IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GARY STAFFIERI and ADRIA CHARLES STAFFIERI,	:	
Plaintiffs,	:	
v.	:	C.A. No. 7439-VCL
HENRY BLACK, MARY LOU BLACK, RAYMOND BUCHTA, BLACKBALL PROPERTIES, LLC, PAUL MILLER, CANDY MILLER, W. SCOTT BLACK, and GAKIS PROPERTIES II, LLC,	:	
Defendants.	:	

CERTAIN DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO CERTAIN DEFENDANTS' MOTION FOR REARGUMENT AND TO VACATE FINAL ORDER AND JUDGMENT

Certain Defendants[1], by and through their undersigned counsel, hereby reply to the "Response In Opposition To Certain Defendants' Motion For Reargument And To Vacate Final Order And Judgment" (the "Response"), as follows:

1. The arguments contained in the Response should be rejected by the Court because: a) this Court lacked jurisdiction to enter the Final Order And Judgment (the "Surprise Order") because the case was on appeal; b) Certain Defendants' reasonably believed that the Court could and would not take action until either a Briefing Schedule was established as required by Court of Chancery Rule 7 or notice and/or a hearing were provided; c) the Surprise Order, entered in violation of Rule 7 and Rule 55(b), is Constitutionally infirm based on principles of fundamental fairness inherent in Due Process; and d) the duplicative, excessive,

[1] Certain Defendants include Defendants Henry Black, Mary Lou Black, Raymond Buchta, W. Scott Black, and Blackball Properties, LLC.

questionable, and over-inclusive attorneys fees/costs application goes far beyond what may be awarded.

2. The Plaintiffs effectively concede that this Court lacked jurisdiction since the action was appealed to the Delaware Supreme Court; no "outstanding application for attorneys fees" was filed prior to the December 5, 2012 Notice of Appeal or the deadline to appeal this Court's Orders denying reargument, reconsideration or new trial on December 7, 2012.

3. The Plaintiffs unreasonably and inexcusably delayed in filing their applications for attorneys fees nearly 2 months after this Court entered the Post-Trial Order. Indeed, Certain Defendants' Counsel spoke to Plaintiffs' counsel on November 13, 2012 about getting a fee application filed promptly to avoid a potential procedural morass. But Plaintiffs dragged their feet instead.

4. Indeed, it is believed that the Plaintiffs intentionally delayed filing their applications in the hopes that they could create a procedural quagmire that might end up barring Certain Defendants from prosecuting an appeal. Since there was no application for attorneys fees "outstanding" at the time that the 30-day appeal deadline elapsed, the Plaintiffs would have unquestionably argued that an appeal filed after this Court ultimately entered the Surprise Order on January 31, 2013 was too late – *i.e.* 75 days after the Court denied Certain Defendants' Motion for Reargument, Reconsideration, And/Or New Trial. The Plaintiffs' 58 day delay in submitting their bills is the root cause of the current procedural quandary; they should not be rewarded for their total lack of alacrity.

5. Instead, Plaintiffs now attempt to cash in on their own lack of diligence to obtain a huge monetary windfall. Even a cursory review of the fee application reveals that it contains

significant duplicative, excessive, questionable, and unreimburseable amounts.[2] And the fact that the Plaintiffs prevailed at best on 50% of their claims leads to the inexorable conclusion that they could not obtain a non-arbitrary award of more than one-half (½) of a reduced fee demand (*e.g.* ½ of say $120,000, or $60,000 total). Since the Surprise Order awards fee and cost amounts that likely exceed any legally and equitably permissible dollar figure, the interests of justice, fairness, this Court's Rules, and the United States and Delaware Constitutions dictate that the Court should vacate or rescind the Surprise Order so that a heinous inequity does not result.[3]

6. Through August of 2012, the Plaintiffs asserted that their attorneys fees were $85,000. Pre-Trial Brief (Plaintiffs) at 43, citing Exhibit 46. Those fees alone exceed any reasonable, awardable amount. But it is impossible to believe that the Plaintiffs incurred another $75,000+ in legal fees in just 2 months after that (September and October, 2012). Thus, the fee application is excessive on its face.

7. Next, Plaintiffs argue that their fee application was outstanding on December 5, 2012 when Certain Defendants affected their appeal, based on the mistaken theory that their applications for attorneys fees were made pre-trial. This argument may be quickly dispensed with based upon its obvious contravention of the record and this Court's Rules.

8. In the Plaintiffs' Pre-Trial Brief, they argued that they should be awarded attorneys fees based upon the Bad Faith Exception to the American Rule. But this does not constitute an "application" for attorneys fees. Instead, it is merely a legal brief that suggests that

---

[2] The penultimate example of unreimbursable costs is the $1,700 bill from the Plaintiffs' expert witness. You cannot receive expert witness fees for a losing damages claim. Besides, the expert testified under oath at deposition that he agreed to act as an expert free of charge. This is why it took so long for the Plaintiffs to make their application: they were busy concocting faux charges to pump up their claim for fees and costs.

[3] A fundamental equitable maxim is that equity abhors a forfeiture. *City of Wilmington v. Wilmer*, 1997 WL 12415, *14 (Del. Ch., Feb. 20, 1997) citing *Jefferson v. Mobay*, 267 A.2d 635, 637 (Del. Ch. 1970). Because the Surprise Order constitutes a default judgment which would award the Plaintiffs a substantial monetary windfall, it qualifies as an abhorrent forfeiture.

the Court should entertain an application post-trial if it believes sufficient evidence is presented at trial to satisfy the Bad Faith Exception as a matter of law.

9. In fact, nothing in the Plaintiffs' Pre-Trial Brief states that it is an "application" for attorneys fees. In addition, the trial is what resulted in the Court's decision that it would entertain an application for attorneys fees via the Post-Trial Order, not the Pre-Trial Brief.

10. Court of Chancery Rule 88 provides that an "application" to the Court for an award of attorneys fees includes an affidavit or letter that itemizes expenses incurred and services rendered. So obviously the Pre-Trial Brief, which did not contain any specifics regarding the amount requested, could not constitute an application for attorneys fees. The application under Rule 88 came months later.

11. Additionally, the Verified Complaint that initiated this action in April of 2012 and the Amended Verified Complaint filed on June 6, 2012 both contained an *ad damnum* clause that sought an award of attorneys fees. Neither of those prayers for relief, however, constitutes an application for fees under Rule 88. Similarly, the Pre-Trial Brief fails to qualify as an "outstanding application for attorneys fees."

12. The two (2) transmittal letters submitted by the Plaintiffs' counsel to the Court, on December 21, 2012 and January 25, 2013, state that they are submitted pursuant to Rule 88. Thus, the Plaintiffs have tacitly conceded that their application for fees was not actually made until after this Court was already divested of jurisdiction pursuant to Certain Defendants' initiation of the Supreme Court appeal. Again, the Plaintiffs' dilatory conduct, taking nearly 2 months to copy bills and draft a short letter and Affidavit, is entirely to blame for the vexing procedural posture this action is presently in.

13. Next, the Plaintiffs speculatively contend that there was some affirmative duty on the part of Certain Defendants to seek guidance from the Court if they were not sure whether it still had jurisdiction to decide their fee application. This belies all logic and common sense based upon decades-long Delaware practice and the specific experience of Certain Defendants' counsel. Never would a Court enter an Order which had not been responded to under circumstances where it would reasonably be assumed that there could be a question as to whether a response was necessary or appropriate. In every instance, the Court would communicate with counsel and either provide a deadline to file a response or request that counsel stipulate to a schedule for additional submissions in order to permit the Court to render a decision. To call the circumstances surrounding the sudden and unexpected entry of the Surprise Order unique would be an understatement.

14. It is not unusual that the Courts of this State would permit an opportunity for the opposing party to respond to a filing seeking a monetary judgment. Indeed, the Due Process Clause of the United States and Delaware Constitutions require that a party be given an opportunity to be heard before he or she may be deprived of property, which includes money. This is such a fundamental rule that no reasonable person could have anticipated it could be overlooked.

15. The Plaintiffs simply hope to skate by with a windfall recovery, wishing the Court will summarily reject Certain Defendants' appropriate and meritorious motion seeking vacation or rescission of the Surprise Order based on the Plaintiffs' blatantly hypocritical, cynical, and inequitable positions.

16. Furthermore, the Plaintiffs' concession that Rule 88 only addresses the attorneys fee application requirements and not any responsive filing constitutes an admission that there

was confusion aplenty as to what would occur next. In case of confusion, Delaware practice resolves the murkiness pursuant to either a stipulated agreement or a Court established path forward. *Sua Sponte* Orders summarily awarding huge monetary judgments based on perceived hyper-technical grounds just do not happen in Delaware.

17. The Plaintiffs never communicated with Certain Defendants regarding a proposed submission schedule on their application for attorneys fees and costs. Nor did they submit a proposed form of Order to the Court seeking the establishment of a schedule. Indeed, the Plaintiffs' pointing the finger of blame at Certain Defendants and the travesty of justice that occurred through the entry of the Surprise Order is pure, unadulterated hypocrisy; the Plaintiffs never lifted a finger to try and move the ball forward even though it was their request for an award.

18. The Plaintiffs do not cite any legal authority or proposition that this Court may *sua sponte* award 100% of an attorneys fees application without giving the opposing party the opportunity to be heard. That is because it is Black Letter Law that no monetary judgment may be awarded against a party unless and until they are given a reasonable opportunity to be heard.

19. Nor do the Plaintiffs cite any legal authority supporting their argument that Certain Defendants had a duty to seek guidance from the Court regarding a briefing schedule. Certain Defendants relied upon: a) decisional law which established that this Court lacked jurisdiction over the action; b) the lack of any deadline to respond to the application under Rule 88; c) Rule 7, which guarantees Certain Defendants an opportunity to make a written submission prior to the Court rendering a decision on the fee application; d) Delaware practice, which eschews unilateral, snap decisions like the Surprise Order; and e) basic precepts of Constitutional

Due Process. Certain Defendants had good reason to wait for Plaintiffs or the Court to address how the fee/cost application should be addressed, if at all.[4]

20. The next legally specious argument presented by the Plaintiffs is that Certain Defendants waived their right to re-argue the Surprise Order based upon their failure to submit any response. For starters, this boot-strapping argument is obviously invalid on its face.

21. Next, the lack of any legal authority in support of the argument constitutes grounds for its rejection. Rule 59(f) contains no language supporting the argument.

22. Further, it is well established that waiver of a legal right, such as the absolute Constitutional right to an opportunity to be heard before a monetary judgment is entered, requires the voluntary and intentional relinquishment of a known right. *Amirsaleh v. Bd. Of Trade of City of New York, Inc.*, 27 A.3d 522, 529 (Del. 2011). But no evidence was presented by the Plaintiffs that Certain Defendants intended to waive their Constitutional and legal right to file a response to the attorney fee application. It is clear that Certain Defendants' had good reason to believe no response was required prior to entry of the Surprise Order, making their actions unintentional.

23. The next frivolous argument submitted by the Plaintiffs is that Certain Defendants cannot present their arguments pursuant to Rule 59(f) because they did not present any argument before the Court entered the Surprise Order. But their use of the citation signal "*See*" and the parenthetical quotation of the holding in that case establish that there is no legal support for their position; the Court may examine the record at the time of decision, which is precisely what Certain Defendants have requested. Regardless, this argument has no bearing on the Court's ability and authority to vacate the Surprise Order pursuant to Rule 60(b).

[4] In Delaware practice, counsel for the Plaintiff generally bears the laboring oar in litigation logistics. And if Plaintiff's counsel fails to act (as in this instance), then the Court will notify counsel of the next steps to take.

24. The next misplaced argument made by the Plaintiffs is a confusing attempt to cast the pending Motion under Rules 59(f) and 60(b) as a Motion for Reargument of the Post-Trial Order. Orders denying Certain Defendants' Motion for Reargument were already entered by the Court on November 7, 2012. Certain Defendants have moved for relief from the Surprise Order under Rules 59(f) and 60(b).

25. To the extent that the Plaintiffs attempt to rebut Certain Defendants' arguments for a significant reduction in the amount of attorneys fees awarded, they abysmally fail. For starters, the full-blown presentation of argument regarding the excessive, duplicative, unreimburseable, and unreasonable amount, degree, and scope of fees and costs requested by Plaintiffs remains to be decided after the Court permits Certain Defendants an opportunity to be heard on the subject. In the interim, Certain Defendants' provided just a brief preview of the outrageous and outlandish amount and extent of attorneys fees and costs applied for by the Plaintiffs. Standing alone this limited summary of reasons for a significant reduction in fees awardable gives the Court good reason to vacate or rescind the Surprise Order. It is simply inconceivable that any amount approaching the magnitude of dollars sought to be awarded by the Plaintiffs could ever result from a fair and reasonable review of the application in light of controlling principles of law and equity.

26. Interestingly, the Plaintiffs did not even attempt to justify the absurd assertion that Plaintiffs' counsel worked for 68 hours on "Trial preparation." Nor did they respond to the unbelievable claim that Plaintiffs' counsel spent more than 62 hours of time working on two (2) modest pre-trial briefs (which failed to address most of the claims that were asserted, and included miniscule content regarding most of the claims that were actually even addressed).

These hours are so obviously inflated beyond the time reasonably necessary to perform the tasks that they taint the veracity of the entire fee application.

27. Moreover, the Plaintiffs' attempts to justify a nearly 2 month delay in submitting an attorneys fees application is implausible and unbelievable. The bills were done. All counsel had to do was copy them, draft a short affidavit, and file them with a brief cover letter to the Court.

28. Only minutes of lawyer time was necessary (dictating and editing one letter and one affidavit); support staff could do the rest. Even assuming counsel was ill and busy, it is unreasonable to suggest that it would have taken more than a few weeks to make this submission: November 21, 2012. But Plaintiffs delayed for another month after that, thereby creating the procedural havoc that now infects this action.

29. The Plaintiffs' foot-dragging and inexcusable dilatoriness in submitting their fee application is the sole cause of the procedural puzzle that the parties and Court now find themselves in. The Court should not reward the Plaintiffs for their 58 day delay.

30. And it is the height of hypocrisy for the Plaintiffs to suggest that they should be excused for unreasonably taking 58 days to make photocopies of bills and prepare a letter and affidavit, while at the same time chastising Certain Defendants for not responding within 40 days to an extensive fee application containing countless legal frailties. Indeed, if 40 days is too much delay, then Plaintiffs must agree that the Court should have summarily entered a fee/cost award of $0 not later than December 17, 2012 (40 days after entry of Orders denying reargument, etc., and before the fee application was belatedly filed).

31. Notably, the Plaintiffs also fail to respond to the credible and weighty argument that they should receive no more than one-half (½) of the amount that the Court reduces the fee

demand to (after excluding duplicative, excessive, and unreimburseable amounts) based on the fact that they only won at best one-half (½) of their case. The record clearly establishes that the Plaintiffs wasted countless hours and tens of thousands of dollars in fees and expenses foolishly chasing a clearly unawardable damages claim for business losses. They also asserted numerous specious claims for damages (trespass, tortious interference, etc.), and unnecessarily pursued clearly unestablishable claims for easements in the alternative to their express easement claim. Arguably, the Plaintiffs won at most one-third (1/3rd) of their case based upon the numerosity of claims. But Certain Defendants would have to concede that Plaintiffs did win one of the two main claims brought: Express Easement. Thus, it is inconceivable that an award of 100% of fees could be supportable; at least half of the litigation time expended by both sides in this action was totally and completely for naught.[5]

32. The Plaintiffs unbelievably question whether Constitutional Due Process requires parties to be given an opportunity to be heard before a monetary judgment is entered against them. Apparently, the Plaintiffs are unaware of this fundamental principle which is so well settled that it is incomprehensible that they could even contest it.

33. Under Court of Chancery Rule 55(b), "[w]hen a party against whom a judgment for affirmative relief is sought, has failed to appear, plead, or otherwise defend as provided by these Rules, and that fact is made to appear, judgment by default may be entered as follows: the party entitled to a judgment by default shall apply to the Court therefor;... ." But Plaintiffs never applied for the Court enter a default judgment prior to entry of the Surprise Order, which is a default judgment. The written submissions made by the Plaintiffs do not apply for a "default

[5] In fact, Certain Defendants should have their attorneys fees reimbursed for having to defend against the unfounded claim for damages. The New Business Rule and Delaware decisional law requiring proof of non-speculative damages meant that the Plaintiffs could never realistically obtain an award of damages arising from losses for a business that never opened.

judgment" or cite Rule 55(b). Thus, it was legally impossible for the Court to have granted a judgment for attorneys fees based upon Certain Defendants supposed default in responding.

34. Also under Rule 55(b), "[i]f the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application." Since no hearing was ever scheduled to be held in order to consider the attorneys fee application, written notice of the application for an entry of a default judgment was not given three days prior. In any event, the Court never conducted a hearing regarding a possible default judgment, thereby eliminating the possibility that a judgment could be validly entered based upon Certain Defendants' alleged default in responding to the attorneys fees application.

35. Rule 55(b) was not followed. Its Due Process protections are directly contravened by the Surprise Order. Accordingly, the Surprise Order is Constitutionally invalid.

36. Finally, the Plaintiffs unfoundedly allege that "it is Certain Defendants' conduct during litigation that drove Plaintiffs' fees up." Response at 5-6, n.7. *First*, the Court did not award fees to the Plaintiffs based upon any alleged bad faith conduct of Certain Defendants during the course of the litigation. *Second*, the bald assertion that Certain Defendants were at fault for the unbelievably excessive amounts of fees claimed to have been incurred does not make it so. Indeed, the indisputable record in this litigation establishes that the Plaintiffs over-litigated this case and unnecessarily increased its degree of complexity and concomitant costs despite pleadings from counsel for Certain Defendants that the case be simplified so that the parties would save costs by litigating more efficiently.

37. It was Plaintiffs who unwisely decided to enlist the inefficient and totally unnecessary services of Mrs. Staffieri's high school friend Ms. Cherry to be their litigation attorney, despite that fact that she doesn't know anything about Delaware law and would obviously have to spend extensive amounts of time beyond what an experienced Delaware practitioner would in order to litigate the case. The Plaintiffs next hired an attorney who could not litigate in Delaware as their "local counsel," causing them to incur tens of thousands of dollars of additional fees which were totally "thrown down the drain." Even after Plaintiffs retained a Delaware lawyer who could handle the matter, they refused to allow that attorney to bifurcate the case and limit the number of easement Counterclaims so as to save on litigation costs. Finally, the *coups de grace*: the Plaintiffs ignored the pleadings of Certain Defendants to not amend their Complaint so as to add numerous farfetched damages claims.

38. Certain Defendants tried in vain to reign in the Plaintiffs' out of control, overly litigious, "shotgun" approach to the litigation. At every turn, Certain Defendants attempted to make the litigation more efficient and less expensive. The Plaintiffs looked a blind eye because they decided to greedily pursue a legally frivolous damages claims in the hopes of figuratively "winning the lottery." And they decided on the tactical strategy of asserting numerous "straw man" claims in the hopes of winning at least one claim for money damages (a wasteful intent indeed). Consequently, it was the Plaintiffs' and the Plaintiffs alone that unreasonably and unnecessarily drove up the costs of the litigation.

39. It is incredible that the Plaintiffs would assert that they should be entitled to receive an award of fees in the neighborhood of at least $100,000 more than is reasonable and legally awardable. They drove up the costs of this litigation to the exorbitant and excessive

degrees that they have asserted. Justice and equity militate against rewarding Plaintiffs for their litigation overkill.

WHEREFORE, Certain Defendants respectfully request that this Court enter one of the two alternative forms of Order submitted with their initial Motion under Rules 59(f) and 60(b).

ABBOTT LAW FIRM

Richard L. Abbott, Esquire (I.D. #2712)
724 Yorklyn Road, Suite 240
Hockessin, DE 19707
(302) 489-2529

Attorneys for Certain Defendants
Henry Black, Mary Lou Black, Raymond Buchta,
W. Scott Black and Blackball Properties, LLC

Dated: February 15, 2013

Not Reported in A.2d, 1997 WL 124151 (Del.Ch.)
(Cite as: 1997 WL 124151 (Del.Ch.))

C
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware, New Castle County.
CITY OF WILMINGTON, a municipal corporation of the State of Delaware, and Mansion Park, Inc., a Delaware corporation, Petitioners,
v.
Bradford J. WILMER, Sr. and Barbara A. Wilmer, Respondents.

No. 14968.
Feb. 20, 1997.

Julianne E. Hammond, Blank, Rome, Comisky & McCauley, and Samuel Spiller, Wilmington, for Plaintiff City of Wilmington

Henry Heiman, Heiman, Aber & Goldlust, Wilmington, for Mansion Park, Inc.

Bradford J. Wilmer, Sr. and Barbara W. Wilmer, Pro Se

ORDER

*1 WHEREAS, a hearing was held in this matter and thereafter a draft report was issued and no exceptions being filed thereto, the draft report was filed as the final report on January 17, 1997 and no exceptions being filed thereto and more than twenty days having passed.

NOW, THEREFORE, the Court having reviewed the final report dated January 17, 1997 and it appearing that there are grounds to so hold, said report is hereby approved and the findings of fact made therein are hereby adopted and in reliance thereon:

1. Mansion Park, Inc. is hereby ordered to arrange for a certified real estate appraiser to prepare a valuation of real estate known as 2200 Jefferson Street, Wilmington, Delaware (New Castle County tax parcel number 26-022.10-187) in order to state the fair market value as nearly as possible for that property as it existed on or about March 8, 1994;

2. Mansion Park, Inc. shall arrange for a lien search with respect to Bradford Wilmer, Sr. and Barbara Wilmer to determine if there were claims against them that attached to their ownership interest in the aforesaid property;

3. Mansion Park, Inc. shall file with the Register in Chancery no later than 90 days following the date of this order copies of the appraisal and of the lien search; and

4. If Bradford Wilmer, Sr. or Barbara Wilmer intends to ask the Court to consider an appraisal of the real estate prepared for them by a certified real estate appraiser, they must file said appraisal with the Register in Chancery no later than 90 days following the date of this order.

The Court will determine whether title to the real estate should be quieted, and in whom, after the filing of these documents.

IT IS SO ORDERED this 20 day of February, 1997.

MASTER'S REPORT

KIGER, Master.

This is a report on proceedings to quiet title to real estate in the City of Wilmington, Delaware (hereafter "the City"). A hearing on the plaintiff's motion for default judgment was held on July 19, 1996, at which time all parties had an opportunity to present their views as to the relief sought. At the end of the hearing, the City was instructed to file additional documents with the Court and the defendants were given additional time to respond, once those documents were filed. That time expired on October 15, 1996, but no further filings from the defendants were received.

Having reviewed the record for this case, I recommend that Mansion Park, Inc. (hereafter "Mansion Park") be ordered to retain a certified real estate appraiser to determine the fair market value of the subject real estate on March 8, 1994, or as close to that

time as possible. Mansion Park should also be ordered to conduct a lien search to determine whether the defendants had any judgments or other liens against them that would attach to their interest in the real estate. To the extent the fair market value of the property on or about March 8, 1994 exceeded the value paid for it by Mansion Park, the difference is the sum payable to the defendants, subject to the claims of their creditors, if any, who acquired a claim against the real estate. Any sum remaining after payment of such claims should be paid to the defendants and at that time an order quieting title to the real estate in Mansion Park should be entered.

I

Background

***2** A. PROCEDURAL BACKGROUND. This action was filed on April 26, 1996. Service was made on the defendants on May 1, 1996. A letter from Barbara Wilmer, one of the defendants, was filed with the Register in Chancery on May 16, but no copy of that letter was provided to the lawyers for the City. Unaware that Mrs. Wilmer had made any response to the complaint, the City filed a motion for default judgment on May 31. The hearing on this motion was scheduled for July 19 in a letter to the lawyers and the defendants dated June 4. That letter also advised the defendants to consult with a lawyer as to their rights.

Mrs. Wilmer appeared at the hearing on July 19. Lawyers for the City and for Mansion Park also appeared. Mr. Wilmer did not appear at that time, nor has he taken any role in this proceeding otherwise.

B. FACTUAL BACKGROUND. Unless otherwise stated, the facts stated in this portion of the report are taken from the complaint and from copies of deeds subsequently filed by the City in support of its motion.

The property that is the subject of this case is known as 2200 Jefferson Street. It is also identified by New Castle County tax parcel number 26-022.10-187 and is located in the City of Wilmington, Delaware. The public record shows that title to this property was transferred to Beatrice M. Wilmer and Verdell M. Wilmer by a deed dated September 11, 1970. *See* New Castle County Recorder of Deeds (hereafter "RoD") Deed Record B, Volume 84, Page 292, recorded that same day. On June 8, 1978, Verdell M. Wilmer transferred his interest in this property to Beatrice M. Wilmer. RoD Deed Record P, Volume 101, Page 185. This deed was accepted for recordation on June 16, 1978.

Beatrice M. Wilmer died on April 6, 1985. Her will left her real estate to her two daughters, Delores Mae Ponzo and Elva Marie Wilmer. *See* New Castle County Register of Wills Folio No. 86228. By deed dated July 30, 1993, these two ladies conveyed their interest in the real estate to the defendants in this action, their brother and his wife. RoD Book 1567, Page 315.[FN1] Certain transfer taxes were paid on August 5, 1993, but it is hard to make out from the copy of the deed whether it was recorded on August 5 or August 14 or possibly on August 24.

> FN1. The citation is correct. Several forms of citation are used in this report because the indexing system for the New Castle County Recorder of Deeds Office changed in the 1980s.

This matter is in court because the two former owners, Mesdames Wilmer and Ponzo, had not paid water and sewer charges owed in connection with the Jefferson Street property. The sum owed in connection with this property was $2,305.43. This sum is stated for the period from January, 1991 through August, 1993. The title for this property was searched on or about June 10, 1993, and correctly identified Ms. Ponzo and Ms. Wilmer as the owners, but apparently no bring-down search was performed before the Writ of Monition was filed on or about October 14, 1993, well over thirty days after title to the real estate was transferred to Bradford and Barbara Wilmer on the records of the Recorder of Deeds.

The name of the Superior Court action filed on or about October 14, 1993 is *City of Wilmington v. Delores Mae Ponzo and Elva M. Wilmer,* Del.Super., No. 93S-10-001. A Writ of Venditioni Exponas was issued on or about January 13, 1994, and the property was sold by the Sheriff to Mansion Park on March 8, 1994. The sale was confirmed by Superior Court on June 13, 1994 and a deed to Mansion Park was issued on June 21, 1994. Docket no. 16, ex. D. It is recorded at RoD Book 1758, Page 49.

***3** Mansion Park bought the property for $23,000.00. This sum paid off the delinquent water and sewer charges and the balance ($18,147.51) was remitted to United States Department of Housing and

Urban Development to satisfy a mortgage given by Beatrice and Verdell Wilmer in 1970. RoD Mortgage Record R, Volume 67, Page 640. Since buying this property, Mansion Park has spent approximately $56,000.00 in renovating it. These two sums, a total of about $79,000.00, represent Mansion Park's out-of-pocket cost in connection with this property prior to the filing of this action. *See* Affidavit of Lidia Riley, docket no. 14, stating the out-of-pocket expense incurred in the renovation and generally describing the nature of the work to be done, including clearing away debris and reconstructing "the entire front of the house". Mansion Park has offered the property for sale and received an offer of $115,000.00. Before the sale can be completed, the cloud on title resulting from the July, 1993 deed to the defendants must be removed.

C. NOTICE TO DEFENDANTS. The record shows that notice was given or attempted to be given to the parties identified in June, 1993 as interested parties. This group included Elva Wilmer and Ms. Ponzo and a variety of creditors or other lien holders. Publication of notice of the sale was given in the News Journal and the New Castle Weekly newspapers. Notice by certified mail, return receipt requested, was sent to Ms. Wilmer and Ms. Ponzo, but these notices were not claimed. These ladies had an address in addition to that of the property, and so both addresses were used for these mailings, but neither letter resulted in these ladies taking action with respect to the proposed sale.

The building itself was posted. *See* letter of July 29, 1996 from Julianne Hammond, Esquire, to Richard C. Kiger, docket no. 16, exhibits K and L. Barbara Wilmer testified at the July 19 hearing that she saw the notice posted on the building and so was aware of the sale.[FN2] She also said that she came to the courthouse the day of the sale, but arrived too late to stop it.

> FN2. Mrs. Wilmer and the lawyers who appeared at the July 19 hearing were sworn so that any testimony they gave, inadvertently or not, while arguing the default judgment motion would be under oath.

II

Issues

A. NOTICE AND DUE PROCESS.

1. The monition law. The issue before the Court is whether the failure of the City to give notice to the defendants in the form required by law entitles them to claim an interest in the subject property today. If so, Mansion Park is not the sole owner of the property and a question persists as to its right to dispose of this real estate in any way. If not, Mansion Park is the sole owner and can convey good title to others, at least with respect to any claims made by the Wilmers. The issue may be stated simply, but analysis shows that it is far from easy or simple to resolve.

The City acted pursuant to its monition statute, §§4-181 to 4-189 of Related Laws, Wilmington City Code (hereafter "WC"), also found at 36 *Del.Laws* Ch. 143. This law applies to taxes or special assessments due the City. This monition law has been construed by State courts on at least three occasions.

*4 The Delaware Supreme Court, in an en banc opinion, discussed the Wilmington monition statute in detail in *Pottock v. Mellott*, Del.Supr., 22 A.2d 843 (1941).

> *There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in such manner and proportion as the legislative will shall direct. Land need not be assessed to any particular person unless the statute requires it, and the Legislature has authority to provide that property shall be assessed without any reference to the name of the owner.* [Citation omitted.] *Under the assessment statute applicable to the City of Wilmington it is manifest that the tax is assessed against the land, the name of the owner, last owner, or reputed owner, being expressly declared to be only an aid in the identification of the property. The power to tax implies the power to enforce the collection of the tax, and necessarily the State in its sovereign capacity may prescribe the manner of collection; and may or may not make use of judicial tribunals, forms and processes, as seems most convenient and advantageous. So the Legislature may authorize tax sales of land without a previous judgment or decree ordering the sale, unless restrained by the constitution.* [Citation omitted.] *The special proceeding provided by the statute for the collection of taxes due the City is a proceeding strictly in rem, and it is in this connection that the word "judgment" must be understood. The use of the word does not necessarily connote an adversary action with the usual incidents of process and service; and it was not used in the statute in the sense of*

a final determination by a court of competent jurisdiction of the rights of parties in an action or proceeding. As employed it was as an apt, legalistic term for the record to be made up by the Prothonotary as the basis of a selling writ; and whether the statute is in conflict with due process of law does not depend upon the fortuitous use of the word "judgment", but upon the general scheme of taxation.

Id., 848. The Court held that notice of the sale and an opportunity for the presale owners to be heard are required by due process of law. However,

[t]he taxes are imposed each year at stated times and places fixed by the law. Every owner of land knows that if the public officers perform their duty, his land will be assessed and taxed each year; and he knows also when, where, and by whom each step in the tax proceeding is to be taken, and where the public record of each step can be found. He is not, therefore, dependent upon the service of actual notice for information that his land has been taxed, and that it will be sold for taxes if they are not paid.

Id., 849. While these comments refer to taxes, rather than special assessments, the subject being discussed is the method of assessing and collecting sums due the City, and, therefore, the quotations just given apply to collection of water and sewer assessments. *See also* Boyd v. Dillman, Del.Super., 197 A. 830 (1938) and *In re Schwartz*, Del.Ch., 45 A.2d 461 (1946). The points being made are that the monition process is not typical litigation, with a plaintiff and defendant; the assessments are against the land, not the owners[FN3]; and due process considerations of fair notice and opportunity to be heard are not the same as the assessment process and must be treated differently.

FN3. Barbara Wilmer states in her May 16 letter that the sewer and water charges were "a Bill that someone else owed we did not even owe the Bill." Docket no. 7, p.2. The defendants, of course, took title to the real estate subject to any claims that already existed against it. The grantors could convey to them only what they had, Scureman v. Judge, Del.Ch., 626 A.2d 5 (1992), and that was a property burdened with debts, among which were delinquent sewer and water fees.

*5 Sewer and water fees are not taxes, so if the monition law is to apply, they must be found to be special assessments. One searches the City Code in vain for a definition of "special assessments" or any other help on this subject. To be sure, there are many references to assessments for a variety of purposes, but none that I could find to special assessments other than in the first sentence of §4-181. The inquiry cannot be resolved on the basis of the City Code.

The term "special assessments" has been construed many times, however, and generally to the same effect. I have found no Delaware case defining the term. Of the definitions I have read, the one that best sums up the principle is this:

Taxation by special assessment differs from general taxation in this: that they can be imposed only to the extent of special benefits received, while the benefits which the taxpayer receives in return for general taxation are the enforcement of the laws, protection to life and property, and such other benefits as are shared by the public at large. The principle which underlies special assessments is that the value of the property is enhanced to an amount at least equal to the assessment.

Hanscom v. City of Omaha, Neb.Supr., 7 N.W. 739 (1881), quoted with approval in City of Beatrice v. Brethren Church, Neb.Supr., 59 N.W. 932 (1894). While local cases have not defined the term "special assessments", they have assumed a definition such as the one just given and proceeded on that basis, and so the Nebraska definition of the term "special assessments" is consistent with the usage of that term in Delaware. *See, e.g.*, Green v. Sussex County, Del.Super., 668 A. 2d 770 (1995); Rollins Cablevue, Inc. v. McMahon, Del.Super., 361 A.2d 243 (1976); Paul Scotton Con. Co., Inc. v. Mayor & Coun. of Dover, Del.Ch., 301 A.2d 321 (1972); Bush v. City of Dover, Del.Supr., 260 A.2d 432 (1969); Hearn Brothers v. City of Newark, Del.Super., 261 A.2d 532 (1969); Mayor, etc., of Wilmington v. Cathedral Cemetery Co., Del.Super., 106 A.2d 706 (1954); and Riley v. Banks, Del.Super., 62 A.2d 229 (1948). I conclude, therefore, that assessments for sewer and water services provided to properties within the City of Wilmington are special assessments as that term is used in the monition law and, therefore, that the City may proceed to collect such assessments, when delinquent, by use of the monition law previously cited.

The procedure stated in the City statute for collection of money by monition is fairly detailed. What matters for purposes of this proceeding is half-way through section 4-181:

> *Said monition, or a copy thereof, shall be posted by the sheriff upon some prominent place or part of the property against which said judgment for the taxes or assessment is a lien, and the sheriff shall make due and proper return of his proceeding under said monition to said prothonotary, within ten days after the posting of said monition as aforesaid.*
>
> *6 *Alias or pluries monition may issue upon like praecipe. The posting of said notice as herein required shall constitute notice to the owner or owners and all persons having any interest in said property.*

(Emphasis supplied.) There is no dispute that the property was posted and that Barbara Wilmer saw the posted notice. The matter cannot be allowed to rest there, however.

The person whose property has been sold has a right to reclaim the property. For a period of sixty days after the approval of the sale by Superior Court, the former property owner may pay the purchase price, plus any costs incurred since the sale, the costs of the sale, and twenty per cent in addition to the purchase price. Section 4-183. This sum is payable to the purchaser. If this is not done, the buyer may ask the Court to confirm the sale and to order the sheriff to issue a deed. If there is no redemption by the former owners,

> *Any real estate or interest therein sold under the provisions hereof shall vest in the purchaser all the right, title and interest of the person in whose name said property was assessed, and/or all right, title and interest of the person or persons who are the owners thereof, and likewise freed and discharged from any dower or curtesy or statutory right, in the nature of a dower or curtesy, whether absolute or inchoate, in or to said real estate.*

Id., §4-182. This section appears to deal specifically with a situation such as the present one, where the assessment shows one name, but the title another. FN4

FN4. I assume for purposes of this discussion that the City's records had not changed by virtue of the transfer of title from the people who held title in June to those who acquired it in August, 1993. If the City had changed its assessment records based on the recording of the deed to Bradford and Barbara Wilmer, that knowledge must be imputed to the City at the time it filed the monition. The result is unavoidable: if the assessment records were changed, the City Finance Department and the City Solicitor must be charged with knowledge of the information in their own records.

2. The nature of the notice required by law. The difficulty of accepting the terms of the monition law at face value (specifically, the provision that posting the property amounts to notice to the owner and all persons having an interest in the property) lies in the application of another law to this proceeding. Section 561(c) of Title 10 states that "[t]he rules [of procedure] so adopted and promulgated [by Superior Court], and all amendments thereof, shall, after they have taken effect, supersede all statutory provisions in conflict or inconsistent therewith."

The law conferring on the City the power to collect taxes and assessments by monition was enacted in 1929. Whatever the origin of 10 *Del. C.* §561, it was reenacted by the Code Revision of 1975, 1 *Del. C.* §103, and so is an expression of the intention of the General Assembly with respect to such matters at a later time than the 1929 enactment of the monition law. The reenactment of the law pertaining to the effect of Superior Court rules specifically did not apply, in 1975, to laws affecting the City of Wilmington, 1 *Del. C.* §105. The need to assess the conflicting provisions of these laws and their bearing on this case arises from the fact that Superior Court has adopted a rule governing sheriff sales that does affect the monition law enacted for the benefit of the City of Wilmington.

Superior Court Rule 69(g) states, in pertinent part, that

> *7 *[n]o sheriff's sale of real estate shall be held unless at least seven (7) days before the sale the plaintiff or his counsel of record shall send [[[notice of the impending sale] by certified mail, return*

receipt requested,... (3) to record owners acquiring title to such real estate...at least thirty (30) days prior to the sheriff's sale;....

(Emphasis supplied.) This language was added to Rule 69 in 1991, according to the Code Revisors' notes following the Rule. Of course, the record shows that the defendants in this action acquired legal title to the subject property far earlier than thirty days before the sheriff sale in March, 1994.

Several cases have interpreted Rule 69. Those written since the adoption of the 1953 Code[FN5] must be the focus of this discussion. The most important of these cases is *Williams v. Singleton,* Del.Supr., 160 A.2d 376 (1960), in which Chief Justice Southerland wrote that, with respect to matters of practice in Superior Court, the rules of that court "supersede any conflicting statute." *Id.,* 378. The same direct approach is found in *Cohee v. Ritchey,* Del.Super., 150 A.2d 830 (1959). While the directness and relevance on the subject of the relationship of the rules of court to enactments of the General Assembly found in *Singleton* are not present in *W. D. Haddock Construction Co. v. D. H. Overmyer Co.,* Del.Super., 256 A.2d 760 (1969); *E. K. Geyser Co. v. Blue Rock Shopping Center,* Inc., Del.Super., 229 A.2d 499 (1967); and *State v. Stoesser,* Del.Super., 183 A.2d 824 (1962), the holdings in those cases are not inconsistent with the analysis made here and the conclusion reached thereby.

> FN5. Little if any reliance, in my opinion, should be placed on *Stockman v. McKee,* Del.Super., 71 A.2d 875 (1950), with respect to the impact of 10 *Del. C.* §561. A careful reading of this case, which preceded the changes made in 1953, shows that it relies, had to rely, on language in the 1935 Code Revision that is no longer present in the statute. Therefore, I read this case as tacitly overruled by the legislature.

Considering all these factors, I view 1 *Del. C.* §105 as pertaining in a general fashion to laws already in existence at the time of the 1975 Code Revision. As such, it prevents laws enacted specifically for the benefit of the City of Wilmington from lapsing by virtue of the Code Revision, but it by no means shields them from subsequent modification by the General Assembly or by Superior Court pursuant to 10 *Del. C.* §561. With respect to the present case, jurisdiction for execution on judgments filed with Superior Court lies with Superior Court. 10 *Del. C.* §562. That being the case, the practice within that court is surely within the scope of authority granted by 10 *Del. C.* §561, and as such, Rule 69(g) supersedes the provisions of the City of Wilmington monition law to the extent they are inconsistent with respect to the notice to be given to parties having an interest in real estate proposed to be sold pursuant to the monition process. Actually, there is not so much a conflict between Rule 69 and the monition statute as there is a cumulation of duties: Rule 69(g) places on the petitioner for a sheriff sale burdens regarding notice that are not made by the monition statute. The fact that the notice requirements of Rule 69(g) are found somewhere other than in the monition law does not mean that they may be ignored.

*8 Rule 69(g) specifically commands that notice of a proposed sale of real estate be given to the record owners of title at least seven days before the sale. This notice was not given in the present case, although Barbara Wilmer has stated under oath that she had actual notice of the sale before it took place.

Superior Court has a long history of vacating sales of real estate for serious irregularities, such as failure to comply with notice statutes. *See, e.g., Hawthorne v. Sayers,* Del.Super., 2 Marvel 177 (1894); *Ocheltree v. Ocheltree,* Del.Super., 4 Houst. 452 (1872); *Clements v. Williamson,* Del.Super., 5 Houst. 25 (1875); *Lewis v. Woodall,* Del.Super., 5 Houst. 543 (1873); and *Burton v. Wolfe,* Del.Super., 4 Harr. 221 (1845). "...the failure of the Sheriff to give the notices and to advertise the sale in the newspapers, as required by the statute, are perhaps among the most usual grounds on which sales are set aside." *Petition of Adair,* Del.Super., 190 A. 105, 107 (1936).

A recent case, *Haskins v. Motivational Ctr., Inc.,* Del.Super., 3388-DE-T-88, Taylor, J. (Mar. 13, 1992), (1992 WL 68921 (Del.Super.)) is very close to the present case. It involved a sheriff sale in which the affidavit supplied by the lawyer for the plaintiff incorrectly stated that there were no liens against the property and, therefore, that there was no need for notice under rule 69(g). The opinion states that Rule 69(g) "was designed to assure that due process notice of the impending sale of the property is given to owners and occupants of the property and holders of liens against the property." *See also Shipley v. First*

Federal Sav. and Loan Ass'n. of Del., D.Del., 619 F.Supp. 421, 436-438, (1985), on due process, and *Brown v. Federal National Mortgage Association*, Del.Supr., 359 A.2d 661 (1976) and *Gelof v. First National Bank of Frankford*, Del.Supr., 373 A.2d 206 (1977), holding that notice of impending sheriff's sales must be given to owners of record (*Brown*) and to owners of equitable interests whose identities can be readily determined (*Gelof*).

To the extent the defendants did not receive notice of the sale because a bring-down title search was not conducted, any judgment creditors whose judgments attached to their ownership interest in this real estate have also been denied their rights in connection with this sale. This point will be discussed further in Section III. Suffice it for now to say that owners and lienholders were not given notice of the sale in *Haskins* and that the sale before the court in that case was vacated for that reason and the successful bidders' deposit was refunded.

When one looks at the statutes and cases just cited, it is clear that property interests--especially property interests that are stated in the public record--may not be affected without compliance with the Constitutional requirements of due process. The view is consistent with the holding in *Pottock, supra.* Rule 69(g) is an attempt to state the degree of compliance that will satisfy the requirements of due process. No such compliance is present in this case. Bradford and Barbara Wilmer were owners of record of title to 2200 Jefferson Street for almost two months before the monition was filed, let alone before the sale and before confirmation of the sale. It would have been an easy thing for the City or Mansion Park to discover their interest in this property. The deed awarding title to Mansion Park was issued despite the public record of the defendants' ownership interest in this property. The sale was clearly in violation of Rule 69(g).

*9 In other words, the ownership interest of the defendants in this property, as stated on the public record, is a serious cloud on the title acquired by Mansion Park in March, 1994, notwithstanding the issuance of a deed to Mansion Park several months later. *Cf. Kittinger v. Rossman*, Del.Ch., 110 A. 677 (1920).

B. WHETHER THE DEFENDANTS CONTINUE TO HAVE ENFORCEABLE RIGHTS IN THE SUBJECT PROPERTY.

1. Rights and duties. The record is clear that the defendants have sustained an injury in that property, title to which was in their names, is now claimed by another. Whether they are entitled to receive anything as a result of this injury is harder to establish.

(a) Timing. The defendants had clear rights to redeem the property or to ask Superior Court to vacate the sale for failure to comply with Rule 69(g). So far as the record shows, the defendants have not attempted to do either of these things. Instead of taking an active role in placing this situation before a court of competent jurisdiction, the defendants have instead allowed the situation to evolve to a point where the City and Mansion Park have had to act, so placing themselves in a reactive posture. Although there is no denying that the City was at fault for not checking the public record at the time the monition was filed, and that Mansion Park was remiss as well, *see infra,* it is equally clear that the defendants have slumbered on their rights at least since the sale on March 8, 1994.

Another question has to do with the extent of time available to the defendants to act. Section 7902 of Title 10, Delaware Code, decrees a twenty year period during which action can be taken to claim an interest in real estate. If there had been compliance with Rule 69(g), it would be reasonable to hold that the specific provisions of that rule, as given force by 10 *Del. C.* §561, take precedence over the twenty year period, but since the defendants were never party to any proceeding in Superior Court, it is much less clear that any rights they may have under 10 *Del. C.* §7902 have been lost. Without deciding the issue, it is fair to say that the defendants appear to be in precisely the position to which §7902 applies. If they have no right to proceed in Superior Court because of the passage of time, they nonetheless would have a right to bring their own quiet title action in this Court pursuant to 10 *Del. C.* §7902.

(b) The Court of Chancery is not an appellate court with respect to matters before Superior Court. There is a serious question as to the role of this Court in a proceeding such as this one. It is clearly empowered to hear and adjudicate actions to quiet title to real estate, but it is not a court to which an appeal from the actions of Superior Court will lie. That is, any attempt to vacate the sale to Mansion Park or to challenge the

validity of that sale must rest in Superior Court because it was Superior Court that confirmed the sale and it was pursuant to the Rules of Superior Court that the sale was conducted and the property sold. The time for attacking the validity of the sale is long past, *see* §4-183, Related Laws, Wilmington City Code, and Superior Court Rule 69(d), assuming that these restrictions on the rights of property owners can be held to apply when notice of a sale has not been given or attempted to be given to parties entitled to receive such notice. *Haskins,* of course, as already stated, indicates that the sale is not valid.

***10** Challenges to such sales should be timely, *Comegys v. Phillips,* Del.Super., 69 A.2d 294 (1949), but far from being timely, no such challenge has yet been made by the defendants. The time for filing such an appeal with the Supreme Court from the confirmation of the sale has passed as well. 10 *Del. C.* §148. Although the defendants have been wronged, it is unclear, because of the passage of time and the statutes of limitation just discussed, that they have a right to proceed in Superior Court today as they ought to have done several years ago.

(c) Laches. Implicit in the remarks already made is the idea that the defendants are guilty of laches. Laches is failure to act in protection of one's rights combined with reliance on such failure by another to his detriment. If laches is found to be present, it precludes the assertion of a right at a later time that might have been dispositive if timely raised. *Scureman v. Judge, supra.* In order for laches to apply in any case, the party against whom the doctrine is invoked must have had knowledge of the need to protect rights, and in this case Barbara Wilmer has testified that she had actual knowledge of the sale. The argument can be made that such knowledge may be imputed to her husband as well because she admits that the property was posted. The detriment in this case has to do with Mansion Park's spending a large sum of money to renovate the subject property (at a time when it should have known that defendants had an ownership interest in it).

(d) The buyer's responsibilities. Mansion Park's conduct in this matter is not without fault. Caveat emptor, when it comes to sheriff's sales, has been the law of this State for decades, in practice if not officially. In 1956, then Judge Herrmann wrote that "[i]t is clear therefrom that purchasers at tax sales in Sussex County generally consider that they are buying a 'pig-in-a-poke', i.e., whatever uncertain right, title and interest the taxable may hold, subject to any lien, encumbrance or other defect of record." *Abbott Supply Company v. Shockley,* Del.Super., 128 A.2d 794, 797 (1956), *affm'd.,* Del.Supr., 135 A.2d 607 (1957), *rev. in part, Brown v. Federal National Mortgage Association, supra,* 663. Although the quotation applies specifically to sales in Sussex County many years ago, the principle remains valid that in an in rem proceeding, where the name of the owner figures in part merely as an aid to identification of the property, *Pottock, supra,* the buyer has an interest in making sure that there has been compliance with all applicable laws. Take note, it is the buyer's responsibility, under WC §4-183, to petition for the deed and to assure Superior Court that there has been compliance with applicable procedures and the buyer in this case did petition for the issuance of the deed. *See also Holladay v. Flinn,* Del.Orph., 149 A. 307 (1929), on the subject of caveat emptor as it relates to judicial execution sales. *Haskins* clearly holds that the successful bidder at an execution sale can ask Superior Court to set aside the sale for failure to comply with Rule 69.

***11** The present case has ties to *Allen v. Folsom,* Del.Ch., 372 A.2d 200 (1976). In *Allen,* a sewer lien was not discovered before settlement on a property, despite diligent inquiry, because of the state of the records maintained by New Castle County, a local government. This Court held that the government is estopped to claim that taxes or assessments are owed when its agents inform the public that they are not owed and the public has no other means of obtaining this information and acts in reliance on it as a consequence. The relevance of *Allen* to the present case is this, that at all times both the City and Mansion Park had it within their power to discover that a mistake had been made and to rectify that mistake before further expenditures were made.

2. Procedural considerations. In weighing the substantive aspects of this case, it should not be overlooked that there are serious procedural issues. Notably, a deed has been issued by the sheriff, the time for challenging the deed has, arguably, elapsed, and there is a default judgment motion before this Court. Although service was made on the defendants on May 1, 1996, no answer has been filed. To be sure, Barbara Wilmer filed a letter in response to the petition on May 16, as already mentioned, but that letter

can only loosely be described as an answer to the complaint for a decree of quiet title. Mrs. Wilmer's letter asks for additional time in which to respond to the law suit, alleges that the sale was illegal for lack of notice, and asks that this Court void the sale. A generous amount of time has been given to the defendants in which to answer the complaint; this Court cannot void the sale for the jurisdictional reasons given earlier (*i.e.,* such application should be made to Superior Court); and Mrs. Wilmer stated at the July 19 hearing that she knew about the sale before it took place. The letter, of course, is from Barbara Wilmer; there is nothing in this record from Bradford Wilmer, although the sheriff's return shows that he was served with a copy of the complaint, and in fact that he accepted service for his wife as well. The record also shows that notice of the sale was given by publication in addition to the other forms of notice.

On the face of it, it would appear that there is some reason to grant a default judgment for the City and Mansion Park under Court of Chancery Rule 55. That is, the defendants have been served with the petition and the motion for default judgment, but they have done nothing to respond beyond Mrs. Wilmer's writing the letter already mentioned and appearing in court to oppose the entry of a default judgment. So far as the record shows, she has done nothing since then to defend her interests in this matter, nor is there anything at all in the record, other than her statements at the hearing, that is under oath as a rebuttal to the claims of the petitioners. To the extent Mrs. Wilmer took a position at the hearing, it is not helpful to her because she admits that she knew about the sale ahead of time. At the risk of being casuistic, however, the matter cannot be allowed to rest so simplistically.

***12** So far as one can tell from the record, the transfer of title to the defendants was a valid one; if it were not, presumably that would have been raised as an additional reason to rule in favor of the City and Mansion Park. Once one admits that the transfer was valid, it follows that any judgments then in force against the defendants attached to their interest in the real estate, and as things now stand, no notice of the Superior Court proceeding or the Court of Chancery proceeding has been given to such judgment creditors, although they are surely within the scope of interested parties to be given notice under Rule 69(g). *Haskins, supra.* Such interest as they might have in this real estate is limited by the extent of the defendants' interest, obviously, *Scureman, supra,* but to proceed to adjudicate this case without taking cognizance of their interests is to ignore the dictates of due process. These interests must be determined and dealt with before title to this real estate can be quieted in any party.

Another consideration that must be addressed is whether this action should be dismissed. I presume, based on the holding in *Haskins* that it would have been possible to file an action in Superior Court to vacate the sale, but only this Court can adjudicate a petition for quiet title. *Newlin v. Phillips,* Del.Ch., 80 A. 640 (1911). Therefore, the plaintiffs could not have filed this action elsewhere, and the defendants' refusal to initiate any legal proceedings left the plaintiffs without a remedy at law.

Viewed from another perspective, if the petitioners are still able to ask Superior Court to vacate the sale,[FN6] instead of filing the present action, they would then be faced with further choices: to abandon Mansion Park's investment in the property by undoing the sale, Barbara Wilmer's testimony strongly indicating that she and her husband are unable to finance the purchase of the improvements made by Mansion Park; or to attempt to make some claim in a separate action in this Court against the Wilmers for unjust enrichment, which claim essentially was made by Mansion Park's lawyer at the July 19 hearing.

> FN6. The same time limitations appear to apply to the petitioners as the defendants. If that is the case, they, too, may have waited too long to ask for relief in Superior Court, a point that is not decided here.

Clearly, once a mistake was made, it ought to have been rectified immediately, and failing that, there should have been some effort made to undo the sale shortly after it took place, but none of these things having happened and the petitioners having proceeded, presumably, in good faith, they should not be faulted for filing their action in this Court. At the least, it avoids the possibility of a multiplicity of actions, as discussed in the last paragraph. Based on the present record, the Court of Chancery is probably the only court that can resolve the title question in a fashion that is as fair to all as humanly possible. Hence, this action for quiet title. "It is the duty of the court [of Chancery] in cases of judicial sales to protect the purchasers against defective titles, and consideration

has therefore been given to the petition." *Dure v. Sharpe*, Del.Ch., 114 A. 207, 208 (1910).

***13** In order to prevail in a quiet title action, the plaintiffs must do so on the strength of their own title, not the weakness of the defendants'. *Marvel v. Barley Mill Road Homes, Inc.*, Del.Ch., 104 A.2d 908 (1954). In the present case, the plaintiffs have a seriously flawed case, as already stated. The reason that it should remain in this Court is the uncertainty of any right to proceed in Superior Court balanced against (1) the need for certainty in matters involving real estate and (2) the equitable aspects of this case, that is, the failure of the defendants, in the past or now, to do anything to protect their rights in the real estate, despite actual knowledge of the sale, and the subsequent outlay of cash and sweat equity, *see Riley, supra,* of Mansion Park in renovating the property.

One last comment on the equitable aspects of this case is in order. Anyone who owns real estate has an interest in the enforcement of deed restrictions and zoning laws. To the extent there is a delay in asserting such rights while allowing another party to change its position with respect to real estate in reliance on the acquiescence of the party entitled to enforce such laws or restrictions, the failure to act in a timely fashion will result in the barring of the remedy that otherwise would be available. *Cannon v. Liberman,* Del.Ch., C. A. No. 637-S, Hartnett, V.C. (May 22, 1979). In *Cannon,* the plaintiff allowed the defendant to make and complete structural changes to his home before attempting to enjoin him from doing so and to compel him to demolish them for failure to comply with the local zoning ordinance. The *Cannon* Court refused to order the demolition of the improvement.

By the same token, one who is aware of his rights in real estate but does not attempt to enforce them until after another has made substantial investments in improving that real estate is guilty of laches. To award the real estate to the dilatory party in such a case would be unjust enrichment.

III

Conclusion

My view of the status of this proceeding is this. There was an execution sale of the defendants' real estate, which sale was flawed for failure to give notice of the sale to the defendants and their judgment creditors, if any, as prescribed by Superior Court Rule 69(g). The time for challenging that sale in Superior Court has expired, so far as the monition statute and Rule 69 are concerned, but the defendants and their judgment creditors may still have rights under 10 *Del. C.* §7902. The defendants have taken no steps to assert their rights in Superior Court, but at least one of them, Barbara Wilmer, has appeared in this action in person and by writing to the Court. Although her husband's wishes in the matter remain unknown, Mrs. Wilmer would like to have the sale set aside and the property returned to her and him. This would be manifestly unfair because the Wilmers would then receive a property arguably valued at $115,000.00, when the same property was burdened with claims at the time the sale took place and has been substantially improved through Mansion Park's efforts since then. Lastly, this action cannot proceed without notice to the Wilmers' judgment creditors, if any, because to do so would deprive them of their rights in this matter without due process of law.

***14 Equity abhors a forfeiture.** *Jefferson Chemical Co. v. Mobay,* Del.Ch., 267 A.2d 635 (1970). In the present case, the relief sought by the petitioners would result in a forfeiture of property rights by the defendants, and the relief sought by Barbara Wilmer would mean a forfeiture by Mansion Park of its substantial investment in improving the real estate neither she nor her husband has made any effort to regain in the manner the law prescribes.

Therefore, in order to do equity as to the competing interests of Mansion Park and the defendants, and in order to bring this matter to a close, Mansion Park, as the true party in interest and as the party that petitioned for the sheriff's deed, should arrange for a certified real estate appraiser to prepare a valuation of the subject property stating its fair market value as the property existed on or about March 8, 1994. This appraisal should be filed with the Court within ninety days after an order is entered implementing this report, if such an order is entered. The defendants may arrange for their own appraisal if they wish, but that appraisal should be filed no later than the one paid for by Mansion Park. If there is a difference between the two appraisals, the Court will determine which to accept.

Mansion Park should also arrange for a lien search with respect to the defendants for such claims against them as would have attached to the subject real

estate. The difference, if any, between the value of the property as shown in the appraisal accepted by the Court and the purchase price paid by Mansion Park will be the equity value of the defendants in this property, which sum shall be liable for any claims against the defendants which attached to their interest in the subject real estate. The sum remaining, once any such claims are paid, will be awarded to the defendants in satisfaction of their claims against this real estate, and after Mansion Park files with the Court an affidavit showing that all such claims have been paid, an order quieting title will be entered if the Court at that time believes such order is warranted.

Del.Ch.,1997.
City of Wilmington v. Wilmer
Not Reported in A.2d, 1997 WL 124151 (Del.Ch.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

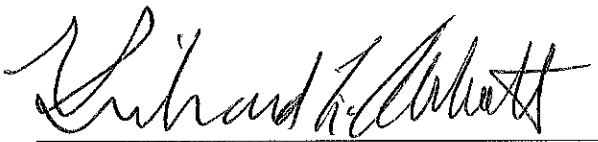
I, Richard L. Abbott, Esquire, do hereby certify that on this 15th day of February, 2013, I caused the foregoing **Certain Defendants' Reply To Plaintiff's Response In Opposition To Certain Defendants' Motion For Reargument And To Vacate Final Order And Judgment** to be electronically filed with this Court and served upon the below-listed individuals as indicated:

VIA ELECTRONIC FILING

Josiah R. Wolcott, Esquire
Connolly Bove Lodge & Hutz
267 East Main Street
Newark, DE 19711

VIA U.S. FIRST CLASS MAIL

Paul Miller
Candy Miller
1 Carillon Court
Wilmington, DE 19803



Richard L. Abbott, Esquire (I.D. #2712)