NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

PENNSYLVANIA AMERICAN WATER COMPANY Appellee v. THOMAS GRECO AND VICTOR GRECO AND THOMAS GRECO AND VICTOR GRECO T/D/B/A PHOENIX ESTATES Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 85 MDA 2012

Appeal from the Judgment Entered February 22, 2012
In the Court of Common Pleas of Luzerne County
Civil Division at No(s): 557-C of 2004

BEFORE: MUSMANNO, OLSON, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: January 9, 2013

Defendants/Appellants, Thomas Greco, Victor Greco, and Thomas Greco and Victor Greco t/d/b/a Phoenix Estates,[1] appeal from the judgment entered in the Luzerne County Court of Common Pleas in favor of Plaintiff/Appellee, Pennsylvania American Water Company,[2] in this commercial landlord-tenant action. Appellants argue: (1) the jury's verdict was against the weight of the evidence; and (2) the court erred in admitting evidence of Appellant Thomas Greco's prior federal conviction of misprision

* Former Justice specially assigned to the Superior Court.

[1] Victor Greco is the father of Thomas Greco; they are the sole partners of Phoenix Estates. N.T. Jury Trial, 7/25-26/11, at 11, 75, 194.

[2] Appellee is a utility company in the business of providing water and waste water services throughout Pennsylvania. ***Id.*** at 41, 50.

of felony.[3] We affirm.

On June 4, 1996, the parties executed a lease agreement, under which Appellee leased commercial space from Appellants. Appellee paid a total of $24,822 as a security deposit to Appellants.[4] N.T. at 57. The lease agreement provided:

> 17.2 *Return of Deposit.* The Security Deposit shall be returned to LESSEE [Appellee] within thirty (30) days of the termination or expiration of this Lease, less any amounts expended by Lessor [Appellants] to keep LESSEE [Appellee] in full compliance with the Lease.

Lease Agreement at 13.

According to Appellee's complaint, in March of 2002, it notified Appellants that it would not renew the lease, and by the end of June 2002 it vacated the premises. Appellee's Compl., 1/14/04, at ¶¶ 27-29, 31; ***see also*** N.T. at 59. Appellee "made several attempts to procure the return of its security deposits," but Appellants did not respond. Appellee's Compl. at ¶¶ 32-36.

Appellee commenced the instant suit against Appellants nine years

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[3] 18 U.S.C. § 4 ("Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.").

[4] Pursuant to the original lease agreement, Appellee paid Appellants $16,000 for a security deposit. N.T. at 51; Lease Agreement, 6/4/96, at 12. Subsequently, the parties executed addendums to the lease agreement, under which Appellee leased additional space and paid additional security deposits. N.T. at 56-57.

ago, on January 14, 2004, alleging breach of contract, and demanding the amount of the security deposit as well as costs, interest, and delay damages. Appellants filed an answer, new matter, and counterclaim, averring that they lawfully retained all of the security deposit monies because Appellee caused damages valued at $52,227.49 and $12,795.00. Appellants' Answer, New Matter, and Countercl., 3/1/04, at ¶¶ 13, 87.

The trial court stated the following on the record just prior to commencement of trial. ***See*** N.T. at 7-9. By order of August 30, 2010, the court gave notice that trial could commence on July 25, 2011; "the order indicated it would serve as a formal attachment for trial."[5] ***Id.*** at 7. On July 14, 2011,[6] eleven days prior to trial, Appellants filed a motion for continuance, stating, "Defendants have a pre-paid vacation scheduled through July 25, 2011 and will be unable to attend on July 25, 2011[.]"[7] Appellants' Mot. for Continuance, 7/14/11, at 1. Appellee opposed the motion. According to Appellants' brief, the trial court orally denied their

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[5] The court noted that "it is not the Court's common practice to file its scheduling orders of record[, and thus] the record in the Office of the Prothonotary will not include an entry relating to the Court's [scheduling] order of August 30th, 2010[.]" N.T. at 9. Neither party disputed that there was a court order scheduling trial for July 25, 2011. ***See id.***

[6] The court noted that Appellants had sought a continuance through a "letter request" dated July 1, 2011. ***Id.*** at 8.

[7] The motion also cited as a reason for continuance the fact that Appellants had made a settlement offer to Appellee. Appellants' Mot. for Continuance at 2.

motion for continuance the same date.[8] Appellants' Brief at 4. On July 19, 2011, Appellants also filed a motion *in limine* to exclude evidence of Appellant Thomas' federal criminal case.[9]

The case proceeded to trial, as scheduled, on July 25, 2011. Appellants Thomas and Victor did not appear. Citing their absence, Appellee made oral motions for default judgment for nonsuit on Appellants' counterclaim. ***See*** N.T. at 3, 7. Appellants' counsel responded that Appellant Victor "could be in town at 3:00." ***Id.*** at 13. Based on this statement, the court found that with Victor's appearance at 3:00 that day, Appellants were available for trial and denied Appellee's motion for nonsuit. ***Id.*** Appellee called one of its employees, Traci Cross, to testify, and called Appellant Victor as if on cross examination. Appellants presented the testimony of three expert witnesses as well as Appellant Victor. Appellant Thomas did not attend trial.

The jury completed the verdict sheet in favor of Appellee as follows: it found Appellee sustained net damages of $24,822 and Appellants sustained net damages of $0. Jury Verdict Interrogs., 7/26/11. Appellants filed a motion for a new trial or judgment notwithstanding the verdict. The court held a hearing on November 23, 2011, and on December 2nd issued an

[8] Our review of the record and docket did not reveal notes of testimony for a proceedings dated July 14, 2011.

[9] Appellants had also filed a motion *in limine* one day earlier, on July 18, 2011, requesting exclusion of other evidence.

order denying Appellants' motion, granting Appellee's motion for pre-judgment interest, and entering judgment in favor of Appellee in the amount of $38,217.72.[10] Order, 12/2/11. Appellants filed a timely notice of appeal[11] and court-ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal.

In their first issue, Appellants claim the court erred in denying their motion for a new trial, where the jury's award of no damages to them was against the weight of the evidence. In support, Appellants cite "uncontroverted evidence" that Appellee's sole witness, Ms. Cross, testified she was not present at the premises at the beginning or end of the lease term and thus could not testify about the building's conditions at those times, Appellants presented the testimony of three expert damage witnesses, repair estimates of $52,227.49 and $12,795.00, an estimate of "additional utility usage by Appellee of $330-$350 per month," and "photographs of the extensive physical damages." Appellant's Brief at 11-12. Citing Appellant Victor's trial testimony, Appellants aver that the photographs "showed objective physical damage to the premises caused by Appellee . . . not a result of normal wear and tear or some other excluded

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[10] On February 21, 2012, Appellee filed a praecipe for entry of judgment.

[11] The thirtieth day after the court's order ruling on the parties' post-trial motions and entering judgment was Sunday, January 1, 2012. Because the following day was a court holiday, Appellants' notice of appeal on Tuesday, January 3rd was timely. ***See*** 1 Pa.C.S. § 1908.

condition[.]" ***Id.*** at 13. They conclude that the jury's failure to award damages for the uncontroverted physical damage shocks one's sense of justice. We disagree.

We note the relevant standard of review:

> In evaluating a claim that a verdict is against the weight of the evidence, Pennsylvania courts employ a shocks-the-conscience litmus. The trial judge's authority to award a new trial on weight-of-the-evidence grounds is narrowly circumscribed on account of the principle that credibility questions are exclusively for the fact finder. The matter is couched as discretionary in the trial court, with its role in the assessment being afforded primacy in view of its substantially closer vantage to the evidentiary presentation as compared to that of an appellate court. Relief is available in an appellate court only if it can be said that the trial court acted capriciously or palpably abused its discretion.

Hatwood v. Hosp. of Univ. of Pa., 2012 WL 4748194, *5 (Pa. Super. Oct. 5, 2012) (citation omitted).

While Appellants cite the evidence tending to be in their favor, Appellee argues they ignore certain evidence, which we review. Appellee contends that "not one of [A]ppellants' experts opined that any of the damages . . . was directly attributable to the actions or inactions of [A]ppellee[.]" Appellee's Brief at 9. On cross examination, Appellants' expert, David Bogansky,[12] stated that he did not know who Appellee was, and clearly stated he did not know who caused the damage. N.T. at 160

[12] Mr. Bogansky is the president of a commercial and residential building and remodeling company. N.T. at 128.

("[Q:] You don't know who caused [the damage]. . . . [A:] No, nor did I testify to that sir."). Appellants' expert Joseph Elms[13] testified that in February of 2004, he prepared an estimate of $12,795 for repairs, stating "[t]he carpet was shot, the doors had to be replaced, the wall repairs, [and] repainting." ***Id.*** at 184-86. On cross examination, Appellee's counsel asked him if he knew "who did any of the . . . damage[ ] in the third floor," and Mr. Elms replied, "The tenant was gone when I came through to do the estimate." ***Id.*** at 188.

We note that while Appellants reiterate the type and value of the alleged damage to the premises, they do not cite to evidence of record tending to establish that it was Appellee who caused the damages described by their expert witnesses. Our review of the trial transcript reveals that Appellant Victor testified to the following. When Appellee began leasing, the premises were "immaculate," and when it left, "[i]t was a mess," beyond "normal wear and tear." ***Id.*** at 195.

In its opinion, the trial court recounted that it instructed the jury that it was to "decide the truthfulness and accuracy of each witness's testimony and whether to believe all or part of none of each witness' testimony." Trial Ct. Op. at 2. It concluded, "Following a thorough review of the record, the Court cannot conclude that [the] jury's verdict was so against the weight of the evidence as to 'shock one's conscience' or warrant the granting of a new

[13] Mr. Elms is a remodeling contractor. ***Id.*** at 181.

trial or a j.n.o.v." ***Id.*** Pursuant to our standard of review, and after review of the evidence adduced at trial, we disagree with Appellants that the trial court "acted capriciously or palpably abused its discretion." ***See Hatwood***, 2012 WL 4748194 at *5. Accordingly, we find no relief is due.

Appellant's second claim on appeal is that the court erred in denying its motions for a continuance and to exclude evidence of Appellant Thomas' prior conviction. In support, they contend they were unfairly prejudiced by Thomas' "physical inability to testify at trial due to being unavailable," because he was the managing partner and had "exclusive knowledge about Appellee's energy usage, operations, [and] explanation as to why Appellants' [counterclaims] were not previously raised [and] regarding his . . . letter sent to Appellee's President[.]" Appellants' Brief at 14. Appellants also state that "Appellee's counsel repeatedly noted his absence to the jury." ***Id.*** at 15. In the alternative, Appellants aver that Thomas "would also have been essentially prevented from testifying due to the" court's denial of their motion *in limine* to exclude evidence of his federal misprision of felony case. They maintain that this offense "has not been found to involve dishonesty or false statement." ***Id.*** We find no relief is due.

We note:

> "[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." "An abuse of discretion is more than just an error in judgment and, on appeal, the trial court will not be found to have abused its discretion unless the record

> discloses that the judgment exercised was manifestly unreasonable, or the result[ ] of partiality, prejudice, bias, or ill-will."

In re K.J., 27 A.3d 236, 243 (Pa. Super. 2011) (citations omitted).

As stated above, the trial court issued notice on August 30, 2010, that trial would commence approximately eleven months later, on July 25, 2011. Neither party disputed that this notice was given. Nine days before the scheduled date for trial, Appellants filed a motion for continuance, stating that they had "a pre-paid vacation scheduled through July 25, 2011." Appellants' Mot. for Continuance at 1. In its opinion, the trial court stated, "[G]iven the timeframes involved, the Court found the basis for Mr. Greco's request to be, at best, disingenuous and, in any event, insufficient for purposes of Pa.R.C.P. [ ] 216 [(grounds for continuance)]." Trial Ct. Op. at 2.

On appeal, Appellants wholly ignore this reasoning, but instead discuss only the prejudicial effect of the absence of Appellant Thomas at trial. The implicit premise of Appellants' argument is an insistence that, despite the court's denial of their motion for a continuance, Appellant Thomas was simply not physically available for trial, and they were prejudiced. Appellants refer to no authority requiring an appellate court to reverse a denial of continuance on this basis, and we decline to do so.

Furthermore, we reject Appellants' contention that Appellant Thomas was "essentially prevented from testifying due to the" court's allowance of

evidence of his federal misprision of felony case. ***See*** Appellants' Brief at 15. We agree with the trial court's analysis:

> [I]t never ruled, as [Appellants] have suggested in their post-trial submissions, that [Thomas] could not attend the trial. To the contrary, [Thomas] apparently elected not to attend the trial despite the denial of his continuance request.
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> . . . In addition, it is difficult to understand how any error in the Court's ruling on [Appellants' motion *in limine*] could be deemed to be anything but harmless insofar as [Thomas] voluntarily chose not to attend trial, never testified and, therefore, was never actually cross examined with the conviction.

See Trial Ct. Op. at 2. Finally, we note that although Appellants' motion *in limine* stated that they had a pre-paid vacation through July 25, 2011, the first day of trial, they offered no explanation why Thomas could not attend the second day of trial, July 26th. For the foregoing reasons, we find no relief is due.

Judgment affirmed.