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IN THE SUPREME COURT OF THE STATE OF DELAWARE

JANEVE CO., INC. and TAX PARCEL NO. 26-028.20-054, Defendant Below, Appellant, vs. THE CITY OF WILMINGTON, a Municipal Corporation of the State of Delaware, Plaintiff Below, Appellee.	C.A. No. 485, 2014

READWAY, INC. and
TAX PARCEL NO. 26-013.30-183,

Defendant Below,
Appellant,

vs.

THE CITY OF WILMINGTON, a Municipal Corporation of the State of Delaware,

Plaintiff Below,
Appellee.

THE REVOCABLE TRUST OF WALTER LOWICKI DATED AUGUST 18, 1999, STANLEY C. LOWICKI, UNKNOWN HEIRS OF WALTER LOWICKI and
TAX PARCEL NO. 26-055.40-022,

Defendant Below,
Appellant,

vs.

THE CITY OF WILMINGTON, a Municipal Corporation of the State of Delaware,

Plaintiff Below, Appellee.

APPELLANTS' OPENING BRIEF

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NATURE OF PROCEEDING

The City of Wilmington brought three monition actions against the properties known as 1309 North Lincoln Street, Wilmington, Delaware, 1309 West Street, Wilmington, Delaware and 2600 18th Street, Wilmington, Delaware. The defendants sought from the Superior Court a ruling that:

1. The monition complaints were inadequate since they did not contain an affidavit verifying the accuracy of the complaint.
2. That res judicata applied to the defendant Readway since two prior monitions had been dismissed against the property owned by Readway.
3. Since the taxes were paid, the Sheriff's sale could be voided.
4. The defendants had a right to a jury trial.
5. The three year statute of limitations applied to the monies which were the subject of the monitions.

The matter was heard before Superior Court Commissioner Parker who ruled that an affidavit was required with the monition complaint. The Commissioner ruled against defendants on all other claims. A motion to reconsider was filed and by Order dated June 13, 2014 Superior Court Judge Wallace confirmed all of the findings and rulings of the Commissioner. It is that Order which is appealed from.

SUMMARY OF ARGUMENTS

1. 25 Del. C. §2903(a) does not create a ten year lien for vacant property fees and the three year statute of limitations for 10 Del. C. §8106 does apply.

2. An alleged debtor does have a right to demand and obtain a jury trial in a court of law for monition action.

3. The Court erred as a matter of law in ordering the sale of defendants below, appellants' properties for amounts in dispute in the three present cases at bar which are the subject of a previously filed monition action.

4. Superior Court Rule 41(a) creates res judicata for all amounts that had been dismissed in the second monition action against the defendant Readway.

STATEMENT OF FACTS

The actions that are the subject of this appeal are three separate monition actions. N12J-03922 was filed on August 29, 2012 and its subject is 1309 North Lincoln Street, Wilmington, Delaware. The defendant is Readway, Inc. (A-78) N12J-03949 was filed on August 30, 2012 and its subject is 1309 West Street, Wilmington, Delaware. The defendant is Janeve Co., Inc. (A-64) N12J-03901 was filed August 30, 2012 and its subject is 2600 18th Street, Wilmington, Delaware. The defendant is Walter Lowicki, Trustee under the Revocable Trust of Walter Lowicki. (A-96)

The claim against Readway, Inc. is for water and sewer charges and vacant property fees. The claim against Janeve Co., Inc. is for vacant property fees. The claim against Walter Lowicki Trust is for exterior improvements and vacant property fees.

There is a separate Superior Court action, *Adjile, et al. vs. City of Wilmington*, C.A. No. 05A-11-001 that has not finished briefing on a motion to reargue. That action encompasses the three properties here. (A-149)

The defendant Readway was the defendant in two prior monition actions. Civil Action No. 08T-10-020 (A-111) which was dismissed pursuant to a motion to vacate. (A-114) The second monition filed against Readway is Civil Action No. N11J-03562

which was dismissed pursuant to a motion to vacate. (A-121)

Each defendant filed an answer disputing the amounts due. (A-68, A-82, A-99) Commissioner Parker heard five legal issues:

1. The monitions were deficient since no affidavit from the City of Wilmington was attached to the original filings.
2. Res Judicata for the Readway defendant applied under Superior Court Civil Rule 41(a) since there were two prior dismissals of monitions against the subject property.
3. Since the property taxes were paid, the Sheriff's sales could be avoided.
4. Defendants have a right to a jury trial.
5. The three year statute of limitations applied to the collection of vacant property fees.

Of the three questions of law, the Commissioner ruled in favor of defendants in only one, that being the lack of affidavits and ordered the monitions amended to include same. The Order of the Commissioner was entered on February 26, 2013. (A-54 and A-124)

A motion to reconsider the Commissioner's Order was filed by all defendants on March 11, 2013. By Order dated June 13, 2014, Judge Wallace affirmed the findings and rulings of Commissioner Parker. (A-36) Defendants requested

reargument which was denied on August 8, 2014. All three properties were the subject of Sheriff's sales which were stayed by the defendants paying the amounts due.

On September 3, 2014, all defendants filed an appeal to this Honorable Court. This is defendants below, appellants' opening brief.

ARGUMENT I

A. Question Presented.

DOES 25 DEL. C. §2903(a) CREATE A TEN YEAR LIEN FOR VACANT PROPERTY FEES AND IF NOT, DOES THE THREE YEAR STATUTE OF LIMITATIONS OF 10 DEL. C. §8106 APPLY TO THE COLLECTION OF VACANT PROPERTY FEE? (THIS ARGUMENT CAN BE FOUND TO HAVE BEEN MADE IN THE COURT BELOW IN THE TRIAL COURT ORDER AT PAGE 12)

B. Standard and Scope of Review.

Whether the Superior Court erred as matter of law in formulating or applying legal principles involves questions of laws, and the standard of review is *de novo. Delaware Alcoholic Beverage Wholesalers v Ayers,* 504 A.2d, 1077, 1081 (Del. 1986). In this case, the Superior Court ordered a sale of appellants' property without a trial to first determine disputed facts or requiring the City to first prove its denied claim. This was an error of law.

C. Merits of Argument.

Defendants below, appellants, argued before the trial court that the three year statue of limitations, 10 Del. C. §8106 applied and each monition could only collect fees that accrued during the three years previous to the date of the filing of the monition. The trial court disagreed. It looked at a different statute, 25 Del. C. §2903(a) wherein a lien of ten years was imposed for municipal "taxes" thus

extending the limitation on collecting vacant property fees from the three years in 10 Del. C. §8106 to ten years.

The defendants below, appellants, state that vacant property fees are not a tax and 10 Del. C. §8106 and its three year limitation on collection applies.

(1) *City of Wilmington v. McDermott*

The authority cited by the trial court for the proposition that vacant property fees are taxes is *City of Wilmington v. McDermott*, 2008 WL 4147580. The court in *McDermott* does not rule that vacant property fees are a tax. At page 3 of the opinion, the court states:

> "Regardless of whether vacant property fees are taxes per se, vacant property fees plainly are special assessments."

On that same page, the court in *McDermott* made an analysis of what "taxes" are. A tax is the general revenue raising source for in this case the City of Wilmington. All properties pay taxes whether or not they receive any services from the City. A special assessment is made against certain properties for a service that an individual property specifically receives.

The court in *McDermott* cites *City of Wilmington v. Wilmer*, 1997 WL 124151. The Chancery Court made a similar analysis regarding water and sewer fees. The court specifically ruled that water and sewer fees are not taxes. They are special

assessments because not all property owners pay them. Only properties that use water are assessed fees and the amount of the fee is based upon the amount of the water used.

Using the analysis in *Wilmer* and *McDermott,* vacant property fees are not taxes. Not every property in the City of Wilmington must pay a vacant property fee. In fact, very few pay such a fee and the fee is specific to each property. The property must be vacant by definition and the fee is based on how many years the property is actually vacant. Vacant property fees are not a tax and the court in *McDermott* was correct to rule it is a special assessment.

2. Title 25, Chapter 29

The Delaware legislature has determined that certain fees charged by "political subdivisions" should be accorded a lien. Subsection 2901(a)(1) states in part:

> "Except as other provided, "lien" or "liens" as used in this section shall arise whenever the following **charges** (emphasis mine)...are levied...and such charged become due."

What follows is a listing of certain fees which are included as charges. Subsection 2901(a)(1)(a) lists, "a. Real property taxes, including penalty and interest thereon."

Subsection 2901(a)(i)(j) lists, "j. Fees imposed by law or ordinance of any political subdivision of the state, which shall include without limitation, municipal corporations, for registration of ownership of any vacant buildings..." There are eleven separately described fees, taxes and services charges collectively described as "charges."

The balance of 25 Del. C. §2901 uses the word "charge" and "chargeable" multiple times using the collective term to refer to all the amounts that could be liened by the statute. In particular, that included 25 Del. C. §2901(b)(1)(7) which establishes a three year lien for "chargeables."

The trial court references 25 Del. C. §2903(a) and rules that vacant property fees have a duration of ten years. Defendant below appellants disagree. The section states, "In New Castle County, all **taxes** assessed against real estate shall continue as a lien against the real estate in the county for ten years..."(emphasis mine). This statute does not use the collective term, "charges," which encompasses all the amounts enumerated in 25 Del. C. §2901(a)(1). The statute is specific to one amount, "taxes." The state legislature knew how to include all amounts (including vacant property fees) as a ten year lien by using the word "charges." It declined to so by only including "taxes."

3. 10 Del. C. §8106

The trial court rejected defendants below, appellants' argument that plaintiff below, appellee could only claim three years of vacant property fees. The trial court ruled that ten years of vacant property fees could be collected citing 25 Del. C. §2903(a). However, 25 Del. C. §2903(a) does not create a ten year lien since vacant property fees by the definitions found in 25 Del. C. §2901 are not taxes and the ten year lien is limited only to taxes.

Defendants below, appellants assert that 10 Del. C. §8106 limits their recovery to three years of vacant property fees. It states:

"...no action based on a statute...shall be brought after the expiration of 3 years from the accruing of the cause of such action..."

Delaware courts have ruled that the word "statute" includes City of Wilmington ordinances, *Mayor and Council of Wilmington v. Durham*, 153 A.2d 568 (Del. Super. - 1959). This Honorable Court has also ruled that the three year statute of limitations applies to fees charged by the City of Wilmington. *Mayor and Council of Wilmington v. Dukes*, 157 A.2d 789 (Del. Supr. - 1960).

Vacant property fees are charged by statute 1 Wilm C. §4-27, 125.0(b)(3). The three year statute of limitations applies (10 Del. C. §8106). There is not a longer ten year statute of limitations because vacant property fees are not taxes and the ten

year lien found in 25 Del. C. §2903(a) therefore does not apply.

ARGUMENT II

A. Question Presented.

DOES AN ALLEGED DEBTOR HAVE A RIGHT TO DEMAND AND OBTAIN A JURY TRIAL IN A COURT OF LAW TO REQUIRE THE CITY OF WILMINGTON TO PROVE HIS DISPUTED CLAIM OF DEBT OF THOUSANDS OF DOLLARS BEFORE THE CITY OF WILMINGTON CAN SEEK EXECUTION OF AN UNPROVEN DISPUTED CLAIM? (THIS ARGUMENT CAN BE FOUND TO HAVE BEEN MADE IN THE COURT BELOW IN THE TRIAL COURT ORDER AT PAGE 15)

B. Standard and Scope of Review.

Whether the Superior Court erred as matter of law in formulating or applying legal principles involves questions of laws, and the standard of review is *de novo. Delaware Alcoholic beverages Wholesalers v Ayers,* 504 A.2nd, 1077, 1081, (Del. 1986). In this case the Superior Court ordered a sale of appellants' property without a trial to first determine disputed facts or requiring the City to first prove its claims, denied by the owners. This was an error of law.

C. **Merits of the Argument.**

This appeal involves City of Wilmington Department of L&I vacancy fee claims with all three owners-appellants involving several periods/years. With the trust owner of 2600 West 18th Street, the City claim for alleged maintenance fee is an additional claim and not a tax. With Readway, Inc., owner of 1309 North Lincoln

Street a deeply disputed claim for water bills from the City for no water delivery service for years which it had to know were incorrect as the City put out a fire at the location which terminated service but billed for water nonetheless coupled with sanitary sewer fees which were unused as there was no water delivery. On information and belief there has not been a meter reading since about the time of the fire in 2004 to the present 2015. A water and sanitary sewer charge is not a tax. All the claims are denied and disputed. See (A-91) where the City completely ignored the concerns and objections of the owner Readway Inc. In these cases, defendants are being claimed to pay large sums of money:

Janeve Co., Inc.	N12J-03974	$4,500.00
Readway Inc.	N12J- 03922	$11,000.00
The Revocable Trust of Walter Lowicki	N12J-03564	$17,000.00

These are large sums of money for part of the claims and the Charter and City of Wilmington Code cannot abrogate a party's right to trial by jury and exempt the City from proof by trial.

The Seventh Amendment to the Constitution of the United States provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved." The Delaware Constitution, Article I, Section 4 states, " Trial by jury shall be preserved as heretofore." Delaware courts have interpreted this section to preserve the right to trial by jury. *Fountain v. State*,

275 A.2d 251 (Del. Supr. 1971). *Getty Refining and Marketing v. Paoli Oil Inc.,* 385 A.2d 147 (Del. Ch. 1978).

In the cases at bar, suits are brought under statute, but common law principles apply. Plaintiff , City, has the burden of proof to show that all the elements to charge a vacant fee exists for each property. The City must prove further the elements of its claim, in each category of billing, special vacancy fee assessment, involuntary maintenance charge, and charge for no water delivery, by a preponderance of the evidence. *Reynolds v. Reynolds,* 237 A.2d 708 (Del. Supr. 1967) at 711. As to the trust, the claim for maintenance charges, which are disputed, need be proven, as well as the disputed water bills for no water service in the case of Readway Inc.

The City will have to prove its claim for cutting hedges, that were already cut by the Trust owner and for billing the taking away of a child's swing set from the yard of the owner without the owner's permission and charging for it.

With regard to statutes, the Delaware courts have held that if the General Assembly or in these cases, the City Council for the City of Wilmington, does not place language in the statute depriving the right to trial by jury, then the defendant parties have a right to trial by jury. *Vaughn v. Veasey,* 125 A.2d 251 (Del. Supr. 1956).

The question appears rather basic to American jurisprudence. The answer

appears obvious and without the necessity of comment. The person seeking money which is denied by a defendant as being owed and disputed must prove his claim in an appropriate court under normal and customary judicial proceedings. This appeal is necessary as the City of Wilmington has by ordinance and practice abolished century old law where is deems itself a creditor.

In the present appeals, the City issued a bill(s) for claimed charges for the appellant properties involved. A response was filed by appellant owners denying the claim(s). Monition actions were commenced to which answers were filed denying the debt and pleading for civil trial action. (A-69, A-83, A-99) Dismissals were filed by the City. The current appeals stem from Monitions filed on August 29, 2012 and August 30, 2012. (A-64, A-78, A-95) Answers were filed denying the debt and jury trial requested for all three owners involved in this appeal. The City may not proceed from a mere billing, the validity of which is disputed, to execution for collection without the process of a trial.

Delaware Cases require the City to prove its claim for debt in the ordinary manner of discovery and fact resolution by stipulation or trial. The City must go through an appropriate court proceeding to resolve disputed facts of alleged debt, fee, tax obligation. See *The Mayor and City Council of Wilmington v. Durham,* 159 A.2d 568, (Del. Super 1959) and *The Mayor of the City of Wilmington v. Dukes,* 157 A.2d

789 (Del. Supr 1960) .

In addition to the cases requiring a civil action to prove a City claim for money, the City Code requires the City in tax delinquency cases, to file an action to prove the validity of the claim. The City Code provides that the City, to collect for an alleged delinquent tax the procedure "...shall be by suit in an action of debt before any justice of the peace, in the Court of common pleas and in the superior court sitting in and for the county, judgments may be obtained in the superior court at the term to which the original process is returnable by filing an affidavit of demand together with a copy of the tax bill in the same manner and under the same conditions as judgments are now obtained under 10 Del. C. §3901....". City Code §4 -140 Suit institution-service of process.

In all the appealed cases the City failed to comply with City Code §4-140 Suit institution-service of process. Initially it never filed an affidavit in its collection process. In these actions on appeal it was discovered that the City was causing sheriff sales without proper affidavits.

In *Durham, supra.* the City bought an action in the Superior Court against two doctors and an operator of a launderette for failing to register and pay a $50.00 Department of License and Inspection fee assessment for engaging in a business of doctor as to two and operating a launderette in the other. After discovery in lieu of a

jury or bench trial the defendants moved to dismiss the action and all parties filed motions for summary judgment, stipulating to the facts. (unlike the present actions on appeal where the facts were in dispute and the city failed to bring an action for fact resolution). The doctors defended on the merits and also claimed the city had no right to sue but only proceed criminally as there was no express provision in the then ordinance for civil suit. Not withstanding the lack of express provision for suit to collect the fee, Judge Christie held the only way the city could collect was by civil action in Superior Court to resolve the dispute. The fee was for doctors activity or right to activity, not inactivity.

Another defendant in the *Durham* case, Walker operated a 'launderette' as opposed to a 'laundry'. The operational fee for a laundry was $50.00 dollars. For a launderette it was $6.00 per machine. The court noted: Article 8 of the Constitution of the State of Delaware, Del. C. Ann. provides in part as follows: " Section 1. All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax and shall be levied and collected under the general laws." The court found the tax/fee to be a denial of the equal protection clause of the constitution as there was no reasonable basis in the tax/fee rate distinction in the business of operating a 'laundry' versus a 'launderette'. The rate was more than double that of others in the same business. The tax as to the Walker launderette was

declared unconstitutional. The failure to tax or assess fee on the 'possibility of drug dealing or other unlawful activity, by transients in an 'occupied' building is a classification of a building owner unreasonably from an owner in an 'unoccupied' building that is perfectly sound, maintained, supervised, overseen, but absent a resident or business occupant for a legislative arbitrary period of time and free of transients and drug activity and arguably unconstitutional. The police power is to be concerned with the 'actual' unlawful use of a building, occupied or unoccupied. The "possibility of an offense" is not a reasonable basis for taxation, nor is such a tax equally applied, where the 'possibility' is universal to all owners. This paragraph shows that Delaware courts have allowed arguments of fact and law in claims made by the City of Wilmington.

In *Dukes*, *supra.*, involving an appeal to the Delaware Supreme court of a co-defendant in the *Durham* case, the Supreme court confirms the principle that the City to collect the business license fee/tax a civil action must be filed, (to which of necessity a defendant may defend against the claim.) The Court confirmed that the collection of L&I fees are subject to the three year statute of limitation.

The basic import of the two cases is that the City must prove its claim for a charge or fee debt and the necessary incident to that proof is defendants right to discovery and jury trial at the defendants' election. The City has never done so in the

Vacancy Ordinance billings, fee, registration instances ever since May 6, 2003.

The City of Wilmington, Home Rule notwithstanding, may not ordain laws that are beyond The Constitution, its Charter, The Municipal Code and governing State statutes, that deprive defendants of fundamental rights of due process, right to jury trial, burden of proof upon one claiming money, and equal protection of the law. See *Schadt lll v. Latchford*, No. 232, 2002, Feb. 6, 2004 Del. Supr. Ct.

In the *Schadt* case, the Supreme Court held that the City of Wilmington could not by ordinance impose the financial liability of maintaining the streets including sidewalks owned by the city upon adjacent property owners, nor could the city impose civil liability upon such owners for failure to do what the city charter expressly stated was the City's responsibility.

Accordingly, the City may not legislatively ordain that its issuing of a bill, charge, claim, or assessment is equivalent to a final judgment of any court, or that the Superior Court or any other Court has no function but to issue execution for sale warrants and that the owner is deprived legislatively of a right to make the city prove its claim and have an impartial jury trial after discovery decide disputed facts. Any language of an Ordinance stating the fee-tax creates a lien carries with it the burden that it is 'inchoate' and not final until the adjudicative process is complete and then may relate back in time, if successful. The possibility of a choate lien is lost if not

proven within three years of the debt, bill, tax. But like mechanics liens, action must be brought timely, as stated by the Delaware Supreme court in *Dukes, supra.* within three years of the year involved, otherwise the claim and potential priority of lien are gone.

Another program of the City which bears upon the issue of 'right to jury trial' is the City program of denying a property owner of his rights in favor swift revenue which has come to be known as the ordinance scheme for an 'Instant Ticket' where a real estate property owner would be fined, assessed, or charged without a prior hearing of $50 for some alleged picayune peccadillo and if not paid within a certain short time doubled in amount. An in house administrative appeal was economically forbidding. New Castle County copied the City idea and procedure to its rue. See the case of *Christine M. Dowd, Trustee v. New Castle County*, U.S. Court of Appeals for the Third Circuit, No 11-2103. In that case, the county issued a ticket for $50.00 for an alleged 'cut brushes' violation which the owner claimed to be a bird habitat. No prior proof of the claim or charge was made by the county. On information and belief the Chief Justice of the U.S. Court of Appeals for the Third Circuit at argument excoriated the county as having by its ordinance and practice there under violated basic individual rights that a first year law student would be aware of. No opinion was issued as the County settled the claim for damages. See News Journal article (A-

156).

While the News Journal article is not a legal opinion, it is illustrative of the argument that the City attempts and does deny owners basic legal rights. The City instant ticket appears to be an out growth of the Vacancy Ordinance fee charge. In both cases, no provision is made for the city to prove anything to support the fee; the City assumes no burden of proof for its claims. It itself decides any objections, for a fee. It deprives the courts of jurisdiction to resolve disputes of debt where it proclaims itself to be a creditor thereby denying basic rights to property owners, and utilizes the court only for execution, all without a judgment after no trial. And over the owners ignored objection.

The City under its practices of going directly to monition without judgment or trial for disputed water, sewer, maintenance charges, and vacant property registration fees cannot override basic protections afforded citizens.

There is language and principle in a classic case of a state attempting to eliminate rights protected by a higher authority that apply here, " A law, absolutely repugnant to another , as entirely repeals that other as if express terms of repeal were used." *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed.579, 1819: quoting from *McCulloch* and adapting the principles by addition to the text as follows: " The result is a conviction that the states have no power, by taxation or otherwise to retard,

impede, burden, or in any manner control, the operations of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *McCulloch*, *supra*. Applying this to the case at bar, the City of Wilmington cannot pass ordinances that are in conflict with the United States Constitution.

How can the City explain not filing an action to prove its claim for a disputed water and sewer bill against Readway Inc. and yet be compelled to sue in Superior Court to prove a storm water bill against a property owner who denies, like Readway, that money is owed factually. Discovery must take place with the resolution of fact to be made by an independent fact finder, court or jury. See *City of Wilmington v. Diamond State Port Corporation,* pending in Superior Court, New Castle County Case No. N12C-10275 JRJ, filed October 31, 2012 in which the City of Wilmington filed suit to obtain a judgment (not monition on mere billing) for storm water fees pursuant to City ordinance antecedent to any execution and in which the Port denied liability and sought dismissal of the City claims and asserted counterclaims. The Superior Court in the Readway Inc. case should require the City to prove its claim just as the City is required to prove its sewer bill against *Diamond State Port Corporation, supra.*

Each defendant, therefore, has a right to trial by jury where it will be the burden

of the City to prove by a preponderance of the evidence, that each party and their property:

1. Was temporarily occupied by transients, including illicit drug user and traffickers(§4-27, 125.0(a)).
2. The building remained vacant for 45 consecutive days (§4-27, 125.0(b)(3)).
3. The number of years vacant for 45 consecutive days (§4-27, 125.0(b)(3)).
4. Whether the building was occupied (§4-27, 125.0(b)(C)).
5. Was the property vacant (§4-27, 125.0(b)(F)).
6. Who is an owner and what entities directly or indirectly control the subject building (§4-27, 125.0(b)(E)). *Reynolds, supra.*
7. Did not an inspection by the City prove occupancy as provided in the ordinance of the Trust property removing it from fee registration (§4-27,125.0(b)(C)).
8. Did not the valid City Business License No. 5273 exempt the Janeve Co. Inc. from the registration fee (§4-27,125.0(b)(C)).
9. What water service, if any, was provided to the Readway Inc. property. (A-91)
10. What where the <u>actual</u> water meter readings for each bill. (A-91)
11. As a consequence of the <u>actual</u> water meter readings, what are the calculations for a sanitary sewer charge.

12. What maintenance was involuntarily provided for the Trust owned property, and the authority for the unlawful conversion of a child's swing and slide set from the Trusts yard and the method of calculation of the bill.

The claims are for registration fees for vacant properties, water-sewer bills, maintenance charge, all of which are disputed. *Durham* and *Dukes, supra.* specifically indicate civil action to determine disputed facts are required for Department L&I fees; Municipal Code requires for tax delinquency a civil action expressly to prove the disputed claim and that civil action by constitutional law must include the right to a jury trial.

ARGUMENT III

A. Question Presented.

DID THE COURT ERR AS A MATTER OF LAW IN ORDERING THE SALE OF APPELLANTS' PROPERTIES FOR AMOUNTS IN DISPUTE, NOT FINAL, AND SUBJECT OF OUTSTANDING LITIGATION? (THIS ARGUMENT CAN BE FOUND TO HAVE BEEN MADE IN THE COURT BELOW IN THE DEFENDANTS' MOTION FOR NEW TRIAL AND TO ALTER OR AMEND A JUDGMENT UNDER RULE 59 AS CONTAINED IN THE DOCKETS AS ITEMS NOS. 47 AND 46)

B. Standard and Scope of Review.

Whether the Superior Court erred as matter of law in formulating or applying legal principles involves questions of laws, and the standard of review is *de novo. Delaware Alcoholic beverages Wholesalers v Ayers,* 504 A.2nd, 1077, 1081, (Del. 1986). In this case the Superior Court ordered a sale of appellants' property without a trial to first determine disputed facts or requiring the City to first prove its claims, denied by the owners. This was an error of law.

C. Merits of the Argument.

In 2005, these defendants objected to the imposition of vacant property fees on the subject properties. Judge Carpenter made certain rulings that the defendants in the case at bar requested be the subject of reargument. Reargument was granted and City of Wilmington requested additional time to present a writing in opposition to that

which was requested by defendants in reargument. The additional time was granted by the court but the plaintiff, The City of Wilmington, has yet to file its writing. Thus, the 2005 case is still open and final adjudication has not been made. While City application of the vacancy ordinance deprives a putative debtor his right to have the City prove a claim for alleged debt before a jury in a civil trial, the Vacancy Ordinance provides the fee is due when the claim or bill final. Appellants contend there can be no finality until the City first presents its claim to a court in a civil action basically in the nature of 'debt' or assessment and properly litigated when facts are disputed.

Under the present argument, the Certiorari protocol was not complete. In the case of *Adjile Inc. et al. v. The City of Wilmington*, Delaware Superior Court, C.A. No. 05A-11-001 WCC (2005) the et al. included the owners in the present appeal. The case remains outstanding and open at the time these monitions on appeal were filed. A motion for reargument was made on December 21, 2005 (A-149) and the City sought time to file an answering brief. (A-151) The brief was never filed and the court never ruled on the motion as of the issuance of the writs in 2014 to sell the subject properties. The decision in *Adjile, supra.* would affect the amounts claimed by the City and finality . (A-149) Notwithstanding the lack of finality, the uncertainty of the amounts, and the lack of compliance with *Durham* and *Dukes, supra.* precedent and

the total lack of a judgment pursuant to a civil action to resolve disputed claims of fact, sales of the properties to the injury of the owners in this appeal.

The order for sale was in violation of the owners rights to due process of law and equal protection of the law and respectfully ought to be reversed.

ARGUMENT IV

A. Question Presented.

FOR DEFENDANT BELOW, APPELLANT READWAY, DID THE DISMISSALS OF TWO PREVIOUS MONITIONS CAUSE THE CLAIMS FOR VACANT PROPERTY FEES TO BE DISMISSED WITH PREJUDICE UNDER SUPERIOR COURT RULE 41(a)? (THIS ARGUMENT CAN BE FOUND TO HAVE BEEN MADE IN THE COURT BELOW IN THE TRIAL COURT ORDER AT PAGE 9)

B. Standard and Scope of Review.

Whether the Superior Court erred as matter of law in formulating or applying legal principles involves questions of laws, and the standard of review is *de novo. Delaware Alcoholic Beverage Wholesalers v Ayers,* 504 A.2d, 1077, 1081 (Del. 1986). In this case, the Superior Court ordered a sale of appellants' property without a trial to first determine disputed facts or requiring the City to first prove its denied claim. This was an error of law.

C. Merits of Argument.

Plaintiff below, appellee, has filed two monition actions against defendant below, appellant, Readway. The prior monitions were dismissed by the City of Wilmington.

Superior Court Rule 41(a) provides:

> "Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is

> without prejudice, except that a notice of dismissal operates as an adjudication on the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or inducing the same claim."

The rule 41(a) states a "notice of dismissal" operates as an adjudication upon the matter if previously dismissed. A notice of dismissal can be by court order. The Superior Court signed such an order pursuant to a Notice of Dismissal, dismissing an in personam claim in *Charlton v. Gallo,* 2009 WL 1639536 (Del. Super. 2009). Likewise, a Justice of the Peace dismissed a claim pursuant to a "Notice of Dismissal." *Mills v. State Farm Mut. Auto. Ins. Co.*, 1999 WL 458790 (Del. Super. 1999). Defendant Readway contends that excepting dismissals from the application of 41(a) and its "two dismissal" rule simply because a judge entered an order is contrary to law.

Rather defendant Readway believes the four step analysis found in, *In Re Chi-Chi's Inc.*, 338 B.R. 618 (Bkrtcy. D. Del. 2006) to be the appropriate law to establish application of the rule.

The Court in *Chi-Chi's* went on to establish a series of facts which must exist for the rule to apply:

1. It must be brought by the same real parties in interest. p. 623

2. The dismissals must have been voluntary. p. 624

3. The dismissals cannot be the result of the mutual agreement of the parties. p. 624

4. The dismissals must arise from the same and underlying facts. p. 624

The case against defendant Readway meets the criteria. All three times the action was brought, it was brought by the City of Wilmington, meeting the first criteria. The dismissals were all voluntary and the result of a motion by the City of Wilmington itself. The second criteria has been met. There was no consent by Readway and the record reflects that Readway was not given notice. Certainly, there was no mutual agreement to dismiss and the third criteria has been met. The dismissals arise from the same underlying facts. Each of the three monitions actions were initiated for water and sewer and vacant property fees. The causes of action are the same.

One only needs to review the various dockets brought by the City of Wilmington vs. Readway to see that multiple filings by the City was a real burden on the principals at Readway. The appropriate remedy is the dismissal of the third cause of action. *Hancock v. Pomazal*, 416 Fed. Appx. 639 (C.A. 9th Cir - 2011).

The reason for the "two dismissal" rule was made clear by the court in *Chi-Chi's*:

> "The purpose of the two dismissal rule is to prevent unreasonable abuse and harassment by plaintiff securing numerous dismissals." at p. 625.

It is clearly difficult for defendant to keep track of all these complaints. This is particularly true when he is not given notice of the dismissals.

EFiled: Jun 13 2014 09:00AM EDT
Transaction ID 55586481
Case No. Multi-Case

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

THE CITY OF WILMINGTON, a)
Municipal Corporation of the State)
of Delaware,)
)
Plaintiff,)
)
) C.A. N12J-03974 PRW
v.)
)
JANEVE CO., INC. AND)
TAX PARCEL NO. 26-028.20-054,)
)
Defendants,)

AND

)
THE CITY OF WILMINGTON, a)
Municipal Corporation of the State)
of Delaware,)
)
Plaintiff,)
)
v.) C.A. N12J-03922 PRW
)
READWAY, INC. AND)
TAX PARCEL NO. 26-013.30-183,)
)
Defendants,)

AND

)
THE CITY OF WILMINGTON, a)
Municipal Corporation of the State)
of Delaware,)
)
Plaintiffs,)

v.	)	**C.A. N12J-03901 PRW**
THE REVOCABLE TRUST OF WALTER LOWICIKI DATED AUGUST 18, 1999, STANLEY C. LOWICKI, UNKNOWN HEIRS OF WALTER LOWICKI AND TAX PARCEL NO. 26-055.40-022,	)	
Defendants.	)	

Submitted: April 29, 2014
Decided: June 13, 2014

Upon Defendants' Motion for Reconsideration of Commissioner's Orders and Appeal from the Commissioner's Findings and Recommendations,
DENIED.

Upon Plaintiff, City of Wilmington's, Motion to Lift Stay of Sheriff's Sale,
GRANTED.

OPINION AND ORDER

Thomas P. Carney, Esquire, City of Wilmington Law Department, Wilmington, Delaware, Assistant City Solicitor, Attorney for Plaintiff City of Wilmington.

John R. Weaver, Jr., Esquire, Stark & Stark, PC, Wilmington, Delaware, Attorney for Defendants.

WALLACE, J.

I. INTRODUCTION

Before the Court are cross-motions: Defendants'—Janeve Co., Inc., Readway, Inc., and the Revocable Trust of Walter Lowicki, Stanley C. Lowicki, and Unknown Heirs of Walter Lowicki (collectively "Defendants")—Motion for Reconsideration, challenging case-dispositive and non-dispositive determinations made by a Superior Court Commissioner;[1] and Plaintiff City of Wilmington's ("the City") Motion to Lift the Stay of Sheriff Sale. For the reasons stated below, Defendants' Motion is denied, and the City's Motion is granted.

II. FACTUAL AND PROCEDURAL BACKGROUND

The facts underlying this matter are not in dispute and arise from a long chain of litigation from the City's efforts to secure payment of vacant property fees for properties owned by Defendants. For approximately a decade, Defendants have failed to pay fees assessed by the City. When the City has attempted to collect these unpaid fees through monition actions, Defendants have vigorously challenged the collection efforts in court. Each year, when presented with a writ of monition, Defendants have brought suit in this Court, often sought reargument when their claims invariably failed, and appealed to the Supreme Court where their challenges were consistently

[1] *City of Wilmington v. Janeve Co., Inc.*, 2013 WL 4877963 (Del. Super. Ct. Sept. 11, 2013) (Comm'r Op. and Order).

rebuffed. This process would repeat when the next year's vacant property fees became due.

In the present action, Plaintiff City of Wilmington filed three Writs of Monition pursuant to City of Wilmington Code ("the Code") § 4-181[2] on September 4, 2012. The three writs were based on unpaid vacant property registration fees assessed under § 4-27 of the Code.[3] The three actions are consolidated for the purpose of this appeal. The properties in question are:

Defendant	Property Address	Tax Parcel Number
Janeve Co., Inc.	1309 West Street Wilmington, Delaware	26-028.20-054
Readway, Inc.	1309 Lincoln Street Wilmington, Delaware	26-013.30-183
Lowicki Trust	2600 West 18th Street Wilmington, Delaware	26-005.40-022

Defendants filed an answer in each monition action. As the answers presented no worthy defense, the City filed three writs of *venditioni exponas*, directing the Sheriff to sell the named properties. Defendants then filed a motion to set aside the monitions and quash the sheriff's sales, which the City opposed. A hearing on Defendants' motion was heard by a

2 1 *Wilm. C.* § 4-181.

3 1 *Wilm. C.* § 4-27.

Commissioner of this Court, at which the Commissioner noted a potential conflict of interest, granted a stay of the sheriff's sales, and sought reassignment of the matter to another Commissioner.

On February 26, 2013, the second Commissioner conducted a hearing on Defendants' motion. Defendants alleged three grounds for relief: (1) for the Readway property, the writ of monition should be dismissed pursuant to Superior Court Civil Rule 41(a) as precluded by the doctrine of *res judicata*; (2) the City's actions were untimely under 10 *Del. C.* § 8106's three-year statute of limitation; and (3) Defendants were entitled a jury trial. The Commissioner denied Defendants' claims, noting that the Defendants' systematic attempts to challenge the City's fee collections efforts on an annual basis—including *pro forma* appeals to this Court and our Supreme Court—were the cause of delayed adjudication.[4] When the following year's vacant property fees became due, and subsequently were not paid, the City

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[4] *See Adjile, Inc. v. City of Wilmington*, 2004 WL 2827893 (Del. Super. Ct. Nov. 30, 2004), *aff'd*, 2005 WL 1139577 (Del. May 12, 2005); *Adjile, Inc. v. City of Wilmington*, 2007 WL 2028536 (Del. Super. Ct. June 29, 2007), *reargument denied*, 2007 WL 2193741 (Del. Super. Ct. July 20, 2007), *aff'd*, 2008 WL 660139 (Del. March 13, 2008); *Adjile, Inc. v. City of Wilmington*, 2008 WL 2623938 (Del. Super. Ct. June 30, 2008), *reargument denied*, 2008 WL 4287316 (Del. Super. Ct. Sept. 12, 2008), *aff'd*, 2009 WL 476538 (Del. Feb. 26, 2009); *Janeve Co. v. City of Wilmington*, 2009 WL 1482230 (Del. Super. Ct. May 7, 2009), *reargument denied*, 2009 WL 2386152 (Del. Super. Ct. July 24, 2009), *aff'd*, 2010 WL 376979 (Del. Jan. 6, 2010); *Adjile, Inc. v. City of Wilmington*, 2010 WL 1379921 (Del. Super. Ct. March 31, 2010), *reargument denied*, 2010 WL 2432961 (Del. Super. Ct. May 28, 2010), *aff'd*, 2010 WL 6012382 (Del. Dec. 28, 2010).

would then be required to file a new writ of monition reflecting the up-to-date fee amounts owed.

The Commissioner reasoned that Superior Court Civil Rule 41(a) is only triggered if an action is dismissed without order of the court, and then later re-filed. As the City had sought the Court's permission to vacate an earlier writ of monition before re-filing the writ with the current fee amounts owed, the current action was not barred under Rule 41(a). Examining Defendants' pattern of purposefully delaying the City's collection efforts, the Commissioner further found that any delay suffered by Defendants was attributable to their own actions. Consequently, they neither proved nor could they argue that they suffered prejudice from the delay. And the statute of limitations did not bar the present action. Finally, the Commissioner found that, as the action for monition arises from a statutory provision,[5] Defendants have no right to a trial by jury because the cause of action did not exist at common law.[6] Defendants filed a motion to reargue the Commissioner's Order which the Commissioner subsequently denied.

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[5] DEL. CODE ANN. tit. 25, § 2901 (2013).

[6] Defendants further argued that the City was required to submit an affidavit in support of its monition, under DEL. CODE ANN. tit. 25, § 2901(b)(2) (2013) ("Notices of Lien shall be in the form of an affidavit, executed by an attorney for the political subdivision or by an employee of the political subdivision having custody and control over the records relating to the charges that constitute the lien . . . ."), and failed to do so. The Commissioner agreed. Following the February 26, 2013 hearing, the City filed a

Defendants now seek reconsideration of the Commissioner's Orders on the following grounds: (1) as for Defendant Readway, the "two dismissal" rule has been satisfied, and the present action should be barred under the doctrine of *res judicata*; (2) for all Defendants, the three-year statute of limitations found in 10 *Del. C.* § 8106 bars the City's claims as untimely; and (3) for all Defendants, the City's claims are simple debt actions—which existed at common law—and therefore the defendants are entitled to a trial by jury.

III. Standard of Review

Under Superior Court Civil Rule 132,[7] Commissioners have the power to conduct both dispositive and non-dispositive hearings and to make certain pre-trial determinations and recommendations.[8] The fundamental nature of the subject matter under review—dispositive or non-dispositive—dictates the degree of deference a judge must give to such a determination.[9] Upon review of a Commissioner's case-dispositive determination, a judge engages

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supplemental/amended affidavit in each of the monition actions, thereby mooting this claim. Defendants have not asserted this claim in their motion for reconsideration, therefore the Court need not address it.

7 Super. Ct. Civ. R. 132(a)(3) & (4).

8 *New Castle County v. Kostyshyn*, 2014 WL 1347745, at *3 (Del. Super. Ct. April 4, 2014).

9 *Id.*

in a *de novo* review.[10] For such case-dispositive determinations, therefore, the Commissioner's disposition acts as proposed findings of fact and recommendations and the judge makes a *de novo* determination of those specified portions, proposed findings of fact, or recommendations to which an objection is made.[11] For non case-dispositive matters, by contrast, the Commissioner's order is reconsidered by a judge only "where [it] has been shown on the record" that the order is "based upon findings of fact that are clearly erroneous, or [] contrary to law, or [] an abuse of discretion."[12]

The Commissioner's opinion contains both case-dispositive and non-dispositive determinations, the Court will apply the appropriate standard of review for each determination.

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10 Super. Ct. Civ. R. 132(a)(4)(iv).

11 Super. Ct. Civ. R. 132(a)(4)(ii).

12 Super. Ct. Civ. R. 132(a)(3)(ii) & (iv).

IV. DISCUSSION

A. As the City Obtained Leave of the Court Prior to Vacating the Prior Writ of Monition, Superior Court Civil Rule 41(a) Does Not Bar Subsequent Action.

Defendant Readway contends that the City's voluntary dismissal of the prior writ of monition triggers the "two dismissal" rule as it is articulated by the Delaware Bankruptcy Court in *In re Chi-Chi's Inc.*[13] In Readway's view, the doctrine of *res judicata* should bar the City's present writ. But because the prior dismissal of the writ was done with leave of the Court, and because the necessity of filing such multiple writs occurred in large part due to Readway's purposeful delay of the City's collection efforts, the subsequent writ is not barred by Rule 41(a).

In alleging that a claim is barred under *res judicata*, a party must show:

> (1) the court making the prior adjudication must have had jurisdiction; (2) the parties to the second action must be the same or be privy to those in the first action; (3) the cause of action must be the same in both cases or the second action must arise from the same transaction that formed the basis of the prior adjudication; (4) the issues in the prior action were decided adversely to the contentions of the plaintiff(s) in the pending case; and (5) the prior decree must be final.[14]

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[13] 338 B.R. 618 (Del. Bankr. 2006).

[14] *Fox v. Christina Square Assoc., L.P.*, 1994 WL 146023, at *3 (Del. Super. Ct. April 5, 1994).

Superior Court Civil Rule 41(a)(1) provides:

> [A]n action may be dismissed by the plaintiff ***without order of the court*** . . . Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.[15]

An action that was voluntarily dismissed by a plaintiff may, therefore, be an "adjudication" for the purpose of *res judicata* analysis, if the dismissal occurred "without order of the court."[16] Readway concedes that the City dismissed the prior writ pursuant to an order of the Court, and therefore Rule 41(a) would appear not to preclude the present writ.

Readway contends, however, that the Court should not except Rule 41(a) dismissals, even those granted by the court, when applying the "two dismissal" rule articulated in *In re Chi-Chi's Inc.* Not so. The purpose of the "two dismissal" rule is "to prevent unreasonable abuse and harassment" by a plaintiff attempting to "secur[e] numerous dismissals without

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[15] Super. Ct. Civ. R. 41(a)(1) (emphasis supplied).

[16] *Id.* (emphasis supplied). A dismissal by order of the court, by contrast, is not similarly considered an adjudication, and therefore cannot be the foundation of a *res judicata* claim. *See* Super. Ct. Civ. R. 41(a)(2) ("By order of the court. Except as provided in [Super. Ct. Civ. R. 41(a)(1)], an action shall not be dismissed at the plaintiff's instance save upon order of the Court and upon such terms and conditions as the Court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the Court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.").

prejudice."[17] A court may apply the "two dismissal" rule to avoid prejudice to a defendant from a plaintiff's bad faith conduct, or to avoid abuse of the judicial system.[18] The "two dismissal" rule "operates as an adjudication on the merits," and therefore it "has been strictly construed" by the courts, especially where the purpose of the exception would not be met.[19]

The concern underlying the "two dismissal" rule—that a plaintiff would cause prejudice to a defendant or harm to the judicial system by repeatedly dismissing and re-filing an action in bad faith—is not present in this matter. The City was forced to update its monition to reflect the current fee amount owed by Readway because of Readway's systematic pattern of delay, not out of any desire to cause prejudice to Readway or harm to the judicial system. As there are no indicia of attempts to prejudice Defendant or cause harm to the judicial system, the "two dismissal" rule is not applicable.

After *de novo* review,[20] the Court adopts the Commissioner's recommendation concerning Defendant Readway's claim of *res judicata*

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17 *Chi-Chi's*, 338 B.R. at 625 (internal quotations and citations omitted).

18 *See id.*

19 *Id.* at 621 (citing *Sutton Place Development Co. v. Abacus Mortg. Inv. Co.*, 826 F.2d 637, 640 (7th Cir. 1987)).

arising under Superior Court Civil Rule 41(a). Defendants' Motion for Reconsideration thereof is **DENIED**.

B. Assessment of Vacant Property Fees Creates a 10-Year Lien, Not Limited by a 3-Year Statute of Limitations Under 10 *Del. C.* § 8106.

Under Delaware law, vacant property fees are "taxes or special assessments, subject to collection by monition and sheriff's sale."[21] Twenty-five *Del. C.* § 2903(a) provides that taxes against real estate constitute "a lien against the real estate . . . for 10 years from July 1 of the year for which the taxes were levied, but if the real estate remains the property of the person who was the owner at the time it was assessed, the lien shall continue until the tax is collected."[22] Defendants argue that § 2903(a) is merely the mechanism that creates the lien against property for unpaid taxes, and cannot supersede the three-year statute of limitations under 10 *Del. C.* § 8106.[23]

Defendants acknowledge that § 2903(a) provides for the imposition of a lien for unpaid taxes, but argues that the amounts the City is attempting to

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20 *See* Super. Ct. Civ. R. 132 (a)(4)(iv) (requiring *de novo* review of case-dispositive matters).

21 *City of Wilmington v. McDermott*, 2008 WL 4147580, at *3 (Del. Super. Ct. Aug. 26, 2008), *aff'd*, 2009 WL 1058735 (Del. April 21, 2009)).

22 DEL. CODE ANN. tit. 25, § 2903(a) (2013).

23 DEL. CODE ANN. tit. 10, § 8106(a) (2013) ("[N]o action to recover a debt not evidenced by a record or by an instrument under seal . . . no action based on a statute . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action.").

collect through its monition action are properly classified as "fees" rather than "taxes," making § 2903(a) inapplicable. Title 25, Chapter 20 of the Delaware Code does contain a list of different classifications of debts payable to the State or its political subdivisions—taxes, fines, and fees—and it might be argued therefore that different treatment based on the type of debt may have been contemplated. Defendants suggest that section 2903(a) only applies to "taxes," and therefore should not be applicable for unpaid vacant property "fees."[24] Our courts have clearly stated that unpaid vacant property fees are, under Delaware law, "taxes or special assessments, subject to collection by monition and sheriff's sale," however.[25] Defendants' attempt to now transmute the nature of the obligation here is unavailing; § 2903(a) clearly imposes a 10-year lien in these circumstances.

Defendants argue in the alternative that, if the lien is valid, the City is still required to bring the monition action within § 8106's three-year limitation period. When interpreting statutory provisions, the "statutory language, where possible, should be accorded its plain meaning."[26] If the statutory language is unambiguous, there is no room for judicial

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[24] DEL. CODE ANN. tit. 25, § 2903(a) ("In New Castle County all ***taxes*** assessed against real estate shall continue as a lien against real estate in the County for 10 years . . . .") (emphasis supplied).

[25] *McDermott*, 2008 WL 4147580, at *3, *aff'd*, 972 A.2d 312.

[26] *Freeman v. X-Ray Assocs., P.A.*, 3 A.3d 224, 230 (Del. 2010).

interpretation, and "the plain meaning of the statutory language controls."[27] Statutory provisions will be read together harmoniously, if possible, and extant language "should not be construed as surplusage if there is a reasonable construction" otherwise.[28] The statutory language in § 2903(a) is clear and unambiguous. The plain meaning, therefore, must control: the failure by Defendants to pay vacant property fees results in a lien assessed against their properties that will remain on the properties for a minimum of 10 years. To read the statutory language otherwise would be to render the 10-year lien language as mere surplusage. It would make little sense to statutorily grant the City a valid 10-year lien against Defendants' property, yet statutorily allow only 3 years to enforce that lien.

After *de novo* review,[29] the Court adopts the Commissioner's recommendation concerning Defendants' claim that the 3-year statute of limitations under § 8106 renders the City's present monition action time-barred. Defendants' Motion for Reconsideration thereof is **DENIED**.

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27 *Doroshow, Pasquale, Krawitz & Bhaya v. Nanticoke Mem'l Hosp., Inc.*, 36 A.3d 336, 342-43 (Del. 2012) (internal citation omitted).

28 *Dewey Beach Enters., Inc. v. Bd. of Adjustment of Town of Dewey Beach*, 1 A.3d 305, 308 (Del. 2010) (quoting *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994)).

29 *See* Super. Ct. Civ. R. 132 (a)(4)(iv) (requiring *de novo* review of case-dispositive matters).

C. Writ of Monition is Purely a Statutory Action, and Therefore Defendants are not Entitled to Jury Trial.

Under the Delaware Constitution, one has a right to a trial by jury "as heretofore,"[30] *i.e.*, a person is entitled to a jury trial if the right existed at common law for that cause of action.[31] Defendants direct the Court to *Nandine v. Darrach*,[32] a case that was before the Delaware Court of Common Pleas in 1800, in support of their assertion that debt actions—as Defendants interpret the City's writ of monition—existed at common law as did a concomitant right to a jury trial. The underlying claim before the Court in *Nandine* was recovery of a personal debt between two private parties.[33] A writ of monition, by contrast, is an *in rem* action, where the City has statutory authority to seize property in order to recoup unpaid property taxes. Defendants are not personally liable for the debt, and therefore the action is not personal in nature.[34]

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30 Del. Const. art. I, § 4.

31 *See Claudio v. State*, 585 A.2d 1278, 1296 (Del. 1991) (citing *Nance v. Rees*, 161 A.2d 795, 799 (Del. 1960)).

32 1800 WL 2501 (Del. Com. Pl. May 13, 1800).

33 *Id.* at *1.

34 *See Steel Suppliers, Inc. v. Ehret, Inc.*, 486 A.2d 32, 35 (Del. Super. Ct. 1984) (noting that statutory liens are *in rem* actions); *Pennamco, Inc. v. Nardo Mgmt. Co., Inc.*, 435 A.2d 726, 729 (Del. Super. Ct. 1981) (same).

Defendants claim that a writ of monition is merely a debt action, and because debt actions were present at common law, Defendants are entitled to a jury trial.[35] But Defendants' use of *Nadine* for this proposition is misplaced, far too broad, and otherwise unsupported. Monition as a cause of action is solely a unique statutory remedy. Defendants have shown no common law analogue to such an action that carried with it a common law jury trial right, and therefore Defendants have demonstrated no right to a jury trial under the Delaware Constitution.

There being no showing on the record presented here that the Commissioner's order is based upon clearly erroneous findings of fact, is contrary to law, or is an abuse of discretion, the Defendants' Motion for Reconsideration on the jury trial claim is **DENIED.**[36]

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[35] *See Mahmoud v. Al-Naser*, 2004 WL 1280313 (Del. May 28, 2004); *Phillips v. Gunby*, 117 A. 383 (Del. Super. Ct. 1921); *Colesberry v. Anderson*, 2 Del. Cas. 407 (Del. 1818); *Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147 (Del. Ch. 1978); *Wilmington Trust Co. v. Renner's Paving, LLC*, 2013 WL 1442366 (Del. Super. Ct. March 27, 2013); *Baks v. Centra, Inc.*, 1997 WL 819130 (Del. Super. Ct. Dec. 15, 1997); *Parsons v. Cannon's Ex'r*, 88 A. 470 (Del. Super. Ct. 1912); *Joseph v. Johnson*, 82 A. 30 (Del. Super. Ct. 1908); *State v. Willard*, 2 Houst. 197 (Del. Super. Ct. 1859); *Y.A. v. V.A.*, 2007 WL 1518291 (Del. Fam. Ct. March 20, 2007).

[36] Super. Ct. Civ. R. 132 (a)(3)(iv) (The Court will reconsider such a non-case-dispositive matter only upon a showing in the record of clear error, violation of law or abuse of discretion.).

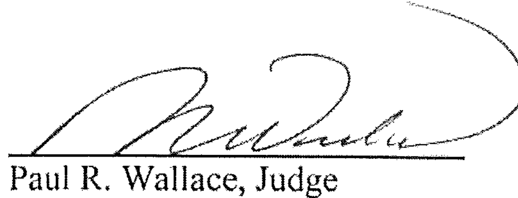
D. City of Wilmington's Motion to Remove the Stay of Sheriff's Sale is Granted.

As Defendants' Motion for Reconsideration is denied, no grounds exist to warrant a stay of the City's writ of monition. The Commissioner's stay is therefore vacated. The City of Wilmington's motion is **GRANTED**.

V. CONCLUSION

For the foregoing reasons, Defendants' Motion for Reconsideration is **DENIED**. Plaintiff City of Wilmington's Motion to Lift Stay of Sheriff's Sale is **GRANTED**.

IT IS SO ORDERED.



Paul R. Wallace, Judge

Original to Prothonotary
cc: All counsel via File & Serve