NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

LAWRENCE COHEN AND DEVON ELSE, INDIVIDUALLY & AS H/W D/B/A LMC ACQUISITIONS, LLC Appellants V. SCOTT AEMISEGGER AND JOSEPH DUFFY D/B/A DIGITAL PLAZA, LLC, MICHAEL LEFKOWITZ D/B/A BENJAMIN ROSS GROUP, LLC, GARY CARBO D/B/A ANTHONY J. CARBO, P.C.	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3823 EDA 2015

Appeal from the Order Entered November 13, 2015
in the Court of Common Pleas of Philadelphia County Civil Division
at No(s): 140801939

BEFORE: PANELLA, LAZARUS, FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED JANUARY 27, 2017**

Appellants, Lawrence Cohen and Devon Else, individually and as husband and wife, D/B/A LMC Acquisitions, LLC, appeal from the orders entered on September 29, 2015 and October 9, 2015 in the Philadelphia County Court of Common Pleas.[1] Appellants contend the trial court erred in denying their petition for extraordinary relief and granting summary judgment in favor of Appellees, Scott Aemisegger and Joseph Duffy, D/B/A

* Former Justice specially assigned to the Superior Court.

[1] The orders were made final by the entry of the November 13, 2015 stipulation dismissing the remaining parties to this action. ***See*** Pa.R.A.P. 341.

Digital plaza, LLC ("Digital Plaza Appellees"), and Gary Carbo D/B/A/ Anthony J. Carbo, P.C., ("Carbo Appellees"). We affirm.

We state the facts as set forth in the trial court's opinion.

> As set forth in [Appellants'] First Amended Complaint, upon which [they rely] in [their] Responses to [Appellees'] Motions for Summary Judgment, it appears the gist of [Appellants'] claims are as follows:
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> > [Appellants] purchased [Digital Plaza Appellees] e-commerce company, Digital Plaza, after all [Appellees] advised that the company was in good financial condition. Relying on [Appellees] professional expertise and misrepresentations, [Appellants] purchased the company—only to later discover that Digital Plaza had not been profitable for several years and was operating at a significant loss. [Appellants] were forced to sell Digital Plaza back to seller [Appellees] for a much lower price than [Appellants] paid for the company. As a result, [Appellants] suffered significant financial loss and emotional distress while [Appellees] were unjustly enriched.
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> In 2012, [Appellants] apparently hired [defendants] Michael Lefkowitz and Bejamin Ross Group, LLC to explore the purchase of a new business, and they identified Digital Plaza as a potential acquisition. [Appellants] then claim[ ] to have hired the Carbo [Appellees] to conduct due diligence with respect to Digital Plaza. The Carbo [Appellees] allegedly identified some financial concerns that were apparently "assuaged" by Aemisegger. In May, 2013, [Appellants] claim[ ] to have paid the Digital Plaza [Appellees] "approximately $130,000.00 in cash [for Digital Plaza] and invested an additional $9,500.00 in the business as working capital.
>
> The Amended Complaint further states that "[i]n June 2013, Digital Plaza lost about $15,000. In July, 2013, it lost about $30,000." "[O]n or about August 26, 2013, [Appellants allege it] sold Digital Plaza back to Aemisegger for approximately $10,000.00 . . . with the agreement that

> [Appellants] would receive a check for the first 30 percent and last 30 percent of Digital Plaza's profit for the next 10 months." "[Appellants claim they] never received a check. Further, Digital Plaza's landlord [allegedly] forced [Appellant] to pay a fee of about $10,000.00 to buy out its lease." . . .
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> [Appellants] asserted claims against the Digital Plaza [Appellees] for Fraud, Breach of Contract, Promissory Estoppel, and Unjust Enrichment. [Appellants] also asserted claims against the Carbo [Appellees] for Breach of Fiduciary Duty and Professional Negligence. Both sets of [Appellees] moved for summary judgment on the claims against them. In response to the Motions for Summary judgment, [Appellants] simply reiterated the allegations in, and cited to only, its First Amended Complaint.

Trial Ct. Op., 1/15/16, at 1-3 (footnotes omitted).

On September 29, 2015, the trial court denied Appellants petition for extraordinary relief to extend discovery. On October 9, 2015, the court granted Digital Plaza Appellees and Carbo Appellees' motions for summary judgment. On November 13, 2015, the parties stipulated that the action was dismissed as to the remaining defendants with leave for Appellants to reinstate the action if the appeal from the October 9th order was successful.[2]

Appellants timely appealed the November 13, 2015 final order and filed a court-ordered Pa.R.A.P. 1925(b) statement of errors complained of on appeal. The trial court filed a responsive opinion.

Appellants raise the following issues for our review:

> (1) [Appellees] raised the "release" issue upon Preliminary Objections—to which the Court of Common Pleas

[2] ***See*** R.R. at 690-691.

> pertinently overruled indicating a material issue of fact in light of [Appellants'] operative complaint and response in opposition to [Appellees'] Preliminary Objections. Without interim discovery, [Appellees] raised the "release" issue—without any record facts in support which would otherwise materially alter the Court of Common [p]leas adjudication aforesaid. [Appellees'] Motion failed to comply with the Pennsylvania and Local Rules of Civil Pocedure—which would otherwise have enabled [Appellants'] due process with opportunity to respond as to the merits of [Appellees'] unsupported contentions. In any event, the release issue was not only rebut [sic] by [Appellants'] Complaint but additionally Replies to New Matters (and Answers to Counterclaim with New Matter). [Appellees] had done nothing which would alter the Court of Common Pleas' original adjudication aforesaid.
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> Immediately following the close of pleadings, did the Court of Common Pleas' err when it granted [Appellees'] Motions for Summary Judgment when those [Appellees] failed to support their motion with either record admissible evidence or otherwise supported material factual averments to have enabled [Appellants'] opportunity to rebut with record admissible evidence? Said differently, did the Court of Common Pleas err in entering summary judgment when [Appellees] Motions raised solely a legal issue just previously overruled upon Preliminary Objections when the Court of Common Pleas held there Respondents (i.e., [Appellants]) failed to rebut by counter-factual evidence (of which affirmative evidence was never submitted by there [sic] [Appellees].
>
> (2) Did the Court of Common Pleas abuse its discretion in denying below [Appellants'] Petition for Extraordinary Relief for extension of the discovery deadline when that petition was joined by [Appellees] given the procedural posture of the underlying commerce action (i.e., Motion for Summary Judgment pending immediately upon the close of pleadings)?

Appellants' Brief at 10-11.

First, Appellants contend the trial court erred in granting Appellees motions for summary judgment.

> Contradicting its order upon Preliminary Objections, the Court of Common Pleas granted summary judgment on the same issue raised upon the Preliminary Objections.
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> As to that issue (*i.e.*, release),[3] summary judgment [Appellees] raised strictly a legal question (which these parties had raised upon Preliminary Objections). The summary judgment [Appellees] produced no record admissible evidence in support of their Motion for Summary Judgment; on the contrary, their Motions for Summary Judgment were merely a renewal of their Preliminary Objections vis-à-vis "release." [Appellants] were not obligated to produce record admissible evidence to rebut strictly legal question let alone to Motions which did not produce let alone even aver supporting admissible evidence.

Appellants' Brief at 24-25. We disagree.

Our review is governed by the following principles:

> [S]ummary judgment is appropriate only in those cases where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. When considering a motion for summary judgment, the trial court must take all facts of record and reasonable inferences therefrom in a light most favorable to the non-moving party. In so doing, the trial court must resolve all doubts as to the existence of a genuine issue of material fact against the moving party, and, thus, may only grant summary judgment where the right to such judgment is clear and free from all doubt. On appellate review, then,
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> > an appellate court may reverse a grant of summary judgment if there has been an error of law or an abuse of discretion. But the issue as to whether there are no genuine issues as to any material fact presents a question of law, and therefore, on that question our standard of review is *de novo*. This

[3] ***See id.*** at 549a.

> means we need not defer to the determinations made by the lower tribunals.

Summers v. Certainteed Corp., 997 A.2d 1152, 1159 (Pa. 2010) (citations and quotation marks omitted).

It is well-established that

> [w]here the non-moving party bears the burden of proof on an issue, he may not merely rely on his pleadings or answers in order to survive summary judgment. Further, failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof establishes the entitlement of the moving party to judgment as a matter of law.

Truax v. Roulhac, 126 A.3d 991, 997 (Pa. Super. 2015) (*en banc*), (citation and quotation marks omitted), *appeal denied*, 129 A.3d 1244 (Pa. 2015).

Rule 1035.3 provides, in pertinent part, as follows:

> (a) Except as provided in subdivision (e), the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion identifying
>
> > (1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion, or
> >
> > (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.

Pa.R.C.P. 1035.3(a)(1)-(2); ***accord Salerno v. Philadelphia Newspapers, Inc.***, 546 A.2d 1168, 1171 (Pa. Super. 1988) (quotation marks and citation

omitted) (holding "it is clear that to survive a motion for summary judgment, the non-moving party may not rely merely upon the controverted allegations of the pleadings, but must set forth specific facts by way of affidavit, or in some other way as provided by the rule, demonstrating that a genuine issue exists.")

Instantly, the trial court opined: "In response to the Motions for Summary Judgment, [Appellants] simply reiterated the allegations in, and cited to only, their First amended Complaint. At the summary judgment stage, [Appellants] 'may not rest upon the mere allegations or denials of the pleadings.' Pa.R.C.P. 1035.3." Order, 10/9/15, n.1.

We agree no relief is due. Appellants responded to Digital Plaza Appellees motion for summary judgment as follows:

> 1. Denied. The Operative Complaint speaks for itself in its entirety.
>
> 2-3. Denied. The asset purchase agreement speaks for itself in its entirety.
>
> 4-5. Denied. The asset sale agreement speaks for itself in its entirety.
>
> 6. Denied. The release speaks for itself in its entirety.
>
> 7. Denied. The Operative Complaint speaks for itself in its entirety. Defendants' pleadings speak for itself in its entirety. Plaintiffs' Reply to New Matter and Answer to Counterclaim with New Matter is incorporated by reference. The release speaks for itself in its entirety.
>
> 8-12. Denied. The release speaks for itself in its entirety.

> 13. Objection. The e-mail is hearsay and irrelevant – it is respectfully requested that e-mail be stricken.
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> 14. Denied. The agreement speaks for itself in its entirety.
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> 15. Denied. The Complaint speaks for itself in its entirety.
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> 16-17. Denied. The agreement speaks for itself in its entirety.
>
> 18. Denied. Plaintiffs incorporate by reference their attached memorandum of law.
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> 19-21. Denied. Said averment is a conclusion of law to which no response is required.
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> 22. Denied. The release speaks for itself in its entirety.
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> 23. Denied. Said averment is a conclusion of law to which no response is required.
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> 24-26. Denied. Said averment is a conclusion of law to which no response is required.
>
> 27-28. Denied. The agreement speaks for itself in its entirety.
>
> 29. Denied. The release speaks for itself in its entirety.
>
> 30-35. Denied. Said averment is a conclusion of law to which no response is required.

Appellants' Response in Opposition to Appellees, Digital Plaza, Et Al.'s Motion for Summary Judgment, 8/20/15, unpaginated.[4]

Appellants' response in opposition to Carbo Appellees' motion for summary judgment is as follows:

[4] We note that this document was not included in the reproduced record.

> 1. Objection. Compound. By way of further answer, the operative complaint speaks for itself in its entirety. To the extent Movants' averment(s) varies from the operative complaint, Movants' Motion's failure to support that variance with record admissible evidence—respectfully suggested as requiring the denial of Movants' Motion.
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> 2. Incorporating by reference Plaintiffs' response to Movants' ¶1, the balance of Movants' averment (i.e., regarding Movants' "advice" to Plaintiff, and the circumstances giving rise), Movants attach no record evidence in support of this denial; to wit, this denial merely creates an issue of fact respectfully requiring the denial of Movants' Motion.
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> 3-5. Plaintiffs incorporate by reference their above ¶1.
>
> 6. Denied. The asset purchase agreement speaks for itself in its entirety. By way of further answer, the asset purchase agreement has already been adjudicated upon Preliminary Objections.
>
> 7. Denied. The resale agreement speaks for itself in its entirety. As to the balance of the averment, Plaintiffs incorporate by reference their above ¶1.
>
> 8. Denied. Said averment is a conclusion of law to which no response is required. By way of further answer, Plaintiffs incorporate by reference this Honorable Court's prior Order(s) deeming the release an issue of material fact.

R.R. at 589a-90a.

Appellants cannot rest upon the mere allegations or denials of the pleadings in their responses to the motions for summary judgment. ***See*** Pa.R.C.P. 1035.3(a); ***Traux***, 126 A.3d at 997; ***Salerno***, 546 A.2d at 1171. (Pa. Super. 1988). We discern no abuse of discretion by the trial court or error of law. ***See Summers***, 997 A.2d at 1159.

Next, Appellants contend "[t]he Petition for Extraordinary Relief should have been granted especially in light of the Court of Common Pleas' adjudication upon the then pending Motions for Summary Judgment." Appellants' Brief at 27.[5] We reproduce Appellants argument in support of this contention in its entirety:

[5] The Motion for Extraordinary Relief is reproduced verbatim:

> This is an action in commercial litigation secondary to fraud.
>
> This action pends before this Honorable Court's commerce program having been initially designated a "standard track" matter for case management purposes.
>
> The discovery deadline is September 8, 2015.
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> This Honorable Court adjudicated all [Appellees] complex preliminary objections on March 16, 2015.
>
> Immediately thereafter, [Appellees] filed Motions for Summary Judgment which have been responded. The Motions for Summary Judgment await this Honorable Court's adjudication.
>
> By agreement of all parties, discovery was stayed pending this Honorable Court's adjudication of the Motions for Summary Judgment.
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> Pleadings closed: August 19, 2015.
>
> [Appellants] respectfully request this Honorable Court stay the within action pending the adjudication of [Appellees'] Motions for Summary Judgment with deadlines to be reset thereafter. In the alternative, [Appellants] respectfully request this Honorable Court extend the discovery deadline by resetting this matter to the "complex track."

> Giving the procedural posture, (the Court of Common Pleas abused its discretion in denying the Motion for Extraordinary Relief to extend the discovery deadline. ***Anthony Biddle***, ***et al***, ***supra***.
>
> The Motion was joined in by all parties. The Motion for Summary Judgment proceeded immediately following the close of pleadings.
>
> The Court of Common Pleas cannot contend on summary judgment that its order granting summary judgment was for failure of discovery in response to summary judgment and then just prior deny a discovery deadline extension joined by all the parties in light of the procedural posture.

Appellants' Brief at 27. No relief is due.

"[A]rguments which are not appropriately developed are waived. ***Jones v. Jones***, 878 A.2d 86, 90–91 (Pa. Super. 2005) (citing ***Korn v. Epstein***, 727 A.2d 1130, 1135 (Pa. Super. 1999))." ***Lackner v. Glosser***, 892 A.2d 21, 29 (Pa. Super. 2006). Appellants do not develop this issue in any meaningful way. ***See id.*** Therefore, it is waived on appeal. ***See id.***

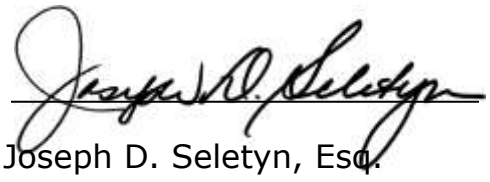
> If not all parties, [Appellants] will be irreparably prejudiced if this Petition for Extraordinary Relief is not granted. On the contrary, no party nor this Honorable Court will be prejudiced by extension. To that end, extension will enable all parties to conduct discovery so that this Honorable Court may come to a just, fair and accurate adjudication of perhaps renewed Motions for Summary Judgment (post-discovery completion).
>
> This is the first Petition for Extraordinary Relief.

R.R. at 620a-621a.

Accordingly, we affirm the September 29, 2015, order denying the Petition for Extraordinary Relief. We affirm the October 9, 2015, order granting the motion for summary judgment of Digital Plaza Appellees and the motion for summary judgment of Carbo Appellees. We agree no relief is due.

Orders affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 1/27/2017