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10/23/2024

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY
COMMONWEALTH OF PENNSYLVANIA
CIVIL DIVISION

FILED
2024 OCT 23 2:22
COURT OF COMMON PLEAS
CIVIL DIVISION
NORTHAMPTON COUNTY, PA

BOROUGH OF BATH, :
Petitioner, :
: No. C-48-CV-2024-01039
v. :
:
MICHAEL LONG, :
Respondent. :

ORDER OF COURT

AND NOW, this 23rd day of October, 2024, **IT IS HEREBY ORDERED** and **DECREED** as follows:

1. Respondent's Motion for Leave to File Appeal *Nunc Pro Tunc* Due to Court Error and to Dismiss Petitioner's Appeal for Lack of Jurisdiction is **DENIED**;
2. Respondent's Motion for Protective Order, Sanctions, and Injunctive Relief is **DENIED**; and
3. Respondent's Motion for Appointment of Court Experts is **DENIED**.

BY THE COURT:

JOHN M. MORGANELLI, J.

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OPINION OF THE COURT

This matter is before the Court on three (3) motions filed by Respondent: (i) Motion for Leave to File Appeal *Nunc Pro Tunc* Due to Court Error and to Dismiss Petitioner's Appeal for Lack of Jurisdiction; (ii) Motion for Protective Order, Sanctions, and Injunctive Relief; and (iii) Motion for Appointment of Court Experts. The matter appeared on this Court's Argument List on October 15, 2024 and was submitted to the Court for disposition on the briefs without oral argument.

RELEVANT FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises from Respondent Michael Long's ("Long") May 17, 2023 request seeking records from the Borough of Bath (the "Borough") pursuant to Pennsylvania's Right-to-Know Law ("RTKL"), 65 P.S. §§ 67.101-67.3104, which was partially denied by the Borough. Long appealed that partial denial to the Office of Open Records ("OOR"). Proceedings before the OOR docketed at *Michael Long v. Bath Borough*, OOR Docket No. AP 2023-1598R, ultimately

resulted in a January 12, 2024 Final Determination Upon Reconsideration. On February 9, 2024, the Borough filed the instant appeal before this Court.

On March 1, 2024, Long filed a "Cross-Appeal of and Petition for Review of Final Determination Upon Reconsideration Dated January 12, 2024, Issued by Pennsylvania Office of Open Records at OOR Docket No. AP 2023-1598." On March 18, 2024, the Borough filed a "Motion to Quash Cross-Appeal of Michael Long" arguing that Respondent's "Cross-Appeal" had been filed more than thirty (30) days from the issuance of the OOR's final ruling, *see* 65 P.S. §§ 67.1302, and was therefore untimely. Long did not file any opposition and the Borough's motion was ultimately granted. *See* August 28, 2024 Order of Court (J. Kassis) ("...it appearing that the cross-appeal by Requestor, Michael Long, is facially untimely, the Motion to Quash Cross-Appeal is GRANTED").

On May 13, 2024, Long filed the "Motion for Leave to File Appeal *Nunc Pro Tunc* Due to Court Error and to Dismiss Petitioner's Appeal for Lack of Jurisdiction" now at issue. The Borough filed a response on May 17, 2024. On May 30, 2024, Long filed a Response to Petitioner's Opposition to Respondent's Motion. On September 9, 2024, Long filed a brief in support of the motion. On October 10, 2024, the Borough filed a brief in opposition.

On September 10, 2024, Long filed the "Motion for Protective Order, Sanctions, and Injunctive Relief" now at issue. The Borough filed a response on

September 30, 2024. On October 3, 2024, Long filed a brief in support of the motion. On October 10, 2024, the Borough filed a brief in opposition.

On September 12, 2024, Long filed the "Motion for Appointment of Court Experts" now at issue. The Borough filed a response on October 3, 2024. On October 4, 2024, Long filed a brief in support of the motion. On October 10, 2024, the Borough filed a brief in opposition.

Each of Respondent's motions have been fully briefed and the matter is now ready for disposition.

DISCUSSION

I. Respondent's Motion for Leave to File Appeal *Nunc Pro Tunc* Due to Court Error and to Dismiss Petitioner's Appeal for Lack of Jurisdiction

Long's first motion seeks leave to file an appeal *nunc pro tunc* and to dismiss the Borough's appeal for lack of jurisdiction. With regard to the first issue, Long contends that the Borough filed a timely appeal on February 9, 2024 and that he arrived at the courthouse on February 12, 2024 – the final day of the thirty (30) day appeal period – seeking to file his appeal when he was "erroneously informed by court staff that a filing fee was required despite the fee being previously satisfied by Petitioner's filing." *See* Respondent's Motion at ¶ 2. Long claims that this "misinformation, along with the inability to pay by cash or money order at the

late hour, prevented [him] from filing the appeal." *See* Respondent's Motion at ¶ 3. It is unclear from Long's written submissions whether he seek *nunc pro tunc* relief to file a new appeal or if he desires to simply reinstate his "Cross-Appeal of and Petition for Review" filed on March 1, 2024 and later quashed as untimely.

In addition to his request for *nunc pro* tunc relief, Long also argues that the Borough's appeal should be dismissed because it was served on him by regular mail rather than certified mail, allegedly in violation of Pa.R.A.P. No. 1514(c). Long argues that this "jurisdictional defect ... is irremediable and necessitates dismissal of the appeal." *See* Respondent's Motion at ¶¶ 9-10.

On the issue of *nunc pro tunc* relief, the Borough notes that "where the legislature has fixed a time period within which an appeal may be filed, that period is mandatory and may not be extended as a matter of grace or indulgence." Olson v. Borough of Homestead, 443 A.2d 875, 878 (Pa. Cmwlth. 1982). "When a statute fixes the time within which an appeal may be taken, a court may not extend that time period or allow an appeal *nunc pro tunc* absent a showing that extraordinary circumstances involving fraud or its equivalent, duress, or coercion *caused the delay in filing an appeal*." In re Borough of Riegelsville from Bucks Cnty. Bd. of Assessment & Revision of Taxes, 979 A.2d 399, 402 (Pa. Cmwlth. 2009) (quoting Hanoverian, Inc. v. Lehigh County Board of Assessment, 701 A.2d 288, 289 (Pa.

Cmwlth. 1997)). A *nunc pro tunc* appeal may be permitted when the appellant proves that:

> (1) the appellant's notice of appeal was filed late as a result of non-negligent circumstances, either as they relate to the appellant or the appellant's counsel;
>
> (2) the appellant filed the notice of appeal shortly after the expiration date; and
>
> (3) the appellee was not prejudiced by the delay.

Criss v. Wise, 781 A.2d 1156, 1159 (Pa. 2001). The Borough argues that Respondent has not established all of these facts, and in fact has not established any of them, and should not be permitted to file a late appeal.

The Borough also argues, in response to the argument that its appeal should be dismissed due to service by regular mail rather than certified mail, that service was proper. The Borough notes that, even assuming *arguendo* that the Rules of Appellate Procedure apply to a statutory appeal under the RTKL, Respondent's argument is based on Pa.R.A.P. 1514(c), which permits parties to be served "as described by Pa.R.A.P. 121(b)," and Rule 121 allows service by first class mail.

We do not find that Respondent has met his burden of establishing "extraordinary circumstances" justifying *nunc pro tunc* relief. Long's argument that his late filing was caused by misinformation about the necessity of a filing fee is actually contradicted by his own "Declaration of Michael Long" attached as

Exhibit D to the motion. Therein, he writes that "[u]pon attempting to file my appeal, I was informed by court staff that I was required to pay a filing fee and that payment could only be made by cash or money order. ***I was not aware of this requirement and had intended to pay the filing fee by credit card.***" *See* Declaration of Michael Long at ¶ 5 (emphasis added). The Declaration goes on to aver that "due to the court staff's insistence on payment by cash or money order, a requirement I was not previously aware of, and my lack of those specific forms of payment, I was prevented from filing my appeal on February 12, 2024." *See* Declaration of Michael Long at ¶ 8. It appears from his own Declaration that Respondent understood the need to pay a filing fee and intended to do so with a credit card, but was not prepared to pay the fee in the form required by the Fee Schedule of the Office of the Prothonotary (i.e. cash, business checks, money orders, traveler checks, or certified checks).

If Respondent was truly without the means to pay the Prothonotary costs on February 12, 2024, he could have filled out a petition to file *in forma pauperis* and filed his timely appeal on that date without paying any filing fee. *See* Pa.R.C.P. No. 240(c) ("If the petition is filed simultaneously with the commencement of the action or proceeding or with the taking of the appeal, the prothonotary shall docket the matter and petition without the payment of any filing fee."). Even assuming for the sake of argument that Respondent had no choice but to file an untimely appeal,

he could have demonstrated his diligence by returning to the courthouse on February 13, 2024 with the fee required by the Prothonotary and filing his appeal just one (1) day late. Instead, he waited eighteen (18) days, through the remainder of February and until March 1, 2024, to file a "Cross-Appeal" and then waited much longer – until May 13, 2024, over three months after the close of the thirty (30) day appeal period – to move for leave to file an appeal *nunc pro tunc*. Respondent has not alleged that he has onerous family or work obligations, difficulties with mobility or obtaining transportation, or any other reason why he was unable to file documents in a more timely manner. In sum, (i) Respondent's late filing was the result of his own negligent failure to equip himself with a method of payment acceptable to the Office of the Prothonotary and (ii) Respondent then failed to file his untimely appeal for several weeks after the expiration date, without excuse or explanation. Accordingly, the motion for leave to file an appeal *nunc pro tunc* is denied.

We also deny Respondent's motion to dismiss Petitioner's appeal for lack of jurisdiction. Respondent has not established impropriety in the method of service utilized by Petitioner.

II. Respondent's Motion for Protective Order, Sanctions, and Injunctive Relief

Respondent next seeks a protective order, sanctions, and injunctive relief due to the Borough's "ongoing campaign of bad faith, harassment, and intimidation." *See* Respondent's Motion at p. 1. He alleges that he has been engaged in a "protracted dispute" with the Borough over access to public records during which the Borough has been "fabricating privilege claims and tampering with evidence," *see* Respondent's Motion at p. 2, and engaged in a "pubic smear campaign, media manipulation, and incitement to harassment," *see* Respondent's Motion at p. 3, which has created a risk of harm to Respondent and his 70-year-old mother, with whom he resides and fears for her safety. Respondent seeks sanctions against the Borough, a protective order pursuant to Pa.R.C.P. No. 4012 to shield him and his mother from further harassment, and an injunction barring the Borough from "making public statements or social media posts that disparage Respondent or misrepresent his action." *See* Respondent's Brief at pp. 16-17.

The Borough points out that "the Pennsylvania Rules of Civil Procedure do not apply to statutory appeals, such as an appeal under the RTKL," Borough of West Easton v. Mezzacappa, 74 A.3d 417, 410 (Pa. Cmwlth. 2013), and that even if Pa.R.C.P. No. 4012 were applicable here, Rule 4012 only pertains to persons "from whom discovery or deposition is sought," which is not the case here. *See*

Pa.R.C.P. No. 4012(a). Further, the Borough argues that this is an appeal of the OOR's ruling, limited only to the question of whether the records sought by Respondent's May 17, 2023 request constitute "public records" under the law, and that the relief now sought by Respondent is not provided for under the RTKL.

We agree with the Borough that Respondent is not entitled to a protective order under the law. Additionally, we note that injunctions are a form of relief authorized pursuant to Pa.R.C.P. No. 1531. As noted above, the Rules of Civil Procedure are inapplicable to an appeal under the RTKL. Finally, to any extent that an injunction may be otherwise available as an equitable remedy at the Court's discretion outside of the application of the Rules of Civil Procedure, we do not find that Respondent has alleged harm sufficient to justify an order curtailing the Borough's speech.[1]

III. Respondent's Motion for Appointment of Court Experts

Respondent's third and final motion seeks the appointment of two (2) independent court-appointed experts: (1) a Digital Forensics Specialist to examine and analyze electronic documents produced by the Borough and (2) a Forensic

[1] To justify injunctive relief, the moving party must establish "(1) an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) greater injury will result from refusing an injunction than from granting it and, concomitantly, that issuance of an injunction will not substantially harm other interested parties; (3) a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) a clear right to relief; (5) the injunction is reasonably suited to abate the alleged harm; and (6) issuance of an injunction will not adversely affect the public interest." Wolk v. Sch. Dist. of Lower Merion, 228 A.3d 595, 610 (Pa. Cmwlth. 2020)

Accountant to review and assess the Borough's financial records. Respondent contends that there appear to be missing messages in a redacted email chain produced by the Borough and that discrepancies in the Borough's records "suggest the possibility of financial misconduct." *See* Respondent's Motion at pp. 2-3. Respondent alleges that as a *pro se* litigant he "lacks the resources and expertise to independently conduct a thorough forensic examination of the Borough's electronic and financial records ... [and] needs the assistance of qualified experts to properly analyze the evidence, present his case effectively, and ensure the justice is served." *See* Respondent's Motion at pp. 3-4.

In short, there is no basis for the relief sought by Respondent. Although courts do possess the power to appoint expert witnesses, *see* Pa.R.E. 706, and to summon and question witnesses of its own accord, *see* Commonwealth v. DiPasquale, 230 A.2d 449, 450 (Pa. 1967), this matter is an appeal of the OOR's legal determinations based upon the factual record developed before it. The Borough's appeal of the OOR's ruling to this Court is a legal matter that does not require additional facts. It is not an opportunity for Respondent to use the Court's resources to conduct an investigation of additional issues that were not raised before the OOR. The motion is therefore denied.

CONCLUSION

Accordingly, we enter the attached Order: