

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

THINKGROW PARTNERS, LLC AND	:	IN THE SUPERIOR COURT OF
GUY LEROY	:	PENNSYLVANIA
	:	
	:	
v.	:	
	:	
	:	
GENETT PARKS	:	
	:	No. 1113 WDA 2023
Appellant	:	

Appeal from the Order Entered August 21, 2023
In the Court of Common Pleas of Erie County Civil Division at No(s):
2023-10007

BEFORE: DUBOW, J., KUNSELMAN, J., and NICHOLS, J.

MEMORANDUM BY NICHOLS, J.:

FILED: August 26, 2024

Appellant Genett Parks appeals from the trial court's order sustaining the preliminary objection filed by Thinkgrow Partners, LLC and Guy Leroy (collectively, Appellees) and dismissing Appellant's petition to vacate the magisterial district judge order. On appeal, Appellant claims that the trial court erred when it determined that even though Appellant served Appellees' counsel with a writ of certiorari, Appellant was still required to file proof of service with the prothonotary within five days of delivery of the writ. Additionally, Appellant contends that the trial court erred by not overlooking procedural defects in Appellant's litigation of the writ of certiorari. We affirm.

The trial court set forth the following factual and procedural history:

[The parties] entered into a "Lease and Option to Purchase Agreement" for the residential property at 537 East Second Street, Erie, Pennsylvania on or about February 1, 2022. On November 14, 2022, [Appellees] filed a landlord-tenant complaint

with Magisterial District Judge [(MDJ)] Suzanne C. Mack seeking a judgment for possession and money damages for rent in arrears. On November 22, 2022, MDJ Mack entered judgment in favor of [Appellees] for both possession and money damages. On December 8, 2022, MDJ Mack issued an order for possession which was served that same day.

On December 19, 2022, [Appellant] appealed the November 22, 2022 judgment to the Erie County Court of Common Pleas at Docket No. 12921-2022. On December 28, 2022, [Appellant] appeared in motion court and presented a petition to vacate the magisterial district judgment. The petition to vacate asserted that the "Lease and Option to Purchase Agreement" was a land sale contract, not a lease subject to the Landlord-Tenant Act, and that therefore the Magisterial District Judge did not have jurisdiction over the matter.

Following oral argument on the petition to vacate on January 4, 2023, [Appellant] withdrew the appeal at Docket No. 12921-2022 and filed a writ of certiorari at this docket number. The praecipe for a writ of certiorari was filed on the court-mandated form and claimed that there was a lack of subject matter jurisdiction and a lack of jurisdiction over [Appellant].

On January 5, 2023, [Appellant] filed proof of service of the writ upon MDJ Mack by certified mail. [Appellant] served [Appellee's] counsel with a copy of the writ by hand delivery on January 9, 2023. [Appellant] did not file a proof of service with regard to service on [Appellees].

[Appellees] filed a praecipe to strike [Appellant's] writ of certiorari for failure to file proof of service of the opposing party within 5 days on January 19, 2023. The prothonotary issued a notice striking the writ that same day. The following day, January 20, 2023, counsel for [Appellant] filed an affidavit and proof of service of writ of certiorari. The affidavit stated that the Magisterial District Judge had been served by certified mail on January 4, 2023 and upon [Appellees'] counsel by hand delivery on January 9, 2023.

[Appellant] filed a motion to dismiss or strike [Appellees'] praecipe to strike on January 23, 2023. [Appellees] filed [a] reply and new matter to [Appellant's] motion to dismiss or strike on February 9, 2023.

[Appellant] subsequently filed a petition to vacate magisterial district judge order for possession and money damages on April 28, 2023, asserting that the "Lease and Option to Purchase Agreement" was a land installment contract, that the MDJ did not have jurisdiction over the issue, and that [Appellant] sought to move forward on the writ of certiorari. [Appellant] also objected to a "Notice of Disposition of Abandoned Personal Property," again asserting that the agreement did not come within the provisions of the Landlord-Tenant Act and therefore the notice was improper. [Appellees] filed the instant preliminary objection to the petition to vacate and brief in support on May 8, 2023. [Appellant] filed a response and brief in opposition on June 2 and 6, 2023, respectively. Oral argument was held on June 7, 2023, at which time counsel for both parties appeared and were heard.

Trial Ct. Op., 8/21/23, at 1-3 (citations altered and formatting altered).

On August 21, 2023, the trial court entered an order sustaining Appellees' preliminary objection and striking Appellant's petition to vacate magisterial district judge order. Trial Ct. Order, 8/21/23. Additionally, the trial court noted that the "writ of certiorari remains stricken, and the judgment of the magisterial district judgment remains in full force and effect." ***Id.*** (some formatting altered).

Appellant filed a timely notice of appeal and the trial court ordered her to file a concise statement of errors complained of on appeal. Appellant timely complied and the trial court filed an opinion incorporating the opinion accompanying its August 21, 2023 order.

Appellant raises the following issues for our review:

1. Did the [trial court] err in holding that, although Rule 1011.B of the Pennsylvania Rules of Civil Procedure for Magisterial District Judges provides an alternative manner of service when an opposite party is represented by an attorney of record, Pa. R.C.P.M.D.J. Rule 1011.C requires a proof of service of the writ

of certiorari on the opposite party's counsel must be filed within 5 days when said Rule 1011.C only requires proof of service of the writ within five (5) days when the service is made "personally" on the "opposite party"?

2. Did the [trial court] err in failing to grant Appellant[]'s motion to strike [Appellees'] praecipe to strike the writ of certiorari when the writ of certiorari issued by the prothonotary of Erie County and delivered to [Appellant] pursuant to Pa. R.C.P.M.D.J. Rule 1011.A and Rule 1009.D included only a section for proof of service upon the magisterial district judge and no corresponding section for proof of service on the opposite party's counsel, especially when it was acknowledged by the opposite party's counsel that the praecipe for and the writ of certiorari in this case was filed on the form prescribed by the state court administrator?
3. Did the Common Pleas Court err in failing to apply Rule 126 of the PA Rules of Civil Procedure to disregard any error or defect of procedure which does not affect the substantial rights of the parties so as to grant [Appellant's] motion to strike [Appellees'] praecipe to strike the writ of certiorari and find that the prothonotary erred in striking the writ under the facts and circumstances of the case?

Appellant's Brief at 3-4 (formatting altered).¹

¹ In her brief, Appellant appears to combine her first two issues. **See** Pa.R.A.P. 2119(a) (stating that "[t]he argument shall be divided into as many parts as there are questions to be argued"). We do not condone Appellant's failure to comply with the Rules of Appellate Procedure, but because the noncompliance does not impede our review, we decline to find waiver on this basis. **See, e.g., Kern v. Kern**, 892 A.2d 1, 6 (Pa. Super. 2005) (stating "[A]s a practical matter, this Court quashes appeals for failure to conform to the Rules of Appellate Procedure only where a failure to conform to the Rules results in the inability of this Court to discern the issues argued on appeal. [The a]ppellants' failure to conform to the Rules of Appellate Procedure regarding [their] brief cannot be condoned, but [the a]ppellants' failure has not hampered our review.") (citation omitted).

In her first two issues, Appellant contends that the trial court erred when it determined that the Pennsylvania Rules of Civil Procedure for Magisterial District Judges require a proof of service of a writ of certiorari on the opposite party's counsel be filed within five days. ***Id.*** at 7. Appellant argues that proof of service within five days is only required when service is made "personally" on the "opposite party." ***Id.*** (citing Pa.R.C.P.M.D.J. 1011.C). Additionally, Appellant alleges that the trial court erred when it denied Appellant's motion to strike Appellees' praecipe to strike the writ of certiorari. ***Id.***

In determining whether the trial court properly sustained preliminary objections, the appellate court must examine the averments in the complaint, together with the documents and exhibits attached thereto, in order to evaluate the sufficiency of the facts averred. When sustaining the trial court ruling will result in the denial of a claim or a dismissal of suit, preliminary objections will be sustained only where the case is free and clear of doubt, and this Court will reverse the trial court's decision regarding preliminary objections only where there has been an error of law or abuse of discretion.

David R. Nicholson, Builder, LLC v. Jablonski, 163 A.3d 1048, 1051 (Pa. Super. 2017) (quoting ***Rambo v. Greene***, 906 A.2d 1232, 1235 (Pa. Super. 2006)) (citations omitted).

The Pennsylvania Rules of Civil Procedure for Magisterial District Judges permit an aggrieved party to file a praecipe for a writ of certiorari with the prothonotary of the court of common pleas "claiming that the judgment should be set aside because of lack of jurisdiction over the parties or subject matter, improper venue or such gross irregularity of procedure as to make the judgment void." Pa.R.C.P.M.D.J. 1009(A).

Service of the writ of certiorari is governed by Rule 1011, which provides:

A. Upon receipt of the praecipe for a writ of certiorari, the prothonotary shall issue the writ and direct it to the magisterial district judge in whose office the record of the proceedings containing the judgment is filed. The writ shall be delivered for service to the party who filed the praecipe.

B. The party obtaining the writ shall serve it, by personal service or by certified or registered mail, upon the magisterial district judge to whom it was directed. In like manner, he shall also serve a copy of the writ upon the opposite party. The address of the opposite party for the purpose of service shall be his address as listed on the complaint form filed in the office of the magisterial district judge or as otherwise appearing in the records of that office. If the opposite party has an attorney of record named in the complaint form filed in the office of the magisterial district judge, the service upon the opposite party may be made upon the attorney of record instead of upon the opposite party personally.

C. If proof of service of the writ upon the magisterial district judge and the opposite party is not filed with the prothonotary within five (5) days after delivery of the writ for service, the prothonotary shall, upon praecipe of the opposite party, mark the writ stricken from the record and the writ shall not be reinstated nor shall any new writ issue.

D. Service and proof of service may be made by attorney or other agent.

Note: The provisions as to service of the writ parallel those for service of notices of appeal. Subdivision C contains sanctions for failing to comply with the prescribed time limits, and reinstatement of the writ or the issuance of a new one is not allowed.

Pa.R.C.P.M.D.J. 1011.

In the instant case, Appellees filed a praecipe to strike Appellant's writ of certiorari on the grounds that Appellant failed to file proof of service upon

the opposite party with the prothonotary within five days. Appellees' Praecipe to Strike Appellant's Writ of Certiorari, 1/19/23, at ¶¶ 2-3. Appellant contends that she used the form prescribed by Rule 1009(D). Appellant's Brief at 10. She argues that the form "only provides a proof of service for service of the writ upon the magisterial district judge." **Id.** Appellant further argues that because service of the writ was not made on the opposite party personally, but rather the opposite party's attorney of record, proof of service was not required to be filed with the prothonotary. **Id.** at 11.

Appellees respond by arguing that the "proof of service requirements in Rule 1011(C) [are] separate and distinct from the service requirements in Rule 1011(B)." Appellees' Brief at 17 (emphasis omitted).

The trial court reached the following conclusion:

The language of both [Rule 1011] and the note is mandatory, not discretionary. The party obtaining the writ is required to serve it upon the magisterial district judge to whom it was directed and upon the opposite party and to file proof of service upon both the magisterial district judge and the opposing party. **See** Pa.R.C.P.M.D.J. 1011(B). Although Rule 1011 does permit service of the writ to be made upon the attorney of record rather than on the opposing party personally, the Rule clearly states that proof of service of the writ on both the magisterial district judge and the opposing party must be filed within five days of the issuance of the writ. **See** Pa.R.C.P.M.D.J. 1011(C). The fact that the rule provides for an alternative manner of service when an opposing party has been represented by an attorney of record does not obviate the need to file proof that the attorney was in fact served.

The [trial court] is cognizant of [Appellant's] argument that the mandated form she used for a praecipe to file a writ of certiorari, AOPC 25-05, appears to include only a section for proof of service upon the magisterial district judge and no corresponding section for proof of service on the opposing party. The [trial court] cannot

explain the apparent discrepancy between the form and the language of the rule. However, as noted above, the rule is clear in mandating that proof of service on the opposing [party] is required, and the fact that the form used apparently did not contain a section related to proof of service on the opposing party does not negate the requirements of the rule. Additionally, the [trial court] notes that the version of form AOPC 25-05 available on the AOPC website is slightly different from the form used by [Appellant] and includes a second page for proof of service on both the magisterial district judge and the opposing party.

In this case, the proof of service on the attorney for the opposing party was not filed within the five days required by the rule. Rule 1011(C) specifically provides: "If proof of service of the writ upon the magisterial district judge **and** the opposite party is not filed with the prothonotary within five (5) day[s] after delivery of the writ for service, the prothonotary **shall**, upon praecipe of the opposite party, mark the writ stricken from the record and the writ shall not be reinstated nor shall any new writ issue." Pa.R.C.P.M.D.J. 1011(C) (emphasis supplied). Thus, the prothonotary was not in error for striking the writ in compliance with the rule.

The [trial court] notes the particularly harsh nature of this sanction, especially where, as here, there is no dispute that the opposing party's attorney was served with the writ within the five-day time period and the proof of service on the opposing party was immediately filed after the writ had been stricken. The note to Rule 1011 specifically provides for this sanction, stating "The provision as to service of the writ parallel those for service of notices of appeal. Subdivision C contains sanctions for failing to comply with the prescribed time limits, and reinstatement of the writ or the issuance of a new one is not allowed." However, the rules related to taking an appeal from a magisterial district judge decision differ from the rules related to filing a writ of certiorari in a significant way. Rule 1006, regarding the striking of an appeal, has similar language compelling a prothonotary to strike an appeal if the appellant fails to comply with the rules regarding service of the appeal; however, that rule specifically provides that the "court of common pleas may reinstate the appeal upon good cause shown." Pa.R.C.P.M.D.J. 1006. There is no similar such language in the rule regarding issuance and service of a writ of certiorari. Although the comments and notes to the rules of procedure are not part of the text of the rules, they can be used in interpreting the text of the rules. Here, the [trial court] finds that the omission

of any kind of “saving language” in the rule regarding writs of certiorari when such language was included in the rule regarding writs of certiorari were to be strictly construed as part of the sanction for noncompliance.

Trial Ct. Op. at 6-8 (some formatting altered).

Following our review of the record, we can discern no error of law or abuse of discretion on the part of the trial court. ***See Jablonski***, 163 A.3d at 1051. Indeed, the plain language of Rule 1011(C) requires that proof of service of the writ of certiorari on both the magisterial district judge and the opposing party be filed with the prothonotary within five days of delivery of the writ. Pa.R.C.P.M.D.J. 1011(C). In the instant case, there is no dispute that Appellant failed to file proof of service on Appellees within five days of the delivery of the writ. As noted by the trial court, Rule 1011 does not provide for any discretion on the part of the prothonotary or the trial court to reinstate the writ of certiorari for failing to timely file proof of service. Accordingly, Appellant is not entitled to relief.

In her next issue, Appellant contends that the trial court erred when it did not apply Rule 126 of the Pennsylvania Rules of Civil Procedure² and grant Appellant’s motion to strike Appellees’ praecipe to strike the writ of certiorari “and find that the prothonotary erred in striking the writ under the facts and circumstances of the case.” Appellant’s Brief at 12. Appellees argue that

² Rule 126 permits a court to “disregard any error or defect of procedure which does not affect the substantive rights of the parties.” Pa.R.C.P. 126(a).

Appellant failed to present this claim to the trial court; therefore, this claim is waived on appeal. Appellees' Brief at 18.

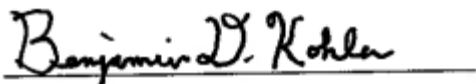
The Pennsylvania Rules of Appellate Procedure explicitly state that "[i]ssues not raised in the trial court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a); **see also *Steiner v. Markel***, 968 A.2d 1253, 1257 (Pa. 2009).

Based on our review of the record, at no point did Appellant request that the trial court apply Rule 126 and disregard any procedural defects on the part of Appellant's litigation of the writ of certiorari. To the contrary, Appellant raised this issue for the first time in her concise statement of errors complained of on appeal. Because she raises this claim for the first time on appeal, Appellant has waived this issue for appellate review and she is not entitled to relief. **See *Cabot Oil and Gas Corporation v. Speer***, 241 A.3d 1191, 1196 (Pa. Super. 2020) (stating that "issues raised for first time in Rule 1925(b) statement are waived"); **see also *Steiner***, 968 A.2d at 1257; Pa.R.A.P. 302(a).

For these reasons, we affirm.

Order affirmed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, reading "Benjamin D. Kohler", is written over a horizontal line.

Benjamin D. Kohler, Esq.
Prothonotary

DATE: 08/26/2024