

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

NORMAN DEFRANCO, BY JOANN
DEFRANCO, ADMINISTRATRIX AND
ANTHONY DEFRANCO, EXECUTOR,
INDIVIDUALLY AND TOGETHER,

Appellants

v.

SENECA FOODS CORPORATION, AND
WEGMANS FOODS; JOHN/JANE DOE(S)
SUED IN THEIR INDIVIDUAL AND
OFFICIAL CAPACITIES,

Appellees

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 1900 WDA 2013

Appeal from the Order entered November 14, 2013,
In the Court of Common Pleas of Erie County,
Civil Division at No(s): 13157-12

BEFORE: PANELLA, DONOHUE, and ALLEN, JJ.

MEMORANDUM BY ALLEN, J.:

FILED: June 18, 2014

Norman DeFranco, ("Decedent"), by Joann DeFranco ("Mrs. DeFranco"), and Anthony DeFranco ("Anthony"), individually and together, (collectively "Appellants")¹, appeal from the trial court's order sustaining the

¹ Appellants have incorrectly identified themselves as administratrix and executor.

preliminary objections filed by Seneca Foods Corporation and Wegmans Foods (collectively "Wegmans"). We affirm.

The trial court explained:

This matter arose when [Decedent] purchased a can of green beans at Wegmans and allegedly choked on foreign object[s] contained in the can. [Mrs. DeFranco] and [Decedent's] son, [Anthony], have brought the instant survival action, as the administratrix and executor of [Decedent's] estate. However, neither [Mrs. DeFranco] nor Anthony have been appointed administrator or executor of [Decedent's] estate.

Memorandum Order, 11/14/13, at 1 (footnotes omitted).

Our review of the record reveals the following: On September 18, 2012, Anthony filed a praecipe to issue a writ of summons against Wegmans, which listed Decedent as the sole plaintiff. Praecipe to Issue Writ of Summons, 9/18/12, at 1. The September 18, 2012 praecipe was accompanied by a letter dated September 11, 2012, from Anthony to the Erie County Clerk of Courts. The letter explained that the writ "was supplied to [Anthony] by attorney Jamie Mead [who] was hired to file a lawsuit in this matter but instead provided [Anthony] with this writ of summons as the statue [sic] of limitations will expire." Letter, 9/11/12, at 1. Anthony requested that the Erie County Clerk of Courts "bill attorney Mead for this filing. Otherwise, please accept filing and return said writ of summons and I will file a motion to proceed in forma pauperis." *Id.* On September 19, 2012, a writ of summons signed by Kelly Spusta, Deputy, was issued against

Wegmans, listing Decedent as plaintiff. On the same date, the prothonotary mailed to Anthony, at the State Correctional Institution at Albion where he resides, a copy of the September 19, 2012 writ, along with a civil cover sheet and with a note asking for the sheet to be completed and returned to the prothonotary. On September 25, 2012, the writ and civil cover sheet were returned to the prothonotary because the "inmate name and number don't match." Envelope from Office of Clerk of Records, postmarked 9/19/12, at 1 (docketed 9/25/12).

On September 27, 2012, a Praeipce for Ammended [sic] Writ of Summons was filed, listing the plaintiffs as Norman DeFranco, by Joann DeFranco, administratrix, and Anthony DeFranco, executor, individually and together. See Praeipce For Ammended [sic] Writ of Summons, 9/27/12, at 1. The amended praecipce was accompanied by a letter to the Erie County Prothonotary's Office from Anthony dated September 23, 2012, stating that he "did not receive a response" regarding the writ he mailed on September 11, 2012. Letter, 9/23/12, at 1. Anthony explained that the prior writ of summons was "prepared by my deceased father's lawyer and was incomplete. In an attempt to correct the record and filings, I am enclosing a complete writ of summons with addresses and such." *Id.* On September 27, 2012, an amended writ of summons was issued by Kelly Spusta, Deputy, listing the plaintiffs as Norman DeFranco, by Joann DeFranco, administratrix, and Anthony DeFranco, executor, individually and together. See Amended

Writ of Summons, 9/27/12, at 1. On September 28, 2012, Anthony filed a civil cover sheet. Civil Cover Sheet, 9/28/12, at 1.

On October 2, 2012, Anthony filed a letter dated September 28, 2012, expressing that “[d]espite a letter requesting Sheriff Service Forms by the Sheriff’s Department, I did not receive any.” Letter, 9/28/12, at 1. Anthony requested “3 Sheriff Service Forms so I can make service to the defendants in the above-referenced case[.]” *Id.* On October 12, 2012, a complaint was filed against Wegmans. *See generally* Complaint, 10/12/12. On October 24, 2012, a Sheriff’s Return of Service was filed indicating that Wegmans was served with the complaint on October 17, 2012. The October 24, 2012 Sheriff’s return of service was accompanied by an Erie County Sheriff’s service form signed by Anthony, requesting the sheriff to “[p]lease serve Seneca Foods Corp[oration] at Wegmans Foods ... as they are business partners with Seneca Foods and able to accept service under P[ennsylvania] Rules of Court.” Erie County Sheriff’s Service Form, 10/12/12, at 1.

On November 21, 2012, Wegmans filed a Notice of Filing Notice of Removal of the action to the United States District Court for the Western District of Pennsylvania. On November 30, 2012, Anthony filed a Praecipe for Entry of Judgment of Non Pros/Default Judgment certifying that Wegmans had “failed to file any pleading/answer to the complaint” and that “Plaintiff has mailed a notice of his intent to file this praecipe ... on November [7], 2012.” Praecipe for Entry of Judgment of Non Pros/Default Judgment,

11/30/12, at 1. On November 30, 2012, Anthony filed a letter addressed to the Erie County Prothonotary's Office noting that he was "in receipt of [their] correspondence" and that he "concede[s] that local rule 236 provides that [Anthony] must provide postage and envelopes for each defendant, however, due to my incarceration[,] I am unable to provide said stamps and envelopes and would respectfully request that you please send the two (2) defendants copies of my filing." Letter, 11/28/12, at 1.

On February 1, 2013, Mrs. DeFranco filed a Motion to Proceed in Forma Pauperis. On February 11, 2013, Anthony filed a letter dated February 6, 2013, indicating that on "January 28, 2013, Federal Judge McLaughlin remanded this case back to the state Court based on my motion." Letter, 2/6/13, at 1. In his letter, Anthony stated that the "last filing was my request for judgment of non pros upon the defendants for not responding to the complaint." *Id.* Anthony then requested that judgment be entered and "a copy of the docketing statement in this case". *Id.*

On February 11, 2013, Wegmans filed preliminary objections to Appellants' complaint. Wegmans averred that the complaint "alleges a survival action for injuries allegedly suffered by [Decedent]." Preliminary Objections to the Complaint, 2/11/13, at 2. Wegmans further averred, "[n]o estate has been opened and neither [appellant] has been or sought to be appointed executor or administrator of the estate of [Decedent]. Under Pennsylvania law such an action can only be brought by the personal

representative of the decedent.” *Id.* On the same date, Wegmans filed an answer and new matter to Appellants’ complaint.

On February 19, 2013, Appellants filed an amended complaint and included a January 24, 2013 sworn statement by Mrs. DeFranco. In her statement, Mrs. DeFranco offered the following details regarding her second attempt to “gain formal Letters of Administration” regarding Decedent’s estate:

I went back to the Courthouse, this time with my grandson, Braden DeFranco. I was told again that I need a lawyer but this time they provided [me] with forms to fill out. But they told me I needed something near \$90.00 dollars. I did not have that kind of money, nor do I have it now because I live off of strict social security and have absolutely no room to make a budget for this. **This occurred in December 2012.**

Statement, 1/24/13, at 1 (emphasis supplied).

On November 1, 2013, the trial court convened a hearing on Wegmans’ preliminary objections. When the trial court asked whether Mrs. DeFranco or Anthony had “ever opened an estate for [Decedent],” Mrs. DeFranco replied “no.” N.T., 11/1/13, at 3. Anthony, appearing by telephone, interjected that “[he] believed [Mrs. DeFranco] did [open an estate] in February [2013][.]” *Id.* at 4. Anthony expressed that Mrs. DeFranco “went in [to the Register of Wills] at my direction because I knew that she had to have a letter in order to file the lawsuit.” *Id.* at 10. In arguing why he should be “a party to this action,” Anthony explained:

[W]e found a will, in fact, there was two of them, but we found one that was notarized ... I submitted it to the Court after it was copied. My mother says that the will itself if for any reason my mother may not be able to represent the estate of my dad, that it would fall upon me and my brother. Now, my mother is elderly, one; B, she's under care for memory problems, and I believe that situation, Your Honor, I should be a party to this action.

Id. at 12-13. The trial court responded to Anthony, "what you're alleging is that [Mrs. DeFranco] is not up to the task [of being the personal representative of Decedent's estate]. That may be so, it may not be so, but that would require you then to qualify." *Id.* at 13.

The trial court questioned whether Anthony would qualify. Specifically, the trial court stated:

I'm not sure given your status as a prisoner whether or not you're prohibited from serving in an estate. Generally, there are fiduciary rules that indicate who can be a [personal representative]. I intend no disrespect, [Anthony], but the stark fact is, you're limited in what you can do by virtue of being in jail, and you're under a cloud that may prohibit you from qualifying as an executor.

Id. at 14.

On November 14, 2013, the trial court issued a memorandum order sustaining Wegmans' preliminary objections and dismissing with prejudice Appellants' amended complaint. Appellants filed a timely appeal. On January 15, 2014, the trial court issued its Pa.R.A.P. 1925(a) opinion in which it expressed that its November 14, 2013 memorandum order "gave adequate reasons in support of its decision to sustain [Wegmans']

Preliminary Objections” thus obviating any “need for further explanation.”
Trial Court’s Pa.R.A.P. 1925(a) Opinion, 1/15/14, at 1.

Appellants present the following issues for our review:

- I. Whether the lower court erred when it ruled on [Wegmans’] preliminary objections while Appellants’ judgment of non pros were [sic] never resolved?
- II. Whether the lower court erred as a matter of law when it ruled that the statute of limitations had expired prior to Appellants taking affirmative steps to gain the executorship [of Decedent’s estate], when the living will clearly named Appellants as executors over his estate and Appellants took affirmative steps to gain “official” executorship prior to the statute of limitations expiring?

Appellants’ Brief at iii.

Initially, we note that in the five paragraphs that Appellants dedicate to their first issue, they fail to cite any case law to support their argument. The failure to develop the argument with relevant jurisprudence affects a waiver of Appellants’ first issue. **See, e.g., Commonwealth v. Genovese**, 675 A.2d 331 (Pa. Super. 1996) (portion of appellate brief must be developed with pertinent discussion of point which includes citations to relevant authority). Waiver notwithstanding, the docket reflects that while Appellants praeciped for judgment of *non pros* on November 30, 2012², the prothonotary did not enter judgment because the case had been

² Appellants argue that they “filed for Judgment of Non Pros twice; once dated November 7, 2013 and again dated November 25, 2013.” Appellants’

removed to federal court pursuant to Wegmans' request, Appellants had not paid the appropriate filing fee for the judgment of *non pros* nor filed an *in forma pauperis* application in lieu of the fee, and Appellants' praecipe did not include the requisite certification pursuant to Pa.R.C.P. 237.1. See Certified Docket Entries, Case No. 13157-2012, at 2. Thus, contrary to Appellants' assertion, there was no outstanding praecipe of *non pros* before the trial court when it entered its order sustaining Wegmans' preliminary objections.

Appellants' second issue challenges the trial court's order sustaining Wegmans' preliminary objections. Our standard of review "is to determine whether the trial court committed an error of law." ***Feingold v. Hendrzak, et al.***, 15 A.3d 937, 941 (Pa. Super. 2011). We are also mindful that:

Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases where it is clear and free of doubt that the pleader will be unable to prove facts legally sufficient to establish the right of relief. If any doubts exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

Id. citing Haun v Community Health Systems, Inc., 14 A.3d 120, 123 (Pa. Super. 2011).

In sustaining Wegmans' objections, the trial court reasoned:

Brief at 5. However, the certified docket only reflects the November 30, 2012 filing.

Anthony asserts that [Appellants] do have standing in this case under an equitable exception. Anthony claims that [Appellants] made attempts to obtain letters testamentary, and would have obtained them but for the lack of help at the Office of the Register of Wills. However, it is clear that [Appellants] did not apply for letters testamentary within the statute of limitations.

Under Pennsylvania law, a survival action must be brought by the personal representative of the decedent's estate. 20 Pa.C.S. § 3373. "Personal Representative" is defined as the executor or administrator of the estate. Pa. R. Civ. P. 2201. An action brought by an estate without a personal representative is void. *Prevish v. Northwest Medical Ctr.*, 692 A.2d 192, 201 (Pa. Super. 1997).

The Pennsylvania Courts have considered whether the appointment of a personal representative after the expiration of the statute of limitations may relate back to the initial filing. The Courts have allowed relation back only where the plaintiffs took affirmative steps to secure their appointment as the personal representatives of the estates prior to the expiration of the statute of limitations. See *McGuire v. Erie Lackawanna. Ry. Co.*, 385 A.2d 466 (Pa. Super. 1978); *D'Orazio v. Locust Lake Village, Inc.*, 406 A.2d 550 (Pa. Super. 1979); *Gasbarini's Estate v. Med. Ctr. of Beaver County, Inc.*, 409 A.2d 343 (Pa. 1979).

This Court finds [Appellants'] equitable argument to be without merit. Because [Appellants] failed to apply for letters testamentary within the statute of limitations period, there can be no relation back to the initial filing. Accordingly, [Appellants] have no standing to bring this suit, this action is void, and the Amended Complaint must be dismissed.

Memorandum Order, 11/14/13, at 1-2 (footnote omitted).

We agree with the trial court and find that Appellants' action is time barred. Appellants acknowledge that Decedent "passed away in July 2012." Appellants' Brief at 1. Therefore, the initial September 19, 2012 writ of summons, which listed only Decedent as plaintiff, was a legal nullity. We

have expressed that “[t]he quintessential example of someone who lacks capacity to sue ... is a deceased person, as capacity only exists in living persons.” ***In re Sauers***, 32 A.3d 1241, 1248-1249 (Pa. 2011) (citation omitted); ***see also Philadelphia Facilities Management Corporation v. Biester***, 431 A.2d 1123, 1127 (Pa. Cmwlth. 1981) (“It has long been an axiom of our legal system that, in order to maintain a suit, a would-be plaintiff must have actual or legal existence.”).

As the trial court observed, “Pursuant to 42 Pa.C.S. § 5524, the applicable statute of limitations is two years. The incident with the green beans allegedly occurred on October 1, 2010. Therefore, the statute of limitations in this matter expired on October 1, 2012.” Memorandum Order, 11/14/13, at 2, n.3. The record reflects that prior to October 1, 2012, Appellants had not applied for letters of administration or letters testamentary. Indeed, as discussed above, Mrs. DeFranco indicated that as of December 2012, there had been no filing requesting the letters of administration or letters testamentary on Decedent’s estate. Statement, 1/24/13, at 1. Mrs. DeFranco confirmed her statement at the hearing on Wegmans’ preliminary objections. N.T., 11/1/13, at 3. Therefore, the trial court did not err when it determined that “[b]ecause [Appellants] failed to apply for letters testamentary within the statute of limitations period, there can be no relation back to the initial filing. Accordingly, [Appellants] have no standing to bring this suit, this action is void, and the Amended

Complaint must be dismissed.” Memorandum Order, 11/14/13, at 2 **citing** **McGuire v. Erie Lackawanna. Ry. Co.**, 385 A.2d 466 (Pa. Super. 1978); **D’Orazio v. Locust Lake Village, Inc.**, 406 A.2d 550 (Pa. Super. 1979); **Gasbarini’s Estate v. Med. Ctr. of Beaver County, Inc.**, 409 A.2d 343 (Pa. 1979).

Appellants maintain “Appellant Joann DeFranco went to the Register of Wills to apply for the letters of administration over the Estate” of Decedent “in September 201[2].” Appellant’s Brief at 1. Appellants further claim that “the Register of Wills boldly informed Joann that she needed both an attorney and \$90.00 dollars to accomplish this. Being indigent, a senior citizen and acting *pro se*, she did not have money for a lawyer, nor did she have \$90.00 required by the Register of Wills. Joann’s efforts here amount to an ‘affirmative step’ taken to gain Executorship over her husband’s Estate before the statue [sic] of limitations ran.” *Id.* at 1-2. We disagree, and remain unpersuaded even after considering Appellants’ argument that a second unsuccessful attempt was made to secure the letters of administration prior to the expiration of the statute of limitations. *Id.* at 2.

While Appellants accuse the Register of Wills of thwarting their efforts to raise Decedent’s estate, Appellants fail to cite any legal authority for the proposition that the Register of Wills had a duty to provide them with legal advice about how to open the estate, how to complete the requisite documentation, or how to solicit *in forma pauperis* status. Notably, Anthony

stated at the November 1, 2013 hearing that he knew that the letters of administration were a prerequisite to filing a suit prior to sending Mrs. DeFranco to the Register of Wills. N.T., 11/1/13, at 10. Indeed, the estate was not opened until February 2013, despite Appellants' knowledge of the importance of this action and that time was of the essence.

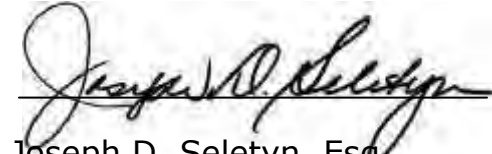
Appellants, pursuing this action *pro se*, had an obligation to raise Decedent's estate, and by failing to do so, forfeited their standing to prosecute this action. ***See Van v. Com., Unemployment Compensation Bd. of Review***, 494 A.2d 1081, 1086 (Pa. 1985) (internal citations omitted) (“[A]ny layperson choosing to represent himself in a legal proceeding must, to some reasonable extent, assume the risk that his lack of expertise and legal training will prove his undoing.”).

Accordingly, we find that Appellants' action is time barred. The trial court properly declined to apply the doctrine of relation back because Appellants failed to apply for the letters of administration or letters testamentary prior to the expiration of the statute of limitations on October 1, 2012.

Order affirmed.

Judge Donohue concurs in the result.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/18/2014