

**COMMONWEALTH OF MASSACHUSETTS
APPELLATE DIVISION OF THE DISTRICT COURT DEPARTMENT**

BOSTONIA NOMINEE TRUST

APPELLATE DIVISION Southern District

NO. 19-ADSP-2050

vs.

TRIAL COURT Stoughton Division

FRIENDS OF THE STATE THEATRE

DOCKET NO. 1855SU0119

DECISION AND ORDER

This cause was before the Appellate Division for the Southern District. It is hereby ordered that the Clerk of the Trial Court make the following entry on the docket of this case:

The trial court's order granting the defendant an extension of time for filing a notice of appeal is reversed, and the defendant's appeal is dismissed.

Opinion filed herewith.

Date: Nov 14, 2019

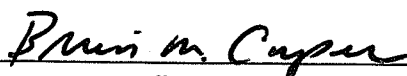
A true copy. Attest

HON. KEVIN J. FINNERTY

Justice

HON. PAUL G. PINO

Justice



Appellate Division Clerk

HON. CATHLEEN E. CAMPBELL

Justice

COMMONWEALTH OF MASSACHUSETTS
APPELLATE DIVISION OF THE DISTRICT COURT DEPARTMENT
SOUTHERN DISTRICT

BOSTONIA NOMINEE TRUST

V.

FRIENDS OF THE STATE THEATRE

NO. 19-ADSP-20SO

In the STOUGHTON DIVISION:

Justice: O'Malley, J.
Docket No. 1855SU0119
Date of Decision Appealed: December 11, 2018
Date of Entry in the Appellate Division: February 26, 2019

In the APPELLATE DIVISION:

Justices: Finnerty, P.J., Pino & Campbell, JJ.
Sitting in: Plymouth, Massachusetts
Date of Hearing: May 3, 2019
Date Opinion Certified: November 14, 2019

COUNSEL FOR PLAINTIFF

John A. Mangones, Esq.
Godbout Law, PLLC
33 Broad Street, 11th Floor
Boston, MA 02109

COUNSEL FOR DEFENDANT

David M. Asack, Esq.
95 West Elm Street
Brockton, MA 02301

OPINION

CAMPBELL, J. As framed by the parties, the sole issue before this Appellate Division is whether a trial court order granting Friends of the State Theatre more than 180 days after the entry of

judgment to file a notice of appeal was erroneous. As the filing of a notice of appeal more than 180 days after the entry of the judgment from which the appeal is sought contravenes Dist./Mun. Cts. R. A. D. A. 14(b), such an order was in error. For the reasons we explain below, the trial court's order extending the period of time for the filing of a notice of appeal is reversed. The appeal by Friends of the State Theatre is dismissed.

On April 17, 2018, the plaintiff, Bostonia Nominee Trust ("Bostonia"), filed a summary process action seeking possession from the defendant, Friends of the State Theatre ("Theatre"). A bench trial was held on April 26, 2018. On May 18, 2018, judgment entered on behalf of Bostonia for possession.

On June 7, 2018, Theatre filed a motion for a new trial, pursuant to Mass. R. Civ. P. 59, and a motion for relief from judgment, pursuant to Mass. R. Civ. P. 60. On August 1, 2018, these posttrial motions were denied.

On August 14, 2018, Theatre filed a notice of appeal. The notice of appeal was not recorded or docketed. That notice of appeal states in relevant part, "The Defendant [Theatre] hereby appeals from the Judgment of this Court entered on May 18, 2018."¹

On August 22, 2018, Theatre filed a motion seeking permission to file a late notice of appeal. On September 6, 2018, the trial court conducted a hearing on the motion. At that hearing, over the objection of Bostonia, the court allowed the motion.

At that hearing, just after the trial court indicated it would allow a late filing of a notice of appeal, the following colloquy occurred:

"The Court: I'm going to allow the motion over your objection.

"Mr. Asack: Thank you, Your Honor. I filed the appeal on Tuesday [August 14, 2018].
If I could withdraw that and refile and I think there's a check attached to it.

1

At oral argument, the parties agreed that pursuant to Dist./Mun. Cts. R. A. D. A. 4(a), Theatre could file a notice of appeal within ten days of the denial of its posttrial motions. It did not do so.

“The Court: What’s that?”

“The Clerk: He’s going to amend his notice of appeal, Your Honor, so that --

“The Court: For that one day inconsistency that you just said?”

“Mr. Asack: *No, he’s talking about the actual notice of appeal. I have to make a determination of which court I wanted to appeal and the ABC things.*”

“The Court: Oh that. Yeah, whatever --

“Mr. Asack: *I’ll do that.*”²

“The Court: -- the Appellate Division -- sure” (emphasis added).

On November 27, 2018, a notice of appeal not having been filed and docketed, Bostonia filed a motion to dismiss the appeal and to reissue the execution. On December 11, 2018, the trial court ordered Theatre to file a notice of appeal before January 4, 2019. It further ordered that an execution would issue on behalf of Bostonia on January 7, 2019 (if the notice of appeal was not filed).³

On December 24, 2018, Bostonia filed a notice of expedited appeal to the Appellate Division seeking relief from the trial court’s December 11, 2018 order.⁴

Rule 14(b) of the Dist./Mun. Cts. R. A. D. A. governs the computation and extension of time for the filing of an appeal. It states:

“The trial court or Appellate Division for good cause shown may upon motion enlarge

2

It is clear the judge and counsel for Theatre are having a discussion regarding the filing of a notice of appeal and Theatre’s obligation to select timely a method of appeal as required by Rule 8A, Rule 8B, or Rule 8C of the Dist./Mun. Cts. R. A. D. A. See *Citibank (S.D.), N.A. v. Surabian*, 2013 Mass. App. Div. 45, 47. A timely selection of a method of appeal was never made in this case. This also can be grounds for dismissal of an appeal. See *Signature Flight Support Corp. v. Global NAPs Realty, Inc.*, 2005 Mass. App. Div. 24, 27-28 (by failing to perfect its appeal by timely selecting method of appeal under Rule 8A, Rule 8B, or Rule 8C, party forfeited its right to appellate review).

3

In its decision, the court recognized, “As noted by the plaintiff in its memoranda, *no appeal is currently on file in connection with this matter*” (emphasis added).

4

Friends of the State Theatre filed a notice of appeal on December 26, 2018. The appeal is from the court’s judgment of May 18, 2018.

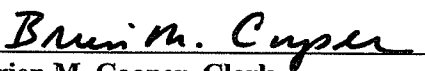
the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; *but the time for filing a notice of appeal may not be enlarged beyond 180 days from the date of entry of the judgment or order sought to be reviewed*" (emphasis added).

The date of the entry of judgment in favor of Bostonia was May 18, 2018. Theatre did not file a notice of appeal from that entry of judgment until December 26, 2018.

More than 180 days passed between the entry of judgment in favor of Bostonia and the filing and docketing of a notice of appeal by Theatre. Pursuant to Rule 14(b), neither the trial court nor the Appellate Division have the ability to expand the period for the timely filing a notice of appeal beyond the 180-day limit.⁵ See *Fannie Mae v. Higgins*, 2017 Mass. App. Div. 169, 169-170 (trial court properly denied defendant's motion to file late notice of appeal where it was outside the 180-day time limit permitted by Rule 14(b)). As such, the trial court's order granting Theatre until January 4, 2019 to file a notice of appeal was erroneous. It is reversed. Additionally, the appeal of Theatre is dismissed.

HON. KEVIN J. FINNERTY, Presiding Justice
HON. PAUL G. PINO, Justice
HON. CATHLEEN E. CAMPBELL, Justice

**This certifies that this is the Opinion
of the Appellate Division in this case.
A True Copy, Attest:**


Brien M. Cooper, Clerk

Although neither motion appears in the expedited appeal, Theatre in its brief argues that it filed on May 25, 2018, or seven days after entry of judgment on May 18, 2018, a motion for new trial under Mass. R. Civ. P. 59 and a motion for relief from judgment under Rule 60. Theatre argues that these motions tolled its obligation to file a notice of appeal from the judgment until after the court's disposition of these motions. As the court denied the motions on August 1, 2018, Theatre argues that it did not exceed the 180-day limit for filing a notice of appeal because the court extended the filing window only from August 13, 2018 to August 14, 2018 and that Theatre did not later withdraw this notice of appeal. Putting aside that the court found that no notice of appeal had been filed by December 11, 2018, see note 3, *supra*, even if we assume that Theatre effectively tolled the clock to file a notice of appeal, see *Dist./Mun. Cts. R. A. D. A. 4(a); Manzano v. McCann*, 401 Mass. 880, 881-882 (1988), we note the trial court was without authority to extend the ten-day window for Theatre's appeal of the judgment following entry of the court's decision on the postjudgment motions, whether to August 14, 2018 or January 4, 2019. See *Nationstar Mtg. LLC v. Culhane*, No. 16-P-1723 (Mass. App. Ct. Jan. 10, 2018) (unpublished Rule 1:28 decision) (collecting cases and discussing appellate courts' consistent and strict adherence to ten-day appeal deadline in G.L. c. 239, § 5, which is jurisdictional and cannot be extended).