

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

MIROSLAW E. KOSTYSHYN, )

Appellant, )

v. )

C.A. No. N22A-04-004 JRJ

NEW CASTLE COUNTY )

DELAWARE DEPARTMENT )

OF LAND USE (DANTE TIBIERI )

AND FRANCIS WEBB) )

Appellees. )

Submitted: May 24, 2022

Decided: August 22, 2022

**OPINION AND ORDER**

*Upon Appellant's Petition for Writ of Certiorari directed to the Justice of the Peace Court No. 13 regarding its decision dated April 1, 2022 and to the Department of Land Use Assessment regarding its decision dated August 28, 2021: **DISMISSED.***

*Upon Appellees' Motion to Dismiss and Quash Writ: **GRANTED.***

Mirosław E. Kostyshyn, 617 Cranhill Drive, Wilmington, DE 19808,  
Appellant, pro se.

Daniel P. Murray, New Castle County Office of Law, New Castle County  
Government Center, 87 Reeds Way, New Castle, DE 19720, for Appellee, New  
Castle County Delaware Department of Land Use.

Jurden, P.J

## **I. INTRODUCTION**

Appellant, Miroslaw E. Kostyshyn, requests a writ of certiorari be issued by this Court directing the New Castle County Delaware Department of Land Use (Dante Tibieri and Francis Walsh), to review its August 28, 2021, decision, which assessed civil penalties due to prior New Castle County Code (“Code”) violations issued on November 14, 2019, and May 1, 2020. Appellant also seeks review of the Justice of the Peace Court No. 13 (“JP. Ct. No. 13”) decision dated April 1, 2022.<sup>1</sup> Appellees have filed a motion to dismiss and quash writ as untimely and improper.

## **II. FACTS**

On November 14, 2019, the New Castle County Department of Land Use (“Department”) issued a notice of violation of the New Castle County Code (“Code”) (“First Violation”) regarding Appellant’s property located at 700 Brandywine Boulevard, Wilmington, DE (“Property”).<sup>2</sup> On May 1, 2020, the Department issued another notice of violation regarding the Property.<sup>3</sup> Thereafter, a Rule to Show Cause Hearing (“RTSC”) was held on November 10, 2020.<sup>4</sup> At the

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<sup>1</sup> Although Appellant’s Notice of Appeal, D. I. No. 1, references a JP. Ct. No. 13 decision dated April 1, 2022, there does not appear to be a JP. Ct. No. 13 decision related to this matter issued on that date. Instead, there is a Court of Common Pleas (“CCP”) decision dated April 1, 2022, related to this matter. This Court considered the error in the court designation to be a scrivener’s error and reviewed the filings as though the Appellant sought a writ of certiorari from the CCP decision dated April 1, 2022, in case number CPU4-21-004236.

<sup>2</sup> Ex. 2 to Appellees’ Motion to Dismiss and Quash Writ. D.I. 8, Transaction ID: 67591767.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

RTSC Hearing, the Hearing Officer found that the Code violations existed at the time the First Violation and the Second Violation were issued.<sup>5</sup>

On December 28, 2020, the Department received Appellant's Application for Hearing before the New Castle County Board of License, Inspection and Review ("Board") dated December 23, 2020, seeking an appeal from the administrative decision issued at the RTSC Hearing.<sup>6</sup> The Board held a public hearing on March 25, 2021, and issued its written decision on April 14, 2021, finding that the "Department did not act in an arbitrary or capricious manner or contrary to law when it issued [First Violation and Second Violation], and therefore, affirm[ed] the RTSC Decision below."<sup>7</sup>

Then, on May 4, 2021, Appellant filed a debt action against Matthew Meyer, Toren Williams, Joseph Day, Dante Tiberi and Francis Walsh in JP. Ct. No. 13 seeking relief for the violation fees paid.<sup>8</sup> Defendants responded by filing a motion to dismiss for lack of jurisdiction.<sup>9</sup> On June 23, 2021, JP. Ct. 13 denied Appellant's claim stating, "Plaintiff's claim require[s] an analysis of the Board of License, Inspection and Review's decision and process, something that is not within the

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<sup>5</sup> *Id.*

<sup>6</sup> Ex. 1 to Appellees' Motion to Dismiss and Quash Writ. D.I. 8, Transaction ID: 67591767.

<sup>7</sup> Ex. 2 to Appellees' Motion to Dismiss and Quash Writ. D.I. 8, Transaction ID: 67591767.

<sup>8</sup> Ex. 3 to Appellees' Motion to Dismiss and Quash Writ. D.I. 8, Transaction ID: 67591767. (JP13-21-002492)

<sup>9</sup> Ex. 4 to Appellees' Motion to Dismiss and Quash Writ. D. I. 8, Transaction ID: 6759167. (JP13-21-002492)

jurisdiction of the Justice of the Peace Court and which is in the purview of the Superior Court via a writ of certiorari.”<sup>10</sup>

On July 29, 2021, Appellant appealed the June 23, 2021 JP. Ct. No. 13 dismissal of his claim to the Court of Common Pleas (“CCP”).<sup>11</sup> Because the Code violations remained outstanding the Department assessed civil penalties on August 25, 2021.<sup>12</sup> While this appeal was pending, Appellant filed another debt action in JP. Ct. 13, on September 10, 2021, against Dante Tibieri and Francis Walsh alleging that they intentionally misrepresented the application of a stay of civil penalties pending the outcome of Appellant’s appeal initiated on December 23, 2020 before the Board.<sup>13</sup>

The CCP dismissed Appellant’s appeal on October 1, 2021.<sup>14</sup> Later that same month, the JP. Ct. 13 dismissed Appellant’s debt action without prejudice.<sup>15</sup> On November 8, 2021, Appellant moved for reconsideration of the JP. Ct. No. 13’s

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<sup>10</sup> *Id.*

<sup>11</sup> Ex. 10 to Appellees’ Motion to Dismiss and Quash Writ. D.I. 8, Transaction ID 6759167. (CPU4-21-002741)

<sup>12</sup> Ex. 6 to Appellees’ Motion to Dismiss and Quash Writ. D. I. 8, Transaction ID: 6759167.

<sup>13</sup> Ex. 7 to Appellees’ Motion to Dismiss and Quash Writ. D. I. 8, Transaction ID: 6759167. (JP13-21-005247)

<sup>14</sup> Ex. 5 to Appellees’ Motion to Dismiss and Quash Writ. D. I. 8, Transaction ID: 6759167. (CPU4-21-002741).

<sup>15</sup> Ex. 8 to Appellees’ Motion to Dismiss and Quash Writ. D. I. 8, Transaction ID: 6759167. (JP13-21-005247)

dismissal dated October 27, 2021.<sup>16</sup> JP. Ct. 13 denied Appellant's motion for reconsideration on November 30, 2021.<sup>17</sup>

On December 15, 2021, Appellant filed a Notice of Appeal with the CCP of the November 30, 2021 JP. Ct. 13 Order.<sup>18</sup> On appeal, the CCP found that although the Appellant indicated that his JP. Ct. No 13 action was a debt action, it was really a "disguised appeal from the Board's decision."<sup>19</sup> In granting Appellees' motion to dismiss, the CCP found it lacked jurisdiction because administrative appeals from Board decisions must be initiated through a writ of certiorari and jurisdiction over the issuance of writs of certiorari lie with the Superior Court.<sup>20</sup>

On April 19, 2022, Appellant filed the instant action, a Notice of Appeal<sup>21</sup> with the Superior Court. The Civil Information Statement accompanying the Notice of Appeal indicates that the Civil Case Code is "ACER – Certiorari."<sup>22</sup> On the face of the Notice of Appeal, Appellant clearly states that he is seeking an appeal from

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<sup>16</sup> Ex. 9 to Appellees' Motion to Dismiss and Quash Writ. D. I. 8, Transaction ID: 6759167. (JP13-21-005247)

<sup>17</sup> *Id.* (JP13-21-005247)

<sup>18</sup> Ex. 9 to Appellees' Motion to Dismiss and Quash Writ. D.I. 8. Transaction ID: 6759167. (CPU4-21-004236).

<sup>19</sup> Ex 10 at 4 to Appellees' Motion to Dismiss and Quash Writ. D.I. 8. Transaction ID: 6759167. (CPU4-21-004236).

<sup>20</sup> *Id.*

<sup>21</sup> D.I. No. 1. Transaction ID: 67489131.

<sup>22</sup> D.I. No. 2. Transaction ID: 67489131.

“the decision a Justice of the Peace Court No. 13 decision dated 04/01/22 and Department of Land Use Assessment dated August 28, 2021.”<sup>23</sup>

Appellees filed a Motion to Dismiss and Quash Writ on May 5, 2022<sup>24</sup> setting forth two bases on which to grant their motion. First, that Appellant’s appeal is time barred<sup>25</sup> and second, that a writ of certiorari is not an appropriate method to appeal a decision from the CCP.<sup>26</sup> In addition, Appellees assert that the writ should be quashed because it was directed to counsel for the Department, and Counsel cannot provide a certified record of the proceedings before the JP Court or the Court of Common Pleas.<sup>27</sup>

### **III. STANDARD OF REVIEW**

This Court may review an appeal from the Board through a writ of certiorari.<sup>28</sup> A writ of certiorari is a common law writ which provides for a limited review of decisions of lower court and inferior tribunals.<sup>29</sup> “Under this common law writ, this Court has the power to quash or affirm the proceedings and to remand.”<sup>30</sup>

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<sup>23</sup> D.I. No. 1. Transaction ID: 67489131.

<sup>24</sup> D.I. No. 8. Transaction ID: 67591757.

<sup>25</sup> *Id.* at 3-4.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 5.

<sup>28</sup> *Adjile, Inc. et al v. City of Wilmington, et al.*, 2008 WL 2623938 at \*1 (Del. Super. June 30, 2008).

<sup>29</sup> *Christiana Town Ctr., LLC v. New Castle County*, 865 A.2d 521 (Del. 2004), 2004 WL 2921830, at \*2.

<sup>30</sup> *Jardel Co., Inc. v. Carroll*, 1990 WL 18296, at \*2 (Del. Super.); *State v. J.P. Ct. No. 7*, 1989 WL 31600, at \*1 (Del. Super.); *Breasure v. Swartrzenruber*, 1988 WL 116422, at \*1 (Del. Super. Oct. 8, 1988) citations omitted.

The Court’s review on certiorari “involves a review only of errors that appear on the face of the record.”<sup>31</sup> A writ of certiorari differs from an appeal in that an appeal “brings up the case on its merits,” and a writ brings up the matter for a review of the “regularity of the proceedings.”<sup>32</sup> Hence, the Court does not consider the matter below “on its merits,”<sup>33</sup> instead “[t]he reviewing court [considers] . . . only whether the lower tribunal (1) committed errors of law, (2) exceeded its jurisdiction, or (3) proceeded irregularly.”<sup>34</sup>

The Superior Court’s review of a final decision from the CCP “is limited to correcting errors of law and determining whether the lower court’s decision is supported by substantial evidence.”<sup>35</sup> “Substantial evidence is such relevant evidence that a reasonable mind would accept as adequate to support a conclusion.”<sup>36</sup> “Absent an error of law, the CCP’s decision will not be disturbed where there is substantial evidence to support its conclusion.”<sup>37</sup>

#### IV. DISCUSSION

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<sup>31</sup> *Luby v. Town of Smyrna*, 2001 WL 1729121, at \*2(Del. Super.), citing *Castner v. State*, 311 A.2d 858, 860 (Del. 1973).

<sup>32</sup> *Breasure*, 1988 WL 116422, at \*1.

<sup>33</sup> *Id.*

<sup>34</sup> *Maddrey v. J.P. Ct. 13 and Arbor Management, d/b/a Compton Town Associates, LP.*, 956 A.2d 1204 (Del. 2008).

<sup>35</sup> *McKanic-Steers v. Summerfield Homeowners, Assoc., Inc.*, 2020 WL 1227721, at \*1 (Del. Super. March 11, 2020).

<sup>36</sup> *Delaware Inst. Of Health Scis., Inc. v. Okorie*, 2011 WL 3481055, at \*1 (Del. Super. Aug. 4, 2011).

<sup>37</sup> *Id.*

## A. Writ of Certiorari

In general, “a petition for writ of certiorari must be filed within the time [thirty days] set for direct appeals.”<sup>38</sup> A writ “filed later than thirty days will be excused only under exceptional circumstances.”<sup>39</sup> The Board issued its written decision on April 14, 2021 (“Board’s Decision”).<sup>40</sup> Included on the last page of the Board’s Decision are instructions on how to appeal a decision of the Board.<sup>41</sup> This language references § 1 of Art. VI of the Rules of Procedure of the Board of Licensing (“Board’s Rules”). Upon reviewing the Board’s Rules – Revised March 10, 2020, the Court notes that the appeal instructions are located under Art. VII, § 1 not Art. VI, § 1. The Board’s Rules at Art. VII, § 1 state: that

An aggrieved party may appeal the decision of the Board by **filing a petition for a writ of certiorari** in the Superior Court of the State of Delaware within thirty (30) calendar days of the date of the Board’s written decision is filed with the Department. (*emphasis added*)

The Court does not consider the mistaken appeal reference a fatal error.

Appellant was first informed of his procedural error of not filing a writ of certiorari by the JP. Ct. No. 13 in its June 23, 2021 Order.<sup>42</sup> Instead of filing a writ

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<sup>38</sup> *In the Matter of Gunn*, 122 A.3d 1292 (2015) (citations omitted).

<sup>39</sup> *Id.*

<sup>40</sup> Ex. 2 to D.I. No. 2. Transaction ID: 67591767.

<sup>41</sup> *Id.* This language states “[a]ppeals from a decision of the Board shall be taken in accordance with § 2.05.105 of the New Castle County Code and Art. VI, § I of the Rules of Procedure of the Board of License, Inspection and Review.”

<sup>42</sup> Ex. 4 to D.I. No. 2. Transaction ID: 67591767.



of certiorari, Appellant appealed the June 23, 2021 JP. Ct. No. 13 Order to the CCP.<sup>43</sup> On October 1, 2021, the CCP granted Appellees' Motion to Dismiss for lack of subject matter jurisdiction.<sup>44</sup> Again, instead of filing a writ of certiorari, Appellant filed a second debt action in JP. Ct. No. 13.<sup>45</sup> Appellees responded with a Motion to Dismiss for lack of subject matter jurisdiction, which the JP. Ct. No. 13 granted on October 27, 2021.<sup>46</sup> Again, instead of filing a writ of certiorari, Appellant, on November 8, 2021, filed a motion for reconsideration, which the JP. Ct. No. 13 denied on November 30, 2021.<sup>47</sup> And, yet again, Appellant did not file a writ of certiorari and instead filed an appeal to the CCP on December 15, 2021.<sup>48</sup> The CCP, after holding a hearing, issued its Memorandum Opinion and Order which granted Appellees' Motion to Dismiss for lack of subject matter jurisdiction. The CCP specifically stated that the proper method to appeal a decision of the Board is to file a writ of certiorari in the Superior Court.<sup>49</sup>

Approximately one year after the Board's Decision, Appellant filed this action – a writ of certiorari – well beyond the thirty-day period. Appellant initially filed an action in the wrong court and sought the wrong remedy. Appellant maintained on

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<sup>43</sup> Ex. 10 at 3, to D.I. No. 8, Transaction No. 67591767.

<sup>44</sup> Exs. 5 and 10 to D.I. No. 8, Transaction No. 67591767.

<sup>45</sup> Ex. 7 to D.I. No. 8, Transaction No. 67591767.

<sup>46</sup> Ex. 10 at 3, to D.I. No. 8, Transaction No. 67591767.

<sup>47</sup> Ex. 9 to D.I. No. 8, Transaction No. 67591767.

<sup>48</sup> Ex. 10 at 4, to D.I. No. 8, Transaction No. 67591767.

<sup>49</sup> *Id.*

the wrong litigation course even though the proper path to seek review was well established,<sup>50</sup> and he was repeatedly informed of his continuing error.<sup>51</sup> Appellant's unilateral decision to pursue an improper course of litigation is not an exceptional circumstance that excuses the delay in filing a petition for writ of certiorari. Thus, the Appellant's untimely Petition for Writ of Certiorari is **DISMISSED**.

## **B. APPEAL FROM COURT OF COMMON PLEAS**

As stated previously, the Court considered Appellant's Notice of Appeal to be a writ of certiorari due to the civil case code designation. While a writ of certiorari is the proper method to appeal a decision of the Board, it is not the proper method to appeal a decision from the CCP.<sup>52</sup> An appeal to the Superior Court is the proper method to appeal a CCP decision.<sup>53</sup>

The CCP's Memorandum Opinion and Order dated April 1, 2022, dismissed Appellant's appeal on jurisdictional grounds finding that it lacked jurisdiction over the appeal because the proper method to appeal a decision of the Board was by filing a writ of certiorari with the Superior Court.<sup>54</sup> "The CCP, like all courts, must dismiss whenever it learns it lacks jurisdiction over the claim."<sup>55</sup> Like the CCP, the Superior

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<sup>50</sup> *Maddrey v. J.P. Ct. 13 and Arbor Management, d/b/a Compton Town Associates, LP.*, 956 A.2d 1204 Del. 2008; *see also* *Miller v. New Castle County*, 2016 WL 229542, at \*2 (Del. Super. Jan. 12, 2016).

<sup>51</sup> Exs. 4, 5, 9, and 10, to D. I. No. 8, Transaction No. 67591767.

<sup>52</sup> 10 *Del.C.* § 1326.

<sup>53</sup> *Id.*

<sup>54</sup> Ex. 10 at 4, to D.I. No. 8, Transaction No. 67591767.

<sup>55</sup> *Griffin v. Ramirez*, 2021 WL 5577261, at \*3 (Del. Super. November 30, 2021).

Court also finds that the proper method to appeal a decision of the Board is by filing a writ of certiorari. Assuming *arguendo* that the Appellant filed a notice of appeal of the CCP's Memorandum Opinion and Order dated April 1, 2022, the Superior Court finds that the CCP's Memorandum Opinion and Order dated April 1, 2022, is supported by substantial evidence and finds no error of law which would disturb the CCP Memorandum Opinion and Order.

### **CONCLUSION**

For all the foregoing reasons, the Appellant's Petition for Writ of Certiorari is **DISMISSED** and Appellees' Motion to Dismiss and Quash Writ is hereby **GRANTED**.

**IT IS SO ORDERED.**

/s/ Jan R. Jurden  
Jan R. Jurden, President Judge