

**COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE**

WILMINGTON, DELAWARE 19801

John K. Welch
Judge

December 13, 2011

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Re: *Tiger Roofing, Inc. v. Lee Schwamman and Cheryl Schwamman*
C.A. No. CPU4-11-4653

Date Submitted: December 9, 2011

Date Decided: December 13, 2011

LETTER OPINION

Dear Counsel:

This matter comes before the Court upon Plaintiff-Below/Appellee Tiger Roofing, Inc.'s ("Appellee") Motion to Dismiss Appeal for lack of subject-matter jurisdiction pursuant to Court of Common Pleas Civil Rules of Procedure 72.3(b) and 12(b)(1). The parties presented their arguments on December 9, 2011, and the Court reserved its decision. This letter constitutes the Court's Final Decision and Order.

I. Facts and Procedural History.

On March 22, 2011, Appellee filed suit against Defendants/Appellants Lee and Cheryl Schwamman ("Appellants") in the Justice of the Peace Court No. 13 to recover an outstanding balance owed after Appellee installed windows in Appellants'

home. Trial was held on July 12, 2011. By written decision dated July 19, 2011, The Honorable Robert C. Lopez entered judgment in favor of Appellee for \$ 7,696.56. The Court further awarded Appellee its attorneys' fees in the amount of \$ 1,500 and court costs of \$ 40.00. Despite the absence of a counterclaim, the Court awarded Appellants "token" damages in the amount of \$ 500 as an offset for work not completed by Appellee.

On August 2, 2011, Appellants filed a notice of appeal in this Court. This Court's docket attaches an image of three documents filed contemporaneously therewith: a Notice of Appeal, a Summons and Praecipe. The Notice of Appeal is date/time-stamped. The Summons and Praecipe are not. The last page of the filing includes the "Case Information" sheet, which, among other things, identifies the Clerk who accepted the electronic filing as Jose Beltran.¹

By letter dated August 9, 2011, Counsel for Appellants requested a certified transcript. The letter request was date-stamped on August 10, 2011, as well as August 17, 2011, and bears an electronic filing time stamp of August 24, 2011 and a handwritten note of "Please file by E-flex." The handwritten note is dated August 18, 2011.

In error, the Summons and Praecipe filed on appeal direct that service be issued to Appellant Tiger Roofing, Inc. The Court issued the summons via certified

¹ The Justice of the Peace Court docket varies from this Court's docket, recording the Notice of Appeal being filed August 19, 2011. Notwithstanding that inconsistency, this Court's docket clearly reflects that the notice, summons and praecipe were timely filed.

mail to Appellant Tiger Roofing on September 13, 2011. Service was perfected on November 3, 2011.

On August 23, 2011, Appellants filed the certified copy of the judgment. On November 30, 2011, Appellants filed the Complaint on appeal.

On November 18, 2011, Appellee filed its Motion to Dismiss. On December 5, 2011, Appellants filed their opposition. A hearing was held on December 9, 2011.

II. Discussion.

Appellee advances two arguments in support of its Motion to Dismiss Appeal. First, Appellee argues that Appellants failed to file a summons and praecipe together with the notice within the time prescribed by the Rules. The failure to timely file the summons and praecipe invokes the jurisdictional bar. In the alternative, Appellee avers that the summons on appeal is defective insofar as it contains a clerical error misidentifying the party to whom service is directed and, thus, the appeal was not perfected properly. The Court will address the arguments *seriatim*.

The Court first turns its attention to the question of whether Appellants complied with the filing requirements of Rule 72.3 to perfect an appeal to this Court.

Section 9571 of Title 10 of the Delaware Code governs appeal procedures from final judgments of the Justice of the Peace Courts. The appeals statute incorporates the procedures defined by the rules and, in this circumstance, the rules are afforded

the same status as the statute.² Under Delaware law, an appellant has 15 days in which to file an appeal *de novo* with the Court of Common Pleas.³ The Notice of Appeal must be filed within that 15 day time period or the Court loses subject-matter jurisdiction to hear the appeal.⁴

Upon review of the submissions and the record facts, this Court concludes that Appellants' filing was timely. On August 2, 2011, this Court's docket reflects that an appeal was filed in this Court. The docket entry has an "image" attached. The image includes a Notice of Appeal, Summons and Praecipe. While this Court notes that only the Notice of Appeal was "clocked in" electronically, it is clear from the image attachment that the three documents were filed collectively and simultaneously. The Court encloses the attachment to the filing for your review.

Moreover, Exhibit A to Appellants' submission -- an e-mail confirmation dated August 12, 2011 as to the electronic filing of the Notice of Appeal -- corroborates that Appellants filed the Notice of Appeal on August 2, 2011. The e-mail further shows that the Court accepted the filing, irrespective of the ensuing exchange as between the Clerk's office and Appellants' counsel.⁵ Consequently, Appellants timely filed the

² *Reed v. Clark's Swimming Pools, Inc.*, 1997 WL 1737122, at *2 (Del. Com. Pl. Sept. 19, 1997) (citing *Lenape Associates v. Callaban*, 616 A.2d 1214 (Table), 1992 WL 354216, at *1 (Del. 1992)).

³ 10 *Del. C.* 9571(b); CCP Civ. R. 72.3(b).

⁴ *Cabbage v. Carroll*, 2006 WL 496138, at *2 (Del. Super. Ct. Feb. 17, 2006) (citing *Preston v. Bd of Adjustment of New Castle County*, 772 A.2d 787, 791 (Del. 2001); *Lenape Associates*, 1992 WL 354216, at *1).

⁵ The Court notes that a time period may be enlarged upon a showing of action by the trial court that prevented performance. It is true that the jurisdiction requirements of 10 *Del. C.* § 9571 must be satisfied. However, a default by a clerk or officer of the court which prevents the timely filing of an appeal by a party

summons and praecipe within the 15 day appeal period and subject-matter jurisdiction may be invoked.

Appellee next seeks to raise the jurisdictional bar arguing that the Summons and Praecipe filed on appeal mistakenly direct the Appellee to serve itself with the Complaint, as opposed to serving the Appellants. As such, the appeal is untimely and should be dismissed. The Court disagrees.

Appellants acknowledge the mistake in the summons on appeal. This Court accepts Counsel's explanation of the error as being a clerical mistake within her office. Appellee basically argues that the summons must be perfect, but the fact is that the praecipe and summons both substantially comply with this Court's rules and the error directing Appellee to serve itself should not be fatal to this appeal. Moreover, Appellants initiated the judicial machinery by properly filing their notice of appeal, praecipe and summons. Taking into consideration that Appellants' filing contained this single deficiency, which Counsel readily conceded once it was revealed, the Court denies Appellee's motion to dismiss on that basis.

III. Conclusion.

For the foregoing reasons, this Court is convinced that Appellants timely perfected their appeal within the time prescribed by Rule 72.3. The Court further finds that the clerical error in the summons and praecipe is not fatal to Appellants'

who took all necessary steps to comply with the rule may justify the Court enlarging the time period to avert frustration of purpose. *Reed*, 1997 WL 1737122, at *3 (citing *Lenape Associates*, 1992 WL 354216, at *3).

appeal. As such, Appellee's Motion to Dismiss Appeal is hereby **DENIED**. Appellants are directed to file an amended summons and praecipe with the Clerk's office within 10 calendar days of this Order, with courtesy copies to be sent to Chambers.

IT IS SO ORDERED this 13th day of December, 2011.

John K. Welch

John K. Welch
Judge

JKW/dac
Encl.

cc: Ms. Tamu White, CCP Chief Civil Case Manager