

TAX APPEAL BOARD OF THE STATE OF DELAWARE

PETER KOSTYSHYN and)
PATRICIA KOSTYSHYN,)
)
 Petitioners,)
)
 v.) Docket No. 1659
)
 DIRECTOR OF REVENUE,)
)
 Respondent.)

BEFORE: Todd C. Schiltz, Esq., Chairman, Steven R. Director, Esq., Vice-Chairman, Joan M. Winters, CPA, and Sindy Rodriquez and Robert Slavin, Members

Peter Kostyshyn and Patricia Kostyshyn, *pro se*

Jennifer R. Noel, Esq., Deputy Attorney General, and Caroline Lee Cross, Esq., Deputy Attorney General, for Respondent.

DECISION AND ORDER

Peter Kostyshyn and his sister, Patricia Kostyshyn (collectively, the “Petitioners”), have filed petitions against the Director of Revenue challenging a decision of the Delaware State Escheator to turn over \$47,156.96 in escheated property to the Delaware Department of Justice pursuant to a Writ of *Fieri Facias*. For the reasons set forth below, the Petitioners have failed to state a claim for relief, and their petitions are dismissed.

Statement of Facts¹

A. The Claims Submitted to the State Escheator

On or about December 31, 2013, Petitioners submitted a claim with the State Escheator. The claim appears to have been submitted telephonically, not in writing. The claim sought the return of \$47,141.96 that had been escheated to the State of Delaware following the sale of a parcel of real property through a Sheriff's sale. The claim was submitted by Patricia Kostyshyn on behalf of Peter Kostyshyn. The State Escheator responded by asking the Kostyshyns to submit supporting documentation for the claim, including a signed power of attorney.

On or about May 21, 2015, Petitioners submitted a written claim form with the State Escheator seeking the return of the \$47,141.96. The form was submitted by "Peter Kostyshyn, Patricia Kostyshyn POA" and stated that the owner of the escheated property is Peter Kostyshyn. The claim form was signed by Patricia Kostyshyn under the heading "Under penalties of perjury, I certify that the

¹ The facts set forth herein are taken from the petitions, the proceedings before the State Escheator that give rise to this case, the proceedings before the Superior Court of the State of Delaware noted below, the proceedings before the Supreme Court of the State of Delaware noted below and the proceedings before the Board, all of which are capable of accurate and ready determination from sources whose accuracy cannot be questioned. *Del. R. Evid.* 201(b)(2); *Aequitas Sols., Inc. v. Anderson*, 2012 WL 2903324, at *3 (Del. Ch. June 25, 2012) (taking judicial notice of a pleading filed in a related action); *In re Wheelabrator Techs., Inc. S'holders Litig.*, 1992 WL 212595, at *11-12 (Del. Ch. Sept. 1, 1992) (taking judicial notice, in a motion to dismiss context, of documents of public record); *see also In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 585 (Del. Ch. 2007) (Rule 201 permits a court to take judicial notice of "documents [outside the pleadings] that are required by law to be filed, and are actually filed, with federal or state officials") (footnote omitted).

information provided on this claim form is true, and all supporting documentation presented are either original or true unaltered copies of the original documents.” A Durable Power of Attorney dated May 12, 2015, and signed by Peter Kostyshyn was submitted with the claim form. Among other things, the Durable Power of Attorney appoints Ms. Kostyshyn to serve as her brother’s attorney in fact and gives her the right “[t]o demand, sue for, recover and receive all sums of money, debts, goods, chattel, effects and thing whatsoever due, payable, or belonging to me in or by any right whatsoever . . .” on behalf of her brother.²

B. The Notice of Determination

On or about August 11, 2015, the State Escheator received a Writ of *Fieri Facias* (the “Writ”) indicating that a judgment in excess of \$9 million had been entered against Mr. Kostyshyn in favor of the Delaware Department of Corrections (“DDOC”).³ The Writ directed the State Escheator to turn over any escheated property held for the benefit of Mr. Kostyshyn to the Delaware Department of

² The claim form was further amended on May 22, 2015 to include the value of two gift cards, one for \$5 and one for \$10, raising the total amount sought on the claim to \$47,156.96.

³ The \$9 million judgment arose from a complaint the State of Delaware filed against Mr. Kostyshyn alleging he committed more than 1600 violations of the Delaware False Claims and Reporting Act while he was imprisoned with the DDOC. Mr. Kostyshyn failed to respond to the complaint and a default judgment in excess of \$9 million was entered against him. He appealed that decision and his appeal was dismissed for failure to prosecute and for failure to comply with the directives of the Supreme Court. The Supreme Court’s dismissal order states that Mr. “Kostyshyn has filed countless frivolous complaints, petitions, appeals and writs in both the state and federal courts.”

Justice (“DDOJ”) to satisfy (or partially satisfy) the judgment against Mr. Kostyshyn.

On August 12, 2015, the State Escheator sent a letter to Ms. Kostyshyn, as attorney in fact for her brother, indicating that his claim for \$47,156.96 had been allowed but that the State Escheator was required to comply with the Writ and turn over the \$47,156.96 to the DDOJ. The August 12 letter advised that if the Petitioners wished to contest the Writ, they had to contact the Superior Court.

C. The Superior Court Action

On or about September 3, 2015, the State of Delaware filed a petition against Mr. Kostyshyn in the Superior Court of the State of Delaware (the “Superior Court Action”) seeking an Order authorizing the release of the \$47,156.96 to the DDOJ and authorizing the DDOJ to distribute the funds to the DDOC. The petition was filed by Oliver Cleary, a Deputy Attorney General for the State of Delaware.

On March 1, 2016, the Superior Court heard argument on the petition filed in the Superior Court Action. Mr. Kostyshyn appeared and was heard. At the conclusion of the hearing, the Court entered an Order in the Superior Court Action granting the petition and directing that the \$47,156.96 be turned over to the DDOJ and that DDOJ “shall first distribute said funds to any and all senior judgment lienholders” holding liens against Mr. Kostyshyn, and that “[a]ny remaining

balance shall be distributed to the judgment creditor Delaware Department of Correction”

On March 14, 2016, Mr. Kostyshyn filed a Motion for Appointment of Counsel, a Motion for Recusal of Judge and a Motion for Continuance and Change of Venue and Motion for Recusal in the Superior Court Action. On June 29, 2016, the Superior Court denied each of these motions as moot, among other reasons.

Neither of the Petitioners ever sought to reargue or appeal the March 1, 2016 Order entered in the Superior Court Action directing that the \$47,156.96 be turned over to the DDOJ for distribution.

D. Proceedings Before the Tax Appeal Board

On October 15, 2015, the Petitioners filed separate petitions with the Tax Appeal Board against the Director of Revenue, which the Board’s secretary combined into this proceeding. Both petitions sought a redetermination of the issues resolved in the August 12, 2015 letter issued by the State Escheator and both claimed the same errors and facts in support.⁴

An initial conference was scheduled in this matter for November 18, 2015. On November 13, 2015, Mr. Kostyshyn filed a “Motion for Continuance’s (sic) of 11/18/15 Pre-Trial Conference, Motions for Copies of All Files Held by Tax

⁴ The alleged errors were: “invasion of privacy by releasing personal information,” “dispute ownership claim for property ID 12436247, 13860528, 13860529,” and “failure to publicize escheat funds.” The alleged facts in support were “possession of original unredeemed gift certificates” and “property ID 12436247 result of fraudulent land transaction.”

Appeal Board, By AG's (sic), By All Parties in Any Kostyshyn Petitions, For All Facts et al. For Copies of All Rules, Procedures of T.A.B. to be Sent to Kostyshyn." On November 14, 2015, Ms. Kostyshyn requested a continuance of the initial conference. The Board rescheduled the initial conference for December 9, 2015, and then rescheduled it for February 10, 2016 at the further request of Ms. Kostyshyn.

On February 9, 2016, Ms. Kostyshyn sent an email to the Secretary of the Tax Appeal Board advising that she would not be appearing on February 10, and stating that the February 10 hearing would have to be rescheduled. Neither Mr. Kostyshyn nor Ms. Kostyshyn appeared for the February hearing, and the Board rescheduled the initial hearing for March 10, 2016.

On February 10, 2016, the Director of Revenue filed a Motion to Dismiss the petitions arguing, among other things, that the petitions failed to state a claim because (i) the State Escheator had granted Mr. Kostyshyn's claim to the \$47,156.96, (ii) the Writ required the \$47,156.96 to be turned over to DDOJ, not the Petitioners, (iii) Petitioners' real complaint seemed to be with the approximately \$9 million judgment entered against Mr. Kostyshyn and the Writ which directed that the \$47,156.96 be turned over the DDOJ, and (iv) neither the State Escheator nor the Director of Revenue had anything to do with the entry of the judgment or the issuance of the Writ.

As set forth above, on March 1, 2016, an Order was entered in the Superior Court Action directing that the \$47,156.96 be turned over to the DDOJ and that DDOJ “shall first distribute said funds to any and all senior judgment lienholders” holding liens against Mr. Kostyshyn, and that “[a]ny remaining balance shall be distributed to the judgment creditor Delaware Department of Correction” Thereafter, the Director of Revenue filed a Supplemental Motion to Dismiss and a Second Supplemental Motion to Dismiss, both of which continued to assert the arguments raised in the original Motion to Dismiss but which advised the Board of the March 1, 2016 Order entered in the Superior Court Action and that Mr. Kostyshyn had not sought reargument of or appealed that Order.

On March 10, 2016, the Petitioners appeared for an initial hearing before the Board on this matter. At that hearing, the parties and the Board agreed that the Petitioners would respond to the Director of Revenue’s then pending Motion to Dismiss on May 31, 2016.⁵ On May 20, 2016, Ms. Kostyshyn requested an extension of time to respond to the Motion to Dismiss. The request was granted and the date by which Petitioners were to respond was moved to June 30, 2016. On June 27, 2016, Ms. Kostyshyn, acting on behalf of both Petitioners, submitted a

⁵ Although the claims filed with the State Escheator stated that Mr. Kostyshyn was the owner of the \$47,156.96 in escheated funds, at the March 10, 2016 hearing, Mr. Kostyshyn asserted that he had no interest in the funds and that they were all due and payable to his sister, Ms. Kostyshyn. Nothing before the Board suggests that Ms. Kostyshyn previously asserted an ownership interest in the funds or that the State Escheator made any determination as to Ms. Kostyshyn’s interest in these funds.

motion for continuance requesting a further extension of time to respond to the Motion to Dismiss. The request was granted and the date by which Petitioners had to respond to the Motion to Dismiss was extended to August 1, 2016. In its June 28, 2016 letter to the Petitioners, the Board stated:

you were given several months to respond to the motion to dismiss, an amount of time you assured the Board was sufficient for you to respond to the motion, and . . . you have now requested two extensions of time to respond to the motion to dismiss. The Board will not grant you any further extensions. Taxpayers have an obligation to pursue their claims. Your failure to respond to the motion to dismiss on August 1 will be viewed as an abandonment of your claim, and your case will be dismissed.

On August 1, 2016, the Petitioners filed a motion, which in pertinent part states (typographical and grammatical errors in the original):

Comes now, the Kostyshyns to request a continuance of a hearing before the Tax Appeal Board so as to remand all matters back to Superior Court to determine not only rightful owner of the funds in question, but to expose and demand damages from the pattern of abuse, deceit, and land fraud by New Castle County Land Use and Sheriff Office. The Petitioners request the history of the source of the alleged funds. Petitioners claim theft by deception. And the funds are the result of an illegal sale of land by New Castle County and their attempts to cover up the fraud by unauthorized individuals. By force and abuse property was seized illegally for benefit of a developer and the petitioners did not want to sell or relinquish said land property. The ownership involved an estate matter and incorrect information was transferred to Superior Court's protect rightful owner. Petitioner Patricia Kostyshyn disputes this transfer of names and claims rightful owner.

Superior Court had to have published notice of funds being kept before escheat process to the State but did not follow the law. Therefore, justification is enough to remand this matter back to

Superior Court. Before that is done, Petitioners request that sworn testimony be conducted on certain individuals to be determined by the Board. A complete comprehensive investigation is being requested in the fraud, corruption and name transfer. For years, this disclosure remained uncorrected and would be referenced numerous times in open court without substantiation or verification, which affected and slanted the petitioner adversely.

The petitioners claim they were contacted the escheatment office and the Attorney General office that funds were available for claiming. Extreme demands were requested for identification, POAs before any information would be released on said funds. The rightful owner was placed under extreme scrutiny and stress and made to wait for months before a scheme was hatched to dupe petitioners to have the funds released to an individual Oliver Cleary, et al., who appeared suddenly without a subpoena demanding the funds without a subpoena. His demanded is mute and must be tossed out. The delay resulted in loss of property. The petitioners claim their privacy was and is being violated; their civil rights violated and are being harassed. How does Oliver Cleary without a subpoena has access to private information and funds that were never made public. The escheator had the duty and the right to protect all confidential and private information of the petitioners being held by the escheator and such information would have required a subpoena for such information to be released. Everyone has rights. This is blatant intrusion into a family private matter and quite frankly none of anyone's business – especially Oliver Cleary. Petitioners ask for an investigation, sanctions and disciplinary actions for raiding computer data bases for their purposes. This is junk justice.

Civil actions have been filed, but continued corruption and racketeering plagued its access to the courts and coverup. Petitioners request the source to step down.

Thereafter, the Director of Revenue filed a reply brief in support of his motion to dismiss.

Analysis⁶

For the reasons set forth below, we conclude that the petitions fail to state a claim and must be dismissed.

The State Escheator took two actions in the August 12, 2015 letter from which the Petitioners appeal. First, the State Escheator determined that Mr. Kostyshyn's claim seeking the return of \$47,156.96 would be allowed. Second, the State Escheator advised Petitioners that, pursuant to the Writ, the State Escheator was required to turn the \$47,156.96 over to the DDOJ.

With respect to allowing Mr. Kostyshyn's claim, the State Escheator granted the very relief the Petitioners sought in the claim they presented to the State Escheator. As the Petitioners received the relief they requested, they cannot assert a claim against the State Escheator for taking this action. *See In re Peierls Charitable Lead Unitrust*, 777 A.3d 232, 235 (Del. 2013) ("It constitutes reversible error for a trial court to have 'addressed issues as to which there was no actual controversy.'") (citations omitted); *Agar v. Judy*, 2015 WL 6949292, at *1 (Del. Ch. Nov. 15, 2015) (Order) (dismissing claims for "fail[ure] to state a claim because of the absence of an actual controversy" between the parties); *Franklin*

⁶ At the outset, the Petitioners have failed to name the proper respondent in their petitions. They named the Director of Revenue as the respondent even though the State Escheator is the party that took action relevant to this case. Although this may be an independent ground for dismissal, the Director of Revenue has not asserted it and the Board will not dismiss the case on this basis as the petitions could be amended to reflect the proper respondent. Sup. Ct. Civ. R. 15.

Balance Sheet Inv. Fund v. Crowley, 2006 WL 3095952, at *8 (Del. Ch. Oct. 19, 2006) (“The primary function of a court is to adjudicate actual controversies. In the absence of a controversy, a case will be dismissed . . .”).⁷

With regard to the decision to turn the \$47,156.96 over to the DDOJ, the State Escheator took this action pursuant to the Writ. A writ is a written judicial order requiring specific action by the person or entity to whom it is directed. Here, the Writ directed the State Escheator to turn the \$47,156.96 over to the DDOJ. The Writ’s directive was upheld and enforced on March 1, 2016, when an Order was entered in the Superior Court Action directing that the \$47,156.96 be turned over to the DDOJ and that DDOJ “shall first distribute said funds to any and all senior judgment lienholders” holding liens against Mr. Kostyshyn, and that “[a]ny remaining balance shall be distributed to the judgment creditor Delaware Department of Correction . . .” The Petitioners never appealed the March 1, 2016 Order issued in the Superior Court Action. As the State Escheator acted pursuant

⁷ Ms. Kostyshyn, who now claims the \$47,156.96 is her property, cannot contend in this proceeding that the State Escheator erred in finding that the \$47,156.96 in escheated property belonged to her brother. This is true because: (i) she filed a claim with the State Escheator acting as her brother’s attorney in fact asserting under oath that he owned the \$47,156.96 and if she believed the \$47,156.96 to be hers she should have asserted that claim before the State Escheator, and (ii) she never asserted such a claim before the State Escheator (*i.e.*, she never claimed to be the owner of the funds before the State Escheator) and thus the State Escheator made no determination as to Ms. Kostyshyn’s interest in the \$47,156.96 from which she can appeal. 12 *Del. C.* § 1146(b) (providing that the State Escheator has full authority to determine all claims to escheated property and that four months after such determination the claimant may apply for a hearing and determination of claim by the Tax Appeal Board). Essentially, as Ms. Kostyshyn never claimed to own the \$47,156.96 and as the State Escheator never determined whether or not Ms. Kostyshyn was entitled to the \$47,156.96, there is no decision of the State Escheator from which Ms. Kostyshyn can appeal.

to a judicial order which was subsequently affirmed when advising the Petitioners that he would turn the \$47,156.96 over to the DDOJ, the Petitioners' challenge fails to state a claim.

Paul C. [Signature]

[Signature] R. [Signature]

James M. Winters

Robert [Signature]

[Signature]

Date:

October 17, 2016