

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

STEAMTOWN MALL PARTNERS, L.P.,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
RENGE, INC. d/b/a CHEESESTEAK	:	
KABOOSE AND CHRISTINE CHEN,	:	
	:	
Appellants	:	No. 1103 MDA 2012

Appeal from the Judgment Entered June 5, 2012,  
In the Court of Common Pleas of Lackawanna County,  
Civil Division, at No. 2009 CV 4445.

BEFORE: SHOGAN, OTT and COLVILLE\*, JJ.

MEMORANDUM BY SHOGAN, J.:

**FILED JULY 12, 2013**

Renge, Inc. d/b/a Cheesesteak Kaboose, and Christine Chen (collectively "Chen"), appeal from the entry of summary judgment on June 5, 2012, in favor of Steamtown Mall Partners, L.P. ("Steamtown"). We affirm.

The trial court summarized the facts of this case as follows:

**Findings of Fact:**

[Steamtown] and [Chen] entered into a valid and binding lease agreement, whereby [Steamtown] agreed to lease to [Chen], and [Chen] agreed to lease from [Steamtown], spaces FC-9 and FC-10 in the Mall at Steamtown. [Steamtown] and [Chen] fully and fairly contemplated and negotiated the terms of the lease.

After the agreed upon construction was complete, on May 15, 2007 possession of spaces FC-9 and FC-10 was delivered to [Chen]. [Chen] failed to open for business or to pay

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\*Retired Senior Judge assigned to the Superior Court.

the required rents and fee. After [Chen] failed to cure the breach, Notice of Termination was served on [Chen] September 19, 2007. The Lease was terminated on September 29, 2007.

Trial Court Opinion, 9/2/10, at 1.

Steamtown filed a complaint against Chen on July 7, 2009, averring breach of contract and unjust enrichment and requesting multiple items of damage. Chen filed an answer and new matter on August 28, 2009. Steamtown filed a motion for summary judgment on March 24, 2010, which the trial court granted on June 23, 2010. Ancillary to the grant of summary judgment, the trial court awarded Steamtown several items of damage: \$903.82 for construction costs and \$8,950.00 for one-half of the architectural services, plus attorney's fees, interest, and costs. The trial court did not set forth the amount of attorney's fees in its June 23, 2010 order. Furthermore, the trial court rejected Steamtown's request for other items of damage, specifically, \$483,561.65 for accelerated rent and \$18,342.11 for marketing charges.<sup>1</sup>

Although the trial court was to conduct a hearing to determine the amount of attorney's fees, no hearing took place. In March of 2012, Steamtown attempted to collect on its unspecified judgment. Eventually, the parties reached an agreement, pursuant to which the trial court entered a stipulated order on June 5, 2012, opening the judgment in favor of

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<sup>1</sup> Steamtown did not challenge the denial of its request for these damages.

Steamtown for two purposes: to reinstate Chen's appellate rights and to determine the amount of attorney's fees awarded in the June 23, 2010 order. The trial court assessed the attorney's fees at \$8,400.35. Order of Court, 6/5/12. Moreover, the trial court stated, "[T]he Order of June 23, 2010 is a final entry of judgment, and the amount set forth therein are sums certain." *Id.* This appeal followed.

Chen presents a single question for our consideration: "Whether the Trial Court erred in determining that no genuine issue of material fact existed in granting [Steamtown's] Motion for Summary Judgment[?]" Chen's Brief at 4.

Preliminarily, we address Chen's suggestion that this Court remand for an evidentiary hearing on two grounds. First, Chen argues:

[she] has an absolute right to appeal the lower court's grant of summary judgment to this Court. However, no meaningful appellate review can be conducted in this matter because there is no transcript from the evidentiary hearing and argument conducted by the court in regards to the summary judgment motion. . . .

Second, the trial court did not issue an opinion in this matter. It did not make findings of fact. It did not make conclusions of law. In reviewing the lower court's grant of summary judgment, this court must review the trial court's factual findings under an abuse of discretion standard, and it must review the trial court's legal findings under a de novo review. Because the court made no findings [of] fact and made no conclusions of law, this is an impossible task.

Chen's Brief at 9–10. In response, Steamtown refutes Chen's assertions, characterizes this appeal as frivolous, and requests sanctions pursuant to Pa.R.A.P. 2744. Steamtown's Brief at 5–6.

"It is, of course, the appellant's responsibility to ensure the record is complete prior to its transmission to this Court." ***Cresci Const. Services, Inc. v. Martin***, 64 A.3d 254, 266 n.18 (Pa. Super. 2013) (quoting ***Daniel v. Wyeth Pharmaceuticals, Inc.***, 15 A.3d 909, 936 n.1 (Pa. Super. 2011)). Here, our review of the certified record confirms Chen's assertion that no transcript of the summary judgment hearing is included. Chen excuses this omission by claiming that counsel withdrew "just two days prior to the hearing," so Chen "was forced to represent herself against a trained attorney." Chen's Brief at 10. However, Chen could have requested a stenographer or a continuance. She chose not to do either. Thus, we decline Chen's implicit request to remedy her omissions by remanding for an evidentiary hearing.

Our review of the certified record also confirms Steamtown's assertion that the trial court filed an opinion on September 2, 2010, in which it sets forth findings of fact and conclusions of law. Trial Court Opinion, 9/2/10, at 1–2. Thus armed with a certified record and the trial court's opinion, we are prepared to conduct meaningful appellate review of Chen's sole issue.

Our analysis begins with the applicable scope and standard of review:

A reviewing court may disturb the order of the trial court only where it is established that the court committed an error of law or abused its discretion. **Capek v. Devito**, 767 A.2d 1047, 1048, n. 1 (Pa.2001). As with all questions of law, our review is plenary. **Phillips v. A-Best Products Co.**, 542 Pa. 124, 665 A.2d 1167, 1170 (1995).

In evaluating the trial court's decision to enter summary judgment, we focus on the legal standard articulated in the summary judgment rule. Pa.R.C.P. 1035.2. The rule states that where there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law, summary judgment may be entered. Where 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. "Failure of a non-moving party to adduce sufficient evidence on an issue essential to his case and on which it bears the burden of proof ...establishes the entitlement of the moving party to judgment as a matter of law." **Young v. PennDOT**, 560 Pa. 373, 744 A.2d 1276, 1277 (2000). Lastly, we will view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. **Pennsylvania State University v. County of Centre**, 532 Pa. 142, 615 A.2d 303, 304 (1992).

**Murphy v. Duquesne University of the Holy Ghost**, 777 A.2d 418, 429 (Pa. 2001).

Chen contends that a trial is necessary because she raised affirmative defenses to Steamtown's claims. Thus, Chen concludes, "If there was a genuine issue of material fact as to any of the affirmative defenses raised by [Chen], then summary judgment was improperly granted." Chen's Brief at 12. The trial court understood and disposed of Chen's challenge as follows:

As [Steamtown] brings this Motion for Summary Judgment, all facts will be viewed in [the] light most favorable to [Chen]. [Chen] conceded through the pleadings there was a Lease between the parties and that she subsequently breached the Lease (Christine Chen deposition, Complaint Exhibit G, Pages 42-43, 61, 70, 95-96). **However, as [Chen] alleges the Lease was both incomplete and a fraud, those issues must be addressed to determine if there is a genuine issue of material fact before summary judgment would be proper.**

[Chen] first allege[s] that the parties contemplated terms that were not in the executed Lease. The Lease provides in part at Section 14.20 that:

The provisions of this Lease are intended by the parties as a final expression of their agreement. No representations, agreements, arrangements, understandings, oral or written, between the parties relating to the subject matter of this Lease have been made or given which are not fully expressed herein. Tenant acknowledges that neither Landlord nor anyone representing Landlord has represented, nor has Tenant relied on any representations, that any number or any specific tenant or tenants will operate in the Shopping Center during the term.

(Complaint Exhibit B, Section 14.20). As the executed Lease contemplates being the final expression of the parties' agreement, and as [Chen] alleges that the additional terms were contemplated before the execution, there can be no genuine issue of material fact as to this allegation.

Next, [Chen] generally allege[s] fraud. The Lease, at Section 1.01v., originally contemplated a \$5,000.00 security deposit. This amount was changed to \$1,000.00 and bears [Chen's] initials. This change in the term at the time of execution evidences [Chen's] personal[] understanding of the Lease and its terms. (Christine Chen deposition, Complaint Exhibit G, Pages 76) (Complaint Exhibit B, Section 1.01). Moreover, [Chen] lease[s] another space from [Steamtown] and as such [is] familiar with [Steamtown's] terms. (Christine Chen deposition, Complaint Exhibit G, Pages 73).

Trial Court Opinion, 9/2/10, at 2–3 (emphasis added).

Upon review, we agree with the trial court that Chen is not entitled to relief because no genuine issue of material fact exists. Chen admitted to entering and then breaching the Cheesesteak Kaboose lease (the “Lease”). N.T. (Chen Deposition), 12/3/09, at 42–43, 61, 84, 94–98, 103.

With regard to her affirmative defenses, Chen bore the burden of proof as the non-moving party. Chen could not merely rely on her pleadings or answers to survive summary judgment. *Young*, 744 A.2d at 1277. Our review of the record reveals that Chen’s new matter contains a laundry list of the affirmative defenses set forth in Pa.R.C.P. 1030. Noticeably absent from the new matter are Chen’s claims that the Lease was incomplete, that Steamtown defrauded her, and that she could not read or write English. New Matter, 8/28/09, at ¶¶ 2–15.

The record further reveals that, at the time Chen executed the Lease on March 21, 2007, she was already a tenant of Steamtown Mall, operating a business known as Christine’s Bistro. N.T. (Chen Deposition), 12/3/09, at 9, 41–42. Chen testified that she has “a difficult time just reading something in English.” *Id.* at 20. So, before executing the Christine’s Bistro lease, Chen had a friend read the lease documents to her. *Id.* at 31–33. With regard to the Lease, Chen testified that she could not point to any terms in the Lease that Steamtown violated. *Id.* at 46. She negotiated the Lease with Steamtown’s representative, Jim Walsh, through her son-in-law,

Chris Sprague. *Id.* at 47–51. Chen claimed the Lease was different from the document her son-in-law negotiated on her behalf; however, she did not have the copy from her son-in-law to compare to the Lease. *Id.* at 56–59. Rather than call her son-in-law or postpone signing the Lease, Chen signed the Lease without reading it. *Id.* at 59–60, 93. She did not subsequently compare the Lease and her son-in-law’s copy. *Id.* at 61–62, 65–69. Additionally, Chen confirmed that she understood specific terms of the Lease, for example, annual rent, marketing charges, and the guarantee. *Id.* at 71–73, 85–86, 102. Before signing the Lease, Chen changed the deposit amount from \$5,000.00 to \$1,000.00, and she negotiated three months of free rent in exchange for one-half of the demolition costs. *Id.* at 76–79.

Based on the foregoing, we conclude that Chen failed to carry her burden of proof with regard to her defenses. Consequently, Steamtown was entitled to the entry of summary judgment as a matter of law. Thus, we discern no trial court error.

Lastly, we address Steamtown’s request that this Court impose sanctions on Chen pursuant to Pa.R.A.P. 2744. That rule provides as follows:

In addition to other costs allowable by general rule or Act of Assembly, an appellate court may award as further costs damages as may be just, including

- (1) a reasonable counsel fee and



(2) damages for delay at the rate of 6% per annum in addition to legal interest,

if it determines that an appeal is frivolous or taken solely for delay or that the conduct of the participant against whom costs are to be imposed is dilatory, obdurate or vexatious. The appellate court may remand the case to the trial court to determine the amount of damages authorized by this rule.

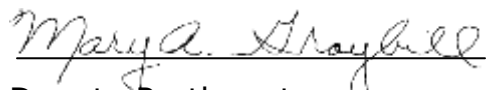
Pa.R.A.P. 2744. "An appeal is 'frivolous' if the appellate court determines that the appeal lacks any basis in law or in fact. Simply because an appeal lacks merit does not make it frivolous." ***Rohm and Haas Co. v. Lin***, 992 A.2d 132, 151 (Pa. Super. 2010) (citations omitted).

Upon review, we conclude that Chen's appeal is inartfully presented and lacks merit. However, we are not persuaded by Steamtown's arguments that this appeal is frivolous or the result of dilatory, obdurate or vexatious conduct. Steamtown's Brief at 6-9. We, therefore, deny Steamtown's request for sanctions.

Judgment affirmed. Request for sanctions denied.

Colville, J., files a Dissenting Memorandum.

Judgment Entered.

  
Deputy Prothonotary

Date: 7/12/2013