

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

BARNABAS MALAWI)	CIVIL ACTION NUMBER
)	
Plaintiff-Appellant)	12A-04-011-JOH
)	
v.)	
)	
PHI SERVICE COMPANY)	
)	
Defendant-Appellee,)	
Third-Party Plaintiff)	
)	
v.)	
)	
ZEDEKIA MALAWI)	
)	
Third-Party Defendant)	

*Submitted: July 27, 2012
Decided: October 12, 2012*

MEMORANDUM OPINION

*Upon Motion of Defendant-Appellee and
Third-Party Plaintiff to Dismiss- **GRANTED***

Appearances:

Barnabas Malawi, 5760 Devers Drive, Apartment J, Indianapolis, Indiana, 46216, Appellant,
Pro Se

Thomas D. Walsh, Esquire, PHI Service Company, Newark, Delaware, Attorney for the
Defendant-Appellee and Third-Party Plaintiff

Zedekia Malawi, 104 Bennett Court, Apartment H, Newport, Delaware, 19801, Third-Party
Defendant, Pro se

HERLIHY, Judge

Introduction

Before the Court is PHI Service Company's ("Appellee") motion to dismiss the notice of appeal filed by Barnabas Malawi ("Appellant"), appealing an order from the Court of Common Pleas. The appeal is untimely under 10 *Del. C.* § 1326(b). Accordingly, Appellee's motion to dismiss is **GRANTED**.

Factual Background

The instant appeal arises from a decision rendered in the Court of Common Pleas on February 22, 2012. Appellant filed a case in that court against Pepco Holdings Inc. ("Pepco"), seeking reimbursement of a \$644.03 electrical payment. After trial, the Court of Common Pleas ruled in favor of Pepco. Specifically, the court found Appellant's payment to the electric company was voluntarily made, and thus, did not meet the elements of duress, as he had claimed. Thus, the court held Appellant was not entitled to a reimbursement of \$644.03 paid to Pepco.

Appellant attempted to appeal the Court of Common Pleas February 22, 2012 decision to this Court by mailing his appeal via the United States Postal Service on March 19, 2012. On March 26, 2012, the Prothonotary's office informed Appellant in writing that the appeal was rejected, as the proper filing fee was not included. A month later, on April 26, 2012, Appellant filed his appeal in this Court.

Parties' Contentions

Appellee moves to dismiss based on the untimely appeal. It contends the appeal was untimely filed because the Court of Common Pleas' decision was rendered on February 22, 2012 and the Appellant did not file an appeal until April 26, 2012. Thus, according to 10 *Del. C.* § 1326, Appellee argues dismissal is appropriate.

Appellant responds that his appeal was originally filed on March 19, 2012, but was rejected for re-submission because the filing fee was not attached. Appellant notes he is a full-time, active member of the United States Armed Forces and was involuntarily relocated to Indiana following the Common Pleas' decision. He further informs this Court that he has, "always made a good faith effort in ensuring that [he] is in compliance with all the Court's requisite procedures in securing [his] interest in this matter."¹ Appellant requests the Court to deny Appellee's motion to dismiss.

Oral argument in this matter was scheduled for July 18, 2012, but was cancelled because of an additional issue discovered by the Court and because of the Appellant's military schedule. The additional issue was based on the

¹ Appellant Resp. Mot. to Dismiss, ¶ 2 at 1.

applicability of 10 *Del. C.* § 1326(a)² to this case. The parties were directed to respond to this additional issue by July 27, 2012. The Appellee responded, taking the position that the case should be dismissed for this additional reason. To date, Appellant has not responded.

The additional reason appeared to be that Appellant was appealing a judgment rendered in the Kent County Court of Common Pleas to Superior Court in New Castle County. That would be contrary to Section 1326(a) requiring such appeals to be within the same county. It developed that there was a clerical error below and that the judgment had been rendered in New Castle County.

Discussion

While this Court has subject matter jurisdiction, the appeal was not timely filed. Section 1326(b) of Title 10 of the Delaware Code mandates a 30 day appeal period from any civil final order, ruling, decision or judgment. “Generally, if a party fails to perfect an appeal within the statutorily mandated period, a jurisdictional defect results, thereby preventing the appellate court from exercising jurisdiction.”³ It is well established in Delaware that in construing language of a

² Under 10 *Del. C.* § 1326(a), a party in the Court of Common Pleas may only appeal a final order, ruling, decision or judgment in that court to the Superior Court in the county in which the order was rendered.

³ *Preston v. Bd. of Adjustment of New Castle County*, 772 A.2d 787, 791 (Del. 2001).

statute, Courts attempt to determine and give effect to the legislative intent.⁴ If however, the statute contains unambiguous language, the plain meaning of the terms control.⁵ A statute is ambiguous if it “is reasonably susceptible of two interpretations.”⁶ Additionally, “[a]mbiguity may also be found if a literal reading of the statute would lead to an unreasonable or absurd result not contemplated by the legislature.”⁷

Section 1326(b) is not ambiguous. The statute clearly states a party has 30 days to appeal a final order, ruling, decision or judgment. There is no indication from the language of the statute that there are circumstances which would extend the 30 day time period of the statute. If that had been the intent of the General Assembly, that language would have been included within the statute.⁸ Thus, because the statute is unambiguous and there is no language within the meaning of the statute extending the 30 day appeal period, Appellant had 30 days from February 22, 2012 to file his appeal in this Court.

⁴ *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000); *State v. Cephas*, 637 A.2d 20, 23 (Del. 1994).

⁵ *Ingram*, 747 A.2d at 547.

⁶ *Dir. of Revenue v. CNA Holdings, Inc.*, 818 A.2d 953, 957 (Del. 2003).

⁷ *Id.*

⁸ *See Irvin-Wright v. State*, 2003 WL 21481004, at *2 (Del. Super. June 16, 2003).

This Court lacks jurisdiction to decide a direct appeal that is untimely and jurisdictional defects cannot be waived.⁹ There is no remedy for an untimely appeal, as the Court lacks jurisdiction.¹⁰ Under Superior Court Civil Rule 72(i), this Court has discretion to dismiss any appeal *sua sponte*, or on a motion to dismiss by any party. Among other reasons stated in the rule justifying a dismissal, “[d]ismissal may be ordered for untimely filing of an appeal . . .”¹¹

In this case, Appellant’s appeal was filed 64 days after the decision was rendered Common Pleas. While Appellant contends he is in the United States Armed Forces and attempts to follow the Court’s procedures, here, the appeal was filed outside the time limit set forth in 10 *Del. C.* § 1326(b). The Court is aware that Appellant attempted to timely appeal, but the document was rejected because the filing fee was not attached. Nothing in the Appellant’s military service prevented him from filing the original appeal papers. And, his military service does not explain or excuse his inability to supply the required fee in March.

Superior Court Civil Rule 77(h)F sets forth a filing fee of \$175.00 for Common Pleas appeals.¹² Furthermore, Super. Ct. Civ. R. 77(h)E provides, “[t]he

⁹ *Eller v. State*, 531 A.2d 951, 953 (Del. 1987).

¹⁰ *Eller*, 531 A.2d at 951; *Irvin-Wright*, 2003 WL 21481004, at *3.

¹¹ Super. Ct. Civ. R. 72(i).

¹² Super. Ct. Civ. R. 77(h)F.

Prothonotary may refuse any filing for which the fees set forth in the rule have not been paid.”¹³ The Prothonotary properly rejected the appeal and provided notice to the Appellant of the rejection. Appellant did not properly file his appeal because by the time it was filed a month later, the statutory time limit necessary for filing a timely appeal had expired. He has offered no explanation why he filed a perfected appeal 28 days later

While it is unfortunate that the Appellant attempted to timely file, the statute unambiguously states that Appellant had 30 days from the Common Pleas’ final decision in which to appeal. He failed to file a proper appeal within the requisite time period under the statute and the Rules of this Court. As this Court does not have jurisdiction to entertain untimely appeals, the appeal is dismissed in accordance with Super. Ct. Civ. R. 72(i).

Conclusion

For the reasons stated herein, Appellee’s motion to dismiss is **GRANTED**.
IT IS SO ORDERED.

J.

¹³ Super. Ct. Civ. R. 77(h)E.