

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

YELLOW BOOK SALES & DISTRIBUTING
COMPANY, INC.,

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

KOREY BLANCK, ACE RESTAURANT
SUPPLY, LLC, AND SHARP
REFRIGERATION & RESTAURANT
SUPPLY, LLC. ,

Appellants

No. 1614 EDA 2012

Appeal from the Order entered May 1, 2012,
in the Court of Common Pleas of Montgomery County,
Civil Division at No(s): 2010-001102.

BEFORE: ALLEN, COLVILLE,* and STRASSBURGER,* JJ.

MEMORANDUM BY STRASSBURGER, J.: **FILED SEPTEMBER 27, 2013**

Korey Blanck, Ace Restaurant Supply, LLC, and Sharp Refrigeration Supply, LLC, (collectively, Appellants) appeal from the trial court order denying their petition to appeal *nunc pro tunc* from the arbitration award entered October 20, 2011 in favor of Yellow Book Sales and Distributing Company (Yellow Book). Upon review, we affirm.

On January 13, 2010, Yellow Book filed a complaint against Appellants in the Court of Common Pleas of Montgomery County. The case proceeded to an arbitration hearing on October 19, 2011. On October 20, 2011, an award was issued in favor of Yellow Book. Pursuant to Pa.R.C.P. 1308(a)(1),

*Retired Senior Judge assigned to the Superior Court.

Appellants were required to file a notice of appeal within 30 days of the October 20, 2011 award. Appellants claim they mailed their notice of appeal and filing fee to the Montgomery County Prothonotary's office for filing on November 16, 2011, five days in advance of the November 21, 2011 filing deadline. However, the Prothonotary's office never received the filing; thus, Appellants' notice of appeal was never docketed.

On January 18, 2012, two months after the expiration of the appeal period, Appellants filed a petition to appeal *nunc pro tunc*, wherein they contended that the lost mail was an "unforeseeable circumstance" warranting extension of the time for filing an appeal.¹ A hearing was held on April 25, 2012, and on April 30, 2012, the trial court denied Appellants' request. Appellants filed a timely notice of appeal to this Court. The trial court did not order Appellants to file a Pa.R.A.P. 1925 statement, and none was filed. However, the trial court did file an opinion pursuant to Pa.R.A.P. 1925(a).

On appeal, Appellants contend that the trial court abused its discretion in denying Appellants' request to file an appeal *nunc pro tunc*. Appellant's Brief at 4.

¹ We note that Appellants attach to their brief a copy of the dated letter to the prothonotary and the money order, but no proof of mailing is provided, nor is there any evidence that Yellow Book was served with the notice of appeal.

Our standard of review for an order denying an appeal *nunc pro tunc* is whether the trial court abused its discretion. ***In the Interest of M.S.K.***, 936 A.2d 103, 104 (Pa. Super. 2007). Rule 1308(a) of the Pennsylvania Rules of Civil Procedure states in relevant part:

An appeal from an award shall be taken by

(1) filing a notice of appeal in the form provided by Rule 1313 with the prothonotary of the court in which the action is pending not later than thirty days after the day on which the prothonotary makes the notation on the docket that notice of entry of the arbitration award has been provided as required by Rule 1307(a)(3).

Pa.R.C.P. 1308(a)(1); ***see also U.S. Claims, Inc. v. Dougherty***, 914 A.2d 874 (Pa. Super. 2006).²

Appeal periods are jurisdictional in nature and may only be extended under certain circumstances. ***See Lee v. Guerin***, 735 A.2d 1280, 1281 (Pa. Super. 1999) (citation omitted) (“Timeliness of an appeal, whether it is an appeal to an appellate court or a *de novo* appeal in common plea court, is a jurisdictional question.”) When a party has filed an untimely notice of appeal, appellate courts may grant a party equitable relief in the form of an appeal *nunc pro tunc* in extraordinary circumstances:

Initially, an appeal *nunc pro tunc* was limited to circumstances in which a party failed to file a timely notice of appeal as a result of fraud or a breakdown in the court’s

² The prothonotary gave notice pursuant to Pa.R.C.P. 1307 on October 20, 2011. ***See*** Trial Court Docket at 3.

operations. In ***Bass v. Commonwealth***, however, this Court found that where an appellant, an appellant's counsel, or an agent of appellant's counsel has failed to file a notice of appeal on time due to non-negligent circumstances, the appellant should not lose his day in court. Therefore, the ***Bass*** Court expanded the limited exceptions for an appeal *nunc pro tunc* to permit such an appeal where the appellant proves that: 1) the appellant's notice of appeal was filed late as a result of non-negligent circumstances, either as they relate to the appellant or the appellant's counsel; 2) the appellant filed the notice of appeal shortly after the expiration date; and 3) the appellee was not prejudiced by the delay. **See [Bass]** at 1135-36. (allowing appellant to appeal *nunc pro tunc* where appeal was filed four days late because appellant's attorney placed the notice of appeal on the desk of the secretary responsible for ensuring that appeals were timely filed and the secretary became ill and left work, not returning until after the expiration of the period for filing an appeal); **see also *Cook v. Unemployment Comp. Bd. of Review***, 543 Pa. 381, 671 A.2d 1130, 1132 (1996) (granting appeal *nunc pro tunc* where claimant filed appeal four days late because he was hospitalized)[;] . . . ***Perry v. Unemployment Comp. Bd. of Review***, 74 Pa.Cmwth. 388, 459 A.2d 1342, 1343 (1983) (fact that law clerk's car broke down while he was on route to the post office, precluding him from getting to the post office before closing time, was a non-negligent happenstance for granting appeal *nunc pro tunc*); ***Tony Grande, Inc. v. Workmen's Comp. Appeal Bd.***, 71 Pa. Cmwth 566, 455 A.2d 299, 300 (1983) (hospitalization of appellant's attorney for unexpected and serious cardiac problems ten days into twenty day appeal period was reason to allow appeal *nunc pro tunc*); ***Walker v. Unemployment Comp. Bd. of Review***, 75 Pa. Cmwth. 116, 461 A.2d 346, 347 (1983) (U.S. Postal Service's failure to forward notice of referee's decision to appellant's address, as appellant had requested, warranted appeal *nunc pro tunc*); ***Interest of C.K.***, 535 A.2d 634, 639 (1987) (appeal *nunc pro tunc* denied where counsel was absent from office and did not learn of appellant's desire to appeal before expiration period because counsel negligently failed to make arrangements to look over his professional obligations); ***Moring v. Dunne***, 493 A.2d 89, 92-93 (1985) (although death of appellant's attorney may have qualified as a nonnegligent circumstance, appellant failed to prove that he attempted to appeal on time but was precluded from doing so as a result of receiving late notice of his attorney's death).

Criss v. Wise, 781 A.2d 1156, 1159-60 (Pa. 2001) (some citations omitted).

In **Criss**, counsel mailed her notice of appeal approximately six days before the expiration of the 30-day deadline. However, counsel's filing arrived at the Prothonotary's office two days late. **Id.** at 1160. The trial court denied the petition for leave to appeal *nunc pro tunc*. On review, this Court remanded the case to the trial court to make factual findings with regard to mail service in Pittsburgh. Our Supreme Court granted allocatur, and reversed, holding that "as delays in the U.S. mail are both foreseeable and avoidable, [a]ppellee's failure to anticipate a potential delay in the mail was not such a non-negligent circumstance for which an appeal *nunc pro tunc* may be granted." **Id.**

Instantly, the circumstances cited by Appellants are substantially similar to those set forth in **Criss** and not "extraordinary" such that they meet the standard for *nunc pro tunc* relief.

Accordingly, we find no error in the trial court's denial of Appellants' petition.

Order affirmed.

J-S50014-13

Judgment Entered.

A handwritten signature in black ink, appearing to read "Kevin Gambetti", written over a horizontal line.

Prothonotary

Date: 9/27/2013