

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

PAT’S KING OF STEAKS, INC.,	:	January Term 2007
Plaintiff,	:	
v.	:	No. 2990
RICHARD OLIVIERI,	:	
Defendant.	:	(Commerce Program)
(Appeal of Maria A. Olivieri)	:	Superior Court Docket No. 1070 EDA 2008

.....
OPINION

Albert W. Sheppard, Jr., J. May 15, 2008

This appeal arises from this court’s denial of Maria Olivieri’s Motion to Intervene and the denial of her Motion for Reconsideration.

Background

In January 2007, plaintiff, Pat’s King of Steaks, Inc. filed this declaratory judgment action against Richard Olivieri seeking a ruling that Richard Olivieri does not own any shares of Pat’s King of Steaks, Inc. The Complaint alleges that on or about 2001, Frank Olivieri, Sr. purchased all of the stock of Pat’s King of Steaks, Inc. from Evelyn Olivieri, Bauer & Spalding and Depen Restaurants. At the time of the sale, it was represented to Frank Olivieri, Sr. that the only outstanding shares were those being sold to him. Five years after the stock transfer, Richard Olivieri came forward claiming that he owns two thousand shares of Pat’s King of Steaks, Inc. Plaintiff urges that Richard Olivieri does not own any shares because: (a) he did not provide consideration for the shares, (b) his claim is barred by the statute of limitations, and (c) that if a transfer was

made to Richard Olivieri by his father, it was not made with the consent of all the shareholders as required under the shareholder's agreement.

After Pat's King of Steaks, Inc. filed this Complaint, Maria Olivieri filed a Petition to Intervene. In her Petition, Maria Olivieri alleges that she is the owner of the outstanding shares of Pat's King of Steaks, Inc. and is entitled to a determination that she is the sole shareholder of Pat's King of Steaks, Inc. Therefore, she should be permitted to intervene in the action.

On January 31, 2008, the court denied Maria Olivieri's Petition to Intervene. On February 27, 2008, Maria Olivieri moved for reconsideration. After oral argument and on March 17th this court denied the Motion for Reconsideration. On March 25, 2008, Maria Olivieri appealed.

Discussion

Pennsylvania Rule of Appellate Procedure 313 allows for an appeal as of right from an order denying intervention in circumstances that meet the requirements of the collateral order doctrine.¹ An order denying intervention must be appealed within thirty days of its entry under Rule of Appellate Procedure 903, or not at all, precisely because the failure to attain intervenor status forecloses a later appeal.²

¹ See Pa.R.A.P. 341 (note) (identifying an order denying the right to intervene as a type of order that is not appealable as a final order but which may fall under Rule 313 (Collateral Orders) or 312 (Interlocutory Appeals by Permission)); see, e.g., Township of Radnor v. Radnor Recreational, LLC, 859 A.2d 1, 4 (Pa. Cmwlth. 2004); Haggar v. Carbon County Tax Claim Bureau, 839 A.2d 448, 450-51 (Pa. Cmwlth. 2003); Nemirovsky v. Nemirovsky, 776 A.2d 988, 991 (Pa. Super. 2001).

² See, In re Barnes Found., 871 A.2d 792 (Pa. 2005). See also, In re Rowan, 763 A.2d 958, 961 (Pa. Cmwlth. 2000)(quashing an appeal on the merits from a final order lodged by a company that had sought but failed to obtain intervenor status).

To preserve her appeal rights, Maria Olivieri should have filed a notice of appeal simultaneously with the Motion for Reconsideration. This would preclude denial of rights in the event that the judge denies, or fails to grant the motion within the thirty day appellate period.³ The mere filing of a motion for reconsideration does not toll the running of the appeal period unless the trial court expressly grants reconsideration within that period.⁴

In order to perfect her right to appeal, it was necessary for petitioner to file a notice of appeal within thirty days of the entry of the January 31, 2008 Order. Since petitioner did not timely file her appeal, the appeal should be quashed.

This court deems it prudent to discuss the reasons for denying interpleader on the merits, notwithstanding its belief that the appeal should be quashed. Interpleader is the procedural mechanism through which claimants raising adverse claims against the money, property or debt held by another may be required to litigate their claims in one proceeding.⁵ Pa. R. Civ. P. 2327 provides that at any time during the pendency of an action, a person not a party to an action shall be permitted to intervene if:

1. the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
2. such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or
3. such person could have joined as an original party in the action or could have been joined therein; or

³Cheatham v. Temple Univ. Hosp., 743 A.2d 518, 520-21 (Pa.Super. 1999).

⁴ Pa.R.A.P. §1701(b)(3)(ii); Estate of Haiko v. McGinley, 799 A.2d 155 (Pa. Super. 2002).

⁵ McKinley v. Mutual Life Ins. Co., 278 Pa. 300, 123 A. 304 (1924).

4. the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.⁶

The grant or refusal of a petition for interpleader is an equitable consideration resting within the sound discretion of the trial court and will not be disturbed absent an abuse of such discretion.⁷

Here, petitioner failed to substantiate the allegations contained within her Petition. Petitioner alleges that she is the sole shareholder of Pat's King of Steaks, Inc. and that neither the plaintiffs nor the defendants have any interest in the company. However, no evidence was presented to demonstrate that this is indeed the reality. The only evidence produced was an alleged agreement between Herbert Olivieri, one of the original shareholders of Pat's King of Steaks, Inc., and petitioner purporting to transfer all the shares to petitioner for one dollar in 1998. But this agreement does **not**, in and of itself, demonstrate that petitioner is the sole shareholder of Pat's King of Steaks, Inc. Simply saying a fact is a fact does **not** make it so. In sum, Maria Olivieri failed to meet her burden under Pa. R. Civ. P. 2327 to persuade the court of her right to intervene.

This court submits that its Order denying intervention should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

⁶ Pa. R. Civ. P. 2327.

⁷ U.S. National Bank in Johnstown v. Robel Construction, Inc., 333 Pa.Super. 605, 482 A.2d 1037 (1984).