

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

ANDREA LENTO,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
KENNETH ZENG AND SUE JOHNSON,	:	
	:	
Appellees	:	No. 1618 EDA 2013

Appeal from the Order Entered April 24, 2013
In the Court of Common Pleas of Philadelphia County
Civil Division No(s).: 1549 June Term 2011

BEFORE: PANELLA, MUNDY and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.:

FILED April 10, 2014

Appellant, Andrea Lento, appeals from the order entered in the Philadelphia Court of Common Pleas that denied her petition to open the entry of judgment of *non pros*. She contends, in relevant part, that she was entitled to have the judgment opened because her failure to appear at trial was excused by the court's inadequate notice of the day of trial. We vacate the order and remand for further proceedings consistent with this memorandum.

Appellant, on June 17, 2011, filed a complaint against Appellees, Kenneth Zeng and Sun Johnson, asserting claims of premises liability after

* Former Justice specially assigned to the Superior Court.

she fell while walking on an uneven sidewalk on or near Appellees' adjoining properties. Appellant sought damages in excess of \$50,000 for injuries to her neck, back, forearm, elbow and knee. The matter proceeded to arbitration, and on September 1, 2012, a panel of arbitrators rendered a finding in favor of Appellees and against Appellant.

Appellant timely appealed the arbitrators' award in the Court of Common Pleas. On September 27, 2012, the scheduling judge issued a case management order, which stated, in relevant part:

For pool cases, the start of the trial pool is defined as the first day of the trial pool month. It is also ordered that all counsel and parties are hereby attached for the March 2013 Trial Pool and counsel should anticipate trial to begin expeditiously thereafter. **All counsel and parties must immediately notify the court in writing of any scheduling conflicts, including trial attachments and prepaid vacations, and are under a continuing obligation to notify the court of any subsequent trial attachments during the trial pool month.** The court will not recognize any untimely conflict notifications. Failure to notify [the] court of scheduling conflicts will result in the imposition of appropriate sanctions. . . . Any requests for continuances or for date-certain trial listing must be submitted in writing with specificity[.]

Docket, Case No. 110601549, at 10-11 (capitalizations omitted and emphasis added).

On March 21, 2013, Appellant received notification that trial would commence the following day, March 22nd, and co-counsel for Appellant filed

an entry of appearance in response to the notification.¹ According to Appellant's counsel, an administrator from the court's Complex Litigation Center called him at 4:15 p.m. on March 21st to notify him of the March 22nd trial date. Counsel stated that he responded to the administrator's call by faxing a letter to the administrator's attention. In the letter, counsel noted he was scheduled for a prepaid vacation starting March 23rd, and co-counsel was attached to Municipal Court hearings, as well as trial on another matter. Counsel requested a continuance until co-counsel's trial in the other matter was completed.

On March 22, 2013, the trial court entered the following order: "Non-pros entered. [Appellant and Appellant's] counsel failed to appear. [Appellees'] counsel were present." ***Id.*** at 12. Five days later, on March 28th, Appellant filed a petition for relief from the judgment of *non pros* asserting, *inter alia*: (1) the court administrator's phone call provided inadequate notice because it gave counsel only seventeen hours' notice of trial; (2) counsel attempted to request a continuance following the phone call; and (3) counsel possessed reasonable explanations for their failure to appear, *i.e.*, his prepaid vacation and co-counsel's involvement in other matters. The court, on April 24, 2014, entered the order denying Appellant's

¹ Counsel asserted that co-counsel was, in fact, responsible for trial in this matter, but acknowledged that she did not enter an appearance before receiving notice of trial on the afternoon of March 21st.

petition for relief from the judgment of *non pros*, which gave rise to this timely appeal.

On June 3, 2013, the trial court issued an order requiring the filing of a Pa.R.A.P. 1925(b) statement within twenty-one days. Appellant, on June 8, 2013, filed an initial Rule 1925(b) statement setting forth the following six questions:

1. Did the Court of Common Pleas commit reversible error by its Order of April 22, 2013, denying [Appellant's] Petition For Relief From Judgment of Non Pros?
2. Did the Court of Common Pleas commit reversible error in denying [Appellant's] Petition For Relief From Judgment of Non Pros where [Appellant's] counsel received a call at 4:15 p.m. on March 21, 2013, from the Complex Litigation Center directing [Appellant] and counsel to appear for trial the next morning at 9:30 a.m.?
3. Did the Court of Common Pleas commit reversible error in denying [Appellant's] Petition For Relief From Judgment of Non Pros where upon request of Ms. Lillian Davis of the Complex Litigation Center, [Appellant's] counsel faxed her a letter requesting that the case be rescheduled for trial at a later date as [Appellant's] counsel, Andrew H. Gaber, Esquire, was scheduled to travel out of state for a prepaid vacation on Saturday, March 23, 2013, and his associate attorney[, co-counsel,] was scheduled to start a jury trial on Tuesday, March 26, 2013, and with both counsel having legal commitments requiring their appearances on Friday, March 22, 2013?
4. Was error committed by the Court of Common Pleas in failing to consider whether the prepaid vacation plans of Andrew H. Gaber, Esquire, scheduled for Saturday, March 23, 2013, and the scheduled March 26, 2013 jury trial to be covered by his only associate attorney constituted a satisfactory excuse for [Appellant's] counsel's inability to start a jury trial on Friday, March 22, 2013, on seventeen hours notice?

5. Was error committed by the Court of Common Pleas Complex Litigation Center the afternoon of March 21, 2013, at 4:15 p.m., when the call was first made to [Appellant's] counsel, directing [Appellant's] counsel to send a letter to explain why he was not available to start a jury trial the following morning, and no response to the requested letter was ever received from the Complex Litigation Center?

6. Was error committed by the Court of Common Pleas in denying [Appellant's] Petition For Relief From Judgment of Non Pros, which rejected [Appellant's] counsel's explanation as not constituting a "satisfactory excuse" for the non-appearance of [Appellant] and her counsel on Friday, March 22, 2013?

Appellant's Statement of Issues Raised on Appeal, 6/18/13, at 1-2.

On June 25, 2013, twenty-two days after the trial court entered its order for a Rule 1925(b) statement,² Appellant filed a supplemental statement containing three questions, which we have renumbered as follows:

[1]. Did the Court of Common Pleas commit reversible error by its Order of April 22, 2013, denying [Appellant's] Petition For Relief From Judgment of Non Pros in contravention of Administrative Judicial Order 98-1^[3] which directs that "Cases will not be assigned later than 3:00 PM on the day prior to jury selection"?

[2]. Did the Court of Common Pleas commit reversible error by its Order of April 22, 2013, denying [Appellant's] Petition For Relief From Judgment of Non Pros in

² The twenty-first day following the entry of the court's Pa.R.A.P. 1925(b) order was Monday, June 24, 2013.

³ Philadelphia Court of Common Pleas Administrative Docket No. 1 of 1998, Admin.J.Admin.Order 98-1 (Mar. 10, 1998).

contravention of Administrative Judicial Order 98-1, where [Appellant's] counsel received a telephone call at 4:15 PM, on March 21, 2013, from the Complex Litigation Center directing [Appellant] and counsel to appear for trial the next morning at 9:30 AM?

[3]. Did the failure of the trial court to notify [Appellant] and her counsel no later than 3:00 PM on the afternoon of May 21, 2013, in violation of Administrative Judicial Order 98-1, provide [Appellant] a reasonable explanation for her absence under [***Mashas v. Sucich***, 18 A.3d 1146 (Pa. 2011) (per curiam order)] where the Supreme Court of Pennsylvania vacated the lower court's non pros where notice of trial was furnished to counsel at 3:55 PM the day before trial was to start?

Appellant's Supplemental Statement of Issues Raised on Appeal, 6/25/13, at 1-2

The trial court authored a responsive Rule 1925(a) opinion to the June 8th initial statement. Trial Court Op., 6/28/13, at 3-6. However, the court concluded that the arguments raised in the June 25th supplemental statement were waived because that statement was untimely filed without seeking the court's permission and asserted claims not properly raised in the trial court. ***Id.*** at 6-7. Alternatively, the court concluded that Appellant's arguments were waived under Pa.R.A.P. 302(a) because she failed to cite Administrative Judicial 98-1 in her petition for relief from the judgment of *non pros*. ***Id.*** at 7.

Appellant, in her brief to this Court, essentially restates several of the questions set forth in her initial and supplemental Pa.R.A.P. 1925(b) statements. Appellant's Brief at 4-6. The argument section of her brief,

however, consists of a single claim that she was entitled to the have the judgment of *non pros* opened because of a breakdown in court operations.⁴ ***Id.*** at 16-18. In support, she focuses on the trial court's failure to comply with Administrative Judicial Order 98-1 when giving notice of the March 22nd trial date.⁵ ***Id.*** at 17-18. Appellant also contends that her counsels' efforts to request a continuance after receiving the notice of trial were reasonable in light of the court's notice of the trial date. ***Id.*** at 17. We conclude that the trial court abused its discretion when denying Appellant's petition to open the judgment of *non pros*.

Preliminary, we must consider whether Appellant properly preserved her argument based on Administrative Judicial Order 98-1. Instantly, the trial court correctly observed that Appellant first cited the order in her supplemental Rule 1925(b) statement, which was not timely filed and which she failed to obtain the leave of the court to file. **See** Pa.R.A.P. 1925(b)(2).

⁴ Appellant's Brief fails to conform to Pa.R.A.P. 2119(a), which requires, *inter alia*, that "[t]he argument shall be divided into as many parts as there are questions to be argued[.]" Pa.R.A.P. 2119(a). However, this defect does not preclude meaningful appellate review.

⁵ Appellant, in her initial Rule 1925(b) statement, alleged that the trial court erred in failing to recognize counsel's prepaid vacation and co-counsel's trial attachment as reasonable explanations for their failure to appear. However, a review of her brief shows that she has abandoned those claims on appeal by failing to cite any portions of the record, develop any argument based on those excuses, or citing any relevant law. **See** Pa.R.A.P. 2119(a); ***Jarl Investments, L.P. v. Fleck***, 937 A.2d 1113, 1131 (Pa. Super. 2007). Therefore, we will not review whether counsel's vacation and co-counsel's other commitments constituted legitimate excuses.

However, we disagree with the court's conclusion that Appellant waived her argument.

Pa.R.A.P. 302(a) provides, "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). Moreover, Pa.R.A.P. 1925, in relevant part, provides:

[(b)](4) *Requirements; waiver.*

(i) The Statement shall set forth only those rulings or errors that the appellant intends to challenge.

(ii) The Statement shall concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge. The judge shall not require the citation to authorities; however, appellant may choose to include pertinent authorities in the Statement.

(iii) The judge shall not require appellant or appellee to file a brief, memorandum of law, or response as part of or in conjunction with the Statement.

* * *

(v) Each error identified in the Statement will be deemed to include every subsidiary issue contained therein which was raised in the trial court[.]

* * *

(vii) Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.

Pa.R.A.P. 1925(b)(4)(i)-(iii), (v), (vii). This Court has stated, "An 'issue' is a disputed point or question on which parties to an action desire the court to

decide.” ***Truesdale ex rel. Truesdale v. Albert Einstein Med. Ctr.***, 767 A.2d 1060, 1063 (Pa. Super. 2001) (citation omitted).

Instantly, Appellant, consistently argued that the court administrator’s notice of the trial date by the 4:15 p.m. phone call was inadequate and that she provided a reasonable explanation for her failure to appear at trial. **See** Appellant’s Pet. for Relief from J. of *Non Pros*, 3/28/13, at 3; Appellant’s Statement of Issues Raised on Appeal, 6/18/13, at 2. Therefore, she preserved the “issue” that the court provided inadequate notice, and her specific citation to authority was subsumed in the error claimed in her initial Rule 1925(b) statement. **See** Pa.R.A.P. 1925(b)(4)(ii), (v) (noting Rule 1925(b) does not require citation to authority and subsidiary issues preserved in trial court are subsumed into error identified in statement). Accordingly, we conclude that Appellant did not waive her argument based on the court administrator’s 4:15 p.m. phone call or her more specific argument based on the alleged violation of Administrative Judicial Order 98-1. We thus proceed to the merits of this appeal.

Our standard of review is as follows:

A request to open a judgment of non pros is by way of grace and not of right and its grant or refusal is peculiarly a matter for the [trial] court’s discretion. We are loathe to reverse the exercise of the court’s equitable powers unless an abuse of discretion is clearly evident.

A trial court abuses its discretion if it “renders a judgment that is manifestly unreasonable, arbitrary or capricious;

that fails to apply the law; or that is motivated by partiality, prejudice, bias or [i]ll-will.”

Gondek v. Bio-Medical Applications of Pa., Inc., 919 A.2d 283, 286 (Pa. Super. 2007) (citations omitted).

Pa.R.C.P. 218 sets forth the following pertinent rules regarding the failure of a party to appear at trial:

(a) Where a case is called for trial, if without satisfactory excuse a plaintiff is not ready, the court may enter a nonsuit on motion of the defendant or a non pros on the court’s own motion.

* * *

(c) A party who fails to appear for trial shall be deemed to be not ready without satisfactory excuse.

Note: The mere failure to appear for trial is a ground for the entry of a nonsuit or a judgment of non pros or the reinstatement of a compulsory arbitration award.

Pa.R.C.P. 218(a), (c) & note.

The trial court’s entry of judgment of *non pros* must be challenged pursuant to Pa.R.C.P. 3051, which, in relevant part, states:

(a) Relief from a judgment of non pros shall be sought by petition. All grounds for relief, whether to strike off the judgment or to open it, must be asserted in a single petition.

(b) If the relief sought includes the opening of the judgment, the petition shall allege facts showing that

(1) the petition is timely filed,

(2) there is a reasonable explanation or legitimate excuse for the conduct that gave rise to the entry of judgment of non pros, and

(3) there is a meritorious cause of action.

Pa.R.C.P. 3051(a)-(b).⁶

Moreover, when considering the explanation or excuse proffered by the party failing to appear and seeking to open the judgment of *non pros*, our courts also consider:

1) whether the failure to appear was inadvertent; 2) whether counsel's failure to appear was part of a pattern of improper behavior, misconduct or abuse; 3) whether the court attempted to contact counsel prior to dismissing the appeal [from the arbitration award]; 4) whether the opposing party would be prejudiced by the delay; and 5) whether the court gave any consideration to lesser sanctions.

Thompson v. Houston, 839 A.2d 389, 391 (Pa. Super. 2003)

Faison v. Turner, 858 A.2d 1244, 1246-47 (Pa. Super. 2004).

Instantly, the trial court opined that entry of judgment of *non pros* was appropriate because counsel and co-counsel for Appellant had ample notice of trial based on the September 27, 2012 scheduling order. The court also criticized counsel for his late attempts to request a continuance or provide notice of scheduling conflicts. However, nothing in the present record reveals that the court made any factual findings regarding Appellant's

⁶ Rule 3051 was subsequently amended on April 5, 2013, effective May 5, 2013, to include a new subsection (c), which is not relevant to this appeal.

“issue” that the court administrator’s phone call at 4:15 p.m. on the day before trial provided inadequate notice. Moreover, the court did not offer any conclusions of law regarding whether the allegedly defective notice constituted a reasonable explanation or legitimate excuse for Appellant’s and counsel’s failure to appear for trial. **See** Pa.R.C.P. 3051(b)(2). Accordingly, we are constrained to agree with Appellant that the court abused its discretion when deciding Appellant’s petition to open the judgment of *non pros*. Thus, we vacate the order and remand for further proceedings to consider Appellant’s claim, as well as the remaining **Faison** factors.

Moreover, on remand the trial court shall also consider Administrative Judicial Order 98-1 states, in relevant part:

1. Type of Case Appropriate for Placement in a Trial Pool - Cases that require relatively short trials and that involve straightforward issues are eligible for assignment to the trial pool. . . .

* * *

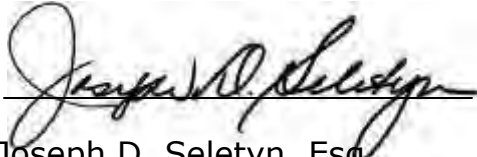
5. Notice - Cases will be assigned on a “next day minimum” notice basis. Cases will not be assigned later than 3:00 p.m. on the day prior to Jury Selection. Cases in the monthly pool may be called in any order. Counsel are expected to be trial ready for the duration of the monthly pool.

Admin.J.Admin.Order 98-1, at ¶¶ 1, 5; **see Mashas v. Sucich**, 18 A.3d 1146 (Pa. 2011) (per curiam order).

Order vacated. Case remanded. Jurisdiction relinquished.

J. S66043/13

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: 4/10/2014