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

MIROSLAW E. KOSTYSHYN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C. A. No.: 06A-04-013 (CLS)**
	)	
THE COMMISSIONERS OF THE TOWN OF BELLEFONTE,	)	
	)	
	)	
Defendants.		

Date Submitted: August 6, 2006
Date Decided: November 30, 2006

Upon Consideration of Defendant's Motion to Dismiss
GRANTED.

ORDER

Miroslaw E. Kostyshyn, Pro Se, Wilmington, Delaware, Plaintiff.

Max B. Walton and Margaret E. Juliano, Esquires, Connolly Bove Lodge & Hutz, LLP, Wilmington, Delaware, Attorneys for Defendant.

SCOTT, J

INTRODUCTION

Plaintiff Miroslaw E. Kostyshyn ("Plaintiff") has filed an appeal from the March 28, 2006 decision of Defendant Commissioners of the Town of Bellefonte ("Defendants"). Defendants now move to dismiss the Complaint for failure to state a claim upon which relief can be granted. Upon consideration of this Motion to Dismiss, it is, hereby, **GRANTED**.

FACTS

The Commissioners of the Town of Bellefonte generally have power to repeal an ordinance under the Town Charter. Section 12 of this Charter states that, "the said Commissioners shall have authority to make such regulations and ordinances for government of the Town as they shall deem necessary and proper." On March 28, 2006, the Commissioners, therefore, established a Board of Adjustment by enacting Bellefonte Ordinance No. 2006-01 ("BOA Ordinance"). This Ordinance repealed a previous ordinance relating to the Board of Adjustment.

On April 27, 2006, Kostyshyn filed the instant appeal of this decision with the Superior Court. The grounds for his appeal are: 1) the Commissioners violated portions of the State Enabling Act of 1923; 2) the method of preparation and presentation of Bellefonte Ordinance No. 2006-

01 was improper; 3) the Commissioners acted illegally; and 4) the issues are the result of fraudulent activities by the Commissioners.

STANDARD OF REVIEW

In assessing the merits of a motion to dismiss for failure to state a claim pursuant to Superior Court Civil Rule 12(b)(6), all well-pleaded facts in the complaint are assumed to be true.[1] "A complaint(,) attacked by a motion to dismiss for failure to state a claim(,) will not be dismissed unless it is clearly without merit, which may be either a matter of law or of fact."[2] Likewise, a complaint will not be dismissed for failure to state a claim unless "(i)t appears to a certainty that, under no set of facts which could be proved to support the claim asserted, would the plaintiff be entitled to relief."[3] That is to say, the test for sufficiency is a broad one. It is measured by whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible to proof under the complaint.[4] If the plaintiff may recover, the motion must be denied.

Similarly, when a defendant who attacks a complaint for failure to state a claim upon which relief could be granted, and who moves to dismiss

[1] *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, 372 A.2d 168, 169 (Del. 1976).
[2] *Diamond State Telephone Co. v. University of Del.*, 269 A.2d 52, 58 (Del. 1970).
[3] *Id*.
[4] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978); *Klein v. Sunbeam Corp*., 94 A.2d 385, 391 (Del. 1952).

the complaint, offers affidavits, depositions, or other supporting documentation, in addition to pleadings, the motion will be considered a motion for summary judgment.[5] Here, the parties have relied upon other matters outside the pleadings. Therefore, the motion will be considered a motion for summary judgment.

The Court's function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of fact exist.[6] Summary judgment will be granted if, after viewing the record in a light most favorable to the non-moving party, no genuine issues of material fact exist and the party is entitled to judgment as a matter of law.[7] If, however, the record indicates there is a material fact in dispute, or if judgment as a matter of law is not appropriate, then summary judgment will not be granted.[8]

DISCUSSION

The Commissioners of the Town of Bellefonte ask the Court to dismiss Plaintiff's appeal for several reasons. First, Defendants claim that Kostyshyn lacks standing to attack the legislative act and cannot state a

[5] *Venables v. Smith*, 2003 WL 1903779, at *2 (Del. Super.); *Shultz v. Delaware Trust Co*., 360 A.2d 576, 578 (Del. Super. Ct. 1976).
[6] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc*., 312 A.2d 322, 325 (Del. Super. Ct. 1973). *See also* Super. Ct. Civ. R. 56.
[7] *Id*.
[8] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

claim for relief based on the Enabling Act. Second, Defendants assert that this Court lacks jurisdiction to hear an appeal of a legislative act. Third, Defendants assert that Kostyshyn cannot state a claim for fraud without particularity. In regard to these arguments, the Court has made the following determinations.

I. Plaintiff Lacks Standing to Attack the Legislative Act

Plaintiff appeals Defendants' adoption of an ordinance establishing the composition of the Board of Adjustment. Pursuant to 22 *Del. C.* §328(a), a person aggrieved by an action of the board can make a petition to the Superior Court. 22 *Del. C.* §328(a) provides:

> Any person or persons, jointly or severally aggrieved by any decision of the board of adjustment, or any taxpayer or any officer, department, board or bureau of the municipality may present to the Superior Court a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the Court within 30 days after the filing of the decision in the office of the board.

In order to maintain the action, however, the plaintiff must establish that he or she has standing to do so.[9] Plaintiff "must satisfy a two-prong test: (1) that it sustained an 'injury-in-fact' and (2) that the interests that it advances are within the 'zone of interests to be protected.'"[10] An injury-in-fact is "an

[9] *T & R Land Co. v. Wootten*, 2006 Del. Ch. LEXIS 169 at *7-8 (citing *Dover Historical Soc. V. City of Dover Planning Comm'n*, 838 A.2d 1103 (Del. 2003)).
[10] *Id.*

invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical."[11]

The Court must, therefore, determine whether Plaintiff Kostyshyn has demonstrated an "injury-in-fact" resulting from the Defendants' enactment of the BOA Ordinance. Kostyshyn simply argues that, "he is an aggrieved and affected person by the BOA Ordinance which, in part, violates the State Enabling Act."[12] However, this argument contains no merit. The Court finds that the 1923 Enabling Act is now codified in Title 22, Chapter 3 of the Delaware Code. Because 22 *Del. C.* §322(d) expressly permits the Board of Commissioners to enact new legislation, the Board did not violate Kostyshyn's rights. Plaintiff Kostyshyn, therefore, did not suffer from an "injury-in-fact" and does not have standing to appeal the legislative decision made by Defendant Commissioners.

II. This Court Does Not Have Jurisdiction to Hear an Appeal of a Legislative Act

In reviewing the decision of a Board, 22 *Del. C.* §328(b) generally directs the Court to allow for a writ of certiorari. This statute provides:

> Upon the presentation of the petition, the Court may allow a writ of certiorari directed to the board to review such decision of the board and shall prescribe therein the time within which a return thereto must be made and served upon the relator's attorney, which shall not be less

[11] *Id.*
[12] Pl. Resp. to Def. Mot. to Dismiss at 3.

> than 10 days and may be extended by the Court. The allowance of the writ shall not stay proceedings upon the decision appealed from, but the Court may, on application, on notice to the board and on due cause shown, grant a restraining order.

However, the Court cannot treat the appeal here as a request for writ of certiorari because Plaintiff lacks standing to challenge the legislative determination. Previous courts in Delaware have generally used the writ of certiorari where the Appellant is aggrieved by a decision of the Board.[13] As determined above, Plaintiff has not suffered from an "injury-in-fact". Hence, this Court cannot use the writ of certiorari here.

III. Plaintiff Cannot State a Claim for Fraud Without Particularity

Superior Court Rule 9(b) provides that, "In all averments of fraud, negligence or mistake, the circumstances constituting fraud, negligence or mistake shall be stated with particularity." In Plaintiff's Notice of Appeal, he simply states that the issues raised in regard to the BOA ordinance "are the result of fraudulent activities by the commissioners."[14] Plaintiff makes no further argument or statement of fact in support of this contention. Therefore, Plaintiff's Notice of Appeal does not comply with Rule 9(b).

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[13] *Boyd v. Heffron*, 1987 WL 28314 (Del Super.); *Harvey v. Board of Adjustment*, 2000 WL 33111028 (Del. Super.); *Kostyshyn v. The Commissioners of Bellefonte*, 2006 WL 1520199 (Del. Super.).

[14] Pl. Notice Of Appeal, ¶4.

CONCLUSION

Based on all of the foregoing, Defendants' Motion to Dismiss is, hereby, **GRANTED**.

IT IS SO ORDERED.

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Judge Calvin L. Scott, Jr.