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OPINIONS

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PLJ

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Opinions

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Gateway School District v. Teamsters Local 205

Motion to Vacate Award—Collective Bargaining

Plaintiff's motion to vacate an arbitrator's award was denied because the issue before the arbitrator was properly defined within the collective bargaining agreement, and the award was rationally derived, thus satisfying the two-prong "essence test." The arbitrator found that employer did not prove its burden of an unpaid suspension and termination and employee was entitled to reinstatement and back pay.

No. GD 16-24655. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Hertzberg, J.—May 25, 2017.

OPINION

I write this Opinion in support of my February 28, 2017 Order of Court, which denied Plaintiff's Motion to Vacate Arbitration Award. On March 28, 2017 Plaintiff filed a Notice of Appeal, appealing the Order to the Commonwealth Court of Pennsylvania. On March 28, 2017, I issued an Order directing Plaintiff to file a Concise Statement of Errors Complained of On Appeal ("Concise Statement"). On April 17, 2017 Plaintiff served its Concise Statement on the undersigned.

Plaintiff alleges that I erred by "finding that the Arbitrator's Award rationally derived from the Collective Bargaining Agreement and satisfied the essence test...." The Grievant, a member of Defendant union, is a school secretary who has worked for Plaintiff school district for 25 years. Grievant works on an 11 month schedule, and has sick days and personal days, but no vacation days. On Thursday, May 19, 2016, Grievant requested to take sick leave for the afternoon of Friday, May 20, 2016. When the HR Director for Plaintiff inquired further, Grievant candidly responded that "she could not lie," and that she was not taking sick time for a doctor's appointment or illness, but rather that she wanted to attend her granddaughter's school function. Grievant previously had exhausted her allocated personal days. The HR Director informed Grievant that if she left work to watch her granddaughter's event, they would need to discuss it in the future. Grievant ultimately attended her granddaughter's event. On July 21, 2016, Plaintiff notified Grievant that the discipline resulting from her use of sick time for personal reasons would be unpaid suspension followed by termination.

On July 25, 2016 Defendant filed a grievance on Grievant's behalf. Marc A. Winters was appointed to serve as impartial arbitrator from a panel supplied by the Federal Mediation and Conciliation Service. On November 9, 2016 an arbitration hearing was held and on November 22, 2016 an Opinion and Arbitration Award was entered. Arbitrator Winters found that Plaintiff did not prove its burden of "just cause" for an unpaid suspension that would end in termination. The Arbitrator awarded Grievant reinstatement, to be made whole for any loss of earnings, less ½ day's pay for the afternoon of May 20, 2016 and less one day of unpaid suspension from the made whole remedy.

On December 22, 2016 Plaintiff filed a Petition to Vacate Arbitration Award in the Court of Common Pleas[1]. On February 27, 2017 I heard argument on this Petition and denied Plaintiff's Petition to Vacate. "An arbitration award must be upheld if it can, in any rational way, be derived from the collective bargaining agreement considering the language, context, and other indicia of the parties' intention." *Cranberry Area School District v. Cranberry Education Association,* 713 A.2d 726 (Pa.Cmwlth.1998). This "essence test" is used to determine whether an arbitration award is rationally derived from a collective bargaining agreement. The essence test is two pronged: 1) the court must determine whether the issues before the arbitrator are properly defined within the Collective Bargaining Agreement, and 2) determine whether the arbitrator's award can be rationally derived from the Collective Bargaining Agreement. *See Westmoreland Intermediate Unit #7 v. Westmoreland Intermediate Unit #7 Classroom Assistants Educational Support Personnel Association*, 939 A.2d 855, 863 (Pa.2007). "The heart of the essence test is that, if the subject matter is within the four corners of the contract, courts are not to judge the validity of the arbitrator's interpretation...." *Conneaut School Service Personnel Assoctioan v. Conneaut School District,* 96 Pa.Cmwlth. 586, 590 (1986). At issue in this case is the suspension and discharge of the Grievant, and whether just cause existed for these forms of discipline. The Collective Bargaining Agreement between the parties encompassed the issues of: the employer's right to suspend and discharge employees, the use of sick days, the necessity of just cause for suspension or discharge, and the finality of an arbitrator's finding. (*See* Plaintiff's Brief in Support of Motion to Vacate, pp. 2-3). Therefore, the first prong of the essence test is satisfied as the issues before the arbitrator are clearly encompassed in the Collective Bargaining Agreement.

The second prong of the essence test is whether the arbitrator's award can be rationally derived from the Collective Bargaining Agreement. As in *Westmoreland Intermediate Unit #7, supra*, Arbitrator Winters found that Plaintiff established just cause for disciplinary action against Grievant, but not just cause for termination. The interpretation of just cause and the discretion to consider mitigating factors are within the authority of an arbitrator. *See Office of the Attorney General v. Council 13, AFSCME,* 577 Pa. 257 (2004). Because the Collective Bargaining Agreement requires just cause for dismissal, the arbitration award was rationally derived from the Collective Bargaining Agreement. A court will only vacate an arbitrator's award where the award is "indisputably and genuinely without foundation...." *Blue Mountain School District v. Soister,* 758 A.2d 742, 743 *citing State System of Higher Education (Cheyney University) v. State College University Professional Association (PSEA-NEA),* 560 Pa. 135, 148 (1999). The Arbitrator adequately provided a foundation for finding Plaintiff lacked just cause to terminate Grievant by citing the mitigating factor of Grievant telling the truth about using sick leave to watch her granddaughter. *See* Opinion and Award, pp. 5-6. Because the arbitrator's award in this case satisfied both prongs of the essence test and was not without foundation, I committed no error by denying Plaintiff's Petition to Vacate Arbitration Award.

BY THE COURT:
/s/Hertzberg, J.

[1] The November 22, 2016 Opinion and Award of Arbitrator Marc Winters is attached to Plaintiff's Petition. A stenographic record of the arbitration hearing was not made. *See* Opinion and Award of Arbitrator, p. 2.

Elizabeth Whitlock v. Designs In Dentistry, LLC, and Adam K. Rich, DMD

Gist of the Action—PA Unfair Trade Practices and Consumer Protection Act

Plaintiff's complaint alleged that dentist breached contract and violated the PA Unfair Trade Practices and Consumer Protection Act (UTPCPL) by performing an unnecessary dental procedure. Court overruled preliminary objection asserting the gist of the action doctrine bars the breach of contract claim in light of Bruno v. Erie Insurance Company, 106 A.3d 48 (2014). Court sustained preliminary objection related to UTPCPL because the Superior Court has ruled that the legislature did not intend the act to apply to medical services.

No. GD-16-023694. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

O'Reilly, S.J.—March 8, 2017.

MEMORANDUM ORDER

This case involves a civil action claim filed by Plaintiff, Elizabeth Whitlock, against Defendants Designs in Dentistry, LLC and Adam R. Rich, DMD over a root canal procedure performed on October 10, 2013. Plaintiff alleges in her Complaint that she continued to experience pain after the procedure and returned to Dr. Rich twice. On January 16, 2014, he refunded her $960.00, the cost of the root canal treatment. The Plaintiff sought treatment with another dentist, Dr. Tom Gillen, who reported no findings on radiograph or upon examination to explain her pain. On March 11, 2014, Plaintiff presented for consultation with Dr. Willeam A. Choby. Dr. Choby opined that the root canal procedure was of questionable necessity. Plaintiff paid Dr. Choby $3,538.00 for his services.

In her Complaint, Plaintiff alleges that Dr. Rich breached his duty to exercise reasonable care in the performance of the work he agreed to perform. She alleges that he performed an unnecessary, unwarranted and invasive dental procedure. As a result of this breach, she has sustained damages.

Plaintiff alleged four counts in her Complaint including negligence, breach of contract, violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Act (UTPCPL), and respondeat superior. Defendants filed Preliminary Objections to Plaintiff's Complaint seeking dismissal of Counts two and three on the grounds that they are legally insufficient. Specifically, they claim that the Gist of the Action Doctrine bars Plaintiff's claim for breach of contract. They also claim that Plaintiff has failed to state a valid claim for violation of the UTPCPL.

Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections. *Haun v. Community Health Systems. Inc.*, 14 A.3d 120, 123 (Pa. Super. 2011). That standard has not been met.

Count two of Plaintiff's Complaint states a claim for breach of contract. Defendants assert that the Gist of the Action Doctrine bars Plaintiff's breach of contract claim. The Gist of the Action Doctrine is designed to maintain the conceptual distinction between breach of contract claims and tort claims. See *Bruno v. Erie Insurance Company*, 106 A3d 48 (2014). The Plaintiff's allegations against the Defendants arise as a matter of tort. However, *Bruno*, supra has shed new light on the "gist of the action" defense and I will permit both theories, at this time, to proceed.

Count three of Plaintiff's Complaint states a claim for UTPCPL. Two Superior Court cases have dealt with the applicability of the UTPCPL to medical service providers. *Foflygen v. Zemel*, 615 A.2d 135 (Pa. Super. 1992) and *Gatten v. Merzi*, 579 A.2d 974 (Pa. Super. 1990). Both dealt with weight loss surgical procedures. The *Foflygen* Court adopted the reasoning of *Gatten* in reaching its decision. *Foflygen* held that the UTPCPL "is inapplicable to the providers of medical services," and upheld the trial court's dismissal of a count premised on it. *Id.* at 1355. According to the Act, unfair methods of competition and deceptive practices in the conduct of any trade or commerce are unlawful. 73 P.S. § 201-3. The phrase "trade or commerce" includes the sale of services. 73 P.S. § 201-2(3). Among the practices condemned by the Act are various misrepresentations as well as other fraudulent conduct that creates a likelihood of confusion or misunderstanding. 73 P.S. § 201-2(4). However, even though the Act does not exclude services performed by physicians, the above cases say that the Act is intended to prohibit unlawful practices relating to trade or commerce and of the type associated with business enterprises. The Superior Court has said that it is clear that the legislature did not intend the Act to apply to physicians regarding medical services. *Gatten* at 976. "I must follow those controlling Pennsylvania Superior Court decisions, *Foflygen* and *Gatten*, and find that the UTPCPL does not apply to the medical services provided by a dentist. However, my belief is that those two cases should be revisited because they set forth little reasoning of why Consumer Protection issues are not available in dental cases. The M-Care Statute does *not* reference dental care. Further in both of the above cases the court simply makes the bald statement that the UTPCPL didn't apply and said its application would make the dentist a "guarantor". I question that theory. Liability would attach only if the dental services were delivered negligently and I do not comprehend this guarantor theory. Further in today's mercantile world, where dentists and hair transplant doctors are constantly on TV a re-visitation of these cases would be worthwhile. To recapitulate, the Preliminary Objection as to the UTPCPL law is sustained but all others are overruled. Answer in 30 days.

So Ordered,
/s/O'Reilly, S.J.

Date: March 8, 2017

Kristine Kirk v.
Edward Hollinger

Post Trial Relief—Failure to Appear

Defendant's Motion for Post-trial Relief from arbitration verdict following Defendant's failure to appear was not overturned as Defendant's unsubstantiated speculation that his mailbox may have been pilfered was not sufficient to establish a breakdown of the court sufficient to set aside the verdict.

No. AR-16-4484. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—March 27, 2017.

OPINION

This case is one of those that out of Rule 1303, Rule of Civil Procedure, which provides that in Common Pleas Arbitration, when the case is called and one party fails to appear, the party that does appear can come before the Motions Judge and get a final verdict on the evidence presented.

In this case, it was called on January 24, 2017 and defendant, Edward Hollinger (HOLLINGER), failed to appear. Plaintiff, Kristine Kirk (KIRK) then appeared before the Motions Judge that day, the Honorable Michael McCarthy and got a verdict of $9,500.00 plus costs.

On January 31, 2017, Defendant filed a timely Motion for Post-trial Relief. I heard the Motion on February 10, 2017 when I was the Motion Judge and the Honorable McCarthy had since been assigned to our Orphans Court Division.

The argument presented by Defendant was that he had not gotten notice of the original Arbitration date and suggested that his mailbox may have been pilfered and the notice of hearing destroyed. This was sheer speculation on his part and he offered nothing concrete to bolster that supposition. Further, his Motion was filed within a matter of days from the entry of the verdict, suggesting that he does indeed get his mail. After analysis, I am not inclined to grant relief since there was no showing of any count break down and I found his speculative reason for why he didn't get notice too fanciful to warrant setting the verdict aside.

Thus, I DENIED relief.

BY THE COURT:
/s/O'Reilly, S.J.

Date: March 27, 2017

Weirton Medical Center, Inc. v.
Introublezone, Inc., d/b/a Introublezone Productions, A Wyoming Corporation, and Paul Schneider and Lynda Schneider, husband and wife

Defamation

Preliminary objections sustained and claim for defamation dismissed. While publication of reality show pitch video on Vimeo online service satisfied the publication element of defamation, video contained nothing that identified the Plaintiff. Although Plaintiff's well known employee appeared in the video, this connection is not sufficient to give rise to a defamation cause of action.

No. GD-16-001563. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—June 13, 2017.

MEMORANDUM ORDER

This matter involves the effort by Plaintiff, Weirton Medical Center, Inc. (WEIRTON) to bring a defamation action against Defendants, Introublezone, Inc., d/b/a Introublezone Productions, A Wyoming Corporation, and Paul Schneider and Lynda Schneider along with ancillary claims for trespass and violations of the Lanham Act.

The Complaint alleges Defendants, in collaboration with one, Doctor Craig Richard Oser, board certified plastic surgeon employed by Weirton defamed Weirton. Dr. Oser specializes in female enhancements and related plastic surgery. Interestingly, Dr. Oser is *NOT* a named defendant.

The facts as alleged and supplemented at oral argument on Defendant's Preliminary Objections show that at Dr. Oser's instance, he retained the Defendants to prepare a video "pilot" for him to be circulated among Television Producers as a possible reality show starring Dr. Oser. In its Complaint, Weirton characterized the video as a "treatment" (para 10). Weirton also avers that a copy of said "written treatment" is attached as Exhibit B.

In fact, Exhibit B is *not* the written treatment – rather it can best be described as a "screen play" complete with stage direction and the like.

The gravamen of the Weirton's complaint is that the video pilot placed Weirton in an unfavorable light and ridiculed some of the putative "patients" appearing in the film.

Apparently the publication element of defamation is satisfied by the allegations at paragraph 22 that the video was aired on an online video service known as Vimeo (para 22).

At argument, on June 1 2017, I inquired, why there was *not* an actual transcript of the video and I opined that Exhibit B was merely a screen play and that Weirton Medical Center, Inc. had not taken the time to transcribe that video into an actual written document. At argument counsel promised to send me the actual video. He did. So to my mind, the defamation, *vel non*, would stand or fall on the video.

After my review – in which I watched the video three times – I find nothing defamatory. Poor taste, yes; Defamation – No.

Nothing in the video identified Weirton and any plaques or pictures on the wall are illegible. That Dr. Oser is an employee of Weirton is well known and Weirton has advertised his employment by it. Nevertheless, this connection does not give rise to a cause of action for something he did, with others, that Weirton doesn't like but does not defame it.

Since I find no defamation, the other claims, *a fortiori*, fail as well.

Accordingly, the Preliminary Objections to all counts are sustained and the Complaint is DISMISSED with PREJUDICE.

BY THE COURT:
/s/O'Reilly, S.J.

Date: June 13, 2017

The County of Allegheny v. Allegheny County Prison Employees Independent Union

Motion to Vacate Award—Sick Leave

Plaintiff's motion to vacate an arbitrator's award was denied. Arbitrator issued an award modifying the calculation of an employees' probationary period and determined that the employee was entitled to sick leave because employee had served his probationary period during his part-time employment before transitioning into a full-time role in the same position.

No. GD-16-022826. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
O'Reilly, S.J.—June 6, 2017.

MEMORANDUM ORDER

This case involves the Appeal by Allegheny County (County) of an arbitration award entered on behalf of the Union representing the Prison Employees at the Allegheny County Jail. The Union is the Allegheny County Prison Employees Independent Union (Union).

The issue involves the calculation and application of a probationary period to be served by new employees.

The matter is somewhat convoluted in that on April 4, 2015, Arbitrator, Matthew Franckiewicz issued an award modifying the calculation of an employees' probationary period. (the Franckiewicz Award).

Thereafter, employee Brandon Carter, on May 7, 2015 received a "counseling letter" (practically a reprimand) in regard to his use of sick leave. The County took the position that he was a probationary employee and was not eligible for the sick leave he used. Carter grieved this "letter" and the matter came on for arbitration before Arbitrator Atul Maharaja who issued an award on August 21, 2016 sustaining the grievance. The County then moved to vacate that award.

I issued a Rule to Show Cause on December 20, 2016 and heard Argument on February 13, 2017.

As noted the interpretation of the Franckiewicz Award are at issue here.

The facts show that the County employed both full and part-time officers and imposed a one year probationary period. The Union took the position that many employees who have served long periods as part-timers and then became full time employees, did not have to serve *another* probationary period.

Here Carter was hired June 4, 2011 and graduated from the training academy in March 2011. He then served as a part-time corrections officer for 3 and 1/2 years and was then made full-time on June 15, 2014. The County took the position that he had to serve another probationary period which would run to June 14, 2015.

Under the Franckiewicz Award a new probationary clause was awarded, to wit:

> The one year probationary period shall start when a corrections officer graduates from the training academy. If the officer graduates the training academy as a part-time officer and is part-time for less the one year, the probation time will extend into the full-time status for the remaining time equaling one year.

The above language appeared in the Union contract effective June 1, 2014 and ending June 30, 2019. It is therefore applicable to the period involving the Carter grievance.

As noted, the Carter matter was heard by Arbitrator Maharaja who ruled in favor of the Union.

In reviewing the award and the briefs of the parties, it appears there was an argument that the Franckiewicz award had only prospective application and was not retroactive. Apparently, this is based on the fact that the grievance by Carter arose on May 7, 2015. The County therefore asserted that the Franckiewicz award was *not* retroactive. The clear language of the Franckiewicz award was that the probationary language went into effect on June 1, 2014.

After review and analysis, the Maharaja award does indeed draw its essence from the Collective Bargaining Agreement and is not to be vacated. Indeed, common sense dictates that after serving one probationary period, Carter ought not be required to serve a second one when he is doing the same job. Rule is discharged and the Arbitration award is affirmed.

BY THE COURT:
/s/O'Reilly, S.J.

Date: June 6, 2017

Forest Highlands Community Association v. Stone Fox Capital, LLC

Default Judgment—Foreclosure—Attorney as Witness

The Court granted Plaintiff's motion to reassess a default judgment taken by Defendant homeowners association in foreclosure action for unpaid monthly maintenance charges. Additionally, the Court held that trial counsel may not testify as a witness for his or her client; and attorneys' fees were properly submitted by detailed affidavit for review by the Court, and Defendant failed to respond by counter-affidavit.

No. GD-15-021806. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Friedman, J.—March 24, 2017.

OPINION

INTRODUCTION

Defendant LLC has appealed from our order dated December 5, 2016, which granted Plaintiff's Amended Motion to Reassess a Default Judgment entered in the captioned mortgage foreclosure action more than a year ago, on January 26, 2016, against the LLC. Foreclosure is the method dictated by the statute governing homeowners associations such as Plaintiff. The matter has an extensive procedural history, which does *not* include any petition to open the default judgment.

The undersigned first became involved in the case while sitting as the General Motions Judge on September 30, 2016. Other judges, sitting earlier in General Motions Court, had entered orders which ultimately resulted in the original Motion to Reassess Damages being scheduled before me. At the request of the parties, who at the time were hoping to settle the matter amicably, we signed a consent order postponing a Sheriff's Sale of the real estate at issue until January 3, 2017.

They were unable to resolve their differences and a hearing on the original Motion to Reassess was scheduled by order dated November 2, 2016, We inadvertently characterized the hearing as a "non-jury trial," a clerical error which Defendant raises in item no. 8 of his 1925(b) Statement; this was discussed in an Interim Partial Opinion filed on March 21, 2017, a copy of which was hand-delivered that same day to the Superior Court Prothonotary. We also ordered that the parties file pre-trial statements, but only Plaintiff did so; Defendant did not file one at all, timely or otherwise. Shortly before the hearing date, Plaintiff filed an *Amended* Motion to Reassess Damages and this was also considered at the hearing. Defendant complains of this as well in his Rule 1925(b) Statement.

The hearing on the motion began and ended on November 15, 2016.

Counsel for the Defendant LLC indicated in his opening statement that he also expected to be its only witness. He planned to testify about the reasonableness of daily fines that had been imposed beginning around August or September of 2015 for a deck that had been constructed without Board approval in May 2013. However, he had neglected to obtain substitute counsel for his client, a fictitious entity, and as a result the Plaintiff's objection to his testimony was sustained, based on the well-settled principle that trial counsel cannot also be a witness for his client.

After Plaintiff had rested its case, asserting claims for unpaid monthly maintenance charges as well as the daily fines, defense counsel stated he had no evidence to present except his own previously barred testimony. This was despite the fact that he had earlier stated he would call the President of the Plaintiff's Board in his own case after the Court had ruled he could not go as far beyond the scope of her direct testimony as he had wished to do during his cross-examination of her. This witness could have been questioned in the LLC's case by defense counsel regarding the relationship of the fines levied to the violations asserted, but he chose not to do so.

Defendant also had no closing argument to make, instead raising an objection that the instant motion should have been filed as a petition. We decided that the objection was untimely and had been waived by not having brought it to the Court's attention long ago, or at least before the hearing started. As a result, due to defense counsel's actions, we were limited to the Plaintiff's evidence and the Defendant's cross-examination of Plaintiff's witnesses.

There was no dispute concerning the unpaid monthly maintenance charges. The reasonable amount of the daily fines was, however, an issue at the hearing. We found that the evidence presented by Plaintiff regarding the daily fines was credible and indicated a degree of patience on the part of the Board that is not often seen when these types of disputes end up in court. According to the credible evidence, Defendant had been aware that its deck had not been approved by the Plaintiff, as required, since construction was begun in or before May 2013, more than three years prior to the hearing. Plaintiff did not start assessing fines for the continuing noncompliance until shortly before the instant case was filed in December 2015. See Plaintiff's Ex. D. The default judgment was entered in January 2016. The amount of daily fines claimed, for 20 days in August 2015 plus every day from September 1, 2015 to July 31, 2016, when Defendant finally complied, is much less than could have been imposed and we found it to be reasonable in the circumstances.

Another issue for the Court was whether or not the time spent and the hourly rate charged by now-retired prior counsel for the Board was reasonable. Prior to the hearing, there had been a stipulation reached by e-mail between Plaintiff's current counsel and defense counsel that the work done and the fees charged by prior counsel were reasonable, and the deposition of prior counsel had been cancelled as a result. Defense counsel stated at the hearing that he only stipulated to the reasonable hourly rate charge, but after argument we concluded that the stipulation he agreed to covered both the hourly rate and the time spent. We also noted that the cancellation of prior counsel's deposition was consistent with Plaintiff's version of the stipulation. The additional counsel fees and costs charged by prior counsel, in the amount of $6,742.51 were therefore added to the judgment amount, along with the then-undetermined fees and costs charged by current counsel plus the unpaid monthly maintenance fees from the date of the default judgment, January 26, 2016, and the daily fines, for a sub-total of $71,367.12.

The third and last issue for the Court at the hearing was the reasonableness of the fees charged by Plaintiff's current counsel who took over after prior counsel retired from the practice of law. We indicated that we would handle that fee issue in accordance with our usual procedure whereby the attorney entitled to fees submits a detailed affidavit, the opposing party states what is objected to and why, and the Court reviews the affidavit, the objections and reaches a decision on the amount of fees to be awarded. Counsel for Plaintiff submitted his affidavit on November 16, 2016; Defendant did not file any objections. Counsel for Plaintiff later filed a Supplemental Affidavit, which added no additional charges but merely stated that said counsel's hourly rate is within the reasonable range of fees charged in our judicial district. A final order reassessing damages in the total amount of $86,714.02 was entered on December 5, 2016, and, as previously indicated, is the order now under appeal.

ISSUES RAISED ON APPEAL

Defendant raises the following allegations of error in his Rule 1925(b) Statement:

1. That the claims in the Amended Motion were different from those raised in the original Motion and should have been made in an amended *complaint*, not in a Motion to Re-assess; Defendant contends it was therefore error to consider the claims in the Amended Motion at the hearing.

2. That the Court ignored Defendant's response to the original Motion, which he asserts should, in any case, have been a *petition* since Defendant asserts the Motion contains facts not of record.

3. That "[p]rior to trial the Defendant served several notices to attend and to produce documents which were necessary to Defendant's defense. The court erroneously ruled that the Plaintiff did not have to either appear or produce the requested documents at trial."

4. That the court should have allowed counsel for the LLC to testify even though he had formally entered his appearance, simply because he was "the principal" of the LLC and resided in the subject property.

5. That the court failed to sustain multiple unspecified hearsay objections made by Defendant.

6. That the admissible evidence at trial was insufficient to warrant the award made.

7. That the Court should have conducted a second hearing on the counsel fees incurred by Plaintiff so that Defendant could cross-examine on the fees asserted.

8. That by conducting a hearing rather than non-jury trial the Court deprived Defendant of its right to file post-trial motions; also that "by entering judgment" rather than "a Decision" the Court acted erroneously.

9. Defendant also purported to reserve the right to raise additional issues if the transcript reveals any.

We have already addressed item no. 8 in our Interim Partial Opinion filed March 21, 2017. As for item no. 9, where Defendant purports to reserve the right to raise additional issues, the Rules of Court as well as our order requiring the Statement do not permit Defendant to raise any further issues not fairly covered by the eight items summarized above.

We will therefore only discuss items no. 1-7.

DISCUSSION

1. The contention that an Amended Complaint should have been filed by Plaintiff rather than a Motion to Reassess Damages has been waived.

Defendant first raises this issue in his 1925(b) Statement. However, at the beginning of the hearing, his only objection was to the authority for and amount of the daily fines and his contention that they were "ridiculous and excessive" and an abuse of discretion. See Transcript at pages 6-9. No objection along the lines of that stated in item no. 1 was made at any time during the hearing. This issue has been waived.

Even if not waived, the items claimed in the Amended Motion to Reassess Damages are covered by the original Complaint filed, as well as by the original Motion to Reassess. This basis for appeal is without merit.

2. The Court did not "ignore" Defendant's response to the original Motion to Reassess Damages.

This issue, too, was first raised in Defendant's 1925(b) Statement and has been waived. Because of settlement attempts by the parties, a *consent* order postponing both the Sheriffs Sale of the LLC's real estate and the argument on the original motion and Defendant's response, was entered on September 30, 2016. Furthermore, Defendant did not ask the Court to consider its response to the original motion after settlement discussions failed or at any time thereafter. Rather Defendant was silent regarding the scheduling of the hearing, and at the hearing itself never asked the Court to consider that response.

3. The undersigned made no ruling or order regarding notices to attend and to produce documents and the Notice of Appeal does not refer to any such order.

We do not understand what Defendant refers to here. We cannot address this issue because it refers to matters we did not decide.

4. It is well settled that trial counsel may not also testify unless replacement trial counsel is retained.

Defense counsel did raise this objection during the hearing. See Transcript p. 18, 11.6-21. However, even though the issue has not been waived, it is without merit. See Rules of Professional Conduct 3.7, quoted in pertinent part below:

Rule 3.7. Lawyer as Witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

Defendant also asserts in this item that *the Court told* Plaintiff's counsel his affidavit was insufficient. We do not recall ever entering any such order and the docket does not indicate there was one. We certainly never had any communication with anyone regarding the original affidavit. As far as we know, the Supplemental Affidavit was filed on Plaintiff's counsel's own initiative. We note that Plaintiff's counsel filed the first affidavit prior to the entry of our Order November 17, 2016, and it might have been this order that counsel sought to comply with. To the extent Defendant's counsel is suggesting that there might have been an *ex parte* communication by the court to Plaintiff's counsel, this is without foundation in reality and is untrue. In any case, the supplemental affidavit merely stated that the hourly rate charged by trial counsel had been held to be reasonable by another judge of coordinate jurisdiction in a different case.

There is no merit to either aspect of item no. 4.

5. The sole hearsay objection made by defendant was sustained.

Defendant fails to specify what inadmissible hearsay he objected to and which of any such objections were improperly overruled. We found only one, at page 40, 1. 24 of the Transcript. That objection was sustained, not overruled. There is no merit to item 5.

6. The admissible evidence at the hearing was credible and was more than sufficient to warrant the amount reassessed.

Defendant does not state what evidence he objected to as inadmissible and, except for the one hearsay objection that was sustained, we did not find any objection to the evidence offered by the Plaintiff. In addition, credibility of witnesses is for the factfinder. The testimony of Plaintiff's three witnesses was highly credible and demonstrated that Plaintiff had been extremely patient with Mr. Joseph despite his recalcitrance regarding issues with the LLC's deck.

Mr. Joseph presented no evidence on behalf of his client. He failed to call Leigh Bishop in his own case even though he said he would do so. See Transcript, p. 61, 11.20-21. He had deprived himself of the ability to testify, as discussed above at item 4. We considered all the evidence available to us and found that the amount of the fines was justified given Mr. Joseph's conduct as the "principal" (as he put it) of the LLC.

The credible evidence demonstrated that the daily fines could have been imposed much earlier, in 2013, but the Plaintiff waited two years before doing so. There is no abuse of discretion by the Plaintiff. The abuses were all inflicted by Mr. Joseph upon the Plaintiff and his own LLC. Since May 2013 he has been aware that the Plaintiff wanted the LLC to comply with its Rules and Regulations regarding its deck. He was given several opportunities to file the correct application and bring the deck into compliance. Instead he chose to delay the LLC's compliance for three years, until some time around July 2016. He also caused the LLC not to pay its monthly assessments and, as recently as March 20, 2017, informed the Court that he will continue to withhold those payments until the instant appeal is finally resolved by the appellate courts. The Plaintiff indicated at the hearing that it has only imposed one late fee, rather than one each month, something Defendant did not dispute. Plaintiff also indicated that interest has not yet been included in its claim but "will be calculated at the time of sale" and at a lower rate (6%) than is permitted by the Association documents (8.25%), on himself as well as on the other members of the Plaintiff Association.

The admissible evidence supported Plaintiff's claim. There is no merit to item no. 6.

7. Defendant waived his right to a separate hearing on Mr. Nernberg's counsel fees by not responding to the original affidavit of Plaintiff's counsel.

Defendant chose not to file objections to Mr. Nernberg's affidavit and also chose not to file a counter-affidavit. He has waived his right to complain on appeal. Furthermore, the Court's own review of the affidavit found Mr. Nernberg's fees reasonable both as to time spent and hourly rate charged.

There is no merit to item no. 7.

CONCLUSION

Defendant has waived most of his grounds for appeal. The default judgment against Defendant was reassessed in a proper amount. Mr. Joseph, whether as counsel for the LLC or as its member, caused the judgment to be entered and to reach its current amount.

Our order should be affirmed.

BY THE COURT:
/s/Friedman, J.

Date: March 24, 2017

Judy Torma v. Parrot Construction Corp.; Paul Chambers

Arbitration Clause—Change Orders

The Court determined that a subsequent agreement was a change order to the original contract, not a separate agreement. Thus, the original contract's arbitration clause controlled the dispute and the arbitrator's award was proper.

No. GD-15-017669. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.
Friedman, J.—September 18, 2017.

OPINION

Plaintiff has appealed from our Decision dated June 28, 2017, which was entered after a hearing as directed by the Superior Court. See 1105 WDA 2017. The question to be decided on remand was whether or not the arbitrator had jurisdiction of an Agreement of Understanding (generally referred to as the "Moving Contract") between the parties. His jurisdiction depended on whether or not that agreement was a Change Order to the original contract or a separate agreement unrelated to the original contract.

As we stated in our Decision, the credible evidence shows the following factual background. Plaintiff was acting under a Power of Attorney given to her by her elderly father who was the actual owner of the premises at issue, a commercial building. The premises had been condemned and Plaintiff had contracted with Defendant on May 15, 2014 to correct the serious structural and other deficiencies that led to the condemnation. There was a good deal of junk in the building, such as old tools and other items that had to be removed and scrapped. There were also old vending machines stored in the building by the Plaintiff's father. All those items had to be removed at some point so that other essential work could be done. Plaintiff was well aware of this and we find her assertion that she had not been told that items inside the building had to be removed not credible. Plaintiff believed the vending machines had some value and tried to have the machines removed herself but was unable to find someone to do it. Plaintiff then asked Defendant to remove and scrap the junk and store the vending machines until the work was finished, resulting in the Agreement of Understanding/Moving Contract which was executed on June 6, 2014. We concluded that the Moving Contract was the first of several change orders to the original contact.

Plaintiff filed a Statement of Matters Complained of on Appeal which is a few pages long but raises no basis for Plaintiff's insistence that the arbitrator did not have jurisdiction. There is no complaint about insufficient evidence, for example, nor is there any other error cited. It is therefore a little difficult to draft an opinion and we can only suggest that Superior Court read the Transcript of the hearing. As we indicated in our Decision, the credible evidence showed that the Moving Contract was the first of

several change orders; the reason for the Moving Contract was Plaintiff's failure to remove old vending machines so that the work under the original contract could be performed. We found the testimony of Plaintiff herself be incredible and that of Mr. Chambers to be highly credible and well-supported by the other evidence in the case.

Our finding, on remand, that the Moving Contract was a change order to the original contract was based on credible and sufficient evidence. Our conclusion that it was therefore covered by the arbitration clause in the original contract was proper. The entire arbitration award should be affirmed. As we understand the earlier ruling of the Superior Court, the attack on rest of the award has already been rejected.

BY THE COURT:
/s/Friedman, J.

Date: September 18, 2017