

2015 WL 3757383 (Mass.App.Ct.) (Appellate Brief)
Appeals Court Of Massachusetts.

SOUTH BOSTON **ELDERLY** RESIDENCES, INC., Plaintiff/Appellee,
v.
Gerald MOYNAHAN, Defendant/Appellant.

No. 2015-P-0319.
May 22, 2015.

On Appeal from a Judgment of the Housing Court, Boston Division

Brief of the Defendant/Appellant Gerald Moynahan

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***1 ISSUE PRESENTED FOR REVIEW**

Whether the Trial Court erred in dismissing the defendant's appeal.

STATEMENT OF THE CASE

This is a summary process case entered on 4 February 2013 (A.2). The defendant filed Answer and Counterclaims (A.2). After jury-waived trial on three separate dates in April and May 2013 (A.1, 5), the Court made findings and entered judgment (A.3), from which the defendant tenant appealed (A.3). The defendant ordered a recording of the trial (A.4) and ordered a transcript. The transcript was received by defendant's counsel in February 2014 (A.6, 10), but was not filed with the Court until 15 December 2014 (A.6). Following the filing of the transcript, plaintiff-appellee moved to dismiss the appeal (A.5-12), which was allowed (A.23). From the allowance of the dismissal of his appeal, defendant-appellant brings this appeal.

STATEMENT OF FACTS

Defendant is a tenant in an **elderly** housing complex in South Boston. During his tenancy, he had *2 certain problems with his apartment that were the subject of counterclaims in this action (A.5), but are not part of the present record.¹ After the landlord brought this summary process action and a jury-waived trial (A.1, 5), the Housing Court found for the landlord on most of Mr. Moynahan's counterclaims (A.5), and he appealed².

The transcriber sent the transcript directly to co-counsel and refused to file the transcript with the Court (A.19). After some discussion, lead counsel and co-counsel³ (who was dealing with the transcript) decided to file the transcript themselves (A.19-20). However, at that point the undersigned lead counsel was about to undergo spine surgery and expected to be absent from his office for an extended time. In order to avoid further events in the appeal occurring while he was *3 away, it was decided to postpone filing the transcript until he had returned (A.20). The transcript was filed on 12 December 2014 (A.12) and docketed on 15 December (A.4), promptly on counsel's return full-time⁴.

ARGUMENT

THE TRIAL COURT ERRED IN DISMISSING THE DEFENDANT'S APPEAL

In this case, plaintiff moved to dismiss the defendant's appeal based on the late filing of the transcript by the defendant.

Although the Rules of Court require the transcriber to file the original transcript with the Court⁵, the transcriber failed to deliver the original transcript to the Court and instead provided it to *4 defendant's Co-counsel in February 2014 (A.10, 19-20). Some discussion ensued with the transcriber, and co-counsel sent the transcript to the Court on 12 December 2014 (A.12, 19-20).

Mass. R.A.P. 10(c) provides:

(c) Dismissal for Failure of Appellant in a Civil Case to Comply With Rule 9(c) or Rule 10(a). If any appellant in a civil case shall fail to comply with Rule 9(c) or Rule 10(a)(1) or (3), the lower court may, on motion with notice by any appellee, dismiss the appeal, but only upon a finding of inexcusable **neglect**; otherwise, the court shall enlarge the appellant's time for taking the required action. *If, prior to the lower court's hearing such motion for noncompliance with Rule 9(c), the appellant shall have cured the noncompliance, the appellant's compliance shall be deemed timely. (emphasis added)*

In the instant case, the delivery of the original Transcript to the Court was completed prior to plaintiff's Motion to Dismiss Appeal. Any noncompliance with the Rules was therefore cured not only prior to the hearing, but prior to the filing of the Motion.

In *Points East, Inc. v. City Council of Gloucester*, 15 Mass. App. Ct. 722 (1983), the Appeals Court upheld the dismissal of an appeal where the appellant had not cured their noncompliance with the *5 rules prior to the hearing. The court noted that the 1979 amendment to Rule 10, adding the sentence regarding cure, was "designed to blunt the bite of the rules so as to prevent them from inflicting fatal wounds for procedural missteps, but not to pull the teeth altogether." *Id.* at 725.

In the instant case, the transcript had been filed before plaintiff even filed the motion. This is in stark contrast to the appellant in *Points East*, who had failed to order a transcript or state that they had no intention of doing so until after the motion hearing. Noting that Rule 10 specifically allows appellants to cure any missteps in the appeal prior to a hearing, the court noted that

“it would have been a simple matter for the appellants to have cured their noncompliance by ordering a transcript, or, if they intended to raise no issues requiring a transcript of the evidence, to say so.” *Id.* at 724. Instead, the appellant chose “not to avail himself of the rescue apparatus in the last sentence of [rule 10\(c\)](#).” *Id.* at 725.

See also *Gilmore v. Gilmore*, 369 Mass. 598, 602-03 (1976) (where court declined to dismiss appeal based on *6 delay in assembling the record); *Mailer v. Mailer*, 387 Mass. 401 (1982) (where court declined to dismiss appeal because court had trial transcript in hand at the time of the motion to dismiss hearing, and thus no delay or prejudice present).

In the instant case, the trial court judge first told plaintiff's counsel that he lacked the power to dismiss the appeal because of the last sentence in [Rule 10\(c\)](#). Then, upon hearing the defendant's counsel's explanation for the delay, the judge reversed himself. Although the last sentence of [Rule 10\(c\)](#) is independent of the reason for the delay, the judge dismissed the appeal because he didn't like the reason.

In the instant case, after an earlier delay due largely to the transcriber's refusal to file the transcript as required by the rules, the undersigned counsel, facing major surgery and expecting to be away from his office for an extended period of time, decided that the transcript should be filed after he returned, in order to avoid events taking place in the appeal while he was away and unable to attend to them. Apparently, if counsel had simply been asleep at the switch and had *7 filed the transcript immediately upon receipt of plaintiff's motion, the motion to dismiss would have been denied. But the judge deemed unacceptable counsel's responsible attempt to prevent events in the appeal from occurring when he expected to be recovering from surgery and unable to deal with them. As lawyers do, Counsel read the rule and complied with it, and did so in a way as to achieve a desired result⁶. Plaintiff could have frustrated that purpose at any time by filing its motion prior to defendant's filing of the transcript, but did not. Plaintiff only filed the motion after any noncompliance had been cured. Attorneys are entitled to rely on the rules as written. If there are to be any exceptions, they should be specified in the rule, as in the 1994 amendment to [Rule 10\(c\)](#), supra n.6, and not derive from one judge's displeasure.

Typically courts are reluctant to dismiss appeals. *8 As the court observed in *Points East* at 724, “In recognition of the severity and finality of a dismissal of an appeal, the decisional law has tempered justice with mercy and accorded to appellants considerable leeway in repairing the consequences of their procedural errors.”

CONCLUSION

For the reasons stated, the dismissal of the appeal should be reversed and the case remanded to the trial court for assembly of the record.

Footnotes

- 1 Issues included severe water leaks and were the subject of city inspections and rent-withholding claims.
- 2 Defendant paid into court the amount ordered pursuant to [G.L. c.239, §8A](#) (A.3, 18) to prevent entry of judgment for possession and resumed paying rent, since the conditions had by that time been repaired (A. 18, 19).
- 3 The court docket does not appear to reflect the appearance at trial of co-counsel for defendant, attorney Ellen Rappaport Tanowitz.
- 4 Although not in the record, it may be helpful to state that Counsel underwent surgery on 9 September 2014 and was in the office for the first time on 29 October 2014, mainly to read mail and pay bills. Counsel came in once or twice a week during November for similar purposes and returned to full-time practice at the beginning of December.
- 5 [Mass. R.A.P. 8\(b\)\(3\)\(iv\)](#) provides:
(iv) Duties of the Transcriber. The transcriber shall prepare an original typed transcript of the designated portions and the requested number of copies, in accordance with the designations, and shall deliver said original to the clerk, with the following certificate of accuracy: ...

- 6 Apparently the undersigned was not the first counsel to do so with respect to [Rule 10\(c\)](#). The 1994 amend-ment to [Rule 10\(c\)](#) was occasioned by many attorneys and pro se litigants believing that they could delay paying the docket fee until receipt of a Motion to dismiss appeal. [Mass. R.A.P. 10\(c\)](#) Reporter's Notes to 1994 Amendment.

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