

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

IN RE ESTATE OF GRAYSON L. HARE,
SR.,

IN THE SUPERIOR COURT OF
PENNSYLVANIA

v.

GRAYSON L. HARE, JR.,

Appellant

No. 370 MDA 2012

Appeal from the Order Entered January 24, 2012
In the Court of Common Pleas of York County
Orphans' Court at No(s): 6708-1619

BEFORE: BOWES, OLSON, and WECHT, JJ.

MEMORANDUM BY BOWES, J.:

Filed: February 19, 2013

Grayson L. Hare, Jr., appeals *pro se* from the January 24, 2012 order entering default judgment against him based on his failure to abide by pretrial orders. We affirm.

Grayson L. Hare, Sr., died testate on October 16, 2008. On November 3, 2008, the Register of Wills of York County admitted to probate decedent's last will and testament dated October 20, 2004, and issued letters testamentary to Shirley J. Simpson, the executrix named therein. The senior Mr. Hare left one-half of his assets to Ms. Simpson, his step-daughter, and one half of his assets divided equally among Appellant and Appellant's two daughters. Ms. Simpson was two when decedent married her mother and was raised as his daughter, as evidenced by the fact that

the will refers to Ms. Simpson as decedent's daughter rather than step-daughter. Ms. Simpson also functioned as decedent's power of attorney prior to his death.

On October 26, 2009, Appellant filed an appeal from probate to the orphans' court division claiming that the will was procured by the undue influence of Ms. Simpson. Additionally, on November 10, 2009, Appellant filed a \$31,056.96 claim, which was later withdrawn, against the estate. On December 30, 2009, Appellant asked to amend the appeal from probate to add an averment that his father's signature was forged. That claim was subsequently withdrawn.

Ms. Simpson thereafter filed an accounting that covered both her actions as power of attorney and operated as a final account for the estate. Despite being represented by counsel, Appellant filed *pro se* objections to the account that challenged nearly every expenditure outlined therein, including payments to the nursing home where decedent resided prior to his death. Those objections were dismissed as untimely and improperly filed *pro se* by a litigant who was represented by counsel. On October 19, 2011, the orphans' court confirmed the account and entered a decree of distribution of the \$177,849.09 balance in the estate to the beneficiaries in accordance with the dictates of the will.

Concurrently with the accounting matter, the will contest was proceeding. There were several status conferences, hearings, and

subpoenas issued. The pre-trial conference was scheduled for December 19, 2011. Four days prior to the conference, Appellant informed Ms. Simpson by email that he fired his attorney of record and would proceed *pro se* until he could find another lawyer. Appellant's counsel attended the conference, but, despite being ordered to appear at that proceeding, Appellant failed to do so. At that time, Appellant's attorney was allowed to withdraw, the will contest was scheduled for trial commencing on January 23, 2012, and the trial court entered an order directed to Appellant personally. The order indicated that trial would not be delayed and that Appellant had until January 6, 2012, to inform the court as to whether he planned to represent himself or have an attorney enter an appearance in the case. In the order, the court also set forth that the trial date had been scheduled for a significant period of time and that a continuance would not be allowed.

On January 18, 2012, the court entered an order indicating the following. It received an *ex parte* communication from Appellant seeking a trial continuance based upon health problems, and the court forwarded a copy of the request to Ms. Simpson with the medical information that formed the basis for the request. Specifically, Appellant sent the court an affidavit of a health care provider dated June 9, 2011, and that affidavit indicated that Appellant was "not continuously incapacitated and [was] able to work." Order of Court, 1/18/12, at 1. On January 17, 2012, Ms. Simpson emailed the court her opposition to any delay in the inception of trial. Ms. Simpson

noted that since Appellant's health problem arose on June 9, 2011, he had belatedly requested a continuance on its basis. She also set forth that she expended considerable financial resources to prepare for the trial, including expert witness fees, travel expenses, and subpoena fees and averred that a continuance would substantially prejudice her. The court denied the continuance.

On January 23, 2012, the same day as trial, Ms. Simpson filed a motion to dismiss the appeal from probate based on the following. On October 6, 2011, the orphans' court issued an order directing that trial briefs be filed two weeks prior to trial, or by January 9, 2012. Appellant had violated this order and had yet to file a brief. At an August 1, 2011 status conference, the parties agreed to prepare and submit a joint trial notebook to the court. On January 5, 2012, Ms. Simpson contacted Appellant and asked that he forward his marked exhibits, which he refused to do. Ms. Simpson averred that Appellant's failure to file a trial brief and forward a copy of his exhibits demonstrated that he was not prepared for trial.

On January 23, 2012, Appellant appeared for trial with various notebooks. After hearing argument, the court entered an order of default judgment against Appellant based upon his failure to prepare a timely trial brief and refusal to work with Ms. Simpson's counsel to "get this matter ready for trial." Order of Court, 1/23/12, at 2. It ruled that Appellant had failed to present a satisfactory excuse for his lack of preparedness on

January 23, 2012.¹ This appeal followed the January 24, 2012 entry of that order.

In this appeal, Appellant raises no objections to the orphans' court's decision to confirm Ms. Simpson's account and enter a decree of distribution in accordance with the proposed distribution outlined in the account.

Rather, his complaints relate to resolution of the will contest proceedings:

- A. Whether the lower court abused its discretion in entering a default judgment on the day of trial where the Appellant had complied with court orders, had served and was ready to produce additional evidence at trial to support his claim?
- B. Whether the lower court erred in denying a continuance when the court allowed former counsel to withdraw and not giving the Appellant an opportunity to seek new counsel?
- C. Whether the lower court abused its discretion in failing to recognize the thirty documents already in evidence, and the additional proof, and the writing expert at trial to substantiate the Appellant's objection to the decedent's will based on forgery which was altogether sufficient to overcome dismissal?

Appellant's brief at 4.

Appellant's first challenge is to the trial court's entry of default against him on January 23, 2012. In its Pa.R.A.P. 1925(b) opinion, the trial court indicated that it had entered judgment against Appellant because he violated

¹ While Appellant maintains on appeal that he was ready to proceed on January 23, 2012, the record of the proceeding neither refutes nor confirms that representation. The notes of testimony from that date contains only a discussion of Appellant's violation of pretrial orders. Ms. Simpson states that Appellant did have exhibits, eighty percent of which had been excluded in a pre-trial ruling.

court orders when he “failed to appear for a pre-trial conference on December 19, 2011, he failed to submit the requisite trial memorandum, and failed to give opposing counsel marked exhibits to create a joint trial binder for the court before the beginning of the trial.” Trial Court Opinion, 4/18/12, at 8. The trial court also relied upon Appellant’s lack of preparedness at the start of trial.

Thus, the January 23, 2012 dismissal actually had two components. First, it was entered due to Appellant’s failure to comply with court directives; second, it was premised upon Appellant’s lack of preparedness to proceed on January 23, 2012. In this later connection, Ms. Simpson asserts that most of the documents that Appellant proposed to submit as exhibits already had been ruled inadmissible based upon a motion *in limine* that she had been granted. **See** footnote one, *supra*.

Appellant’s argument on appeal recites principles pertinent only to entry of a default judgment. Since the order in question expressly stated that the court was entering default judgment due to Appellant’s disregard of its directives, we will likewise analyze the ruling under standards applicable to that type of dismissal, which is subject to the following standard of review.² A refusal to open a default judgment is

² While Appellant did not file a motion to open default judgment, we note that the trial court expressly told him that he had to file the present appeal within thirty days. In light of the scenario in question and the court’s
(Footnote Continued Next Page)

within the sound discretion of the trial court, and we will not overturn that decision absent a manifest abuse of discretion or error of law.

However, we will not hesitate to find an abuse of discretion if, after our own review of the case, we find that the equities clearly favored opening the judgment.

An abuse of discretion is not a mere error of judgment, but if in reaching a conclusion, the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill will, as shown by the evidence or the record, discretion is abused.

Smith v. Morrell Beer Distributors, Inc., 29 A.3d 23, 25 (Pa.Super. 2011) (quoting ***Dumoff v. Spencer***, 754 A.2d 1280, 1282 (Pa.Super. 2000)).

A court is permitted to enter default judgment as a sanction for a party's violation of an order. ***City of Philadelphia v. Fraternal Order of Police Lodge No. 5 (Breary)***, 985 A.2d 1259 (Pa. 2009). Our Supreme Court outlined four factors an appellate court is to apply in considering whether default was properly entered due to disregard of a court order. That decision specifically related to a discovery order. We therefore have tailored the factors so that they can be cogently applied to the present case, which pertains to a violation of directives to provide trial materials. The considerations are: the prejudice sustained by the non-offending party and

(Footnote Continued) _____

information, we cannot find fault with Appellant's failure to file a petition to open default. Moreover, Appellant preserved his objection to the ruling by argument presented at the January 23, 2012 proceeding.

the party's ability to cure it; the sanctioned party's willfulness or bad faith in not abiding by the order; the number of violations committed by the offending party; and the severity of the sanction in question considered in light of the offending party's conduct. *Id.* The first two factors receive the most weight in the analysis. *Id.*

The prejudice suffered by Ms. Simpson was substantial and incurable. She had expended significant time and money in preparing for trial and was unable to adequately do so since she was not briefed on the trial issues and was not given exhibits that Appellant planned to introduce. Trial had started, so the prejudice could not be cured. Appellant committed three infractions by failing to appear for a pretrial conference, to cooperate in preparation of trial materials, and to prepare a timely brief on the issues he planned to present to the trial court. We also view Appellant's defaults as willful since he offered no explanation as to why he did not appear at the pretrial conference, did not prepare his trial brief in a timely manner, and refused to cooperate with Ms. Simpson's counsel, who asked three weeks in advance of trial for the documents to place in the joint trial notebook.

Appellant suggests that his non-cooperation was not established because Ms. Simpson could not locate the email sent requesting the trial exhibits. However, on January 23, 2012, Appellant admitted to having received the request to give Ms. Simpson his marked trial exhibits. N.T., 1/23/12, at 6-7. Counsel for Ms. Simpson also outlined that Appellant

refused to cooperate. In light of the facts in question, we cannot conclude that the trial court committed an abuse of discretion in awarding the most severe sanction available to it.

Next, we consider Appellant's position that the trial court improperly refused Appellant's request for a continuance. "This Court has noted that a trial court has broad discretion regarding whether a request for continuance should be granted, and we will not disturb its decision absent an apparent abuse of that discretion." *In re K.J.*, 27 A.3d 236, 243 (Pa.Super. 2011) (citation and quotation marks omitted). Initially, we note that there is a disconnect between the reason that Appellant sought a continuance in the trial court and the argument presented on appeal. Appellant stated to the trial court that he needed a continuance based upon a physical disability. The court rejected that request due to Appellant's failure to substantiate that his medical condition precluded him from attending trial. On appeal, Appellant suggests that he needed a continuance to secure an attorney. However, Appellant did not seek a continuance on this basis at any point in the trial proceedings.

To support his position that he needed a continuance to secure a lawyer, Appellant references statements he made to the court on January 23, 2012, regarding his attorney's recent withdrawal. However, those remarks were offered as his excuse for not timely preparing his trial brief and not cooperating with Ms. Simpson's request to forward his trial

exhibits. They were not leveled in support of a continuance request. Furthermore, an order was sent to Appellant on December 19, 2012, directing him to secure an appearance by an attorney prior to trial and that no continuances would be granted if he did not obtain one. Appellant knew his attorney no longer represented him before that date since he sent an email on December 15, 2011, to Ms. Simpson informing her that he had fired his lawyer. Given that Appellant fails to substantiate either that his medical condition warranted a continuance or that he lacked sufficient time to secure another lawyer, we conclude that the continuance rulings by the trial court were not an abuse of discretion.

Appellant's final argument fails, on its face, due to the procedural posture of this proceeding. He claims that the matter should not have been dismissed since documents admitted into evidence substantiated that he had sufficient proof regarding forgery. However, none of Appellant's proof was admitted into evidence. Instead, prior to proceeding to the evidentiary portion of the proceeding, the matter was dismissed based on Appellant's noncompliance with pre-trial directives. In light of the foregoing, we affirm.

Order affirmed.