

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

Janice Allmaras, *pro se*, Joseph J. Rolla, *pro se*
and Robert Viscount, *pro se*

Petitioners,

v.

THE BOARD OF ADJUSTMENT OF SUSSEX
COUNTY, DELAWARE

Respondent.

*
* C.A. No. S19A-06-001 CAK
*
*
*
*
*
*
*
*
*
*
*
*
*
*

FILED PROthonotary
SUSSEX COUNTY
2019 JUN 20 4 10:54

PETITIONERS' MOTION TO AMEND

NOW COME Appellants Allmaras, Rolla and Viscount and move to amend the petition to add two parties to this matter: 1) Special Use Applicant Old Orchard Ventures, LLC and 2) Landowner Karen Hefke.

Background

On September (undated), 2018, a Special Use application was filed at the Board of Adjustment for Sussex County (the Board) by the Applicant, Old Orchard Ventures, LLC (OOV), naming Karen Hefke (Hefke) as the landowner of the property at issue. On February 5, 2019, the Board rendered its decision approving the application. On that same date, the Board sent a notice to both OOV and Hefke informing both of the decision and expressly noting the potential for an appeal of the decision. On February 11, 2019, Appellants filed a request for rehearing

pursuant to the Rules of the Board. On February 21, 2019, OOV filed an opposition to the request for rehearing. On March 6, 2019, Appellants filed a Verified Petition for a Writ of Certiorari. On March 28, 2019, the Board filed a motion to dismiss for a lack of subject matter jurisdiction. On April 1, 2019, at a regular Board meeting, the Board voted to deny the request for rehearing. On April 26, 2019, Appellants filed a second Verified Petition for a Writ of Certiorari. After a hearing on the first Motion to Dismiss on May 17, 2019, both Petitions were dismissed **without prejudice**. The first Motion to Dismiss was granted by an order of this Court and the second by stipulation between the Board and the Appellants and an order by this Court on May 21, 2019; as the appeals were premature to a final decision by the Board on the request for rehearing. On June 5, 2019, the Board issued its final decision on the request for rehearing; making the decision ripe for appeal. This appeal was filed on June 24, 2019. On June 26, 2019 this Court granted Appellants' Petition for a Writ of Certiorari. On July 19, 2019, the Board filed a Motion to Dismiss for lack of subject matter jurisdiction, alleging that the Appellants failed to name all of the necessary parties; namely, the applicant and the land owner. The Appellants have filed an opposition response to the Motion to Dismiss on this same date. By this Motion, Appellants seek to add these parties. If the Petitioners' Motion to Amend is granted, the Motion to Dismiss will be moot.

The Requirements of Rule 15 Are Satisfied

Under Superior Court Civil Rule 15, motions to amend may be granted.

Under Rule 15(c), a pleading will relate back to the original pleading when:

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

Appellants contend whether the Court should grant this Motion to Amend and permit that amendment to “relate back” to the date of the original filing, is controlled by the Delaware Supreme Court’s decision in DiFebo v. Board of Adjustment of New Castle County, 2016 WL 297490 (Del. Jan. 25, 2016).

The requirements for amendments relating back to the date of our Verified Petition in this proceeding, specifically Rule 15 (c)(3), have been met herein. As required, Rule 15(c)(2) has been met; this is the same occurrence noted in the original Petition. Further, the two parties sought to be added by the amendment knew or should have known of this appeal. Initially, when the Board rendered its grant of

the Special Use application on February 5, 2019, a notice of that decision was sent to the applicant and Hefke and included an express statement that there was the potential for an appeal. Appellants filed the request for rehearing just six (6) days after the Board's decision; one form of a potential appeal. The Applicant (OOV) filed an opposition to that request for rehearing on February 21, 2019. The Board's current file with respect to its Case No. 12225 includes a complete copy of the Appellants' Verified Petition dated June 24, 2019. And, on August 17, 2019, the Appellants sent a bare notice of the filing of this appeal to both OOV and Hefke via U.S. Priority Mail; each received that notice. Additionally, there will be no prejudice to either potential party; no briefing, not even the scheduling thereof, has occurred to date. Further, either may submit any filing they consider necessary and appropriate. As to the final requirement of a mistake as to the identity of the proper party to be named in the action, Appellants respectfully request that the Court reject the "strict rule" and follow the suggestion of our Supreme Court in DiFebo and follow the rationale in Krupski and Federal Rule of Civil Procedure Rule 15(c). Krupski v. Costa Crociere S. p. A., 560 U.S.538, at 549, 2010. *See* Defibo.

"The reasonableness of the mistake is not itself at issue.... [A] plaintiff might know that the prospective defendant exists but nonetheless harbor a misunderstanding about his status or role in the events giving rise to the claim at issue, and she may mistakenly choose to sue a different defendant based upon that misimpression. That kind of deliberate but mistaken choice does not foreclose a finding that [Federal] Rule 15(c)(1)(C)(ii) has been satisfied." Krupski at 549.

Under Krupski, the focus should be on what the parties to be added knew or should have known within the period set forth in Superior Court Rule 4(j).

Here, the date of the Petition in this appeal is June 24, 2019. Under Rule 4(j), Appellants have 120 days to effect service and add these two parties. DiFebo. Thus, this application is timely and the parties to be added have actual knowledge of this appeal.

For these reasons, the Appellants respectfully request the Court grant this motion to amend and permit the addition of the two parties: Old Orchard Ventures, LLC and Karen Hefke. Further, the Appellants request that the Court hear this Motion to Amend prior to its consideration of the Board's Motion to Dismiss as this motion is critical to the substance of the Motion to Dismiss.

By: Janice Allmaras
Janice Allmaras, *pro se*

Joseph J. Rolla
Joseph J. Rolla, *pro se*

Robert Viscount
Robert Viscount, *pro se*

DATED: August 20, 2019

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

Janice Allmaras, *pro se*, Joseph J. Rolla, *pro se* *
and Robert Viscount, *pro se* *

C.A. No. S19A-06-001 CAK

Petitioners,

v.

THE BOARD OF ADJUSTMENT OF SUSSEX *
COUNTY, DELAWARE *

Respondent. *

FILED PROthonotary
SUSSEX COUNTY
2019 AUG 20 A 0:55

ORDER

AND NOW, this _____ day of _____, 2019, the
Court having considered Appellants Allmaras, Rolla and Viscount’s
Motion for Leave to Amend, related papers and any responses thereto;

IT IS HEREBY ORDERED that Appellants may amend the original
Petition in the above-captioned cause to add as parties Old Orchard

Ventures, LLC and Karen Hefke.

Judge

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

Janice Allmaras, *pro se*, Joseph J. Rolla, *pro se* *
and Robert Viscount, *pro se* *

C.A. No. S19A-06-001 CAK

Petitioners, *

v. *

THE BOARD OF ADJUSTMENT OF SUSSEX *
COUNTY, DELAWARE *

Respondent. *

FILED PROthonotary
SUSSEX COUNTY
2019 AUG 20 A 10:55

NOTICE OF MOTION

To: James P. Sharp, Esquire
122 W. Market Street
P.O. Box 554
Georgetown, DE 19947

PLEASE TAKE NOTICE that the attached Petitioners' Motion to Amend will be heard on September 6, 2019, at 11:00 a.m.

By: Janice Allmaras
Janice Allmaras, *pro se*

Joseph J. Rolla
Joseph J. Rolla, *pro se*

Robert Viscount
Robert Viscount, *pro se*

DATED: August 20, 2019

Word Count:

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

Janice Allmaras, *pro se*, Joseph J. Rolla, *pro se*
and Robert Viscount, *pro se*

Petitioners,

v.

THE BOARD OF ADJUSTMENT OF SUSSEX
COUNTY, DELAWARE

Respondent.

*
* C.A. No. S19A-06-001 CAK
*

*

*

*

*

*

*

*

*

*

*

FILED PROTHONOTARY
SUSSEX COUNTY
2019 AUG 20 A 10:55

CERTIFICATE OF SERVICE

Joseph J. Rolla, *pro se*, Appellant, in the foregoing cause, hereby certifies that

I caused to be mailed by United States mail, postage prepaid, a true and correct

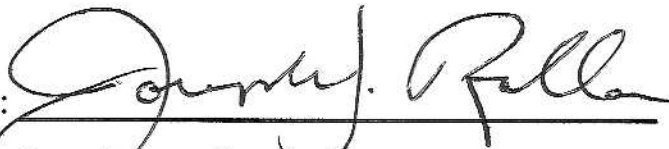
copy of Petitioners' Motion to Amend, on the 20th day of August, 2019,

to the following:

Moore & Rutt, P.A.
James P. Sharp, Esquire
122 Market Street
P.O. Box 554
Georgetown, DE 19947
Attorneys for Respondent Sussex County
Board of Adjustment

Old Orchard Ventures, LLC
c/o Barry Baker, President
10 A-Del Drive
Newark, DE 19702

Karen Hefke
P.O. Box 732
Lewes, DE 19958

By: 
Joseph J. Rolla, *pro se*