

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

DON BLOOM, )  
 ) C.A. No. 06A-03-002 (JTV)  
 Appellant / )  
 Plaintiff Below, )  
 )  
 v. )  
 )  
 TINA TURNER, )  
 )  
 Appellee / )  
 Defendant Below. )

*Submitted: June 13, 2006*  
*Decided: October 10, 2006*

Stephen W. Spencer, Esq., and Melissa E. Cargnino, Esq., Phillips, Goldman & Spence, Dewey Beach, Delaware. Attorneys for Appellant.

Michael J. Malkiewicz, Esq., Barros, McNamara, Malkiewicz & Taylor, Dover, Delaware. Attorney for Appellee.

*Upon Consideration of Appeal From*  
*Decision of The Court of Common Pleas*  
**AFFIRMED**

**VAUGHN, President Judge**

***Bloom v. Turner***

C.A. No. 06A-03-002 (JTV)

October 10, 2006

**OPINION**

This action is an appeal of a February 23, 2006 decision of the Court of Common Pleas (“CCP”) denying Don Bloom’s (“the appellant”) Motion for Enlargement of Time to Appeal. The court found that it lacked subject matter jurisdiction to hear the appeal because the concept of excusable neglect had no application to the appeal to CCP under 10 *Del. C.* § 9571. Rather, the court found that the appellant’s two month delay upon discovering his appeal had not been properly perfected and rendered it untimely.

**FACTS**

This case originated when the appellant filed a breach of contract complaint seeking \$1,080 plus court costs against Tina Turner (“the appellee”) in Justice of the Peace Court No. 16. The alleged breach was that the appellant relied on the appellee’s representation that she was a “certified massage therapist” when in fact she was a certified massage technician. The trial was held on September 29, 2005. After reviewing the testimony, evidence, and arguments, the Justice of the Peace Court (“JP Court”) entered judgment for the appellee and awarded sanctions against the appellant for filing a frivolous lawsuit.

On September 29, 2005, the court mailed a copy of the Notice of Court Action. In addition to the judgment, the mailing also included a one page document briefly detailing the right to appeal. However, the appellant claims, J.P. Civ. Form No. 14A: Justice of the Peace Courts Civil Post-Judgment Procedures, was not included. The appellant and his attorney could not agree on terms for representation for an appeal.

***Bloom v. Turner***

C.A. No. 06A-03-002 (JTV)

October 10, 2006

Therefore, on October 7, 2005, Mr. Bloom went to J.P. Court to file his appeal to CCP. He claimed that a court employee advised him as to the procedure to follow. He states that he wrote what was dictated and submitted the note to the court with a \$10 fee believing this to be sufficient to file the appeal. However, this was actually a request for a transcript.

In October 2005, Mr. Bloom began searching for counsel to represent him in the appeal but was unsuccessful. He was informed on December 5, 2005, during consultation with an attorney, that the appeal had not been properly perfected. Mr. Bloom retained counsel on January 23, 2006 and a Notice of Appeal, a Complaint, and a Motion for Enlargement of Time of Appeal were filed in CCP on February 1, 2006.

On February 23, 2006 the CCP judge's opinion was issued dismissing the appellant's appeal for lack of jurisdiction and denying the Motion for the Enlargement of Time for Filing the Appeal. According to the judge, even if the appellant was misinformed by a JP Court clerk about the appeal procedures, and even if he mistakenly assumed an appeal had been perfected, on December 5, 2005, during his consultation with an attorney, he learned it was evident it was not. At that point he knew he needed to take action but instead delayed it for nearly two more months. The court considered this lengthy delay as being caused by the appellant and not court personnel, and held that the subsequent appeal filed almost four months after the final judgement was untimely.

**CONTENTIONS OF THE PARTIES**

***Bloom v. Turner***

C.A. No. 06A-03-002 (JTV)

October 10, 2006

The appellant asserts that CCP has appellate jurisdiction to hear his appeal because jurisdiction exists after the statutory time to appeal has expired where failure to perfect a timely appeal has been caused by erroneous action of a court employee. The appellee cites 10 *Del. C.* § 9571(b) which requires that appeals to the Court of Common Pleas be filed within 15 days from the final judgment of the JP Court. The appellee asserts that although the Delaware courts have created exceptions to the strict requirements of the statute where the fault lies with erroneous action of an officer of the court, the judge correctly found that the delay in this case was not excusable.

The appellant also claims that he filed his appeal to CCP in the wrong court and for that reason his appeal should be deemed to have been timely filed. The appellee challenges this by maintaining that no appeal was filed in any court prior to February 1, 2006. Further, the appellant was aware that no appeal had been filed on December 5, 2005.

**STANDARD OF REVIEW**

When addressing appeals from the Court of Common Pleas, this Court sits as an intermediate appellate court.<sup>1</sup> As such, its function is the same as that of the Supreme Court.<sup>2</sup> The court's role is to "correct errors of law and to review the factual findings of the Court below to determine if they are 'sufficiently supported by the

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<sup>1</sup> *State v. Richards*, 1998 Del. Super. LEXIS 454.

<sup>2</sup> *Baker v. Connell*, 488 A.2d 1303 (Del. 1985).

***Bloom v. Turner***

C.A. No. 06A-03-002 (JTV)

October 10, 2006

record and are the product of an orderly and logical deductive process.”<sup>3</sup> If substantial evidence exists for a finding of fact, this Court must accept that ruling. It must not make its own factual conclusions, weigh evidence or make credibility determinations.<sup>4</sup> Errors of law are reviewed *de novo*.<sup>5</sup>

**DISCUSSION**

As stated in the decision issued in this case by CCP, the right to appeal to CCP in a civil action from any final order, ruling, decision, or judgment of the JP Court is established by statute. 10 *Del. C.* § 9571(b) provides that an appeal shall be taken within 15 days of the final judgment. This is a jurisdictional statute and if it is not complied with, the court has no jurisdiction.<sup>6</sup> Therefore, an appeal must be perfected before the expiration of the 15 day period.<sup>7</sup>

The appellant cites various cases which stand for the proposition that appellant jurisdiction may exist after the statutory time to appeal has expired where the failure to file a timely appeal has been caused by erroneous action of a court clerk.<sup>8</sup> Each,

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<sup>3</sup> *State v. Huss*, 1993 Del. Super. LEXIS 481, at \*2 (citing *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)).

<sup>4</sup> *Johnson v. Chrysler*, 213 A.2d 64 (Del. 1965).

<sup>5</sup> *Downs v. State*, 570 A.2d 1142, 1144 (Del. 1990).

<sup>6</sup> *Williams v. Singleton*, 160 A.2d 376 (Del. 1960).

<sup>7</sup> *Dzedzej v. Prusinski*, 259 A.2d 384 (Del. 1969).

<sup>8</sup> See *Petrucelli v. McFarland*, 1989 WL 41700 (Del. Super.); *Hicks v. Taggart*, 1999 WL 462375 (Del. Super.); and *Latocha v. D.O.W. Finance Corp.*, 1999 WL 1847335 (Del. Com. Pl.).

***Bloom v. Turner***

C.A. No. 06A-03-002 (JTV)

October 10, 2006

as discussed in the CCP opinion, is distinguishable from the case at bar.

This Court agrees that even if the appellant received misinformation from a clerk of the JP Court, he was on notice as of December 5, 2005 that his appeal had not been perfected and yet took no action until February 1, 2006. The delay after December 5, 2005, is not attributable to court personnel and therefore is not excusable. The filing of the appeal nearly four months after final judgment was entered in the JP Court is clearly untimely.

The appellant asserts that CCP had jurisdiction because his appeal was filed in the wrong court. It is correct that CCP has jurisdiction to hear appeals initially filed in the wrong court which are transferred to it.<sup>9</sup> However, this is the case “*provided* it was timely filed in the first instance[.]”<sup>10</sup> The appellant places reliance on *Hicks*. In *Hicks* the appellant received written information from the JP Court as to the time frame for filing his appeal. He followed the instructions but filed the appeal in Superior Court rather than CCP. The Superior Court judge transferred the case to CCP. The court refused jurisdiction because the initial filing was untimely. Ultimately, the reviewing court found that CCP had jurisdiction over the controversy because the JP Court provided the wrong dates. This case is distinguishable in two respects. First, the appellant never properly or timely filed an appeal to CCP. Second, assuming arguendo, that the court clerk gave erroneous information, the appellant did not file any appeal and did nothing to rectify the situation once the error

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<sup>9</sup> 10 *Del. C.* § 1902.

<sup>10</sup> *Hicks v. Taggart*, 1999 WL 462375 at \*2 (Del. Super.).

***Bloom v. Turner***

C.A. No. 06A-03-002 (JTV)

October 10, 2006

came to his attention.

The decision of the Court of Common Pleas judge is sufficiently supported by the record and is therefore *affirmed*.

**IT IS SO ORDERED.**

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary  
cc: Order Distribution  
File