NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

TRUE RAILROAD REALTY, INC., ANDREA SILVERSHEIN AND GREG SILVERSHEIN, LEWIS NORRY, LEWIS NORRY FAMILY GST TRUST, NORRY BROTHERS COMPANY, SUSAN GOLDBERG, ALICE SHAPIRO, ERIC SINGER, HILLEL NORRY, HILLEL NORRY FAMILY GST TRUST, ELLIOT NORRY, AND ELLIOT NORRY FAMILY GST TRUST, TRADING AS TRUE RAILROAD ASSOCIATES, L.P., v. AMES TRUE TEMPER, INC. APPEAL OF: TRUE RAILROAD ASSOCIATES, L.P.	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 856 MDA 2012

Appeal from the Order Entered on April 11, 2012
In the Court of Common Pleas of Cumberland County
Civil Division at No(s): 11-8463

BEFORE: BOWES, J., OLSON, J., and WECHT, J.

MEMORANDUM BY WECHT, J.: **FILED MAY 22, 2013**

True Railroad Realty, Inc. ("Appellant"), appeals from an April 11, 2012 order. That order denied Appellant's motion for reconsideration of the trial court's March 21, 2012 order granting Ames True Temper, Inc's ("Appellee") motion for partial judgment on the pleadings. Because Appellant's appeal properly would lie from the underlying order granting judgment on the pleadings rather than the order denying a motion for reconsideration, and because Appellant's appeal was filed more than thirty

days after the March 21, 2012 order, it is untimely. Thus, we quash this appeal for lack of jurisdiction.

The trial court set forth the relevant factual and procedural background of this case in its opinion granting Appellee's motion for partial judgment on the pleadings, as follows:

> [Appellant] is a Pennsylvania limited partnership with its registered offices located in Harrisburg, Dauphin County, Pennsylvania. [Appellee] is a Delaware Corporation with its principal place of business in Camp Hill, Cumberland County, Pennsylvania, and is the successor in interest of True Temper Hardware Company. On November 30, 1994, [Appellant] and [Appellee] (through its predecessor) entered into an "Amended and Restated Lease dated November 30, 1994" (hereinafter "Lease"), by which [Appellant], as Landlord, leased to [Appellee], as Tenant, approximately forty-four acres of land located in Hampden Township, Cumberland County, Pennsylvania.
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> Article 42 of the Lease outlined the details regarding [Appellee's] option to purchase. This Article, which is at the core of the instant dispute, provided, in part, as follows:
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> 42. Purchase Option.
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> (a) The Option. Landlord hereby gives and grants to Tenant the exclusive right and option (the "Purchase Option") to purchase the Demised Premises on the terms and conditions hereinafter set forth.
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> (b) The Option Period. Tenant may exercise the Purchase Option at any time during the period commencing on January 1, 2011, and ending at midnight on October 31, 2011 (the "Option Period").

> (c) Exercise of Option. Provided Landlord has not then notified Tenant of an Event of Default which remains uncured, Tenant may exercise the Purchase Option at any time during the Option Period by giving the Landlord a written notice to that effect.
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> * * *

On October 22, 2010, Appellee entered into an "Amendment to [the] Lease Agreement" with [Appellant] (hereinafter "Lease Amendment" or "Amendment"). The Lease Amendment, the validity of which is not disputed, referenced the Lease and provided, in pertinent part, as follows:

> 2. **EXERCISE OF RENEWAL OPTION**. Pursuant to Paragraph 3(b) of the Lease, Ames exercises its option to renew the Lease, extending the terms and conditions of the lease through April 30, 2020. The renewal option shall be effective upon payment by True to Ames of $250,000. Such payment shall be made on or before December 31, 2010 and is to be utilized by Ames for building improvements, maintenance, repairs or other items it deems fit in its sole discretion. If such payment is not made on or before December 31, 2010, then this Amendment shall terminate and be of no further force and effect and Ames will be deemed to not have exercised its option to renew lease.

Pursuant to the Lease Amendment, the $250,000 paid to [Appellee] by [Appellant] would be paid back to [Appellant] if [Appellee] exercised the Purchase Option contained in the Lease. The provision in the Lease Amendment concerning the Purchase Option provided, in its entirety, as follows:

> 3. **PURCHASE OPTION**. If Ames exercises the Purchase Option set forth in Paragraph 42 of the Lease, the $250,000 paid to Ames pursuant to this Amendment shall be paid to True. Payment shall be made upon execution of the Payment Option.

On October 26, 2011, five days prior to the expiration of the "Option Period" as defined in the Purchase Option of the Lease, [Appellant] sent a written notice to [Appellee] that notified [Appellant] of [Appellee's] intention to exercise the Purchase Option (hereinafter "Notice of Purchase Option Exercise."). On November 9, 2011, [Appellant] responded to [Appellee's] October 26, 2011 letter, contending that, according to the Lease Amendment, [Appellee] was required to concurrently pay to [Appellant] the $250,000.00 with its Notice of Purchase Option Exercise, and that, due to [Appellee's] failure to tender payment of $250,000.00 upon providing the Notice of Purchase Option Exercise, "the Purchase Option was not effectively exercised during the option period." In its November 9, 2011, letter, [Appellant] took the position that, "[It] does not have any obligation to perform under the Purchase Option."

The following day, [Appellee] responded to [Appellant's] November 9, 2011 letter. In its response, [Appellee] set forth its position that, according to the Lease Amendment, the $250,000.00 was "due upon execution of the Purchase Option" rather than upon "exercise of the Purchase Option," and therefore, the sum was "payable at closing on the purchase of the Property." [Appellee's] position was articulated in the following paragraph of its November 10, 2011 letter:

> The $250,000 payment is not a deposit or down payment to be made prior to closing on account of the purchase price; rather, the $250,000 is essentially reimbursement to the landlord for the payment of $250,000 made by the landlord to Ames True Temper under the preceding paragraph 2 of the Lease Amendment, and that reimbursement would only be made if and when the parties actually consummated the purchase and sale of the Property, not simply upon the giving of notice of exercise of the Purchase Option.

Despite its position, [Appellee] notified [Appellant] that it had "forwarded to [Appellant's] account the sum of $250,000, to be credited against the purchase price at closing." However, via correspondence dated November 11, 2011, [Appellant] rejected [Appellee's] Ames's $250,000.00 payment and declared that the Purchase Option provision had been terminated.

> On November 29, 2011, [Appellee] sent to [Appellant] a "Notice of Default," which asserted that [Appellant] was in default due to its failure to select an independent appraiser to participate in the determination of the "Market Value of the Demised Premises," pursuant to Article 42(d) of the lease.

Trial Court Opinion ("T.C.O."), 3/21/2012, at 3-9 (internal citations omitted).

On November 10, 2011, Appellant filed a declaratory judgment complaint seeking a determination of the rights of both Appellant and Appellee in relation to the November 30, 1994 lease agreement and the October 22, 2010 amendment to said lease agreement. The complaint related to the interpretation of the parties' contractual agreement for the Purchase Option contained in the non-residential lease.

On November 29, 2011, Appellee filed an answer and new matter, along with a counterclaim seeking declaratory judgment in its favor. On December 29, 2011, Appellee filed a motion for partial judgment on the pleadings, to which Appellant replied with its own motion for judgment on the pleadings. In these competing motions, the parties debated the juncture at which the $250,000 had to be paid in order to execute the Purchase Option. Appellant argued that the money had to be paid contemporaneously with the notice of intent to exercise the Purchase Option. Appellee, on the other hand, argued that the money had to be paid only upon closing. On March 21, 2012, the trial court granted Appellee's motion. The court concluded that the language used in the non-residential lease agreement and lease amendment was unambiguous, and that the purchase option provision did not obligate Appellee to tender the $250,000 payment to

Appellant simultaneously with its notice of intent to exercise the purchase option. T.C.O, 3/21/12, at 1-3 (internal citations omitted). Instead, the payment was due at the closing.

On March 30, 2012, Appellant filed a "Motion for Reconsideration of Order Granting Partial Judgment on the Pleadings and Motion for Sanctions." ***See*** Motion for Reconsideration of Order Granting Partial Judgment on the Pleadings and Motion for Sanctions ("Motion"), 3/30/2012, at 1-2. On April 11, 2012, the trial court denied that motion. On May 7, 2012, Appellant filed a notice of appeal, purportedly from the April 11, 2012 order rather than the March 21, 2012 order granting partial judgment on the pleadings. On May 14, 2012, Appellee filed a motion in this Court seeking to quash the appeal. We subsequently denied the motion without prejudice to Appellee's right to re-raise the issue before this panel. ***See*** Order, 07/02/2012. Appellee has raised this issue again in its brief to this Court.

On May 31, 2012, Appellant complied with Pa.R.A.P. 1925(b) and submitted to the trial court a statement of errors complained of on appeal. The trial court issued an opinion, dated July 10, 2012, in response to Appellant's Pa.R.A.P. 1925 statement.

Appellant raises the following two issues for our consideration:

1. Should Appellee's motion to quash this appeal be denied, in that the trial court's refusal to vacate its partial judgment on the pleadings was appealable as a collateral order under Pa.R.A.P. 313?

2. Should partial judgment on the pleadings in favor of Appellee be vacated, where Appellee improperly delayed production of

> requested discovery that would have demonstrated issues of fact precluding judgment on the pleadings and where the trial court's refusal to vacate was based upon a premature finding of "fact" made without a fact-finding process and before permitting Appellant to respond to the new factual averments made by [Appellee]?

Appellant's Brief at 2.

We first must confront Appellee's renewed request that we quash this appeal. On March 21, 2012, the trial court granted Appellee's motion for partial judgment on the pleadings. Appellant did not appeal this order. Instead, Appellant filed "Plaintiff's Motion for Reconsideration of Order Granting Partial Judgment on the Pleadings and Motion for Sanctions." That motion was denied on April 11, 2012. On May 7, 2012, Appellant appealed the April 11, 2012 order.

Pursuant to Pennsylvania Rule of Appellate Procedure 341, a party may appeal, as of right, from any final order of a lower court. Pa.R.A.P. 341(a).[1] A notice of appeal must be filed within thirty days after the entry of a final order from which the appeal is taken. Pa.R.A.P. 903(a).

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[1] Because Appellee styled its motion for judgment on the pleadings as "partial," we must acknowledge a lingering question regarding whether that underlying order disposed of all claims as to all parties, and hence was final. Based upon our review of the record, we believe that the underlying order was final in effect. The entry of a formal declaratory judgment adjudicating the rights of the parties is a final judgment, from which an appeal may be taken. ***See Commerce Bank/Harrisburg, N.A. v. Kessler***, 46 A.3d 724, 728 (Pa. Super. 2012); ***Penn America Ins. Co. v. Peccadillos, Inc.***, 27 A.3d 259, 263 n.2 (Pa. Super. 2011).

Appellant did not appeal the March 21, 2012 order. Instead, Appellant sought reconsideration of that order. Appellant then appealed the order denying that motion. It is well established that the denial of a motion for reconsideration is not an appealable order. ***See Erie Ins. Exch. v. Larrimore***, 987 A.2d 732, 743 (Pa. Super. 2009). The mere filing of a petition for reconsideration, rehearing, or re-argument does not by itself extend or toll the period for filing an appeal. ***See Cheathem v. Temple Univ. Hosp.***, 743 A.2d 518, 520 (Pa. Super. 1999) (citing ***Moore v. Moore***, 634 A.2d 163, 167 (Pa. 1993)). Before a motion for reconsideration will toll the thirty-day time period to file an appeal, the trial court must enter an order within that time period "expressly granting" reconsideration of the final order. Pa.R.A.P. 1701(b)(3)(i-ii). That did not occur in this case. The trial court denied Appellant's motion. Thus, the applicable period during which Appellant must have filed its appeal expired on or about April 20, 2012. As Appellant filed its notice of appeal on May 7, 2012, this appeal is facially untimely.

Appellant now claims that the motion was not a motion to reconsider, but instead, in substance, was a motion to vacate the order. Appellant points to the fact that, in two places in the motion, Appellant specifically requested vacatur of the March 21, 2012 order. Appellant further maintains that the title of the motion is irrelevant; it is the substance of the motion and the relief sought that determines the character of a motion. Appellee strenuously argues that Appellant's motion for reconsideration was, in fact, a

motion for reconsideration, not a motion to vacate. Appellee charges Appellant with "disingenuously" attempting to re-style the motion to make it appealable. "[Appellant] appears to believe that if it simply calls the motion which was denied by another name, the unappealable order will become appealable." Brief for Appellee at 6. Appellee notes that in every motion for reconsideration, the moving party seeks to have an order vacated, and another disposition entered in place of the original disposition.

If Appellant's present claim that the motion was a motion to vacate the order is correct, then the denial of the motion would be an appealable final order, and this appeal would be timely. ***See*** Pa.R.A.P. 311(a)(1).[2] However, if the filing constitutes a motion for reconsideration, as it is titled, then the appeal is untimely. ***See Larrimore***, ***Cheathem***, *supra*; Pa.R.A.P. 903(a). We must, therefore, determine whether Appellant's motion is a motion for reconsideration or a motion to vacate.

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[2] Rule 311(a)(1) provides, in pertinent part, as follows:

> **(a) General rule.** An appeal may be taken as of right . . . from:
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> (1) *Affecting judgments*. An order refusing to open, **vacate** or strike off a judgment. If orders opening, vacating or striking off a judgment are sought in the alternative, no appeal may be filed until the court has disposed of each claim for relief.

Pa.R.A.P. 311(a)(1).

Appellant's motion was titled "Plaintiff's Motion for Reconsideration of Order Granting Partial Judgment on the Pleadings and Motion for Sanctions." In the opening paragraph of the motion, Appellant summarizes its claim that Appellee refused to comply with discovery obligations and withheld/concealed material evidence. The final sentence of that paragraph states: "As a result of [Appellee's] improper conduct, [Appellant] **requests reconsideration** of the Court's order granting partial judgment on the pleadings and moves for a sanction against [Appellee] pursuant to Pa.R.Civ.P. 4019." Motion at 1-2 (emphasis added). The motion proceeds to detail the factual and procedural history in twenty-one paragraphs. ***Id.*** at 3-5. Before paragraph twenty-two, the motion contains the heading "**MOTION FOR RECONSIDERATION**". ***Id.*** at 5. In paragraph forty-one, in the section seeking sanctions, Appellant cross-references "the above motion for reconsideration." ***Id.*** at 11. Moreover, the proposed order that Appellant attached to the motion used the term "motion for reconsideration." Nowhere in its pleadings did Appellant refer to the motion as a motion to vacate the judgment. It was not until the notice of appeal that Appellant first characterized the motion as such.

Appellant points out that it specifically requested vacatur of the order throughout the motion. For instance, Appellant points to paragraph 36 wherein it asked the court to vacate its order. However, Appellant chooses not to set forth the entirety of that paragraph, which reads: "[Appellant] requests that the Court **reconsider** and vacate its order granting partial

judgment on the pleadings." ***Id.*** at 10, ¶ 36. Appellant made a similar request in paragraph forty-three of the motion. There, Appellant did not include any reconsideration language. However, this passing reference does not modify the clear character and intent of the motion. At all relevant places, Appellant referred to the motion as a motion for reconsideration. Finally, the trial court considered the motion as such in disposing of it. ***See*** T.C.O. 7/10/2012, at 8.

The overwhelming evidence suggests that the motion was filed as, and was intended to be, a motion for reconsideration. The two references to vacating the order in a forty-three paragraph motion do not change the clear character and subject of the motion, particularly when one of the references is used in conjunction with the request to reconsider. Appellant cannot alter the substantive nature of the motion now simply by referring to it as a motion to vacate.

Alternatively, Appellant attempts to recharacterize this appeal as an appeal from a collateral order.[3] Appellant's brief argument attempts to utilize the alleged discovery violations that formed the basis for its motion

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[3] Appellant also argues that the partial judgment on the pleadings was not a final order. Appellant concedes that this issue was not presented in the trial court. ***See*** Appellant's Brief at 16. Since Appellant did not raise the issue before the trial court, this issue is waived. ***Brown v. Philadelphia Tribune Co.***, 668 A.2d 159, 162 (Pa. Super. 1995). Thus, we only may address whether Appellant's appeal from the denial of his motion for reconsideration was proper.

for reconsideration to transform the denial of the motion for reconsideration into a collateral discovery order. Appellant again alleges that Appellee delayed producing certain discovery materials that would have demonstrated material issues of fact precluding judgment on the pleadings. Appellant argues that the alleged discovery delays implicate an important public policy goal of avoiding "discovery abuses" and "fostering proper conduct during discovery." Appellant's Brief at 22.

A collateral order is one that: (1) is separable from and collateral to the main cause of action; (2) involves a right too important to be denied review; and (3) presents a claim that will be irreparably lost if review is postponed until final judgment in the case. Pa.R.A.P. 313(b). Courts typically only permit appeals from collateral orders when there is a public policy concern that is greater than the current litigation. ***Richner v. McCance***, 13 A.3d 950, 956 (Pa. 2011). A discovery order is collateral when it is distinct from the underlying cause of action. ***T.M. v. Elwyn, Inc.***, 950 A.2d 1050, 1056 (Pa. Super. 2008); ***see also Feldman v. Ide,*** 915 A.2d 1208, 1211 (Pa. Super. 2007). Pennsylvania courts generally will not entertain interlocutory appeals from discovery orders unless the discovery order was not related in any way to the merits of the action itself. ***Castellani v. Scranton Times, L.P.***, 916 A.2d 648, 652 (Pa. Super. 2007).

Appellant cites no case in which a Pennsylvania court has held that an ordinary discovery order constitutes a collateral order. Appellant also fails to establish that, to the extent that the trial court's order was a discovery

order, the order was distinct from the underlying cause of action so as to overcome the general principle that a discovery order cannot constitute a collateral order. Thus, Appellant's alternative recharacterization of the order fails.

Appellant's motion sought reconsideration. Therefore, it was not a final order, and was not appealable. Appellant did not appeal directly from the March 21, 2012 order, and did not file any appeal within thirty days of the entry of that order. Consequently, we lack jurisdiction to hear the merits of this case.

Appeal quashed for lack of jurisdiction.

Judgment Entered.

Mary A. Hoyle

Deputy Prothonotary

Date: 5/22/2013