

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

FILED
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CLERK OF COURT
PROthonARY

JACQUELINE M. DEMARCO and :
BRAD DEMARCO, :
 :
 Appellees :
 :
 v. : No. 19-0765
 :
 THOMAS ACKER and :
SABINA ACKER, :
 :
 Appellants :

Robert T. Yurchak, Esquire Counsel for Appellees
Anthony Roberti, Esquire Counsel for Appellants

MEMORANDUM OPINION

Serfass, J. - February 14, 2022

Here before the Court is the appeal of our non-jury trial verdict, entered on November 24, 2021, in favor of Jacqueline M. DeMarco and Brad DeMarco (hereinafter "Appellees") and against Thomas Acker and Sabina Acker (hereinafter "Appellants") awarding damages in the amount of eight thousand five hundred eighty-one dollars and twenty-six cents (\$8,581.26). We file the following Memorandum Opinion pursuant to Pa.R.A.P. 1925(a) and respectfully recommend that the instant appeal be either quashed or dismissed for the reasons set forth hereinafter.

FACTUAL AND PROCEDURAL BACKGROUND

Appellees are the owners of real property situated at 43 West Sixth Street, Jim Thorpe, Pennsylvania. Appellants are the owners

of adjacent property situated at 531 North Street, Jim Thorpe, Pennsylvania. In the case indexed to docket number 15-2312, this Court found that Appellees had established their claim for adverse possession of a three (3') feet wide by fifty (50') feet long portion of real property in our decision and verdict of May 16, 2017, which was affirmed by the Superior Court of Pennsylvania on April 27, 2018.

Appellees' property contains an above-ground swimming pool, a pool deck and a surrounding fence. In June of 2015, Mr. Acker cut a section of Appellees' pool deck and removed a section of Appellees' fence. The actions of Mr. Acker caused the remainder of the pool deck to become unstable and to partially fall into the pool which resulted in the pool becoming unusable.

On April 18, 2019, Appellees initiated the instant action through the filing of a complaint seeking a judgment and injunctive relief. A non-jury trial was held before the undersigned on November 12, 2021. Appellees presented testimony and evidence regarding the cost for the replacement of their pool, pool deck and fence. On November 24, 2021, we issued a verdict in favor of Appellees and against Appellants in an amount equal to the cost of replacing Appellees' pool and pool deck, but not for replacement of Appellees' fence as there was conclusive testimony that the removed section was reinstalled in 2015 and has remained in place ever since.

Our verdict was filed and entered on the docket on November 24, 2021 and notice thereof was directed to counsel on that same date. Pursuant to Pa.R.C.P. 227.1(c), the parties had until December 6, 2021 to file post-trial motions. On December 7, 2021, Appellants filed a "Petition for Leave to File Post Trial Motion for Reconsideration *Nunc Pro Tunc*" asserting that the length of time to file a post-trial motion was unreasonably short based upon their purported receipt of notice of the verdict on December 2, 2021, and requesting leave to file an untimely post-trial motion. On December 9, 2021, we issued a Rule to Show Cause regarding Appellants' petition for leave. On December 23, 2021, while the rule and the petition for leave were still pending before this Court, Appellants filed an Appeal to the Superior Court of Pennsylvania requesting review and reversal of our November 24, 2021 verdict. On December 28, 2021, Appellees filed an Answer to Appellants' petition for leave requesting that this Court deny Appellants' petition as moot due to the filing of the instant appeal. That same day, we entered an order directing Appellants to file a concise statement of matters complained of on appeal pursuant to Pa.R.A.P. 1925(b). In compliance with our order, Appellants filed their "Concise Statement of Matters Complained of" on January 13, 2022.¹

¹ We also note that on January 13, 2022, Appellants filed a "Praecipe to Enter Judgment" on the November 24, 2021 Verdict. That same day, judgment in favor of Appellees and against Appellants was entered by the Prothonotary of Carbon County.

ISSUES

In their Concise Statement, Appellants raise the following issues:

1. Whether this litigation seeking damages for an intentional tort is barred by the two (2) year statute of limitations because the case was filed about forty-six (46) months after the alleged event;
2. Whether the award of damages for "replacement damages" is barred by the fact that no evidence was presented to the Court that the deck and fence could not be repaired to the same condition as before the alleged event, and no evidence was presented as to the value of the deck and fence on the date of the alleged tort;
3. Whether this case is barred by stare decisis because it is the second case filed on the same facts heard in case No. 15-2312; and
4. Whether the judgment against Sabina Acker arising out of Thomas Acker's actions is supported by any evidence or testimony.

DISCUSSION

At the outset, we note the odd procedural posture of the instant matter. On December 7, 2021, Appellants filed their petition for leave to file an untimely post-trial reconsideration

motion. On December 28, 2021, Appellees filed an answer to Appellants' petition for leave pursuant to our issued rule, but we have yet to take action on the pending petition. Appellants filed the instant appeal on December 23, 2021 prior to the filing of Appellee's answer and this Court's disposition of Appellants' petition for leave.

The Pennsylvania Rules of Appellate Procedure provide that "after an appeal is taken ... the lower court ... may no longer proceed further in the matter." Pa.R.A.P. 1701(a). The trial court has limited authority to take action in a case after an appeal is filed, but we do not find any of the enumerated exceptions to be applicable in the instant matter. See Pa.R.A.P. 1701(b)(1)-(6). At the present time, there is no post-trial motion pending before the Court as we have not ruled on Appellants' petition for leave. We also note that if Appellants' petition was granted and a post-trial motion was filed, this Court now lacks jurisdiction to address Appellants' motion for post-trial relief due to the filing of the instant appeal. See Ostrowski v. Pethick, 590 A.2d 1290, 1292 (Pa.Super. 1991); see also Kaiser v. 191 Presidential Grp., 454 A.2d 141, 143 (Pa.Super. 1982).

Where there is a pending post-trial motion, the appellate courts of this Commonwealth have held that the appeal must be quashed and the case remanded for the trial court to rule on the pending post-trial motion. See Valley Gypsum Co., Inc. v.

Pennsylvania State Police, 581 A.2d 707, 709 (Pa.Cmwlth. 1990); see also Litt v. Rolling Hill Hospital, 437 A.2d 1008, 1009-10 (Pa.Super. 1981). Such an appeal is premature and "frustrate[s] the orderly disposition" of any post-trial motions. Valley Gypsum Co., Inc., 581 A.2d at 709.

Post-trial motions serve the "important function in [the] adjudicatory process [of] afford[ing] the trial court in the first instance the opportunity to correct asserted trial court error and also clearly and narrowly fram[ing] issues for appellate review." Newman Dev. Grp. of Pottstown, LLC v. Genuardi's Fam. Mkts., Inc., 52 A.3d 1233, 1239 (Pa. 2015) (quoting Diamond Reo Truck Co. v. Mid-Pac. Indus., Inc., 806 A.2d 423, 428 (Pa.Super. 2002)). A petition for leave to file a post-trial motion *nunc pro tunc* is not a post-trial motion, but if this Court were to grant Appellants' petition, a post-trial motion could be filed while the instant appeal is pending. As such, we respectfully recommend that the instant appeal be quashed and that this Court be permitted the opportunity to address Appellants' petition and any subsequent post-trial motion.

If the Superior Court finds that the instant appeal should not be quashed based upon the aforesaid reasons, we respectfully recommend that the instant appeal be dismissed because no timely post-trial motions have been filed.

A verdict in a non-jury trial is not immediately appealable absent the entry of a final judgment. Carr v. Michuck, 234 A.3d 797, 804 (Pa.Super. 2020) (citing Reuter v. Citizens & Northern Bank, 599 A.2d 673, 675-76 (Pa.Super. 1991)). Additionally, a party must file post-trial motions to preserve claims the party wishes to raise on appeal. Chalkey v. Roush, 805 A.2d 491, 492 (Pa. 2002). "Issues not raised in the trial court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a).

Appellants appealed our verdict of November 24, 2021 prior to the entry of a final judgment. Appellants then filed a praecipe to enter judgment on January 13, 2022 and judgment was entered on that same day, several weeks after their filing of the instant appeal.² As previously discussed, Appellants have not filed any post-trial motions and, as such, have not preserved any issues for appellate review. Therefore, the instant appeal should be dismissed.

CONCLUSION

Based upon the foregoing, we respectfully recommend that the instant appeal be quashed to permit disposition of Appellants' petition for leave and any potential post-trial motion or, alternatively, that the instant appeal be dismissed because the

² We note that pursuant to Pa.R.C.P. 227.4(1)(a), the prothonotary shall, upon praecipe of a party, enter judgment upon the decision of a judge following a trial without jury if no timely post-trial motion is filed. In filing their "Praecipe to Enter Judgment" on January 13, 2022, Appellants have acknowledged that no timely post-trial motion has been lodged in this matter.

verdict was not appealable absent entry of a final judgment and no issues have been preserved for appellate review.

BY THE COURT:

A handwritten signature in black ink, appearing to read "S.R. Serfass", written over a horizontal line.

Steven R. Serfass, J.