

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

8012 ALLENTOWN PIKE, LLC,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
ANTHONY VALERIANO, JR., AND	:	
MYRTLE ANN VALERIANO, Husband and	:	
Wife,	:	
	:	
Appellees	:	No. 679 MDA 2013

Appeal from the Order entered on April 4, 2013
in the Court of Common Pleas of Berks County,
Civil Division, No. 10-14740

BEFORE: SHOGAN, ALLEN and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED DECEMBER 03, 2013**

8012 Allentown Pike, LLC ("Plaintiff"), appeals from the Order denying its Petition seeking permission to file a Notice of appeal *nunc pro tunc*. Additionally, Anthony Valeriano, Jr., and Myrtle Ann Valeriano (collectively "Defendants") have filed a Petition to quash the appeal as untimely. We deny Defendants' Petition to quash and reverse the trial court's Order.

The trial court set forth the procedural history underlying this appeal as follows:

[In August 2010,] Plaintiff brought [this] action against [] Defendants for breach of contract, negligence and fraud[,] alleging [that] Defendants did not disclose known structural damage and non-repaired fire damage to property purchased by [] Plaintiff. At the conclusion of discovery, [] Defendants filed a [M]otion for summary judgment[,] which [the trial court] granted by [an] Order [dated] December 14, 2012 [(hereinafter

“the Summary Judgment Order”).^{1]} [In response, Plaintiff filed a] Motion for Reconsideration[, which the trial court denied] on January 8, 2013[, and dismissed Plaintiff’s Complaint with prejudice].

Trial Court Opinion, 5/28/13, at 1 (footnote added).

Plaintiff filed a Notice of appeal from the Summary Judgment Order on January 22, 2013. However, the last day to timely file a notice of appeal was Friday, January 18, 2013. **See** Pa.R.A.P. 903(a) (providing that a notice of appeal “shall be filed within 30 days after the entry of the order from which the appeal is taken.”). Accordingly, Plaintiff’s Notice of appeal was filed one day late.²

On February 5, 2013, Defendants filed a Petition to quash Plaintiff’s appeal, pointing out that it was untimely. In response, this Court entered a *per curiam* Order granting Defendants’ Petition to quash. Plaintiff then filed a Petition requesting this Court to grant it permission to file a notice of appeal *nunc pro tunc*. In this Petition, Plaintiff’s counsel, Robin J. Gray, Esquire (“Attorney Gray”), asserted as follows:

[At] the time that the [Summary Judgment] Order was originally entered ..., [Attorney Gray’s] husband was diagnosed with brain cancer. Counsel’s husband underwent surgery to remove the tumor at Hershey Medical Center [on] November 29, 2012.

¹ Since the Prothonotary entered the Summary Judgment Order on the trial court’s docket on December 19, 2012, the thirty-day period for filing a notice of appeal commenced on that date. **See** Pa.R.A.P. 108(b) (providing that “[t]he date of entry of an order in a matter subject to the Pennsylvania Rules of Civil Procedure shall be the day on which the clerk makes the notation in the docket that notice of entry of the order has been given”).

² Monday, January 21, 2013 was a state holiday. Plaintiff filed its Notice of appeal on Tuesday, January 22, 2013.

Afterward, he was placed in [a] ... rehabilitation hospital for three and a half weeks, being unable to walk for himself. ... [Attorney Gray] was unable to work very much from the end of November through the end of January due to traveling back and forth to Hershey Hospital and Rehab and taking care of her husband at home. Although a care giver was hired to assist, much of the care was placed upon [Attorney Gray]. Counsel does not have any associates or secretary to assist in the office. ... Counsel filed the Notice of appeal [on behalf of Plaintiff] as soon as she could when she was able to come back into the office and re-establish her practice. ... [Attorney Gray] did everything in her power to ensure that the appeal was filed timely, given the fact that she was away from her practice for an extended period due to her husband's illness.

Petition to File a Notice of Appeal *Nunc Pro Tunc*, 2/5/13, at ¶¶ 5-6, 8-10, 12, 21 (numbering and paragraph breaks omitted). In response, this Court filed a *per curiam* Order denying Plaintiff's Petition without prejudice to raise the issue in the trial court. Plaintiff then filed an identical Petition with the trial court. By an Order entered on April 4, 2013, the trial court denied Plaintiff's Petition requesting permission to file an appeal *nunc pro tunc*, without having conducted a hearing.

Plaintiff timely filed a Notice of appeal from the April 4, 2013 Order. The trial court then ordered Plaintiff to file a Pa.R.A.P. 1925(b) concise statement of errors complained of on appeal, and Plaintiff timely complied.

On appeal, Plaintiff raises the following issue for our review: "Whether[,] in light of the facts presented, the trial court erred in its denial of Plaintiff's Petition to file the Notice of Appeal *Nunc Pro Tunc*[?]" Brief for Plaintiff at 4.

Initially, we note that our standard of review in determining the propriety of a denial of an appeal *nunc pro tunc* is whether the trial court abused its discretion. ***Union Elec. Corp. v. Bd. of Prop. Assessment***, 746 A.2d 581, 583 (Pa. 2000).

The Pennsylvania Supreme Court has characterized the purpose of *nunc pro tunc* restoration of appellate rights as follows:

Allowing an appeal *nunc pro tunc* is a recognized exception to the general rule prohibiting the extension of an appeal deadline. This Court has emphasized that the principle emerges that an appeal *nunc pro tunc* is intended as a remedy to vindicate the right to an appeal where that right has been lost due to certain extraordinary circumstances. Generally, in civil cases, an appeal *nunc pro tunc* is granted only where there was fraud or a breakdown in the court's operations through a default of its officers.

Id. at 584 (citations and internal quotation marks omitted). Our Supreme Court has held that *nunc pro tunc* relief may also be granted where

(1) the appellant's notice of appeal was filed late as a result of *non-negligent circumstances, either as they relate to the appellant or the appellant's counsel*; (2) the appellant filed the notice of appeal shortly after the expiration date; and (3) the appellee was not prejudiced by the delay.

Criss v. Wise, 781 A.2d 1156, 1159 (Pa. 2001) (emphasis added).

Here, it is undisputed that Plaintiff's Notice of appeal was filed one day late. However, Plaintiff maintains that it should be permitted to file a notice of appeal *nunc pro tunc* because Attorney Gray's failure to file a timely

appeal was attributable to non-negligent circumstances. Brief for Plaintiff at 10.³ Specifically, Plaintiff asserts that

[a]t the time that [the Summary Judgment Order] was filed with the Prothonotary, [Attorney Gray's] husband was undergoing brain surgery for a brain tumor and rehabilitation. [Attorney Gray filed] the [N]otice of appeal late due to her inability to be in the office because of her husband. ... [Attorney Gray's] husband was an integral part of Counsel's law office and *handled all of the managerial as well as filing responsibilities for the law firm.*

Id. at 9, 10 (emphasis added).

Under the extraordinary circumstances presented in this case, we determine that Plaintiff has met its heavy burden of establishing all three prongs of the 30-day appeal exception set forth in **Criss, supra**:

- (1) Plaintiff's notice of appeal was filed late due to non-negligent circumstances. After the entry of the Summary Judgment Order, Attorney Gray was forced to be away from her office for an extended period due to her husband's unexpected and serious brain tumor surgery and intensive rehabilitation. Additionally, counsel's husband was the person responsible for filing court documents at Attorney Gray's solo-practitioner law office;
- (2) Upon returning to her office, Attorney Gray filed the Notice of appeal merely *one day* late; and
- (3) There is nothing in the record to indicate that Defendants were prejudiced by the one-day delay.

³ We note that Plaintiff generally raised this claim in its Rule 1925(b) Concise Statement. We decline to find waiver since (1) Plaintiff's Concise Statement did raise a challenge to the trial court's denial of its Petition seeking permission to appeal *nunc pro tunc*; and (2) in that Petition, Plaintiff averred that non-negligent circumstances had caused Attorney Gray to file an untimely Notice of appeal. Accordingly, Plaintiff's Concise Statement was sufficient to alert the trial court of the issues that Plaintiff wished to raise on appeal.

Accordingly, Plaintiff is entitled to *nunc pro tunc* relief, as it should not lose its day in court due to the non-negligent acts of its attorney. **See Bass v. Commonwealth Bureau of Corr., et al.**, 401 A.2d 1133, 1135-36 (Pa. 1979) (allowing appellant to appeal *nunc pro tunc* where appeal was filed four days late because appellant's attorney placed the notice of appeal on the desk of the secretary responsible for ensuring that appeals were timely filed and the secretary became ill and left work, not returning until after the expiration of the period for filing an appeal); **see also Cook v. Unemployment Comp. Bd. of Review**, 671 A.2d 1130, 1132 (Pa. 1996) (granting appeal *nunc pro tunc* where claimant filed appeal four days late because he was hospitalized); **Tony Grande, Inc. v. Workmen's Comp. Appeal Bd.**, 455 A.2d 299, 300 (Pa. Cmwlth. 1983) (where the appellant's counsel was hospitalized during the appeal period for unexpected and serious cardiac problems, and counsel's associate intervened and filed a notice of appeal only three days after the expiration of the appeal period, holding that counsel's non-negligent failure was reason to allow appeal *nunc pro tunc*).

Petition to quash denied. Order reversed. Plaintiff is granted the right to appeal *nunc pro tunc*. Jurisdiction relinquished.

J-S67035-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style with a horizontal line drawn through the middle of the text.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/3/2013