

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

MARY SUE DiFEBO, )  
 )  
 Appellant, )  
 )  
 ) C.A. No. N14A-11-006 FWW  
 v. )  
 )  
 BOARD OF ADJUSTMENT OF NEW )  
 CASTLE COUNTY, RICHARD PAVERD, )  
 BRIDGET PAVERD, BRUCE OSBORNE, )  
 CYNTHIA OSBORNE, and RAMESH )  
 BATTA, )  
 )  
 Appellees. )

Submitted: March 11, 2015  
Decided: April 17, 2015

Upon Appellee Ramesh Batta's Corrected Motion to Dismiss  
**GRANTED.**

**OPINION AND ORDER**

Lisa C. McLaughlin, Esquire and Aaron C. Baker, Esquire, Phillips, Goldman & Spence, P.A., 1200 N. Broom St., Wilmington, Delaware, 19806, Attorneys for Appellant.

Richard L. Abbott, Esquire, Abbott Law Firm LLC, 724 Yorklyn Rd., Suite 240, Hockessin, Delaware 19707, Attorney for Appellees.

Darryl A. Parson, Esquire, Julie M. Sebring, Esquire and Wilson B. Davis, Esquire, New Castle County Office of Law, New Castle County Government Center, 87 Reads Way, New Castle, Delaware 19720, Attorney for the Board of Adjustment of New Castle County.

**WHARTON, J.**

## I. INTRODUCTION

Appellee, Ramesh Batta (“Appellee Batta”), filed a Corrected Motion to Dismiss (“Motion to Dismiss”) in response to Appellant Mary Sue DiFebo’s (“Appellant”) Notice of Appeal and First Amended Notice of Appeal or Petition in *Certiorari* (“Amended Petition”) challenging the Board of Adjustment of New Castle County’s (“Board”) decision. Appellee Batta contends that the Notice of Appeal is procedurally defective and that the Amended Petition is time-barred under 9 *Del. C.* § 1314. The Court finds that the Amended Petition is untimely pursuant to 9 *Del. C.* § 1314. Therefore, Appellee Batta’s Motion to Dismiss is **GRANTED** and Appellee’s First Amended Notice of Appeal or Petition in *Certiorari* is **DISMISSED**.

## II. FACTUAL AND PROCEDURAL CONTEXT

On November 17, 2014, Appellant filed a Notice of Appeal<sup>1</sup> challenging the Board’s October 20, 2014 decision. On February 3, 2015, Appellee Batta filed a Motion to Dismiss<sup>2</sup> alleging, *inter alia*, that Appellant’s action was incorrectly initiated as an appeal rather than as a petition for writ of *certiorari* and that Appellant failed to join the record owners of the property to the action.

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<sup>1</sup> D.I. 1.

<sup>2</sup> D.I. 15.

In response to the Motion to Dismiss, on February 5, 2015, Appellant filed the Amended Petition<sup>3</sup> and named the record property owners in the caption. Appellee Batta filed a Motion to Strike First Amended Notice of Appeal (“Motion to Strike”)<sup>4</sup> on February 10, 2015. The Court heard oral argument on the Motion to Dismiss and Motion to Strike on March 11, 2015 and denied Appellee Batta’s Motion to Strike.<sup>5</sup> Thereafter, the parties agreed on the record that Appellee Batta’s Motion to Dismiss applied to the Amended Petition and requested that the Court resolve the Motion on the merits.

### **III. THE PARTIES’ CONTENTIONS**

Appellee Batta asserts that 9 *Del. C.* § 1314 provides that a petition for writ of *certiorari* is the appropriate procedural context through which to challenge a Board decision. Appellee Batta argues that the Amended Petition is deficient in the following ways: 1) the Amended Petition is time-barred because it was filed more than 30 days after the Board filed its decision;<sup>6</sup> 2) Appellant failed to join indispensable parties by the 30-day statutory deadline;<sup>7</sup> and 3) the Amended Petition fails to specify any alleged illegality in the Board’s decision.<sup>8</sup>

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<sup>3</sup> D.I. 16.

<sup>4</sup> D.I. 17.

<sup>5</sup> D.I. 29.

<sup>6</sup> Appellee Batta’s Corrected Mot. to Dismiss Br., D.I. 15, at ¶ 7.

<sup>7</sup> *Id.* at ¶¶ 9-10.

<sup>8</sup> *Id.* at ¶ 8.

Appellant concedes that the initial Notice of Appeal is the improper procedural mechanism through which to initiate the action and acknowledges that 9 Del. C. § 1314 requires that Appellant file a petition for writ of *certiorari* to challenge Board decisions. However, Appellant contends that the initial Notice of Appeal filed within 30 days of the Board’s decision conferred jurisdiction upon the Superior Court and argues that the Court should not dismiss the action for a procedural defect that has not resulted in substantial prejudice to the opposing parties.<sup>9</sup>

Appellant also concedes that the record property owners are indispensable parties to the action. However, Appellant argues that Super. Ct. Civ. R. 4(j) allows Appellant to amend a defect within 120 days of the expiration of the statute of limitations if the Court finds that the amendment relates back to the original pleading pursuant to Super. Ct. Civ. R. 15(c).<sup>10</sup> Appellant asserts that the indispensable parties received notice of the Amended Petition on February 5, 2015.<sup>11</sup> Appellant also contends that the Amended Petition sufficiently identifies the alleged illegality of the Board’s decision.<sup>12</sup>

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<sup>9</sup> Appellant’s Br. in Opposition, D.I. 21, at ¶ 9.

<sup>10</sup> *Id.* at ¶¶ 10-12.

<sup>11</sup> *Id.* at ¶ 13.

<sup>12</sup> *Id.* at ¶16.

#### IV. STANDARD OF REVIEW

9 *Del. C.* § 1314(a) provides the statutory requirements for judicial review of Board of Adjustment decisions. In the context of a Motion to Dismiss for statutory deficiencies, the Court must determine whether the Amended Petition satisfies each requirement set forth in the statute. Specifically, the statute mandates that “[a]ny person aggrieved by any decision of the Board of Adjustment...may present to the Superior Court a petition duly verified alleging that such decision is illegal in whole or in part, and specifying the grounds of illegality.”<sup>13</sup> Additionally, “the petition shall be presented within 30 days after the filing of the [Board’s] decision.”<sup>14</sup>

#### V. DISCUSSION

At oral argument, Counsel for Appellant acknowledged that the Notice of Appeal should have been a petition for writ of *certiorari*. Additionally, Counsel for Appellant conceded that the record property owners, who were not named in the Notice of Appeal, are indispensable parties to the action. The Court applies by analogy Super. Ct. Civ. R. 15 to amendments of administrative appeals.<sup>15</sup> More

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<sup>13</sup> 9 *Del. C.* § 1314(a).

<sup>14</sup> *Id.*

<sup>15</sup> *Sussex Med. Investors L.P. v. Del. Health Res. Bd.*, 1997 WL 524065 at \*7 (Del. Super. April 8, 1997).

precisely, the Court applies Super. Ct. Civ. R. 15(c) where indispensable parties have not been joined in the initial petition.<sup>16</sup>

Super. Ct. Civ. R. 15(c) allows an amendment to a pleading to relate back to the date the original pleading was filed only when the proffered pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading

and, within the period provided by statute or these Rules for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.<sup>17</sup>

The party seeking to amend bears the burden of satisfying all of the elements of Super. Ct. Civ. R. 15(c).<sup>18</sup>

The parties agree that the Amended Petition arises out of the same conduct or occurrence set forth in the Notice of Appeal. Therefore, the Court must decide whether Appellant established that, within the proper time period, the indispensable

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<sup>16</sup> See, e.g., *Hackett v. Bd. of Adjustment of Rehoboth Beach*, 794 A.2d 596, 598-99 (Del. 2002)(per curiam); *Preston v. Bd. of Adjustment of New Castle County*, 772 A.2d 787, 790-91 (Del. 2001)(per curiam).

<sup>17</sup> Super. Ct. Civ. R. 15(c)(3).

<sup>18</sup> See *Lovett v. Pietlock*, 2011 WL 149349, at \*2 (Del. Super. Jan. 5, 2011)(“[Movant’s] amended complaint must completely satisfy the strictures of Rule 15(c)(3); otherwise, the amended complaint will not relate back to the date of the original filing, and will be barred by the statute of limitations.”).

parties received notice of the institution of the action such that the indispensable parties will not be prejudiced in maintaining a defense and whether Appellant established that, within the proper time period, the indispensable parties knew or should have known that, but for a mistake concerning their identity, the action would have been brought against them.

**A. Appellant Failed to Meet its Burden Under Super. Ct. Civ. R. 15(c) to Establish that the Amended Petition Relates Back to the Notice of Appeal.**

“Judicial review of an administrative proceeding initiated through the *certiorari* process, while the functional equivalent of an appeal, may be subject to specific pleading requirements. One requirement of the *certiorari* proceeding is notice to a party affected by the administrative ruling.”<sup>19</sup> The Delaware Supreme Court has applied the 30-day period set forth in 9 *Del. C.* § 1314 as the pertinent time period for purposes of analyzing the notice requirements of Super. Ct. Civ. R. 15(c).<sup>20</sup>

In *Hackett v. Bd. of Adjustment of Rehoboth Beach*, 794 A.2d 596 (Del. 2002), the Delaware Supreme Court affirmed the Superior Court’s dismissal of a petition for writ of *certiorari* where, in response to a motion to dismiss, the appellant filed a motion to amend to include the indispensable party after the

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<sup>19</sup> *Hackett*, 794 A.2d at 598.

<sup>20</sup> See *Preston*, 772 A.2d at 791 (“In this case, the Writ [of *certiorari*] was filed and verified within the statutory 30–day period and it named the Board as a respondent as required by § 1314(a).”); *Hackett*, 794 A.2d at 598 (“The motion to amend was filed after the expiration of the thirty day appeal period.”).

statutory period had expired.<sup>21</sup> The Court determined that, under 9 *Del. C.* § 1314(a), the failure to notify an indispensable party cannot be cured using the relation back provision in Super. Ct. Civ. R. 15 when the 30-day statutory time period to file a petition for writ of *certiorari* had passed.<sup>22</sup>

Similarly, in *Preston v. Bd. of Adjustment of New Castle County*, 772 A.2d 787 (Del. 2001), the Delaware Supreme Court concluded that the Superior Court correctly determined that an indispensable party did not receive notice of a petition for writ of *certiorari* when “notice of the [appellant’s] appeal was not within the statutorily mandated 30-day period.”<sup>23</sup> However, the Delaware Supreme Court remanded the action to the Superior Court to determine whether the indispensable party had constructively intervened in the action.<sup>24</sup>

Despite the clear precedent applying the 30-day statutory time period, Appellant, relying upon *Walker v. Handler*, 2010 WL 4703403 (Del. Super. Aug. 26, 2010) and Super. Ct. Civ. R. 4(j), urges the Court to allow 120 days from the expiration of the statute of limitations to notify indispensable parties.<sup>25</sup> In *Walker*, the court found that “[u]nder the present Rule 15 notice may be given after termination of the [statute of] limitations period, provided that service is made

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<sup>21</sup> *Hackett* 794 A.2d at 597-98.

<sup>22</sup> *Id.* at 598.

<sup>23</sup> *Preston*, 772 A.2d at 791.

<sup>24</sup> *Id.* at 791-92.

<sup>25</sup> Appellant’s Br. in Opposition, at ¶¶ 12-14.

within the additional 120-day period required by Rule 4(j).”<sup>26</sup> However, the *Walker* case did not involve interpreting the procedure for amending a petition for writ of *certiorari* but instead concerned the procedure for amending a civil complaint in a personal injury case.<sup>27</sup> Moreover, Appellant has not identified and the Court is unaware of precedent applying the 120-day allowance under Super. Ct. Civ. R. 4(j) specifically to actions in *certiorari*.

Based upon the text of 9 *Del. C.* § 1314(a) and the *Hackett* and *Preston* decisions, the Court finds that the Amended Petition does not satisfy the 30 day requirement set forth by statute. The Board’s decision was filed on October 20, 2014 and the Amended Petition was filed on February 5, 2015, well after the 30-day deadline. Therefore, the Court finds that the Amended Petition is untimely under 9 *Del. C.* § 1314(a).

In addition, Appellant has not demonstrated that the requirements of Super. Ct. Civ. R. 15(c)(3)(A)-(B) have been met to allow Appellant to amend the Notice of Appeal. Appellant has not established that the indispensable parties received notice of the action such that the parties will not be prejudiced in maintaining a defense on the merits. Nor has Appellant established that the indispensable parties knew or should have known that, but for a mistake concerning their identity, the action would have been brought against the indispensable parties. Therefore, even

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<sup>26</sup> *Walker v. Handler*, 2010 WL 4703403, at \*3 (Del. Super. Aug. 26, 2010).

<sup>27</sup> *Id.* at \*1.

if the Court found that the Amended Petition was timely filed under 9 *Del. C.* § 1314(a), Appellant has not met its burden under Super. Ct. Civ. R. 15(c)(3). Consequently, the Amended Petition cannot relate back to the Notice of Appeal.

At oral argument, Counsel for Appellant represented to the Court that Appellant will not pursue argument that the indispensable parties have constructively intervened in the action. Therefore, the Court deems argument regarding constructive intervention waived. Because the Court finds that the Amended Petition is untimely because it does not relate back to the date of the filing of the Notice of Appeal, the Court need not address Appellee Batta's additional arguments related to other deficiencies in the Amended Petition. Appellee Batta's Motion to Dismiss is **GRANTED**.

## VI. CONCLUSION

The Court finds that Appellant's Amended Petition is untimely because it does not relate back to the Notice of Appeal. Therefore, Appellee Batta's Corrected Motion to Dismiss is hereby **GRANTED**. Appellant's Amended Notice of Appeal or Petition for Writ of *Certiorari* is hereby **DISMISSED**.

**IT IS SO ORDERED.**

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/s/ Ferris W. Wharton, Judge