

**THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS**

_____	:	
BARBARA GREEBY	:	CIVIL TRIAL DIVISION
	:	
Appellant/Plaintiff,	:	JULY TERM, 2006
	:	No. 0498
	:	
v.	:	Superior Court Docket No.
	:	2398 EDA 2007
PEDRO QUINONES	:	
	:	
Appellee/Defendant	:	
_____	:	

OPINION

PROCEDURAL HISTORY

Plaintiff appeals from the Order dated August 21, 2007, wherein the lower Court denied Plaintiff's Motion to Appeal the Arbitration Award *Nunc Pro Tunc*.

FACTUAL BACKGROUND

It is alleged by Barbara Greeby (hereinafter Plaintiff), that on or about August 16, 2004, Defendant Pedro Quinones (hereinafter Quinones), was negligently operating his automobile and struck Plaintiff, while she was a pedestrian in the parking lot of the Walmart Shopping Center located at 4640 Roosevelt Boulevard, Philadelphia, Pennsylvania. (Complaint, ¶3-5). As a result of this accident, Plaintiff contends that she sustained economic

loss as well as injuries to her back, left wrist and forearm and left foot.
(Complaint, ¶3-6).

On June 30, 2006, Plaintiff filed a Complaint alleging the
aforementioned facts and injuries, demanding damages not in excess of the
arbitration limits. (Complaint, ¶ 13). The case proceeded to Arbitration
on March 6, 2007, wherein Plaintiff failed to appear, but was represented by
counsel. Prior to commencement of the Arbitration, Plaintiff's counsel,
advised defense counsel that Plaintiff would not be appearing and was aware
that an adverse judgment would be entered in favor of Defendant and against
Plaintiff (See Docket). (Response to Plaintiff's Motion to Appeal
Arbitration Nunc Pro Tunc, ¶5). The Judgment was posted to the docket on
March 7, 2007, while still represented by counsel. Its is disputed by the
parties as to whether written notice of the arbitration award was given to
Plaintiff pursuant to Pa.R.C.P. 1307. (See Docket). No appeal had been
filed prior to the expiration of the thirty day (30) appeal period. (See
Docket). On April 12, 2007, the case was closed due to the fact that no
appeal had been filed within the applicable time period.

On July 19, 2007, over four (4) months after the arbitration was held,
Plaintiff filed a Motion to Appeal the Arbitration Award Nunc Pro Tunc
stating that Plaintiff's counsel never received proper notice of the arbitration

award. (Plaintiff's Motion to Appeal Arbitration Nunc Pro Tunc).

Defendant Quinones filed his Response to the Motion on August 8, 2007.

By Order dated August 21, 2007, this Court denied Plaintiff's request to Appeal the Arbitration Award Nunc Pro Tunc. (See Docket). Plaintiff subsequently filed their Notice of Appeal on September 26, 2007 and issued their Statement of Matters accordingly.

The sole issue on appeal is whether the trial Court committed an error of law or abused its discretion in denying the Plaintiff's Motion to Appeal the Award of Arbitrators Nunc Pro Tunc.

LEGAL ANALYSIS

Allowance of an appeal *Nunc Pro Tunc* lies at the sound discretion of the trial Judge. *Nagy v. Best Home Servs.*, 2003 PA Super 271, 829 A.2d 1166, 1167-1168 (2003) . In the usual case, where a party requests permission to file an appeal *Nunc Pro Tunc*, it is because counsel for the appealing party has not timely filed an appeal. *Id.* That party must therefore show more than mere hardship. *Id.* Rather, a trial court may grant such an appeal only if the delay in filing is caused by "extraordinary circumstances involving 'fraud or some breakdown in the court's operation through a

default of its officers.” *Id.*, (quoting *Cook v. Unemployment Compensation Board of Review*, 543 Pa. 381, 383-384, 671 A.2d 1130, 1131 (1996)).

Our Supreme Court in *Bass v. Commonwealth Bureau of Corrections, et al.*, 485 Pa. 256, 401 A.2d 1133 (1979) expanded the limited circumstances under which a Nunc Pro Tunc relief would be appropriate to include where “an appellant, an appellant’s counsel, or an agent of appellant’s counsel has failed to file a notice of appeal on time due to non-negligent circumstances.”

Plaintiff relies on *Bass* for her support that she is entitled to *Nunc Pro Tunc* relief from the arbitration award. Our Supreme Court in *Bass* explained that they would grant a Nunc Pro Tunc appeal if the appellant could prove that “(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.” *Id.* “The exception for allowance of an appeal nunc pro tunc in non-negligent circumstances is meant to apply only in unique and compelling cases in which the appellant has clearly established that she attempted to file an appeal, but unforeseeable and unavoidable events precluded her from actually doing so.” *Criss v. Wise*, 566 Pa. 437, 781 A.2d 1156, 1160 (2001).

Pennsylvania appellate Courts have made it abundantly clear that the granting of *Nunc Pro Tunc* relief is not designed to provide assistance to parties whose counsel has not followed proper procedure in order to preserve the right of appeal. *Lenhart v. CIGNA*, 2003 Pa.Super. 195, 824 A.2d 1193 (2003).

In order to perfect an appeal, parties must strictly adhere to statutory provisions for filing. *Criss*, 781 A.2d at 1159. *Pa.R.C.P. 1308* states in pertinent part:

- (a) An appeal from an award shall be taken by
 - (1) filing a notice of appeal in the form provided by Rule 1313 with the prothonotary of the court in which the action is pending not later than thirty days after the day on which the prothonotary makes the notation on the docket that notice of entry of the arbitration award has been provided as required by Rule 1307(a)(3),...

Furthermore, *Pa.R.C.P. 1307* states that the prothonotary shall enter the award of record on the docket and immediately send, by ordinary mail a copy of the award, with notice of the date and time of its entry on the docket to each party's attorney of record, and note in the docket the date of mailing the notice.

Plaintiff contends that her counsel never received notice of the award in the mail and based on this assertion, the Court should grant Plaintiff's

motion to appeal the arbitration *Nunc Pro Tunc*, as it was a breakdown in the court system and not Plaintiff's counsel's negligent actions that lead to Plaintiff's failure to file a timely appeal. (Plaintiff's Motion to Appeal Arbitration Nunc Pro Tunc, ¶¶10-12). Therefore, had Plaintiff's counsel been given proper notice, they would have filed an appeal within the thirty (30) days after the arbitration award had been recorded. (Id.). This contention by plaintiff is unconvincing. The Court in *Criss* has stated that delays in the mail are "both foreseeable and avoidable." *Criss*, 781 A.2d at 1160.

In addition, under Pennsylvania law, an entry on the docket that notice of an order or award was given under Pa.R.C.P. 236, gives rise to a presumption that that item was received by the addressee. *City of Philadelphia v. Tasker*, 119 Pa. Cmwlth. 519, 547 A.2d 1261 (1988). Furthermore, the presumption of receipt, is not a conclusive presumption; instead it is one which is rebuttable by evidence showing that the item was not received by the addressee. Id. The same rule applies to the case before this Court.

Plaintiff counsel, by his own admission, states that an associate of his firm appeared at the arbitration and advised counsel that he would not be able to go forward because his client was not going to appear. (Plaintiff's Statement of Matters, pg. 1). It is disputed whether Plaintiff's counsel

expressed intent on filing an appeal or that one would not be filed.

(Statement of Matters, pg. 1; Affidavit of Tesha Stoner dated 8/7/07).

Regardless, it is believed that Plaintiff's counsel knew or should have known based on the foregoing facts and discussions that an adverse award was certain to be entered against his client. In addition, the findings of the arbitration panel are promptly entered and reflected on our docketing system for public review pursuant to *Pa.R.C.P.* 1307. The docket provides another form of notice for Plaintiff's counsel. A simple review of the docket would have revealed arbitration results, which the associate attorney already knew to be the case. By having personal knowledge of the outcome of the arbitration through her legal counsel's presence and by the Court's prompt placement of the outcome on the docket, Plaintiff cannot thereafter claim they did not have proper notice of the award due to non-negligent circumstances, which rendered the timely filing of the notice of appeal unforeseeable and unavoidable. The written notice of the arbitration is but one aspect of the notification process under *Pa.R.C.P.* 1307, which are meant to provide the attorney with notice of the outcome of the results. Plaintiff's attorney's physical presence during the arbitration and his awareness as to its outcome, along with placement of the results on the docket provides sufficient notice to Plaintiff to satisfy the notice

requirement. Given these circumstances and failure to file an appeal within thirty (30) days from the award was the result of the Plaintiff's negligence in failing to remain in contact with her attorney regarding the status of the case and the failure of the attorney to note the deadline for filing the appeal and determine whether an appeal should be filed.

Secondarily, according to *Bass* the appeal must be filed shortly after the expiration date. In *Bass*, the attorney filed his notice of appeal four (4) days after deadline because he was unable to locate the file from his secretary, who had been out of work due to illness. *Bass*, 485 Pa. at 260. In the present case, Plaintiff had not filed her notice of appeal from the award of arbitrators until ninety (90) days after the deadline had expired. This extensive delay in filing the appeal would unduly prejudice the defendant, in allowing additional costs and fees in further litigating this matter, when both defendant and defense counsel reasonably believed it reached full adjudication.

According to the facts of this case Plaintiff and Plaintiff's counsel's conduct in failing to file her appeal until ninety (90) days after the deadline cannot be contributed to non-negligent conduct, which would warrant the granting of an appeal nunc pro tunc according to the *Bass* test. Plaintiff's counsel's knowledge that a defense award had been reached at the

arbitration followed by the award's immediate recording on the docket for all to view, satisfies the Notice requirement of *Pa.R.C.P.* 1307 and created an obligation of due diligence to timely file an appeal in this case in a timely manner pursuant to *Pa.R.C.P.* 1308. In light of the facts, Plaintiff has not offered any evidence which would rebut the presumption that notice of the arbitration award was received according to *Tasker*. Therefore nunc pro tunc relief cannot be extended to plaintiff in this case.

CONCLUSION

In light of the foregoing analysis, this Court believes that the Plaintiff's Motion to Appeal the Arbitration Award Nunc Pro Tunc was properly denied by this Court, and respectfully requests that it be affirmed by the Court above.

BY THE COURT:

ALLAN L. TERESHKO, J.

1-15-2008

DATE