

IN THE SUPREME COURT OF THE STATE OF DELAWARE

VASYL MICHAEL HARIK,	§	
	§	No. 554, 2012
Plaintiff Below,	§	
Appellant,	§	
	§	Court Below–Superior Court
v.	§	of the State of Delaware in and
	§	for New Castle County
BRIAN HENRY and	§	
INVESTIGATIVE UNIT OF	§	
NEWARK POLICE DEPARTMENT,	§	
PETER SAWYER, INVESTIGATIVE	§	
UNIT, ELECTRONIC	§	
SURVEILLANCE SQUAD, AND	§	
INTELLIGENCE INVESTIGATION	§	
SQUAD OF THE DELAWARE	§	
STATE POLICE IN WILMINGTON,	§	
THE STATE OF DELAWARE,	§	
	§	
Defendants Below,	§	C.A. No. N12C-04-209
Appellees.	§	

Submitted: December 31, 2012

Decided: March 5, 2013

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

ORDER

This 5th day of March 2013, upon consideration of the appellant’s opening brief, the appellees’ motions to affirm and joint motion to dismiss, and the appellant’s response opposing the motion to dismiss, it appears to the Court that:

(1) On April 24, 2012, the appellant, Vasyl Michael Harik (“Harik”), filed a civil complaint in the Superior Court against the appellees, Brian Henry and the Newark Police Department (“NPD”), and Peter Sawyer and the Delaware State Police (“DSP”) (collectively “NPD & DSP”). Harik’s complaint, entitled “Complaint about GPS Monitoring without a Warrant, Electronic Surveillance and Discrimination” (hereinafter “Complaint”), sought injunctive relief and damages against NPD & DSP for their alleged used of a global positioning system device to unlawfully monitor Harik and his son.

(2) The record reflects that NPD & DSP filed motions to dismiss the Complaint under Superior Court Civil Rule 12(b). Harik filed responses opposing the motions.¹ At the conclusion of a hearing held on July 18, 2012,² the Superior Court dismissed the Complaint on the basis that Harik had “failed to present any reasonable set of circumstances under which he could prevail in an action.”³ The Superior Court did not expressly grant leave to amend the Complaint. Short written orders granting the motions to dismiss were docketed on July 19, 2012.

¹ See Del. Super. Ct. Civ. R. 12(b)(1)-(7) (listing defenses that may be made by motion).

² The July 18, 2012 hearing transcript was filed in the Superior Court record.

³ Hr’g tr. at 23 (July 18, 2012). See Del. Super. Ct. Civ. R. 12(b)(6) (providing that the defense of “failure to state a claim upon which relief can be granted” may be made by motion).

(3) On August 7, 2012, Harik filed a “Motion for Leave of the Court to Allow Submission of a Revised Complaint with New Evidence” (hereinafter “Motion to Revise Complaint”). At an August 22, 2012 hearing,⁴ the Superior Court denied the Motion to Revise Complaint on the merits, concluding that it “still fails to state a claim upon which relief can be granted.”⁵ The court also determined that the Motion to Revise Complaint was untimely filed under Superior Court Civil Rule 59 (hereinafter “Rule 59”).⁶ A short written order denying the Motion to Revise Complaint was docketed on August 24, 2012.

(4) Three days after the Motion to Revise Complaint was denied, Harik filed a “Motion for Reargument of Leave of the Court to Allow Submission of a Revised Complaint with New Evidence (hereinafter “Motion for Reargument”). At the conclusion of a hearing held on September 12, 2012,⁷ the Superior Court denied the Motion for Reargument on the basis that Harik had “not presented . . . any argument regarding an overlooked legal precedent that would change the outcome of the case.”⁸ A

⁴ A copy of the August 22, 2012 hearing transcript is attached as exhibit 7 to DSP’s motion to affirm.

⁵ Hr’g tr. at 14 (Aug. 22, 2012).

⁶ See Del. Super. Ct. Civ. R. 59 (governing new trials and rearguments).

⁷ A copy of the September 12, 2012 hearing transcript is attached as exhibit 10 to DSP’s motion to affirm.

⁸ Hr’g tr. at 12 (Sep. 12, 2012).

short written order denying the Motion for Reargument was docketed on September 14, 2012.

(5) On October 11, 2012, Harik filed a notice of appeal from the Superior Court's dismissal of his Complaint and the denial of his Motion for Reargument. Harik filed his opening brief and appendix on November 26, 2012.

(6) Having carefully considered the parties' positions on appeal and the Superior Court record, we have determined, as did the Superior Court, that neither the Complaint nor the Motion to Revise Complaint alleged cognizable claims. We therefore conclude that the Superior Court's dismissal of the Complaint for failure to state a claim was appropriate. We also conclude that, to the extent the Motion to Revise Complaint sought to amend the Complaint, the proposed revisions would have been futile, and the Superior Court's denial of the Motion to Revise Complaint was appropriate.⁹

(7) NPD & DSP have moved to dismiss the appeal as untimely. Harik's response in opposition to the motion focuses on the merit of his

⁹ See Del. Super. Ct. Civ. R. 15(a) (governing amendments). See *FS Parallel Fund, L.P. v. Ergen*, 2005 WL 1950199 (Del. Supr.) (affirming denial of motion for leave to file an amended complaint on the basis that the amendments would be futile and subject to dismissal under Rule 12(b)(6)).

Complaint and subsequent pleadings. Harik does not address the timeliness of his appeal.¹⁰

(8) A civil appeal must be filed within thirty days after entry upon the docket of the judgment, order or decree from which the appeal is taken.¹¹ The time period within which to file a notice of appeal is jurisdictional.¹² A timely-filed motion under Rule 59 will toll the period for filing an appeal; however, an untimely motion will not.¹³ To be timely filed, a Rule 59 motion for reargument must be filed “within 5 days after the filing of the Court’s opinion or decision.”¹⁴ Both a motion for new trial and a motion to alter or amend a judgment must be filed under Rule 59 “not later than 10 days after the entry of judgment.”¹⁵

(9) In this case, we conclude that, because the Superior Court’s July 19, 2012 dismissal of Harik’s Complaint was a final judgment, the court’s application of the Rule 59 time constraints to Harik’s Motion to

¹⁰ Del. Supr. Ct. R. 29(b).

¹¹ Del. Supr. Ct. R. 6(a)(i).

¹² *Carr v. State*, 554 A.2d 778, 779 (Del. 1989).

¹³ See *McDaniel v. DaimlerChrysler Corp.*, 860 A.2d 321, 323 (Del. 2004) (concluding that only timely Rule 59 motion for reargument will delay finality of judgment) (citing to *Preform Bldg. Components, Inc. v. Edwards*, 280 A.2d 697, 698 (Del. 1971) (holding that timely Rule 59 motion for reargument tolls appeal period, but untimely motion does not)).

¹⁴ Del. Super. Ct. Civ. R. 59(e).

¹⁵ Del. Super. Ct. Civ. R. 59(b), (d).

Revise Complaint was appropriate.¹⁶ Moreover, when applying the time constraints, the Superior Court correctly concluded that the Motion to Revise Complaint, which was filed on August 7, 2012, nineteen days after the July 19, 2012 dismissal, was untimely filed under Rule 59.

(10) Without the tolling effect of a timely-filed motion under Rule 59, Harik's appeal filed on October 11, 2012 from the July 19, 2012 dismissal of the Complaint is untimely and must be dismissed for lack of jurisdiction.¹⁷ Harik's appeal from the September 14, 2012 denial of his timely-filed Motion for Reargument is timely.

NOW, THEREFORE, IT IS ORDERED that:

A. The joint motion to dismiss the appeal is GRANTED in part. The appeal from the Superior Court's July 19, 2012 judgment is DISMISSED as untimely filed.

B. The motions to affirm are GRANTED. The Superior Court's judgment of September 14, 2012, is AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice

¹⁶ *Cf. Braddock v. Zimmerman*, 906 A.2d 776, 783-84 (Del. 2006) (holding that a final judgment results whenever a complaint is dismissed . . . unless the plaintiff is expressly granted leave to amend).

¹⁷ *McDaniel v. DaimlerChrysler Corp.*, 860 A.2d 321, 323 (Del. 2004).