

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

Appeal No. 2021-P-1018

THOMAS CERRETANI,
Appellant,

v.

ANN C. MCNEFF, PERSONAL REPRESENTATIVE OF THE ESTATE
OF RALPH CERRETANI,
Appellee

On Appeal from a Judgment of the
Northeast Housing Court

BRIEF OF APPELLANT
THOMAS CERRETANI

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COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

Appeal No. 2021-P-1018

THOMAS CERRETANI,
Appellant,

v.

ANN C. MCNEFF, PERSONAL REPRESENTATIVE OF THE ESTATE
OF RALPH CERRETANI,
Appellee

I. STATEMENT OF THE ISSUES

1. Whether the Northeast Housing Court erred as a matter of law when it entered an order denying the Appellant's Motion to Pay Appeal Bond Late?

2. Whether the Northeast Housing Court erred as a matter of law when it entered an order granting the Appellee's Motion to Dismiss the appeal?

II. STATEMENT OF THE CASE

The Appellee, Ann C. McNeff, Personal Representative of the Estate of Ralph Cerretani ("Appellee") brought a summary process action against the Appellant, Thomas Cerretani ("Appellant") for possession of the property

located at 65 Forest Park Drive, Billerica, Massachusetts (the "Property") and obtained judgment for possession on May 17, 2021 ("May 17, 2021 Judgment"). The Appellant filed a Notice of Appeal of the May 17, 2021 Judgment. See Appendix p.79. On July 30, 2021, this Court ordered the Appellant to pay a bond of \$267.42 within six (6) days of the Order as a condition for entry in the Appeals Court. See Appendix p.81. The Appellant did not pay the bond within six days for excusable reason and filed a Motion to Pay Appeal Bond Late to allow the appeal bond to be paid immediately and for the appeal to proceed.

This appeal arises from an order entered by the Northeast Housing Court that denied the Appellant's Motion to Pay Appeal Bond Late and, in conjunction therewith, allowed the Appellee's cross Motion to Dismiss the Appeal, both entered on September 29, 2021. See Addendum, page 14-17. This appeal was docketed on November 12, 2021.

A. Statement of Facts

The Appellant and Ann C. McNeff, are the children of Ralph Cerretani ("Ralph"). See Appendix p.76. Ralph died on December 9, 2014 testate. Ralph owned the

Property at the time of his death. Ralph's will devised the Property to his three children (including the Appellant and Ann C. McNeff) as well as Ms. McNeff's spouse. Id. The Appellant resided in the Property both prior to and after Ralph's death and continues to reside there. The Appellant was never a tenant of the Property and neither Ralph nor his estate were a landlord to the Appellant.

Ann C. McNeff was appointed as the personal representative of Ralph's estate. The Appellee never filed a motion or any pleadings in the probate action to take the Property from the devisees in order to sell on behalf of the Estate to pay the Estate liabilities.

On or about November 24, 2020, the Appellee commenced a summary process action in the Northeast Housing Court, Docket Number 20H77SP001892. After a trial, judgment entered for possession to the Appellee. Id. The Appellant maintains he has a meritorious appeal as a devisee of the Property so filed a Notice of Appeal of this judgment. See Appendix p.79. On July 30, 2021, the Northeast Housing Court ordered the Appellant to pay a bond of \$267.42

within six (6) days of the Order as a condition for entry in the Appeals Court. See Appendix p.81. As the summary process action was not an action for non-payment of rent, the bond was only for the amount of the court costs awarded in the judgment. On the way to the court to pay the bond, the Appellant had car trouble and could not make it to the court. See transcript. The Appellant went the following day, but the court would not accept the bond since it was past the allotted six days and instructed the Appellant to just file a motion to pay the bond late and then they could accept it.

Accordingly, on August 16, 2021, the Appellant filed a motion to pay the bond late. See Appendix p.84. The Appellee opposed this motion and also filed a cross motion to dismiss the appeal See Appendix p.86 and p.92. The Appellant opposed the motion to dismiss. See Appendix p.94. On September 27, 2021, the Northeast Housing Court conducted a hearing on the two motions. On September 29, 2021, the Northeast Housing Court entered an order that denied the Appellant's Motion to Pay Appeal Bond Late and an order allowing the Appellee's Motion to Dismiss the Appeal. See Addendum, page 14-17. The Northeast Housing Court's order cites

that it has no authority to grant an extension of time to pay the statutorily required appeal bond and cited *Liberty Mobilehome Sales, Inc. v. Bernard*, 6 Mass. App. Ct. 914 (1978) in support thereof. See Addendum, page 14-17. These orders are the subject of this appeal. See Addendum, page 14-17.

III. SUMMARY OF ARGUMENT

The Northeast Housing Court had authority to extend the appeal bond payment timeframe and accept the Appellant's payment of the appeal bond after the expiration of six days.

IV. ARGUMENT

The Northeast Housing Court erred when it denied the Appellant's Motion to file the Appeal Bond Late and granted the Appellee's Motion to Dismiss the Appeal.

The Appellant was ready, willing and able to pay the appeal bond, but as a result of circumstances not within the Appellant's control, he was not able to pay the appeal bond within the court's calculated six days, so he filed a motion to allow the acceptance of the bond late, which the court wrongfully denied eliminating the Appellant's rights.

Case law supports that the Northeast Housing Court can accept the bond late if the Appellant has a meritorious defense. See Connolly v. Moore, 2000 Mass. App. Div. 294, 294 (2000). Here, the Appellant set forth a meritorious defense to the Northeast Housing Court, but this was disregarded. Instead, the Court cited the *Liberty Mobilehome Sales* case in support of its denial, which was erroneous.

The statute states that “[u]pon the rendering of a decision on review, the reviewing court shall give notice of the decision to the parties and the defendant shall comply with the requirements of the decision within 5 days after receiving notice thereof. If the defendant fails to file with the clerk of the court rendering the judgment, the amount of bond, deposit or periodic payment required by the decision of the reviewing court within 5 days **from receipt of notice of the decision**, the appeal from the judgment shall be dismissed.” G.L. c. 239 § 5 (h) (emphasis added). See Addendum, page 18. The Northeast Housing Court made no findings of when the order was received by the Appellant in order to even calculate the six days from receipt. Whether the bond was even late was never determined by the Court and the Appellant only

filed the motion the court advised he needed to in order for them to accept the bond. It was improper to dismiss the action without first making this determination if it was even late.

Furthermore, the Northeast Housing Court's reliance upon the *Liberty Mobilehome Sales* case is misguided. That case involved the dismissal of eviction appeals that were not filed within six days from the judgment as allowed by G.L. c. 239 § 5 and ruled that the Housing Court judge had no power to extend the time for filing either the appeals or the bonds required by that section. While the ruling includes the filing of the bond in the opinion, the case did not involve the payment of the bond. It is materially different than this matter. Here, the Appellant did file the notice of appeal timely, as well as the transcript. The only delay was in paying the appeal bond due to uncontrollable circumstances, which it is still unclear if it was even late when the Appellant went to pay it.

The Appellant cited the *Connolly* case in support of allowing his motion to accept the appeal bond late. See Connolly v. Moore, 2000 Mass. App. Div. 294

(2000). In that case, the Court cited that where the defendant has raised a meritorious defense and there is good cause for not perfecting the appeal, the Court has discretion to allow the bond. Id. Here, the Appellant has set forth sufficient evidence that he has a meritorious appeal being a devisee of Property he is being evicted from when the Estate had not filed any pleadings to take the Property to sell it to pay Estate liabilities. That appeal was not a delay tactic and is meritorious. Moreover, the Appellant represented that his car broke down on the way to the court to pay the bond so was not able to pay it until the following day, when the Court denied acceptance of it as a result of it allegedly being late.

In addition, at the motion hearing, the Appellee cited that the Appellant did not pay use and occupancy so it is further support for the appeal to be dismissed. The Court did not cite the use and occupancy payment as a basis in granting the Appellee's motion to dismiss. However, the Appellant pointed out that the use and occupancy was appealed and the order related thereto was just issued. The Appellant could still make the payment within the

thirty days without any basis to support dismissing the appeal.

V. CONCLUSION

Based on the foregoing, the Northeast Housing Court erred when it denied the Appellant's Motion to File the Appeal Bond Late and granted the Appellee's Motion to Dismiss the Appeal because it did not determine the date the Appellant received the order to pay bond and had authority to extend the time for the Appellant to pay the bond.

/s/ Nancy A. Morency

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Date: Dec. 17, 2021

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

NORTHEAST HOUSING COURT
DOCKET NO. 20H77SP001892

31

ANN C. MCNEFF, as Personal Representative,
Of the Estate of Ralph Cerretani
Plaintiff,

v.

THOMAS CERRETANI,
Defendant,

MOTION TO PAY APPEAL BOND LATE

NOW COMES the Defendant, Thomas Cerretani, and hereby respectfully requests that this Honorable Court accept payment of the appeal bond late. In support thereof, the Defendant states as follows:

1. On or about July 30, 2021 (sic), this Court ordered the Defendant to pay a bond of \$267.42 within six (6) days of the Order as a condition for entry in the Appeals Court.
2. The Defendant attempted to pay the bond, but it was considered too late when he presented payment to the court.
3. The Defendant is ready, willing and able to pay the appeal bond immediately.
4. The Defendant will be unfairly prejudiced if the appeal is not entered.
5. No party will be prejudiced by this request.

WHEREFORE, the Defendant respectfully requests that this Honorable Court order that the Defendant may pay the appeal bond late.

9/29/21 - Motion denied after hearing on 9/27/21. The Court has no authority to grant an extension of time to pay the Statutory - required appeal bond. See, e.g., Liberty Motors v. Sales, Inc. v. Bevard, 6 Mass. App. Ct. 914 (1997) ("Housing Court had no power to extend the time for the filing either of the appeals or the bonds required by G.L.C. 239, § 51.").

Not Judice

9/29/21 – Motion is denied after hearing on 9/27/21. The court has no authority to grant an extension of time to pay the statutorily required appeal bond. See, e.g., Liberty Motorhome Sales, Inc. v. Bernard, 6 Mass. App. Ct. 914 (1978 (“Housing Court had no power to extend the time for the filing either of the appeal or the bonds required by [G.L. c. 239, § 5]”). Gustavo Del Puerto, First Justice

Date Filed: 9/15/2021 6:37 PM
Housing - Northeast
Docket Number: 20H77SP001892

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

NORTHEAST HOUSING COURT
LOWELL DIVISION
Docket No.: 20H77SP001892

ANN C. MCNEFF, as Personal Representative of
the Estate of Ralph Cerretani,
Plaintiff,

v.

THOMAS CERRETANI
Defendant.

MOTION TO DISMISS APPEAL

NOW COMES the Plaintiff, Ann C. McNeff, as Personal Representative of the Estate of Ralph Thomas Cerretani, and hereby submits this Motion to Dismiss Appeal for Defendant's failure to pay the appeal bond.

In support thereof, the Plaintiff incorporates herein by reference her Opposition to Defendant's Motion to Pay Appeal Bond Late, along with the attached, Affidavit of Ann C. McNeff. In short, Plaintiff asserts that Defendant should not be granted leave to pay the appeal bond late because payment of the appeal bond and ongoing use and occupancy are substantive conditions for bringing an appeal, the deadline cannot be enlarged, and the deadline has already passed. Therefore, the appeal must be dismissed.

WHEREFORE, the Plaintiff respectfully requests that this Honorable Court deny Defendant's Motion to Pay Appeal Bond Late, dismiss Defendant's appeal, and award Plaintiff reasonable counsel fees.

9/29/21 - Motion is allowed after hearing on 9/27/21, as Defendant failed to pay the appeal bond as ordered, and did not pay use and occupancy as required. Sent to Justice.

9/29/21 – Motion is allowed after hearing on 9/27/21, as Defendant failed to pay the appeal bond as ordered, and did not pay use and occupancy as required. Gustavo Del Puerto, First Justice

ALM GL ch. 239, § 5

Current through Chapter 90 of the 2021 Legislative Session of the 192nd General Court.

Annotated Laws of Massachusetts > PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES (Chs. 211 - 262) > TITLE III REMEDIES RELATING TO REAL PROPERTY (Chs. 237 - 245) > TITLE III REMEDIES RELATING TO REAL PROPERTY (Chs. 237 — 245) > Chapter 239 Summary Process for Possession of Land (§§ 1 — 14)

§ 5. Appeal — Bond.

(a) If either party appeals from a judgment of the superior court, a housing court, or a district court in an action under this chapter, including a judgment on a counterclaim, that party shall file a notice of appeal with the court within 10 days after the entry of the judgment. An execution upon a judgment rendered pursuant to section 3 shall not issue until the expiration of 10 days after the entry of the judgment.

(b) In an appeal of a judgment of a district court, other than an appeal governed by subsection (c), the appellant shall, before any appeal under this section is allowed, file in the district court a bond payable to the appellee in the penal sum of \$100, with surety or sureties as approved by the court, or secured by cash or its equivalent deposited with the clerk, conditioned to satisfy any judgment for costs which may be entered against the appellant in the appellate division within 30 days after the entry thereof.

(c) Except as provided in section 6, the defendant shall, before any appeal under this section is allowed from a judgment of the superior court, a housing court, or a district court, rendered for the plaintiff for the possession of the land or tenements demanded in a case in which the plaintiff continues at the time of establishment of bond to seek to recover possession, give bond in a sum as the court orders, payable to the plaintiff, with sufficient surety or sureties approved by the court, or secured by cash or its equivalent deposited with the clerk, in a reasonable amount to be fixed by the court. In an appeal from a judgment of a district court the bond shall be conditioned to enter the action in the appellate division at the return day next after the appeal is taken. In an appeal from a judgment of the superior court or a housing court the bond filed shall be conditioned to enter the action in the appeals court. Appeals from judgments of the superior court or a housing court shall otherwise be governed by the Massachusetts Rules of Appellate Procedure. The bond shall also be conditioned to pay to the plaintiff, if final judgment is in plaintiff's favor, all rent accrued at the date of the bond, all intervening rent, and all damage and loss which

ALM GL ch. 239, § 5

the plaintiff may sustain by the withholding of possession of the land or tenements demanded and by any injury done thereto during the withholding, with all costs, until delivery of possession thereof to the plaintiff.

(d) In appeals from a judgment of the superior court, a housing court or a district court the deposit shall not be transmitted to the appeals court or the appellate division unless specifically requested by said appeals court or appellate division. The superior court, a housing court or a district court may give directions as to the manner of keeping the deposit. Upon final judgment for the plaintiff, all money then due to him may be recovered in an action on the bond provided for in the third paragraph of this section.

(e) A party may make a motion to waive the appeal bond provided for in this section if the party is indigent as provided in section 27A of chapter 261. The motion shall, together with a notice of appeal and any supporting affidavits, be filed within the time limits set forth in this section. The court shall waive the requirement of the bond or security if it is satisfied that the person requesting the waiver has any defense which is not frivolous and is indigent as provided in said section 27A of said chapter 261. The court shall require any person for whom the bond or security provided for in subsection (c) has been waived to pay in installments as the same becomes due, pending appeal, all or any portion of any rent which shall become due after the date of the waiver. A court shall not require the person to make any other payments or deposits. The court shall forthwith make a decision on the motion. If the motion is made, no execution shall issue until the expiration of 6 days from the court's decision on the motion or until the expiration of the time specified in this section for the taking of appeals, whichever is later.

(f) Any party aggrieved by the denial of a motion to waive the bond or who wishes to contest the amount of periodic payments required by the court may seek review of the decision as hereinafter provided. If the motion was made in the superior court or a housing court, the request for review shall be to the single justice of the appeals court at the next sitting thereof. If the motion was made in any district or municipal court, the request for review shall be to the appellate division then sitting pursuant to section 108 of chapter 231. The court receiving the request shall review the findings, the amount of bond or deposit, if any, and the amount of periodic payment required, if any, as if it were initially deciding the matter, and the court may withdraw or amend any finding or reduce or rescind any amount of bond, deposit or periodic payment when in its judgment the facts so warrant.

(g) Any party to the action may file a request for the review with the clerk of the court originally hearing the request to waive bond within the time period provided in this section for filing notice of appeal, or within 6 days after receiving notice of the decision of the court on the motion to waive bond, whichever is the later. The court shall then forward the motion, the court's findings and any other documents

ALM GL ch. 239, § 5

relevant to the appeal to the clerk of the court reviewing the decision which, upon receipt thereof, shall schedule a speedy hearing thereon and send notice thereof to the parties. Any request for review filed pursuant to this section shall be heard upon statements of counsel, memoranda and affidavits submitted by the parties. Further testimony shall be taken if the reviewing court shall find that the taking of further testimony would aid the disposition of the review.

(h) Upon the rendering of a decision on review, the reviewing court shall give notice of the decision to the parties and the defendant shall comply with the requirements of the decision within 5 days after receiving notice thereof. If the defendant fails to file with the clerk of the court rendering the judgment, the amount of bond, deposit or periodic payment required by the decision of the reviewing court within 5 days from receipt of notice of the decision, the appeal from the judgment shall be dismissed. Where a defendant seeks review pursuant to this section, no execution shall issue until the expiration of 5 days from the date defendant has received notice of the decision of the reviewing court.

History

1783, 42, § 2; 1825, 89, § 2; RS 1836, 104, § 10; 1848, 142, § 1; GS 1860, 137, § 9; 1871, 315, § 2; 1874, 271, § 8; PS 1882, 175, § 6; 1885, 384, § 5; 1888, 325, § 1; RL 1902, 181, § 6; 1917, 326; 1946, 175 § 1; 1969, 366; 1971, 347, § 1; 1975, 667, § 3; 1977, 655, § 1; 1982, 304, § 3; 1985, 754; 2004, 252, § 19, approved Aug 4, 2004, effective Aug 9, 2004.

Annotated Laws of Massachusetts

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Certificate of Compliance Pursuant to Rule 16(K) of
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I, Nancy A. Morency, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision);

Mass. R. A. P. 16(e) (references to the record);

Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations);

Mass. R. A. P. 16(h) (length of briefs);

Mass. R. A. P. 18 (appendix to the briefs); and

Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

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CERTIFICATE OF SERVICE

I, Nancy A. Morency, hereby certify that on the 17th day of December, 2021, I served a true and accurate copy of the Appellant's Brief by electronic service to the following:

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SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS
17th DAY OF December 2021.

/s/ Nancy A. Morency
Nancy A. Morency, Esq.