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1-9-03

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RICHARD VIETH and NORMA JEAN VIETH,	:	
Plaintiffs	:	
v.	:	**NO. 3:CV-01-2439**
THE COMMONWEALTH OF PENNSYLVANIA, *et al.,*	:	**(JUDGES RAMBO NYGAARD & YOHN)**
Defendants	:	

EXECUTIVE OFFICERS' REPLY TO PLAINTIFFS' AND *AMICI'S* OPPOSITION TO SUMMARY JUDGMENT

Defendants Governor Schweiker, Secretary of the Commonwealth Weaver, and Commissioner Filling (the Executive Officers), through their undersigned counsel, hereby join in Lt. Governor Jubelirer and Speaker Ryan's (the Presiding Officers) Reply to Plaintiffs' and *Amici's* Opposition to Summary Judgment. The Executive Officers write separately to address one specific point.

THE MARCH 15th ORDER OF THE ARMSTRONG COUNTY COURT OF COMMON PLEAS WAS NOT A FINAL JUDGMENT.

Senator Mellow argues that the March 15th order of the Armstrong County Court of Common Pleas was a final order because no appeal was taken from it within 30 days. In reaching this conclusion Senator Mellow makes the same legal error that the Court of Common Pleas itself made misapplying principles of Pennsylvania law.

Senator Mellow asserts that 42 P.S. §5505 does not require that a judgment must result from a contested proceeding in order to be final. This assertion is incorrect. In fact, §5505 has been consistently interpreted to mean that a judgment entered in an adverse proceeding, *i.e.*, a contested case, becomes final if no appeal is filed within 30 days. *PHEAA v. Lal*, 714 A.2d 1116, 1118 (Pa. Cmwlth. 1998), *petition for allowance of appeal denied*, 559 Pa. 683, 739 A.2d 546 (1999). Pursuant to this interpretation, the Court of Common Pleas' order of March 15, 2002 is not a final judgment.

The Court of Common Pleas' order of March 15, 2002 was issued in response to a petition of the Board of Elections of Armstrong County (the Board). The finality of an order is a judicial conclusion that can be reached only after examination of its ramifications. *Flowers v. Flowers*, 417 Pa. Super. 528, 612 A.2d 1064, 1065 (1992). Among those ramifications is whether an appellant is out of court. *Id.* The March 15 order was not entered in an adverse or contested proceeding. A petitioner, the Board, simply asked the court, at a time and in a manner prohibited by statute, for an order altering the metes and bounds of two administrative election districts in the county; and the Court of Common Pleas granted that petition. That court's action did not produce any aggrieved party and, therefore, potential appellant, because there were no adverse parties.

A judgment entered in an adverse proceeding does become a final judgment if no appeal therefrom is filed within 30 days. *Simpson v. Allstate Insurance Co.*, 350 Pa. Super. 239, 504 A.2d 335, 337 (1986) (*en banc*).

Pennsylvania's courts have repeatedly held that recognizing judgments entered as final only if no appeal is taken serves a definite function. It establishes a point at which litigants, counsel, and courts may regard contested lawsuits as being at an end. *Simpson v. Allstate Insurance Co.*, 504 A.2d at 337; *Anderson v. Anderson*, 375 Pa. Super. 341, 544 A.2d 501, 504 (1988). There has been a decision following an examination of the critical issues through bilateral participation of the parties and no appeal. *Simpson v. Allstate Insurance Co.*, 504 A.2d at 337.

These factors are not present here. The March 15th order, like a judgment entered by confession or default, is not final. *Simpson v. Allstate Insurance Co.*, 504 A.2d at 337; *Orie v. Stone*, 411 Pa. Super. 481, 601 A.2d 1268, 1270 (1992), *appeal dismissed*, 533 Pa. 315, 622 A.2d 286 (1993).

Rather than address this consistent Pennsylvania case law, Senator Mellow cites to a series of decisions regarding the constitutionality of statutory forfeiture schemes. *United States v. Bajakajian*, 524 U.S. 321 (1998) (The theory behind such forfeitures is the fiction that the action was directed against the guilty property rather than against the offender himself. The proceeding *in rem* stands independent of and wholly unaffected by any criminal proceeding *in personam*); *Calero-Toledo v. Pierson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974) (The vessel was treated as the offender without regard to the owner's conduct. The proceeding *in rem* stands independent of and wholly unaffected by any criminal proceeding *in personam*); *United States v. The Antoinetta*, 153 F.3d 138, 143 (1946) (Concerning the seizure of eight Italian vessels seized and forfeited pursuant to the Trading with

the Enemy Act). This action does not involve the forfeiture of property and does not negate principles of Pennsylvania law.

Senator Mellow does cite to one state court decision, *In re: Deed of Trust of McGargo*, 483 Pa. Super. 570, 652 A.2d 1330 (1995), suggesting that that court held that the trial court could not amend a declaratory judgment because it was an *in rem* proceeding. In fact, as that court specifically pointed out, there were adverse parties presenting contested views of the legal issues. *Id.* at 1331-1332. The court also pointed out that in that action the trial court's subsequent order was entered after two appeals had been taken from the original order by those adverse parties. *Id.* at 1337. None of these factors are present in this action.

The Court of Common Pleas incorrectly held that its March 15th order became final on April 15th after no appeal was taken. In this instance there was no adverse party to take such an appeal and no final judgment. Senator Mellow makes the same error. Since the March 15th order is not a final judgment, it was entirely proper to apply to it the clarifying amendment to 25 P.S. §2746 from the date of its original enactment.

CONCLUSION

For the reasons set forth above and in the Executive Officers' Memorandum in Support of Summary Judgment, this Court should enter judgment in favor of the defendants and against plaintiff.

Respectfully submitted,

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DATED: January 9, 2003

CERTIFICATE OF SERVICE

I, **J. BART DeLONE,** Senior Deputy Attorney General for the Commonwealth of Pennsylvania, hereby certify that on January 9, 2003, I caused to be served a copy of the foregoing document entitled **Executive Officers' Reply to Plaintiffs' and *Amici's* Opposition to Summary Judgment,** upon the following:

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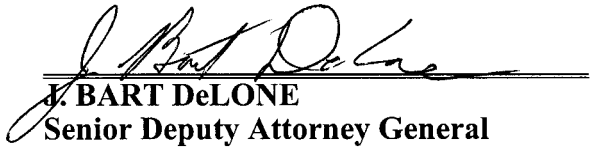

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