

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

STEPHEN F. MANKOWSKI,

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellant

v.

GENIE CARPET, INC.,

Appellee

No. 2065 EDA 2013

Appeal from the Order Entered June 19, 2013
In the Court of Common Pleas of Bucks County
Civil Division at No(s): 2012-07822

BEFORE: BENDER, P.J.E., PANELLA, J., and LAZARUS, J.

MEMORANDUM BY BENDER, P.J.E.

FILED MAY 27, 2014

Appellant, Stephen F. Mankowski (hereinafter "Homeowner"), appeals from the trial court's order entered June 19, 2013, denying his "Petition to Reinstate Appeal And/Or Extension of Time In Which To File the Complaint." After careful review, we affirm.

The trial court set forth the facts and procedural history of this case as follows:

This case, docketed at 2012-07822, and a related case, docketed at 2012-07821 ("the related case"), are appeals from magisterial district court. The claims are for breach of contract. The parties entered into an agreement for Genie Carpet, Inc. ("Contractor") to replace the carpets in Homeowner's residence with hardwood flooring for \$5,130. Both parties filed separate breach of contract actions in magisterial district court. The procedural history is complicated by the two cases at the magisterial district court level, which were not consolidated.

Homeowner's lawsuit avers he was not satisfied with Contractor's workmanship. Homeowner alleges the installed hardwood flooring had various defects, including uneven

floorboards, broken tongue and groove, mismatched finishing, and scratches. Homeowner contends that it would cost \$2,745 to repair and complete the project, yet Homeowner seeks damages in the amount of \$5,130 – the full contract price for the work – plus treble damages under the Home Improvement Consumer Protection Act, 73[] P.S. § 517.1, *et. seq.*

Contractor’s related breach of contract action seeks payment for the allegedly unpaid portion of the invoice for the installed hardwood flooring.

On August 2, 2012, the magisterial district judge (“MDJ”) entered default judgment in favor of Contractor in both cases because Homeowner did not appear for the hearing. On August 31, 2013, Homeowner filed Notices of Appeal [with the Court of Common Pleas of Bucks County] in both cases.

On January 9, 2013, in the related case, Homeowner (as the defendant in that case) sent a ten (10) day notice of default judgment for Contractor’s failure to file a complaint. Homeowner filed a Praecipe to Enter Judgment of *Non[]Pros* on January 25, 2013, and judgment was entered against Contractor (plaintiff in the related case) for failure to file a complaint.

In this case, Homeowner did not file a complaint within twenty (20) days of the appeal as required by Rule 1004A of the Pennsylvania Rules of Conduct, Office Standards and Civil Procedure for Magisterial District Judges [(Pa.R.C.P.M.D.J. 1004A)].... On January 18, 2013, Contractor filed a Praecipe to Strike Notice of Appeal from District Justice Judgment pursuant to [Pa.R.C.P.M.D.J.] 1006, and the prothonotary marked the appeal stricken. On January 25, 2013, Homeowner filed a Petition to Reinstate Appeal and/or Extension of Time in Which to File the Complaint. Homeowner also filed a complaint on January 25, 2013. Following oral argument, [the trial court] entered an Order denying Homeowner’s Petition to Reinstate. Homeowner appealed this Order on July 18, 2013.

Trial Court Opinion (TCO), 9/17/13, at 1-3 (footnote omitted).

Pursuant to the court’s order, Homeowner filed a timely concise statement of errors complained of on appeal in accordance with Pa.R.A.P. 1925(b). Herein, Homeowner raises two issues for our review:

I. Did the lower court err in dismissing [Homeowner's] petition to reinstate his appeal where [Contractor] failed to comply with the requirement in the Pennsylvania Rules of Civil Procedure that [he] serve a ten-day notice before filing a praecipe for judgment of *non pros*?

II. Did the lower court err in dismissing [Homeowner's] petition to reinstate his appeal where [Homeowner] demonstrated good cause for his failure to file the complaint (settlement discussions and [Contractor's] specific request that he refrain from taking action) and the absence of any prejudice to [Contractor]?

Homeowner's Brief at 4.

In his first issue, Homeowner contends that the court should have granted his petition to reinstate the appeal because Contractor failed to provide written notice of its intent to strike the appeal prior to the filing of the praecipe. Homeowner maintains that written notice was required pursuant to Pennsylvania Rule of Civil Procedure 237.1, which states, in pertinent part:

(a)(1) As used in this rule,

"judgment of non pros" means a judgment entered by praecipe pursuant to Rules 1037(a) and 1659;

Note: When a defendant appeals from a judgment entered in a magisterial district court, Pa.R.C.P.M.D.J. 1004(b) authorizes the appellant to file a praecipe for a rule as of course upon the appellee to file a complaint or suffer entry of a judgment of non pros. The entry of the judgment of non pros is governed by Pa.R.C.P. No. 1037(a) and is subject to this rule.

"judgment by default" means a judgment entered by praecipe pursuant to Rules 1037(b), 1511(a), 3031(a) and 3146(a).

(2) No judgment of non pros for failure to file a complaint or by default for failure to plead shall be entered by the prothonotary unless the praecipe for entry includes a certification that a

written notice of intention to file the praecipe was mailed or delivered

(i) in the case of a judgment of non pros, after the failure to file a complaint and at least ten days prior to the date of the filing of the praecipe to the party's attorney of record or to the party if unrepresented, or

(ii) in the case of a judgment by default, after the failure to plead to a complaint and at least ten days prior to the date of the filing of the praecipe to the party against whom judgment is to be entered and to the party's attorney of record, if any.

The ten-day notice period in subdivision (a)(2)(i) and (ii) shall be calculated forward from the date of the mailing or delivery, in accordance with Rule 106.

(3) A copy of the notice shall be attached to the praecipe.

(4) The notice and certification required by this rule may not be waived.

Note: A certification of notice is a prerequisite in all cases to the entry by praecipe of a judgment of non pros for failure to file a complaint or by default for failure to plead to a complaint. Once the ten-day notice has been given, no further notice is required by the rule even if the time to file the complaint or to plead to the complaint has been extended by agreement.

Pa.R.C.P. 237.1.

While the trial court concluded that Rule 237.1 was not applicable to Contractor's praecipe to strike Homeowner's notice of appeal, Homeowner disagrees. He maintains that the applicability of Rule 237.1 and its notice requirement is apparent from the "plain meaning of the words used" in the rule, such as "in all cases" and "may not be waived." Appellant's Brief at 11 (quoting Pa.R.C.P. 237.1(a)(4); Note to (a)(4)).

Homeowner further argues that the language contained in Pa.R.C.P.M.D.J. 1004 indicates that Contractor was subject to the notice requirement of Rule 237.1. Rule 1004 states, in relevant part:

A. If the appellant was the claimant in the action before the magisterial district judge, he shall file a complaint within twenty (20) days after filing his notice of appeal.

B. If the appellant was the defendant in the action before the magisterial district judge, he shall file with his notice of appeal a praecipe requesting the prothonotary to enter a rule as of course upon the appellee to file a complaint within twenty (20) days after service of the rule or suffer entry of a judgment of non pros.

Note: The twenty days allowed the claimant-appellant under subdivision A will give him time to consider, among other things, matters under Rule 1007B. **The procedure upon failure to file a complaint pursuant to a rule to do so entered under subdivision B will be governed by the Rules of Civil Procedure (Pa.R.C.P. No. 1037(a)).**

Pa.R.C.P.M.D.J. 1004(A)-(B), Note. Homeowner acknowledges that subpart (A), and not subpart (B), applies in this case. Nevertheless, he argues that if the Rules of Civil Procedure apply to subpart (B), the same must be true for subpart (A), making Rule 237.1 applicable.

Finally, Homeowner emphasizes that “there is nothing in the applicable language of [Pa.R.C.P.M.D.J.] 1006 that supersedes or otherwise overrules the provisions of the Pennsylvania Rules of Civil Procedure.” Homeowner’s Brief at 12. Rule 1006 states: “Upon failure of the appellant to comply with

Rule 1004A or Rule 1005B, the prothonotary shall, upon praecipe of the appellee, mark the appeal stricken from the record. The court of common pleas may reinstate the appeal upon good cause shown.” Pa.R.C.P.M.D.J.

1006. Homeowner interprets Rule 1006 as follows:

There is nothing in this Rule that removes this proceeding out from under the aegis of the Pennsylvania Rules of Civil Procedure. Rather, it merely states that the appellee must file a praecipe in order to strike the appeal for any perceived failure to file a complaint. As stated above, the rules for filing such a praecipe are found in the Pennsylvania Rules of Civil Procedure, and they require at least ten days notice, with proof of such notice attached to the praecipe.

Homeowner’s Brief at 12. Because Contractor did not supply such notice, Homeowner contends that his petition to reinstate the appeal should have been granted.

We disagree. While not binding authority, the Honorable R. Stanton Wettick, Jr., of the Court of Common Pleas of Allegheny County succinctly addressed the applicability of Rule 237.1 to the striking of an appeal for failure to file a complaint in ***Seubert and Associates Inc. v. Tiani***, 45 Pa. D. & C. 4th 268 (Pa. Com. Pl. 2000). There, the plaintiff filed a notice of appeal from a MDJ decision, but failed to file a complaint. ***Id.*** at 270-71. Consequently, the prothonotary struck the appeal upon the filing of a praecipe by the defendant. ***Id.*** at 271. As in the present case, the plaintiff relied on Rule 237.1 in arguing that the appeal should not have been stricken because the defendant failed to provide plaintiff with the requisite

written notice of his intention to strike the appeal prior to the filing of a praecipe. *Id.* at 271.

In rejecting the plaintiff's argument, Judge Wettick held that Rule 237.1 did not apply because "the present case does not involve the entry of either a judgment of *non pros* or a judgment by default." *Id.* at 272. He elaborated:

The relief that defendant obtained was not based on any rules of civil procedure governing common pleas court proceedings or case law governing the entry of a judgment of non pros. The relief, instead, was based on a rule of civil procedure governing district justice proceedings which provides for the striking of the appeal.

The striking of an appeal for failure to file a complaint cannot be equated with the entry of a judgment of non pros for failure to file a complaint. When an appeal is stricken, the district justice judgment becomes a final judgment based on the merits of the parties' claims and defenses. Consequently, the doctrines of res judicata and collateral estoppel bar any further litigation involving the subject matter of the lawsuit. *Burr v. Callwood*, 374 Pa. Super. 502, 543 A.2d 583 (1988). The judgment of non pros for failure to file a complaint, on the other hand, is not a judgment on the merits. Consequently, the case law permits the plaintiff to institute a second lawsuit raising the same claims. *Haefner v. Sprague*, 343 Pa. Super. 342, 494 A.2d 1115 (1985).

In summary, the rules of procedure governing district justice proceedings require the plaintiff who files an appeal to file a complaint within 20 days after the filing of a notice of appeal (Rule 1004A), and it provides the remedy upon failure of the plaintiff to comply: the striking of the appeal which leaves the district justice judgment in full force and effect. **These rules are not altered by any of the rules of civil procedure governing common pleas court proceedings, because none of the rules of civil procedure governing common pleas court proceedings address the situation in which a**

plaintiff who files an appeal from a district justice proceeding fails to comply with Pa.R.C.P.D.J. 1004A.

Id. at 272-73. (footnote omitted; emphasis added).

We adopt Judge Wettick's sound rationale in rejecting Homeowner's argument that the notice requirement of Rule 237.1 applied in this case. By its plain language, Rule 237.1 applies to praecipes that seek the relief of judgment *non pros* or judgment by default, not praecipes seeking the relief of the prothonotary's striking an appeal from a MDJ decision. Moreover, in drafting Rule 1004, our Supreme Court chose to *expressly state* that the Rules of Civil Procedure governed subpart B, yet said nothing about the applicability of those rules to subpart A. Undoubtedly, this omission was intentional, and it supports our conclusion that Rule 237.1 does not apply to Contractor's praecipe in this case. Accordingly, Contractor was not required to provide Homeowner with written notice prior to filing its praecipe to strike Homeowner's appeal, and the court did not err in denying Homeowner's petition to reinstate the appeal on this basis.

In his second issue, Homeowner contends that the court should have reinstated the appeal because Contractor would not have been prejudiced, and Homeowner proffered good cause to do so, as required by Rule 1006. This Court has interpreted "good cause" as requiring "an appealing party to proffer some legally sufficient reason for reinstating the appeal." ***Slaughter v. Allied Heating***, 636 A.2d 1121, 1123 (Pa. Super. 1993) (citing ***Anderson v. Centennial Homes, Inc.***, 594 A.2d 737, 739 (Pa. Super. 1991)). "[T]he determination of whether good cause has been

demonstrated is trusted to the trial court's sound discretion." **Id.** (citation omitted).

According to Homeowner, his "good cause" for failing to file a timely complaint "was that the parties were engaged in settlement negotiations." Homeowner's Brief at 15. He states that, "[i]ndeed, at one point, [Contractor's] counsel expressly requested that [Homeowner] refrain from filing his complaint while the parties continued settlement talks." **Id.** In support of this claim, Homeowner cites to communications between the parties which he included in the reproduced record, and which he attached to his petition to reinstate the appeal.

After reviewing these communications, the trial court concluded "the parties were not in active settlement discussions at the time Contractor filed the [p]raecipe to [s]trike." TCO at 6. The trial court explained:

[I]t appears that Homeowner terminated settlement discussions by serving Contractor with a ten-day notice on January 9, 2013, that Homeowner intended to take default judgment in the related case because Contractor had not filed a complaint. In response, Contractor's counsel sent an email on January 17, 2013, requesting Homeowner take no further action in the related case pending settlement discussions and stating that Contractor offered to waive the allegedly unpaid balance due on the invoice so that Homeowner could expend that sum toward having the floors refinished by a different contractor. On January 18, 2013, instead of replying to Contractor's request to take no further action or to Contractor's settlement offer, Homeowner's counsel [replied and] insisted [that] "[Contractor] is subject to treble damages for his clear violations of the PA Home Improvement Act. If you [*sic*] client is willing to go out of pocket and pay towards these amounts, please get in touch with me.

Contractor's counsel responded with a letter to Homeowner's counsel on January 18, 2013, advising that he was filing the Praeceptum to Strike Notice of Appeal because Homeowner's counsel did not respond to the settlement offer. Contractor's counsel concluded, "In light [of] the striking of [Homeowner's] appeal in the case where he is Appellant-Claimant ..., it appears that my client will not file a complaint in the other case ... and will consider this matter closed." On January 25, 2013, Homeowner obtained judgment of non pros in the related case because Contractor did not file a complaint.

We concluded that Homeowner failed to show good cause to reinstate the appeal because the parties were not in active settlement discussions at the time Contractor filed the Praeceptum to Strike. Homeowner terminated settlement discussions prior to filing a complaint in this case. Homeowner's actions of filing the ten-day notice prior to taking default judgment in the related case and insisting on treble damages indicated that Homeowner ceased settlement negotiations. Homeowner simply failed to protect his rights by perfecting his appeal in this action before threatening default judgment in the related case. In response to Homeowner's actions, Contractor acted within its rights under the MDJ Rules of Civil Procedure and filed a praecipe to strike Homeowner's appeal.

TCO at 5-7.

Based on our examination of the parties' communications, we conclude that the court's interpretation was reasonable. Thus, we ascertain no abuse of discretion in the trial court's determination that Homeowner did not show "good cause" to reinstate the appeal in this regard.

We also note that Homeowner's reliance on ***Delverme v. Pavlinsky***, 592 A.2d 746 (Pa. Super. 1991), to support his claim that he demonstrated "good cause" is unconvincing. In ***Delverme***, we held that the plaintiffs demonstrated "good cause" to reinstate their appeal where they were acting

pro se and “were not aware that they were required to file a complaint within twenty days of the notice of appeal.” **Id.** at 748-49. We explained:

Given that appellants had already filed a complaint in the magistrate's office it is not unreasonable to conclude that they would be unaware that it was necessary to file yet another complaint in the court of common pleas. Appellees contend that appellants were on notice of this requirement by virtue of the language on the notice of appeal form which states:

If appellant was claimant (See Pa.R.C.P.D.J. No. 1001(6)) in action before District Justice he MUST FILE A COMPLAINT within twenty (20) days after filing his NOTICE OF APPEAL.

While such language is certainly clear to those in the legal profession, the legal significance of filing a *new* complaint may not be so readily understandable to a person with no legal background who is working his way through this appeal process for the very first time. Further, as soon as appellants received notice that their appeal had been stricken they immediately retained counsel in an effort to rectify the situation. We believe that appellants' actions demonstrate an attempt to comply with all the rules for taking an appeal from a magistrate's decision, and do not think that they should be punished for inadvertently failing to comply with one of the rules, particularly when the notice of appeal was timely filed and served upon appellees. Thus, we conclude that good cause existed to reinstate this appeal.

Id. at 749.

The trial court found the facts of **Delverme** distinguishable from the present case. Namely, the court emphasized, “Homeowner is not *pro se*; Homeowner was represented by counsel at all times.” TCO at 9. The court then explained why this Court’s decision in **Hanni v. Penn Warranty Corp.**, 658 A.2d 1349, 1351 (Pa. Super. 1995), was more analogous to the present facts. In **Hanni**, we upheld the trial court’s conclusion that there was not

good cause shown to reinstate the appeal where the defendant/appellant did not appear for the MDJ hearing and did not adhere to the procedural rules in appealing from that decision. In making this determination, we emphasized:

As [Rule 1006] clearly states, the trial court is never required to reinstate appeals (whereas the prothonotary can be required to strike them). The rule provides two levels of discretion. First, the trial court has discretion to determine whether there is good cause for reinstating the appeal. After examining appellant's excuse for failing to timely file the proofs of service, the trial court is not required, but is permitted to reinstate the appeal, in its discretion. Considering the weight this rule gives to the trial court's discretion, we should be careful that we do not simply substitute our judgment as to whether an appeal should be reinstated. Rather, we should uphold any reasonable decision by the trial court, even though we might not agree with it ourselves.

Id. at 1351 (citations and footnote omitted).

In comparing **Hanni** to the present case, the trial court stated:

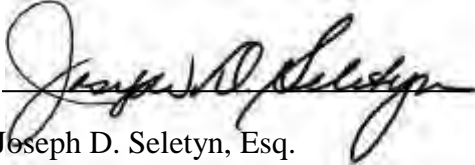
Like the defendant in **Hanni**, Homeowner did not appear for the hearing before the MDJ, which resulted in the MDJ entering default judgment against Homeowner. Homeowner then filed an appeal with this [c]ourt on August 31, 2012, but did not attempt to comply with the MDJ Rules of Civil Procedure to perfect his appeal. Homeowner chose not to file a complaint in this [c]ourt within 20 days as required by Rule 1004A of the MDJ Rules of Civil Procedure. By the time Contractor filed the Praecipe to Strike Notice of Appeal on January 18, 2013, 140 days had elapsed without Homeowner filing a complaint.

TCO at 8. For these reasons, the trial court "did not excuse Homeowner's failure to comply with the procedural rules" and denied his petition to reinstate the appeal.

In light of the record and the explanation provided by the trial court, we conclude that the court's decision in this regard was reasonable.

Accordingly, we affirm the court's order denying Homeowner's petition to reinstate the appeal.

Order affirmed. 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: 5/27/2014