en banc* decision that explicitly disapproved of ***Bonavitacola***. Thus, ***Johnston*** cannot be relied upon for the proposition for which the dissent cites it.

Appeal quashed.

Judge Bowes files a Dissenting Memorandum.

Judgment Entered.



Interim Deputy Prothonotary

Date: 5/14/2013