

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

2017 OCT 12 PM 12:46

<p>JOHN BRAVO,</p> <p style="padding-left: 100px;">Plaintiff(s),</p> <p style="padding-left: 100px;">vs.</p> <p>2536-38 NORTH BROAD STREET ASSOCIATES, LP, ET AL.,</p> <p style="padding-left: 100px;">Defendant(s).</p>	<p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p> <p>:</p>	<p>NOVEMBER TERM, 2014</p> <p>NO. 1464</p> <p>COMMERCE PROGRAM</p> <p>Superior Court Docket Nos. 2589 EDA 2017 2685 EDA 2017</p>
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OPINION

BY: Patricia A. McInerney, J.

October 12, 2017

I. BACKGROUND

On March 15, 2017, a bench trial of the above-caption matter commenced before this Court. The trial spanned three days and thereafter the Parties submitted proposed findings of fact and conclusions of law. On June 28, 2017, the Court filed comprehensive findings of fact, discussion, and conclusions of law. The Court found in favor of Plaintiff John Bravo (“Plaintiff”) and against Defendants 2536-38 North Broad Street Associates, LP (“Defendant Partnership”), Slavko Properties, Inc., and Slavko Brkich (“Defendant Brkich”) (collectively, “Defendants”) in the amount of \$642,306.75, plus interest of \$140,109.53.

No post-trial motions were filed. Rather, on July 18, 2017, Defendants filed an “appeal to the Superior Court of Pennsylvania from the [F]indings of Fact, Discussion and Conclusions of Law entered in this matter on the 28th day of June, 2017.” (Defs.’ Notice of Appeal, July 1, 2017). That same day, Defendants also filed a motion for stay of execution. In that motion, Defendants stated:



Pursuant to Pa. R. Civ. P. 3121(b), Defendant's 2536-38 North Broad Street Associates, LP, Slavko Properties, Inc., and Slavko Brkich hereby move that the Court stay execution on the judgment entered in the amount of \$642,306.45 plus interest of \$140,109.53 as a result of its Findings of Fact, Discussion and Conclusions of Law dated June 28, 2017 (the "Decision"). The grounds for the Motion are as follows:

The breach of contract findings in the Decision largely turn on whether there is an implied duty of good faith and fair dealing owed by a general partner to a limited partner where a partnership agreement gives the general partner control over the management of the partnership. This issue is pending before the Pennsylvania Supreme Court in Hanaway v. Parkesburg Group, LP, 2015 PA Super 263, 132 A.3d 461 ... (2015), allocatur granted, Docket No. 55 MAP 2016. The case was argued in December 2016. A decision that there is no such duty would undermine most, if not all, of the breach of contract claim. Plaintiff should not be proceeding with execution on the judgment pending that decision.

(Defs.' Mot. for Stay of Execution, pp. 1-2).

Defendants also noted: "on the same day as they are filing ... this Motion [they are] also filing a Notice of Appeal to the Superior Court of Pennsylvania. The appeal will assert that the Court in its Decision made reversible errors of law as a result of which all or part of the judgment may be reversed." (Id. at p. 2). And thereafter, Defendants provided six examples of this Court's purported reversible errors of law. (*See id.* at pp. 2-3).

On July 20, 2017, this Court filed a *Pennsylvania Rule of Appellate Procedure* 1925(a) opinion. Therein, the Court noted "*Pennsylvania Rule of Civil Procedure* 227.1 sets forth the requirements for post-trial relief and provides in most relevant part that '[p]ost-trial motions shall be filed within ten days after ... the filing of the decision in the case of a trial without jury.'" (Op., June 20, 2017, *quoting* Pa. R. Civ. P. 227.1(c)). The Court also noted, "'[i]f an issue has not been raised in a post-trial motion, it is waived for appeal purposes.'" (Op., June 20, 2017, *quoting* *L.B. Foster Co. v. Lane Enterprises, Inc.*, 710 A.2d 55 (Pa. 1998)). As such, the Court concluded that since Defendants failed to file a post-trial motion, they waived their issues on appeal.

On July 20, 2017, after having been served with the Court's opinion, Defendants filed a praecipe to withdraw their notice of appeal. Then, on July 21, 2017, the Court having concluded Defendants had waived their issues and Defendants having withdrawn their notice of appeal, the Court dismissed Defendants' Motion for Stay of Execution as moot.

On July 21, 2017, after the Court had dismissed their Motion for Stay of Execution as moot, Defendants filed a motion for both reconsideration of the Court's July 20, 2017 opinion and leave to file a motion for post-trial relief *nunc pro tunc*. Therein, Defendants presented the following two questions, which Defendants suggested should be answered in the affirmative:

1. Should the Court's Opinion of July 20, 2017 stating that a now withdrawn appeal should be quashed because Defendants did not file a motion for post[-]trial relief be reconsidered and vacated where the Defendants have without undue delay filed a motion to file a motion for post[-]trial relief *nunc pro tunc* only 11 days after the non[-]jurisdictional 10 day requirement of Pa. R. Civ. P. 227.1[?] [*Suggested Answer: Yes.*]

2. Should the Court exercise its discretion to allow Defendants leave to file a motion for post[-]trial relief *nunc pro tunc* of a Decision against them for over \$782,000 where the filing would be only 11 days past the 10 day requirement of Pa. R. Civ. P. 227.1, the grounds of the motion were largely presented in connection with a motion for stay of execution which [defense] counsel thought the Court could use to correct any alleged errors in the Decision in a Rule 1925 opinion for the Superior Court ... [?] [*Suggested Answer: Yes.*]

(Defs.' Recons. Mot. (Mem.), July 21, 2017, pp. 1-2 (some emphasis added)).

In terms of why defense counsel failed to file a timely post-trial motion and how he became alerted of the need to do so, Defendants elaborated as follows:

The Court presumably received prompt notice that a Notice of Appeal had been accepted for filing on July 19, 2017 and understandably spoke out that alleged errors in its June 28 Decision had been waived on appeal because Defendants had not timely filed a motion for post[-]trial relief. Alerted to the problem, [defense counsel] withdrew the Notice of Appeal before the Office of Judicial Records had transmitted it to the Superior Court. So the Notice of Appeal did not remove this matter from the Court's jurisdiction.

The mistake in not filing a motion for post[-]trial relief was based on the understanding that if the Court was otherwise alerted to the alleged errors in its Decision, it could address them in the Opinion it would be required to provide to the Superior Court pursuant to Rule 1925(a) of the *Pennsylvania Rules of Appellate Procedure*[.]

[Defense counsel] ... filed a Notice of Appeal thinking that the Court would write a Rule 19[2]5 Opinion. Also filed was a Motion to Stay Execution [mentioning] ... several errors which Defendants believed existed in the Decision. The thought was that once these errors were briefed in [the context of the Motion to Stay Execution], the Court could use the parties arguments to decide if any modifications or corrections should be made to the Decision in its Rule 1925 Opinion.

(Id. at pp. 2-3 (emphasis added)).

Thus, Defendants acknowledged the only thing that alerted them to the need to file a post-trial motion following the filing of a decision in the case of a trial without jury, was this Court's initial opinion. And the only reason given for not filing a post-trial motion was a misreading and/or understanding of rules of procedure that would not have provided the Trial Court an opportunity to change or modify its decision. At most, it would have allowed the Trial Court to suggest to the Superior Court in a 1925(a) opinion that it be reversed and the case be remanded based on arguments from a motion unrelated to the appeal, that only asked the Trial Court stay execution pending the Supreme Court's decision in *Hanaway*.

Having withdrawn their notice of appeal and purportedly concerned about losing the right to appeal the Court's decision thirty days after the filing of the Findings of Fact, Discussion, and Conclusions of Law, Defendants also requested that the Court consider the motion on an expedited basis. On July 24, 2017, the Court accommodated this request and set a response date of July 26, 2017, but noted "[t]he grant of *nunc pro tunc* relief is not designed to provide relief to parties whose counsel has not followed proper procedure in preserving appellate rights."

(Order, July 24, 2017, quoting *Lenhart v. Cigna Companies*, 824 A.2d 1193, 1197-98 (Pa. Super. Ct. 2003)).

On July 25, 2017, Defendants filed a supplemental memorandum in support of their motion for reconsideration and leave to file a motion for post-trial relief *nunc pro tunc*. Therein, Defendants primarily attempted to argue against the applicability of *Lenhart*, which the Court had quoted for the proposition that *nunc pro tunc* relief is not designed to provide relief to parties whose counsel has not followed proper procedure in preserving appellate rights. Secondly, Defendants attempted to minimize the extent of their fault for the position they were in by again reiterating the nonsensical argument “that a Rule 1925 opinion written with the knowledge of the errors in the Decision which Defendants discussed in the Motion to Stay Execution would enable the Court to modify or correct its decision in the same way as it could in deciding a motion for post[-]trial relief.” (Defs.’ Supplemental Mem., July 25, 2017, p. 4).

In terms of *Lenhart*, Defendants argued against the extraordinary circumstances standard for *nunc pro tunc* post-trial relief applied in that case and in favor of a lesser standard as articulated in *Watkins v. Watkins*, 775 A.2d 841 (Pa. Super. Ct. 2001). Under the extraordinary circumstance standard, a trial court may grant *nunc pro tunc* consideration of a motion for post-trial relief where the circumstances occasioning the failure to file the motion did not stem from counsel’s negligence or from a failure to anticipate foreseeable circumstances, but rather stem from extraordinary circumstances involving fraud or some breakdown in court operations. *See Lenhart*, 824 A.2d at 1196. Under the *Watkins*-type standard, whenever a party files a post-trial motion at a time when the trial court has jurisdiction over the matter but outside the ten-day requirement of *Pennsylvania Rule of Civil Procedure* 227.1, the trial court has the discretion to consider the motion and will “not be subject to review unless the opposing party objects.”

Watkins, 775 A.2d at 845 (quotations omitted). “If the opposing party objects, then the trial court must consider the fault of the party filing late and the prejudice to the opposing party.” *Id.*

Defendants argued:

Here although a Notice of Appeal was filed in the trial court, it was quickly withdrawn before it was transmitted to the Superior Court and before an appeal had been docketed. The motion for leave was filed on the same day, only 11 days after the deadline when this Court had, and still has, jurisdiction to exercise its discretion. Even though the motion would be filed in a procedurally flawed manner, that discretion must be exercised applying the Watkins factors -- the fault of the party filing late and the prejudice to the opposing party.

(Defs.’ Supplemental Mem., July 25, 2017, p. 4).

On July 26, 2017, within the abbreviated schedule set by the Court, Plaintiff filed his response to Defendants’ motion. Therein, Plaintiff argued the extraordinary circumstances standard should be applied, stating in part “[t]he fact that Defendants ultimately withdrew their notice of appeal [after they were alerted to the problem by the trial court] does not excuse the fact that the appeal had been filed and the jurisdiction of the trial court had been divested.” (Pl.’s Resp., July 26, 2017, p. 4). Plaintiff, however, also argued that:

even if [the Trial] Court still has jurisdiction, the Court should deny the instant motion as [Plaintiff] objects to consideration of Defendants’ motion to file post[-] trial motions *nunc pro tunc*. Thus, the fault of Defendants in failing to timely file post[-]trial motions must be considered. As previously noted, Defendants’ failure to timely file post[-]trial motions was inexcusable. Moreover, [Plaintiff] is prejudiced by any further delay in this matter as further delays will deprive him of the ability to collect the significant judgment in this case from the Defendants, who were found liable for commingling funds and failing to observe corporate formalities, and have transferred hundreds of thousands of dollars to other entities controlled by Defendants. While the delay is admittedly not substantial, Defendants have failed to provide any legitimate explanation for ... failing to timely file post[-]trial motions.

(*Id.* at p. 5).

Thereafter, Defendants filed a reply memorandum in further support of their motion. Therein, Defendants doubled down on their nonsensical argument for not filing a post-trial

motion. Defendants, however, also included a dubious argument that because the Court included “discussion” in the findings of fact and conclusions of law, defense counsel believed “no further ruling by the [C]ourt would be forthcoming[] [s]o [he] spelled out the alleged errors in the Decision in the separate context of a motion to stay execution — the same errors as would have been the basis for a post-trial motion — so they could be considered by the Court in preparing a Rule 1925 Opinion.” (Defs.’ Reply Mem., July 26, 2017, p. 1). Defendants continued that the result of the manner in which they proceeded “could be a modification or reversal of the Decision before the Superior Court considered the matter in the same way as it would have considered this Court’s ruling on a post-trial motion for relief.” (Id. at pp. 1-2). And “[t]he purpose of the motion for post-trial relief procedure would have been served[,]” according to Defendants. (Id. at p. 2).

On July 28, 2017, the Court entered an order denying Defendants’ motion. And on July 31, 2017, Defendants again filed an appeal. This time, however, Defendants purported to appeal from not just the Court’s decision following the bench trial, but also from: (1) the July 20, 2017 opinion stating the initial appeal should be quashed because all issues related to the Court’s decision were waived by the failure to file a post-trial motion; (2) the July 28, 2017 order denying Defendant’s motion for both reconsideration of the aforementioned opinion and leave to file a motion for post-trial relief *nunc pro tunc*; and (3) the March 24, 2016 order granting Plaintiff’s motion for reconsideration of an October 5, 2015 order striking Count III of Plaintiff’s Amended Complaint and reinstating that count for breach of fiduciary duty.

On August 10, 2017, Plaintiff filed a cross- appeal to the Superior Court. Therein, Plaintiff purported to appeal from both the decision to not award him legal fees and costs following the bench trial and the June 16, 2016 order sustaining Defendants’ Amended

Preliminary Objections to the Second Amended Complaint and dismissing Count VI thereof for fraudulent transfer.

The Court directed both parties to file a *Pennsylvania Rule of Appellate Procedure* 1925(b) statement. In Defendants' 1925(b) Statement, which covered nine pages, they asserted nineteen errors related to the four areas from which they were appealing. In Plaintiff's 1925(b) Statement, he asserted his two purported errors across six paragraphs.

II. DISCUSSION

A. Defendants' Appeal

In their prolix nine-page 1925(b) statement, Defendants assert nineteen complaints of error. At their eighteenth complaint of error, Defendants argue “[this] Court erred in its Order dated July 24, 2017[,] in suggesting with its quote from Len[h]art ... that it should decide whether to allow the *nunc pro tunc* filing by determining if Defendants had shown ‘extraordinary circumstances’ of the type required in Len[h]art, where, unlike this case, the motion was made *after* the trial [c]ourt had already lost jurisdiction to the appellate court.” (Defs.’ 1925(b) Statement ¶ 18 (some emphasis added)).

The specific intent of this Court in including the quote was not to suggest which standard should be applied, but rather to suggest that even though the Court was willing to accommodate Defendants' desire for expedited consideration of the motion they still had a tough row to hoe. Nevertheless, the Court agrees with Plaintiff that the extraordinary circumstances standard is in fact the correct standard to be applied to determine whether Defendants were entitled to *nunc pro tunc* relief.

In this case, unlike cases such as *Watkins* where an untimely motion that could be treated as a motion for post-trial relief was filed and addressed before filing a notice of appeal, 775 A.2d

at 845, Defendants did not file anything that could meaningfully be considered an untimely motion for post-trial relief before filing notice of appeal and invoking the jurisdiction of the Superior Court. Defendants, now, in an after-the- fact manner attempt to put great weight on their motion for stay of execution that was filed nearly simultaneously with their notice of appeal. However, there is nothing about that motion, or the procedure Defendants created/followed, that entitle them to a *Watkins*-type standard of review. *Cf. Watkins*, 775 A.2d at 845n.1 (noting a motion for reconsideration filed fifteen days after the final order was entered and before filing notice of appeal was properly “treated as an untimely motion for post-trial relief incorrectly captioned as a motion to reconsider” by the trial court at a time when it still had jurisdiction over the case).

In their motion, the only relief Defendants asked for was a stay of execution pending the Pennsylvania Supreme Court’s decision in *Hanaway*. While Defendants in an effort to bolster their argument in favor of a stay also mentioned errors this Court purportedly made, and that they had filed an appeal thereof which could result in all or part of the Court’s decision being reversed, there is nothing about the motion that gave the Court an opportunity to correct alleged errors or even suggested that Defendants desired the Trial Court to do so. Rather, what Defendants did was specifically invoke the jurisdiction of the Superior Court and suggest to the Trial Court that its myriad errors and likely reversal in whole or part by the Superior Court further favored stay of execution.

The Pennsylvania Supreme Court had reasoned that the filing of post-trial motions: ensure[s] that the trial judge has a chance to correct alleged trial errors. This opportunity to correct alleged errors ... advances the orderly and efficient use of our judicial resources. First, appellate courts will not be required to expend time and energy reviewing points on which no trial ruling has been made. Second, the trial court may promptly correct the asserted error. With the issue properly presented, the trial court is more likely to reach a satisfactory result, thus

obviating the need for appellate review on this issue. Or if a new trial is necessary, it may be granted by the trial court without subjecting both the litigants and the courts to the expense and delay inherent in appellate review. Third, appellate courts will be free to more expeditiously dispose of the issues properly preserved for appeal....

Sahutsky v. H.H. Knoebel Sons, 782 A.2d 996, 1000 (Pa. 2001), quoting *Benson v. Penn Central Transp. Co.*, 342 A.2d 393, 394 (Pa. 1975). See also *Motorists Mut. Ins. Co. v. Pinkerton*, 830 A.2d 958, 964 (Pa. 2003) (emphasis added) (stating “[t]he venerable purpose of the post-trial motion procedure is to permit the trial court to correct its own errors *before* appellate review is commenced.”).

Here, none of the purposes for filing post-trial motions were accomplished by Defendants’ near simultaneous filing of a motion for stay of execution and a notice of appeal. This Court would have had no opportunity to promptly correct the alleged errors and appellate review would be necessitated. Defendants’ argument “that a Rule 1925 opinion written with the knowledge of the errors in the Decision which Defendants discussed in the Motion to Stay Execution would enable the Court to modify or correct its decision in the same way as it could in deciding a motion for post[-]trial relief[.]” (Defs.’ Supplemental Mem., July 25, 2017, p. 4)[.] is nonsensical and a clear attempt to minimize the extent of their fault for the position they were in. Asking the Superior Court in a 1925(a) opinion for reversal, after having parsed together arguments from a motion that is not even the subject of the appeal, neither gives the trial court a chance to correct alleged errors, nor obviates the need for appellate review.

Moreover, admittedly, the only thing that alerted Defendants to the need to file a post-trial motion was this Court’s initial 1925(a) opinion, which was promptly filed after receipt of Defendants’ initial notice of appeal. In this Court’s opinion, under such circumstances, Defendants should not benefit from a lesser standard of review at Plaintiff’s expense by their

subsequent withdrawal of their initial notice of appeal. Assuming the withdrawal of the appeal returned jurisdiction to this Court, the Court still believes under the circumstances of this case the extraordinary circumstances standard is the appropriate standard to be applied to determine whether or not Defendants were entitled to *nunc pro tunc* relief.

As stated above, under the extraordinary circumstance standard, a trial court may grant *nunc pro tunc* consideration of a motion for post-trial relief where the circumstances occasioning the failure to file the motion did not stem from counsel's negligence or from a failure to anticipate foreseeable circumstances, but rather stem from extraordinary circumstances involving fraud or some breakdown in court operations. *See Lenhart*, 824 A.2d at 1196. Defendants do not even attempt to argue they meet this standard as unfortunately there is nothing more in this case than defense counsel's negligence or fault in the way he chose to proceed. As such, this Court's July 28, 2017 order denying Defendant's motion for, *inter alia*, leave to file a motion for post-trial relief *nunc pro tunc* should be affirmed and the remainder of Defendants' appeal should be quashed as all other issues have been waived.¹

Nevertheless, even applying the *Watkins*-type standard, Defendants were not entitled to *nunc pro tunc* relief. As stated above, under that standard, whenever a party files a post-trial motion at a time when the trial court has jurisdiction over the matter but outside the ten-day requirement of *Pennsylvania Rule of Civil Procedure* 227.1, the trial court has the discretion to

¹ While in his after-the-fact attempt to salvage issues for appeal defense counsel also purports to appeal from the March 24, 2016 order granting Plaintiff's motion for reconsideration of an October 5, 2015 order striking Count III of Plaintiff's Amended Complaint and reinstating that count for breach of fiduciary duty, the issues related thereto have also been waived. "Once an issue is raised in a proceeding, it must be preserved at each and every stage in the proceeding, including a contemporaneous objection at trial, post-verdict motions if required, and the briefing and argument of post-verdict motions. Otherwise, it is waived." 20 West's Pa. Prac., Appellate Practice § 302:59 (footnote omitted). As Defendants did not follow this procedure, their issues related to the March 24, 2016 order have also been waived.

consider the motion and will “not be subject to review unless the opposing party objects.”

Watkins, 775 A.2d at 845 (quotations omitted). “If the opposing party objects, then the trial court must consider the fault of the party filing late and the prejudice to the opposing party.” *Id.*

In *Leffler, Inc. v. Hutter*, 696 A.2d 157, 166 (Pa. Super. Ct. 2003), the plaintiff filed a cross-motion for post-trial relief one day late because of inclement weather the day before. Thereafter, the defendants filed a response, asserting the motion was untimely and the issue raised therein should be deemed waived. *Id.* The trial court agreed with the defendants “that the late filing, of itself, warranted the waiver sanction and refused to entertain [the plaintiff’s] motion.” *Id.*

Applying the *Watkins*-type standard on appeal, the Superior Court noted the only argument made for waiver was that the motion was filed one day late, but “[n]o allegation was made that this lateness prejudiced the [defendants] or in any way impeded the speedy and effective resolution of the case.” *Id.* at 166. Thereafter, the Superior Court stated that while “[i]t is true, as the [defendants] assert[ed], that the language of Rule 227.1 does not require a showing of prejudice prior to a party’s motion being dismissed for failure to timely file[.]” in interpreting the Rule, it has held prejudice must be considered under a *Watkins*-type standard. *See id.*

Applying that standard to the facts of the case, the *Leffler* court noted the motion was filed only one day late and copies were immediately mailed to opposing counsel. *Id.* “Aside from the mere fact of the tardy filing itself,” the court “fail[ed] to see how [the plaintiff’s] lateness upset effective court procedure or prejudiced the [defendants].” *Id.* The court noted:

While this late filing was surely a transgression of the Rules, not all transgressions are equal and, therefore, sanctions such as waiver should be reserved for those instances in which indulgence of a late filing actually works to prejudice the interests of the adverse party or the orderly administration of justice. The Rules recognize this distinction, and thereby permit a court to mete out the proper punishments accordingly.

Id. Thereafter, the Superior Court held the trial court abused its discretion in refusing to entertain the plaintiff's motion and addressed the substantive merits of the issue raised therein. *Id.*

In this case, unlike the movant in *Leffler*, Defendants were not entitled to *nunc pro tunc* relief. First, regarding fault, unlike the inclement weather in *Leffler*, there is nothing more than defense counsel's negligence or fault to consider in this case. Second, regarding prejudice, unlike the adverse party and one day late filing in *Leffler*, Plaintiff has asserted prejudice and Defendants filed their motion eleven days late.

While Plaintiff admitted the delay was not substantial, he asserted he would be prejudiced by any further delay in his attempt "to collect the significant judgment in this case from the Defendants, who were found liable for commingling funds and failing to observe corporate formalities, and have transferred hundreds of thousands of dollars to other entities controlled by Defendants." (Pl.'s Resp., July 26, 2017, p. 5). This Court agrees.

Moreover, this Court sees other prejudice to Plaintiff that was not mentioned in his response, which at Defendants' request was court ordered to be filed in a hastened manner. First, the procedure Defendants created/followed has led to increased litigation. The Parties have already had to devote some time to this issue of whether or not Defendants are entitled to *nunc pro tunc* relief and no doubt will have to devote substantially more. Second, as will be addressed below, the procedure Defendants created/followed has also in all likelihood led Plaintiff to waive his issue regarding legal fees and costs. The Court sees this as further prejudice to Plaintiff.

Finally, indulgence of a late filing in this case would actually work to prejudice, and has already prejudiced, the orderly administration of justice. In this case, Defendants filed an earlier notice of appeal and the Court an earlier opinion. Now, the Court is being forced to spend considerably more time addressing competing positions regarding the standard of review and

questionable assertions from Defendants as to why they did what they did simply because this Court filed its earlier opinion in an expeditious manner.

For these reasons, and others, the Court stands by its assertion that the “[t]he grant of *nunc pro tunc* relief is not designed to provide relief to parties whose counsel has not followed proper procedure in preserving appellate rights[.]” *Lenhart*, 824 A.2d at 1197-98, is an appropriate consideration in this case. Moreover, the Court would assert the statement from our Supreme Court “that if inadvertence of counsel were a valid reason for disregarding the time limitation [of its] rules , then they might as well not have any rules at all[.]” *E. J. McAleer & Co. v. Iceland Prod., Inc.*, 475 Pa. 610, 615, 381 A.2d 441, 444 (1977), is equally applicable.

Simply put, this Court believes Defendants have failed to present any legitimate reason for the procedure they created/followed and failure to comply with *Pennsylvania Rule of Civil Procedure* 227.1. Therefore, for all the reasons mentioned above, this Court’s July 28, 2017 order denying Defendant’s motion for leave to file a motion for post-trial relief *nunc pro tunc* should be affirmed even under a *Watkins*-type standard and the remainder of Defendants’ appeal should be quashed as all other issues have been waived.

B. Plaintiff’s Appeal

In his 1925(b) statement, Plaintiff asserts two complaints of error. Plaintiff’s first complaint is that this Court “erred in sustaining Defendants’ Amended Preliminary Objections to the Second Amended Complaint and dismissing Count VI of the Second Amended Complaint for [f]raudulent [t]ransfer.” (Pl.’s 1925(b) Statement ¶ 1). Plaintiff’s second complaint is that this Court erred in not awarding legal fees and costs to Plaintiff as part of its decision following the bench trial. (*See* Pl.’s 1925(b) Statement ¶¶ 4-6).

Addressing Plaintiff's second complaint first, as indicated above, this Court believes Plaintiff has waived his issue regarding legal fees and costs by failing to file a timely post-trial motion. As stated above, *Pennsylvania Rule of Civil Procedure 227.1* sets for the requirements for post-trial relief and provides in most relevant part that "[p]ost-trial motions shall be filed within ten days after ... the filing of the decision in the case of a trial without jury." Pa. R. Civ. P. 227.1(c). The Rule further provides that "[i]f a party has filed a timely post-trial motion, any other party may file a post-trial motion within ten days after the filing of the first post-trial motion." *Id.*

Here, in all likelihood Plaintiff's counsel made a considered decision to not file a post-trial motion regarding legal fees and costs when Defendants filed no post-trial motion regarding this Court's decision. If Defendants had filed a timely post-trial motion, Plaintiff would almost assuredly have filed his own post-trial motion regarding his issue within ten days thereafter, pursuant to *Pennsylvania Rule of Civil Procedure 227.1(c)*.

But now that Defendants are pursuing the instantaneous appeal without having filed a timely post-trial motion, Plaintiff's counsel in all likelihood has made a considered and tactical decision to pursue the issue of legal fees and cost on appeal. In this Court's estimation, however, none of that (nor anything else) obviated the need for Plaintiff to file a timely post-trial motion. As such, Plaintiff's issue regarding not awarding legal fees and costs should be deemed waived.

Addressing Plaintiff's first complaint, the Court also finds it to be waived, but also without merit. In his 1925(b) statement, Plaintiff notes that the Court stated in its order sustaining Defendants' preliminary objections and dismissing Count V of the Second Amended Complaint for fraudulent transfer that:

Plaintiff ... lacks standing to assert direct claims against the newly added defendants for fraudulent transfer of the funds of [Defendant Partnership] since he

is not a “creditor” of the partnership with respect to the dividends or profits allegedly due to him. Claims seeking return of such funds from the newly added defendants could be asserted only by the partnership, which has not been done here.

(Pl.’s 1925(b) Statement ¶ 2.). Thereafter, in claiming error, Plaintiff asserts:

In the instant case, on March 24, 2016[,] [Plaintiff] was granted leave to file a Second Amended Complaint against Melon Green Realty Group, Inc. (“Melon Green”), Hunting Park Plaza Associates, LP (“Hunting Park”) and Brewery Park Associates, LP (“Brewery Park”) as these entities received hundreds of thousands of dollars from [D]efendant Brkich and [D]efendant Partnership from funds that should have been distributed to shareholders such as [Plaintiff]. [Defendant] Partnership’s other limited partners (Slavko Properties, Inc., The Brkich Family Irrevocable Deed of Trust f/b/o Steven Slavko and The Brkich Family Irrevocable Deed of Trust f/b/o Marko Brkich), all of which were controlled by [D]efendant Brkich and in collusion, would certainly not be inclined to file any claim for fraudulent transfer against other entities also controlled by [Defendant] Brkich.

(Pl.’s 1925(b) Statement ¶ 3).

While neither party provided binding authority on the issue of whether Plaintiff could assert a cause of action for fraudulent transfer against the defendants that were added, the Court found persuasive Defendants’ citation of Third Circuit precedent for the proposition that Plaintiff did not have a “claim,” nor was he a “creditor,” etc., for purposes of the Pennsylvania Uniform Fraudulent Transfers Act (“PUFTA”), 12 Pa. C.S. § 5101 *et seq.* For example, having noted those courts have held “provisions of the PUFTA and the Bankruptcy Code should be construed and interpreted uniformly because consistency between the two statutes was a goal of those who drafted the PUFTA and who have interpreted it[,]” (Defs.’ Am. Prelim. Objections (Mem.) p. 4, quoting *Fid. Bond & Mortg. Co. v. Brand*, 371 B.R. 708, 719 (E.D. Pa. 2007)), Defendants cited *In re Ben Franklin Hotel Assocs.*, 1998 WL 94808, at *2 (E.D. Pa. Mar. 4, 1998), for the proposition “that the expectation of profit associated with a limited partnership interest is not a ‘claim’ and that a limited partner is therefore not a ‘creditor.’” (Defs.’ Am. Prelim. Objections (Mem.) pp. 4-5).

In response, Plaintiff had merely argued the cases cited by Defendants were not binding, were distinguishable and “do not apply to claims by a limited partner against a partnership or transferees based on fraudulent transfer.” (Pl.’s Resp. to Defs.’ Am. Prelim. Objections (Mem.) p. 2, *incorporating by reference* Pl.’s Reply in Supp. of Mot. to Am. Compl. 3). For example, Plaintiff had argued “[e]ven if limited partners are generally not ‘creditors’ under the [B]ankruptcy [C]ode as to their equity interests, [that] does not mean that [Plaintiff] does not have a claim against [Defendant] Partnership based on breach of the [p]artnership agreements as well as under the [PUFTA].” (Pl.’s Resp. to Defs.’ Am. Prelim. Objections (Mem.) p. 2, *incorporating by reference* Pl.’s Reply in Supp. of Mot. to Am. Compl. 4).

Plaintiff now appears to making solely a direct versus derivative standing- type argument. Having not been briefed or argued before, this Court fails to see how that argument affects whether Plaintiff had a claim, was a creditor, or was owed a debt for purposes of the PUFTA. As such, Plaintiff’s appeal of this issue should be quashed or denied. *See, e.g., Hinkal v. Pardoe*, 133 A.3d 738, 746 (Pa. Super. Ct. 2016) (*en banc*) (stating a Rule 1925(b) statement is not a vehicle in which previously unasserted issues may be raised for the first time and, therefore, such issues waived for purposes of appeal).

WHEREFORE, for the reasons stated above, the instant appeals should be quashed in part and denied in part.

BY THE COURT:


McINERNEY, J