



IN THE SUPREME COURT OF THE STATE OF DELAWARE

Supreme Court Case No. 185, 2017

KEVIN GARBER t/a CARPENTRY UNLIMITED,

Petitioner Below/Appellant,

v.

NEW CASTLE COUNTY DEPARTMENT OF LAND USE
AND NEW CASTLE COUNTY BOARD OF LICENSE,
INSPECTION & REVIEW,

Respondents Below/Appellees.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE
COUNTY OF NEW CASTLE

APPELLANT'S CORRECTED REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Table of Authorities	ii
I. INTRODUCTION	1
II. THROUGH THE UNDERLYING PROCEEDINGS, THE COUNTY IS DEPRIVING CARPENTRY UNLIMITED OF ITS INTERESTS IN THE BOND PROCEEDS WITHOUT ADEQUATE PROCEDURAL DUE PROCESS	3
III. THE HEARING OFFICER AND THE LIRB FAILED TO ADHERE TO STATUTORY AND DECISIONAL STANDARDS WHEN APPLYING THE STATUTE OF LIMITATIONS UNDER 10 <i>Del. C.</i> § 8106	12
IV. CONCLUSION	15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Becon Management & General Contracting, Inc.</i> , 178 S.W.2d 198 (Tex. App. 2005).....	5
<i>Cableguard Systems, Inc. v. Mid-Continent Casualty Co.</i> , 73 Fed Appx. 28 (5th Cir. 2003).....	5
<i>Christiana Town Ctr., LLC v. New Castle Cty.</i> , 865 A.2d 521 (Del. 2004)	9, 12
<i>Council of Sussex Cty. V. Green</i> , 516 A.2d 480, 481 (Del. 1986)	9, 12
<i>Dambro v. Meyer</i> , 974 A.2d 121 (Del 2009)	13
<i>Goldberg v. Kelly</i> , 397 U.S. 254, 90 S. Ct. 1011	6
<i>Granfinanciera S.S. v. Nordberg</i> , 492 U.S. 33 (1989).....	4, 5
<i>Hill v. Borough of Kutztown</i> , 455 F.3d 255 (3rd Cir 2006)	8
<i>INA v. Allgood Electric Co., Inc.</i> , 494 S.E.2d 728 (Ga. App. 1997)	5
<i>Lecates v. Justice of the Peace Court No. 4</i> , 637 F.2d 898 (3rd Cir. 1980)	5
<i>McCool v. Gehret</i> , 657 A.2d 269 (Del. 1995)	4
<i>SCCB, Inc. v. P. Browne & Assoc.</i> , 751 F.Supp.2d 813 (M.D.N.C.)	5
<i>U.S. v. James Daniel Good Real Property</i> , 510 U.S. 43, 114 S. Ct. 492, 126 L.Ed.2d 490 (1993)	6

<i>Vichi v. Koninklijke Philips Elecs. N.V.</i> , 62 A.3d 26 (Del. Ch. 2012)	13, 14
<i>Wal-Mart Stores, Inc. v. AIG Life Ins. Co.</i> , 860 A.2d 312 (Del. 2004)	14
<i>Wallace v. Flintco Inc.</i> , 143 F.3d 955 (5th Cir. 1998)	5
Constitutional Provisions	
U.S. Const. amend XIV, § 1	6, 8
DEL. CONST. of 1897, ART. I, § 4	4
Statutes	
9 <i>Del. C.</i> § 1315	6
10 <i>Del. C.</i> § 8106	1, 12, 14
29 <i>Del. C.</i> §§ 10101-10161	9
73A C.J.S. Public Administrative Law	6
Administrative Procedures Act	9
New Castle County Code § 02.05.103	6, 7
New Castle County Code Sec. 6.03.013(A)	7
New Castle County Code Sec. 6.03.013(B)(1)(b)(3)	8
New Castle County Code Sec. 6.03.013(B)(3)&(B)(3)(a)	7
New Castle County Code §12.002	14
Other Authorities	
Rodgers-Waire and Horowitz, Twenty Second Annual Northeast Surety and Fidelity Claims <i>Conference, Jury Trial Issues In Surety Fidelity Litigation</i> FN22 (2011)	5
73A C.J.S. Public Administrative Law and Procedure § 379	6

I. INTRODUCTION

This case raises serious questions about whether the RTSC and LIRB proceedings provide sufficient due process and judicial review to comport with modern standards of due process. Despite significant property interest at stake, namely \$150,000 of proceeds under a statutory compliance bond, the underlying proceedings did not afford Carpentry Unlimited a detached and neutral magistrate. The RTSC Hearing Officer is a County employee and the LIRB members are appointed by the County executive. This is constitutionally problematic because the County is beneficiary under the bond and has a pecuniary interest in the outcome.

Additionally, the underlying process also did not afford a legally-trained judge to address the legal issues raised by Carpentry Unlimited. There was no legally-trained judge to address the parties' contractual rights under the statutory compliance bond. Carpentry Unlimited never even had the opportunity to contest the amount of the claim. To date, Carpentry Unlimited was not provided copies of the repair estimates to contest the claim.

Next, the RTSC and LIRB decisions are defective because they do not adhere to statutory or decisional standards in the application of 10 *Del. C.* § 8106. The County does not have jurisdiction to issue code violations after the statute of limitations has run under 10 *Del. C.* § 8106 and the violation notice was issued

more than three years after the County inspected and approved the construction at issue.

The County arbitrarily chose the date of the certificate of occupancy as the date the statute of limitations began to run. There is no basis in Delaware law to support this finding. Under Delaware law, the time the statute of limitations begins to run is the time of injury or the wrongful act. In this case, the statute of limitations would have started to run when the construction related to the alleged code violations was completed.

Additionally, the RTSC and LIRB decisions do not properly reflect a basis for tolling under Delaware law. Because the County inspected and approved the construction at issue, there is no basis for the County to assert tolling of the statute of limitations. The County cannot be blamelessly ignorant of the alleged code violations, which is one of the underlying bases for tolling under any of the doctrines, if it inspected and approved the construction at issue.

Because the underlying proceedings did not provide adequate due process and the RTSC and LIRB decisions do not adhere to statutory or decisional standards, this Court should quash the RTSC and LIRB decisions in their entireties as contrary to law.

II. THROUGH THE UNDERLYING PROCEEDINGS, THE COUNTY IS DEPRIVING CARPENTRY UNLIMITED OF ITS INTERESTS IN THE BOND PROCEEDS WITHOUT ADEQUATE PROCEDURAL DUE PROCESS

There is not a more important function of this Court than to patrol the constitutional boundaries of the State's executive and legislative branches of government. The system of checks and balances between the executive, judicial, and legislative branches of government is a critical component of our democracy. This Court should not sit idly and wait for the legislative branch to act when a boundary is violated, but should affirmatively intercede as the gatekeeper if one of the branches steps out of bounds.

Common-law writ of *certiorari* is an antiquated legal doctrine, and when applied in its strictest form, it does not afford modern due process protections. There is no evidentiary review and no meaningful review for legal error. Respondents who appear before RTSC and LIRB proceedings may be subject to substantial fines and may be subject to the collection of bond proceeds of the statutory compliance bond by the County without any meaningful judicial review.

In the case at bar, as a result of Carpentry Unlimited's alleged breaches of the statutory compliance bond, the County claims that it will have an immediate right to collect \$150,000 of the bond proceeds without any further judicial determination. (Answer. Br. pg 3-4, 16-17; A48-49). In fact, if successful

defending this appeal, the County has stated that it intends to immediately take steps to collect the bond proceeds from the surety. (*Id.*)

The County has crossed a constitutional boundary line. “Behind closed doors,” the County and the homeowners have obtained repair estimates and have demanded payment of the entire amount of the bond proceeds from the surety. (A49). At no time during the process did Carpentry Unlimited have the opportunity to contest the amount of the County’s claim. The County did not even provide Carpentry Unlimited with copies of the estimates. If the County is successful in this appeal, the surety will not know what its payment obligations are under the bond because there has been no judicial determination of the parties’ responsibilities under the bond.

The lack of a legally-trained judge to determine the parties’ contractual rights under the bond is constitutionally problematic. Article I, Section 4 of the 1897 Delaware Constitution’s right to a jury trial should attach when a statutory claim is analogous to a common-law breach of contract claim.¹ For example, due to the Seventh Amendment protections, “[c]laims for damages for an alleged

¹ See *Granfinanciera S.S. v. Nordberg*, 492 U.S. 33, 40-42 (1989) (finding that the protections under the Seventh Amendment attached when statutory claim is analogous to claim sounding in common law; see also *McCool v. Gehret*, 657 A.2d 269, 282 (Del. 1995) (“[T]he right to a jury trial in civil proceedings has always been and remains exclusively protected by provisions in the Delaware Constitution.”)).

breach of a statutory payment bond obligation are generally jury eligible.”² In this case, the County is essentially pursuing a claim for money damages against Carpentry Unlimited for alleged breaches of the statutory compliance bond, which is analogous to a claim of breach of contract.³ Accordingly, Carpentry Unlimited was entitled to a right to a legally-trained judge at sometime during the process.⁴

Carpentry Unlimited was severely prejudiced by not having a legally-trained judge in the process. The RTSC Hearing Officer and the LIRB are not legally trained to properly address the legal defenses Carpentry Unlimited raised during the below proceedings, *i.e.*, the statute of limitations, the *Spearin* doctrine, and equitable estoppel. Because the Superior Court on *certiorari* review cannot weigh evidence or address the merits of the case, *certiorari* review does not satisfy the requirement of having a legally-trained judge available at sometime during the process as the County contends (Answer. Br. pg. 22.).

² Rodgers-Waire and Horowitz, Twenty Second Annual Northeast Surety and Fidelity Claims Conference, *Jury Trial Issues In Surety Fidelity Litigation* FN22, (2011), www.forcon.com/userfiles/file/nesfcc/2011/02-Horowitz.pdf (citing *Cableguard Systems, Inc. v. Mid-Continent Casualty Co.*, 73 Fed Appx. 28 (5th Cir. 2003) (Miller Act); *Wallace v. Flintco Inc.*, 143 F.3d 955 (5th Cir. 1998) (Miller Act); *SCCB, Inc. v. P. Browne & Assoc.*, 751 F.Supp.2d 813 (M.D.N.C.) (Miller Act); *Becon Management & General Contracting, Inc.*, 178 S.W.2d 198 (Tex. App. 2005) (Little Miller Act); *INA v. Allgood Electric Co., Inc.*, 494 S.E.2d 728 (Ga. App. 1997) (Little Miller Act).

³ *Granfinanciera S.S.*, 492 U.S. at 40-42.

⁴ *Lecates v. Justice of the Peace Court No. 4*, 637 F.2d 898, 911 (3rd Cir. 1980) (holding that due process entails the right to a jury trial and a legally-trained judge at some point during the process of adjudication).

The underlying process also failed to provide Carpentry Unlimited a detached and neutral magistrate during the process – which is a core fundamental protection guaranteed under the Fourteenth Amendment.⁵ Where there are property interests at stake and the government has a pecuniary interest in the outcome, litigations before administrative agencies are entitled to a detached and neutral magistrate.⁶ Carpentry Unlimited did not have the opportunity to present his case to a detached and neutral magistrate because the Superior Court’s review on *certiorari* was extremely limited.

The LIRB is comprised of three board members who are appointed by the County Executive.⁷ It is not clear what pecuniary interests the members have for serving on the LIRB. Further, it is Carpentry Unlimited’s understanding that the County attorney helps LIRB to decide the legal issues presented during the proceedings and takes a large role in drafting the LIRB written decisions. The lack of neutrality of the LIRB creates constitutional issues. The County is the beneficiary under that statutory compliance bond and, therefore, has a direct

⁵ *U.S. v. James Daniel Good Real Property*, 510 U.S. 43, 55-56, 114 S. Ct. 492, 126 L.Ed.2d 490 (1993); *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S. Ct. 1011, 25 L.E.2d 287 (1970).

⁶ *Id.*; see also 73A C.J.S. Public Administrative Law and Procedure § 379 (“[J]udicial review of administrative actions or decisions is constitutionally required whenever a controversy over constitutionally protected personal or property rights is involved.”).

⁷ 9 Del. C. § 1315; § 02.05.103 County Code.

pecuniary interest in the outcome of the proceedings.⁸ (A51-A53); Answer Br. pg. 16.) The County approved the construction drawings and inspected all phases of construction of 510 Bellevue, including the building envelope prior to the construction of the exterior of the building. (A14; A224-A225.) Thus, the County had a direct pecuniary interest in establishing that Carpentry Unlimited is the party responsible for the alleged issues affecting the home.

Carpentry Unlimited's structural engineer determined that the property was built in accordance with the drawings. (A245-257.) Carpentry Unlimited was required to construct the building in accordance with the drawings and could not deviate from them. The homeowners hired the architect who was not licensed or qualified to design this home. The architect used commercial applications which were inappropriate for residential construction. (*Id.*) The County should not have approved the construction drawings.⁹

Per the County Code, the items constituting the violations related to the building envelope, flashing, and the installation of the stucco accessories were

⁸ *Id.*

⁹ Sec. 6.03.013(A) of the County Code requires that “[t]he construction documents shall be prepared by a registered design professional in the State of Delaware.” There was no record of the architect being licensed in the State of Delaware, despite the County's approval. (A245.) Pursuant to Sec. 6.03.013(B)(3)&(B)(3)(a) of the County Code the Code Official is required to examine the construction documents for code compliance and approve the construction drawings for use.

required to be detailed on the drawings and be part of County's inspection items.¹⁰ Carpentry Unlimited was required to have the drawings at the site, which would have been verified by CSBI Driscoll. CSBI Driscoll could have confirmed these facts if he were permitted to testify by the LIRB. Carpentry Unlimited should also have had the right to confront CSBI Driscoll as a critical County witness.

This process was fundamentally unfair and warrants adequate judicial review. The County will always have an interest in imposing liability on the contractor under circumstances where the County approved the drawings and the construction at issue, especially here, where it appears that the County approved the drawings of an unlicensed architect. (A245.) Due process demands that a detached and neutral magistrate review the RTSC and LIRB proceedings when the County has an interest in the outcome.

In the case at bar, without the availability of a legally-trained, detached and neutral magistrate, Carpentry Unlimited is in jeopardy of being wrongfully deprived of significant property interests without adequate procedural due process.¹¹ At a minimum, Carpentry Unlimited should have received the same

¹⁰ Sec. 6.03.013(B)(1)(b)(3) of the County Code requires that "Construction documents for all buildings shall describe the exterior wall envelope in sufficient detail to determine compliance with Chapter."

¹¹ *Hill v. Borough of Kutztown*, 455 F.3d 255 (3rd Cir 2006) (stating that deprivation of procedural due process occurs when an individual is deprived of an interest protected under the Fourteenth Amendment, and the procedures available to him did not provide adequate due process).

protections that litigants receive who appear before State agencies under the Administrative Procedures Act (“APA”).¹² Until the legislature acts, there is no meaningful oversight of the RTSC and LIRB proceedings by the State’s judicial branch of government despite the existence of significant property interests at stake.

Because the RTSC and LIRB proceedings are not subject to the APA and *certiorari* review to the Superior Court is the only appeal process available, the underlying proceedings do not provide sufficient due process and legislative change is necessary. There should be some meaningful judicial review of RTSC and LIRB proceedings aside from common-law writ of *certiorari* to the Superior Court. The doctrine does not comport with modern standards of due process.

This Court has stated that one of the fundamental core principles of due process of an administrative proceeding is “adherence to the statutory or decisional standards then controlling.”¹³ The Superior Court is not able to properly determine whether the County adhered to statutory or decisional standards if the record is limited to “the complaint initiating the proceedings, the answers or responses (if

¹² 29 *Del. C.* §§ 10101-10161.

¹³ *Christiana Town Ctr., LLC v. New Castle Cty.*, 865 A.2d 521 (Del. 2004) (citing *Cty. Council of Sussex Cty. v. Green*, 516 A.2d 480, 481 (Del. 1986)).

required), and the docket entries.” (Order pg. 4.) This is particularly true in this case where there is no answer or docket available to review. The above language, if read literally, would only include the violation notice as part of the reviewable record.

The Superior Court must be able to review the entire proceedings against the written decisions of the RTSC and LIRB in order to properly determine whether they adhere to statutory or decisional standards. This does not necessarily require the Superior Court to take or weigh evidence or make factual findings. An adequate record is necessary to determine, at a minimum, whether the administrative agency followed its own procedures and statutory guidelines.

For example, in this case, a mere cursory review of the RTSC hearing would have shown that Carpentry Unlimited was charged with many violations that could not have been personally observed by CSBI Fox:

- CSBI Fox admitted to never inspecting the roof, although violations 4 and 6 refer to violations pertaining to the roof construction. (A132, A164, A184, A193-A194.)
- CSBI Fox admitted that the County does not perform deconstruction, although violations 1, 12, and 13 relate to building envelope failures which are underneath the exterior. (A103, A105, A189.)
- CSBI Fox admitted to not going up to the second floor to inspect the second-floor window, although violation 2 relates to violations with respect to the second-floor window. (A89, A104, A132, A187.)

- CSBI Fox admitted that he did not witness any water penetration into the building, although violations 2, 3, 4, 6 are premised upon water penetration of the building envelope. (A106, 185.)

CBSI Fox inspected only the exterior of the building and relied on the expert report of Mr. Frank Peter of Cogent Building Diagnostics to issue the violations. (Answer. Br. pg. 10-11; A26-A28.) Every alleged code violation in the notice refers to the Cogent report. (A55-A57.) Mr. Peter was not a County-authorized inspector, and his testing methods were unreliable. Further, Mr. Peter was hired by the homeowners to serve as their expert in the related litigation.

The County violated its own procedures by relying on the Cogent report. (*See* Prong IV of the Opening Brief.) Without weighing any evidence, the Superior Court could have determined that the County wrongfully relied upon the Cogent report. (A26-A28.) The Superior Court could have also determined that the burden of proof was inappropriately imposed on Carpentry Unlimited. (A28-A32.) Carpentry Unlimited could not properly defend himself below because the RTSC and the LIRB proceedings are fundamentally unfair and there is no meaningful review on appeal.

Due to the lack of adequate due process during the below proceedings, this Court should quash the RTSC and LIRB decisions in their entireties as contrary to law.

III. THE HEARING OFFICER AND THE LIRB FAILED TO ADHERE TO STATUTORY AND DECISIONAL STANDARDS WHEN APPLYING THE STATUTE OF LIMITATIONS UNDER 10 Del. C. § 8106

In order to satisfy constitutional muster, a quasi-judicial tribunal must state the reasons underlying the result and must adhere to the controlling statutory and decisional standards.¹⁴ On the face of the record, the RTSC and LIRB decisions fail to adhere to statutory and decisional standards. There is no basis under Delaware law to measure the statute of limitations (“SOL”) from the date of the certificate of occupancy. The selection of the date of the certificate of occupancy by both the RTSC Hearing Officer and the LIRB to measure the running of the SOL is arbitrary and capricious and renders the decisions defective.

In addition, both the RTSC and LIRB decisions do not establish a basis under Delaware law to support tolling of the statute of limitations. The County had the burden of proof to establish that it was blamelessly ignorant in not discovering the alleged code violations during the initial inspections conducted by CSBI Driscoll. The County would also have had the burden of establishing tolling under one of the doctrines and explaining the factual background that would have justified tolling under the doctrine. Both the RTSC and LIRB decisions are devoid

¹⁴ *Christiana Town Center, LLC, LLC*, 2004 WL 2921830 at *2 (citing County Council of Sussex County, 516 A.2d at 481).

of any such legal analysis; therefore, the decisions are arbitrary and capricious and defective.

As admitted by the County in its Answering Brief, “[t]he hearing officer determined that the statute of limitation started to run upon the issuance of the certificate of occupancy.” (Answer. Br. pg. 10.) The LIRB made the same finding: “[t]he Board considered the factual and legal arguments made by the parties and concluded that the earliest the statute of limitations period began to run [was] on July 26, 2013, the date the Department issued the certificate of occupancy.” (Answer. Br. pg. 14.)

The above findings by the Hearing Officer and the LIRB are arbitrary and capricious. Under Delaware law, the SOL begins to run at the time of injury or wrongful act. *Dambro v. Meyer*, 974 A.2d 121, 126 (Del 2009). The time of injury in this case would have occurred prior to the lath inspection or at the time the items constituting the alleged code violations were constructed.

The LIRB made factual findings that the weather barrier inspection occurred on 12/11/2012 and the lath inspection occurred on 12/21/2012. (A225-A225.) Thus, the items constituting the code violations (which relate to the installation of the weather barrier and the stucco/lath accessories) would have been constructed prior to the lath inspection date of 12/21/2012.¹⁵ (*Id.*)

¹⁵ *Vichi v. Koninklijke Philips Elecs. N.V.*, 62 A.3d 26, 42 (Del. Ch. 2012)

The SOL would have started to run even if the County was blamelessly ignorant of the existence of the alleged code violations.¹⁶ Because the SOL would have started to run sometime in the Fall of 2012, the code violations were time barred on January 20, 2016, the date the violation notice was issued. (A55-A57.) At that time, because the SOL had run, the County no longer had jurisdiction to issue the violation notice to Carpentry Unlimited.¹⁷

The County, not the homeowners, would have had the burden of establishing a factual basis to support tolling under one of the doctrines.¹⁸ Once it had been established that the SOL had run, the burden shifts to the party asserting tolling.¹⁹ The County would be hard-pressed to establish that they were blamelessly ignorant about the existence of the alleged code violations when the County inspected and approved the construction at issue.²⁰

Due to the lack of adherence to statutory and decisional standards in the application of 10 *Del. C.* § 8106, this Court should quash the RTSC and LIRB decisions in their entireties as contrary to law.

¹⁶ *Id.*

¹⁷ *See* §12.002 of the County Code.

¹⁸ *Vichi*, 62 A.3d 26 at 42.

¹⁹ *Id.*

²⁰ *Wal-Mart Stores, Inc. v. AIG Life Ins. Co.*, 860 A.2d 312, 319 (Del. 2004)

IV. CONCLUSION

Because the underlying proceedings did not provide adequate due process and the RTSC and LIRB decisions do not adhere to statutory or decisional standards, this Court should quash the RTSC and LIRB decisions in their entireties as contrary to law.

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