

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

ADJILE, INC.,
STANLEY WOJCIECHOWSKI,
HERSHEY WOJCIECHOWSKI,
READWAY, INC., TRUSTEE,
WALTER LOWICKI, TRUSTEE OF
WALTER LOWICKI REVOCABLE
TRUST, JANEVE CO., INC.

Plaintiffs in Error/ Petitioners/
Appellants Below

v.

CITY OF WILMINGTON, a Municipal
Corporation under the laws of the State of
Delaware, DEPARTMENT OF LICENSES
AND INSPECTION, JEFFREY J.
STARKEY, Commissioner, BOARD OF
LICENSE AND INSPECTION REVIEW,
DONALD L. GOUGE, JR.,
MAMIE BAYNARD,
G. JERRY VELAZQUEZ,
JOANN WOODRING,
BOARD MEMBERS

Defendants in Error/ Respondents/
Appellees Below.

C.A. No. 09A-05-004 WCC

Submitted: December 23, 2009
Decided: March 31, 2010

Opinion

Appellee's Motion to Dismiss - GRANTED IN PART. DENIED IN PART.

**Appeal by *Writ of Certiorari* from Board of License and Inspection Review.
DENIED.**

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CARPENTER, J.

Before the Court is the City of Wilmington’s (the “Appellee”) Motion to Dismiss the writ of certiorari filed by Adjile, Inc., et. al. (the “Appellants”) appealing the Board of License and Inspection Review’s (the “Board”) denial of their petitions for waivers of vacancy assessments. Upon review of the Appellee’s Motion, the Court has granted dismissal of issues previously raised before this Court. As to the remaining issues, the Court has reviewed the Appellants’ writ and the Board transcript and the Board’s decision is hereby AFFIRMED. ¹

Facts

In November 2008, the Department of Licenses and Inspections (the “Department”) issued vacant building registration assessment fees to Appellants as owners of the following properties: (1) 1309 West Street, (2) 2600 W. 18th Street, (3) 1309 N. Lincoln Street, (4) 709 W. 10th Street, and (5) 2712 N. Tatnall Street. The Department found the properties to be vacant for a number of years with a total assessment sum of \$44,000.² Subsequently, Appellants appealed and submitted a request for waiver of the assessment fees, which the Commissioner of Licenses and Inspections denied on January 14, 2009.³ Appellants subsequently appealed that denial to the Board on March 30, 2009.

¹ Since the Court is denying the remaining claims it did not require a further response from the City.

² The fees were calculated pursuant to the Wilm. C. § 4-27 at 125.0(b)(3). The statements sent in November 2009 included unpaid assessments and fines from prior years and present assessments, if applicable.

³ Waivers were denied for various reasons including: past due fees are ineligible for a waiver; failing to provide sufficient evidence that property is occupied or evidence demonstrating process of rehabilitation, selling, leasing, or demolishing vacant property; and ineligible for a waiver due to receiving a waiver in the past.

At the hearing before the Board it was determined that the properties located at 709 W. 10th Street and 2712 N. Tatnall Street were sold prior to the hearing, and thus were no longer issues for the Board to consider. However, the Board denied the requested waiver as to 2600 W. 18th Street and 1309 West Street and granted a 90-day extension as to 1309 N. Lincoln Street to allow Appellants time to sell the property.

Appellants appeal the Board's decision via this writ of certiorari to this Court and argues the following: (1) the vacancy ordinance is an unconstitutional bill of attainder; (2) the Board acted irregularly and contrary to law by not granting a waiver for 1309 Lincoln Street; (3) the Board never calculated the challenged assessments for accuracy; (4) the Board never determined the assessment as a "lien" on real estate; (5) the Board acted illegally and irregularly as to 1309 West Street; (6) the Board's chairman failed to recuse himself; and (7) there is need for prior owner registration for an assessment.

The City of Wilmington filed a Motion to Dismiss under Rule 12(b)(6), arguing that the doctrines of res judicata and collateral estoppel bar the appeal. The Court will first address the Appellee's Motion to Dismiss and then will decide the merits of the remaining issues.

Standard of Review

When reviewing a Motion to Dismiss, the Court must accept all well-pleaded allegations as true.⁴ If the Plaintiff can recover under any reasonably conceivable set of circumstances susceptible of proof, the Motion to Dismiss will be denied.⁵ Only claims that are “clearly without merit” will be dismissed.⁶

This Court’s role in reviewing a writ of certiorari is limited. The Court shall review the record to determine whether the Board “exceeded its jurisdiction, committed legal error, or proceeded irregularly.”⁷ It is not within the discretion of this Court to consider the merits of the case or to weight the sufficiency of the evidence presented.⁸

Discussion

A. Appellee’s Motion to Dismiss

The Appellee has moved to dismiss Appellants’ writ of certiorari pursuant to Rule 12(b)(6). The Motion to Dismiss is based on res judicata and collateral estoppel. These two legal principles prevent a party from re-litigating a matter previously resolved by the same court.

⁴ *State Human Relations Bd. v. Sea Colony Recreational Assoc.*, 2009 WL 3326630, at *1 (Del. Super. Oct. 14, 2009).

⁵ *Id.*

⁶ *Id.*

⁷ *Christiana Town Ctr., LLC v. New Castle County*, 2009 WL 2921830, at *2 (Del. Dec. 16, 2004) (TABLE).

⁸ *Id.*

Res judicata bars claims where the following elements are met: (1) the original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issue decided was the same as the case at bar; (4) the issues in the prior action must have been decided adversely to the appellants in the case at bar; and (5) the decree in the prior action was a final decree.⁹

Collateral estoppel applies where: (1) the issue previously decided is identical with the one presented in the action in question; (2) the prior action has been fully adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.¹⁰

Because this is Appellants' fifth appeal in the past six years¹¹ with respect to the Board's denial of vacancy assessment waivers, some of the issues raised in this appeal have been previously heard and decided by this Court and the Delaware

⁹ *Bailey v. City of Wilmington*, 766 A.2d 477, 481 (Del. 2001) (citing *Hughes v. Trans World Airlines, Inc.*, 336 A.2d 572, 574 (Del. 1975); *Playtex Family Prod., Inc. v. St. Paul Surplus Lines Ins. Co.*, 564 A.2d 681, 683 (Del. Super. 1989)).

¹⁰ *State v. Machin*, 642 A.2d 1235, 1239 (Del. Super. 1993).

¹¹ See *Janeve Co., Inc. v. City of Wilmington*, 2009 WL 1482230 (Del. Super. May 7, 2009), *aff'd* 2010 WL 376979 (Del. 2010) (TABLE); *Adjile, Inc. v. City of Wilmington*, 2008 WL 2623938 (Del. Super. June 30, 2008), *aff'd* 968 A. 2d 491 (Del. 2009); *Adjile, Inc. v. City of Wilmington*, 2007 WL 2028536 (Del. Super. June 29, 2007), *aff'd* 945 A.2d 593 (Del. 2008) (TABLE); *Adjile, Inc. v. City of Wilmington*, 2004 WL 2827893 (Del. Super. Nov. 30, 2004), *aff'd* 875 A.2d 632 (Del. 2005).

Supreme Court. A review of the Appellants' pleadings reveals that this Court as well as the Delaware Supreme Court have previously addressed the issues relating to (1) whether Chairman Gouge wrongfully refused to recuse himself, (2) the need for prior owner registration for assessment, and (3) the Board's failure to recalculate challenged fees. The elements of res judicata and collateral estoppel have been met as to these issues, and thus, the Appellee's Motion to Dismiss as to these claims will be granted.

The Court will now consider the remaining arguments brought forth in Appellants' writ of certiorari.

B. Bill of Attainder

Appellants first contend that the vacancy ordinances are unconstitutional under Article I, Section 10 of the U.S. Constitution because they constitute a bill of attainder amounting to guilt and infliction of punishment without a judicial trial.¹² The Court first notes that the constitutionality of the vacancy ordinance has been addressed multiple times before this Court and affirmed by the Delaware Supreme Court. Both Courts have found that the ordinance is constitutional and the purpose of it is not intended to punish individuals.¹³ Although the Court previously addressed

¹² Appellants' Opening Br. at 9.

¹³ See *Adjile, Inc.*, 2007 WL 2028536, at *3; *Adjile, Inc.*, 2004 WL 2827893, at *3.

the constitutionality of the ordinance under ex post facto law, the ordinance is still constitutional as to bill of attainders.

Ex post facto law and bill of attainders are similar in that there is a legislative enactment often intended to impose retroactive punishment.¹⁴ However, a bill of attainder is intended to prevent punishment through legislative action without the right to a judicial trial.¹⁵ As such, the purpose of a bill of attainder is “to ensure that the legislature would not overstep the bounds of its authority and perform the functions of the other departments.”¹⁶ Bill of attainders have been found in cases where the legislature exceeded the authority granted to them.¹⁷

The Court finds that the City of Wilmington has acted within its authority under the Home Rule Charter Section 1-101 to enact the ordinances in question here for the protection of the health, safety and welfare of the citizens of Wilmington.¹⁸ Under 1 *Wil. C.* §1-10-1, “[t]he city shall have the power to enact ordinances and to make rules and regulations necessary and proper for carrying into execution of any of its express or implied powers; and such ordinances, rules and regulations may be

¹⁴ *Nixon v. Admin. of Gen. Serv.*, 433 U.S. 425, 469 (1977).

¹⁵ *Cummings v. Missouri*, 71 U.S. 277, 323 (1866).

¹⁶ *U.S. v. Brown*, 381 U.S. 437, 444 (1965).

¹⁷ *See Brown*, 381 U.S. 437 (1965) (finding that a statute making it a crime for member of Communist Party to serve as officer or employee of labor union is unconstitutional as “bill of attainder”); *In re Yung Sing Hee*, 36 F. 437 (1888) (finding that the legislative act intended to inflict punishment of banishment or exile from the United States on a citizen, for any cause or no cause, or because of race or color, is a unconstitutional bill of attainder).

¹⁸ 1 *Wil. C.* § 1-101.

made enforceable by the imposition of fines, forfeitures, penalties and imprisonment.”

This Court has held numerous times that

the ordinance creates a valid regulatory scheme that calls for a reasonable fee based upon the detrimental effect of property left vacant for long periods of time. This is neither criminal, nor penal. While it does assess fees for past vacancy, it does not retrospectively assess such fees. Instead, the ordinance requires one fee for the current year which is calculated based upon the number of years a building has been vacant.¹⁹

Therefore, the bill of attainder argument fails like Appellants’ previous ex post facto argument. The vacancy ordinances are not unconstitutional and do not amount to a bill of attainder because the ordinance was enacted within the powers prescribed under the City Charter, the assessment is not penal or criminal, and administrative as well as judicial review is available for those allegedly harmed by the City’s actions.

C. Waiver as to the Property Located at 1309 Lincoln Street

Next, Appellants argue that the Board acted irregularly when refusing to grant a waiver to the “new owner” of 1309 Lincoln Street because the “new owner” was simply the alter ego of the previous owner.²⁰ Appellants argue that the new and previous owners are legally separate and therefore the Board acted contrary to law.²¹

¹⁹ *Adjile, Inc.*, 2007 WL 2028536, at *3; *Adjile, Inc.*, 2004 WL 2827893, at *3.

²⁰ Appellants’ Opening Br. at 15.

²¹ *Id.*

A review of the hearing record shows that the Board granted an extension and was “opposed to giving another waiver to Readway Inc. because in essence it is Mr. Lowicki.”²² The Board goes on to further explain:

this is not an all arranged transaction to a completely different person, [sic] once again it’s Mr. Lowicki, so the City will deny, would oppose granting a second waiver because what this establishes is that...[sic], anybody can now go [sic] file [sic] for a corporation and transfer a property to a corporation in order to get around the one-time waiver requirement.²³

Based on the Board’s explanation as to why an extension was granted over a waiver, the Court finds that the Board did not act irregularly or contrary to law. If the Court was to accept the Appellants’ argument as to the specific facts here, the Court would undermine the purpose of Section 125.0, and in doing so would encourage owners to avoid compliance with the vacancy ordinance by annually transferring the property to different entities that are controlled by the previous owner. Such gamesmanship cannot be condoned or endorsed by the Court.

D. Whether the Assessment is a ‘Lien’ on Real Estate

Appellants next contend that the ordinance never expressly states the nature of the lien or whether the assessment is a lien on real estate.²⁴ It is well settled that an automatic lien is placed on real property for certain charges levied or imposed by the

²² Tr. of Hrn’g. of Bd. of License and Inspection Review at 25.

²³ *Id.*

²⁴ Appellants’ Opening Br. at 18-19.

City.²⁵ Under 25 *Del. C.* § 2901(a)(1)(j), these charges include fees for registration of ownership of any vacant building.²⁶ Because the Delaware and Wilmington Code are to be read together, a lien is automatically placed on real estate once the vacancy assessments are issued and this argument is without merit.

E. Board’s Actions as to the Property Located at 1309 West Street

Appellants also argue that the Board acted illegally and irregularly in removing the property at 1309 West Street from the agenda without prior approval from the Appellants. According to Section 125.0 (b)(4) “owners have the right to appeal the imposition of the registration fees to the licenses and inspection review board.” However, a right to appeal is created only where there is imposition of fees and because a vacancy fee was not imposed on 1309 West Street for the 2009 year, there was no issue for the Board to consider.

In an attempt to get beyond this procedural hurdle, Appellants further contend that the Board removed the property from the agenda in order to avoid granting a waiver for the \$4,500 assessment on the property.²⁷ A review of the record indicates that the \$4,500 Appellants reference are the vacancy registration fees past due on the

²⁵ *City of Wilmington v. McDermott*, 2008 WL 4147580, at *2 (Del. Super. Aug. 26, 2008).

²⁶ 25 *Del. C.* § 2901(a)(1)(j) states: “[e]xcept as otherwise provided, ‘lien’ or ‘liens’ as used in this section shall arise whenever the following charges, as defined in this section, are levied or imposed by the State or any political subdivision thereof... and such charges become due:...(j) Fees imposed by law or ordinance of any political subdivision of the State, which shall include, without limitation, municipal corporations, for registration of ownership of any vacant buildings located within the political subdivision...”

²⁷ Appellants’ Opening Br. at 21.

property.²⁸ Regardless whether the property is now occupied, Appellants are still held responsible for past vacancy assessments on the property. The letter sent by the Board on January 14, 2009²⁹ clearly states that the \$4,500 amount reflects the previous assessments and that Appellants are “ineligible for a waiver of the past due registration fees because past due fees are not subject to a request for waiver.”³⁰ Therefore, even if the Appellants were allowed to address the Board regarding the 1309 West Street vacancy bill sent in 2009, Appellants would still be obligated to pay the \$4,500 because these are past due fees.

Lastly, Appellants argue that the appeal “would reveal that [sic] L&I was still carrying the property on its books as vacant from 2003 when they/it knew it was occupied.” Appellants state that “the bill statement³¹ **affirms** that the property is still vacant – since 2003 – which the department knew was untrue” and directs the Court to page 4 of the hearing transcript as evidence of this.³²

After an examination of the bill in question and the letter from Jeffrey Starkey of the City’s Department of Licenses and Inspections, the Court finds that the \$4500 bill was clearly for past assessments on the property that have not been paid and there is no attempt to improperly assess fees for an occupied property. The hearing

²⁸ App. to Appellants’ Opening Br. at A000051-53.

²⁹ *Id.* at A000051.

³⁰ *Id.*

³¹ *Id.* at A000053.

³² Appellants’ Opening Br. at 20 (emphasis added).

transcript at page 4 also fails to provide evidence of the Board's alleged knowledge that the property was occupied starting in 2003. Page 4 of the transcript only shows the following communications with respects to 1309 West Street:

Chair: Okay, that's, that's fine. One question I have, and I forgot to ask this earlier of Ms. Ferguson, is in the packet that was sent to us a week or so ago, us, being the Board members, there's 1309 West Street. I didn't see that on the agenda. I assume that's been dealt with or resolved in some way?

CF: 1309 West Street did not receive a vacant registration fee this year because it is occupied.

Nothing within this excerpt indicates to the Court that the Board is improperly exercising its jurisdiction regarding this property or committed legal error by removing it from the agenda. The property was not assessed in 2009 because it was occupied. This, however, does not allow for a waiver of the fees for the years the property remained vacant.

Conclusion

For the foregoing reasons, the Appellee's Motion to Dismiss is granted as to: (1) whether Chairman Gouge wrongfully refused to recuse himself, (2) the need for

prior owner registration for assessment, and (3) the Board's failure to recalculate challenged fees. The Appellants' writ of certiorari is denied as to all other issues.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.