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

PETER W. HUKKA	:	
	:	**No. 12-0775**
Appellant	:	
vs.	:	
	:	
SHELLEY JAYE WEYHENMEYER	:	
	:	
Appellee	:	

Cynthia S. Yurchak, Esquire — Counsel for Appellant
Nicholas J. Masington, Esquire — Counsel for Appellee

MEMORANDUM OPINION

Matika, J. – December 23, 2014

On December 6, 2013, this Court held a non-jury trial in which it took testimony and received exhibits into evidence in an action filed by Peter Hukka (hereinafter "Appellant") against Shelley Weyhenmeyer (hereinafter "Appellee") challenging the validity of a deed and agreement of sale between the parties, claiming there was a lack of delivery and lack of consideration relative to each document.

On June 30, 2014, this Court rendered a Decision and Verdict, which *inter alia,* found that there was delivery of both documents and that Appellant had failed to sufficiently establish a lack of consideration on either document. Accordingly, this Court denied all relief requested by Appellant. Subsequently, Appellant filed for post-trial relief, which was also denied. An appeal followed and this opinion is

in support of this Court's underlying rulings in favor of Appellee.

FACTUAL AND PROCEDURAL BACKGROUND[1]

Appellant and Appellee were involved in a romantic relationship, during which they had two children. On October 8, 2003, Appellant and Appellee jointly purchased a parcel of real estate located at 128 Lentz Trail, Jim Thorpe, Pennsylvania, for the sum of one hundred fifty-nine thousand, six hundred dollars ($159,600). The parties executed a mortgage in the amount of eighty-four thousand dollars ($84,000), and Appellee contributed approximately ninety-nine thousand dollars ($99,000) of her own money towards the purchase of that real estate and necessary repairs thereto.

In 2008, the parties' relationship had deteriorated to the point that they began the process of purchasing a separate residence for Appellant, located at 105 Center Street, Jim Thorpe, Pennsylvania. On September 23, 2008, the parties removed Appellee's name from the original agreement of sale on the Center Street property. Appellee argued, and presented evidence which corroborated her claims that, though the money for the ten thousand dollar ($10,000) down payment on the Center

[1] A much more thorough and detailed accounting of this Court's Findings of Fact and Procedural History can be found in the June 30, 2014 "Decision & Verdict", which the Court has attached hereto for the Superior Court's convenience.

Street property came from the parties' joint bank account, it originated from her personal accounts and was transferred into the joint account. Despite attempts to reconcile, the parties' relationship ended in October of 2009, and Appellant moved into the Center Street property permanently.

Earlier in 2009, Appellee and Appellant commenced negotiations to divide their jointly held property, which concluded with the execution of two documents, one titled "Agreement RE: Division of Property" and the other document being the deed to the Lentz Trail property. These documents were finalized by Attorney Kim Roberti and presented to Appellant, who concurred that these were in accordance with their agreement. The parties then had the documents notarized by the John Yurconic Agency in Lehighton, Pennsylvania. Appellant transferred his entire interest to the Lentz Trail property to Appellee, as set forth in the Division of Property Agreement (hereinafter "Agreement").

In the Agreement, Appellant agreed to transfer his interest in the Lentz Trail Property to Appellee in consideration for ten thousand dollars ($10,000) and other valuable consideration. Appellee admitted at trial she failed to tender the ten thousand dollars to Appellant[2], though Appellant did receive the other

[2] The June 30, 2014 Decision discusses, in depth, the reasons for which this Court found for Appellee, despite this admission. See pages 19-28 of the June 30, 2014 Decision attached hereto.

consideration, including title to his car and all of his personal belongings from the Lentz Trail property. The parties once again entertained the idea of reconciliation, and therefore, Appellee postponed recording the deed on the Lentz Trail property. However, in October of 2009, Appellee recorded the deed, believing their relationship was over and broken beyond repair.

Following their separation, Appellant filed suit with this Court. After dismissing two counts of the original complaint due to the statute of limitations, this Court found in favor of Appellee on all remaining counts. Subsequently on July 9, 2014, Appellant filed a Motion to Amend the Pleadings to Conform to the Evidence and a Motion for Post-Trial Relief. Those motions were denied by this Court on October 2, 2014.

On October 31, 2014, Appellant filed an appeal[3] to Superior Court. Thereafter, this Court directed that he, pursuant to Pennsylvania Rules of Appellate Procedure 1925(b) file a Concise Statement of Matters Complained of on Appeal, which was timely filed as well. In this statement, Appellant raised numerous issues. This Court finds that these matters can be reduced to the following two issues:

[3] This Court's Decision and Verdict issued in support of this ruling was filed on June 30, 2014. However, due to the filing of post-trial motions, the verdict was never reduced to a judgment until Appellant was required to do so by order of the Superior Court dated December 11, 2014. Judgment was subsequently entered on December 15, 2014.

1) Whether this Court erred in finding that the evidence and testimony presented by Appellee was more credible and convincing than the evidence and testimony presented by Appellant; and

2) Whether this Court erred in denying Appellant's Motion for Post-Trial Relief and Motion to Amend the Pleadings.

The Court will address these issues accordingly.

DISCUSSION

I. Determinations of Credibility

In Appellant's Matters Complained of on Appeal, Appellant avers fifteen (15) separate points, several of which this Court finds to be overly vague and confusing. From what this Court can determine, at least fourteen (14) of the averments speak to this Court's findings of fact and assignment of credibility to the testimony at the non-jury trial before this Court.[4] Upon consideration of this Court, it is determined that only Averment 3 could potentially contain a different claim of law, and therefore, that paragraph will be responded to separately in this opinion.

A. *Credibility of the Witnesses*

When an appellant challenges the trial court's determination of witness credibility, the Superior Court has clearly held this is a matter for the finder of fact:

[4] For example, Defendant uses the phrase "erred in finding" or comparable language in at least ten (10) of the fifteen (15) averments.

> It is well established that the credibility of witnesses is an issue to be determined by the trier of fact. On appeal, this [Superior] Court will not revisit the trial court's determinations . . . regarding the credibility of the parties. Thus, [an] argument, which would require this Court to revisit and essentially reverse the [trial court] on his credibility determinations, provides no grounds for relief.

Stephan v. Waldron Elec. Heating and Cooling LLC, 100 A.3d 660, 667 (Pa. Super. Ct. 2014), *quoting Woods v. Cicierski*, 937 A.2d 1103, 1105 (Pa. Super. Ct. 2007). Further, the Superior Court has also stated that "the trial court, as the finder of fact, is entitled to weigh the evidence and assess the credibility of witnesses." *Krankowski v. O'Neil*, 928 A.2d 284, 287 (Pa. Super. Ct. 2007), *citing Baehr v. Baehr*, 889 A.2d 1240, 1245 (Pa. Super. Ct. 2005).

In the case *sub judice*, Appellant globally claims that this Court erred by finding a lack of credibility in regards to his testimony while not discrediting or ignoring the testimony and evidence presented by Appellee. During the non-jury trial, this Court heard testimony from both Appellant and Appellee, reviewed exhibits from both parties, and explained, in detail, in the attached June 30, 2014 Decision and Verdict why Appellant was determined not to be credible.

Accordingly, based on both the case law and the sound reasoning of this Court, acting in its capacity as the sole judge of credibility, Appellant's claim that this Court erred in

finding a lack of credibility in his testimony and evidence should be dismissed.

B. *Findings of Fact*

Turning to Appellant's claims that this Court erred in its findings of fact based on credibility issues, once again, Pennsylvania case law supports the idea that under ordinary circumstances, the trial court's determinations are not to be disturbed. The Supreme Court previously maintained "[w]hen this Court entertains an appeal originating from a non-jury trial, we are bound by the trial court's findings of fact, unless those findings are not based on competent evidence." *McShea v. City of Phila.*, 995 A.2d 334, 338 (Pa. 2010), *quoting Triffin v. Dillabough*, 716 A.2d 605, 607 (Pa. 1998). Further, the Superior Court has commented that "we are bound by the facts that are found by the trial court and adequately supported in the record", in clear agreement with the Supreme Court. *In re O'Brien*, 898 A.2d 1075, 1080 (Pa. Super. Ct. 2006).

In the instant case, Appellant makes numerous averments that this Court's findings of fact were incorrect.[5] Appellant,

[5] See Averments 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14 in the Matters Complained of on Appeal. Averment 15 deals with this Court's finding of credibility with witnesses, addressed above. As stated above, Averment 3 appears to possibly argue either an error in the finding of fact or in the denial of Appellant's post-trial motions, though this Court is unclear as to what exactly Appellant is claiming. For the sake of thoroughness, to the extent it actually does deal with this Court's denial of Appellant's post-

for example, argues that this Court erred in finding the record was "muddled" with regards to the point in time when the parties' relationship began to deteriorate. In the course of the non-jury trial, testimony was taken as to the point in time when their relationship reached its end. Due to the conflicting testimony of the parties, as well as evidence presented, this Court found it difficult to ascertain the exact date and stated so accordingly in the June 30, 2014 Decision. The other averments all correspond to this argument that this Court erred in some finding of fact or in another area well within this Court's discretion.

Therefore, based on case law and this Court acting in its capacity as the finder of fact, this Court's factual findings should not be disturbed[6], and Appellant's challenge should be dismissed accordingly.

II. **Denial of Post-Trial Motions**

Following this Court's June 30, 2014 Decision and Verdict, Appellant filed two post-trial motions on July 9, 2014: a "Motion for Post-Trial Relief Pursuant to Pa.R.C.P. 227.1" and a "Motion to Amend Pleadings to Conform to Evidence". Following receipt of briefs from both parties and foregoing an oral argument, this Court denied both post-trial motions on October

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trial motions, those issues will be addressed in a subsequent section of this opinion.

[6] These findings are supported in law by the conclusions of law reached by this Court in the June 30, 2014 Decision and the case law referred to therein.

2, 2014. In this appeal to the Superior Court, Appellant stated in the Notice of Appeal that he is appealing *inter alia* this Court's denial of these Motions.

However, Appellant's averment contains no specific mention of the post-trial motion, and only one of the averments seems to actually touch on the denial of those post-trial motions.[7] Therefore, this Court considers the matter waived as there is no specific averment. In the event that it is not waived, this section also includes an explanation as to why denial of Appellant's post-trial motions was proper.

A. *Appellant's Argument Regarding Denial of Post-Trial Motions is Waived as the Matters Complained of on Appeal Contain No Specific Averments*

It is understood, both through the language of the rule and from case law, that "[a]ny issues not raised in a Pa.R.A.P. 1925(b) statement will be deemed waived." *Commonwealth v. Hill*, 16 A.3d 484, 427 (Pa. 2011), *quoting Commonwealth v. Lord*, 719 A.2d 306, 309 (Pa. 1998). *See also In re A.B.*, 63 A.3d 345 (Pa. Super. Ct. 2012). Also, the Superior Court has said that:

> When an appellant fails adequately to identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues. An issue not identified for review in a Rule 1925(b) statement is waived whether or not the lower court actually addresses the issue in an opinion.

[7] Averment 3, as mentioned in Footnote 5, may potentially deal with this Court's denial of the post-trial Motions.

In re Estate of Daubert, 757 A.2d 962, 963 (Pa. Super. Ct. 2000).

Here, Appellant's Matters Complained of on Appeal contains no specific averments as to any error in this Court's denial of his post-trial motions. This Court, based on a very broad interpretation of Averment 3, feels this *might* relate to the denial of Appellant's post-trial motions.[8] However, this Court feels that this level of uncertainty as to what is actually being appealed impedes the preparation of a complete and adequately thorough legal analysis pertinent to those issues. Consequently, this Court believes any argument raised by Appellant with regards to the denial of his post-trial motions should be denied due to the lack of a specific averment.

B. *In the Alternative, if the Matter is Not Deemed Waived, this Court's Denial of Appellant's Post-Trial Motions was Proper*

In the event that Appellant's argument is not deemed waived,

this Court was correct in denying Appellant's post-trial motions. Rule 227.1 of the Pennsylvania Rules of Civil Procedure allows for the trial court to, upon the written motion

[8] Averment 3 reads, in its entirety, "The lower court erred in failing to, in the alternative, grant a variance, when the pleadings, taken as a whole, plead a proper cause of action which is proved by the evidence at trial." There is no mention in this averment, or any of the 14 other averments, of any post-trial motions. The *only* reference to Appellant's Motion for Post-Trial Relief or his Motion to Amend Pleadings is found at the end of a sentence in the Notice of Appeal. No reference is made to either document anywhere in the Matters Complained of on Appeal.

for Post-Trial Relief "affirm, modify or change the decision; or enter any other appropriate order." Pa. R.C.P. 227.1(a)(4-5). Further, case law has indicated repeatedly that motions for post-trial relief may be granted or denied at the lawful discretion of the trial court and will not be reversed without a manifest abuse of discretion or a clear error of law. *See Mitchell v. Gravely Int'l*, 698 A.2d 618, 619 (Pa. Super. Ct. 1997). Additionally, "[w]e will not disturb the trial court's decision unless the court palpably abused in discretion or committed an error of law." *Fischer v. Troiano*, 768 A.2d 1126, 1129-30 (Pa. Super. Ct. 2001).

The PA Supreme Court has ruled in a similar fashion regarding the trial court's discretion regarding a motion to amend the pleadings:

> "Rule 1033 of the Pennsylvania Rules of Civil Procedure allows a party to amend his or her pleadings with either the consent of the adverse party or leave of court. Leave to amend lies within the sound discretion of the trial court and the 'right to amend should be liberally granted at any stage of the pleadings *unless there is an error of law or resulting prejudice to an adverse party*'".

Werner v. Zazyczny, 681 A.2d 1331, 1338 (Pa. 1996), *quoting Connor v. Allegheny Gen. Hosp.*, 461 A.2d 600, 602 (Pa. 1983) (emphasis added). The Superior Court has expanded on this, ruling:

> A trial court has broad discretion in ruling on a party's motion to amend the pleadings. An amendment

> will not be allowed, however, when it is against a positive rule of law, where it states a new cause of action after the statute of limitations has run, or when it will surprise or prejudice the opposing party.

Somerset Cmty. Hosp. v. Allan B. Mitchell & Assocs., Inc., 685 A.2d 141, 147 (Pa. Super. Ct. 1996).

With regard to what defines "prejudice", the Supreme Court has explained:

> [a]n amendment introducing a new cause of action will not be permitted . . . This could constitute 'resulting prejudice' to the adverse party. However, if the proposed amendment does not change the cause of action but merely amplifies that which has already been averred, it should be allowed . . . .

Schaffer v. Larzelere, 189 A.2d 267, 270 (Pa. 1963) (*abrogated on other grounds by Fine v. Checcio*, 870 A.2d 850 (Pa. 2005)). "Prejudice must amount to something more than the removal of a procedural defect that the amendment is intended to cure. Rather, a trial court may not deny a party leave to amend unless *unfair surprise* or some comparable prejudice will result from the amendment." *Pilotti v. Mobil Oil Corp.*, 565 A.2d 1227, 1229 (Pa. Super. Ct. 1989) (emphasis in original).

In the instant matter, Appellant argues this Motion to Amend is merely to fix what he deems to be a "procedural" defect. Appellant's Motion for Post-Trial Relief and Motion to Amend the Pleadings are littered with references to "technicalities" and that this Court "tutors" Appellant on word choice. However, in this Court's opinion, what Appellant is

asking for goes well beyond a procedural defect. Here, Appellant presented a cause of action grounded in the argument of "lack of consideration", and after this Court's Decision and Verdict in Appellee's favor, is now seeking a "second bite of the apple", claiming that Appellant really meant to argue "failure of consideration".[9]

Accordingly, this Court believes allowing Appellant to amend the complaint now would be permitting him to change his cause of action on appeal after his original cause of action was rejected by this Court. This new cause of action would force Appellee to prepare an entirely new defense than the one made before this Court **after the fact**, which this Court considers to be well within the definition of "unfair prejudice" to Appellee. This Court believes that to allow Appellant to amend his pleadings to conform to the evidence does not merely amplify that which has already been averred, but changes his cause of action and therefore, falls in line with the Supreme Court's standard in *Schaffer*. The Motion to Amend and Post-Trial motions were properly denied.

[9]In the June 30, 2014 Decision, this Court indicated that in the pleadings, Appellant failed to plead an adequate breach of contract or failure of consideration claim, causes of action which may have presented a better argument in Appellant's favor at trial. In that Decision, this Court explained in great detail the difference between the two types of consideration arguments, as well as why Appellant's argument for "lack of consideration" failed. See pages 23-28 of the June 30, 2014 Decision and Verdict attached hereto.

Secondly, this Court finds fault with the language of Appellant's Averment 3 in the Matters Complained of on Appeal. The Superior Court has stated that a variance is needed when "the proof fails to materially correspond to the allegations . . . ." *Reynolds v. Thomas Jefferson Univ. Hosp.*, 676 A.2d 1205, 1209-10 (Pa. Super. Ct. 1996).

In Appellant's motion for post-trial relief, Appellant avers that he "did plead a case of failure of consideration".[10] Further, in Averment 3, Appellant complains that this Court erred in not granting him a variance, and the pleadings, "taken as a whole" already plead a proper cause of action. If, by Appellant's own admission, the pleadings already "plead a proper cause of action", why then, this Court wonders, would a variance be necessary?

CONCLUSION

Based upon the foregoing, this Court respectfully recommends that the June 30, 2014 verdict and December 15, 2014 judgment be allowed to stand and that this Court's Order, dated October 2, 2014, denying Appellant's Motion for Post-Trial Relief and Motion to Amend the Pleadings be affirmed.

[10] See Averment 15 of Appellant's Motion to Amend Pleadings and Averment 13 of Appellant's Motion for Post-Trial Relief, both of which claim Appellant did present sufficient evidence to show failure of consideration.

BY THE COURT:

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Joseph J. Matika, J.