

JEFFREY MILLER. Petitioner v. JANET A. MARTIN,
Respondent, C.P. Franklin County Branch, Civil Action -
Law, No. 1999-20494

Miller V. Martin

*Appeal Nunc Pro Tunc - Non-negligent Happenstance - Attorney Negligence -
Oral Leases*

1. There is a very limited range of circumstances in which a nunc pro tunc appeal may be permitted. This range includes fraud or breakdown in operations of the court, or a non-negligent happenstance beyond the control of the party or his attorney.

2. For an appeal nunc pro tunc to be granted under the concept of non-negligent happenstance, the event must be uncontrollable and unpreventable, such as a sudden, severe illness.

3. Miscommunication, or possible attorney negligence, are not grounds to allow an appeal nunc pro tunc.

4. Oral leases constitute tenancy periods equivalent to the intervals in which rent is paid.

Robert E. Graham, Esquire, Counsel for Petitioner
Shawn D. Meyers, Esquire, Counsel for Respondent

OPINION AND ORDER

WALKER, P. J., December 6, 1999.:

Background

Petitioner, Jeffrey Miller, brings this action, a Petition for Leave to Appeal Nunc Pro Tunc, because his attorney had not timely filed an appeal for Mr. Miller from District Justice Carter's decision against him in a landlord/tenant dispute. Mr. Miller had been brought before the district justice by his landlord, Janet Martin ("Landlord"), in August, 1999, to evict him from the apartment he was renting. The hearing concluded with a judgment to Landlord for possession of the premises. Mr. Miller was given ten days to file an appeal from this decision.

Mr. Miller had resided in the apartment for thirty years, approximately twenty-four years of which were with his mother. Mr. Miller's mother, Gloria Miller, was the only signatory on the leases that were signed over the past thirty years. The last written lease that was signed by both Gloria Miller and Landlord was executed in 1978. The last lease in either party's possession is signed only by Landlord, for the term of October 1, 1979 to October 1, 1980. Both these leases specify a one-year rental term, with rent to be paid monthly. Jeffrey Miller was never a signatory on any of the leases. Mr. Miller and his mother continued to live in the apartment, without a signed lease, until 1993, when Gloria Miller died. At that time, Mr. Miller called Landlord's agent and advised her that he would like to continue to live in the apartment. This arrangement was orally agreed upon, and Mr. Miller continued paying rent on a monthly basis. A formal lease agreement was never executed between Mr. Miller and Landlord.

For reasons unknown, in May of this year, Landlord served Mr. Miller with a notice to vacate the apartment. Mr. Miller refused to leave, and Landlord was forced to file a complaint against him. A hearing was held on August 13, 1999 with the district justice, who ruled that Landlord could take possession of the premises after the ten day appeal period had expired.

Mr. Miller contends that he advised his attorney in that proceeding, Thomas Diehl, to file an appeal to the judgment. Attorney Diehl claims it was his understanding that they had decided not to file an appeal, as it would be without merit. Mr. Miller said he was unaware that no appeal had been filed until he received a call from Constable Spielman about vacating the apartment on August 27, 1999. Mr. Miller states he immediately tried to contact Attorney Diehl. Attorney Diehl informed him that he had not, and would not, file an appeal for Mr. Miller because there was no legal basis to do so. Mr. Miller then approached other attorneys on this matter until he obtained his current counsel. Mr. Miller's current counsel was

able to regain possession of the premises for Mr. Miller until a decision can be made on the matter of Mr. Miller's appeal.

Because the appeal was not timely filed by Attorney Diehl, the issue that is before this court is whether it can now allow Mr. Miller to proceed with his appeal nunc pro tunc.

Ruling

The court has determined that it cannot permit Mr. Miller to file an appeal nunc pro tunc, as there is no legal precedent allowing such action under the facts of this case.

Discussion

While the decision to permit an appeal nunc pro tunc is one entirely within the trial court's discretion, *Caron v. Reliance Insurance Co.*, 703 A.2d 63 (Pa.Super. 1997), there is a very limited range of circumstances under which such an appeal can be permitted.

"[T]he time for taking an appeal cannot be extended as a matter of mere indulgence. An extension of such time can be permitted only in those cases where there has been fraud or some breakdown in the court's operation."

West Penn Power Co. v. Goddard, 460 Pa. 551, 333 A.2d 909 (1975); *In re In the Interest of C.K.*, 369 Pa. Super. 445, 449, 535 A.2d 634, 636 (1987). In the instant matter, there has been no attempt to show fraud or a breakdown of operations in the court. Mr. Miller asserts in his brief that there was a miscommunication with his attorney, and has alleged possible malpractice in his complaint. Mr. Miller said that he instructed his attorney to file an appeal. The attorney states in his deposition that he and Mr. Miller came to a mutual decision to not file an appeal.

In addition to fraud or breakdown in the court's operation, a nunc pro tunc appeal can be permitted under the concept of a "non-negligent happenstance," as first decided in *Bass v. Commonwealth*, 485 Pa. 256, 401 A.2d 1133 (1979). This is

the argument Mr. Miller promotes in his brief. Application of *Bass* is limited "to cases presenting unique and compelling facts justifying a late filed appeal." *In re In the Interest of C.K.*, 369 Pa.Super. 445, 535 A.2d 634 (1987). The scope of *Bass* is exceedingly limited. *In re Glosser Brothers, Inc.*, 382 Pa.Super. 177, 555 A.2d 129 (1989). The situations in which *Bass* has been applied are unusual and unpreventable, such as the sudden illness of the appellant, his counsel, or counsel's staff.

In *Bass*, the late appeal was permitted because the secretary entrusted with filing it suddenly became ill and left work. The appeal had been completed and in a folder on her desk. It was promptly filed when it was discovered, on her return, just four days after the deadline. *Bass, supra* at 258-60, 401 A.2d at 1135. The *Bass* court drew the analogy of an attorney having a heart attack while en route to the courthouse to file an appeal. If the attorney lost control of his vehicle in this situation and injured a bystander, he would not be liable for damages resulting from his non-negligent driving. Likewise, his client should not suffer because he was unable to reach the courthouse to file the appeal. *Bass, supra* at 260, 401 A.2d at 1135.

Appeals nunc pro tunc have been allowed sparingly in similar situations where an appeal was not timely filed because of unusual circumstances beyond the control of the appellant or his counsel. In *Perry v. Unemployment Compensation Board of Review*, 74 Pa.Cmwlth. 388, 459 A.2d 1342 (1983), a nunc pro tunc appeal was permitted where the law clerk's car broke down on the way to file the original appeal. A late appeal was denied, however, where the appellant knew of his attorney's death, but waited to secure new counsel until he was informed of it in writing several months later. *Moring v. Dunne*, 342 Pa.Super. 414, 493 A.2d 89 (1985).

In the instant case, the court does not find that the alleged miscommunication was an extraordinary circumstance beyond the control of Mr. Miller and his counsel. It is difficult to

believe that each party could have communicated a definite decision about whether to file the appeal and been misunderstood by the other party. If the conversation had been ambiguous, either party could have followed up later with the other. Mr. Miller could have contacted his attorney to check on the progress of the appeal within the ten day period. Attorney Diehl might have sent a letter to Mr. Miller outlining the conversation they had after the hearing to ensure that a mutual decision had been made about the appeal. There was no unusual happenstance that prevented Mr. Miller, his attorney or the attorney's office staff from filing the appeal.

It is apparent that the *Bass* exception is for situations where there was an intention to file an appeal, and for reasons beyond the control of the attorney or his staff, the appeal was not filed timely. A non-negligent circumstance of the type defined in *Bass* is not evident in the instant case, therefore further analysis of the *Bass* requirements,¹ as defined in *Cook v. Unemployment Compensation Board of Review*, 543 Pa. 381, 671 A.2d 1130 (1996), is not necessary.

Additionally, Mr. Miller's complaint alleges possible legal malpractice, or at the least, negligence on the part of his first attorney. This is not grounds to allow an appeal nunc pro tunc. "[T]he mere neglect or mistake of the appellant or his counsel is not considered a sufficient excuse for failure to file a timely appeal." *Moring v. Dunne*, 342 Pa. Super. 414, 418, 493 A.2d 89, 91 quoting *State Farm Mutual Automobile Insurance Co. v. Schultz*, 281 Pa. Super. 212, 218 n.7, 421 A.2d 1224, 1227, n.7 (1980). "[A]ny negligence on the part of his attorney does not entitle Licensee to nunc pro tunc relief." *Riddle v.*

¹To clarify the application of *Bass*, the Pennsylvania Supreme Court set out these guidelines:

that where an appeal is not timely because of non-negligent circumstances, either as they relate to appellant or his counsel, and 1) the appeal is filed within a short time after the appellant or his counsel learns of and has an opportunity to address the untimeliness, and 2) the time period which elapses is of very short duration, and 3) appellee is not prejudiced by the delay, the court may allow an appeal nunc pro tunc. *Cook, supra* at 1131.

Department of Transportation, 136 Pa.Cmwlth. 508, 583 A.2d 865 (1990).

However, because a non-negligent happenstance was not found to allow the appeal nunc pro tunc, it does not automatically follow in all cases that the attorney was negligent. Looking to the underlying facts of this case, it is clear that Attorney Diehl's decision to not file an appeal was not negligence, but proper under the circumstances. It is undisputed by the parties that Mr. Miller had an oral agreement with Landlord, but never a written lease. Both parties also agree that Mr. Miller had been paying rent on a monthly basis. Where an oral lease provides that rent is paid monthly, even if it is renewed yearly for rent adjustments, such an oral lease constitutes a month-to-month tenancy. *Local 325 of the United Food & Commercial Workers Union v. Department of Transportation*, 132 Pa.Cmwlth. 1, 571 A.2d 557 (1990); see also *Island Construction Corp. v. Danielson*, 316 F.2d 161 (3d Cir. 1963)

("[W]here one enters into the possession of real property under an oral lease for a definite time, with periodic rent reserved, he is not a tenant for the time agreed upon, but a tenant from period to period, corresponding to the times on which rent is payable."

(quoting *Watkins v. Balch*, 41 Wash. 310, 83 P. 321 (1906))).

As Attorney Diehl testified, there was no legal basis to appeal. It would have been a waste of Mr. Miller's time and money, and possibly a breach of professional ethics to pursue the action further. Moreover, in Mr. Miller's deposition, when he reiterates what he discussed with Attorney Diehl after his hearing in relation to an appeal, he states that:

Judge Carter did not have a full understanding of the relationship. He was unaware of the length of my tenancy, that there were no complaints directed to me or to my mother, any of us, about not caring for the apartment or any complaints from neighbors, nothing, either verbally or in writing, never.

Miller Deposition, page 36.

These are not legally relevant issues and it is doubtful Attorney Diehl would have raised an appeal based on these ideas. While the court sympathizes with Mr. Miller's plight at being forced to leave his home of the last thirty years, Mr. Miller must realize that it is simply not his property and he must vacate, as the owner has requested. It is obvious that Mr. Miller either fails or refuses to understand that the length of his tenancy and that he was always an exemplary tenant does not instill any property rights in him to the apartment.

Mr. Miller also suggests that Landlord is having him removed from his apartment in retaliation for taking legal action for an injury he suffered on the premises six years ago. On its face, retaliation now for an incident that occurred six years ago seems unlikely. Additionally, Mr. Miller is claiming discrimination from Landlord because of his injury. He has filed a complaint with Pennsylvania Human Relations, which is his only recourse on that matter at this time.

ORDER OF COURT

December 6, 1999, the petitioner's request for leave to appeal nunc pro tunc is denied.

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