J. S78002/12

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

MID-COUNTY RESOURCES, LLC	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOSEPH R. REISINGER,	:	No. 1489 MDA 2011
Appellant	:	

Appeal from the Order Entered July 22, 2011,
in the Court of Common Pleas of Luzerne County
Civil Division at No. 15509-2010

BEFORE: FORD ELLIOTT, P.J.E., PANELLA AND ALLEN, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: **FILED MAY 07, 2013**

Joseph R. Reisinger appeals the order of July 22, 2011, granting summary judgment in favor of Mid-County Resources, LLC and granting appellee possession of the premises in question. We affirm.

Appellant resides at 444 South Franklin Street in the city of Wilkes-Barre, with a law office on the first floor (appellant is a licensed attorney). At one time, appellant owned the property; however, on August 6, 2009, 444 South Franklin Street, along with other properties owned by appellant, were put up for judicial tax sale. Appellant's petition for reconsideration of the order authorizing the sale was denied.

At the August 26, 2009 tax sale, appellee was the high bidder on 444 South Franklin Street, and paid the amount of the bid and transfer tax.

However, according to appellee, the county tax claim bureau failed to turn over the deed to the property, causing a complaint in ***mandamus*** to be filed. On July 26, 2010, the court of common pleas ordered the tax claim bureau to supply appellee with the deeds to five properties, including 444 South Franklin Street. On July 28, 2010, the bureau transferred ownership of the property to appellee by way of a deed filed to Luzerne County Record Book 3010 page 153725.

On September 22, 2010, a representative of appellee, via hand-delivered correspondence, informed appellant that appellee was the owner of the property, that appellant was to pay appellee the sum of $1,000 per month in rent, that he was delinquent for the months of August and September 2010, and that if the rent was not paid by October 1, 2010, appellee would proceed to ejectment. Appellant failed to make any payment, and on October 6, 2010, appellee delivered a copy of a "Ten (10) Day Notice to Quit for Failure to Pay Rent Upon Demand," demanding that $3,300 be paid for rent and late payments and further that possession of the premises be delivered by October 16, 2010.

Subsequently, on October 20, 2010, appellee filed a landlord/tenant complaint seeking possession of the premises. On November 5, 2010, a magisterial district judge entered judgment for appellee in the amount of $4,689 and granted appellee possession of the premises. On November 15, 2010, appellant appealed the judgment to the court of common pleas,

requesting that a rule be issued upon appellee to file a complaint within 20 days or be subject to judgment of ***non pros***.

Appellee filed a complaint on November 30, 2010, containing counts for eviction and recoupment of money damages, trespass, and ejectment. On December 30, 2010, appellee sent 10-day notice of intent to take a default judgment. After more than 10 days elapsed with no response from appellant, on January 11, 2011, appellee filed a praecipe for default judgment, and praecipe for writ of possession, and judgment was entered for appellee.

Appellant filed a timely petition to open and/or strike default judgment which was granted. Appellant filed an answer to the complaint and new matter; appellee filed a reply to new matter. On June 6, 2011, appellant filed a motion for summary judgment with a supporting brief; on July 6, 2011, appellee filed its own motion for summary judgment together with a brief in opposition to appellant's motion for summary judgment and in support of appellee's motion for summary judgment. On July 22, 2011, the trial court denied appellant's motion for summary judgment, granted appellee's motion for summary judgment, and granted possession of the property to appellee effective September 1, 2011 (to allow appellant sufficient time to relocate). The trial court also entered judgment in favor of appellee for a sum equal to the amount of the rent (calculated at $1,000 per month) from September 22, 2010 to September 1, 2011, less any funds

received from the escrow account. The trial court ordered the release of all funds held in escrow to appellee, and denied appellant's petition for a stay of execution. This timely appeal followed.[1]

Initially, we note:

> Our scope of review of a trial court's order disposing of a motion for summary judgment is plenary. Accordingly, we must consider the order in the context of the entire record. Our standard of review is the same as that of the trial court; thus, we determine whether the record documents a question of material fact concerning an element of the claim or defense at issue. If no such question appears, the court must then determine whether the moving party is entitled to judgment on the basis of substantive law. Conversely, if a question of material fact is apparent, the court must

[1] Appellant's notice of appeal was filed August 23, 2011, ostensibly one day late (the 30th day fell on Sunday, August 21, 2011, and is excluded from the computation of time, ***see*** 1 Pa.C.S.A. § 1908, excluding weekends and holidays). Notice of appeal must be filed within 30 days after entry of the order from which the appeal is taken. Pa.R.A.P., Rule 903(a), 42 Pa.C.S.A. The date of entry of an order is the day that the clerk of the court mails or delivers copies of the order to the parties. Pa.R.A.P., Rule 108(a), 42 Pa.C.S.A. In a matter subject to the Pennsylvania Rules of Civil Procedure, the date of entry is the day that the clerk makes the notation in the docket that notice of entry of the order has been given pursuant to Pa.R.C.P., Rule 236(b), 42 Pa.C.S.A. ***See*** Pa.R.A.P. 108(b); ***Frazier v. City of Philadelphia***, 557 Pa. 618, 621, 735 A.2d 113, 115 (1999) ("an order is not appealable until it is entered on the docket with the required notation that appropriate notice has been given") (citations omitted). The trial court docket does not include a notation that notice of the order was sent to the parties on any particular date. Accordingly, the date that the 30-day appeal period commenced is not apparent from the docket and we will consider the appeal to be timely. ***See***, ***e.g. Vertical Resources, Inc. v. Bramlett***, 837 A.2d 1193 (Pa.Super. 2003) (appeal was not untimely where there was no indication on the docket that Rule 236 notice was sent).

> defer the question for consideration of a jury and deny the motion for summary judgment. We will reverse the resulting order only where it is established that the court committed an error of law or clearly abused its discretion.
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> ***Grimminger v. Maitra***, 887 A.2d 276, 279 (Pa.Super.2005) (quotation omitted). "[Moreover,] we will view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party." ***Evans v. Sodexho***, 946 A.2d 733, 739 (Pa.Super.2008) (quotation omitted).

Ford Motor Co. v. Buseman, 954 A.2d 580, 582-583 (Pa.Super. 2008), ***appeal denied***, 601 Pa. 679, 970 A.2d 431 (2009).

Appellant addresses each count in the complaint separately. With regard to the first count, seeking eviction and recoupment of money damages, appellant argues that there was no lease agreement between the parties. (Appellant's brief at 34.)

> A lease embraces any agreement, whether express or implied, which gives rise to the relationship of landlord and tenant. When ... the facts are not in dispute[,] the existence of the landlord and tenant relation is a question of law for the court. A tenant is one who occupies the premises of another in subordination to the other's title and with his assent, express or implied. The agreement may be in writing or parol and the reservation of rent is not essential to the creation of the landlord and tenant relation.

> ***Lasher v. Redevelopment Auth. of Allegheny County***, 211 Pa.Super. 408, 236 A.2d 831, 833 (1967) (citations omitted). In ***Lasher***, this Court found the existence of a lease even though there was no written lease, nor was rent ever paid.

Mirizio v. Joseph, 4 A.3d 1073, 1089 (Pa.Super. 2010), ***appeal denied***, 609 Pa. 691, 14 A.3d 829 (2010).

Instantly, an implied lease agreement was effectively created by the circumstances. Appellee purchased the property at tax sale and was the rightful owner. Apparently, appellant refused to vacate the premises so appellee agreed to allow him to stay for $1,000 per month in rent. As the trial court observes, appellant never objected to the arrangement and remained in possession, but failed to pay any rent, resulting in a complaint being filed.

"[Appellee] attempted to establish a lease relationship with [appellant] on September 22, 2010, by imposing a rental charge of $1,000.00 per month. [Appellant] did not object to the arrangement and remained in possession of the premises after September 23, 2010. [Appellant] failed to make payments which resulted in a Landlord and Tenant Complaint being filed." (Trial court opinion, 7/22/11 at 2.) "Many tenants in this Commonwealth have oral month to month leases, becoming tenants at will. As in this case, the periodic rent was to be paid on a monthly basis, therefore, the tenancy is month to month. The lack of a written lease does not give [appellant] a 'free ride,' nor does it give [appellant] any right of

possession." (***Id.*** at 3.) We agree. As long as appellant remained in possession of the premises, appellee, as the legal, record title-holder to the property, was entitled to fair market rental value. ***Mirizio***, ***supra***. We further agree with the trial court that $1,000 per month for the property was fair and reasonable. (Trial court opinion, 7/22/11 at 3.)

Appellant also argues that appellee failed to allege the existence of such agreement in its complaint. (Appellant's brief at 34.) Pennsylvania Rule of Civil Procedure 1019 provides that when any claim or defense is based upon an agreement, the pleading shall state specifically if the agreement is oral or written; if the agreement is in writing, it must be attached to the pleading. Pa.R.C.P., Rule 1019(h), (i), 42 Pa.C.S.A. Obviously, as explained above, there was no "lease agreement" between the parties ***per se***; rather, such agreement is implied by the surrounding circumstances as a matter of equity. Furthermore, whether the plaintiff complied with Rule 1019 is more properly raised by a preliminary objection under Pa.R.C.P. 1017(b) in the nature of a motion to strike off a pleading because of lack of conformity to law or rule of court. A purported violation of Rule 1019 is not an affirmative substantive defense and therefore is not a proper subject to be pleaded as new matter. Appellant's failure to file preliminary objections waives the issue.

Finally, with regard to Count I, appellant contends that the deed to the property is not in appellee's name. (Appellant's brief at 35.) Appellant

argues that the deed identifies the grantee only as "Mid-County Resources," not "Mid-County Resources, LLC," which is appellee's legal name. (RR at 261a-263a.)

> A deed is to be interpreted in light of the conditions existing when it was executed and the entirety of the language is to be considered. See generally, ***Highland v. Commonwealth***, 400 Pa. 261, 161 A.2d 390 (1960). While it is true that a deed must specify the grantee with sufficient certainty so as to identify him from the rest of the world, the description need not be contained in any particular clause. 12 P.L.E., Deeds, s 4. ***See also*** 23 Am.Jur.2d, Deeds, s 198: 'It is sometimes necessary to resort to the rules of construction to determine the grantee or grantees in a deed. The primary rule of construction that the intention of the parties is to be ascertained may be applied to support the designation as one as grantee whose identity is made certain by the instrument as a whole, even though he is not specifically named or is inaccurately described therein.'

St. Michael and Archangel Russian Orthodox Greek Catholic Church v. Uhniat, 451 Pa. 176, 186, 301 A.2d 655, 660 (1973).

Appellant's argument in this regard is absurd. It is obvious that appellee, Mid-County Resources, LLC is the intended grantee. As appellee states, at most, the failure to identify appellee by its full legal name can be attributed to a scrivener's error. (Appellee's brief at 14.) We will not invalidate the deed on such grounds.

Next, we turn to Count II of the complaint, trespass. Again, appellant argues that there was never any lease agreement between the parties, and that appellee was not the named grantee on the deed to the property.

(Appellant's brief at 37.) These claims have already been addressed above. Appellant also complains that appellee failed to attach a copy of the deed to its complaint. (***Id.*** at 38.) Actually, a review of appellee's complaint indicates that it incorporated the deed by reference as expressly permitted by Rule 1019(g).[2] (Complaint, 11/30/10 p.2 ¶5; RR at 228a.) Moreover, such an argument is more appropriately brought via preliminary objections, which appellant failed to file. Regarding appellant's status as that of a trespasser, as the trial court remarks, "[Appellant] has offered no legal or factual basis for his continued possession of this property that he does not own. He does not argue permission, license, necessity, or any other possible basis. Quite simply, [appellant] is a trespasser." (Trial court opinion, 7/22/11 at 3.)

Turning to Count III of the complaint, ejectment, appellant raises many of the same issues, including that appellee was not the lawful grantee. Appellant also argues that appellee violated Pa.R.C.P. 1054 by failing to set forth in the complaint an abstract of the title upon which it relies. (Appellant's brief at 39.) To the contrary, appellee's complaint provided an abstract of title and incorporated the deed by reference. Furthermore,

[2] "Any part of a pleading may be incorporated by reference in another part of the same pleading or in another pleading in the same action. A party may incorporate by reference any matter of record in any State or Federal court of record whose records are within the county in which the action is pending, or any matter which is recorded or transcribed verbatim in the office of the prothonotary, clerk of any court of record, recorder of deeds or register of wills of such county." Pa.R.C.P. 1019(g).

appellant's argument in this regard should have been brought via preliminary objections.

Next, appellant contends that the trial court did not properly apply the relevant standard of review for summary judgment motions. (***Id.*** at 44.) According to appellant, the trial court did not view the record in the light most favorable to him, and there were disputes of material fact which precluded summary judgment. We disagree. The only salient facts, which are not in dispute, are that appellee purchased the property at tax sale; appellee paid the amount of the bid and transfer tax; the tax claim bureau transferred legal ownership of the property to appellee and supplied it with a deed; and appellant continues to occupy the property and refuses to pay any rent despite the fact that he no longer has any ownership interest in the property. Appellant never sought to overturn the tax sale and has admitted, in court pleadings in related actions, including in federal court, that he has not been the owner of the property since December 5, 2008. Simply put, appellant has no legal status in relation to the property whatsoever; he is, as the trial court observes, a mere trespasser and has no right of possession. All of appellant's arguments, including his contention that appellee was not really the grantee because the tax claim bureau did not include "LLC" after its name in the deed, are specious, trivial, and unworthy of serious discussion. Appellant attempts to obfuscate the fact that he is basically just a squatter in appellee's property and has no legal right to be there.

We now turn to the remainder of appellant's arguments on appeal. Appellant contends that the trial court's order releasing funds held in escrow to appellee was in error. According to appellant, before the escrow funds could be released, appellee was required to prove expenses related to appellant's occupancy of the building, ***e.g.*** heating costs. (***Id.*** at 50-51.) Appellant argues that before appellee could receive funds from the escrow account, it would have to submit a list of itemized expenses already incurred, for which it is requesting reimbursement. (***Id.*** at 49.)

Pa.R.C.P.M.D.J., Rule 1008, 42 Pa.C.S.A., "Appeal as Supersedeas," provides, in relevant part, as follows:

> When an appeal is from a judgment for the possession of real property, receipt by the magisterial district judge of the copy of the notice of appeal shall operate as a supersedeas only if the appellant at the time of filing the notice of appeal, deposits with the prothonotary a sum of money (or a bond, with surety approved by the prothonotary) equal to the lesser of three (3) months' rent or the rent actually in arrears on the date of the filing of the notice of appeal, based upon the magisterial district judge's order of judgment, and, thereafter, deposits cash or bond with the prothonotary in a sum equal to the monthly rent which becomes due during the period of time the proceedings upon appeal are pending in the court of common pleas, such additional deposits to be made within thirty (30) days following the date of the appeal, and each successive thirty (30) day period thereafter.
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> > Upon application by the landlord, the court shall release appropriate sums from the escrow account on a continuing basis while the appeal is pending to compensate the landlord for the tenant's

> actual possession and use of the premises during the pendency of the appeal.

As stated above, on November 5, 2010, a magisterial district judge entered judgment for appellee in the amount of $4,689 and granted appellee possession. Appellant appealed the judgment to the court of common pleas. In accordance with Rule 1008, appellant paid $1,000 per month into escrow which operated as a supersedeas during the pendency of the appeal. In fact, after appellant failed to make the required escrow payments, supersedeas was terminated on March 28, 2011; however, after appellant was served with a writ of possession, he paid the money into escrow and supersedeas was reinstated. (Appellee's brief in support of motion for summary judgment, 7/6/11 at 6; RR at 309a.)

By order of July 22, 2011, filed July 25, 2011, following grant of summary judgment in favor of appellee, the trial court ordered the prothonotary to release all funds held in escrow to appellee, noting that it was clearly entitled to said funds in light of the trial court's other rulings. The trial court's order was not in error. Once it ruled in favor of appellee on the summary judgment motion, there was no longer any appeal pending in the court of common pleas. At that point, appellee was clearly entitled to the escrow funds. ***See*** Rule 1008(D) ("If an appeal is stricken or voluntarily terminated, any supersedeas based on it shall terminate. The prothonotary shall pay the deposits of rental to the party who sought possession of the

real property.") Appellant's bald contention, unsupported by any authority whatsoever, that appellee was required to submit a list of expenses is completely baseless. The "expenses" appellee has incurred are the direct result of appellant's possession and use of the premises, ***i.e.*** lost rental value of the property. Appellant relies on the phrase "appropriate sums" appearing in paragraph B of Rule 1008, ***supra***; however, that section of the Rule only applies during the pendency of the appeal. The trial court's grant of summary judgment for appellee ended the appeal from the MDJ's order and appellant was no longer entitled to supersedeas under Rule 1008. Appellant's argument has no basis in law or fact.

Next, appellant argues that the trial court could not order release of the escrow funds without first issuing a rule to show cause. (Appellant's brief at 52-55.) As appellee notes, Rule 1008 requires only an "application," which is what appellee filed. (Appellee's brief at 19.) Furthermore, appellant never objected to the lack of a rule to show cause in the lower court. (***Id.***) As such, the matter is waived. Pa.R.A.P., Rule 302(a), 42 Pa.C.S.A. At any rate, appellant had the opportunity to respond to appellee's applications for release of escrow funds by filing objections, so he would be unable to show how he was prejudiced by the trial court's failure to issue a rule to show cause. We have already determined, for the reasons discussed above, that the trial court did not err in releasing the escrow funds to appellee. There is no merit here.

Finally, in his last issue on appeal, appellant claims that the trial court erred in denying his petition for a stay. Appellant relies on subsection (b)(2) of Pa.R.C.P. 3121, which provides:

> (b) Execution may be stayed by the court as to all or any part of the property of the defendant upon its own motion or application of any party in interest showing
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> > (1) a defect in the writ, levy or service; or
> >
> > (2) any other legal or equitable ground therefor.

Pa.R.C.P., Rule 3121(b)(1)-(2), 42 Pa.C.S.A.

> (c) In an order staying execution the court may impose such terms and conditions or limit the stay to such reasonable time as it may deem appropriate.
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> > *Note*: The defendant may under these rules obtain a stay upon a showing that the net rents or income can satisfy the judgment, interest and costs within a reasonable time, that a stay will not imperil the ultimate collection of the judgment and that in balancing the equities no undue hardship will be inflicted on the plaintiff. The court may in granting stay provide for payment to the plaintiff or may order sequestration of the rents or income.

Pa.R.C.P., Rule 3121(c) and note, 42 Pa.C.S.A.

> [A] court in which the execution proceedings are pending has an inherent power to stay the proceedings where it is necessary to protect the rights of the parties. Pa.R.C.P. 3121 authorizes a court to stay an execution upon the showing of a legal or equitable ground therefor. "The grant of a

> stay of execution is within the sound discretion of the trial court, and its decision will not be disturbed absent a clear abuse of that discretion." ***In re Upset Sale, Tax Claim Bureau of Berks***, 505 Pa. 327, 339, 479 A.2d 940, 946 (1984), citing ***Pennsylvania Company v. Scott***, 329 Pa. 534, 549, 198 A. 115, 122 (1938); ***Augustine v. Augustine***, 291 Pa. 15, 18, 139 A. 585, 586 (1927). A court, in exercising this power, should not stay an execution unless the facts warrant an exercise of judicial discretion. This entails a balancing of the rights of the debtor and creditor.

Kronz v. Kronz, 574 A.2d 91, 94 (Pa.Super. 1990).

Appellant's petition for a stay of the proceedings was based on his petition to intervene filed at case number 6963 of 2010 before a different trial judge. (Memorandum in support of petition for stay, 7/20/11 at 2; RR at 360a.) Case number 6963 of 2010 was the ***mandamus*** action brought by appellee in which it sought the deeds to five properties purchased at the tax sale. As recounted above, relief was granted and the tax claim bureau was ordered to turn over the deeds to five properties, including 444 South Franklin Street. Appellant filed a petition to intervene in the ***mandamus*** action on the basis that he was an indispensable party. (***Id.*** at 3; RR at 361a.)

It is unclear from the record whether or not appellant's petition to intervene was granted; according to appellee, the matter was discontinued. (Appellee's brief at 22.) At any rate, we find no abuse of discretion in the trial court's determination that there was simply no legal basis for the court to grant a stay, particularly where appellee was entitled to summary

judgment in its favor. (***See*** order denying petition for stay, 7/22/11 at 1; RR at 446a.) Having found, for the reasons discussed above, that the trial court did not err in granting summary judgment for appellee, we cannot find that the trial court abused its discretion in denying appellant's petition for stay of execution. Appellee is clearly the owner of the property at issue and is entitled to possession of the property and monetary damages.

Order affirmed.

Judgment Entered.

Mary A. Hoyle

Deputy Prothonotary

Date: 5/7/2013