

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

**THE CITY OF WILMINGTON, a)
Municipal Corporation of the State)
of Delaware,)**

Plaintiff,)

v.)

**JANEVE CO., INC. AND)
TAX PARCEL NO. 26-028.20-054,)**

Defendants,)

AND)

**THE CITY OF WILMINGTON, a)
Municipal Corporation of the State)
of Delaware,)**

Plaintiff,)

v.)

**READWAY, INC. AND)
TAX PARCEL NO. 26-013.30-183,)**

Defendants,)

AND)

**THE CITY OF WILMINGTON, a)
Municipal Corporation of the State)
of Delaware,)**

Plaintiffs,)

C.A. N12J-03974 PRW

C.A. N12J-03922 PRW

| | | |
|-------------------------------|---|---------------------|
| v. |) | C.A. N12J-03901 PRW |
| |) | |
| THE REVOCABLE TRUST OF |) | |
| WALTER LOWICKI DATED |) | |
| AUGUST 18, 1999, |) | |
| STANLEY C. LOWICKI, |) | |
| UNKNOWN HEIRS |) | |
| OF WALTER LOWICKI AND |) | |
| TAX PARCEL NO. 26-055.40-022, |) | |
| |) | |
| Defendants. |) | |

Submitted: April 29, 2014
Decided: June 13, 2014

*Upon Defendants' Motion for Reconsideration of Commissioner's Orders
and Appeal from the Commissioner's Findings and Recommendations,*
DENIED.

*Upon Plaintiff, City of Wilmington's, Motion to Lift Stay of
Sheriff's Sale,*
GRANTED.

OPINION AND ORDER

Thomas P. Carney, Esquire, City of Wilmington Law Department,
Wilmington, Delaware, Assistant City Solicitor, Attorney for Plaintiff City
of Wilmington.

John R. Weaver, Jr., Esquire, Stark & Stark, PC, Wilmington, Delaware,
Attorney for Defendants.

WALLACE, J.

I. INTRODUCTION

Before the Court are cross-motions: Defendants’—Janeve Co., Inc., Readway, Inc., and the Revocable Trust of Walter Lowicki, Stanley C. Lowicki, and Unknown Heirs of Walter Lowicki (collectively “Defendants”)—Motion for Reconsideration, challenging case-dispositive and non-dispositive determinations made by a Superior Court Commissioner;¹ and Plaintiff City of Wilmington’s (“the City”) Motion to Lift the Stay of Sheriff Sale. For the reasons stated below, Defendants’ Motion is denied, and the City’s Motion is granted.

II. FACTUAL AND PROCEDURAL BACKGROUND

The facts underlying this matter are not in dispute and arise from a long chain of litigation from the City’s efforts to secure payment of vacant property fees for properties owned by Defendants. For approximately a decade, Defendants have failed to pay fees assessed by the City. When the City has attempted to collect these unpaid fees through monition actions, Defendants have vigorously challenged the collection efforts in court. Each year, when presented with a writ of monition, Defendants have brought suit in this Court, often sought reargument when their claims invariably failed, and appealed to the Supreme Court where their challenges were consistently

¹ *City of Wilmington v. Janeve Co., Inc.*, 2013 WL 4877963 (Del. Super. Ct. Sept. 11, 2013) (Comm’r Op. and Order).

rebuffed. This process would repeat when the next year's vacant property fees became due.

In the present action, Plaintiff City of Wilmington filed three Writs of Monition pursuant to City of Wilmington Code ("the Code") § 4-181² on September 4, 2012. The three writs were based on unpaid vacant property registration fees assessed under § 4-27 of the Code.³ The three actions are consolidated for the purpose of this appeal. The properties in question are:

| Defendant | Property Address | Tax Parcel Number |
|------------------|-----------------------------------------------------------|-------------------|
| Janeve Co., Inc. | 1309 West Street Wilmington, Delaware | 26-028.20-054 |
| Readway, Inc. | 1309 Lincoln Street Wilmington, Delaware | 26-013.30-183 |
| Lowicki Trust | 2600 West 18 th Street Wilmington, Delaware | 26-005.40-022 |

Defendants filed an answer in each monition action. As the answers presented no worthy defense, the City filed three writs of *venditioni exponas*, directing the Sheriff to sell the named properties. Defendants then filed a motion to set aside the monitions and quash the sheriff's sales, which the City opposed. A hearing on Defendants' motion was heard by a

² 1 *Wilm. C.* § 4-181.

³ 1 *Wilm. C.* § 4-27.

Commissioner of this Court, at which the Commissioner noted a potential conflict of interest, granted a stay of the sheriff's sales, and sought reassignment of the matter to another Commissioner.

On February 26, 2013, the second Commissioner conducted a hearing on Defendants' motion. Defendants alleged three grounds for relief: (1) for the Readway property, the writ of monition should be dismissed pursuant to Superior Court Civil Rule 41(a) as precluded by the doctrine of *res judicata*; (2) the City's actions were untimely under 10 *Del. C.* § 8106's three-year statute of limitation; and (3) Defendants were entitled a jury trial. The Commissioner denied Defendants' claims, noting that the Defendants' systematic attempts to challenge the City's fee collections efforts on an annual basis—including *pro forma* appeals to this Court and our Supreme Court—were the cause of delayed adjudication.⁴ When the following year's vacant property fees became due, and subsequently were not paid, the City

⁴ See *Adjile, Inc. v. City of Wilmington*, 2004 WL 2827893 (Del. Super. Ct. Nov. 30, 2004), *aff'd*, 2005 WL 1139577 (Del. May 12, 2005); *Adjile, Inc. v. City of Wilmington*, 2007 WL 2028536 (Del. Super. Ct. June 29, 2007), *reargument denied*, 2007 WL 2193741 (Del. Super. Ct. July 20, 2007), *aff'd*, 2008 WL 660139 (Del. March 13, 2008); *Adjile, Inc. v. City of Wilmington*, 2008 WL 2623938 (Del. Super. Ct. June 30, 2008), *reargument denied*, 2008 WL 4287316 (Del. Super. Ct. Sept. 12, 2008), *aff'd*, 2009 WL 476538 (Del. Feb. 26, 2009); *Janeve Co. v. City of Wilmington*, 2009 WL 1482230 (Del. Super. Ct. May 7, 2009), *reargument denied*, 2009 WL 2386152 (Del. Super. Ct. July 24, 2009), *aff'd*, 2010 WL 376979 (Del. Jan. 6, 2010); *Adjile, Inc. v. City of Wilmington*, 2010 WL 1379921 (Del. Super. Ct. March 31, 2010), *reargument denied*, 2010 WL 2432961 (Del. Super. Ct. May 28, 2010), *aff'd*, 2010 WL 6012382 (Del. Dec. 28, 2010).

would then be required to file a new writ of monition reflecting the up-to-date fee amounts owed.

The Commissioner reasoned that Superior Court Civil Rule 41(a) is only triggered if an action is dismissed without order of the court, and then later re-filed. As the City had sought the Court's permission to vacate an earlier writ of monition before re-filing the writ with the current fee amounts owed, the current action was not barred under Rule 41(a). Examining Defendants' pattern of purposefully delaying the City's collection efforts, the Commissioner further found that any delay suffered by Defendants was attributable to their own actions. Consequently, they neither proved nor could they argue that they suffered prejudice from the delay. And the statute of limitations did not bar the present action. Finally, the Commissioner found that, as the action for monition arises from a statutory provision,⁵ Defendants have no right to a trial by jury because the cause of action did not exist at common law.⁶ Defendants filed a motion to reargue the Commissioner's Order which the Commissioner subsequently denied.

⁵ DEL. CODE ANN. tit. 25, § 2901 (2013).

⁶ Defendants further argued that the City was required to submit an affidavit in support of its monition, under DEL. CODE ANN. tit. 25, § 2901(b)(2) (2013) ("Notices of Lien shall be in the form of an affidavit, executed by an attorney for the political subdivision or by an employee of the political subdivision having custody and control over the records relating to the charges that constitute the lien"), and failed to do so. The Commissioner agreed. Following the February 26, 2013 hearing, the City filed a

Defendants now seek reconsideration of the Commissioner’s Orders on the following grounds: (1) as for Defendant Readway, the “two dismissal” rule has been satisfied, and the present action should be barred under the doctrine of *res judicata*; (2) for all Defendants, the three-year statute of limitations found in 10 *Del. C.* § 8106 bars the City’s claims as untimely; and (3) for all Defendants, the City’s claims are simple debt actions—which existed at common law—and therefore the defendants are entitled to a trial by jury.

III. STANDARD OF REVIEW

Under Superior Court Civil Rule 132,⁷ Commissioners have the power to conduct both dispositive and non-dispositive hearings and to make certain pre-trial determinations and recommendations.⁸ The fundamental nature of the subject matter under review—dispositive or non-dispositive—dictates the degree of deference a judge must give to such a determination.⁹ Upon review of a Commissioner’s case-dispositive determination, a judge

supplemental/amended affidavit in each of the motion actions, thereby mooting this claim. Defendants have not asserted this claim in their motion for reconsideration, therefore the Court need not address it.

⁷ Super. Ct. Civ. R. 132(a)(3) & (4).

⁸ *New Castle County v. Kostyshyn*, 2014 WL 1347745, at *3 (Del. Super. Ct. April 4, 2014).

⁹ *Id.*

engages in a *de novo* review.¹⁰ For such case-dispositive determinations, therefore, the Commissioner’s disposition acts as proposed findings of fact and recommendations and the judge makes a *de novo* determination of those specified portions, proposed findings of fact, or recommendations to which an objection is made.¹¹ For non case-dispositive matters, by contrast, the Commissioner’s order is reconsidered by a judge only “where [it] has been shown on the record” that the order is “based upon findings of fact that are clearly erroneous, or [] contrary to law, or [] an abuse of discretion.”¹²

The Commissioner’s opinion contains both case-dispositive and non-dispositive determinations, the Court will apply the appropriate standard of review for each determination.

¹⁰ Super. Ct. Civ. R. 132(a)(4)(iv).

¹¹ Super. Ct. Civ. R. 132(a)(4)(ii).

¹² Super. Ct. Civ. R. 132(a)(3)(ii) & (iv).

IV. DISCUSSION

A. As the City Obtained Leave of the Court Prior to Vacating the Prior Writ of Monition, Superior Court Civil Rule 41(a) Does Not Bar Subsequent Action.

Defendant Readway contends that the City's voluntary dismissal of the prior writ of monition triggers the "two dismissal" rule as it is articulated by the Delaware Bankruptcy Court in *In re Chi-Chi's Inc.*¹³ In Readway's view, the doctrine of *res judicata* should bar the City's present writ. But because the prior dismissal of the writ was done with leave of the Court, and because the necessity of filing such multiple writs occurred in large part due to Readway's purposeful delay of the City's collection efforts, the subsequent writ is not barred by Rule 41(a).

In alleging that a claim is barred under *res judicata*, a party must show:

(1) the court making the prior adjudication must have had jurisdiction; (2) the parties to the second action must be the same or be privy to those in the first action; (3) the cause of action must be the same in both cases or the second action must arise from the same transaction that formed the basis of the prior adjudication; (4) the issues in the prior action were decided adversely to the contentions of the plaintiff(s) in the pending case; and (5) the prior decree must be final.¹⁴

¹³ 338 B.R. 618 (Del. Bankr. 2006).

¹⁴ *Fox v. Christina Square Assoc., L.P.*, 1994 WL 146023, at *3 (Del. Super. Ct. April 5, 1994).

Superior Court Civil Rule 41(a)(1) provides:

[A]n action may be dismissed by the plaintiff *without order of the court* . . . Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.¹⁵

An action that was voluntarily dismissed by a plaintiff may, therefore, be an “adjudication” for the purpose of *res judicata* analysis, if the dismissal occurred “without order of the court.”¹⁶ Readway concedes that the City dismissed the prior writ pursuant to an order of the Court, and therefore Rule 41(a) would appear not to preclude the present writ.

Readway contends, however, that the Court should not except Rule 41(a) dismissals, even those granted by the court, when applying the “two dismissal” rule articulated in *In re Chi-Chi’s Inc.* Not so. The purpose of the “two dismissal” rule is “to prevent unreasonable abuse and harassment” by a plaintiff attempting to “secur[e] numerous dismissals without

¹⁵ Super. Ct. Civ. R. 41(a)(1) (emphasis supplied).

¹⁶ *Id.* (emphasis supplied). A dismissal by order of the court, by contrast, is not similarly considered an adjudication, and therefore cannot be the foundation of a *res judicata* claim. See Super. Ct. Civ. R. 41(a)(2) (“By order of the court. Except as provided in [Super. Ct. Civ. R. 41(a)(1)], an action shall not be dismissed at the plaintiff’s instance save upon order of the Court and upon such terms and conditions as the Court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon defendant of the plaintiff’s motion to dismiss, the action shall not be dismissed against the defendant’s objection unless the counterclaim can remain pending for independent adjudication by the Court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.”).

prejudice.”¹⁷ A court may apply the “two dismissal” rule to avoid prejudice to a defendant from a plaintiff’s bad faith conduct, or to avoid abuse of the judicial system.¹⁸ The “two dismissal” rule “operates as an adjudication on the merits,” and therefore it “has been strictly construed” by the courts, especially where the purpose of the exception would not be met.¹⁹

The concern underlying the “two dismissal” rule—that a plaintiff would cause prejudice to a defendant or harm to the judicial system by repeatedly dismissing and re-filing an action in bad faith—is not present in this matter. The City was forced to update its monition to reflect the current fee amount owed by Readway because of Readway’s systematic pattern of delay, not out of any desire to cause prejudice to Readway or harm to the judicial system. As there are no indicia of attempts to prejudice Defendant or cause harm to the judicial system, the “two dismissal” rule is not applicable.

After *de novo* review,²⁰ the Court adopts the Commissioner’s recommendation concerning Defendant Readway’s claim of *res judicata*

¹⁷ *Chi-Chi’s*, 338 B.R. at 625 (internal quotations and citations omitted).

¹⁸ *See id.*

¹⁹ *Id.* at 621 (citing *Sutton Place Development Co. v. Abacus Mortg. Inv. Co.*, 826 F.2d 637, 640 (7th Cir. 1987)).

arising under Superior Court Civil Rule 41(a). Defendants' Motion for Reconsideration thereof is **DENIED**.

B. Assessment of Vacant Property Fees Creates a 10-Year Lien, Not Limited by a 3-Year Statute of Limitations Under 10 Del. C. § 8106.

Under Delaware law, vacant property fees are “taxes or special assessments, subject to collection by monition and sheriff’s sale.”²¹ Twenty-five *Del. C. § 2903(a)* provides that taxes against real estate constitute “a lien against the real estate . . . for 10 years from July 1 of the year for which the taxes were levied, but if the real estate remains the property of the person who was the owner at the time it was assessed, the lien shall continue until the tax is collected.”²² Defendants argue that § 2903(a) is merely the mechanism that creates the lien against property for unpaid taxes, and cannot supersede the three-year statute of limitations under 10 *Del. C. § 8106*.²³

Defendants acknowledge that § 2903(a) provides for the imposition of a lien for unpaid taxes, but argues that the amounts the City is attempting to

²⁰ See Super. Ct. Civ. R. 132 (a)(4)(iv) (requiring *de novo* review of case-dispositive matters).

²¹ *City of Wilmington v. McDermott*, 2008 WL 4147580, at *3 (Del. Super. Ct. Aug. 26, 2008), *aff'd*, 2009 WL 1058735 (Del. April 21, 2009)).

²² DEL. CODE ANN. tit. 25, § 2903(a) (2013).

²³ DEL. CODE ANN. tit. 10, § 8106(a) (2013) (“[N]o action to recover a debt not evidenced by a record or by an instrument under seal . . . no action based on a statute . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action.”).

collect through its monition action are properly classified as “fees” rather than “taxes,” making § 2903(a) inapplicable. Title 25, Chapter 20 of the Delaware Code does contain a list of different classifications of debts payable to the State or its political subdivisions—taxes, fines, and fees—and it might be argued therefore that different treatment based on the type of debt may have been contemplated. Defendants suggest that section 2903(a) only applies to “taxes,” and therefore should not be applicable for unpaid vacant property “fees.”²⁴ Our courts have clearly stated that unpaid vacant property fees are, under Delaware law, “taxes or special assessments, subject to collection by monition and sheriff’s sale,” however.²⁵ Defendants’ attempt to now transmute the nature of the obligation here is unavailing; § 2903(a) clearly imposes a 10-year lien in these circumstances.

Defendants argue in the alternative that, if the lien is valid, the City is still required to bring the monition action within § 8106’s three-year limitation period. When interpreting statutory provisions, the “statutory language, where possible, should be accorded its plain meaning.”²⁶ If the statutory language is unambiguous, there is no room for judicial

²⁴ DEL. CODE ANN. tit. 25, § 2903(a) (“In New Castle County all *taxes* assessed against real estate shall continue as a lien against real estate in the County for 10 years”) (emphasis supplied).

²⁵ *McDermott*, 2008 WL 4147580, at *3, *aff’d*, 972 A.2d 312.

²⁶ *Freeman v. X-Ray Assocs., P.A.*, 3 A.3d 224, 230 (Del. 2010).

interpretation, and “the plain meaning of the statutory language controls.”²⁷ Statutory provisions will be read together harmoniously, if possible, and extant language “should not be construed as surplusage if there is a reasonable construction” otherwise.²⁸ The statutory language in § 2903(a) is clear and unambiguous. The plain meaning, therefore, must control: the failure by Defendants to pay vacant property fees results in a lien assessed against their properties that will remain on the properties for a minimum of 10 years. To read the statutory language otherwise would be to render the 10-year lien language as mere surplusage. It would make little sense to statutorily grant the City a valid 10-year lien against Defendants’ property, yet statutorily allow only 3 years to enforce that lien.

After *de novo* review,²⁹ the Court adopts the Commissioner’s recommendation concerning Defendants’ claim that the 3-year statute of limitations under § 8106 renders the City’s present motion action time-barred. Defendants’ Motion for Reconsideration thereof is **DENIED**.

²⁷ *Doroshov, Pasquale, Krawitz & Bhaya v. Nanticoke Mem’l Hosp., Inc.*, 36 A.3d 336, 342-43 (Del. 2012) (internal citation omitted).

²⁸ *Dewey Beach Enters., Inc. v. Bd. of Adjustment of Town of Dewey Beach*, 1 A.3d 305, 308 (Del. 2010) (quoting *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994)).

²⁹ See Super. Ct. Civ. R. 132 (a)(4)(iv) (requiring *de novo* review of case-dispositive matters).

C. Writ of Monition is Purely a Statutory Action, and Therefore Defendants are not Entitled to Jury Trial.

Under the Delaware Constitution, one has a right to a trial by jury “as heretofore,”³⁰ *i.e.*, a person is entitled to a jury trial if the right existed at common law for that cause of action.³¹ Defendants direct the Court to *Nandine v. Darrach*,³² a case that was before the Delaware Court of Common Pleas in 1800, in support of their assertion that debt actions—as Defendants interpret the City’s writ of monition—existed at common law as did a concomitant right to a jury trial. The underlying claim before the Court in *Nandine* was recovery of a personal debt between two private parties.³³ A writ of monition, by contrast, is an *in rem* action, where the City has statutory authority to seize property in order to recoup unpaid property taxes. Defendants are not personally liable for the debt, and therefore the action is not personal in nature.³⁴

³⁰ Del. Const. art. I, § 4.

³¹ See *Claudio v. State*, 585 A.2d 1278, 1296 (Del. 1991) (citing *Nance v. Rees*, 161 A.2d 795, 799 (Del. 1960)).

³² 1800 WL 2501 (Del. Com. Pl. May 13, 1800).

³³ *Id.* at *1.

³⁴ See *Steel Suppliers, Inc. v. Ehret, Inc.*, 486 A.2d 32, 35 (Del. Super. Ct. 1984) (noting that statutory liens are *in rem* actions); *Pennamco, Inc. v. Nardo Mgmt. Co., Inc.*, 435 A.2d 726, 729 (Del. Super. Ct. 1981) (same).

Defendants claim that a writ of monition is merely a debt action, and because debt actions were present at common law, Defendants are entitled to a jury trial.³⁵ But Defendants' use of *Nadine* for this proposition is misplaced, far too broad, and otherwise unsupported. Monition as a cause of action is solely a unique statutory remedy. Defendants have shown no common law analogue to such an action that carried with it a common law jury trial right, and therefore Defendants have demonstrated no right to a jury trial under the Delaware Constitution.

There being no showing on the record presented here that the Commissioner's order is based upon clearly erroneous findings of fact, is contrary to law, or is an abuse of discretion, the Defendants' Motion for Reconsideration on the jury trial claim is **DENIED**.³⁶

³⁵ See *Mahmoud v. Al-Naser*, 2004 WL 1280313 (Del. May 28, 2004); *Phillips v. Gunby*, 117 A. 383 (Del. Super. Ct. 1921); *Colesberry v. Anderson*, 2 Del. Cas. 407 (Del. 1818); *Getty Ref. & Mktg. Co. v. Park Oil, Inc.*, 385 A.2d 147 (Del. Ch. 1978); *Wilmington Trust Co. v. Renner's Paving, LLC*, 2013 WL 1442366 (Del. Super. Ct. March 27, 2013); *Baks v. Centra, Inc.*, 1997 WL 819130 (Del. Super. Ct. Dec. 15, 1997); *Parsons v. Cannon's Ex'r*, 88 A. 470 (Del. Super. Ct. 1912); *Joseph v. Johnson*, 82 A. 30 (Del. Super. Ct. 1908); *State v. Willard*, 2 Houst. 197 (Del. Super. Ct. 1859); *Y.A. v. V.A.*, 2007 WL 1518291 (Del. Fam. Ct. March 20, 2007).

³⁶ Super. Ct. Civ. R. 132 (a)(3)(iv) (The Court will reconsider such a non-case-dispositive matter only upon a showing in the record of clear error, violation of law or abuse of discretion.).

D. City of Wilmington's Motion to Remove the Stay of Sheriff's Sale is Granted.

As Defendants' Motion for Reconsideration is denied, no grounds exist to warrant a stay of the City's writ of monition. The Commissioner's stay is therefore vacated. The City of Wilmington's motion is **GRANTED**.

V. CONCLUSION

For the foregoing reasons, Defendants' Motion for Reconsideration is **DENIED**. Plaintiff City of Wilmington's Motion to Lift Stay of Sheriff's Sale is **GRANTED**.

IT IS SO ORDERED.

/s/ Paul R. Wallace

Paul R. Wallace, Judge

Original to Prothonotary
cc: All counsel via File & Serve