

**COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE**

KENT COUNTY COURTHOUSE
38 THE GREEN
DOVER, DELAWARE 19901
PHONE: (302) 735-3910

**CHARLES W. WELCH, III
JUDGE**

March 10, 2016

Shae Lyn Chasanov, Esq.
Schmittinger & Rodriguez, P.A.
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Dover, DE 19901
Attorney for Appellee, *Plaintiff Below*

Jonathan Layton, Esq.
Layton & Associates, P.A.
The Buckner Building
1308 Delaware Avenue, Suite 8
Wilmington, DE 19806
Attorney for Appellant, *Defendant Below*

RE: Brandi Butler v. Abigail Jane Davis
C.A. No.: CPU5-15-001209
Appeal from Justice of the Peace Court

Decision on Appellee's Motion to Dismiss

Dear Ms. Chasanov and Mr. Layton:

The Court has reviewed the Motion to Dismiss filed by the appellee, plaintiff below, Abigail Jane Davis, for the above-referenced matter. Ms. Davis moves the Court to dismiss the appeal filed by the appellant, defendant below, Brandi Butler, pursuant to Court of Common Pleas Civil Rule 41(b) for failure to comply with the Civil Rules of the Court. After careful consideration by the Court, Ms. Davis' motion is denied because there are no grounds that warrant a dismissal of this action.

The current appeal arises from a replevin action filed by the appellee, on or about August 24, 2015, in the Justice of the Peace Court. In her complaint below, the appellee alleged that she was the lawful owner of a dog that was in the appellant's possession. On September 23, 2015, the Justice of the Peace Court found that the appellee was the lawful owner of the dog and entered judgment against the appellant.

On October 7, 2015, the appellant filed a Notice of Appeal with all necessary documentation in this Court. In addition, she filed a Motion to Stay execution on the judgment being appealed pursuant to Court of Common Pleas Civil Rule 62(c). The Court granted the Motion to Stay and ordered that the appellant post a supersedeas bond.¹

On the morning of October 16, 2015, Justice of the Peace Court issued a Writ of Replevin for the return of the dog because the appellant had not filed a copy of the Notice of Appeal in that court. Later that day, the appellant filed, in Justice of the Peace Court, a copy of the Notice of the Appeal along with all accompanying documents that were filed in this Court on October 7, 2015.² Justice of the Peace Court stayed the Writ of Replevin on or about October 19, 2015, per this Court's Order to stay execution.

The appellee filed the instant Motion to Dismiss on the grounds that (1) the Court lacks jurisdiction to hear the appeal because the appellant failed to file a timely Notice of Appeal with the Justice of the Peace Court pursuant to Court of Common Pleas Civil Rule 72.3(e); (2) the appellee never received a copy of the appellant's Motion to Stay and therefore, was barred from filing a response in opposition; and (3) the appellant failed to file a timely certified transcript of the Justice of the Peace Court judgment in accordance with the Justice of the Peace Court Civil Post-Judgment Procedures and Court of Common Pleas Civil Rules.³

It is well settled law in Delaware that the requirements of 10 *Del. C.* § 9571, which governs the right to appeal from the Justice of the Peace Court, is jurisdictional. *Gibson v. Car Zone*, 2007 WL 3231595, at *1 (Del. Com. Pl. July 05, 2007). A litigant's failure to adhere to such requirements divests the Court of subject matter jurisdiction to hear the appeal. *Id.* Pursuant to § 9571(b), an appeal to this Court from Justice of the Peace Court must be taken within 15 days of the final judgment of the Justice of the Peace Court that is being appealed. The Delaware Code also provides that the Court of Common Pleas shall establish appeal procedures by rule. 10 *Del. C.* § 9571(d). The Court has adopted Court of Common Pleas Civil Rule 72.3

¹ The Court's Order was docketed on October 9, 2015. The appellant posted bond, in cash, in the amount of \$100.00 on October 19, 2015.

² The filing was timed stamped and docketed by the Justice of the Peace Court Clerk on October 16, 2015.

³ Reconsideration of the Court's Order to stay execution is being considered separate from this decision.

to govern civil appeals *de novo* from Justice of the Peace Court. That rule provides that such appeals are commenced in the Court of Common Pleas by filing a notice of appeal with the Court within the time prescribed by 10 *Del. C.* § 9571(b) (i.e. 15 days). Ct. Com. Pl. Civ. R. 72.3(b).

Upon acceptance of the filing of a notice of appeal by the clerk, the appellant, within 10 days, must file a notice of appeal with the Justice of the Peace Court to stay the record. *See* Ct. Com. Pl. Civ. R. 72.3(d)-(e); *see also Deysher v. Mid-Atlantic Sys. of DPN, Inc.*, 2011 WL 6946969, at *1 (Del. Com. Pl. Dec. 20, 2011). Court of Common Pleas Civil Rule 72.3(e) reads as follows:

Record; Stay. The appellant shall, within 10 calendar days, file a notice of appeal with the Justice of the Peace Court *to stay the record*. The record on appeal shall constitute the record below as of the time of the filing of the notice of appeal. There shall be no stay of execution or other proceedings below unless ordered by this Court pursuant to Rule 62(c). (italics supplied)

Failure to comply with the Court's time requirements to file a notice of appeal in Justice of the Peace Court under Rule 72.3(e) "to stay the record" does not mean the Court loses jurisdiction to hear the appeal. It just means that the record in Justice of the Peace Court is not stayed.

Furthermore, in the instant case, a copy of the appellant's Notice of Appeal was timely filed with the Justice of the Peace Court pursuant to Civil Rule 72.3(e). Under Court of Common Pleas Civil Rule 6(a), in computing any period of time prescribed by the Court Rules, the day of the act shall not be included. Additionally, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and other legal holidays shall be excluded in the computation." Ct. Com. Pl. Civ. R. 6(a). When a Court Rule does not specify calendar days or business days, the Court will presume calendar days. *Haggerty v. Bd. of Pension Trustees of the State of Delaware*, 2015 WL 4477798, at *10 (Del. Super. July 20, 2015) (citations omitted). The appellant filed her Notice of Appeal in this Court on October 7, 2015. A copy of the Notice of Appeal was filed with the Justice of the Peace on October 16, 2015, well

within the 10 day time period prescribed by Civil Rule 72.3(e). Therefore, the appellee's contention that the appeal should be dismissed for failure to file a timely notice of appeal with the Justice of the Peace Court is clearly without merit.

Finally, the appellee contends that the appeal should be dismissed because the appellant did not file a timely certified transcript of the Justice of the Peace Court record within 10 days after the appeal was filed as required by the Justice of the Peace Court Civil Post-Judgment Procedures. It is the practice of this Court that the appellant file with the Court a certified record of the Justice of the Peace Court judgment. However, there is no longer a requirement in the Court of Common Pleas Civil Rules that the appellant file a certified transcript of the record below within 10 days after filing a notice of appeal. The Court of Common Pleas Civil Rules govern practice and procedure with respect to civil proceedings in this Court and in such matters they supersede any conflicting Justice of the Peace Court Rules or Civil-Post Judgment Procedures. The appellant filed a certified copy of the Justice of the Peace Court record for this case on or about October 29, 2015. The filing of the record complied with the civil appeal procedural requirements of this Court.

In conclusion, the Court finds that the appellant complied with the Court Civil Rules of Procedure when filing her civil appeal in this Court. Therefore, the appellee's Motion to Dismiss is **DENIED**.

IT IS SO ORDERED this 10th day of MARCH, 2016.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles W. Welch, III". The signature is written in a cursive, flowing style.

Charles W. Welch, III

CWW: mek