

COURT OF COMMON PLEAS OF PHILADELPHIA
ORPHANS' COURT DIVISION
O.C. No. 1897 DE of 2003
Control No. 040561
Estate of Louis Baselice, Deceased

OPINION

Factual Background

On the afternoon before a writ of possession was scheduled to be executed on property located at 1334 Jackson Street, Gary Silver (“petitioner”) filed an emergency petition (the “March 2004 emergency petition”) seeking to stay execution. The petitioner was a tenant who resided at the 1334 Jackson Street property that is owned by respondent, the Estate of Louis Baselice. The parties had previously been embroiled in extensive litigation in the civil division over petitioner’s effort to purchase the 1334 Jackson Street property, during which two emergency petitions to stay execution of a writ of possession had been filed, with one granted for a discrete period.¹

¹ The petitioner generally references this extensive litigation in his emergency petitions. In December 2002, Gary Silver filed a complaint in the civil division, Silver v. Baselice, December 2002, No. 3082 seeking specific performance of an agreement of sale for \$85,000 for the 1334 Jackson Street property against the Baselice estate and its realtor. The complaint alleged, inter alia, that Louis Baselice had entered into this agreement prior to his death. Gary Silver also filed a praecipe for lis pendens.

The Baselice estate responded by filing preliminary objections, asserting, inter alia, that Mr. Silver had failed to make an \$8,500.00 deposit as required by their agreement and failed to appear at settlement prior to November 2, 2001. These objections were sustained by Judge Carrafiello, who dismissed the complaint by order dated April 7, 2003. The lis pendens was also vacated. This ruling was appealed, but that appeal was dismissed for failure to file a brief.

On September 3, 2003, Mr. Silver filed an emergency petition for stay of a writ of possession issued for the 1334 Jackson Street property. Judge Carrafiello granted this emergency petition by order dated September 4, 2003, which postponed the writ of possession until October 1, 2003 on condition of payment of the September 2003 rent of \$1,000. Another emergency petition for stay of writ of possession was filed by Mr. Silver on October 1, 2003. Judge Carrafiello scheduled a hearing for October 9, 2003. On November 18, 2003 an emergency petition for reinstatement of the writ of possession was filed. The parties thereafter entered into the following stipulation that was approved by Judge Carrafiello on November 18, 2003:

STIPULATION FOR SETTLEMENT AGREEMENT

AND NOW, this 18 day of November 2003, it is hereby stipulated by the parties hereto, acting through their respective counsel who are duly authorized to sign this stipulation as follows:

NOW, WHEREFORE, in consideration of the mutual promises contained herein, and intending to be legally bound, it is agreed that:

The March 2004 emergency petition was not the first emergency petition to stay execution that had been filed with the Orphans' court. In February 2004, Gary Silver had also filed an emergency petition to stay execution of a writ of possession (the "February 2004 Emergency Petition") for the 1334 Jackson Street property. In response to that motion, this court scheduled a hearing for February 25, but before it was held the parties reached a stipulation of settlement dated February 24, 2004. The February 24, 2004 stipulation provides:

STIPULATION FOR SETTLEMENT AGREEMENT

AND NOW, this 24th day of February 2004, it is hereby stipulated by the parties hereto acting through their respective counsel who are duly authorized to sign this stipulation as follows:

NOW, WHEREFORE, in consideration of the mutual promises contained herein, and intending to be legally bound, it is agreed that:

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1. Gary Silver and Occupants will continue to reside in 1334 Jackson Street, Philadelphia, PA. 19148.
 2. Gary S. Silver and Occupants will pay \$1,000.00 per month rent due by the 5th of each month beginning November 1st 2003 and each month thereafter until the property is sold. Rent to be paid to A. Criniti Realty, Inc. (*Handwritten: November's rent shall be paid 11/21/03*)
 3. Gary S. Silver and Occupants will upon signing of this agreement pay \$425.52 for gas & electric bills due and will continue to pay all utilities upon presentation.
 4. Gary S. Silver and Occupants will permit For Sale sign to be put on the property and will not remove it, will permit the realtor for the Estate of Louis Baselice, deceased to bring people through the house upon 24 hours notice and will keep the property in a clean and neat condition.
 5. Gary S. Silver and Occupants will permit the Estate of Louis Baselice, deceased, to inspect the property and make any needed repairs for the sale of the property.
 6. Gary S. Silver and Occupants will provide the Estate of Louis Baselice, deceased, with a set of keys to the residence.
 7. Gary S. Silver and Occupants will remove the cat litter from the basement tub.
 8. Upon sale of the property to a third person Gary S. Silver and Occupants agree to vacate the premises upon thirty days notice.
 9. If the property is sold to Gary S. Silver and Occupants the above will remain in effect until the date of sale of the property.
 10. If Gary S. Silver and Occupants fails to adhere to any of the above paragraphs the Estate of Louis Baselice, deceased, may request this Court for an order allowing the immediate eviction of Gary S. Silver and Occupants.

The undersigned counsel, with the authority and consent of their respective clients, execute this stipulation the day and year first above written.

Handwritten: Writ of Possession stayed until December 18, 2003 pending further order of Orphans' Court, to wit, in the event that there is no order entered in Orphans' Court staying the Writ of Execution further Writ can Issue on December 19, 2003 without further order of court

1. The Writ of Possession will be stayed until on or after March 2, 2004, pending the sale of the premises known as 1334 Jackson Street, Phila. Pa. 19148
2. Gary Silver will pay \$5,000.00 at the signing of this agreement by certified funds or Attorney Escrow check representing the \$5,000.00 down payment.
3. Gary Silver will provide a copy of the mortgage approval at the signing of this agreement.
4. The sale of property will occur on March 1st 2004 at 3:00 p.m. at 2617 South 17th Street, Phila. Pa. 19145, pursuant to the terms of the agreement of sale for the property dated December 3rd 2003 and attached hereto.
5. All utilities owned by Gary Silver for the property will be paid at settlement.
6. Real Estate Taxes for 2004 have been paid by the Estate and will be pro-rated at settlement.
7. The Estate will provide a roofing certification to purchaser at settlement.
8. In the event that the Buyer, Jane Marie D'Amato, is in default of her obligations under the agreement of sale of December 3rd 2003, regarding the premises known as 1334 Jackson Street, Philadelphia, PA 19148, and settlement does not occur on or before March 1st 2004, because of said default, then in that event, Gary Silver and/or his wife, Jane Marie D'Amato, give up all rights to purchase the property.
9. In the event that the Buyer, Jane Marie D'Amato, is in default of her obligations under the Agreement of Sale of December 3rd 2003, regarding the premises known as 1334 Jackson Street, Philadelphia, PA 19148, and settlement does not occur on or before March 1st 2004, because of said default, then in that event, Gary Silver and/or his wife, Jane Marie D'Amato, give up all rights to possession of the said property.
10. By signing this agreement Gary Silver and his wife Jane Marie D'Amato agree they will not file any action of any kind in any Court to stay any further action of the Estate to evict them from the premises known as 1334 Jackson Street, Phila. PA 19148, in the event that the buyer Jane Marie D'Amato is in default of her obligation under the agreement of Sale of December 3, 2003, regarding said premises, and settlement does not occur on or before March 1st 2004, because of said default.
11. Further Gary Silver and his wife Jane Marie D'Amato agree that should either of them file a bankruptcy petition that petition will NOT act as a stay to the eviction proceedings of the Estate against Gary Silver and the Estate will be permitted to evict all residents from the premises known as 1334 Jackson Street, Phila. PA. 19138.
12. By signing this agreement, Gary Silver and his wife Jane Marie D'Amato and the Estate of Louis Baselice, deceased, acknowledge that they have received representation from their Counsel, that they are giving up important rights that they may have been able to avail themselves of and that they are freely giving up those rights as part of this agreement.

Less than one month after this stipulation was signed by counsel, Gary Silver on March 16, 2004 filed his second emergency petition to stay execution of a writ of possession. After a preliminary ex parte conference with the petitioner and his counsel, this court scheduled an emergency hearing for all parties at 10 a.m. on March 17th. Shortly after the hearing began, the Estate's attorney informed this court that the writ had already been executed.² At a later point in the hearing, petitioner's counsel objected, stating that "[w]e spoke with the Sheriff this morning. They are going to wait" to which the Estate's attorney, responded: "The locks have been changed. The sheriffs are waiting there with orders. If you order it, they are going to give the key back. But the writs have been executed and the locks have been changed."³ On subsequent review, a writ of possession for the address of 1334 Jackson Street bears the following handwritten note: "3/17/04 9 a.m. Possession of Premises Given. Locks changed. Goods secured as per Sgt. Taylor."⁴

The parties were nonetheless invited to present their arguments on the substantive issues as to the enforceability of (1) the February 24, 2004 stipulation of settlement (the "February stipulation") and (2) the agreement of sale dated December 3, 2003 ("December sale agreement") for the 1334 Jackson Street property. The petitioner essentially argued that his emergency petition to stay the writ of possession for the 1334 Jackson Street property should be granted because the purchaser, Jane Marie D'Amato, (the petitioner's wife) was not in default of the December sale agreement or of the February stipulation, even though they had received notice that a writ of possession was scheduled for execution on March 17, 2004.⁵ Although he conceded that settlement for the 1334 Jackson Street property had not taken place on March 1, 2004 as required by the February

² See 3/17/04 Notes of Testimony (hereinafter "N.T.") at 8.

³ See 3/17/04 N.T. at 32-33.

⁴ See Writ of Possession, filed under the caption *Baselice v. Silver*, May 2003, No. 2893, which was referenced in the proposed order of Silver's March 2004 emergency petition.

⁵ See Silver's 3/16/04 Emergency Petition, ¶11.

stipulation,⁶ petitioner asserted that the February stipulation incorporated the December sale agreement and that these documents had to be interpreted in tandem. Hence, since the settlement did not take place because the Purchase Money Mortgage had not been committed, there had been no default under the terms of the December sale agreement.⁷ The petitioner invoked Rosen v. Empire Valve & Fitting, Inc., 381 Pa. Super. 348, 553 A.2d 1004 (1989) to support this argument⁸ and pointed to the Mortgage Contingency provisions of the December sale agreement, Section 6 (c). That section set forth a mortgage commitment date of January 15, 2004. Yet, it further provided:

If a written commitment is not received by Seller by the above date, Buyer and Seller agree to extend the mortgage commitment date until Seller terminates this Agreement in writing by notice to Buyer.⁹

In essence, therefore, petitioner asserted that the seller had the burden of terminating the agreement by written notice for failure to obtain the mortgage commitment:

There has been no termination of this agreement by the seller in this case. . . . It's not really a default. There would have been an option of the seller to terminate the agreement. They never executed that option.¹⁰

Finally, the petitioner noted that a letter dated March 16, 2004 indicated that the sum of \$140,283.26 had been wired from Gateway Funding to Constitution Abstract Company for the closing of 1334 Jackson Street.¹¹ He noted that his attorney by letter had informed the Estate of a new settlement date scheduled by letter for March 16, 2004.¹²

The Estate, however, did not agree to this new settlement date and had so informed petitioner

⁶ See 2/24/04 Stipulation, ¶4.

⁷ Silver's 3/16/04 Emergency Petition, ¶¶ 3 & 8. See also 3/17/04 N.T. at 17-18, 26-29.

⁸ See 3/17/04 N.T. at 13-15.

⁹ See December Sale Agreement, 6 (C) & 3/17/04 N.T. at 15.

¹⁰ See 3/17/04 N.T. at 15.

¹¹ See 3/17/04 N.T. at 20. See Ex. P-1.

¹² See Silver's 3/16/04 Emergency Petition, ¶ 4-5 & Ex. D.

two days prior to the hearing.¹³ Instead, it responded that the purchasers had defaulted on their agreement of sale, and the stipulation merely gave them “one more shot” to show up for settlement on March 1, 2004 which they failed to do.¹⁴ The Estate also argued that it had terminated the sale agreement so that consequently the stipulation controlled.¹⁵ It argued that Rosen v. Empire Valve & Fitting, Inc. was factually inapplicable since it dealt with the return of a security deposit rather than with the sale of property.¹⁶ When asked to produce proof that the December agreement had been terminated, the estate subsequently submitted the following letter dated January 19, 2004:

John,

This letter is to notify you that your Client has breached her contract for the purchase of 1334 Jackson Street, but (sic) not supplying the additional deposit of Four Thousand Dollars (\$4,000) which was due 15 days after the signing of the Agreement of Sale dated on 12-3-03.

Enclosed you will find a Release form which when signed by your buyer we will return her initial deposit of One Thousand Dollars. Thank you.

Sincerely,

Anthony Criniti

Ex. D-1.

Finally, the Estate asked the court to consider, as a matter of equity, the extensive litigation history of this case: the Estate had repeatedly sought writs of possession, but then relented when the petitioner filed his “last minute” emergency requests for “one more chance.”¹⁷ In fact, the Estate emphasized once again, the present writ had already been executed.¹⁸

After completion of the argument, this court dismissed the petition as moot due to the execution

13 See 3/17/04 N.T. at 9.

14 See 3/17/04 N.T. at 29-31.

15 See 3/17/04 N.T. at 24-27.

16 See 3/17/04 N.T. at 31. The Estate’s interpretation of Rosen is valid. That case focuses only on the narrow issue of whether the sales agreement at issue permits the buyer to recover his down payment where a mortgage commitment is withdrawn. See Rosen, 381 Pa. Super. at 349, 553 A.2d at 1004. It has little relevance to the issue of whether failure to obtain a mortgage commitment constitutes a breach that would invalidate the sale agreement.

17 See 3/17/04 N.T. at 32.

of the writ. Johnson v. Martofel, 797 A.2d 943 (Pa. Super.), app. denied, 572 Pa. 706, 813 A.2d 842 (Pa. 2002). Because of the emergency nature of the hearing, the record presented was inadequate¹⁹ to resolve the issue of the enforceability of the agreement of sale. That general issue, however, can still be raised by the petitioner since he had previously filed a petition for citation directed at Donato Baselice, as executor of the Estate of Louis Baselice, to show cause why the Estate should not accept an offer from Gary Silver to purchase the premises at 1334 Jackson Street.²⁰

After this court issued the order dismissing the March 2004 emergency petition, Mr. Silver filed a motion for reconsideration to which the Estate filed a response. On April 16, 2004, the petitioner filed a notice of appeal to the Superior Court. This court subsequently issued an order dated April 19, 2004, directing the petitioner to file a concise statement of matters complained of pursuant to Pa.R.A.P. 1925(b). This 1925(b) opinion is in response to that statement and notice of appeal.

Legal Analysis

In response to the Rule 1925 (b) order, petitioner filed a statement that focused on the dismissal of his emergency petition as moot, arguing that “his petition was not moot, in that, his Petition was to stay a writ of possession that had not yet been fully executed at the time of the hearing.”²¹ It is well established that a Rule 1925(b) statement “is a crucial component of the appellate process because it allows the trial court to identify and focus on those issues the parties plan to raise on appeal” and then “prepare an opinion addressing its alleged errors.”

Provident National Bank, N.A., 832 A.2d 1077, 1080-81 (Pa. Super. 2003). Indeed, this

18 See 3/17/04 N.T. at 32-33.

19 Counsel for the Estate, for instance, complained that due to the emergency nature of the hearing, he did not have access to his complete file. See 3/17/04 N.T. at 26.

20 The Petition for citation was granted by decree dated November 20, 2003. According to the docket, an answer has yet to be filed. Under Philadelphia Orphans’ Court Rule 3.5.B.(3), the petitioner has the option to file for a default judgment, but with notice to the opposing party.

21 See Appellant Gary Miller, Esquire’s Statement of Matters Complained Of.

statement is considered so crucial, that issues that are not waived by it are deemed waived. See, e.g. Estate of Daubert, 757 A.2d 962, 963 (Pa. Super. 2000). Consequently, this issue of whether the emergency petition to stay execution of the writ of possession was properly denied as moot must be addressed, rather than the other substantive reasons for this court's order. It should be noted that the substantive relief requested by the petitioner was quite extreme since he sought enforcement of a settlement for the sale of real property that was rejected by the owner. The record provided failed to establish petitioner's unambiguous right to this relief.

The standard for granting a petition seeking to stay execution of an action for ejectment is set forth in Pa.R.C.P. 3162. This rule provides:

- (a) Execution shall be stayed as to all or any part of the property of the defendant
 - (1) upon written direction of the plaintiff to the sheriff;
 - (2) upon a showing of exemption or immunity of property from execution;
 - (3) upon a showing of a right to stay under the provisions of Act of Congress or Act of Assembly.
- (b) Execution may be stayed by the court as to all or any part of the property of the defendant upon its own motion or application of any party in interest showing
 - (1) a defect in the writ or service; or
 - (2) any other legal or equitable ground.

Pa.R.C.P. 3162

In arguing that his emergency petition to stay the writ of possession should be granted, petitioner essentially raises the legal argument that the buyer was not in default of the December 2003 agreement of sale or of the February 2004 stipulation. Unfortunately, the petitioner waited to present this petition on the afternoon prior to the scheduled day for execution of the writ²² -- at a

22 The March 2004 emergency petition notes that petitioner sent a letter to respondent to reschedule the settlement for March 16th but the Estate refused to agree. Silver's 3/16/04 Emergency Petition, ¶¶ 15 & 16 & Ex. D. This unilateral effort to amend the stipulation or change the date of settlement was a nullity since it is well established that both an offer and an acceptance are necessary to form a contract. While an offer may be accepted by conduct, here the Estate by its conduct rejected the offer of a new March 16th settlement date. See generally Hartman v. Baker, 766 A.2d 347, 351 (Pa. Super. 2000) ("The law of this Commonwealth makes clear that a contract is created where there is mutual assent to the terms of a contract by the parties with capacity to contract").

time when opposing counsel asserts petitioner was aware that counsel for the Estate would be unavailable.²³ Although counsel was granted an ex parte conference after he stated that he had been unable to locate the estate's attorney, this court scheduled an emergency hearing for the next morning to provide an opportunity for all interested parties to present their case.

The emergency petitions acknowledged the extensive litigation history that preceded them. A review of the relevant dockets indicates that two emergency petitions to stay execution of writs of possession on the 1334 Jackson Street property had been filed in the civil division before Judge Carrafiello, who granted one of them for a period of less than one month. The second petition was resolved by a stipulation that the parties entered into dated November 18, 2003 which provided:

Writ of Possession Stayed Until December 18, 2003 pending further order of Orphans' Court, to wit, in the event that there is no order entered in Orphans' Court staying the Writ of Execution further Writ can Issue on December 19, 2003 without further order of court.²⁴

Within three months of entering into this stipulation with Judge Carrafiello's approval, petitioner filed in Orphans' Court two emergency petitions to stay execution of writs of possession on the 1334 Jackson Street property. Petitioner failed, however, to pursue a petition for citation that he had filed earlier on November 18, 2003 to resolve the substantive issue of whether the Estate should be required to accept Gary Silver's offer to purchase the premises at 1334 Jackson Street for the sum of \$150,000. Arguably, if this petition had been diligently pursued, the substantive issues could have been developed in a careful, rational process rather than through last minute "emergency" brinkmanship. Indeed, those issues remain pending.

As for the emergency petitions seeking a stay of execution of the writs of possession, the first

²³ As counsel for the Estate stated during the hearing: "I spoke with Mr. Cavaliere Monday to let him know we weren't settling it. Yesterday I let Mr. Cavaliere know I was in New York all day yesterday. If he was to have any filings, he was to contact Mr. Basalice directly. I was unavoidably out of the area yesterday." See 3/17/04 N.T. at 9

²⁴ See Stipulation for Settlement Agreement of November 18, 2003, Silver v. Basalice, December 2002, No. 3082.

petition was temporarily resolved by the February 24, 2004 stipulation. After the March 1, 2004 deadline for a new settlement date passed, the petitioner filed his second emergency petition and this court scheduled the March 17th hearing. Very early into that emergency hearing, the Estate's attorney informed this court that the writ had been executed. Despite the objections by petitioner's counsel that the sheriff had informed him that he would "wait," the Estate's attorney emphasized that the locks had been changed.²⁵

A subsequent review of the actual writ of possession indicates by handwritten note that at "9.a.m." on March 17, 2004 "possession of premises given. Locks changed. Goods secured inside property as per Sgt. Taylor"²⁶ In other words, the writ had been executed one hour prior to the 10 a.m. hearing. This court therefore was faced with a fait accompli—or moot case-- even before any testimony or evidence had been presented. The Pennsylvania Superior Court has addressed the issue of whether a trial court properly denied as moot a petition to stay a writ of execution when it lacked sufficient time to consider the petition prior to its execution. In the recent case of Johnson v. Martofel, 797 A.2d 943 (Pa. Super.), app. denied, 572 Pa. 706, 813 A.2d 842 (Pa. 2002), the Superior court affirmed that decision, concluding that the execution of the writ by the sheriff prior to the trial court's ruling rendered it moot.

The appellant in Johnson was a tenant who refused to comply with a stipulation and a subsequent court order that she would either purchase the property at issue for \$15,000, find another buyer for it, or vacate the property. The prothonotary issued a writ of possession that the sheriff was scheduled to execute at 10 a.m. on May 7, 2001. The tenant sought to stay execution of the writ by appearing before the court at 9:15 a.m. on the day the writ was to be executed. The Judge concluded

25 See 3/17/04 N.T. at 32-33 & 8.

26 See n. 4 and accompanying text *infra*. See also Writ of Possession, Baselice v. Silver, May 2003, No. 2893.

that he lacked sufficient time to consider the stay petition prior to its execution. Two days later, he dismissed the petition as moot.

In concluding that the petition had been properly dismissed as moot, the court emphasized that as “a general rule an actual case or controversy must exist at all stages of the judicial process, and a case once ‘actual’ may become moot because of a change of facts.” Johnson v. Martofel, 797 A.2d at 946 (quoting In re Estate of Dorone, 349 Pa. Super. 59, 502 A.2d 1271, 1274 (1985)). The Johnson court thereafter framed the issue before it:

Therefore, we must determine whether the trial court, in ruling upon the motion to stay the execution of the writ of possession or set it aside, could issue an order that had any legal force or effect by granting the requested relief. Clearly, the issue of Appellant’s request for a stay of execution of the writ of possession had been rendered moot by the sheriff’s execution of the writ. It would have been futile for the court to have issued an order staying the execution of the writ after the writ had already been executed. We must next determine whether there would have been any legal force or effect to the court setting aside the writ after it had been executed. A writ of possession is simply the legal means for executing a judgment of possession. *See* Pa.R.C.P. 3160. Once Appellant was out of possession of the Property, the writ of possession became a nullity. The purpose for which the writ existed, namely divesting Appellant of possession of the Property, had been achieved and therefore, setting aside the writ of possession would be of no consequence. Johnson v. Martofel, 797 A.2d at 946-47.

Significantly, the Johnson court held that there was no basis for granting the requested relief of either staying the execution of the writ or setting it aside. Johnson v. Martofel, 797 A.2d at 947 (“after the sheriff executed the writ, the court could not issue an order that had any legal force or effect regarding the requested relief”). Similarly, under the precedent of Johnson v. Martofel, in the instant case, once the writ was executed as to the 1334 Jackson Street property, the issue before this court was moot. Consequently, the petition was properly dismissed.

Date: _____

BY THE COURT:

John W. Herron, J.