NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

PUSEY & RAFFENSPERGER BUILDERS, INC. Appellant v. AMERICAN/HUNGERFORD BUILDING PRODUCTS, A MASCO CONTRACTOR SERVICES COMPANY Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1215 MDA 2012

Appeal from the Order Entered June 7, 2012
In the Court of Common Pleas of Lancaster County
Civil Division at No(s): CI-10-12696

BEFORE: MUNDY, J., OLSON, J., and STRASSBURGER, J.**

MEMORANDUM BY MUNDY, J.: Filed: March 6, 2013

Appellant, Pusey & Raffensperger Builders, Inc., appeals from the June 7, 2012 order granting the motion for judgment on the pleadings filed by Appellee, American/Hungerford Building Products, a Masco Contractor Services Company, and dismissing Appellant's complaint. After careful review, we affirm.

The trial court summarized the relevant facts and procedural history of this case as follows.

> At some point prior to 2006, [Appellant], entered into an oral contract with [Appellee] to install insulation at an apartment complex

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** Retired Senior Judge assigned to the Superior Court.

> [Appellant] was building in Mountville, Lancaster County. [Appellee] installed the insulation per the contract in these apartments. At some point in 2009, a mold problem developed in the attics of the apartment buildings. Pursuant to an arbitration agreement between the apartment complex owner, [Appellant], and the architect, the apartment complex owners obtained a judgment against [Appellant] in the amount of $34,196.31 for the damages suffered by the owners as a result of the mold problem. [Appellee] was not a party to the arbitration.
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> On October 6, 2010, [Appellant] filed a Writ of Summons docketed to CI-10-12696. On October 27, 2011, [Appellant's] Complaint was filed but inadvertently docketed to CI-11-12547. Thereafter, on November 23, 2011[,] [Appellee] filed its Answer and New Matter under the CI-11-12547 docket number. On March 13, 2012, the two dockets were consolidated to CI-10-12696 by stipulation of the parties. On March 23, 2012, [Appellee] filed a Motion for Judgment on the Pleadings for [Appellant's] failure to file a response to the New Matter pled with its November 23, 2011 Answer. On March 27, 2012, [Appellant] then filed, without seeking leave of [the trial] court, an untimely Reply to New Matter.[1]
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> [1] Not only was the Reply untimely filed under Pa.R.C.P. No. 1026(a), but it was not properly verified as required by Pa.R.C.P. No. 1024.

Trial Court Opinion, 6/7/12, at 1-2 (citations omitted; footnote in original).

Thereafter, on June 7, 2012, the trial court entered an order granting Appellee's motion for judgment on the pleadings, and dismissing Appellant's complaint. On July 3, 2012, Appellant filed a timely notice of appeal.[1]

On appeal, Appellant raises the following issue for our review.

> [1.] [Whether t]he [trial] court abused its discretion[] dismissing [] Appellant's action based upon the late filing of a Reply when the lateness of the Reply did not prejudice the substantive rights of [] Appellee[?]

Appellant's Brief at 4.

Motions for judgment on the pleadings are permitted by Pa.R.C.P. 1034 after the pleadings have closed, so long as trial is not unreasonably delayed.

> Appellate review of an order granting a motion for judgment on the pleadings is plenary. The appellate court will apply the same standard employed by the trial court. A trial court must confine its consideration to the pleadings and relevant documents. The court must accept as true all well pleaded statements of fact, admissions, and any documents properly attached to the pleadings presented by the party against whom the motion is filed, considering only those facts which were specifically admitted.

Wachovia Bank, N.A. v. Ferretti, 935 A.2d 565, 570 (Pa. Super. 2007) (citations and internal quotation marks omitted).

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[1] Appellant and the trial court have complied with Pa.R.A.P. 1925.

Rule 1026, in turn, requires that "every pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading." Pa.R.C.P. 1026(a). The failure to file a timely reply results in all factual averments in the New Matter being deemed admitted. Pa.R.C.P. 1029(b). Our Supreme Court has long recognized that,

> [w]hen a party moves to strike a pleading, the party who files the untimely pleading must demonstrate just cause for the delay. It is only after a showing of just cause has been made that the moving party needs to demonstrate that it has been prejudiced by the late pleading.

Peters Creek Sanitary Authority v. Welch, 681 A.2d 167, 170 (Pa. 1996) (citation omitted). "We will affirm the grant of such a motion only when the moving party's right to succeed is certain and the case is so free from doubt that the trial would clearly be a fruitless exercise." ***Wachovia Bank***, ***supra.***

Herein, upon careful review of the evidentiary record, we discern no error on the part of the trial court in granting Appellee's motion for judgment on the pleadings. The record indicates that Appellant failed to "demonstrate just cause" for the nearly three month delay in filing its Reply to New Matter. ***American Future Systems***, ***supra***. In reaching said decision, we reiterate the following well-reasoned conclusions of the trial court, as set forth in its June 7, 2012 opinion.

> In the instant case, [Appellee] filed its Answer and New Matter on November 23, 2011 with a certificate of service evidencing service on [Appellant] on November 22, 2011. Accordingly, [Appellant] was required to respond no later than

> December 12, 2011 or have all of the facts averred in [Appellee's] New Matter deemed admitted under the Rules. [Appellant] failed to file a timely Reply and, in response, [Appellee] filed a Motion for Judgment on the Pleadings to enforce the Rules. In fact, [Appellant] did not file a Reply to [Appellee's] New Matter until more than 3 months after the deadline, without leave of [the trial] court for doing so, and only after [Appellee] had filed its Motion for Judgment on the Pleadings. In its response to the Motion for Judgment on the Pleadings, [Appellant] relies on its Reply and asserts that its late filing is a mere technicality, and [Appellee] has not been prejudiced thereby. This argument ignores both the law and the facts of the instant case. … As such, all the factual allegations asserted in the New Matter are deemed admitted.
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> The essence of [Appellant's] Complaint is that [Appellee] breached the oral contract to provide insulation installation services. … Not only did [Appellee] specifically deny these allegations in its Answer, but in its New Matter, it alleges:
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> > 25. [Appellee] was not responsible for the design or selection of the soffits, ventilation, or insulation system.
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> > 29. [Appellee] installed the insulation as directed by Plaintiffs.
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> Treating these facts as having been admitted, it becomes clear that [Appellant] cannot establish a right to recovery for breach of contract against [Appellee] where [Appellee] did not design or select the insulation system and installed it as directed by [Appellant] in accordance with industry standards.

Trial Court Opinion, 6/7/12, at 3-4 (citations and footnotes omitted).

As noted, our Supreme Court in ***Peters Creek Sanitary Authority*** has unequivocally held that in situations where a party fails to meet a filing deadline, the proper standard to be applied is that a party who filed an untimely pleading must first "demonstrate just cause for the delay," prior to any showing by the moving party that it suffered prejudice by the late pleading. ***Peters Creek Sanitary Authority***, ***supra*** at 170. Herein, the trial court properly concluded that Appellant failed to demonstrate just cause for its late filing. Thus, the burden to show prejudice never shifted to Appellee, and the trial court properly accepted as true all of the averments of fact in Appellee's November 23, 2011 New Matter. As in ***Peters Creek Sanitary Authority***, the trial court in the instant matter "found no reason to extend the twenty (20) day filing period established by Rule 1026. It is clear that such a decision was wholly within the trial court's broad discretion." ***Id.*** at 170-171. We, therefore, discern no abuse of the trial court's discretion, and affirm its June 7, 2012 order granting Appellee's motion for judgment on the pleadings and dismissing Appellant's complaint.

Order affirmed.

Judge Strassburger files a Concurring Statement.