

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL DIVISION

NE EXCAVATING SOLUTIONS, INC., :  
:   
Plaintiff :   
:   
Vs. : No. 15-0526  
:   
BUILDERS CHOICE PLUMBING & :   
HVAC, LLC, John Febbraio and :   
Maidah Febbraio, :   
Defendants :

MEMORANDUM OPINION

Matika, J. - January 26, 2018

This Memorandum Opinion is issued in response to the Appeal to the Pennsylvania Superior Court by the Defendants, John Febbraio and Maidah Febbraio (hereinafter "Febbraio") and Defendant, Builders Choice Plumbing & HVAC, LLC (hereinafter "Builders Choice".) For the reasons stated herein, the Appeal should be quashed.

FACTUAL AND PROCEDURAL BACKGROUND

Defendants, Febbraio and Builders Choice have filed an appeal to the Pennsylvania Superior Court from the Order of Court dated November 20, 2017, which denied a Motion to Modify Judgment filed

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only by Febbraio.<sup>1</sup> In that Order, this Court denied Febbraio's Motion to Modify a Judgment to remove the individual Defendants from the Judgment.

On December 18, 2017, Febbraio and Builders Choice filed the instant appeal. On December 27, 2017, this Court directed that Febbraio and Builders Choice file a concise statement of errors complained of on appeal pursuant to Pennsylvania Rule of Appellant Procedure 1925(b).<sup>2</sup> As of the date of this Memorandum Opinion, the Defendants, Febbraio and Builders Choice have failed to file this statement.

#### LEGAL DISCUSSION

In accordance with Pennsylvania Rule of Appellate Procedure 1925(b):

If the judge entering the order giving rise to the notice of appeal ("judge") desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial

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<sup>1</sup> The Motion to Modify Judgment filed on March 10, 2017 was filed only by Febbraio, therefore, if that is the order from which this appeal is taken the Court is clueless as to why Builders Choice joined in this appeal as the denial of the Motion does not impact Builders Choice.

<sup>2</sup> This entire action evidences a failure of the Defendants to timely act to defend the underlying action. Default judgment was originally obtained by the Plaintiff, NE Excavating Solutions, Inc. and against all Defendants on January 5, 2016. A subsequent Petition to Open/Strike that Judgment was filed on January 25, 2016, but denied by the Court by Order dated June 23, 2016. It was not until March 10, 2017 that Febbraio filed a request to remove them from judgment, some thirteen (13) months later. Now Defendants have once again failed to timely act and file a concise statement.

court and serve on the judge a concise statement of the errors complained of on appeal ("Statement").

Pa.R.A.P. 1925(b). Pursuant to subsection (2) of Pennsylvania Rule of Appellate Procedure 1925(b),

The judge shall allow the appellant at least 21 days from the date of the order's entry on the docket for the filing and service of the Statement. Upon application of the appellant and for good cause shown, the judge may enlarge the time period initially specified or permit an amended or supplemental Statement to be filed.

Pa.R.A.P. 1925(b)(2). "Appellant shall file of record the Statement and concurrently shall serve the judge[,] with service upon the judge to "be in person or by mail as provided in Pa.R.A.P. 121(a)." Pa.R.A.P. 1925(b)(1).

An examination of the docket entries in this matter establishes that this Court's Order directing Febbraio and Builders Choice to file a concise statement was docketed on December 27, 2017. Additionally, the docket entries verify that said order was mailed to Defendants' counsel of record by the Carbon County Prothonotary by way of first class mail on December 28, 2017. The consequence of such was that Febbraio and Builders Choice had until January 18, 2018, that being the twenty-first day following the docketing of this Court's Order directing them to file a concise statement and to serve upon the Court such statement of matters complained of. Neither Febbraio nor Builders Choice

had filed their concise statement by January 18, 2018, or on any date thereafter and no extension was ever requested or granted.

As the Supreme Court of this Commonwealth has ruled, in order for an appellant to preserve his or her claims for appellate review, appellant must comply with a trial court's order requiring appellant to file a statement of matters complained of on appeal in a timely manner. *Commonwealth v. Castillo*, 888 A.2d 775, 780 (Pa. 2005). Any issues not raised in an appellant's concise statement will be deemed waived. *Hess v. Fox Rothschild, LLP.*, 925 A.2d 798, 803 (Pa. Super. Ct. 2007). "Since the Rules of Appellate Procedure apply to criminal and civil cases alike, the principles enunciated in criminal cases construing those rules are equally applicable in civil cases." *Kanter v. Epstein*, 866 A.2d 394, 400 n.6 (Pa. Super. Ct. 2004), *appeal denied*, 880 A.2d 1239 (Pa. 2005).

As stated previously, "any issues not raised in a 1925(b) statement will be deemed waived." *Commonwealth v. Lord*, 719 A.2d 306, 309 (Pa. 1998). However, there are caveats to a finding of waiver as delineated in *Forest Highlands Community Association v. Hammer*, 879 A.2d 223 (Pa. Super. Ct. 2005). To determine that appellant has waived such issues the *Hammer* Court stated:

First, the trial court must issue a Rule 1925(b) order directing an Appellant to file a response within [twenty-one] days of the order. Second, the Rule 1925(b)

order must be filed with the prothonotary. Third, the prothonotary must docket the Rule 1925(b) order and record in the docket the date it was made. Fourth, the prothonotary shall give written notice of the entry of the order to each party's attorney of record, and it shall be recorded in the docket the giving of notice. See Pa.R.C.P. 236. If any of the procedural steps set forth above are not complied with, Appellant's failure to act in accordance with Rule 1925(b) will not result in a waiver of the issues sought to be reviewed on appeal.

*Id.* at 309.

In the case at bar, this Court issued an order on December 27, 2017 directing the filing of a concise statement within twenty-one days from the date of the order. The order was filed, docketed, and made of record in the dockets by the Carbon County Prothonotary on December 28, 2017. The docket entries make evident that the Prothonotary provided notice of the order to counsel of record for the Defendants via first class mail, on December 28, 2017. In view of the fact that the Defendants have failed to timely file a concise statement as prescribed by this Court's Order of December 27, 2017, Defendants thus have not complied with said order. Consequently, this Court believes Febbraio and Builders Choice have waived their right to appellate review. Accordingly, this Court respectfully recommends that the Honorable Superior Court quash their appeal.

#### CONCLUSION

Based upon the foregoing, this Court concludes Febbraio and

Builders Choice have waived their right to appellate review of this matter. Accordingly, this Court respectfully requests that the appeal of the November 20, 2017 Court order be **QUASHED**.<sup>3</sup>

BY THE COURT:

  
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Joseph J. Matika, Judge

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<sup>3</sup> Alternatively, if this Court speculates as to the nature of the basis for the appeal because the Appellate Court still desires to hear the merits of the appeal, it would simply point to the footnote contained in the November 20, 2017 Order, a copy of which is attached hereto as our rationale for denying the motion to remove Febbraio from the judgment.

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CIVIL DIVISION

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No. 15-0526

BUILDERS CHOICE PLUMBING & :  
HVAC, LLC, JOHN FEBBRAIO, :  
and MAIDAH FEBBRAIO, :  
Defendants :

ORDER OF COURT

AND NOW, this 20th day of November, 2017, upon consideration of the "Motion for Modification of Judgment of Individual Defendants" filed by Defendants, John Febbraio and Maidah Febbraio, the brief in support thereof, the brief in opposition thereto lodged by Plaintiff and after argument thereon, it is hereby **ORDERED and DECREED** that said Motion is **DENIED**<sup>1</sup> for want of jurisdiction by this Court.

<sup>1</sup> A complaint was filed by Plaintiff on March 24, 2015 against the moving Defendants (hereinafter "Febbraio") and Builders Choice Plumbing and HVAC, LLC (hereinafter "Builders Choice"). On May 14, 2015, all three (3) of these Defendants filed a joint Answer, New Matter and Counterclaim. Plaintiff thereafter filed Preliminary Objections to the Answer, New Matter, and Counterclaim. On November 20, 2015, this Court granted those objections and directed all Defendants to file an amended answer, new matter, and counterclaim. As a result of the Defendants failure to file this amended responsive pleading, Plaintiff on January 5, 2016 obtained default judgment against all three (3) Defendants. At no time had any Defendant filed preliminary objections to the complaint.

On January 25, 2016, all Defendants filed a Petition to Strike or Open Judgment. This Court denied that Petition by Order dated June 23, 2016. This case then sat dormant on the dockets of the Court until the filing of the instant motion by Febbraio. In this Motion, for the first time, Febbraio alleges that the "underlying business relationship" was between Plaintiff and Defendant, Builders Choice Plumbing and HVAC, LLC, and that the dispute between those parties had nothing to do with them. Further, in the untimely lodged brief of May 19, 2017, Febbraio also alleges that Plaintiffs failed to establish

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Joseph J. Matika, J.

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a right to pierce the corporate veil of Builders Choice to be able to seek liability as against them.

42 Pa.C.S.A. §5505 states that, "Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order is taken or allowed." Therefore, under this statute, a trial court lacks authority to award additional relief if such relief is sought more than thirty (30) days after the entry of a final order, or in this case, default judgment. After that thirty (30) days the court is divested of jurisdiction. *Ness v. York Township Board of Commissioners*, 123 A.3d 1166, 1169 (Pa. Commw. Ct. 2015), citing *Freidensbloom v. Weyant*, 814 A.2d 1253, 1255 (Pa. Super 2003), overruled in part on other issues by *Miller Electric Co. v. Deweese*, 901 A.2d 1051 (2006). However, there are exceptions to that general rule when the modification is necessary to correct an obvious technical error but not to make substantive changes. *Ettelman v. Comm. of Pa, Dept of Transportation, Bureau of Driver Licensing*, 92 A.3d 1259, 1262 (Pa. Commw. 2014). In the case *sub judice*, the basis for the request for modification is premised upon a defense by Febbraio to the Plaintiff obtaining any relief from or judgment against Febbraio. This is a request to make a substantial change to the judgment by vacating that judgment as against Febbraio. Further, this Court cannot allow a modification of a perceived or alleged substantive defect on the basis that the defect, in this case the entry of default judgment against Febbraio, was not before the Court. *Pendle Hill v. Zoning Hearing Board of Nether Providence Twp.* 134 A.3d 1187, 1195 (Pa. Commw. Ct. 2016 citing *Ettelman*, supra.) That issue was never properly raised in the underlying action as either a defense or through preliminary objections to the Complaint.