

In terms of exercising the option, Plaintiff asserted he exercised the option on or about August 6, 2013, which was acknowledged and accepted by Defendants' counsel on August 27, 2013, but thereafter Defendant failed to cooperate in good faith to consummate the transaction. (Id. at ¶¶ 12-14.) Rather, Plaintiff asserted on January 13, 2014, Defendants, "wrongfully terminated the Lease Purchase Agreement by asserting that [Plaintiff] had not paid rent in December and January when [in fact] [Plaintiff] **did** pay the rent in December and the January rent was not yet due...." (Id. at ¶ 21 (emphasis original).) In support of that assertion, Plaintiff stated "[u]nder Paragraph 4, [he] [was] obligated to pay monthly rent to [Defendants] commencing December 15, 2013 in the amount of \$500.00 and the fifteenth day of each month thereafter[;]" "[he] tendered the first payment of rent to [Defendants] in accordance with the Lease Purchase Agreement[;]" and the January rent was not yet due at the time of termination as the termination notice was sent on January 13th, but rent was not due until the 15th of each month. (See id. at ¶¶ 18-21.)

Plaintiff attached a copy of the lease agreement to their complaint. The lease, dated December 12, 2012, provided that one year after the commencement of the lease, monthly installments of rent were due "on the fifteenth (15th) day of each month...." (Id. at Ex. A ¶¶ 1, 4.) The lease also provided at Paragraph 36, titled "OPTION TO PURCHASE," that Plaintiff: "shall have a first right option to purchase the property from [Defendants] during this lease. [Defendants] shall automatically accept the requested option to agree to the sale[] pursuant to the terms below and shall not have any basis for refusing the request from [] [Plaintiff]." (Id. at Ex. A ¶ 36.)

On December 10, 2014, Defendants filed an answer to the complaint along with new matter and a counterclaim. The first page of this filing contained a notice to defend rather than a notice to plead.

Responding to Plaintiff's assertion that Defendants had wrongfully terminated the lease by asserting Plaintiff had not paid rent in December and January when in fact Plaintiff did pay the rent in December and the January rent was not yet due, Defendants asserted: "Denied, on the contrary, Defendants properly terminated the commercial lease agreement, and therefore the option to purchase, and strict proof to the contrary is demanded." (Answer ¶ 21.) Responding to Plaintiff's specific assertion that under paragraph 4 of the Lease Purchase Agreement, he was obligated to pay monthly rent to Defendants commencing December 15, 2013 in the amount of \$500.00 and the fifteenth day of each month thereafter, Defendants asserted: "It is admitted that pursuant to the commercial lease agreement, Plaintiff [was] obligated to pay monthly rent in the amount of \$500.00 per month. By way of further answer, Plaintiff has failed and refused to do so." (Id. at ¶ 19.) Responding to Plaintiff's specific averment that he had tendered the December 2013 rent payment in accordance with the Lease Purchase Agreement, the only rent payment Plaintiff asserted was due as of the time Defendants terminated the agreement, Defendants answered: "It is specifically denied that any lease purchase agreement exists and strict proof to the contrary is demanded thereof." (Id. at ¶ 20.)

In their new matter Defendants asserted, among other things, that "[o]n or about December 10, 2012, Plaintiff and Defendant[s] entered into a [c]ommercial [l]ease agreement..." and "[p]ursuant to the terms of the commercial lease agreement, Plaintiff herein agreed to pay Defendant[s] herein a monthly rent of \$500.00 beginning 12/10/13." (Id. at ¶¶ 97-98.) Defendants also asserted that "[p]ursuant to paragraph 20 of the commercial lease agreement, [i]t

was agreed that in the event of Plaintiff's failure to pay rent when due, 'this lease and the term hereby created shall determine [sic] and become absolutely void without any right on the part of [Plaintiff] to save the forfeiture by payment of any sum due....'" (Id. at ¶ 99 (quoting paragraph 20 of the lease).) Based on these and other assertions, Defendants stated in their counterclaim that "[i]n breach of the terms of the commercial lease agreement, Plaintiff ... failed to pay rent for the period December 10, 2013 through and including December 2014." (Id. at ¶ 102.)

Plaintiff did not file a reply to Defendants' new matter and counterclaim, and on June 10 2015, the case proceeded to bench trial before this court. At the trial, but prior to testimony being presented, Defendants raised for the first time the issue of Plaintiff failing to file a reply to Defendants' new matter and counterclaim, and suggested all of the allegations therein should be deemed admitted. (N.T., June 10, 2015, 7-8.) The trial proceeded and Defendants' counsel in closing again raised the issue in closings. (Id. at 128-31.) At that time, defense counsel argued Defendants were not seeking a default judgment, but that every allegation in the new matter and counterclaim be deemed admitted. (Id. at 129-30.) Defendants argued based on those admissions a judgment in their favor for possession of the property, for termination of the lease, and for rent and legal fees, and a judgment in their favor for all of Plaintiff's claims should be entered. (Id. at 130-31.)

Following the conclusion of the trial, this court issued findings of fact and conclusions of law from the bench, which were filed of record with the prothonotary on June 11, 2015. This court found the testimony of the attorney who represented Plaintiff in exercising the option very credible. This court found that the lease was unambiguous, and the option was clearly exercised, but Defendants failed to act in good faith to carry out that transaction. The court ordered Defendants sell the property to Plaintiff for \$800,000 per the terms of their agreement. The court

also ordered Plaintiff, who was still occupying the property, pay Defendants rent of \$500 per month for April 2014 to the time of trial, at a total of \$6,500.

On June 18, 2015, Defendants filed a timely motion for post-trial relief. In their motion, Defendants asserted:

1. Plaintiff filed a Complaint against Defendants for Specific Performance related to property that Plaintiff leased from Defendants.
2. Defendants filed an Answer with New Matter and Counterclaim seeking unpaid rentals, legal fees, and possession of the real estate in question.
3. Plaintiff failed to reply to Defendants' New Matter. Said New [M]atter contained averments that are not deemed denied without a reply.
4. Plaintiff failed to reply to Defendants' Counterclaim.
5. Pursuant to Rule 1029(b) of the Pennsylvania Rules of Civil Procedure, "Averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication.
6. Pursuant to Rule 1032(a) of the Pennsylvania Rules of Civil Procedure, "A party waives all defenses and objections which are not presented either by preliminary objection, answer or reply, except a defense which is not required to be pleaded under Rule 1030(b), the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, the objection of failure to state a legal defense to a claim, the defenses of failure to exercise or exhaust a statutory remedy and an adequate remedy at law and any other nonwaivable defense or objection".
7. At trial, but prior to testimony, Defendants raised the issue that Plaintiff failed to Reply to Defendants' New Matter.
8. At trial, but prior to testimony, Defendants raised the issue that Plaintiff failed to Answer Defendants' Counterclaim.
9. At trial, but prior to testimony, Defendants requested that Plaintiff's Complaint be dismissed and that a Judgment for Defendant be entered as a result of Plaintiff's failure to Reply to Defendants' New Matter.
10. Said requested [sic] was denied.
11. At trial, but prior to testimony, Defendants requested that Plaintiff's Complaint be dismissed and that a Judgment for Defendant be entered as Plaintiff on the Counterclaim, and that a finding for Defendant and against Plaintiff for back rent, legal

fees, and possession of the subject real estate be entered as a result of Plaintiff's failure to Answer Defendants' Counterclaim.

12. The trial court committed an error of law by failing to order that all of Defendants' averments in its' New Matter are admitted as a result of Plaintiff's failure to Reply to Defendants' New Matter.
13. The trial court committed an error of law by failing to order that all of Defendants' averments in its' Counterclaim are admitted as a result of Plaintiff's failure to Answer Defendants' Counterclaim.
14. The trial court committed an error of law by failing to order the relief requested by Defendants as a result of Plaintiff's failure to Reply to Defendants' New Matter and Plaintiff's failure to Answer Defendants' [C]ounterclaim.

(Defs.' Post-Trial Mot. ¶¶ 1-14.) Defendants' memorandum of law, which was attached, merely reiterated the arguments made in their motion.

On June 22, 2015, Plaintiff filed a response to Defendants' motion for post-trial relief. Therein, Plaintiff denied Defendants were entitled to the relief that they sought. (Pl.'s Resp. ¶¶ 12-14.) Plaintiff also argued he was not required to file a reply to Defendants new matter or counterclaim because Defendants' filing contained no notice to plead in accordance with *Pennsylvania Rule of Civil Procedure* 1361, but rather contained a notice to defend in accordance with Rule 1018.1, "which is the form of notice requiring a response to a **Complaint** and **not** an **Answer**." (Id. at ¶¶ 3-4 (emphasis original).) Moreover, Plaintiff argued Defendants' notice to defend did not state the answer contained new matter or a counterclaim as required by Rule 1361.

On June 23, 2015, this court ordered oral argument be held on Defendants' motion for post-trial relief. The court also ordered that in addition to whatever other arguments the parties may have, the parties be prepared to address the following issue:

If Defendants' inclusion of a notice to defend rather than a notice to plead in their answer with new matter and counterclaim were to be treated as a matter of form over substance and an insufficient basis to deny post-trial relief, would

Defendants be entitled to post-trial relief where even in the presence of the necessary notice to plead the plaintiff need only reply to factual allegations in the counterclaim or new matter, and the plaintiff is under no obligation to respond to legal conclusions that may have been pled by the defendant[,] and only properly pleaded facts in the new matter or counterclaim are to be deemed admitted where the plaintiff fails to reply to the defendant's new matter or counterclaim.

(Order, June 24, 2015, attached hereto as "Attachment 1," (quotations and citations omitted).)

On July 6, 2015, Plaintiff filed a supplemental brief in opposition to Defendants' motion for post-trial relief, part of which addressed the issue this court asserted above. That part of the brief asserted no reply was required to Defendants' new matter or counterclaim, but even if it was the new matter and counterclaim were almost entirely legal conclusions to which no reply was required, and admission of Defendants' sparse factual allegations would not entitle Defendants to the relief that they sought.

By order dated July 9, 2015 and docketed July 10, 2015, this court denied Defendants' motion for post-trial relief. Therein, in addition to again noting "the plaintiff need only reply to factual allegations in the counterclaim or new matter," this court also noted "when a fact has been put at issue by the complaint and answer, there is no need to respond to it if it is also included in new matter or counterclaims." (Order, July 10, 2015, attached hereto as "Attachment 2," (quotations and citation omitted).) This court then, in part, concluded every allegation from their new matter and counterclaim that Defendants asserted should be deemed admitted and entitled them to relief, was clearly placed into issue by the complaint and the answer and, therefore, Defendants were not entitled to the relief they sought based on Plaintiff's failure to reply to them.

Defendants filed a timely notice of appeal, and this court ordered them to file a *Pennsylvania Rule of Appellate Procedure* 1925(b) statement. In their 1925(b) statement, Defendants delineated the following seven complaints of error:

1. Whether the Trial Court erred in denying Defendant's Motion to Dismiss Plaintiff's Complaint as a result of Plaintiff's failure to respond to Defendant's New Matter and Counterclaim and pursuant to Pa.R.C.P.1029 (b) and Pa. R.C.P. 1030?
2. Whether the Trial Court erred in denying Defendant's request that all of Defendant's averments in the New Matter and Counterclaim be admitted as a result of Plaintiff's failure to respond to same, despite Plaintiff's claim to the contrary that response/answers had been filed?
3. Whether the Trial Court erred in failing to find that the commercial lease in question and the term had determined and become absolutely void, without any right to save the forfeiture, pursuant to the express terms of said lease agreement, drafted by Plaintiff, as pled by Defendant?
4. Whether the Trial Court erred in failing to find that Plaintiff had breached the commercial lease agreement and in so doing had forfeited any and all rights there under?
5. Whether the Trial Court erred in failing to find that the commercial lease had been properly terminated?
6. Whether the Trial Court erred in failing to find that Defendant was entitled to possession of the real estate in question?
7. Whether the Trial Court erred in finding that Plaintiff was entitled to purchase the real estate in question as a result of its' failure to respond/plead to Defendant's New Matter and Counterclaim pursuant to the applicable Rules of Civil Procedure?

(Def.'s 1925(b) Statement.)

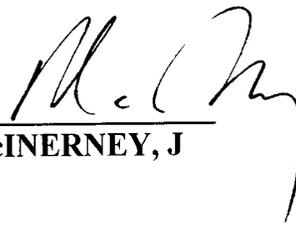
As a preliminary matter, it is a well-settled principle that “[f]ailure to raise an issue in a post-trial motion waives appellate review of the claim.” *Bensinger v. Univ. of Pittsburgh Med. Ctr.*, 98 A.3d 672, 682 (2014). It is also a well-settled principle that “failure to set forth an argument in briefs filed in the court in support of post-trial motions constitutes a failure to preserve the issue or issues not argued.” *DiSalle v. P.G. Pub. Co.*, 544 A.2d 1345, 1364 (Pa. Super. Ct. 1988). The purpose of these rules “is to afford the trial court the opportunity to correct an error at the time it is made, and to inform the court of the issues which must be

decided at the post-trial stage....” *See id.* at 1363 (discussing *Pennsylvania Rule of Civil Procedure 227.1*).

Here, the only issues Defendants raised in their post-trial motion and briefed in their accompanying memorandum were the alleged failure on the part of this court to order “that all of Defendants’ averments in its’ New Matter are admitted as a result of Plaintiff’s failure to Reply to Defendants’ New Matter” and “that all of Defendants’ averments in its’ Counterclaim are admitted as a result of Plaintiff’s failure to Answer Defendants’ Counterclaim” and grant “the relief requested by Defendants as a result of Plaintiff’s failure to Reply to Defendants’ New Matter and Plaintiff’s failure to Answer Defendants’ [C]ounterclaim.” (Defs.’ Mot. ¶¶ 12-14.) As such, these are the only issues Defendants presented us with the need and opportunity to address. Therefore, to the extent Defendants’ 1925(b) statement asserts complaints beyond those presented at the post-trial stage, those issues are waived.

In terms of the issues that were not waived and are properly before the Court, in the opinion of this court, the prior orders of June 24, 2015 and July 10, 2015 adequately (and correctly) address and dispose of those issues. Accordingly, for purposes of the instant appeal, this court relies upon and should be affirmed on the basis of those previous orders, which are attached hereto as “Attachment 1” and “Attachment 2.”

BY THE COURT:



McINERNEY, J

Attachment 1

fails to file a timely and proper reply, the court cannot enter a judgment in favor of the defendant unless and until the court has ascertained that the facts deemed to have been admitted by the plaintiff are sufficient on their face to support such a judgment.”).

BY THE COURT:



McINERNEY, J.

Attachment 2

(emphasis added). For example, let's assume a plaintiff alleged in its complaint \$500 of rent was paid on December 15, 2013 and the defendant denied the same and included an averment in its new matter or counterclaim that rent of \$500 was not paid on December 15, 2013. If the plaintiff failed to reply to this averment in new matter or a counterclaim, it would not be deemed to have admitted that \$500 of rent was not paid on December 15, 2013 because no reply to this allegation would be needed as the matter was clearly placed into issue by the complaint and answer.

Here, Plaintiff alleged in his complaint that:

- “19. Under Paragraph 4 [of the lease], Fan is obligated to pay monthly rent to Sellers commencing December 15, 2013 in the amount of \$500.00 and the fifteenth day of each month thereafter.”
- “20. Fan tendered the first payment of rent to ... Sellers in accordance with the Lease Purchase Agreement.”
- “21. On January 13, 2014, Sellers wrongfully terminated the Lease Purchase Agreement by asserting that Fan had not paid rent in December and January when Fan did pay the rent in December and the January rent was not yet due”

(Pl.'s Compl. ¶¶ 19-21 (citations omitted)(emphasis original).)

In response, Defendants alleged in their answer that:

- “19. It is admitted that pursuant to the commercial lease agreement, Plaintiff is obligated to pay monthly rent in the amount of \$500.00 per month. By way of further answer, Plaintiff had failed and refused to do so.”
- “20. It is specifically denied that any lease purchase agreement exists and strict proof to the contrary is demanded thereof.”
- “21. Denied, on the contrary, Defendants properly terminated the commercial lease agreement, and therefore the option to purchase, and strict proof to the contrary is demanded.”

(Defs.' Answer ¶¶ 19-21.)

Arguably, by virtue of their failure to specifically deny the factual averments in Paragraphs 20 and 21, it is Defendants whom should be deemed to have admitted that Plaintiff tendered December's rent in accordance with the lease and that January's rent was not yet due when they terminated the lease. But in any event, there was no need for Plaintiff to respond to averments such as “[i]n breach of the terms of the commercial lease agreement, Plaintiff has failed to pay rent for the period December 10, 2013 through and including December 2014[.]” (Defs.' Answer ¶ 102), because the matter was clearly placed into issue by the complaint and answer. And as such, there is no basis to grant Defendants' motion for post-trial relief and deny Plaintiff specific performance.

Moreover, by the time Plaintiff had actually stopped paying rent in this case, Defendants had already materially breached the lease by their actions and inactions in terms of the option to purchase provision, which also provided that its terms and conditions “shall supercede any terms elsewhere in the agreement that is in conflict with these conditions[.]” (Lease ¶ 36 (emphasis added)), and by wrongfully terminating it. Suspending payment of rent under such circumstances did not defeat Plaintiff's right to specific performance and Defendants were more than made whole by the award of \$6,500. Defendants would be well advised to consider this in plotting their next course of action.