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

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| **MIROSLAW E. KOSTYSHYN,** | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | **C. A. No.: 07A-01-004 (CLS)** |
| | ) | |
| **BOARD OF ADJUSTMENT** | ) | |
| **(TOWN OF BELLEFONTE),** | ) | |
| | ) | |
| Appellee. | ) | |

Date Submitted: May 21, 2007
Date Decided: August 17, 2007

*Upon Consideration of Appellee's Motion to Dismiss*
**GRANTED**.

**ORDER**

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

John E. Tracey, Esquire, Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware, Attorney for Defendant.

**Scott, J.**

## INTRODUCTION

Plaintiff Miroslaw E. Kostyshyn ("Appellant") has filed an appeal of the December 12, 2006 decision of Defendant Board of Adjustment ("Appellee") in which the Board granted the application of Cynthia Anker ("Anker") for an area variance. Because the 30 day appeal period has passed, and Anker has failed to join an indispensable party, the Court finds that it must dismiss Appellant Kostyshyn's appeal in the matter at hand. Appellee Board's Motion to Dismiss is, hereby, **GRANTED.**

## FACTS

On November 16, 2006, the Board held a hearing at which Anker presented evidence to establish the need for a variance. Appellant Kostyshyn did not attend this hearing. Kostyshyn's brother, however, submitted a letter of opposition after the hearing took place. Before filing a written decision on December 12, 2006, the Board considered all the evidence. The Board unanimously approved Anker's variance to subdivide her lot into two lots; each 250 square feet below the minimum lot size requirements established by the town's zoning code.

Appellant Kostyshyn filed the instant appeal of the Board's December 12, 2006 decision on January 11, 2007. Prior to this appeal, Kostyshyn had filed an appeal on April 27, 2006 of a March 28, 2006 decision issued by the

Town of Commissioners. Kostyshyn essentially challenged the Town's decision to create a Board of Adjustment. On November 28, 2006, this Court granted The Town of Commissioners' Motion to Dismiss the April 27, 2006 appeal, finding that: 1) Kostyshyn lacked standing to challenge the legislative act (which permits the Board to enact new legislation); 2) This Court does not have jurisdiction to hear an appeal of a legislative act; and 3) Plaintiff cannot state a claim for fraud without particularity.

In the instant January 11, 2007 appeal, Kostyshyn challenges an area variance granted to Anker. Kostyshyn named the Board of Adjustment, but did not name Anker as a party. Kostyshyn states the following grounds for his appeal:

1) The Board of Adjustment was improperly constituted for the plaintiff had a case (pending) challenging the legality of the Board..[1]

2) The attorney representing the Board of Adjustment distorted and wrote the board's decision letter of November 12, 2006; but signed by Brian Donovan, Chairman.

3) The Board of Adjustment violated a long standing ordinance that being Bellefonte Ordinance 91-1 and also New Castle County Code.

4) All the above issues are the result of fraudulent activities by the Board of Adjustment and their attorney.

[1] The Court notes that Kostyshyn is referring to the aforementioned April 27, 2006 appeal that challenged the formation of the Board of Adjustment.

## PARTIES' CONTENTIONS

Appellee Board of Adjustment argues that the Court must dismiss Kostyshyn's appeal because he failed to join Cynthia Anker within the allotted appeal time. Because Kostyshyn only had 30 days to file his appeal under 22 *Del. C.* §328(a),[2] the Board argues that he can no longer join another party. Appellee Board cites Superior Court Civil Rules 15 and 19, and Delaware case law that states, "The failure to join an indispensable party within the allotted appeal time is fatal to the jurisdiction of the Court to consider the petition."[3] Under Delaware law, a Court must assess the prejudice when making a decision in the absence of Cynthia Anker. Appellee, therefore, contends that "any judgment rendered in the absence of Anker would not be adequate because, as a necessary party, it was not present to defend its interests."[4]

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[2] 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.

[3] Appellee Mot. to Dismiss, ¶3 (citing *Hackett v. Board of Adjustment of City of Rehoboth*, 794 A.2d 596, 599 (Del. 2002); *Sussex Medical Investors, L.P. v. Delaware Health Resources Board*, 1997 Del. Super. LEXIS 334; *Dzedzej v. Prusinki*, 259 A.2d 384 (Del. Super. 1969)).

[4] Appellee Mot. to Dismiss, ¶3.

Appellant Kostyshyn argues that he "did not fail to join, Cynthia Anker ("Anker") as an indispensable party because she was not an indispensable party."[5] Kostyshyn claims that Anker:

> had no legal right, from the very beginning, to even apply or seek an area variance of less than 6,500 square feet. What Anker did, was a SELF CREATED PROBLEM. And, furthermore, the Board of Adjustment had a fiduciary duty to refuse her application and to refund her application fee….[6]

Kostyshyn also argues that the Board's Motion to Dismiss must fail for three additional reasons. First, Kostyshyn argues that the Board had no legal standing to grant the variance because his pending appeal "dealt with the way and method the Commissioners had used to adopt Bellefonte Ordinance 2006-01, which was to create a Board of Adjustment... To date, the Court has not entered a final decision in this case."[7]

Second, Kostyshyn argues that the Board of Adjustment violated Bellefonte Ordinance 91-1, adopted in 1991. According to Kostyshyn, this ordinance amended the zoning code by establishing a minimum lot size of 6,500 square feet. Furthermore, Ordinance 91-1 states that, "No owner(s) of real property... shall be permitted to seek or cause subdivision of real estate"

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[5] Appellant Resp. to Mot. to Dismiss, ¶10.

[6] *Id.*

[7] Appellant Resp. to Mot. to Dismiss, ¶5; The Court issued a final decision in this matter on November 28, 2006.

that would result in a parcel less than 6,500 feet.[8] Appellant Kostyshyn, therefore, claims that, "The Commissioners had determined that the subdivision of existing lots into lots of less than 6,500 square feet in area would be grossly inconsistent with the development of the residential district of Bellefonte…."[9]

Third, Kostyshyn argues that Appellee's Motion to Dismiss violated Court rules because it exceeds the four page limit. Kostyshyn accuses Appellee's attorney of doing "an end-run around the Prothonotary by hand delivering a courtesy copy of his Motion to Dismiss, first to Judge Scott and then to the Prothonotary."

## APPLICABLE LAW

Because the 30 day appeal period has passed, the Court must determine whether the "relation back" provision of Superior Court Civil Rule 15(c) applies here. Superior Court Rule 15(c) provides that:

> An amendment of a pleading relates back to the date of the original pleading when:
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> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

[8] Appellant Resp. to Mot. to Dismiss, ¶9.

[9] Appellant Resp. to Mot. to Dismiss, ¶8.

> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (A) is satisfied and, within the period provided by statute or these Rules for service of the summons and notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.[10]

If the Court finds that Kostyshyn cannot amend the pleadings under Rule 15(c), the Court must decide whether Anker is an indispensable party to the appeal. Superior Court Rule 19 pertains to failure to join an indispensable party. Under Superior Court Rule 19(a)(2)(i):

> A person who is subject to service of process and whose joinder will not deprive the Court of jurisdiction over the subject matter of the action shall be joined as a party in the action if… (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest…[11]

Furthermore, Rule 19(b) provides that:

> If a person… cannot be made a party, the Court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the Court include:

[10] Del. Super. Ct. Civ. R. 15(c).

[11] Del. Super. Ct. Civ. R. 19(a)(2)(i).

(1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties

(2) the extent to which by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided

(3) whether a judgment rendered in the person's absence will be adequate

(4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.[12]

## DISCUSSION

First, the Court must address Appellant Kostyshyn's argument regarding the length of the Board's Motion to Dismiss. Superior Court Civil Rule 78(b) provides that motions cannot exceed "four pages in length on letter size paper".[13] Here, the Board's Motion only exceeds this four page limit by one conclusion sentence and signature line. The Court finds that this small defect is not fatal to the Court's consideration of this Motion.

The Court will, therefore, determine the applicability of Rules 15 and 19 here. Under Superior Court Rule 15(c), the "'knew or should have known" requirement clearly provides that "relation back is limited to situations where but for a mistake concerning the identity the proper party

[12] Del. Super. Ct. Civ. R. 19(b).

[13] Del. Super. Ct. Civ. R. 78(b).

has not been sued.'"[14] Kostyshyn has failed to establish the necessary elements for "relation back" because he does not allege a mistake in identity here. Instead, Kostyshyn acknowledges the identity of Cynthia Anker by arguing against her rights in the case at hand. Kostyshyn avers that Anker "had no legal right, from the very beginning, to even apply or seek an area variance of less than 6,500 square feet." Since Kostyshyn does not satisfy the requirements of Rule 15(c), the pleadings here cannot be amended after the applicable appeal period.[15]

Hence, the Court must decide whether Anker is an indispensable party to the appeal under Superior Court Rule 19. In addressing whether Anker is an indispensable party, the Delaware Supreme Court case of *Hackett v. Board of Adjustment of City of Rehoboth*[16] provides strong support for the Court's decision. The Supreme Court ruled that "a property owner whose interests are impacted by a ruling of a board of adjustment is an affected party."[17] The appellant in *Hackett* filed a petition with Rehoboth City's Board of Adjustment that objected the grant of a permit to the *Sands*, a hotel.

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[14] *Sussex Medical Investor, L.P. v. Del. Health. Res. Bd.*, 1997 Del. Super. 334, at *19 (citing *Mullen v. Alarmguard of Delmarva, Inc*., 625 A.2d. 264, 265 (Del. 1993)).

[15] *Id*. (citing *Mullen* 625 A.2d. at 263).

[16] 794 A.2d 596 (Del. 2002).

[17] *Id*.

When the Rehoboth Board denied this appeal, appellant filed a "Petition for Writ of *Certiorari*" in the Superior Court of Sussex County, asking the Court to review the Board's decision.[18] The Board filed a Motion to Dismiss this appeal, in which they claimed failure to join an indispensable party. The appellant in *Hackett* then filed a Motion to Amend the caption of his petition in order to name *Sands* as a party. However, the appellant filed this Motion after the thirty day appeal period.[19]

The Superior Court in *Hackett* made a bench ruling that dismissed the appeal and found that "failure to name the property owner was fatal defect in the appellate review process and that deficiency could not be cured through amendment after the appeal period had expired."[20] On appeal, the Supreme Court affirmed this ruling and stated that the Board had no true interest in the outcome of an appeal. Furthermore, as to the *Sands* Hotel, the Supreme Court stated, "Clearly, a property owner whose interests are impacted by a ruling of a board of adjustment is an affected party."[21]

Like the Superior Court in *Hackett*, this Court must also grant the Appellee Board's Motion to Dismiss for failure to join an indispensable

[18] *Id.* at 597.

[19] *Id.* at 598.

[20] 794 A.2d at 598.

[21] *Id.*

party. Appellant Kostyshyn has failed to name the property owner here, Cynthia Anker, as a party to his appeal of the Board's decision to grant a variance. As the property owner in the underlying matter, Anker's interests were affected by the Board of Adjustment's ruling. Anker, therefore, has an interest in the outcome of this appeal.

Finally, the Court notes that the Town of Bellefonte's Ordinance 91-1, cited by Appellant Kostyshyn, provides further support for the Court's decision. This ordinance directly addresses the rights of the property owner by stating that "No owner(s) of real property... shall be permitted to seek or cause subdivision of real estate." As such, Anker's rights are clearly at stake in a Board decision regarding this Ordinance. Kostyshyn cannot seek an appeal on grounds of Ordinance 91-1 without giving Anker the opportunity to defend her rights.

## CONCLUSION

For the foregoing reasons, the Board's Motion to Dismiss is, hereby, **GRANTED.**

**IT IS SO ORDERED.**

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**Judge Calvin L. Scott, Jr.**