JEFFREY J. DEPOLO	:	IN THE COURT OF COMM
	:	
vs.	:	CHESTER COUNTY, PEN
	:	
BOARD OF SUPERVISORS OF TREDYFFRIN TOWNSHIP, and MICHAEL C. HEABERG, KRISTEN K. MAYOCK, PAUL OLSON, EVELYN RICHTER, JOHN P. DiBUONAVENTURO, MARK FREED and MURPH WYSOCKI, in their capacities as members of the Board of Supervisors of Tredyffrin Township	:	
and	:	
TREDYFFRIN TOWNSHIP ZONING HEARING BOARD OF APPEALS, and ARNOLD BORISH, DANIEL McLAUGHLIN and NEILL KLING, in their capacities as members of the Zoning Hearing Board of Appeals of Tredyffrin Township	:	NO. 2016-10648-ZB
	:	CIVIL ACTION

Robert B. Famiglio, Esquire on behalf of Plaintiff/Appellant Jeffrey J. DePolo
Maureen M. McBride, Esquire and Vincent T. Donohue, Esquire on behalf of the Board of Supervisors of Tredyffrin Township, Michael Heaberg, Kristin Mayock, Paul Olson, Evelyn Richter, John DiBuonaventuro, Mark Freed and Murph Wysocki
Stacy L. Fuller, Esquire and John E.D. Larkin, Esquire on behalf of the Tredyffrin Township Zoning Hearing Board of Appeals, Arnold Borish, Daniel McLaughlin and Neill Kling

ORDER OF COURT

AND NOW, this 20th day of December, 2016, upon review and consideration of the Preliminary Objections to Plaintiff/Appellant's Complaint/Transfer, and Plaintiff's Response thereto, said Preliminary Objections are SUSTAINED.[1]

It is hereby ORDERED and DECREED that Plaintiff's Complaint is DISMISSED with prejudice.

BY THE COURT:

Jeffrey R. Sommer J.

2016-10648-ZB

[1] Jeffrey DePolo (hereinafter "DePolo"), an amateur radio enthusiast, had on his property, two seventeen-foot antennae, one of which was atop a ten-foot basketball hoop. On November 25, 2013, DePolo applied to the Township for a variance to construct a 180-foot amateur radio tower and antenna in his backyard. Such a construction would allow DePolo to expand his communication abilities as he desired. However, the Township Zoning Officer denied DePolo's application, relying on §208-18.G of the Tredyffrin Township Zoning Ordinance which limits the height of structures in the R-1/2 Residential Zoning District to 35 feet.

This section of the zoning ordinance was in an apparent conflict with existing state law which provides that no "ordinance, regulation, plan or any other action shall restrict amateur radio antenna height to less than 65 feet above ground level." See, 53 Pa.C.S. §302(b). This conflict was acknowledged by the zoning officer as was an exception to the law for historic districts. The Township contends that the property is situated in a historic district, yet DePolo denies the classification. DePolo was offered a compromise whereby he could construct a 65-foot antenna and tower. Depolo rejected this offer and took an appeal to the Zoning Hearing Board.

A hearing was held and proper notice was provided. The hearing lasted five days, during which testimony was taken from DePolo, a radio antenna expert, and neighbors claiming they would be adversely impacted by the erection of the tower. At the hearing, DePolo argued that the Code of Federal Regulations permits the construction of radio towers of unlimited height and that the Township's 35-foot limitation is preempted and void. By a decision issued on October 23, 2014, the Zoning Hearing Board rejected this argument but, in the alternative, did grant a variance to permit the construction of a 65-foot tower.

Unhappy with this result, DePolo chose to file a Complaint on November 21, 2014 before the United States Federal Court for the Eastern District of Pennsylvania. DePolo did not file an appeal of the decision with the Court of Common Pleas as required by Section 1102-A(a) of the Pennsylvania Municipalities Planning Code. See, 53 P.S. §11001-A generally; 53 P.S. §11002-A(a). DePolo's Federal Court Complaint named the Zoning Hearing Board, certain of its members, the Tredyffrin Township Board of Supervisors and its members, and certain of his neighbors. His Complaint alleged that DePolo is the owner of property located at 1240 Horseshoe Trail in Tredyffrin Township (hereinafter "the Property"). The Property is located in Tredyffrin's R-1/2 Residential District and near the Valley Forge National Historic Park

The Complaint contains three counts in which DePolo sought declaratory relief. In it, DePolo alleges violations of (1) 47 CFR §97.15(B), (2) 53 Pa.C.S. §302, and (3) Pennsylvania zoning laws generally. In the federal action, the Defendants filed a Motion to Dismiss under Fed.R.Civ. 12(b)(6). The Court granted the Motion on May 18, 2015, dismissed DePolo's federal claims, and declined to exercise supplemental jurisdiction over the state-law claims. DePolo appealed the decision to the Third Circuit on June 15, 2015. The Third Circuit affirmed dismissal of the Complaint, albeit

on other grounds, on August 30, 2016 in a precedential opinion. Importantly, in the Third Circuit's decision, the Court noted:

> [DePolo] had adequate opportunity to litigate the matter beyond the ZHBA [sic] by appealing to the appropriate Court of Common Pleas within thirty days of the ZHBA's [sic] decision. Rather than do that, DePolo filed this suit in the District Court, and allowed the thirty-day appeal period under state law to expire. This was fatal to his ability to obtain federal review of his claim.... He is therefore now bound by the final judgment of the ZHBA [sic]. Its ruling is a final judgment on the merits that is entitled to preclusive effect in federal court.

On September 12, 2016, DePolo filed a motion for transfer in the Third Circuit, seeking to transfer the matter to this Court under 42 Pa.C.S. §5103 related to the transfer of erroneously-filed matters. Following briefing and argument, the Third Circuit denied the motion for transfer on October 6, 2016. DePolo then initiated the instant action in this Court, which has been filed as an appeal from the Zoning Hearing Board's decision.

The issue here is one of collateral estoppel. Collateral estoppel acts to foreclose litigation in a subsequent action where issues of law or fact were actually litigated and necessary to a previous final judgment. *Henion v. Workers' Compensation Appeal Board (Firpo & Sons, Inc.)*, 776 A.2d 362 (Pa. Cmwlth. 2001). Collateral estoppel bars a subsequent lawsuit where (1) an issue decided in a prior action is identical to one presented in a later action, (2) the prior action resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action, and (4), the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action. *Rue v. K–Mart Corp.*, 552 Pa. 13, 713 A.2d 82 (1998).

Here, DePolo seeks to transfer this matter from federal court, where the action was first filed, to the Court of Common Pleas, where the action should have been filed. Collateral estoppel bars our review of this matter. The question of whether transfer was appropriate under 42 Pa.C.S. §5103 was explicitly considered by the Third Circuit in ruling on DePolo's motion for transfer and answered in the negative. Section 5103 provides that a case erroneously filed in federal court but which should have been brought in state court, may be transferred to state court and treated as if it was first filed there when federal court lacked jurisdiction over suit. 42 Pa.C.S. §5103; see also, *Suburban Roofing Co. v. Day & Zimmerman, Inc.*, 578 F. Supp. 374, 375 (E.D. Pa. 1984); *Elec. Lab Supply Co. v. Cullen*, 782 F. Supp. 1016, 1021 (E.D. Pa. 1991), aff'd sub nom. *Elec. Lab. Supply Co. v. Cullen*, 977 F.2d 798 (3d Cir. 1992) (under Pennsylvania law, federal court may transfer case to state court when federal court has dismissed matter for lack of jurisdiction.). In the instant matter, DePolo did not file in a court without jurisdiction. On the contrary, the District Court and Third Circuit

opinions held that the federal courts did have jurisdiction under *Izzo v. Borough of River Edge*, 843 F.2d 765 (3d Cir. 1988) and 28 U.S.C. §1291, respectively. See, Memorandum, Dalzell, J., May 18, 2015, at 15, and Opinion, Aug. 30, 2016, at 10. The District Court did not lack jurisdiction to hear the state-law claims, but rather declined to exercise supplemental jurisdiction over them. *Id.* Thus, it does not qualify for transfer under 42 Pa.C.S. §5103.

The other three factors are present as well. The District Court's decision was a final judgment on the merits. DePolo briefed and argued his position before the District Court and a ruling was issued on substantive, rather than procedural, grounds. Next, the party against whom collateral estoppel is asserted (here, DePolo) was a party to the prior action. Finally, DePolo had a full and fair opportunity to litigate the issue and did so in federal court. We, therefore, find that collateral estoppel bars our review of this matter and the action must be dismissed with prejudice.

To the extent that DePolo's filing is considered an appeal from the Zoning Hearing Board's decision of October 23, 2014, the appeal is untimely. Pursuant to 53 P.S. § 11002-A(a), an appeal to the Court of Common Pleas must be filed within thirty (30) days after entry of the decision of the Zoning Hearing Board. The instant "appeal" has been filed more than two (2) years late. Moreover, DePolo has failed to follow the procedure required by the Chester County Local Rules of Civil Procedure related to an appeal from a Zoning Hearing Board decision. No notice of appeal from the decision of the Zoning Hearing Board has been filed as required by C.C.R.C.P. 5002(c).

However, were we to accept this transfer and review the matter raised, we would likely find that the issue is similarly precluded as above under the doctrine of collateral estoppel. The Third Circuit concluded that the Zoning Hearing Board's determination was a final judgment on the merits which is not reviewable due to DePolo's failure to follow proper procedure under this Commonwealth's Rules of Civil Procedure. The parties are the same and the issues are the same in the federal action as in the instant matter. Moreover, it is clear that DePolo has been afforded a full and fair opportunity to litigate this dispute, including appellate review. This attempt to transfer is simply an attempt at a second bite of the apple which we cannot indulge for the reasons set forth herein.