



## 10/26/92 LENAPE ASSOCIATES v. LIZ AND TOM CALLAHAN

1992 | Cited 0 times | Supreme Court of Delaware | October 26, 1992

### ORDER

This 26th day of October, 1992, it appearing that:

1) Pro se appellees Liz and Tom Callahan (the "Callahans") filed suit in the Justice of the Peace Court No. 12 against Appellant Lenape Associates ("Lenape") on a debt action. Judgment was entered in favor of the Callahans on December 11, 1991. In accordance with 10 Del.C. § 9571, Lenape filed a Notice, Allowance of Appeal and a Praecipe in the Superior Court on December 19, 1991, but failed to file a certified transcript until December 27, 1991. The Callahans moved to dismiss the appeal for lack of jurisdiction because the transcript was not submitted within fifteen days of entry of judgment as required by Superior Court Rule 3. The Superior Court granted the motion.

2) Lenape appeals, contending that any delay in filing the transcript constitutes a violation of Superior Court Rule 3 rather than the statute, 10 Del.C. § 9571. Thus, Lenape contends that the jurisdictional bar of 10 Del.C. § 9571 is not raised.

3) That argument lacks any basis in existing law. It is well-settled that § 9571 is a jurisdictional statute governing the right of appeal from Justice of the Peace Courts. *State ex rel. Caulk v. Nichols*, Del. Supr., 281 A.2d 24 (1971); *Williams v. Singleton*, Del. Supr., 160 A.2d 376 (1960). When an appellant violates the statute, the court loses subject matter jurisdiction to hear the appeal. *Williams v. Singleton*, 160 A.2d at 378. Thus, if the transcript filing requirement derives from the statute, Lenape's failure to timely file the transcript invokes the jurisdictional bar.

4) The question whether the statute incorporates the transcript filing requirement is easily answered by examining the legislative history of 10 Del.C. § 9571. This analysis discloses that noncompliance with the transcript filing procedure violates the provisions of the statute because § 9571 requires the Superior Court to establish the procedure necessary to perfect an appeal. See, e.g., Sen. Bill No. 88, 136th General Assembly (1991) (enacted). The procedure subsequently established to perfect an appeal includes a requirement that the appellant file with the Prothonotary a praecipe and certified transcript of the record within fifteen days of the judgment below. Super. Ct. R. 3(c).<sup>1</sup> Because Lenape failed to file a certified transcript within the fifteen day period, the Superior Court correctly dismissed the appeal for lack of subject matter jurisdiction.

5) Alternatively, Lenape argues that the time for filing the transcript should be enlarged because Super. Ct. R. 6(e) requires that three days be added to the prescribed period whenever a party must



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act after receiving service by mail. If three days were added to the time in which Lenape was required to respond, it would have met the deadline. But Lenape's application of the rule to the facts of this case fails to consider the language of the rule and the cases that have interpreted it. Close examination of these two factors leads to the inescapable Conclusion that the rule cannot be given the construction Lenape asserts.

6) The key to determining when the rule enlarges the period of time a party has to respond lies in the language "after being served and service is by mail." Super. Ct. R. 6(e). Unless a litigant's duty to act is conditioned upon service of documents by mail, the time for response remains unaltered. Lenape's duty to act was conditioned upon entry of judgment in the Justice of the Peace Court, and not upon service of documents by mail. Thus, the provisions of Super. Ct. R. 6(e) are clearly inapplicable. Any other result would be inconsistent with those cases that have interpreted the time limit in 10 Del.C. § 9571 to preclude enlargement under Super. Ct. R. 6. See *Williams v. Singleton*, Del., Supr., 160 A.2d 376(1960); *Ademski v. Ruth*, Del. Supr., 229 A.2d 837(1967); *Vanaman v. Short*, Del. Super., C.A. No. 87C-SE40, Lee, J.,(March 29, 1989), *aff'd.*, Del. Supr., 565 A.2d 281(1989).

7) Lenape also argues that even if the time period is not enlarged under Super. Ct. R. 6(e), the period for filing the transcript should be extended because its lawyer's failure to timely file the transcript amounts to excusable neglect.<sup>2</sup> In a sworn affidavit included in appellant's appendix, its counsel asserts that he filed the appeal and ordered the transcript on December 19, 1991. He also claims that no one from Justice of the Peace Court No. 12 called him to tell him the transcript was ready to be picked up until December 26, 1992.

8) First, counsel's assertions are not supported by the record. The Justice of the Peace Court's docket discloses that neither the appeal was filed, nor the transcript requested, until December 20, 1991. Lenape's counsel also failed to pay the nominal \$7.00 transcript fee until December 23, 1991. Despite this last minute request at the peak of the holiday season, the docket discloses that the transcript was diligently prepared and available on December 24, 1991. There is no suggestion that the appellant was unable to obtain a copy of the transcript on the morning of December 26. All told, Lenape's suggestion that the circumstances of its failure were beyond counsel's control is factually inaccurate. The record is devoid of facts to sustain a claim of excusable neglect.

9) Second, the transcript filing period may not be expanded as a matter of law. Because we have held, (*supra*) , that the time limits set forth in Superior Court Rule 3 are incorporated in 10 Del.C. § 9571, Lenape would only be entitled to relief if we determined that a claim of excusable neglect is sufficient to expand the time limits provided under the statute. But the cases discussed above that interpret 10 Del.C. § 9571 negate any possibility that the transcript filing period could be enlarged on grounds of excusable neglect. Although Super. Ct. R. 6(b) permits a court to enlarge the period of time a party has to act when the failure to act was the result of excusable neglect, the rationale behind the cases precluding enlargement under Super. Ct. R. 6(e), apply with equal force to the excusable neglect rule. See, e.g., *Williams v. Singleton*, Del., Supr., 160 A.2d 376 (1960); *Ademski v.*



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Ruth, Del. Supr., 229 A.2d 837 (1967); Vanaman v. Short, Del. Super., C.A. No. 87C-SE40, Lee, J., (March 29, 1989), aff'd., Del. Supr., 565 A.2d 281(1989).

10) The end result is that the jurisdictional requirements of 10 Del.C. § 9571 must be satisfied unless a default by a clerk or officer of the court prevents the timely filing of an appeal by a party who took all necessary steps to comply with the rule. Casey v. Southern Corporation, Del. Supr., 29 A.2d 174 (1942). The effect of this rule is to protect a litigant who relies in good faith on the reasonable instructions of the court.

11) Lenape's contention that its counsel relied on what someone in the Office of the Prothonotary told him about the period to file an appeal is baseless. Instead, like any reasonably competent lawyer, he should have read the statute and determined the relevant period. Compare Catts v. Al-Arnasi, Del. Super., C.A. No. 89C-SE18, Lee, J. (February 12, 1990). Having failed to do so, he may not now shift blame to the Office of the Prothonotary.

12) Finally, Lenape argues that in order to overcome the harsh effect of an outright dismissal, the Superior Court should have accepted the appeal as a writ of certiorari. See Elcorta, Inc. v. Summit Aviation. Inc., Del. Super., 528 A.2d 1199(1987). Any reliance on Elcorta is misplaced. Certiorari is on the record below, and thus distinct from Lenape's goal of seeking a trial de novo. WOOLLEY ON DELAWARE PRACTICE, § 897 (1906).

13) The fact that a litigant has lost its right to appeal by negligently permitting the appeal period to lapse will not warrant the issuance of certiorari. 14 C.J.S. Certiorari § 24(1991).

14) Our recent order in Continental Airlines v. American General Corp., Del. Supr., 575 A.2d 1160(1990), is inapposite. There, we were dealing with a Supreme Court Rule having none of the legal background which 10 Del.C. § 9571 brings to Super. Ct. Civ. R. 3.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is,

AFFIRMED.

BY THE COURT:

A.G.T. Moore II

Justice

1. Contrary to the erroneous assertions of Lenape, that the rule is outdated and only relates to the prior version of the statute, Super. Ct. R. 3 was amended on December 1, 1991, more than four months after the most recent amendment to 10



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Del.C. § 9571 was adopted.

2. If the circumstances were beyond Appellant's counsel's control, as suggested in Lenap's brief, then counsel would not have committed any negligence for which appellant could be excused. Since the Court finds ample evidence of negligence in the record below, the inapplicability of the excusable neglect rule is fully discussed.

