

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

ROBERT MACK,

Appellant

v.

LUIS VEGA AND KLMD TRUCKING, LLC.,

Appellees

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 3395 EDA 2013

Appeal from the Order October 25, 2013  
in the Court of Common Pleas of Philadelphia County  
Civil Division at No.: 01774 June Term 2009

BEFORE: FORD ELLIOTT, P.J.E., LAZARUS, J., and PLATT, J.\*

MEMORANDUM BY PLATT, J.:

**FILED JULY 07, 2014**

Appellant, Robert Mack, appeals from the order sustaining the preliminary objections of Appellees, Luis Vega and KLMD Trucking, LLC, and dismissing his complaint. We affirm.

On June 11, 2009, Appellant filed a complaint against Appellees for damages he allegedly suffered in a motor vehicle accident with them in Philadelphia, Pennsylvania on June 11, 2007. On June 21, 2009, Appellant attempted to serve the out-of-state Appellees by certified and regular mail. The certified letters were returned as unclaimed. On August 16, 2010, this

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\* Retired Senior Judge assigned to the Superior Court.

case was deferred due to Appellee Luis Vega's deployment with the United States Navy.

On May 7, 2013, the case was removed from deferred status via praecipe by Appellant. Appellees filed preliminary objections raising the issue of defective service on September 9, 2013. Appellant filed both preliminary objections and an answer in response to Appellees' preliminary objections.

On October 25, 2013, in two separate orders, the trial court overruled the preliminary objections of Appellant, and sustained those of Appellees, resulting in the dismissal of Appellant's complaint. The court denied Appellant's motion for reconsideration on November 8, 2013. Appellant timely appealed on November 20, 2013.<sup>1 2</sup>

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<sup>1</sup> Appellant filed a Rule 1925(b) statement of errors on December 20, 2013 and an amended statement on January 13, 2014, and the court filed a Rule 1925(a) opinion on December 23, 2013. **See** Pa.R.A.P. 1925.

<sup>2</sup> The trial court requests that we quash this appeal because Appellant improperly appealed from the November 8, 2013 order denying his motion for reconsideration. (**See** Trial Court Opinion, 12/23/13, at 3); **see also** *Cheathem v. Temple Univ. Hosp.*, 743 A.2d 518, 521 (Pa. Super. 1999) ("Pennsylvania case law is absolutely clear that the refusal of a trial court to reconsider . . . a final decree is not reviewable on appeal.") (citation omitted). However, on January 13, 2014, Appellant filed a praecipe to correct the date of the order from which he is appealing from November 8, 2013 to October 25, 2013. (**See** Praecipe to Correct Date of Order Appealed From, 1/13/14, at 1). Consequently, we decline to quash where Appellant timely filed the notice of appeal within thirty days of the October 25, 2013 order dismissing the complaint. **See** Pa.R.A.P. 903(a).  
(Footnote Continued Next Page)

Appellant's statement of questions involved raises five questions for our review:

I. Did [Appellees] "waive" or give up their right to file [p]reliminary [o]bjections as to "defective service" of process when [they] knew or should have known of the alleged defective service in June of 2009 but did not file [p]reliminary [o]bjections until September 9, 2013 . . . [?]

II. Were [Appellees'] [p]reliminary [o]bjections defective as they did not bear a [n]otice to [p]lead?

III. Did [Appellees] waive or give up their right to file [p]reliminary [o]bjections regarding "service" as [they] never pled prejudice[?]

IV. Were [Appellees'] [p]reliminary [o]bjections [d]effective as they violated P[a].R.C.P. 1026(a) which requires every subsequent [p]leading to be filed within [t]wenty (20) days after service of the preceding [p]leading and to contain a [n]otice to [p]lead?

V. Have [Appellees] waived the right to file [p]reliminary [o]bjections considering the fact that they called [Appellant's] counsel asking for an extension of time within which to file responsive pleadings at which time [Appellant's] counsel advised [Appellees], by letter, that [Appellant] was agreeable to granting an extension of time within which to answer the [c]omplaint only?

(Appellant's Brief, at 4-5 (some quotation marks omitted)).

"Our standard of review of an order of the trial court overruling or granting preliminary objections is to determine whether the trial court  
(Footnote Continued) \_\_\_\_\_

Instead, "we will regard as done what ought to have been done and treat this appeal as if properly filed." ***Eichman v. McKeon***, 824 A.2d 305, 310 n.1 (Pa. Super. 2003), *appeal denied*, 839 A.2d 352 (Pa. 2003) (citation omitted). We have changed the caption accordingly.

committed an error of law.” **Schemberg v. Smicherko**, 85 A.3d 1071, 1073 (Pa. Super. 2014) (citation omitted).

Preliminarily, we observe that the argument section of Appellant’s brief fails to conform to Pennsylvania Rule of Appellate Procedure 2119(a).<sup>3</sup> (**See** Appellant’s Brief, at 10-24). Appellant raises five questions, but the argument section of his brief contains only one section, and he merely cites boilerplate law from the Pennsylvania Rules of Civil Procedure and two inapposite cases. (**See** Appellant’s Brief, at 10-24); **see also** Pa.R.A.P. 2119(a). Additionally, Appellant’s “discussion” of his issues contains bald conclusory statements without pertinent supporting caselaw. (**See id.**); **see also** Pa.R.A.P. 2119(a)-(b). Therefore, Appellant’s issues are waived. **See In re Estate of Whitley**, 50 A.3d 203, 209-10 (Pa. Super. 2012), *appeal denied*, 69 A.3d 603 (Pa. 2013) (waiving issue for failure to provide pertinent authority or discussion).

Moreover, to the extent that we can discern the bases of Appellant’s claim that the trial court erred in granting Appellees’ preliminary objections,

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<sup>3</sup> Rule 2119(a) requires that:

[t]he argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part—in distinctive type or in type distinctively displayed—the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent.

Pa.R.A.P. 2119(a).

it would not merit relief. For example, Appellant asserts that the court erred in sustaining Appellees' preliminary objections because "[they] have given up their right to raise the issue of improper service for basically sitting on their hands for approximately [four] years (including [two] years of deferral due to [Appellee Vega's] military service[.])" (Appellant's Brief, at 11-12).

We disagree.

Pa.R.C.P. 1026(a) provides: ". . . every pleading subsequent to the complaint shall be filed within twenty days after the service of the preceding pleading . . ." Pa.R.C.P. No. 1026(a), 42 Pa.C.S.A. This twenty day filing period has been interpreted liberally and is permissive rather than mandatory. The decision of whether an extension of time shall be granted is within the discretion of the trial court. A late pleading may be filed if the opposing party is not prejudiced and justice requires. Prejudice results when an opposing party's delay causes a party any substantial diminution [in their] ability to present factual information in the event of trial . . . .

**Weaver v. Martin**, 655 A.2d 180, 183-84 (Pa. Super. 1995) (case citations and some quotation marks omitted).

Rule 404 of the Pennsylvania Rules of Civil Procedure provides, in relevant part, that: "Original process shall be served outside the Commonwealth within ninety days of . . . the filing of the complaint . . . by mail in the manner provided by Rule 403[.]" Pa.R.C.P. 404(2). Rule 403 provides, in pertinent part, that:

[A] copy of the process shall be mailed to the defendant by any form of mail requiring a receipt signed by the defendant or his authorized agent. Service is complete upon delivery of the mail.

\* \* \*

(2) If the mail is returned with notation by the postal authorities that it was unclaimed, the plaintiff shall make service by another means pursuant to these rules.

Pa.R.C.P. 403(2). Further, “[b]ecause jurisdiction over a person is dependent upon proper service . . . **the rules relating to service of process must be strictly followed.**” *Dubrey v. Izaguirre*, 685 A.2d 1391, 1393 (Pa. Super. 1996) (citation omitted; emphasis added).

Here, it is undisputed that Appellees are located in New Jersey and that Appellant attempted to serve the complaint on June 21, 2009 via certified and regular United States mail, but that the certified mail was returned to him as unclaimed. (**See** Appellant’s Brief, at 6-7, 19; Appellees’ Brief, at 5). Because “[s]ervice is complete upon delivery of the mail[,]” and the certified mail was not delivered as required for service on an out-of-state defendant, Appellant failed to serve Appellants properly, and the time for filing preliminary objections did not begin to run. **See** Pa.R.C.P. 403; 1026(a); **see also Dubrey, supra** at 1393.

In fact, even assuming *arguendo* that the preliminary objections were filed more than twenty days after Appellees were served properly, Appellant has failed to establish prejudice. **See Weaver, supra** at 183-84; (Appellant’s Brief, at 10-23). Appellant argues that he is prejudiced because Appellees filed their preliminary objections after the statute of limitations for his complaint had expired, and therefore, he now is precluded from reinstating it. (**See** Appellant’s Brief, at 18). However, this argument is

disingenuous where the evidence of record establishes that, since 2009, Appellant has been aware that service was incomplete, and he did nothing to remedy that defect. (**See** Return of Service Luis Vega, 6/24, 6/27, 7/08/2009; Return of Service KLMD Trucking, LLC, 6/24, 7/14, 7/19/2009).

Further, our review of the record reveals that, on August 16, 2010, this case was deferred due to Appellee Vega's military deployment, and remained in deferred status until May 7, 2013. (**See** Trial Court Docket, No. 090601774, at unnumbered page 5). On September 9, 2013, Appellees filed preliminary objections on the basis of improper service, and the trial court exercised its discretion to decide the preliminary objections on their merits. **See Weaver, supra** at 184. Indeed, where proper service was not effectuated in the first place, we conclude that any argument that the preliminary objections were untimely and that, therefore, the court abused its discretion in sustaining them, would lack merit.

We also are not persuaded by Appellant's reliance on **Lamp v. Heyman**, 366 A.2d 882 (Pa. 1976) (plurality decision). (**See** Appellant's Brief, at 14-17). The **Lamp** decision addressed the issue of whether the statute of limitations barred a plaintiff from continuing her action where:

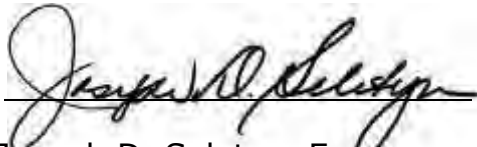
[her] attorney files a praecipe for a writ of summons to commence an action within the time period permitted by the statute of limitations, instructs the prothonotary to issue the writ but not deliver it to the sheriff for service, and then has the writ reissued and served after that time period has expired, is barred by the statute of limitations from continuing the action.

**Lamp, supra** at 884. This is inapposite to the case before us where Appellees did not file preliminary objections on the basis of the statute of limitations. (**See** Appellant's Preliminary Objections, 9/26/13, at unnumbered pages 1-2). Also, Appellant did not raise an issue about the statute of limitations barring the re-filing of his complaint in either his Rule 1925(b) statement or his amended Rule 1925(b) statement. (**See** Rule 1925(b) Statement, 12/20/13; Amended Rule 1925(b) Statement, 1/13/14).

Accordingly, not only is **Lamp** not pertinent, any issue regarding the statute of limitation is waived for our review. **See Greater Erie Indus. Dev. Corp. v. Preque Isle Downs, Inc.**, 88 A.3d 222, 223 (Pa. Super. 2014) (holding that issues not raised in a Rule 1925(b) statement are waived). Therefore, even if Appellant had not waived his claims for failure to properly develop them, they would not merit relief.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 7/7/2014