

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

FRANK TOSCANO AND CHERYL
TOSCANO,
Appellees

IN THE SUPERIOR COURT
OF
PENNSYLVANIA

v.

BASSANER LTD A/K/A BASSANER
MOVING COMPANY, LTD A/K/A
BASSANER MOVING AND STORAGE,
LTD A/K/A GUESS WHO'S MOVING CO.
AND ANDREW BASSANER
Appellants

No. 2088 EDA 2013

Appeal From The Judgment Entered June 10, 2013
In The Court of Common Pleas of Philadelphia County Civil Division
At No(s): 011201636

BEFORE: BOWES, OTT, and JENKINS, JJ.

MEMORANDUM BY JENKINS, J.:

FILED JUNE 23, 2014

Bassaner LTD and Andrew Bassaner (collectively "the Bassaners") appeal from an order docketed on June 13, 2013 reviving a judgment that Frank and Cheryl Toscano ("the Toscanos") entered against the Bassaners in 2005.

The Bassaners argue that the trial court lacked personal jurisdiction over Andrew Bassaner. This argument is not cognizable in revival of judgment proceedings. Moreover, the Bassaners litigated this issue without success during earlier stages of this case, so the law of the case doctrine bars them from raising it again. The Bassaners also argue that the Toscanos' receipt of monies from the Toscanos'

insurer extinguishes their right of recovery from the Bassaners. This argument is not cognizable within the narrow scope of revival proceedings. Moreover, payment from a collateral source such as the Toscanos' insurer does not preclude them from obtaining full recovery of their damages from the Bassaners. For these reasons, and for others discussed below, we affirm.

A detailed procedural history will place the Bassaners' arguments in proper context. Andrew Bassaner was the principal of Bassaner LTD, a moving company. In 2000, the Toscanos contracted with Bassaner LTD to move the Toscanos' belongings from one residence to another¹. On June 26, 2000, Bassaner LTD's employees loaded the Toscanos' belongings onto a moving truck with the understanding that Bassaner LTD would deliver these items to the Toscanos' new residence on July 31, 2000². Bassaner LTD delayed delivery until August 10, 2000, and many of the Toscanos' belongings were missing

¹ Bassaners' Motion For Summary Judgment (6/10/13), exhibit 1.

² Toscanos' Reply Brief In Support Of Motion For Judgment Of Revival (June 3, 2013), exhibit B, pp. 8-10 (summarizing evidence that the Toscanos introduced in a July 2011 arbitration proceeding against the Bassaners in the American Arbitration Association). The evidence introduced during the arbitration proceeding is not in dispute, because as explained on pages 2-6, *infra*, (1) the Toscanos prevailed in the arbitration, (2) the trial court confirmed the arbitration award and entered judgment in the Toscanos' favor, and (3) this Court quashed the Bassaners' appeal from the judgment.

at the time of delivery³. The Toscanos filed a report with the Philadelphia Police Department, which informed them that Andrew Bassaner had been arrested for theft⁴. The Bassaners, it turned out, had been accused of illegally selling personal property of over 100 victims who had entrusted them to move their personal belongings⁵. On August 20, 2000, the Toscanos accompanied the police to the Bassaners' filthy, urine-soaked and rat-infested warehouse in an attempt to recover their property⁶. The Toscanos could only find a few of their belongings jumbled together with other peoples' property. The recovered items were all damaged⁷. Despite subsequent visits, the Toscanos only recovered one third of the items they had entrusted to the Bassaners⁸.

In October 2000, the Toscanos filed a civil complaint and later an amended complaint against the Bassaners in the Court of Common Pleas of Philadelphia County ("the trial court") at October Term, 2000,

³ *Id.*, pp. 10-13.

⁴ *Id.*, pp. 13-14.

⁵ *Id.*, p. 19.

⁶ *Id.*, pp. 14-19. The Toscanos described the warehouse as "looking like Beirut" and saw rat droppings throughout the site. *Id.*, p. 14. A police detective testified that she "never saw such a mess in [her] entire life." *Id.*, p. 17.

⁷ *Id.*, pp. 14-16.

⁸ *Id.*, pp. 15-19.

No. 1786. Both Andrew Bassaner and Bassaner LTD filed preliminary objections through Charles Kovler, Esquire, the same attorney who represents them in the present appeal⁹. In early 2001, the Toscanos discontinued their action in the trial court and commenced an action against the Bassaners in the American Arbitration Association (“AAA”)¹⁰. On November 7, 2001, following a four-day hearing, an arbitrator awarded the Toscanos \$177,675.00 in damages against the Bassaners¹¹.

On December 12, 2001, the Toscanos filed a petition in the trial court at December Term, 2001, No. 1636 to confirm the arbitration award. The docket at this caption number reflects that the Toscanos served the petition upon Andrew Bassaner on March 20, 2002, while he was awaiting criminal trial on hundreds of charges relating to his thefts as principal of Bassaner, LTD. On April 4, 2002, Andrew Bassaner pled guilty in the criminal division of the trial court to 174 theft-related charges¹². The trial court sentenced him to 2-4 years of

⁹ Bassaners’ motion for summary judgment, exhibit 11 (docket entries from action at October Term, 2000, No. 1786).

¹⁰ *Id.*

¹¹ *Id.*, exhibit 6.

¹² Toscanos’ Memorandum Of Law In Support Of Their Motion For Judgment Of Revival, p. 12 n. 12 (filed April 30, 2013). In addition, this Court takes judicial notice of Andrew Bassaner’s criminal docket at CP-51-CR-0405441-2001. ***In Re Schulz’ Estate***, 139 A.2d 560, 563

incarceration plus 21 years of probation and ordered him to pay over \$1 million in fines and restitution¹³.

The Bassaners filed preliminary objections to strike service of the petition to confirm, which the trial court sustained. In October 2003, the Toscanos filed an amended petition to confirm the arbitration award, and after multiple attempts, they successfully served the amended petition on both Bassaner, LTD and Andrew Bassaner. On November 19, 2003, the Bassaners filed a motion to vacate the award insisting the AAA arbitrator lacked jurisdiction over Andrew Bassaner and therefore had no authority to enter an award against him personally¹⁴. On April 22, 2004, the trial court denied the Bassaners' motion to vacate the award¹⁵. On April 26, 2005, the trial court granted the Toscanos' amended petition to confirm the arbitration award and entered judgment against the Bassaners in the amount of

(Pa.1958) ("the entire record of this estate, including the record before the various courts, was admitted into evidence and, even if it were not, we could take judicial notice thereof").

¹³ *Id.*

¹⁴ R.R. 148-157a.

¹⁵ Trial Court Docket, December Term, 2001, No. 1636.

\$177,675.00¹⁶. This Court subsequently held that the April 26, 2005 order was a final, appealable order for purposes of appeal¹⁷.

On July 5, 2005, the Bassaners appealed to the Superior Court at 1934 EDA 2005. The Toscanos moved to quash this appeal as untimely. In an answer to the motion to quash, the Bassaners claimed that they had the right to appeal *nunc pro tunc*, because they never received service of the April 26, 2005 order confirming the arbitration award (or, for that matter, service of the October 2003 amended petition to confirm the arbitration award). On September 12, 2006, this Court remanded the case for an evidentiary hearing on the issue of service¹⁸. On February 6, 2007, the trial court entered findings of fact and conclusions of law determining that Andrew Bassaner received valid service of the amended petition on October 15, 2003 at the Alternative and Special Detention Work Release Center, where he was serving his criminal sentence¹⁹. The trial court also determined that on or after November 18, 2003, counsel received service of the amended petition on behalf of Bassaner LTD²⁰. Finally, the trial court

¹⁶ R.R. 164a.

¹⁷ ***Toscano v. Bassaner***, 1934 EDA 2005, slip op., pp. 5-6 (8/3/07).

¹⁸ ***Toscano v. Bassaner***, 1934 EDA 2005, slip op. (9/12/06).

¹⁹ R.R. 166-168a.

²⁰ *Id.*

found that the Bassaners received notice of the April 26, 2005 order confirming the arbitration award²¹. On August 3, 2007, based on the trial court's findings, this Court quashed the Bassaners' appeal at 1934 EDA 2005²².

Between 2007 and 2013, the Toscanos did not pursue collection efforts on the judgment because they believed the Bassaners were insolvent. This changed on January 23, 2013, when a Florida attorney notified the Toscanos' attorney that Andrew Bassaner was living in central Florida under an alias and apparently had significant financial resources, since he was renting a home for \$14,000 a month and driving a luxury car²³. The following day, the Toscanos filed a praecipe for writ of revival of the 2005 judgment²⁴. On February 14, 2013, the Toscanos served the writ of revival on Andrew Bassaner during his violation of parole hearing in Philadelphia²⁵.

²¹ *Id.*

²² ***Toscano v. Bassaner***, 1934 EDA 2005, slip op. (8/3/07).

²³ Trial Court Opinion, 8/18/13, p. 3 (citing Toscanos' Motion for Judgment on the Pleadings, Affidavit of Plaintiffs' Counsel, ¶ 6).

²⁴ Trial court Docket, December Term, 2001, No. 1636.

²⁵ R.R. 28a (Bassaners' Verification Of Defense Or Answer To Plaintiffs' Writ Of Revival, p. 5). Andrew Bassaner objected in the trial court to service of the writ while he was in custody, but he does not raise this objection in his appellate brief.

On April 15, 2013, the Bassaners filed an answer requesting the trial court to strike the writ of revival because (1) it lacked jurisdiction over Andrew Bassaner; (2) the compensation that the Toscanos received from their own insurance company constituted a satisfaction of their judgment against the Bassaners; (3) the release that the Toscanos signed with their own insurance company extinguished their right of recovery against the Bassaners; and (4) the Toscanos' attorney was a fraudster²⁶. Furthermore, on April 14, 15, and 16, 2013, the Bassaners served discovery requests on the Toscanos²⁷.

On April 30, 2013, the Toscanos filed a motion for judgment on their writ of revival²⁸. One week later, the Toscanos filed a motion for protective order from the Bassaners' discovery requests²⁹.

On May 14, 2013 and May 31, 2013, without obtaining leave of court or the Toscanos' consent, the Bassaners filed amended answers to the writ of revival³⁰. On June 10, 2013, the Bassaners filed a

²⁶ R.R. 24-31a.

²⁷ R.R. 51-56a.

²⁸ R.R. 37-45a.

²⁹ R.R. 46-50a.

³⁰ R.R. 120a.

motion for summary judgment, but the prothonotary did not docket this motion until June 11, 2013³¹.

In an order signed on June 10, 2013 and docketed the next day, the trial court granted the Toscanos' motion for judgment on their writ of revival and ordered the prothonotary to enter judgment of revival against the Bassaners³². Presumably, when the trial court signed the order granting the Toscanos' motion, it did not know about the Bassaners' motion for summary judgment that was filed the same day.

On July 2, 2013, the Bassaners filed a notice of appeal to this Court³³, even though two motions (the Bassaners' motion for summary judgment and the Toscanos' motion for protective order) remained undecided. On July 19, 2013, the Bassaners filed a statement of matters complained of on appeal³⁴.

On August 14, 2013, the trial court denied the Bassaners' motion for summary judgment and granted the Toscanos' motion for protective order³⁵.

³¹ **See** trial court docket.

³² R.R. 129a (showing that court signed order on June 10, 2013); see *also* docket (showing date of entry on docket).

³³ **See** trial court docket.

³⁴ **Id.**

³⁵ **Id.**

Having outlined the procedural history of this case, we now address whether we have jurisdiction over the Bassaners' appeal. Generally, an appeal is only permissible from a final order unless otherwise permitted by statute or rule of court. **Zitney v. Appalachian Timber Products, Inc.**, 72 A.3d 281, 285 (Pa.Super.2013) (citing **Fanning v. Davne**, 795 A.2d 388, 391 (Pa.Super.2002)). Here, the trial court clearly intended its June 11, 2013 order granting the Toscanos' motion for judgment of revival to be a final determination. Technically, however, there was no final order, because two motions (the Bassaners' motion for summary judgment and the Toscanos' motion for protective order) remained undecided.

Nevertheless, we have jurisdiction over this appeal pursuant to Pa.R.A.P. 905(a)(5), which provides that "a notice of appeal filed after the announcement of a determination but before the entry of an appealable order shall be treated as filed after such entry and on the day thereof." Under Rule 905(a)(5), when an appeal is filed after a final determination but before entry of judgment, the entry of judgment perfects what otherwise would be a premature appeal. **See Jones v. Rivera**, 866 A.2d 1148, 1149 n. 1 (Pa.Super.2005) (under Rule 905(a)(5), appeal filed after the denial of post-trial motions was perfected through subsequent entry of judgment).

Although the Bassaners' appeal was premature on the date of their notice of appeal, it subsequently was perfected by the entry of the August 14, 2013 orders denying the Toscanos' motion for summary judgment and granting the Toscanos' motion for protective order. Stated in terms of Rule 905(a)(5), the June 11, 2013 order was an "announcement of a determination," and the August 14, 2013 orders constituted the "entry of. . . appealable order[s]." Therefore, we proceed to the issues raised in the Bassaners' appeal.

The Bassaners' brief raises two issues in their statement of questions presented:

1. Is lack of contractual in-personam jurisdiction and failure to serve Andrew Bassaner personally with a notice of claim before the [AAA] a non-waivable defense unless a signed submission form is presented to the arbitrator which if proven renders the judgment void as a matter of law and can that defense be raised in defense to a writ of revival?
2. Are the verifications of defense sufficient that asserted no in personam jurisdiction over Andrew Bassaner, recovery of property in kind that may be considered payment of the judgment, general release and res judicata sufficient to permit discovery to develop the defenses and was it an abuse of discretion by the court to deny discovery where the plaintiffs and their counsel have engaged in a heroic effort to conceal by fraud and conspiracy the fact that they have recovered their property and is that de facto payment of the lien of judgment thus a defense to the writ of revival?³⁶

³⁶ The two issues in the Bassaners' brief are condensed versions of the twenty issues raised in their Pa.R.A.P. 1925(b) statement of matters complained of on appeal, a number approaching the level of prolixity that we cautioned against in *Kanter v. Epstein*, 866 A.2d 394 (Pa.Super.2004) (quashing appeal due to extraordinarily lengthy Rule 1925(b) statement).

The Bassaners' first argument does not warrant relief, since the Bassaners do not have the right to contest jurisdiction in a proceeding to revive a judgment. The only cognizable defenses in a proceeding to revive a judgment lien are that the judgment does not exist, has been paid or has been discharged. ***PNC Bank, Nat. Ass'n v. Balsamo***, 634 A.2d 645, 649 (Pa.Super.1993). The claim that the AAA arbitrator lacked jurisdiction over Andrew Bassaner falls outside this narrow class of defenses.

Even if this defense were cognizable in a revival proceeding, the Bassaners previously litigated this issue without success during an earlier stage of this case. In November 2003, after the Toscanos filed their amended petition in the trial court to confirm their AAA arbitration award, the Bassaners moved to vacate the award on the ground that the AAA arbitrator lacked jurisdiction over Andrew Bassaner. In April 2005, the trial court rejected this argument and granted the Toscanos' amended petition to confirm and entered judgment against the Bassaners. The Bassaners had the right to appeal this decision, but their appeal was quashed as untimely in August 2007. Due to the quashal, the trial court's decision that the AAA had jurisdiction over Andrew Bassaner is no longer subject to challenge. ***Garrison v. Erb***, 227 A.2d 848, 849 (1967) (where issues raised in mortgagors' petition for resale of property at sheriff's sale

with a rule to show cause were adjudicated against the mortgagors, and their appeal from that decision was quashed, issues could not be relitigated in subsequent action to quiet title). Moreover, under the law of the case doctrine, the trial court could not reopen jurisdictional questions during revival of judgment proceedings that it decided in the course of affirming the arbitration award in 2005. **Commonwealth v. Starr**, 664 A.2d 1326, 1331 (Pa.1995) (law of the case doctrine embodies concept that a court involved in the later phases of a litigated matter should not reopen questions decided by the same court in an earlier phase)³⁷.

In their second argument on appeal, the Bassaners contend that the trial court should have permitted discovery during revival proceedings on the issues of (1) jurisdiction over Andrew Bassaner, (2) recovery of property in kind that may be considered payment of the judgment, (3) general release and (4) res judicata. None of these subjects warrant discovery. The trial court stated that this argument fails because the Bassaners raised these defenses in supplemental

³⁷ Although the trial court opinion did not mention **Garrison, Starr** or the concepts therein, we may affirm on any ground that appears in the record. **Commonwealth v. Truong**, 36 A.3d 592, 593 n. 2 (Pa.Super.2012) (*en banc*) (“This [C]ourt may affirm [the trial court] for any reason, including such reasons not considered by the trial court”).

answers to the writ of revival without seeking leave of court or the Toscanos' consent to file amended answers³⁸.

We agree with the reasoning of the distinguished trial court, and we also affirm on other grounds rooted in the record. ***Truong, supra.***

First, as discussed above, the Bassaners have no right to challenge jurisdiction over Andrew Bassaner in this stage of the case.

Second, the Bassaners' claim that the Toscanos concealed their recovery of property falls outside the three types of issues that the Bassaners can raise in revival proceedings. ***Balsamo, supra.*** Whether the Toscanos recovered items is irrelevant to whether this judgment exists (it clearly does), whether it has been paid (it clearly has not), or whether it has been discharged (it clearly has not). Even if this defense were cognizable in revival proceedings, it is devoid of merit. The Toscanos testified during the arbitration in 2001 that they had recovered various items, all of which were damaged. There is no evidence that the Toscanos concealed recovery of any items.

Third, the Bassaners assert that the Toscanos signed a release with their insurance company, Lititz, in order to receive \$52,000 in insurance proceeds for damaged property. The Bassaners take the novel position that this release somehow operates to release the Bassaners in full. Once again, this claims falls outside the three

³⁸ Trial Court Opinion, 8/18/13, p. 5.

cognizable issues in revival proceedings: (1) whether a judgment exists, (2) has been paid or (3) has been discharged. Even if we reviewed this claim on the merits, it would fail, for under the collateral source rule, the Bassaners obtain no benefit from payments by Lititz to the Toscanos. ***Nigra v. Walsh***, 797 A.2d 353, 356 (Pa.Super.2002) (“[t]he collateral source rule provides that payments from a collateral source shall not diminish the damages otherwise recoverable from the wrongdoer”); ***see also Beechwoods Flying Service, Inc. v. Al Hamilton Contracting Corp.***, 476 A.2d 350, 352 (1984) (collateral source rule “intended to avoid precluding a claimant from obtaining redress for his or her injury merely because coverage for the injury was provided by some collateral source, e.g. insurance”). In addition, the plain language of the release does not apply to the Bassaners. The Toscanos only released “[Lititz], its parents, subsidiaries, affiliates, employees, agents, insurers and attorneys, of and from any further claims or liability under a policy of homeowners insurance.”³⁹ The Bassaners do not fall within any of these categories.

Finally, the Bassaners have waived their res judicata argument by failing to develop it in their brief or citing to any relevant authority. ***In Re S.T.S., Jr.***, 76 A.3d 24, 42 (Pa.Super.2013) (issue is waived

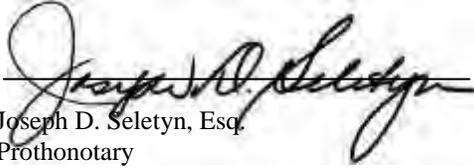
³⁹R. 118-119a.

J-A09042-14

when appellant fails to develop his issue in an argument and fails to cite any legal authority).

Order granting judgment of revival affirmed. Toscanos' motion to quash appeal denied as moot.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/23/2014