NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

LINDA PELLEGRINO,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
PHILLIP KATULKA AND GENEVIEVE FOX,	:	
	:	
Appellants	:	No. 915 EDA 2013

Appeal from the Judgment entered February 26, 2013,
Court of Common Pleas, Delaware County,
Civil Division at No. 11-53637

BEFORE: GANTMAN, DONOHUE and OLSON, JJ.

MEMORANDUM BY DONOHUE, J.: **FILED DECEMBER 11, 2013**

Appellants, Phillip Katulka and Genevieve Fox ("Katulka and Fox"), appeal the trial court's order entered on February 26, 2013 denying their Motion to Stay all Execution of Judgment, Request Bond, and Overturn Non-Suit (hereinafter, the "Motion to Stay"). For the reasons that follow, we reverse the trial court's order, vacate the judgments entered in the case, and remand for further proceedings consistent with this decision.

On October 11, 2011, Appellee Linda Pellegrino ("Pellegrino") filed a complaint against Katulka and Fox, her neighbors, asserting a claim in trespass based upon an alleged encroachment onto her property from a brick patio/deck installed by Katulka and Fox. The case was scheduled for an arbitration hearing to take place on July 11, 2012. On December 12, 2011, Katulka and Fox filed an answer and new matter to Pellegrino's

complaint, and also asserted a number of counterclaims seeking declaratory and injunctive relief based upon adverse possession, irrevocable license, title by consentable lines, easement by prescription, easement by implication, and slander of title.

On July 11, 2012, Katulka and Fox failed to appear at the scheduled arbitration hearing. Pursuant to Rule 1303 of both the Pennsylvania Rules of Civil Procedure and the Delaware County Rules of Civil Procedure,[1] the case

[1] Pa.R.Civ.P. 1303 provides in relevant part as follows:

> Rule 1303. Hearing. Notice
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> * * *
>
> (a)(2) The local rule may provide that the written notice required by subdivision (a)(1) include the following statement:
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> > "This matter will be heard by a board of arbitrators at the time, date and place specified but, if one or more of the parties is not present at the hearing, the matter may be heard at the same time and date before a judge of the court without the absent party or parties. There is no right to a trial de novo on appeal from a decision entered by a judge."
>
> * * *
>
> (b) When the board is convened for hearing, if one or more parties is not ready the case shall proceed and the arbitrators shall make an award unless the court
>
> > (1) orders a continuance, or
> >
> > (2) hears the matter if the notice of hearing contains the statement required by subdivision (a)(2) and all parties present consent.

was immediately referred to the Court of Common Pleas and an award was entered in favor of Pellegrino in the amount of $12,211.20. The trial court also entered a non-suit on the counterclaims of Katulka and Fox. On August 8, 2012, Katulka and Fox filed an appeal from the arbitration award requesting a jury trial, but were notified that this filing was in error since the award had been entered by the Court of Common Pleas rather than by a board of arbitrators.

> Note: It is within the discretion of the court whether it should hear the matter or whether the matter should proceed in arbitration. If the court is to hear the matter, it should be heard on the same date as the scheduled arbitration hearing.
>
> In hearing the matter, the trial court may take action not available to the arbitrators, including the entry of a nonsuit if the plaintiff is not ready or a *non pros* if neither party is ready. If the defendant is not ready, it may hear the matter and enter a decision.

Pa.R.Civ.P. 1303.

The Delaware County counterpart rule contains the notice set forth in Pa.R.Civ.P. 1303(a)(2), and further provides in its subsection (b)(2) as follows:

> (b)(2) Should the court decide to hear the matter pursuant to Pa.R.C.P. 1303(b)(2), the trial court may choose to:
>
> > (i) enter a judgment of nonsuit if the plaintiff is not ready or fails to appear; or
> >
> > (ii) enter a judgment of non pros if neither party is ready or appears; or
> >
> > (iii) hear the matter and make a decision, if the defendant is not ready or fails to appear.

Delaware.R.Civ.P. 1303(b)(2).

On August 16, 2012, Katulka and Fox filed a notice of appeal in this Court, and also filed the above-referenced Motion to Stay in the trial court. By order dated November 1, 2012, this Court dismissed the appeal on the grounds that because Katulka and Fox had not filed post-trial motions within ten days after entry of the trial court's order, they had not preserved any issues for appeal.

Thereafter, on February 26, 2013, the trial court entered an order denying the Motion to Stay. In its written opinion pursuant to Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure, the trial court observed that the Motion for Stay was "basically a petition to open or vacate the judgment." Trial Court Opinion, 6/10/2013, at 2. The trial court concluded that the Motion for Stay had not been promptly filed and that Katulka and Fox had not asserted any meritorious argument entitling them to relief. ***Id.***

On March 22, 2013, Katulka and Fox filed the present appeal, setting forth three issues for our consideration and determination:

> 1. Did the trial court err in determining that it had jurisdiction to enter an award in favor of [Pellegrino] and to enter a non-suit on [Katulka's and Fox's] real estate title claims and $75,000 damage claim, upon referral from the arbitration program under Delaware County Rule of Civil Procedure 1303(b)(2), even though these claims were never subject to arbitration?
>
> 2. Did the trial court err in keeping the entire case in the arbitration program, after [Katulka and Fox] filed counterclaims for $75,000 in damages and for

declaratory/injunctive relief regarding title to real estate?

3. Did the trial court err and/or abuse its discretion in refusing to grant [Katulka's and Fox's] post-trial motion, because their failure to appear was excusable under the circumstances of this case?

Brief of Katulka and Fox at 4.

In connection with the first two issues, Katulka and Fox raise for the first time the question of whether the entry of judgment on July 11, 2012, based upon their failure to appear at the arbitration hearing, is void for lack of subject matter jurisdiction. In support, Katulka and Fox cite to, *inter alia*, this Court's en banc decision in ***Robert Half International Inc. v. Marlton Technologies, Inc.***, 902 A.2d 519 (Pa. Super. 2006) (*en banc*). Based upon our review of the certified record on appeal, we agree with Katulka and Fox that our decision in ***Robert Half*** governs here and requires that the judgments in this case be vacated.

In ***Robert Half***, RHI filed a complaint against Marlton and the prothonotary scheduled the case for a compulsory arbitration hearing. ***Id.*** at 521. In response, Marlton filed counterclaims seeking damages in excess of $75,000. ***Id.*** at 522. RHI failed to appear at the scheduled arbitration hearing, at which time the case was transferred to the Court of Common Pleas pursuant to Pa.R.Civ.P. 1303 and Phila.R.Civ.P. 1303. ***Id.*** The Court of Common Pleas entered a judgment of *non pros* against RHI on its claim against Marlton, and a judgment in favor of Marlton on its counterclaim in

the amount of $513,613.80 (including consequential damages). ***Id.*** Upon receiving notice of the judgment, RHI requested post-trial relief in the nature of a motion to strike on the grounds that Marlton's counterclaim was not subject to arbitration because it exceeded the jurisdictional limit of $50,000. ***Id.*** The trial court denied any relief, entering final judgment against RHI on its claim and in favor of Marlton on its counterclaim in the amount of $513,613.80. ***Id.*** at 524.

Sitting *en banc*, this Court reviewed the relevant rules of civil procedure (both state and local) as well as 42 Pa.C.S.A. § 7361, which governs compulsory arbitration in Pennsylvania:

> **§ 7361. Compulsory arbitration**
>
> (a) General rule.--Except as provided in subsection (b), when prescribed by general rule or rule of court such civil matters or issues therein as shall be specified by rule shall first be submitted to and heard by a board of three members of the bar of the court.
>
> (b) Limitations.--No matter shall be referred under subsection (a):
>
> (1) which involves title to real property; or
>
> (2) where the amount in controversy, exclusive of interest and costs, exceeds $50,000.

42 Pa.C.S.A. § 7361. Based upon these considerations, we concluded that the filing of Marlton's counterclaim seeking damages in excess of the $50,000 limit *immediately divested the arbitration program of jurisdiction over the entire case*.

> Section 7631 makes clear the monetary limits of compulsory arbitration are jurisdictional. Having examined the available alternatives, we conclude the best resolution of this dilemma is to hold that the filing of Marlton's counterclaim, which arose out of the same transaction as the original claim, immediately divested the arbitration program of jurisdiction over the entire case. Once Marlton filed its counterclaim, the whole case belonged in the Court of Common Pleas trial program.

Robert Half, 902 A.2d at 529. Because no jurisdiction existed for the case to be in the arbitration program, we ruled that the trial court erred when it immediately, upon RHI's failure to appear for the arbitration hearing, considered the case on its merits pursuant to Pa.R.Civ.P. 1303 and Phila.R.Civ.P. 1303. ***Id.*** Accordingly, we vacated both the judgment of *non pros* entered against RHI and the judgment in favor of Marlton on its counterclaim. ***Id.*** at 530.

Our decision in ***Robert Half*** governs in the current case. The counterclaims filed by Katulka and Fox sought damages in excess of $50,000, and also asserted claims relating to title to real property (*e.g.*, adverse possession, easement by prescription). Because these counterclaims did not assert claims within the jurisdictional limits of section 7361, the filing of these counterclaims immediately divested the arbitration program of jurisdiction over the entire case. As a result, the trial court had no jurisdiction to enter any judgment in the case based upon application of

Pa.R.Civ.P. 1303 and Delaware.R.Civ.P. 1303 as a result of the failure of Katulka and Fox to appear at the scheduled arbitration hearing.

While it is true, as Pellegrino argues in her appellate brief, that Katulka and Fox failed to raise the issue of subject matter jurisdiction at any time in the trial court or during the first appeal to this Court, this does not change our decision here. Pennsylvania appellate courts have repeatedly held that objections based upon subject matter jurisdiction may not be lost by estoppel, consent, or waiver. ***See, e.g.***, ***Harcourt v. General Accident Insurance Company***, 615 A.2d 71, 75 (1992), *appeal denied*, 534 Pa. 648, 627 A.2d 179 (1993).

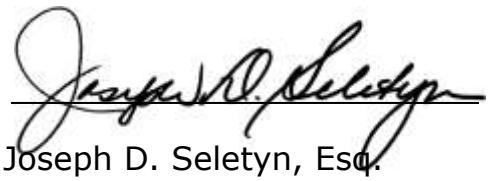
> [I]t is never too late to attack a judgment or decree for want of jurisdiction. That question is always open. Such a judgment is entitled to no authority or respect, and is subject to impeachment in collateral proceedings at any time by one whose rights it purports to affect. The want of jurisdiction over the subject matter may be questioned at any time. It may be questioned either in the trial court, before or after judgment, or for the first time in an appellate court, and it is fatal at any stage of the proceedings, even when collaterally involved.... Moreover, [it] is well settled that a judgment or decree rendered by a court which lacks jurisdiction of the subject matter or of the person is null and void and is subject to attack by the parties in the same court or may be collaterally attacked at any time.

Barnes v. McKellar, 644 A.2d 770, 773 (Pa. Super.) (citations and internal quotation marks omitted) (quoting ***DeCoatsworth v. Jones***, 607 A.2d at

1094, 1101 (Pa. Super. 1992)), *appeal denied*, 539 Pa. 663, 652 A.2d 834 (1994).

The trial court's order entered on February 26, 2013 is reversed. The judgment entered in favor of Pellegrino and against Katulka and Fox in the amount of $12,211.20, and the judgment of non-suit entered on the counterclaims of Katulka and Fox, are both hereby vacated. The case is remanded to the trial court for further proceedings consistent with this decision. Jurisdiction relinquished.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/11/2013