

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF THE                   §  
PETITION OF GABRIEL G.               § No. 391, 2006  
ATAMIAN FOR AN                       §  
EXTRAORDINARY WRIT OF               §  
MANDAMUS AND/OR                   §  
PROHIBITION                           §

Submitted: July 31, 2006  
Decided: September 25, 2006

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

**ORDER**

This 25<sup>th</sup> day of September 2006, it appears to the Court that:

(1) The petitioner, Gabriel Atamian, has filed a petition requesting this Court to issue an extraordinary writ of mandamus and/or prohibition compelling the Superior Court to allow Atamian to present a motion to set aside the Superior Court's order entering summary judgment against him in an action he filed in that court. The defendant in the action below, Michael Ryan, DDS, has filed a motion to dismiss Atamian's petition on the ground that the extraordinary writ process cannot be used to compel a trial court to perform a discretionary act.

(2) The docket in Superior Court C.A. No. 03C-12-038 reflects that Atamian filed his complaint in December 2003 against Ryan and another defendant, Becden Dental Laboratory, alleging assault, conspiracy, and other

related claims associated with the alleged negligent installation of a dental crown. In March 2006, at a hearing on the defendants' respective motions for summary judgment, Atamian walked out of the hearing while it was in progress despite the judge's warning that Atamian would forfeit his right to present oral argument against the summary judgment motions, which would be decided solely on the parties' written submissions.

(3) Thereafter, on May 25, 2006, the Superior Court entered a single-paragraph final order, pursuant to Superior Court Civil Rule 54(b), granting summary judgment to Ryan and dismissing Atamian's claims against Ryan with prejudice. On May 31, 2006, Atamian filed a Motion to Set Aside Order of Dismissal, arguing among other things that the Superior Court's entry of final judgment under Rule 54(b) was improper because the Superior Court failed to state any reasons in support of its judgment. On June 9, 2006, the Superior Court docketed an opinion granting summary judgment to both defendants. On July 20, 2006, the Superior Court entered an order that treated Atamian's Motion to Set Aside Order of Dismissal as a motion for reargument and denied it as untimely.

(4) Rather than file a notice of appeal, which would have been the appropriate remedy, Atamian filed this extraordinary writ. The

extraordinary writ process, however, cannot be used as a substitute for a timely-filed appeal.<sup>1</sup> Accordingly, dismissal of this writ is warranted.

(5) Nonetheless, because it appears that the Superior Court erred as a matter of law in denying Atamian's motion to set aside the judgment of dismissal as untimely,<sup>2</sup> we find it appropriate to direct the Superior Court to vacate its July 20 order and reconsider Atamian's motion on its merits. Thereafter, Atamian may pursue an appeal, if necessary.

NOW, THEREFORE, IT IS ORDERED that Atamian's petition for an extraordinary writ is DISMISSED with instructions to the Superior Court consistent with this Order.

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice

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<sup>1</sup> *Matushefske v. Herlihy*, 214 A.2d 883, 885 (Del. 1965).

<sup>2</sup>In computing the five-day filing period for a motion for reargument under Superior Court Civil Rule 59(e), intervening Saturdays, Sundays, and holidays are excluded. *Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969). Using that method of computation, it appears Atamian's motion, which was filed May 31 from a May 25 order, was timely. We offer no opinion on Atamian's objection to the Superior Court's consideration of his motion to set aside the judgment as a motion for reargument.