

**COURT OF COMMON PLEAS  
FOR THE STATE OF DELAWARE  
KENT COUNTY COURTHOUSE  
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**ANNE HARTNETT REIGLE  
JUDGE**

January 29, 2014

James D. Nutter, Esquire  
Parkowski, Guerke & Swayze, P.A.  
16 S. Front Street  
Georgetown, DE 19947  
Attorney for Defendant Below – Appellee

Mr. Robert Malinowski  
98 Eastmoor Circle  
Smyrna, DE 19977  
Pro Se Plaintiff Below – Appellant

RE: Robert Malinowksi v. Pulte Group Incorporated  
C.A. No. CPU5-13-001077

Dear Mr. Nutter and Mr. Malinowski,

On October 2, 2013, Plaintiff Below/Appellant, Robert Malinowski, timely filed a Notice of Appeal and Complaint appealing an order issued by the Justice of the Peace Court dismissing his case against Defendant Below/Appellee, Pulte Group Incorporated (“Pulte Group”). On November 7, 2013, Pulte Group filed an Answer and Affirmative Defenses denying all of Mr. Malinowski’s averments made in the Complaint. On November 21, 2013, through counsel, Pulte Group filed the present Motion to Dismiss. On December 27, 2013, Mr. Malinowski filed a response confirming the allegations set out in the Complaint. This is the Court’s decision on the motion.

Pulte Group argues this case should be dismissed for Mr. Malinowski’s failure to comply with the mirror image rule and the procedure for perfecting an appeal pursuant to Court of Common Pleas Civil Rule 72.3(e). Pulte Group alleges that Mr. Malinowski’s Complaint on appeal discusses issues not considered by the Justice of the Peace Court. Pulte Group also alleges that Mr. Malinowski’s failure to file a certified copy of the record below prevents this Court from asserting jurisdiction over the appeal.

Court of Common Pleas Civil Rule 72.3 sets forth the requirements for an appeal *de novo* to this Court. Rule 72.3(f) provides that “[a]n appeal to this Court that fails to join the identical parties and raise the same issues that were before the Court below shall result in a dismissal on jurisdictional grounds.” CT. COM. PL. CIV. R. 72.3(f); *Four Corners Fin. Grp. v. Augeley*, 2011 WL 3655149, at \*5 (Del. Com. Pl. Aug. 3, 2011). A civil action is considered transferred to the jurisdiction of the Court of Common Pleas from the Justice of the Peace Court upon the clerk’s acceptance of the filing and notation that the case is on appeal. CT. COM. PL. CIV. R. 72.3(d), (f). The mirror image rule “prevent[s] this [C]ourt from acquiring subject matter jurisdiction over an appeal *de novo* from the Justice of the Peace Court, unless the appeal from the court below contains the identical: 1) parties, 2) character or right in which the parties are sued, and 3) cause and form of action.” *Four Corners Fin. Grp.*, 2011 WL 3655149, at \*5 (internal quotation marks omitted) (citing *Levy’s Loan Office v. Folks*, 2009 WL 1856642, at \*1 (Del. Com. Pl. June 26, 2009)).

An appeal from the Justice of the Peace Court is commenced by the appellant filing a notice of appeal with this Court “within 15 days from the entry of the final judgment, order, or disposition from which an appeal is permitted by law.” CT. COM. PL. CIV. R. 72.3(b). The complaint shall be filed with the notice of appeal by the appellant when the appellant is the plaintiff below. CT. COM. PL. CIV. R. 72.3(b). The complaint shall be filed by the appellee within 20 days of his receipt of the notice of appeal when the appellee is the plaintiff below. If the appellant wishes to stay the record below, the appellant shall file a notice of appeal with the Justice of the Peace Court within 10 days of the notice of appeal. CT. COM. PL. CIV. R. 72.3(f).

In the present case, Pulte Group contends that the appeal should be dismissed for Mr. Malinowski’s failure to comply with the mirror image rule. Pulte Group asserts that Mr. Malinowski’s Complaint on appeal discusses the “parties’ prior attempts to reach a settlement,” an issue not addressed by the court below. The Court disagrees. Mr. Malinowski’s Complaint does make reference to a “settlement.” However, the “settlement” discussed by Mr. Malinowski refers to the purchase of his home, not settlement negotiations with Pulte Group in this dispute. The order issued by the Justice of the Peace Court explicitly discussed Mr. Malinowski’s settlement on his home. Therefore, Mr. Malinowski did not violate the mirror image rule.

Pulte Group also contends that Mr. Malinowski violated Rule 72.3(e) by not filing a certified copy of the record below within 10 days of the filing of the notice of appeal. Pulte Group’s argument stems from a prior version of Rule 72.3 which stated “[t]he appellant shall file a certified copy of the record of the proceedings below, not including the evidence, within 10 days of the filing of the notice of appeal. Process shall not issue until the appellant has filed the

record.” CT. COM. PL. CIV. R. 72.3(b) (2006). The current version of Rule 72.3 states “[t]he appellant shall, within 10 calendar days, file a notice of appeal with the Justice of the Peace Court to stay the record.” CT. COM. PL. CIV. R. 72.3(e).

First, failure to comply with the 10 day rule is not a jurisdictional bar under either version of Rule 72.3. *Bloom v. Turner*, 2006 WL 758461, at \*2 (Del. Com. Pl. Feb. 23, 2006). Second, the primary objective of the current Rule 72.3(e) is to “stay execution or other proceedings” in the lower court. CT. COM. PL. CIV. R. 72.3(e). Even if one were to interpret the current version of Rule 72.3(f) as relating to issuance of process, the functional purpose of the rule would be to electronically serve Pulte Group’s attorney of record with the notice of appeal. *Hall v. Sussex Pines Country Club, Inc.*, 2013 WL 1094984, at \*1 (Mar. 7, 2013). In this case, Mr. Malinowski’s Notice of Appeal was served on Pulte Group through Pulte Group’s attorney of record. Therefore, the purpose of the rule was satisfied.

The Court has carefully considered Pulte Group’s Motion to Dismiss and Mr. Malinowski’s response. The Court concludes that Pulte Group’s Motion to Dismiss is DENIED. IT IS SO ORDERED.

Sincerely,



Anne Harnett Reigle