

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

MARGRETE EBERT	:	
	:	CIVIL TRIAL DIVISION
Appellant/Plaintiff,	:	
	:	JULY TERM, 2006
v.	:	No. 4723
	:	
INDIAN VALLEY REALTY, A PARTNERSHIP: AND ROBERT LANDIS, FLOYD LANDIS & DANIEL LANDIS AND PRUDENTIAL-RITTENHOUSE REALTY GROUP AND HAROLD R. RITTENHOUSE, INC.	:	Superior Court Docket No. 2456 EDA 2007
	:	
Appellees/Defendants	:	

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 Margaret Ebert (hereinafter Plaintiff) that on September 12, 2004, she was involved in a slip and fall accident caused by a doormat which was left to remain on the front steps of 305 Broad Street, Harleysville, Pennsylvania that created an unreasonable risk and hazard. (Complaint, ¶9). The property located at 305 Broad Street is owned, operated and managed by Indian Valley Realty (hereinafter Indian Valley), Robert Landis, Floyd Landis and Daniel Landis (hereinafter collectively the Landis defendants), Prudential-Rittenhouse Realty Group (hereinafter Prudential) and Harold R.

Rittenhouse, Inc. (hereinafter Rittenhouse). (Complaint, ¶7-11). As a result of this accident, Plaintiff contends that she sustained economic loss as well as injuries not limited to metatarsal fracture of her left foot. (Complaint, ¶15).

On August 4, 2006, Plaintiff filed a Complaint against Indian Valley, the Landis defendants, Prudential and Rittenhouse alleging they failed to maintain the 305 Broad Street premises in a safe manner, resulting in the aforementioned accident and injuries. (Complaint). Plaintiff demanded damages not in excess of the arbitration limits.

(Complaint). The case proceeded to Arbitration on June 5, 2007 and plaintiff failed to appear on this date for her arbitration. (Arbitration Award). However, plaintiff alleges that plaintiff's counsel did appear and advised opposing counsel and the Court that he would not be able to go forward and instead would be filing an appeal. (Plaintiff's Motion To Appeal The Arbitration Award Nunc Pro Tunc). A verdict was subsequently entered in favor of Defendants and against Plaintiff (See Docket). The judgment was posted to the docket on June 5, 2007. It is undisputed that written notice of the arbitration award was mailed to plaintiff pursuant to Pa.R.C.P. 1307 on the same day the award was issued. (See Docket). No appeal had been filed prior to the expiration of the thirty day (30) appeal period. (See Docket). On July 11, 2007, the case was closed due to the fact that no appeal had been filed within the applicable time period.

On July 18, 2007, Plaintiff filed a Motion to Appeal the Arbitration Award Nunc Pro Tunc setting forth as the basis for such relief was that a member of Plaintiff counsel's staff was instructed to file an appeal and never did so. (Plaintiff's Motion to Appeal Arbitration Nunc Pro Tunc, ¶6-7). Defendants timely filed their response to the motion. (See Docket). 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 19, 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)).

The plaintiff relies on the Supreme Court case of *Bass v. Commonwealth Bureau of Corrections, et al.*, 485 Pa. 256, 401 A.2d 1133 (1979), which 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."

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 pertinent facts in *Bass* were stated as follows:

Appellant decided to file an appeal in this Court from the order of Commonwealth Court. Appellant's counsel prepared the necessary appeal papers which were typed up by his secretary and were ready for filing on Friday, July 7, six days prior to the expiration of the time allowed for filing the appeal. The papers were placed in a folder on the corner of the secretary's desk, along with other papers to be taken to the courthouse for filing. During the late afternoon of that Friday, the secretary became sick and left work. She was out sick during the entire following week, returning to work on Monday, July 17. Although the normal office procedure was to have a secretary check the desk of a secretary who was ill, in this case the secretary who was ill was the one who routinely did this checking. The ill secretary, in her deposition concerning this matter, stated that she was too sick to think about calling the office. During her illness, she was treated by a physician.

When the secretary returned to the office, she became aware that the appeal had not been filed and immediately took steps to correct the situation. A petition for permission to file an appeal nunc pro tunc was filed in this Court on Monday, July 17, four days after the normal appeal period had expired. Appellee concedes that the delay in filing the appeal was caused by the secretary's illness. Under the circumstances recited, we conclude that appellant's petition for permission to file an appeal nunc pro tunc should be granted. *Bass*, 401 A.2d at 1134-35.

Our Supreme Court in *Criss* further explained the exception stated in *Bass*, "[t]he 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). (emphasis added). Thus, 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 attorney's staff was instructed to file an appeal but inadvertently failed to do so. In so stating, plaintiff attempts to accord her case with that of *Bass*. However, in *Bass* the attorney took meaningful steps in preparing the paperwork for filing his notice of appeal. In the case *sub judice*, plaintiff cites no facts which would support the any preparations were made to file the appeal in a timely manner, despite receiving subsequent notifications of the Arbitration Award from the Court pursuant to Pa.R.C.P. 1307 and having actual notice of the award as a result of her attorney's presence at the arbitration.

In addition, the secretary's illness in *Bass* which caused attorney to miss the filing deadline was authenticated by her deposition and the fact that she sought medical treatment with a physician. The sickness of the attorney's secretary amounted to non-negligent circumstances that were unforeseeable and unavoidable thereby warranting a grant of relief. Here, the plaintiff's claim that her attorney's secretary forgot to file the appeal amounts to *negligent* conduct that could have been avoided had the plaintiff done her due diligence. As we have previously stated, negligent conduct is not a recognized circumstance permitting nunc pro tunc relief under *Bass*. Plaintiff fails to allege any conduct by her, her attorney or attorney's staff, which would amount to either extraordinary circumstances involving fraud or breakdown in court operations or non-negligent conduct to warrant a nunc pro tunc appeal.

Furthermore, according to *Bass* the appeal must be filed shortly after the expiration date. *Bass*, 401 A.2d at 1135. The appellant in *Bass* filed her notice of appeal four (4) days after deadline because her attorney was unable to locate the file from his secretary, who had been out of work due to illness. *Id.* In the present case, Plaintiff had not filed her notice of appeal from the award of arbitrators until thirteen (13) days after the deadline had expired. Plaintiff's delay in filing her appeal is more than three times the time elapsed in *Bass* and is well overdue. The delay in filing the appeal also 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 thirteen (13) days after the deadline cannot be attributed to

extraordinary circumstances involving fraud or breakdown in court operations, nor was it the result of non-negligent conduct, which would warrant the granting of an appeal nunc pro tunc according to the *Bass* test. 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:

Date

ALLAN L. TERESHKO, J.