

ACTION MANAGEMENT, INC.,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
	:	
Plaintiff	:	
	:	
vs.	:	NO. 99-00,163
	:	
MICHAEL ESPOSITO,	:	CIVIL ACTION - LAW
	:	
Defendant	:	
	:	PETITION FOR LEAVE TO APPEAL
	:	NUNC PRO TUNC

**Date: June 27, 2001**

**OPINION and ORDER**

Before the Court is Defendant’s Petition for Leave to Appeal the Award of Arbitrators, *Nunc Pro Tunc*, which was filed on October 26, 2000. A hearing and argument were held on March 26, 2001. For reasons to be explained in this opinion, Defendant’s petition will be DENIED.

**Facts**

This case involves Plaintiff’s attempt to collect an unpaid loan owed by Defendant to Plaintiff’s assignor, Northern Central Bank. After the pleadings were closed, the case was scheduled for arbitration on May 31, 2000.

In April 2000, Defendant’s original counsel, a Mr. Younger, withdrew. In that same month, Eugene LaManna, Esquire entered his appearance on behalf of Defendant. After he had failed to negotiate a settlement of the Plaintiff’s claim before the arbitration hearing Mr. LaManna advised Defendant not to appear for the arbitration. On May 31, 2000, the arbitrators entered an award for Plaintiff in the amount of \$10,977.40. Within a few days after the arbitration award was made Mr. LaManna advised Defendant that an appeal of the arbitration

award would be taken. Defendant paid Mr. LaManna \$500.00 to file the appeal on June 10, 2001.

Attorney LaManna testified he began to suffer from depression in early to mid-June of 2000. Mr. LaManna's illness became so acute that he had to take time off from his practice. He sought treatment in July and August outside the Commonwealth. He stopped seeing clients and did not process any work. Consequently, the appeal for Plaintiff was never filed. Mr. LaManna testified while he did contact his office while he was in treatment to inquire about the general status of the practice, but he did not specifically make any references to Defendant's appeal in these contacts. Mr. LaManna further testified that he did not make any arrangements with anyone of his three partners to ensure that Defendant's appeal was filed. Mr. LaManna stated that during this time his ability to concentrate was hindered by the drug treatment regimen he was following.

Defendant speaks and writes very little English. He describes himself as having a very limited understanding of the legal system. He says, and the Court accepts, that he solely relied on advice of counsel in governing his actions in response to the lawsuit initiated by Plaintiff.

Mr. LaManna's health condition and subsequent absence from his work were unknown to Defendant. Defendant did not again hear from Mr. LaManna until after the appeal period had lapsed.

This Court finds credible the Defendant's testimony that he first learned the appeal of the arbitration award had not been filed when he had received a phone call from Action Management informing him that the appeal had not been filed. There is a discrepancy

as to when this call was made. There is little question that Plaintiff contacted Defendant by phone in August and in that call demanded payment. Defendant referred the caller to Mr. LaManna's office. Although Defendant acknowledges the August phone call he also testified he first learned no appeal was filed two days before the Sheriff appeared to levy on his property. Based on affidavits and documents filed after the hearing (as permitted by the Order of March 26, 2001) this Court finds the writ of execution was served on the Defendant by the Berks County Sheriff's Office on October 11, 2000. The Court further finds the telephone call from Plaintiff to Defendant in which Defendant first learned the appeal had not been filed occurred within a week prior to October 11, 2000.

Upon receiving the call from Plaintiff in October Defendant contacted one of Mr. LaManna's partners who confirmed the appeal had not been filed and advised him to obtain a new lawyer. Defendant did so promptly resulting in the filing of this Petition on October 26, 2000.

### *Discussion*

Pa.R.C.P. 1308 clearly states that a party has thirty (30) days after the entry of the arbitrator's award in the prothonotary's docket to file an appeal. If no appeal is filed within the allotted time period, then the award becomes final. The timely filing of an appeal is necessary to invoke the jurisdiction of the court; while the time limit imposed by statute or court rule will not be extended as a matter of indulgence or grace courts have exercised their discretion in limited situations to the extraordinary relief of permitting an appeal filed beyond the time deadline to proceed under the doctrine of *nunc pro tunc*. See *Lee v. Guerin*, 735 A.2d 180 (Pa. Super. 1999). In this case, no appeal was filed before the deadline expired. In an

effort to avoid the consequence of this rule, Defendant asserts the failure to timely appeal was due to the non-negligent happenstance of his original counsel's depression and therefore he is entitled to pursue the appeal.

“As a general rule, an appeal *nunc pro tunc* is only granted in civil cases where there was fraud, or a breakdown in the court's operations.” *Lee v. Guerin, Id.*, at 1281. This rigid standard was relaxed somewhat in *Bass v. Commonwealth*, 401 A.2d 1133 (1979), when the Supreme Court for the first time allowed an appeal to be filed with it *nunc pro tunc* on the grounds a non-negligent happenstance had delayed appellant's counsel from timely filing of the appeal.

In *Bass*, the attorney's secretary charged with actually filing the appeal had prepared the papers for filing when she became suddenly ill on a Friday, six days before the appeal was due. She missed the entire next week of work. She returned to work ten days later on a Monday and discovered the mistake. The law office then promptly filed a petition with the Supreme Court that Monday to allow the appeal to be filed *nunc pro tunc*, four days late. The law office had a procedure to monitor such uncompleted work but that procedure has been the responsibility of the secretary who had been out ill. Her illness had prevented her from calling the office during her absence. The Court, in *Bass* recognized that an attorney's negligent conduct would not excuse an untimely filed appeal. Under the facts of the case before it the Court in *Bass* found the failure to timely appeal was the result of non-negligent conduct which was corrected in a very short time during which the prejudice to the other side was minimal. Therefore, the holding in *Bass* allowed the out-of-time appeal, *nunc pro tunc*.

Subsequent decisions involving non-negligent conduct have been much more reserved. This is especially true when the conduct concerns the diligence of counsel. In the case of *In re C.K.*, 535 A.2d 634 (Pa.Super. 1987), the Court held that an attorney's absence from the office for two weeks following his mother's heart attack did not constitute non-negligent conduct. In *C.K.* the appealing party timely notified counsel's office they desired to appeal while the counsel was absent attending to his mother's health needs. The appeal period expired before counsel returned to work and learned of appellant's desire to appeal. The "Petition to File a Notice of Appeal Nunc Pro Tunc" was filed almost two months after the expiration of the appeal period. The Court noted that, despite his extended absence, counsel "did not arrange for substitute counsel to monitor his cases . . . [or] notify appellants that they should seek new appellate counsel." *Id.* At 636.

The Court again considered the issue in *Freeman v. Bonner*, 761 A.2d 1193, 1196 (Pa. Super. 2000). In *Freeman*, counsel did not timely file an appeal because she was out of the jurisdiction attending to a terminally ill parent. As in *In re C.K.*, the Court refused to allow the appeal *nunc pro tunc* finding counsel's absence from work did not constitute non-negligent behavior because she should have arranged for substitute counsel.

Other cases have allowed an appeal to be filed *nunc pro tunc* under the reasoning of *Bass, supra*. *Tony Grande, Inc. v. W.C.A.B.*, 455 A.2d 299 (Pa. Cmwlt. 1983) involved the hospitalization of appellant's counsel ten days into the appeal period. Three days after the appeal period had run absent counsel's associate first learned of the missed filing and immediately moved to appeal *nunc pro tunc* which was granted. In *Perry v. Commonwealth Unemployment Bd. of Rev.*, 459 A.2d 1342 (Pa. Cmwlt. 1983), an automobile accident

resulted in a three-day delay in filing the appeal; there was no prejudice to appellee; **the *nunc pro tunc*** appeal was permitted.

In the cases permitting the *nunc pro tunc* appeal it is clear that prompt action was taken by counsel's office to address the minimal delay in filing the appeal. This is not the situation now before this Court. Rather, the situation before us is very similar to that in *In Re C.K.*, *supra* and *Freeman v. Bonner*, *supra*, which clearly hold that if there is an opportunity to arrange for substitute counsel, which opportunity is neglected, the Court will not consider counsel's absence from or inability to work as non-negligent conduct.

Attorney LaManna's depression certainly does not constitute negligence. The Court recognizes that depression is a serious illness that can have severe repercussions. Furthermore, the Court finds that this illness certainly impacted Attorney LaManna's ability to function. However, Attorney LaManna's depression did not appear abruptly or render him totally unable to function. As evidence of this, the Court points to his testimony concerning his checking the status of his office while he was in treatment. This Court finds Attorney LaManna had ample opportunity and mental and physical capacity to arrange for substitute counsel. His office also had ample opportunity to review the status of his incompleting work. The failure of Mr. LaManna and his office to take action to protect Defendant's appeal rights so cannot be considered non-negligent behavior. Consequently, this Court cannot grant Defendant's petition for leave to appeal *nunc pro tunc*.

It should be noted that the Court in no way finds the actions of Defendant himself to be neither negligent nor untimely. Defendant followed the advice of his original counsel and dutifully made payment for the appeal. When Defendant learned that the appeal

had not been filed, he diligently sought and ultimately obtained alternate representative. Though the Court agrees that these circumstances are indeed unfortunate, the Court finds prior case law dictates a denial of Defendant's petition.

**ORDER**

Defendant's petition for leave to appeal *nunc pro tunc* is DENIED.

BY THE COURT,

William S. Kieser, Judge

cc: Gregory Stapp, Esquire  
Kenneth Kitay, Esquire  
231 East State Street, Suite 200; Kennett Square, PA 19348  
Judges  
Suzanne Lovecchio, Law Clerk  
Gary L. Weber, Esquire (Lycoming Reporter)