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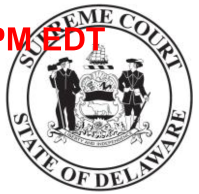

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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' REPLY BRIEF

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ARGUMENT I

A. Question Presented.

WHETHER THE NATURE OF A LIEN HAS ANY BEARING ON THE APPLICATION OF THE THREE YEAR STATUTE OF LIMITATIONS AND WHETHER THE SUPERIOR COURT ERRED IN FAILING TO APPLY THE THREE YEAR STATUTE OF LIMITATIONS

B. Standard and Scope of Review.

The Superior Court's interpretation of a statute is a question of law which this Court review *de novo*. *Dambro v. Meyer,* 974 A.2d 121, 129 (Del. 2009). The Court must determine "whether the Superior Court erred as a matter of law in formulating or applying legal principals. *Id.*

C. Merits of Argument.

When applying a "statute of limitations," you look back in time. The question to be asked is, now that the suit is filed, how many years in the past may the fees that are due be collected? When applying a "lien," you look forward to determine how many years will the judgment be secured by real property? It is legal error to suggest that the length of a lien, as established by the statute, has any effect on the statute of limitations imposed by a different statute.

In the case at bar, it is defendants below, appellants' contention that when each monition was filed, the City of Wilmington could collect its vacant property fees from

that day and fees that had accrued in the previous three years and no more. Once the amount of the vacant property fees that had accrued in the previous three years had been calculated, that amount will be a lien on real estate for three or ten years and will have no impact on the statute of limitations and how many years of vacant property fees the City of Wilmington may collect.

Vacant property fees exist by statute, 1 *Wilm. C.* §4-27, 120. The Delaware Code at 10 *Del. C.* §8106 states: "...no action based on a statute...shall be brought after the expiration of three years from the accruing of the cause of action."
The three year statute of limitations applies to municipalities charging fees under their own statutes. *Mayor and Council of Wilmington v. Dukes,* 157 A.2d 789 (Del. Super. 1960). Municipalities initiate litigation to collect their fees based on statutory authority. Since the municipality is litigating based on "statute," the plain language of 10 *Del. C.* §8106 means that the three year statute of limitations applies. There is no differentiation in the three year statute between in rem and in personum actions. The City of Wilmington can only collect vacant property fees that accrued in the previous three years to the date of filing.

Although the defendants below, appellants' assert that the three year statute of limitations clearly applies to the case at bar, both the trial court and the City of Wilmington's Answering Brief relies heavily on *City of Wilmington v. McDermott,*

2008 Del. Super. LEXIS 309 (Del. Super. Ct. Aug. 26, 2008). The court in *McDermott* stated: "The question is whether the City of Wilmington can use monition and sheriff's sale to collect vacant property fees."

So the court was not deciding statute of limitations or liens for vacant property fees.

The court in *McDermott* was interpreting the monition statute 36 *Del. Laws* Ch. 143. It is that statute that has the phrase "for the collection of taxes or special assessments." Previous court opinions have decried the monition statute's failure to define a tax or a special assessment *City of Wilmington v. Wilmer,* 1997 WL 124151 (Del. Ch.). So the court in *McDermott* looked at Vacant Property Fees to see if they could be litigated under the phrase "taxes or special assessments" as defined in the monition statute.

By contrast, Title 25, Chapter 29 has multiple definitions of charges levied by municipalities. They are found in 25 *Del. C.* §2901(a)(1). "Real Property taxes" are enumerated in 25 *Del. C.* §2901(a)(1)(a). "Registration of ownership of any vacant buildings" are separately enumerated in 25 *Del. C.* §2901(a)(1)(j). For the purpose of Title 25,Chapter 29, taxes are not vacant property fees because they are separately defined. Collectively, all the fees (including taxes and vacant property fees) are referred to as "charges." Charges are given a three year lien 25 *Del. C.* §2901(b)(7).

"Taxes" and only taxes are given a 10 year lien 25 *Del. C.* §2903(a).

To compare the monition statute which provides no definitions to Title 25, Chapter 29 which has multiple definitions is comparing an apple to an orange. Therefore, the interpretation of a tax by the *McDermott* court has no bearing on the definition of a tax in Title 25, Chapter 29, because *McDermott* court is giving an opinion on the monition statute only.

Circling back to the point, Title 25, Chapter 29 has no reference to statute of limitations. Its clear purpose is to create a lien. It has no subchapter that speaks to statute of limitations. Therefore, the language of 10 *Del. C.* §8106 remains the only code section that enumerates the limitation on bringing an action on a statute. That limitation is three years and the City of Wilmington may only collect vacant property fees that accrued in the three years previous to the filing of the monition.

ARGUMENT II

A. Question Presented.

WHETHER THE SUPERIOR COURT ERRED AS A MATTER OF LAW IN THAT IT DID NOT REQUIRE A TRIAL BY JURY BEFORE THE CITY OF WILMINGTON WAS PERMITTED TO EXECUTE ON ITS MONITIONS.

B. Standard and Scope of Review.

The Superior Court's interpretation of a statute is a question of law which this Court review *de novo*. *Dambro v. Meyer,* 974 A.2d 121, 129 (Del. 2009). The Court must determine "whether the Superior Court erred as a matter of law in formulating or applying legal principals. *Id.*

C. Merits of Argument.

Earlier decisions of Delaware courts in the past several years over different issues connected with the temporary unlawful occupancy by transients of buildings, aka the Vacancy Property ordinance, did not involve the disputes reaching the execution stage of the City on its monition. The cases here were at the execution stage. The trial court erred as a matter of law in believing and holding that a bill for a fee under 25 *Del. C.* §2901(a)(1)(j) created an 'automatic lien.' It is not an automatic lien because 25 *Del. C.* §2901(b)(1) requires the filing of a notice of a lien with an affidavit. No such notice was filed in the case at bar. *Dukes, infra* and *Mayor*

and Council of Wilmington v. Durham, 153 A.2d 568 (Del. Super. - 1959) provide that claims from the City or the Department Of Licenses and Inspection for money fees" must be proven in the traditional way of filing suit where the disputed facts will be adjudicated in accordance with the rules of civil procedure for discovery, motions, jury, etc.

The City claims that a trial is not necessary because their actions are in rem. In the case of *Iannoti v. Kalmbacher,* 34 Del. 600, 156. A. 366 (1931), another in rem action, Judge Rodney states that the failure to follow the statutory requirements will void the action. In the cases at bar, the failure of the City of Wilmington to follow 25 *Del. C.* §2901(b)(1) voids their action. "However true it may be that a very important purpose is the obtaining of the lien on the particular property, yet the fact must not be lost sight of that the fixation of the debt for labor or materials is the very essential of the action and unless the debt exists and is enforceable then the ultimate purpose concerning the existence of the lien and its subsequent enforcement can never arise." ... "All mechanics lien proceedings are statutory... The whole proceeding is in derogation of the common law.... The statute, therefore, must be strictly construed especially as to the obtaining and existence of a lien."

To start the lien process, the City must qualify under 29 *Del. C.* §2901(a)(1). It must also file with the Prothonotary, a "Notice of Lien" in accordance with the

several conditions of the statute.

On information and belief, the City never obtained a lien against the defendants as it never filed a Notice of Lien. There are no "Notice of Liens" in the City of Wilmington's Appendix. Nothing "constitutes a lien" unless a proper "Notice of Lien" was first filed strictly in accordance with the lien statute—strict interpretation being required.

In the *Dukes, infra* the court states that the City, to prove claims for fees demanded by the City of Wilmington Department of Licenses and Inspection, must do so by civil action. The City differentiates *Dukes,* stating the complaint in that case is an action *"in personam"* while the demands for monition in the present cases are *"in rem."* According to the City, disputed facts in claims by the City for money against a person require trials to resolve the claim, but claims by the City for money against a person's real estate require no trial to resolve the disputed claim and the City need prove nothing to anyone: its billing or its claim and according to the City, it is equivalent to a final judgment, no need for court intervention except for a court order to sell. These cases and courts, in *Durham* and *Dukes* made no distinction, therein whether the money claim is *in personam* or *in rem*. The courts specifically cite the City of Wilmington's obligation and particularly, claims for fee from the Department of Licenses and Inspection to file suit to prove its claim. The City admits

never filing suit to prove its claim. The characterization of the asset by the City to satisfy an unproven claim is no distinction for disobeying the law of having to first prove your claim to judgment before execution can be considered. All land/real property is owned " *in personam*" whether human, artificial, governmental or of uncertain or disputed identity, but it is 'owned' by some one. *In rem* disputes involving trespassing, boundaries, mineral rights still call for 'independent of the parties', fact finding, calling for the court, whether by jury or judge to resolve factual disputes. The City's argument is that not only are the defendants property owners not entitled to a jury trial when they dispute the '*in rem'* demand for money, they are entitled to no trial at all of any kind to resolve the dispute. The City has set up a system to abolish due process of law where by its demand in the nature of a 'billing', disputed and unpaid, entitles the city to a 'monition' collection process without prior filing of a notice of lien, without judgment and with out affidavit.

The City chose a civil trial in *City of Wilmington v. Diamond State Port Corp.*, 2014 Del. Super. LEXIS 427, (Del. Super. Aug. 15, 2014) involving a disputed water storm sewer bill, (an *in rem* subject) but used monition against Readway (Lincoln Street) involving a disputed water service bill, and no sewer service. The City should be consistent and permit a trial in every case where it demands fees.

The City has not complied with the law to use the monition process and it is

jurisdictional. See 9 *Del. C.* §8732(a). "No proceeding shall be brought under this subchapter unless the tax or assessment sought to be collected hereunder shall at the time of the filing of the praecipe in the office of the Prothonotary be and constitute a lien upon the property against which the tax or assessment was assessed or laid."

The City did not comply with the condition precedent and did not file any Notice of Lien against defendants as required by 25 *Del. C.* §2901(b)(1). The failure to comply results in dismissal. *Iannoti v. Kalmbacher, infra.*

The approach taken by the City is similar to the "instant ticket." The owners in the City struggled ignorantly against the City under its scheme before the realization that basic property and owners rights were being violated as in the case of *Schadt lll, v Latchford*, No. 232, 2002, Feb. 6, 2004 Del. Supr. Ct. and the instant ticket *in rem* procedure created by the City of assessing fees without first proving the validity of the assessment. The instant ticket procedure was condemned by the U.S. Court of Appeals for the Third Circuit in *Christine M. Dowd, Trustee v. New Castle County*, Appellate Docket No. 11-2113, United States Court of Appeals for the Third Circuit. The Vacancy Ordinance is a mirror of the discredited instant ticket procedure and likewise is to be discredited.

Accordingly the court erred as a matter of law in ordering the sale of property where there was no prior judgment, no valid lien, and no jurisdiction and in denying

the right of defendants to make the City prove its claim and in excusing the City from the obligation to first prove its claim as required by *Durham* and *Dukes, infra* by civil jury action and other authority.

ARGUMENT III

A. Question Presented.

THE COURT ERRED AS A MATTER OF LAW IN ORDERING THE SALE OF PROPERTY WHEN IT HAD EVIDENCE THAT ONE CASE RELATING TO THE SALE WAS OPEN AND UNDECIDED AND WOULD AFFECT THE AMOUNTS CLAIMED.

B. Standard and Scope of Review.

The Superior Court's interpretation of a statute is a question of law which this Court review *de novo*. *Dambro v. Meyer,* 974 A.2d 121, 129 (Del. 2009). The Court must determine "whether the Superior Court erred as a matter of law in formulating or applying legal principals. *Id.*

C. Merits of Argument.

The defendants below, appellants' demand for a jury trial before and after the issuance of a monition was notice that there were material issues of fact to be determined and a cataloguing of all evidentiary and discovery issues would be appropriate at that proceeding—implicit in this was the undecided Superior Court case of 2005, *Adjile Inc., et al. v. City of Wilmington,* C.A. No. O5A-11-001 WCC . The Court was made aware, that by not allowing a jury trial, one factor that undermined the ordered sale is the fact that the 2005 case involving the parties was still open and not concluded which would affect and undermine the amounts claimed by the City

until resolved properly. The trial court should not order a sale when there was no final judgment in that matter, when from the courts own file, there was evidence on a motion for reargument filed and to which motion Mrs.Tassone-DiNardo requested time to file a response, did not do so and the motion for reargument was never decided.

Defendants, owners, were entitled to have *Dukes* and *Durham* obeyed through trial and show that the City was wrongly billing for water and sewer and ignoring protestations for years and charging for uncalled for alleged maintenance and the vacancy bills were wrongly imposed and the amounts were incorrect and that none of the claims of the City were ever proven. That was part of the argument in *Adjile, infra.*

It was necessary to get into the details of evidence when the court decided not to require the City to prove its claim a grant a trial—a detail that was incontrovertible—a case of the parties was undecided, which affected the unproven numbers in a sale.

Those cases, the ones preceding the present appeal, were at a time when the owners did not fully comprehend the nature of the City procedure and awakened in the current monition process where the City was selling properties without affidavits and without prior adjudicated judgments.

The court's decision to order a sale knowing a case was undecided was legal

error and should be reversed.

The order of the court should be vacated, restitution made to the defendants for the loss of funds and remanded to the court for such further relief to the defendants as is appropriate.

ARGUMENT IV

A. Question Presented.

WHETHER THE UNILATERAL MOTION TO VACATE THE FIRST TWO MONITIONS FOR DEFENDANT READWAY WILL INVOKE THE TWO DISMISSAL RULE CAUSING THE READWAY MONITION TO BE DISMISSED.

B. Standard and Scope of Review.

The Superior Court's interpretation of a statute is a question of law which this Court review *de novo*. *Dambro v. Meyer,* 974 A.2d 121, 129 (Del. 2009). The Court must determine "whether the Superior Court erred as a matter of law in formulating or applying legal principals. *Id.*

C. Merits of the Argument.

Delaware Superior Court 41(a)(1) states at pertinent part: 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. The monition action filed against the defendant Readway for the property known as 1309 North Lincoln Street is the third to be filed by the City of Wilmington. That second dismissal opens the door for defendant Readway to say there has been a dismissal with prejudice *Anderson v. Aon Corp.,* 614 F.3d 361 (7th Cir. 2010). The answering brief by the City of Wilmington states that Superior Court

Civil Rule 41(a) does not apply since the actual dismissal was not a notice of dismissal but an order resulting from a motion to vacate. Defendant Readway would like this Honorable Court to recognize another difference. The filing of a monition requires the lifting of a judgment not the dismissal of a pending case.

The purpose of the two dismissal rule is to prevent unreasonable abuse and harassment by a plaintiff securing numerous dismissals without prejudice *In re Chi-Chi's Inc.,* 338 B.R. 618 (Bankr. D. Del. 2006). If filing and dismissing a case is unreasonable abuse, then filing and dismissing a monition is more abusive.

The City of Wilmington filed two monitions and unilaterally determined to vacate them both. The decision was made by the City of Wilmington to vacate. The unilateral filing by the City should invoke the two dismissal rule and cause the dismissal of the monition against defendant Readway.

CONCLUSION

This Honorable Court should limit any claim by the City of Wilmington to three years worth of accrued charges, looking back from the date of the filing of the monition by the City of Wilmington. This Honorable Court should remand this case to the trial court for jury trial on defendants below, appellants' answers filed in each action.

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