IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, COMMONWEALTH OF PENNSYLVANIA
CIVIL DIVISION

JASON MOHAP, SHANNON MOHAP BERNARD KOTYUK, BRAD LEACH, CRAIG HANDCHETT, DARLENE HANCHETT, and PAUL HERIC,	:	**No. C-48-CV-2019-06046**
Plaintiffs,	:	
v.	:	
THE BOARD OF SUPERVISORS OF UPPER NAZARETH TOWNSHIP, NORTHAMPTON COUNTY, PENNSYLVANIA,	:	
Defendant.	:	

ORDER OF COURT

AND NOW, this 22nd day of November, 2019, upon consideration of Defendant's Motion for Preliminary Objections and Brief in support thereof, and Plaintiff's Response to Defendant's Preliminary Objections and Brief in Support, the Defendant's Preliminary Objections are hereby **GRANTED**.

STATEMENT OF REASONS

I. Factual and Procedural History

Plaintiffs proffered that in October of 2018, JVI LLC, the alleged owner of an 88-acre parcel of Land (the "Land") within the Upper Nazareth Township (the "Township"), made a formal application for Project Tadmor ("Project Tadmor"), which consisted of building two warehouse facilities on the Land. In December of 2018, JVI LLC pursued discussions with the Township's Planning Commission.

Subsequently, residents of Upper Nazareth Township (the "Plaintiffs") filed suit against the Board of Supervisors of Upper Nazareth Township (the "Defendant") on July 3, 2019. Therein, Plaintiffs explained their concern for their safety, health and welfare. Plaintiffs accused the Township of allowing "illegal filling of wetlands" because John Soloe, Zoning Officer ("Zoning Officer") for the Township, had due notice of the issue.

Plaintiffs requested an Order in Mandamus "directing Defendant to cause immediate cessation of any further consideration of Project Tadmor by the Planning Commission or any other governing or advisory entity or staff member of the Township, to cause immediate notice to Owner that it can elect to either withdraw its application or agree to a period of suspension of any review of its application during which time it must rectify the illegal land development in accordance with SALDO [Subdivision and Land Development Ordinance] and zoning ordinances." Compl. at ¶ 16. In addition, Plaintiffs requested this Court to direct Defendant to conduct a formal inquiry into the ability of the Zoning Officer to perform his duties, and any additional relief as deemed appropriate.

On July 18, 2019, Defendant filed five Preliminary Objections Pursuant to Rule 1028 of the Pennsylvania Rules of Civil Procedure. Defendant also identified the owner of the property in question as Joseph A. Tavianini. See Prelim. Obj. at ¶ 5. Further, Plaintiff asserted that the neighboring properties, owned by William B. Hildebrand and Karen M. Hildebrand at tax

parcel K6-21-1, and Russell D. Beatty at tax parcel K7-14-1, (collectively, the "Neighbors") are the subject of wetlands pollution, rather than the Land discussed here. See id. at ¶ 6.

On August 5, 2019, Plaintiff filed a Response to Defendant's Preliminary Objections and Notice of Defendant's Failure to File a Brief in Support with the Praecipe for Argument and New Matter. On August 5, 2019, Defendant filed a Brief in Support of its Preliminary Objections. Plaintiff filed a Brief in Support of Plaintiff's Response to Defendant's Preliminary Objections. Argument was presented before the undersigned on August 27, 2019. This matter is now ready for disposition.

II. LEGAL STANDARD

Preliminary objections may be filed by either party on the basis of:

> (1) lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint; (2) failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter; (3) insufficient specificity in a pleading; (4) legal insufficiency of a pleading (demurrer); (5) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action; (6) pendency of a prior action or agreement for alternative dispute resolution; (7) failure to exercise or exhaust a statutory remedy; and (8) full, complete and adequate non-statutory remedy at law.

Pa.R.C.P. 1028. In ruling on preliminary objections, "we will consider as true all well-pleaded facts and inferences reasonably deducible therefrom, but not conclusions of law, argumentative allegations or opinions." Erie Cty. League of Women Voters v. Com., Dep't of Envtl. Res., 525 A.2d 1290, 1291 (Pa. Commw. 1987).

III. DISCUSSION

a. Pa.R.C.P. 1028(a)(2) Failure of Pleading to Conform to Rule of Court

Pennsylvania Rule of Civil Procedure 1022 states, "Every pleading shall be divided into paragraphs numbered consecutively. Each paragraph shall contain as far as practicable only one material allegation."

Defendant argues Plaintiff's Complaint, at paragraphs 9, 10, 11, 12 and 13 fail to conform to Pa.R.C.P. 1022 because the averments "contain multiple factual allegations and legal conclusions." Prelim. Obj. at ¶ 10. Paragraph 9 discusses the Owner's alleged plan, Project Tadmor, and the initiation process. Paragraph 10 reviews the steps Plaintiffs took after learning of Project Tadmor. Paragraph 11 consists of two paragraphs. In the first paragraph, it states that the Defendant was placed on notice of potential "illegal wetlands filling" and proceeds to say how Defendants should have reacted. The second paragraph cites the Township's Zoning Ordinance Section 27-104.8 and states that the Defendant should have been aware of its duty to comply with the aforementioned ordinance. Paragraph 12 relays facts related to the Zoning Officer receiving notice of alleged illegal wetlands filling, and in a second paragraph cites the Township's Zoning Ordinance Section 27-104 and states that the Defendant failed to follow the aforesaid ordinance. Paragraph 13 continues the discussion of the Zoning Officer and questions his ability to fulfill that position. Upon review of the Plaintiff's Complaint, we find that paragraphs 9, 11 and 12 fail to conform to

Pa.R.C.P. 1022 because they contain more than one material allegation. Therefore, Defendant's preliminary objection for failure of pleading to conform to a rule of court is granted.

b. Pa.R.C.P. 1028(a)(2) Inclusion of Scandalous or Impertinent Matter

To be scandalous or impertinent, the allegations must be immaterial and inappropriate to the proof of the cause of action. Common Cause/Pennsylvania v. Commonwealth, 710 A.2d 108, 115 (Pa. Commw. 1998). As briefly mentioned *supra*, Plaintiff's Complaint at paragraph 13 questions the Zoning Officer's capabilities. More specifically the Complaint states that the Zoning Officer is also the "Zoning Officer for the Borough of Tatamy, the Chief of Police and Zoning Officer for the Borough of Stockertown, and the owner of a for profit company, raising the question of whether he has the time and ability to adequately carry out his duties." Compl. at ¶ 13.

Plaintiffs insinuate that the Zoning Officer is too preoccupied with various responsibilities to be able to fulfill his duties. "Unsupported tangential statements which cast a derogatory light on public officials may be stricken as scandalous." Colosi v. Bucher, 2009 WL 6044857 (Lancaster C.C.P., Aug. 28, 2009)(citing Common Cause, 710 A.2d 108 at 115.) Stating that the Zoning Officer received notice and failed to act is a credible argument. However, basing the Zoning Officer's lack of action on his other

responsibilities, without more specific and factual support, is unnecessary. We find the inclusion of the Zoning Officer's external responsibilities to be impertinent matter.

c. Pa.R.C.P. 1028(a)(5) Non-Joinder of a Necessary Party

A party is indispensable when his or her rights are "so connected with the litigated claims that no relief can be granted without infringing upon those rights". Reichley v. North Penn School Dist., 537 A.2d 391, 392 (Commw. Ct. 1988). An indispensable party must be made a party to the lawsuit in order to protect those rights. See generally Nudi v. Pine Twp., 92 Pa.Cmwlth. 32 (1985).

Defendant argues that Plaintiffs have failed to name all necessary parties to this action. Plaintiffs allege that the land in question is owned by JVI LLC; however, Defendant argues that the land is owned by Joseph A. Tavianini, Jr. and the land is developed by JVI LLC. Plaintiffs allege that JVI LLC has allowed "illegal filling of the wetlands," but Defendant argues that the land Plaintiffs refer to is owned by the Neighbors. Therefore, Defendant argues that this action is central to the interests of Joseph A. Tavianini, Jr., JVI LLC, as well as the Neighbors and, accordingly, they should be named as necessary parties.

The Pennsylvania Supreme Court explained that in determining whether a party is indispensable, the analysis involves a minimum consideration of the following factors: "(1) Do absent parties have a right or

interest related to the claim?; (2) If so, what is the nature of that right or interest?; (3) Is that right or interest essential to the merits of the issue?; (4) Can justice be afforded without violating due process rights of absent parties?" Mechanicsburg Area Sch. Dist. v. Kline, 494 Pa. 476, 481 (1981). The parties mentioned *supra* have an interest in this matter. Specifically, they have a pecuniary and legal interest in the case because it relates to their properties and/or conduct. These rights are essential to the merits of the case because if this Court were to grant Plaintiffs' request, we would be interfering with not only the activity of the Defendant, but we would also be affecting the property rights and business of the individuals and company named above. Lastly, we find justice can only be afforded by protecting the due process rights of the non-parties by allowing them to be heard on this matter before their legal interests are impacted.

d. Pa.R.C.P. 1028(a)(7) Failure to Exhaust Statutory Remedy

Defendant's preliminary objection is essentially based upon the Plaintiffs' choice of action. Pennsylvania MPC Section 10617 (also referred to as "Section 617") states:

> In case any building, structure, landscaping or land is, or is proposed to be, erected, constructed, reconstructed, altered, converted, maintained or used in violation of any ordinance enacted under this act or prior enabling laws, the governing body or, with the approval of the governing body, an officer of the municipality, or any aggrieved owner or tenant of real property who shows that his property or person will be substantially affected by the alleged violation, in addition to other remedies, may institute any appropriate action or proceeding to prevent, restrain, correct or abate such building, structure, landscaping or land, or to prevent, in or about such premises, any act, conduct,

> business or use constituting a violation. When any such action is instituted by a landowner or tenant, notice of that action shall be served upon the municipality at least 30 days prior to the time the action is begun by serving a copy of the complaint on the governing body of the municipality. No such action may be maintained until such notice has been given.

At this point, Plaintiffs could have asserted a cause of action under MPC Section 617 against the land owner, Joseph A. Tavianini, Jr., and land developer, JVI LLC because these parties have taken action and, therefore, the matter is ripe. See generally Smith v. Ivy Lee Real Estate, LLC, 165 A.3d 93 (holding a plaintiff may pursue a MPC Section 10610 claim against a private defendant). In Hanson v. Lower Federick Tw. Bd. of Sup'rs., the Commonwealth Court held that Section 617 of the MPC "provides for a more direct and orderly procedure than an action in mandamus..." Hanson, 667 A.2d 1221, 1223 (Commw. Ct. 1995).

On the contrary, ripeness is lacking against the Defendant at this time. See Subsection (e)(1) *infra*. The record is void of Plaintiffs giving notice to Defendants of their intent to file an action, pursuant to the procedure outlined in MPC Section 617. Based upon the foregoing, Plaintiffs should have chosen to pursue a claim against the land owner and land developer under 617 rather than the Defendant.

e. Pa.R.C.P. 1028(a)(4) Legal Insufficiency of a Pleading

Defendant's final preliminary objections are in the nature of a demurrer. Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. Pa.R.C.P. 1028(a)(4); see also Feingold v. Hendrzak, 15 A.3d

937, 941 (Pa. Super. 2011), citing Haun v. Community Health Systems, Inc., 14 A.3d 120, 123 (Pa. Super. 2011). A preliminary objection in the nature of a demurrer admits every well-pleaded fact and all inferences reasonably deducible therefrom. Creeger Brick & Bldg. Supply Inc. v. Mid-State Bank & Trust Co., 560 A.2d 151, 152 (Pa. Super. 1989). This type of preliminary objection is only proper when the law is clear that a plaintiff is not entitled to recovery based on the facts alleged in the complaint. Bargo v. Kuhns, 98 A.3d 686, 689 (Pa. Super. 2014) quoting Yocca v. Pittsburgh Steelers Sports, Inc., 854 A.2d 425, 436 (Pa. 2004). Thus, if any doubt exists as to whether a demurrer should be sustained, the preliminary objection should be overruled. Joyce v. Erie Ins. Exch., 74 A.3d 157, 162 (Pa. Super. 2013) citing Feingold, 15 A.3d at 941.

1. Project Tadmor

The Pennsylvania Supreme Court stated, "Mandamus is an extraordinary writ that will only lie to compel official performance of a ministerial act or mandatory duty where there is a clear legal right in the plaintiff, a corresponding duty in the defendant, and want of any other appropriate and adequate remedy." Kuren v. Luzerne Co., 146 A.3d 715, 750-51 (Pa. Sept. 28, 2016). The Pennsylvania Supreme Court explained:

> While this Court has said that mandamus will not lie to compel discretionary acts, this has usually been interpreted to mean that while a court may direct that discretion be exercised, it may not specify *how* that discretion is to be exercised nor require the performance of a particular discretionary act. The writ cannot be used to control the exercise of discretion or judgment by a public official or

> administrative or judicial tribunal; to review or compel the undoing of an action taken by such an official or tribunal in good faith and in the exercise of legitimate jurisdiction, even though the decision was wrong; to influence or coerce a particular determination of the issue involved; or to perform the function of an appeal or writ of error. We have indicated that the writ should not be granted in doubtful cases, and that it entails the application of equitable principles by the court asked to issue the writ.
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> In short, mandamus is chiefly employed to compel the performance (when refused) of a ministerial duty, or to compel action (when refused) in matters involving judgment and discretion. It is not used to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of an action already taken. Mandamus is a device that is available in our system to compel a tribunal or administrative agency to act when that tribunal or agency has been "sitting on its hands." It must not be turned into a general writ of error or writ of review lest we further encourage interlocutory and piecemeal appellate review, or multiple appeals with their attendant burdens and delays.

Penn. Dental Ass'n v. Com. Ins. Dept., 516 A.2d 647, 652 (Pa. Oct. 22, 1986)(internal citations omitted). Mandamus is used for enforcing existing rights rather than creating new ones. Pa. Dem. Party v. Pa. Dept. of State, 159 A.3d 72, 78 (Pa. Commonw. Ct. 2017).

Here, Plaintiffs request a writ of mandamus seeking an order to force Defendants to suspend consideration of Project Tadmor. The three prong test for granting a writ of mandamus begins with the question on whether the plaintiff has a legal right. The residents of Nazareth Township have a valid interest in the "safety, health and welfare" of their community. Compl. at ¶ 10.

The second prong poses whether the defendant has a duty to act. The Defendant is subject to the MPC, SALDO, and local zoning ordinances. The obstacle before the Plaintiffs is whether this issue is ripe. Mandamus would

be appropriate if the Defendants did not act. Defendants contend the plan for Project Tadmor "was submitted to the Upper Nazareth Township Planning Commission, subject to comment and review from them," which then received "exhaustive scrutiny by the Township." Def. Br. In Supp. Of Prelim. Obj. at p. 12. Here, Defendants are not "sitting on their hands," but rather, the details of Project Tadmor are before the Planning Commission and not before the Board of Supervisors yet. At oral argument, Defendant's counsel stated that the Defendants plan on acting before the end of this year. After Defendants take an action, such as issuing a permit, the Plaintiff's case would then become ripe to appeal Defendant's decisions to this Court.

2. Zoning Officer

Plaintiffs seek an investigation into the capabilities of the Zoning Officer. This is not our function. This Court, or any other court, cannot interfere with the discretionary actions of an administrative agency, absent egregious conduct, such as bad faith or fraud.[1] As discussed *supra*, the allegations that the Zoning Officer fails to fulfill his duty based on his activities outside of work is insufficient. While the argument that the Zoning

[1] Pet. of Acchione, 227 A.2d 816, 820 (Pa. 1967) (stating "[C]ourts will not review the actions of governmental bodies or administrative tribunals involving acts of discretion, in the absence of bad faith, fraud, capricious action or abuse of power; they will not inquire into the wisdom of such actions or into the details of the manner adopted to carry them into execution. It is true that the mere possession of discretionary power by an administrative body does not make it wholly immune from judicial review, but the scope of that review is limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or functions. That the court might have a different opinion or judgment in regard to the action of the agency is not a sufficient ground for interference; Judicial discretion may not be substituted for Administrative discretion.")

Officer has failed to act on the notice given to him at public meetings may be credible, it is not "bad faith."[2] In the case at bar, to command the Defendant to act based on the aforementioned allegations would disturb the balance of the *trias politica*, or separation of powers.

BY THE COURT:

/s/ Samuel P. Murray
SAMUEL P. MURRAY, J.

Dated: November 22, 2019

[2] Restatement (Second) of Contracts Section 205, cmt. D (1979) "A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.