IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia	:	
	:	
v.	:	No. 2178 C.D. 2013
	:	Submitted: October 6, 2014
John Hummel, Jr.,	:	
Appellant	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE LEADBETTER **FILED: November 18, 2014**

John Hummel, Jr. appeals from the order of the Court of Common Pleas of Philadelphia County (docketed on October 16, 2013) essentially denying reconsideration of its prior order denying relief in his appeal from an order of the Philadelphia Municipal Court. Because an order denying reconsideration is not reviewable, we dismiss the appeal.

On April 2, 2012, the City of Philadelphia, Department of Licenses and Inspections, filed a code enforcement complaint in the Municipal Court seeking the imposition of fines for violations of the Philadelphia Code at 4602 N. Penn Street, Philadelphia, PA 19111, property owned by Appellant. The violations were for operating a rooming house: (1) without a business privilege license; (2) without a housing inspection license; (3) without a zoning permit for that use; and

(4) without a certified fire protection system. *See* Code Enforcement Complaint, Reproduced Record (R.R.) at 8a-10a. An affidavit of service was filed indicating that service of original process had been perfected, as personal service was made on an "[a]dult in charge of Defendant(s) residence," at 1238 Friendship Street, Philadelphia 19111, identified by name and relationship as "Harry . . . Grand Daughter's [sic] Boyfriend." Affidavit of Service, R.R. at 11a. Neither Appellant nor his attorney appeared at the May 17, 2012, hearing on the charges in Municipal Court. The City requested and was granted a default judgment of $5,000.00 against Appellant.

On October 1, 2012, Appellant's attorney filed a petition to open the default judgment (PTO) in the Municipal Court, stating as the *sole reason* for the appeal that: "Petitioner is currently seeking a zoning proceeding in order to legalize the use at the property." PTO, R.R. at 13a. Although the preprinted appeal form specifically asked "for [the] reason" that Appellant "failed to appear at the hearing," Appellant left the answer to that question blank. *Id.* By order dated October 2, 2012, the petition to open was denied for the reason that "[t]he defense to the claim is without merit." Municipal Court Order, R.R. at 14a.

Appellant filed a timely notice of appeal with the Philadelphia Court of Common Pleas on October 9, 2012, but failed to file a motion setting forth the relief requested within twenty days as required by local rule,[1] inexplicably waiting

[1] Pursuant to Philadelphia County Local Rule 1001, an order of the Municipal Court denying a petition to open a default judgment is a supplementary order appealable to the court of common pleas, and the appeal is "limited to a review of the record." Phila. Cty. LR 1001(a)(3). The rule further provides that within 20 days of filing the notice of appeal, the appellant must file "a motion . . . setting forth the relief requested, and shall attach . . . a copy of . . . [the] Code Enforcement Complaint . . . the stenographic record of the proceeding before the Municipal Court, if available . . . [and] all other documents required to be filed by Philadelphia Civil Rule **(Footnote continued on next page…)**

nearly ten months before he filed a document he styled, "Petition to Open Judgment and Remand to Philadelphia Municipal Court" (First Petition) on July 31, 2013. For the first time, Appellant alleged that service of the complaint was defective, that the lack of notice of a hearing at which a default judgment was entered against him violated his right to due process, and that the fines were excessive and confiscatory, in violation of the Philadelphia Home Rule Charter.[2] Appellant did not offer any explanation for the lengthy delay in filing this document following his notice of appeal nor did he seek *nunc pro tunc* relief. On August 26, 2013, common pleas denied this appeal "due to Appellant's failure to comply with Phila. [Cty. LR] 1001(f)(2)."[3] No appeal was taken from the August 26th order.

On September 16, 2013, Appellant filed a second "Petition to Open Judgment and Remand to Philadelphia Municipal Court" in common pleas, which was nearly identical to the first, with the addition of two sentences stating that the code enforcement complaint and the transcript order form were attached as

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(continued…)

208.1 et seq. which is necessary to enable the court to decide the issue presented." *Id.*, LR 1001(f)(2)(i)(a)-(c). Accordingly, Appellant had until October 29, 2012, to file his motion with the trial court.

[2] In particular, Appellant averred that the code enforcement complaint listed an incorrect address for him, 1238 Friendship Street, Philadelphia, PA 19111, when he did not live there at that time, and that service was made on an individual at that address identified only as "Harry," and "granddaughters' boyfriend," and that this "78 year old man, who was not well known to [him] and was not in any authorized [sic] to accept service for [him]." First Petition, R.R. at 24a. Appellant further alleged that he had "no notice of the Municipal Court hearing whatsoever," and that the fine entered by the court was "excessive and confiscatory and in violation of the Philadelphia Home Rule Charter, which limits fines for Code violations to $300 per violation." *Id.* Finally, Appellant alleged that "Municipal Court inexplicably denied the Petition to Open Default Judgment on October 2, 2012, despite the fact that there was clearly defective service." *Id.*, R.R. at 25a.

[3] Common Pleas' Order, dated August 23, 2013, docketed August 26, 2013. R.R. at 36a.

exhibits, as well as the addition of a new paragraph "A" in the supporting brief in which he averred compliance with the Philadelphia County Local Rule 1001(f)(2) and attached the required documents. *See* Appellant's Brief in Support of Second Petition, R.R. at 45a. Appellant did not offer any explanation for his earlier failure to comply with Local Rule 1001 or for the delay in filing the documents after the notice of appeal, nor did he address his failure to raise the issues of defective service, lack of notice, and excessive fines in his petition to open before the Municipal Court. Finally, Appellant did not contend that common pleas erred in denying his appeal for failing to comply with the local rule.[4]

By order docketed October 16, 2013, common pleas denied Appellant's second application, "per this Court's August [26], 2013 order." R.R. at 60a. While Appellant chose not to appeal the August 26th order, he did timely appeal the October 16th order and, thereafter, common pleas filed its opinion in accordance with Rule 1925(b) of the Rules of Appellate Procedure. In its opinion, common pleas opined that, because its August 26, 2013 order was a final and appealable order pursuant to Rule of Appellate Procedure 341(b), and Appellant did not file an appeal from that order within thirty days as required by Rule of Appellate Procedure 903(a), his appeal should be quashed. Common Pleas further opined that because Appellant did not comply with the requirements of Philadelphia County Local Rule 1001(f)(2) and did not offer any explanation justifying his noncompliance, it was denying his appeal on procedural grounds, citing *Bass v. Commonwealth,* 401 A.2d 1133, 1135 (Pa. 1979), which held that *nunc pro tunc* filings should be allowed sparingly, and only where there was fraud,

[4] Rule of Civil Procedure No. 239(f) provides that, "[n]o civil action or proceeding shall be dismissed for failure to comply with a local rule." Pa. R.C.P. No. 239(f).

a breakdown within court operations, or non-negligent happenstance that impeded a party's ability to comply with pertinent deadlines.

Before this court, Appellant raises the following issues: (1) whether common pleas erred in denying his second petition where there was a defective affidavit of service, lack of service of process and, thus, no notice of the Municipal Court hearing; and (2) whether the principles of fairness, justice and procedural due process require the default judgment against him be opened to allow proceedings on the merits.[5] While these issues may have had merit had they been timely raised and preserved for appeal, they are not before us. Specifically, as discussed below, by appealing only from the October 16th order, Appellant has essentially taken an appeal from an order that is most properly characterized as a denial of reconsideration, which is not subject to appellate review.

Appellant argues that his appeal is from the denial of a petition to open judgment, and that Pa. R.A.P. 311(a)(1) provides that "[a]n appeal may be taken as of right … from … [a]n order refusing to open, vacate or strike off a judgment." He then posits that because Rule 311 is titled "Interlocutory Appeals as of Right," the August 26th order must have been interlocutory. Therefore, he asserts that the matter before common pleas remained open when the October 16th order was entered, and so he had a right to appeal that order on the merits. This argument misses the mark. There is no question that the order of August 26th

[5] Appellant also argues that the City has waived any arguments on appeal because it failed to enter an appearance below and present any arguments in opposition to his petition to open default judgment, citing Rule of Appellate Procedure 302(a), which provides that issues not raised in the lower court are waived and cannot be raised for the first time on appeal. As the City correctly points out, this rule applies only to appellants, not appellees. *Civil Serv. Comm'n v. Paieski*, 559 A.2d 121, 126 n.8 (Pa. Cmwlth. 1989). In any event, it is well settled that this Court may affirm for any reason and is not limited to grounds raised by the parties. *McAdoo Boro. v. Com., Pa. Labor Rel. Bd.*, 485 A.2d 761, 764 n.5 (Pa. 1984).

ended the case and disposed of all Appellant's requests for relief, so notwithstanding the title of Rule 311, it was a final order.[6] Indeed, it was entered on the court's docket as a "final disposition."

Appellant was thus required to file an appeal to this court within thirty days of that order to perfect this court's jurisdiction, as well as to preserve any issue for appellate review.[7] Instead of filing a timely appeal from the August 26th order, Appellant attempted to re-litigate the issue before common pleas by filing a second "Petition to Open and Remand to Philadelphia Municipal Court" accompanied by the documents required by Local Rule 1001(f)(2). Since common pleas had already disposed of his appeal by final order, this petition can only be viewed as a request for reconsideration. The mere filing of a motion for reconsideration does not toll the time for taking an appeal from the order at issue *unless* the trial court expressly grants reconsideration within that time period, a circumstance which did not occur in this case. *See* Pa. R.A.P. 1701(b)(3).[8] Thus, the appeal taken to this court encompasses only the October 16th denial of reconsideration.

This court has repeatedly held that "Pennsylvania case law is absolutely clear that the refusal of a trial court to reconsider, rehear, or permit reargument of a final decree is not reviewable on appeal." *Thorn v. Newman,* 538

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[6] A final order is "any order that … disposes of all claims and of all parties …." Pa. R.A.P. 341(b)(1).

[7] *See* Pa. R.A.P. 903(a).

[8] As the note to Rule 1701 explains, "the better procedure under this rule will be for a party seeking reconsideration to file an application for reconsideration below and a notice of appeal . . . [thus] [i]f the application lacks merit the trial court . . . may deny the application by the entry of order to that effect or by inaction. The prior appeal paper will remain in effect, and appeal will have been taken without the necessity to watch the calendar for the running of the appeal period." *See* Note following Pa. R.A.P. 1701.

A.2d 105, 108 (Pa. Cmwlth. 1988), citing *Provident Nat'l Bank v. Rooklin*, 378 A.2d 893, 897 (Pa. Super. 1977).

Accordingly, there is nothing before the court to review and the appeal must be dismissed.[9]

BONNIE BRIGANCE LEADBETTER,
Judge

[9] Even if we were to reach the merits of this appeal, we would have no choice but to affirm. Although Appellant raised the issues of defective service, lack of notice and excessive fines before common pleas and this court, he never raised them with Municipal Court when he petitioned that court to open judgment. Issues not raised in the lower court are waived and cannot be raised for the first time on appeal. Pa. R.A.P. 302(a); *Upper Moreland Twp. Sch. Dist. v. Crisafi,* 86 A.3d 950, 954 (Pa. Cmwlth. 2014). A court may open a default judgment only where *all* of the following three elements are established: (1) the moving party promptly filed his petition to open the default judgment; (2) the default is reasonably explained; and (3) a meritorious defense is shown. *Southeastern Pa. Transp. Auth. (SEPTA) v. Ray,* 569 A.2d 1020, 1021 (Pa. Cmwlth. 1990). In his petition to open filed with the Municipal Court, the only ground raised by Appellant was a one sentence explanation that, "[he] [was] currently seeking a zoning proceeding in order to legalize the use at the property." PTO, R.R. at 13a. Since he failed even to plead the requisite elements necessary to open a judgment, common pleas would have had no basis to reverse the Municipal Court's refusal to open, even if it had addressed the appeal on the merits rather than dismissing based on Appellant's procedural default. *A fortiorari*, we could not find that common pleas erred in denying appellate relief in the first instance, let alone that it abused its discretion in refusing to reconsider where nothing new was added the second time around.

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Appellant	:	

O R D E R

AND NOW, this 18th day of November, 2014, Appellant's appeal in the above-captioned matter is hereby DISMISSED.

BONNIE BRIGANCE LEADBETTER,
Judge