NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

VINCENT JAMES GROSSO, AND CARL HINRICHS, Appellants v. BLUE BELL COUNTRY CLUB, WILLIAM R. BEISEL, CATHOLIC LEADERSHIP CONFERENCE, E.F. BUD HANSEN, JR., E.F. BUD HANSEN, III, AND THOMAS H. HANSEN, Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 476 EDA 2011

Appeal from the Order entered December 29, 2010,
in the Court of Common Pleas of Montgomery County,
Civil Division, at No(s): 2001-11907

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

MEMORANDUM BY ALLEN, J.: **FILED AUGUST 06, 2013**

Vincent James Grosso and Carl Hinrichs, ("Appellants"), appeal from the trial court's order denying their petition to open and reinstate their action against Blue Bell Country Club, William R. Beisel, Catholic Leadership Conference, E.F. Bud Hansen, Jr., E.F. Bud Hansen, III, and Thomas H. Hansen, (collectively "Blue Bell"). We affirm.

The trial court summarized the factual and procedural history as follows:

> This action by golfers who allege they were denied a trip to Scotland they claim they won in a charity golf tournament sponsored by defendant Catholic Leadership Conference was brought on June 18, 2001. [Blue Bell] assert[s] they withdrew

*Retired Senior Judge assigned to the Superior Court.

> the prize after they learned plaintiff, Vince Grosso, was a PGA professional golfer who failed to disclose that to the organizers of this amateur tournament.
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> The action was terminated by the Prothonotary when [Appellants'] counsel failed to respond to the Notice of Intention to Terminate mailed on June 18, 2009. The docket does not reflect that the Notice was returned by the postal authorities, so the action was terminated on September 4, 2009. On February 2, 2010[,] [Appellants] filed a Petition to Reinstate, which was stricken on March 19, 2010 because of [Appellants'] failure to file a Certificate of Service. A new return day was issued on March 25, 2010[,] and [Blue Bell] filed an Answer, responding to the factual averments of the Petition, on April 27, 2010. On May 1, 2010[,] the Court Administrator issued an Order granting 60 days to take discovery and providing the Petition would be listed for argument upon the filing of an Argument Praecipe after the 60 day discovery period expired. No discovery was taken, and [Appellants'] counsel filed an Argument Praecipe on July 21, 2010.
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> We denied the Petition to Reinstate on December 2[9], 2010. [Appellants] filed a Motion for Reconsideration on January 21, 2011[,] and a Notice of Appeal on January 28, 2011. We denied the Motion for Reconsideration on February 2, 2011.

Trial Court Opinion, 3/7/13, at 1-2.

The trial court and Appellants have complied with Pa.R.A.P. 1925.

Appellants present the following questions for our review:

> **QUESTION 1**: WHETHER THE LOWER COURT ABUSED ITS DISCRETION AND ERRED WHEN IT REFUSED TO REINSTATE THE INSTANT CASE WHERE:
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> (1) NEITHER APPELLANTS NOR APPELLANTS' COUNSEL RECEIVED NOTICE OF THE IMPENDING TERMINATION OR THE ACTUAL TERMINATION OF THE CASE AND, AS SUCH, THERE IS A REASONABLE EXPLANATION AND A LEGITIMATE EXCUSE FOR NOT FILING BOTH A STATEMENT OF INTENTION TO PROCEED AND A PETITION TO REINSTATE THE ACTION WITHIN THE TIME PERIODS SPECIFIED IN PENNSYLVANIA RULE OF CIVIL PROCEDURE 230.2; AND

> (2) THE PETITION TO REINSTATE WAS TIMELY FILED (APPROXIMATELY THIRTEEN (13) DAYS) AFTER APPELLANTS' COUNSEL'S RECEIPT OF ACTUAL NOTICE REGARDING THE TERMINATION OF THIS MATTER BY THE PROTHONOTARY.
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> **QUESTION 2**: WHETHER THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING APPELLANTS' PETITION UNDER PA.R.C.P. 230.2(a), WHEN IT FAILED TO REINSTATE THE APPELLANTS' CASE WHERE THERE WAS OFF-DOCKET ACTIVITY THAT TOOK PLACE DURING THE LITIGATION INCLUDING APPELLANTS' COUNSEL'S CONTINUED ATTEMPTS TO SCHEDULE AND NOTICE DEPOSITIONS IN 2009/2010 BEFORE AND AFTER THE MATTER WAS TERMINATED, CONSISTENT WITH APPELLANTS' EVIDENCE SUBMITTED TO THE COURT IN APPELLANTS' PETITION.

Appellants' Brief at 1.

Since Appellants' issues are interrelated, we will address them together. "Our review of the decision of the trial court to deny a petition to reinstate a terminated case is limited to determining whether the trial court abused its discretion or committed an error of law." ***Kane v. Vigunas,*** 967 A.2d 987, 989 (Pa. Super. 2009) (internal citation omitted).

Here, the trial court correctly explained:

> When an action has been terminated under Pa.R.C.P. 230.2 for lack of activity, it must be reinstated if a petition to reinstate is filed within 30 days of the entry of the order of termination on the docket. Pa.R.C.P. 230.2(d)(2). Under Subdivision (d)(3) of that Rule:
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> > "If the petition is filed more than thirty days after the entry of the order of termination on the docket, the court shall grant the petition and reinstate the action upon a showing that
> >
> > (i) the petition was timely filed following the entry of the order for termination and

> (ii) there is a reasonable explanation or a legitimate excuse for the failure to file both
>
> (A) the statement of intention to proceed prior to the entry of the order of termination on the docket [and]
>
> (B) the petition to reinstate the action within thirty days after the entry of the order of termination on the docket."
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> Prejudice or lack of it does not enter into this. That would be the subject of a common law petition for judgment of *non pros*, which exists independently of termination under this Rule. Pa.R.C.P. 230.2 *Comment II.b*.
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> [Appellants] [have] the burden of proof. *Martin v. Grandview Hospital*, 373 Pa. Super. 369, 541 A.2d 361, 362 *allocator denied*, 521 Pa. 605, 555 A.2d 115 (1988). The standard of review is limited to whether the trial court committed an abuse of discretion. *Martin, supra*.
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> When a petition is filed, the Court orders time for discovery, and [if] no discovery is taken, the facts are the well-pleaded allegations of the Answer. *McCoy v. Mahoney*, 820 A.2d 736 (Pa. Super. 2003); Pa.R.C.P. 206.7(c); 208.4(b). The Montgomery County practice of allowing time for an answer, ordering depositions, and listing upon the praecipe of a party has long been considered the equivalent of the formal rule to show cause. *Arthurs Travel Center, Inc. v. Alten*, 268 Pa. Super. 330, 408 A.2d 490, 492 (1979) ("This is particularly apt where the petitioners do not avail themselves of the opportunity to take depositions before the case is argued.") In *McCoy v. Mahoney*, 820 A.2d 736, 737-740 (Pa. Super. 2003)[,] the Superior Court noted the filing of the praecipe for determination, as [Appellants] here did on July 21, 2010, effectively notified the Court the parties believed the matter was ripe for determination.

Trial Court Opinion, 3/7/13, at 2-3.

In denying Appellants' petition to open and reinstate this action based on the foregoing, the trial court explained:

> [T]he facts before us, from [Blue Bell's] Answer and the docket are: This is an action by a PGA professional and a

> colleague who entered the golf tournament to prey on amateurs and a charity. They sued after they were discovered and the prize was awarded to the runners-up. [Appellants] initially prosecuted the case in the newspapers and then essentially abandoned their claim. There was no docket activity from 2003 to 2005 when the first Notice of Intention to Terminate was mailed to [Appellants'] counsel. They filed a Notice of Intention to Proceed. [Appellants] filed a single pleading between 2006 and 2008. After two more years of lack of docket activity, the Prothonotary sent another Notice of Intention to Terminate. This time there was no response and the action was terminated.
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> [Blue Bell] denied the allegation of off docket discovery activity and alleged that depositions were scheduled on only one occasion and were cancelled by [Appellants'] counsel. Subsequent actions to schedule discovery took place only after the Notice of Intent to Terminate was sent. The Notice was received, and [Appellants] offered no proof that it was returned as undeliverable. Therefore there was no reason for the Prothonotary to take further action to contact [Appellants'] counsel. Presumably when [Appellants'] counsel left his former firm he had his mail forwarded. [Appellants'] counsel took no action to address the termination until eight months after the Notice to Terminate and five months after termination.

Trial Court Opinion, 3/7/13, at 3-4 (footnote omitted). Our review of the record supports the trial court's rationale.

Appellants contend that they have diligently prosecuted this matter since 2001, and that "[d]uring that time, Appellants' counsel served extensive discovery requests, filed and successfully obtained Orders from the courts compelling the Production of Documents from[,] and Depositions of[,] the Appellees." Appellants' Brief at 6. However, the record reflects more than a decade of intermittent activity, including a prior notice to terminate in 2005 due to more than two years of inactivity. *See* Certificate of Transmittal of Record under Pa.R.A.P. 1931(c), Docket Entries, 3/8/13, at

1-3. Further, while Appellants highlight their receipt of a January 11, 2007 Order directing Blue Bell to be deposed, these depositions were not conducted until June 23, 2010, over three years later. *See* Appellants' Brief at 9, 4.

The record additionally reflects changing co-counsel for Appellants, including Susan L. White, Esquire, who entered her appearance on September 6, 2006. *See* Entry of Appearance, 9/6/06, at 1. Specifically, Attorney White and an additional attorney from her firm, Michael V. Phillips, Esquire, jointly filed an entry of appearance on September 6, 2006. *Id.* However, Attorney Phillips subsequently withdrew his appearance. *See* Withdrawal of Appearance of Co-Counsel, 9/25/06, at 1. Attorney Phillips' withdrawal was followed by the entry of Katherine O. Lavelle, Esquire, on November 16, 2006, and her subsequent withdrawal on April 10, 2007. *See* Entry of Appearance, 11/16/06, at 1; *see also* Withdrawal of Appearance, 4/10/07, at 1. Attorney Lavelle worked in the same firm as Attorney White, yet the withdrawal did not specifically state that Attorney White was no longer involved in the case. *See* Withdrawal of Appearance, 4/10/07, at 1. Significantly, while Appellants' current counsel asserts that Attorney White no longer represents Appellants and has left the practice of law, the record is devoid of any formal withdrawal of appearance by Attorney White. *See* Appellant's Brief at 6; *see also* Certificate of Transmittal of Record under Pa.R.A.P. 1931(c), Docket Entries, 3/8/13, at 1-3. Thus, it was reasonable

for the prothonotary to mail the notice of termination to Attorney White, as counsel for Appellants, at her last known address.

Aside from Appellants' counsel's assertions and affidavit that the notice of termination was not received by Appellants or their counsel, the record is devoid of evidence that the notice was not delivered. Indeed, while Appellants' petition to open and reinstate included a copy of an email from Attorney White announcing her transition from the practice of law, the petition did not include any affidavits from Attorney White regarding the notice to terminate and her lack of receipt. *See generally* Appellants' Petition to Open and Reinstate Action, 2/2/10.

Appellants had an opportunity to develop this evidence *prior* to the trial court's denial of Appellants' petition to open and reinstate. *See* Order, 5/1/10, at 1 (granting Appellants 60 days to secure discovery). Instead of securing discovery regarding the lack of receipt of the notice to terminate, and establishing that Appellants had a reasonable explanation for their failure to respond to the notice to terminate, Appellants, by their own admission, only conducted "depositions of [Blue Bell parties] and Appellants…which **addressed the issues in the underlying case**." Appellant's Brief at 4 (emphasis supplied). Appellants did not include, or cause to be included, in the certified record, a copy of these depositions such that we could review them for evidence warranting relief under Pa.R.C.P. 230.2(d)(3).

Thus, Appellants did not avail themselves of the opportunity to secure evidence regarding their lack of response to the notice to terminate until after the trial court's order denying Appellants' petition to open and reinstate. *See generally* Appellants' Motion for Reconsideration, 1/21/11. Specifically, the trial court observed:

> More than three weeks after we denied the Petition to Reinstate[,] [Appellants] filed a Motion for Reconsideration, to which they attached affidavits of counsel attempting to flesh out their allegations of non-receipt. Those affidavits gave [Blue Bell] no opportunity to cross-examine the affiants, as would have been the case if depositions had been taken pursuant to the Order of May 1, 2010. Moreover, the mere testimony of counsel that a notice is not received is insufficient to overcome the presumption of receipt when a document is mailed. *Wheeler v. Red Rose Transit Authority*, 890 A.2d 1228, 1231 (Pa. Cmwlth. 2006). Reconsideration is not a vehicle to present evidence which was available at the time of the prior proceedings. *Bushofsky v. Unemployment Compensation Board of Review,* 156 Pa. Cmwlth. 100, 626 A.2d 687, 690 (1993).

Trial Court Opinion, 3/7/13, at 4. We agree.

Our agreement recognizes that Pa.R.C.P. 230.2(b)(2) provides that "[t]he notice [of termination] shall be served by mail pursuant to [Pa.R.C.P.] Rule 440…". "Service by mail of legal papers other than original process is complete upon mailing." Pa.R.C.P. 440(b). Further, Rule 440(b) "establishes a rebuttable presumption that the notice was received. This shifts the burden to the recipient that the notice was not received. Notably, testimony alone will not rebut the presumption." ***Wheeler v. Red Rose Transit Authority,*** 890 A.2d 1228, 1231 (Pa. Cmwlth. 2006) (internal citation omitted) (affirming trial court's denial of a petition to reinstate an

action that had been terminated due to record inactivity where appellant's counsel "failed to rebut the presumption that he received the notice of termination of the case"). Even considering the materials appended to Appellants' motion for reconsideration, we are not persuaded that the trial court erred in denying Appellants' petition to open and reinstate this action.

In sum, the 2005 notice to terminate, which Appellants undeniably received and to which they responded, alerted Appellants to the need to maintain record activity. Appellants' failure to do so triggered the second notice to terminate which ultimately resulted in the trial court's order denying Appellants' petition to open and reinstate their action. The trial court did not abuse its discretion in determining that Appellants were not entitled to relief under Pa.R.C.P. 230.2(d)(3). We therefore affirm the trial court's order.

Order affirmed.

Judgment Entered.

Prothonotary

Date: 8/6/2013