

**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, )  
 )  
v. )  
 )  
JANEVE CO., INC. and TAX PARCEL )  
NO. 26-028.20-054, )  
 )  
Defendants. )

C.A. No. N12J-03974

and

THE CITY OF WILMINGTON, a )  
Municipal Corporation of the State of Delaware, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
READWAY, INC. and TAX PARCEL )  
NO. 26-013.30-183, )  
 )  
Defendants. )

C.A. No. N12J-03922

and

THE CITY OF WILMINGTON, a )  
Municipal Corporation of the State of Delaware, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
THE REVOCABLE TRUST OF WALTER )  
LOWICKI DATED AUGUST 18, 1999, )  
STANLEY C. LOWICKI, UNKNOWN HEIRS )  
OF WALTER LOWICKI and TAX PARCEL )  
NO. 26-005.40-022, )  
 )  
Defendants. )

C.A. No. N12J-03901

## **OPINION AND ORDER**

The City of Wilmington filed a Writ of Monition in each of the three above captioned cases in order to recover the vacant property fees assessed against each of the referenced three properties.

### **Defendants' Motion to Set Aside the Monition Actions**

Defendants filed a motion seeking to set aside the monition in each of the three cases. In their motion to set aside the monition, Defendants raised a number of contentions. Defendants contended that the monition actions were procedurally deficient, that a monition action was not the proper process for the City of Wilmington to use to recover the vacant property fees assessed against the properties at issue, and that the statute of limitations should operate to limit or reduce the City of Wilmington's entitlement to recover the vacant property fees assessed. Defendants also contended that the monition actions should be dismissed pursuant to Superior Court Civil Rule 41(a).

On February 26, 2013, a hearing was held on Defendants' motion to set aside the monitions. At the February 26, 2013 hearing, the court detailed on the record the basis for the denial of Defendants' motion. Following the February 26, 2013 hearing, two issues remained outstanding.

The first issue was that before proceeding with the monition actions, the City of Wilmington was required to file a supplemental/amended Affidavit in each of the actions. Following the hearing of February 26, 2013, the City of Wilmington filed a

supplemental/amended Affidavit in each of the three cases and this issue is now moot.

Consequently, there is only one issue that remained outstanding. Defendants contended that Superior Court Civil Rule 41(a) operates to preclude the City of Wilmington from proceeding with the monition actions at issue. Rule 41(a) is triggered in those instances in which a plaintiff has voluntarily dismissed the same case on more than one prior occasion (at least twice) without order of the court.

Defendants requested an opportunity to determine whether any of the actions at issue had been dismissed at least two times previously and an opportunity to file supplemental briefing on this issue if any of the pending actions fell within this parameter. The court granted Defendants request to address this issue if any of the pending actions had been dismissed at least twice before the commencement of the present action.

Defendants subsequently advised the court that only one of the three pending cases, the action involving Defendant, Readway, Inc., had been dismissed twice before by the City of Wilmington. Thus, for the reasons set forth at the hearing on February 26 2013, all of Defendants' contentions against the other two defendants are without merit and the Writ of Monition for each of those cases shall issue immediately.

**Monition Action is the Proper Process to Recover Vacant Property Fees Assessed**

To recap briefly, these Defendants have unsuccessfully challenged the ability of the City of Wilmington to assess vacant property fees and its entitlement to enforce those

assessments on numerous prior occasions.<sup>1</sup> Vacant property fees are assessed annually by the City of Wilmington.<sup>2</sup>

It appears that each and every year the vacant property fees are assessed, these Defendants challenge the entitlement of the City of Wilmington to assess the fees and thereafter challenge the City of Wilmington's entitlement to collect the fees assessed. Defendants have never been successful in any challenge yet they relentlessly persist in their efforts.<sup>3</sup> Each year, the Defendants challenge the fees assessed for that year, when they are unsuccessful in their challenge, they then seek reargument, and when their reargument is denied, they appeal to the Delaware Supreme Court. When the Defendants lose their challenge in the Delaware Supreme Court, as they always have, they begin again with their challenges for the next year's assessment.

Although Defendants' legal challenges have never been successful, the practical effect of their continuous legal challenges has been to delay the ability of the City of Wilmington to proceed with their collection of the fees assessed through the monition process. The collection efforts are stayed for all intents and purposes during Defendants'

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<sup>1</sup> See, *Adjile, Inc., et al. v. City of Wilmington, et al.*, 2004 WL 2827893 (Del.Super. 2004), *aff'd*, 2005 WL 1139577 (Del. 2005); *Adjile, Inc. et al. v. City of Wilmington*, 2007 WL 2028536 (Del.Super. 2007), *reargument denied*, 2007 WL 2193741 (Del.Super. 2007), *aff'd*, 2008 WL 660139 (Del. 2008); *Adjile, Inc. et al. v. City of Wilmington, et al.*, 2008 WL 2623938 (Del.Super. 2008), *reargument denied*, 2008 WL 4287316 (Del.Super. 2008), *aff'd*, 2009 WL 476538 (Del. 2009); *Janeve Co., et al. v. City of Wilmington, et al.*, 2009 WL 1482230 (Del.Super. 2009), *reargument denied*, 2009 WL 2386152 (Del. Super. 2009), *aff'd*, 2010 WL 376979 (Del. 2010); *Adjile, Inc., et al. v. City of Wilmington, et al.*, 2010 WL 1379921 (Del.Super. 2010), *reargument denied*, 2010 WL 2432961 (Del.Super. 2010), *aff'd*, 2010 WL 6012382 (Del. 2010)(This is Appellants' fifth appeal in six years relating to vacant property fees assessed by the City of Wilmington. Appellants' claims are either barred on the grounds of *res judicata* and collateral estoppel or they otherwise lack merit.); *Adjile, Inc., et al. v. City of Wilmington, et al.*, 2010 WL 2433117, at \*2 (Del.Super. 2010)(the Superior Court must express some puzzlement as to Appellant's decision to appeal the vacant property fees assessed by the City of Wilmington each year, especially since no such appeal before the Superior Court or the Delaware Supreme Court has ever been granted in Appellant's favor. Yet, Appellant has persistently filed an appeal each year and at times asserts very similar arguments that the courts have already reviewed and denied.)

<sup>2</sup> *Adjile, Inc. et al. v. City of Wilmington*, 2010 WL 2433117, at \*2 (Del.Super. 2010).

<sup>3</sup> *Id.*

legal challenges and when the challenges are forced to an end, the Defendants' challenges begin anew with the next year's assessments.

Despite Defendants' present contention that the City of Wilmington cannot proceed with a monition action to recover the vacant property fees assessed, the controlling case law clearly establishes that the vacant property fees assessed by the City of Wilmington constitute "taxes or special assessments" which may be collected through the monition process and sheriff's sale.<sup>4</sup>

Defendants' counsel in this case was also counsel for the defendant in the controlling case, *City of Wilmington v. Dorothy McDermott*, 2008 WL 4147580 (Del.Super.), *aff'd*, 2009 WL 1058735 (Del. 2009). Thus, there can be no question that Defendants' counsel in this case is well aware of the controlling law that the City of Wilmington is permitted to proceed with a monition action and sheriff's sale to recover the vacant property fees assessed.

Moreover, Defendants contend that the entitlement of the City of Wilmington to recover the vacant property fees assessed should be limited or reduced by the delay in the City of Wilmington's enforcement action. It should be emphasized, however, that each time the City of Wilmington sought to collect the vacant property fees assessed, the Defendants held up the enforcement with extended legal challenges. The delay in the collection of the vacant property fees assessed is largely attributable to the Defendants ongoing, continuous, and renewed legal challenges.

In a prior case involving these same Defendants, *Adjile, Inc., Readway, Inc., Trustee of Walter Lowicki Revocable Trust, and Janeve, Co., Inc. et al., v. City of*

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<sup>4</sup> *City of Wilmington v. Dorothy McDermott*, 2008 WL 4147580 (Del.Super.), *aff'd*, 2009 WL 1058735 (Del. 2009)(vacant property fees assessed by the City of Wilmington constitute taxes or special assessments which may be collected through the monition process and sheriff's sale.)

*Wilmington, et al.*, 2010 WL 1379921, at \*4 (Del.Super. 2010), as well as in the *McDermott* case, 2008 WL 4147580, at \*2-3, the Superior Court held that once vacant property fees are assessed by the City of Wilmington an automatic lien is placed on the real property and these liens are governed by 25 *Del. C.* ¶ 2901 *et seq.* The vacant property fee was expressly deemed a “tax or special assessment” by the *McDermott* court and as a “tax or special assessment”, the lien that is placed on the real property shall continue for (at least) 10 years as per 25 *Del. C.* ¶ 2903(a). The imposition of a lien does not affect or limit the ability of the City of Wilmington to collect charges through monition. Monition is the statutory framework for collecting taxes or special assessments. See, 25 *Del. C.* ¶ 2901(b)(9); *McDermott*, 2008 WL 4147580, at \* 2.

The City of Wilmington is permitted to proceed with a monition action and sheriff’s sale for the collection of the vacant property fees assessed. An automatic lien has been placed on the real estate for these fees assessed and the lien continues for (at least) 10 years. Since the property owners’ failed/refused to pay these fees assessed, the City of Wilmington can recover these fees assessed through a monition action, at any time the lien remains pending on the real property. All of the fees assessed in each of these three cases are less than 10 years old and none of the fees sought to be recovered through the respective monition actions at issue have been paid.

Moreover, the ability of the City of Wilmington to proceed with any of its efforts to recover the fees assessed have been thwarted by the Defendants’ ongoing, continuous, and repeated legal challenges and appeals. Consequently, Defendants are not entitled to any reduction of the vacant property fees assessed under the facts and circumstances of these cases based on any statute of limitations.

**Rule 41(a) is not Triggered Because No Prior Monition Action Was Dismissed Without Order of the Court**

Defendant Readway, Inc. contends that because two prior monition actions were dismissed against it, the pending monition action is now barred by Superior Court Civil Rule 41(a). Defendant Readway, Inc. is incorrect in this regard because the prior monition actions were vacated only after obtaining the approval of and by express order of the court.

Superior Court Civil Rule 41(a) provides that an action may be dismissed by the plaintiff *without order of the court* and that such dismissal is without prejudice, unless otherwise stated, “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 . . . an action based on or including the same claim.” (emphasis added.)

In the subject matter, the City of Wilmington never dismissed any of the prior monition actions against Defendant Readway, Inc. without order of the court. Thus, Rule 41(a) was not triggered because the City of Wilmington did not voluntarily dismiss any monition action without order of the court.

In both of the monition actions previously filed against Defendant Readway, the City of Wilmington filed a motion with the court seeking the court’s permission to vacate the writ of monition and thereafter obtained an order from the court permitting it to do so. Each time, the City of Wilmington advised the court that as a result of the length of time that has lapsed since the filing of the Writ of Monition, the Monition no longer accurately reflected the current outstanding obligations owed by Defendant to Plaintiff.

Indeed, the lapse of time that resulted between the filing of the Writ of Monition and the ability of the City of Wilmington to begin execution of the amount owed is largely attributed to the Defendant's administrative appeals, legal challenges and appeals seeking to prevent the enforcement of the fees assessed.

Each time the City of Wilmington sought an order of the court granting it permission to vacate its pending Writ of Monition, the City explained that "the Monition no longer accurately reflects the current outstanding obligations owed by Defendant to Plaintiff." The City sought the court's permission to vacate the Writ of Monitions, not because it desired to cease its collection effects against Defendant Readway, Inc. but because it needed to update the Writ to accurately reflect the amounts owed. There was never any dismissal, let alone two dismissals, voluntarily made by the City without order of the court. Rule 41(a) is not applicable in this case.

### **Defendants' Motion for Reconsideration or Reargument is Denied**

To the extent that Defendants seek this court to reconsider its prior ruling of February 26, 2013, the request to do so is denied. Defendants have not demonstrated that this court misapprehended the law or facts of this case. There is no basis upon which this court could or should review its earlier Order.<sup>5</sup>

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<sup>5</sup> See, *McElroy v. Shell Petroleum, Inc.*, 1992 WL 397468 (Del. 1992); *Wilmington Trust Co. v. Nix*, 2002 WL 356371 (Del.Super. 2002).



**Conclusion**

For the reasons set forth on the record at the hearing on February 26, 2013, and for the reasons set forth herein, all of Defendants' objections to the City of Wilmington proceeding with its monition actions in each of these cases are without merit, Defendants' motion seeking to set aside the monition in each of these three cases is denied, and the Writ of Monition for each of these of the three cases shall issue immediately.

**IT IS SO ORDERED this 11<sup>th</sup> day of September, 2013.**

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Lynne M. Parker  
Commissioner of the Superior Court

oc: Prothonotary (civil)  
Thomas P. Carney, Esquire  
John R. Weaver, Esquire