

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard J. Jacobs, :
Appellant :
v. :
The Township of Lower Saucon, :
Timothy V. and Kori Lannon, :
Bob and Michelle Dabundo, :
David F. and Donna Lee : No. 1742 C.D. 2009
Applolloni : Submitted: March 15, 2010

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: August 18, 2010

Richard J. Jacobs (Jacobs) appeals the order of the Court of Common Pleas of Northampton County (trial court) which granted the application of Timothy V. Lannon (Lannon), Kori Lannon (Mrs. Lannon), Bob Dabundo, Michelle Dabundo, David F. Applolloni, and Donna Lee Applolloni (collectively, Intervenors) to intervene, sustained the preliminary objections of the Intervenors and the Township of Lower Saucon (Township), and dismissed Jacobs's complaint.

I. Background.

Jacobs and his wife owned the property at 1772 Arden Lane in the Township where they resided. The property is located at the corner of Arden Lane in the Arden Subdivision and Stover Road which is located in the adjacent Meadows Subdivision. In his original complaint filed November 12, 2008, Jacobs

alleged that the installation of a gate on the portion of Stover Road adjacent to his home was contrary to the recommendations of fire, medical and other first responders, that the placing of the gate would leave residents of the Arden Subdivision and other residents who live south of the gate with only one method of ingress and egress, and that the gate would pose a clear danger to the health, safety, and welfare of the public. Jacobs sought an injunction to prevent the Township from installing a gate in the center of Stover Road until Stover Road was completed, an injunction to prevent the Township from approving and or installing any further gates blocking public roads, an order directing the Township to conduct a car count of vehicles traversing Stover Road, and an order directing that an independent source conduct a traffic study.

II. Petition to Intervene.

On December 2, 2008, the Township preliminarily objected. On December 10, 2008, Lannon and Mrs. Lannon petitioned to intervene but withdrew the petition the same day. On January 23, 2009, the remainder of the neighbors petitioned to intervene.

The trial court conducted a hearing on the petition on January 23, 2009. Lannon testified that he resided at 1835 Viola Lane, Hellertown in Lower Saucon Township with his wife, Mrs. Lannon, and their three daughters. Notes of Testimony, January 23, 2009, (N.T.) at 3; Reproduced Record (R.R.) at 65a. Lannon explained the location of the gate: “There’s an access road three doors down from me to the development behind us, and a gate was put up to keep traffic from going through. It was blocked. When we brought [sic] the property, we were

told it would never be opened.” N.T. at 3; R.R. at 65a. Lannon testified that the other intervenors lived in close proximity to the gate. N.T. at 3; R.R. at 65a. Lannon was concerned about “an increase in traffic, the safety of the children, and having a quiet street mostly.” N.T. at 4; R.R. at 66a. Previously, the road had been opened for a short time and “traffic increased noticeably.” N.T. at 5; R.R. at 67a.

Jack Calahan, Township Manager, testified that when the Township approved the subdivision plan, one of the conditions was the installation of an emergency access gate on Stover Road. N.T. at 17; R.R. at 79a.

On January 23, 2009, the trial court granted the petition to intervene.

III. Amended Complaint.

On January 28, 2009, the Intervenor's preliminarily objected. On February 20, 2009, Jacobs preliminarily objected to the Intervenor's preliminary objections. After a conference on March 6, 2009, the trial court ordered that Jacobs file an amended complaint (Amended Complaint).

On April 6, 2009, Jacobs complied and alleged:

6. The Meadows Subdivision was granted final approval subject to certain conditions at a meeting of Lower Saucon Council on May 21, 2003, however, on the recorded plan of the Meadows Subdivision which was filed at the Recorder of Deeds for Northampton on October 26, 2005, at Vol. 2005-5, page 631 it states that the plan was approved by Lower Saucon Council on September 7, 2005.

7. Condition number 10 of the conditions upon which the Meadows Subdivision was approved at the vote by Lower Saucon Council on May 21, 2003, was the following:

‘The Developer shall enter into an Improvements Agreement with the Township and post improvements security to the satisfaction of the Township Solicitor. The Improvements Agreement shall contain a provision requiring the Developer to install a gate, acceptable to the Township across Stover Road adjacent to the Arden Subdivision, if notified to do so by the Township prior to the end of the Subdivision Maintenance Agreement.’

8. Appearing on the recorded plan of the Meadows is the following notation relative to a possible gate located on Stover Road at the point where the Meadows Subdivision and the Arden Subdivision meet.

‘The location and type of gate will be determined by the Lower Saucon Township Council if deemed necessary after Stover Road is constructed.’

9. The gate as set forth in paragraph number seven would prevent the free flow of traffic along Stover Road from the Arden Subdivision to the Meadows Subdivision and points north and east and visa [sic] versa.

10. Prior to the adoption of the Meadows Subdivision, Stover Road was always planned as an open, unobstructed roadway along its entire length in the identical location as it [sic] laid out at the present, appearing on an approved subdivision called the Wagner Farm.

.....

13. On July 16, 2008, The Lower Saucon Township Council voted to require a gate be placed in the center of Stover Road, thus preventing the free flow of traffic along its entire length and shortly thereafter, the Developer, Toll Brothers, installed a gate in the center of Stover Road which blocked all public traffic at the point of the gate.

14. The placing of the gate in the center of Stover road will prevent police, fire and other first responders, including medical personal [sic], from responding to emergencies in a timely fashion if they are required to use Stover Road.

15. The placing of the gate in the center of Stover Road was contrary to the specific recommendations and desires of fire, medical and other first responders of emergencies that may be required to travel along Stover Road to access the Arden Subdivision and the residents who live to the south and west of the gate. The Defendant [Township] was warned of possible adverse consequences to the public if the Stover Road was blocked by such a gate in a letter dated February 1, 2000.

Amended Complaint, April 6, 2009, Paragraph Nos. 6-10, 13-15 at 2-4; R.R. at 13a-15a.

The Amended Complaint contained four causes of action: 1) the placement of the gate will cause motor vehicles to trespass on his land when they are forced to turn around because of the gate and will force drivers to stop at his door to ask for a method to open the gate; 2) the installation of the gate constituted an unreasonable interference with the right of the public to use a public right of way and/or a public street; 3) the installation of the gate was contrary to the laws of the United States and Pennsylvania because the gate should not be placed at the center point of Stover Road, the gate was in violation of the Americans with Disabilities Act of 1990, the installation was in violation of Section 6109(b) of the Vehicle Code, 75 Pa.C.S. §6109(b) and other alleged violations of the Vehicle Code as well as Pennsylvania Department of Transportation regulations; and 4) because people traveled the entire length of Stover Road with motor vehicles

unobstructed for a year before the installation of the gate there was a vested public easement.

Jacobs sought an injunction to prevent the Township from continuing or causing the continuance of an alleged private and public nuisance and asked the trial court to direct the Township to comply with the laws of the Commonwealth and the United States and, if the Township did not comply, to order removal of the gate. Jacobs also sought a declaration that Stover Road was a public street with the public having a free right of passage.

IV. Preliminary Objections of Intervenors.

On April 23, 2009, the Intervenors preliminarily objected and alleged that Jacobs was barred from challenging the implementation of a condition of the Plan approval (the installation of the gate) because the right to challenge the condition was waived by the original property owner when there was no appeal within thirty days after the plan was approved on May 21, 2003. Further, there was a notation on the Plan recorded at the Recorder of Deeds of Northampton County on October 26, 2005, which stated that the Plan was approved by the Township Council on September 7, 2005. Again, there was no challenge or appeal. The Intervenors also alleged that Jacobs did not have capacity to sue the Township pursuant to Pa.R.C.P. No. 1028(a)(5).¹ The Intervenors further asserted that Jacobs failed to exercise or exhaust a statutory remedy pursuant to Pa.R.C.P.

¹ Pa.R.C.P. No. 1028(a)(5) provides: “Preliminary objections may be filed by any party to any pleading and are limited to the following grounds: (5) lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.

No. 1028(a)(7).² The Intervenors further objected on the basis that the allegations in the Amended Complaint did not set forth the elements of a private nuisance. The Intervenors also challenged Jacobs’s standing to require the Township to take any action with respect to the gate and to enforce Pennsylvania Department of Transportation regulations. The Intervenors also asserted that Jacobs’s request for relief was moot because the gate had already been installed. Finally, the Intervenors maintain that the Plan Approval indicated that the original owner accepted the installation and Jacobs has no greater rights than his predecessor in ownership.

V. The Township’s Preliminary Objections.

On April 27, 2009, the Township preliminarily objected on the basis that Jacobs failed to exercise or exhaust statutory remedies because there was no appeal of the Plan Approval as required under Section 1002-A(a) of the Pennsylvania Municipalities Planning Code (MPC).³ The Township also preliminarily objected on the basis that Jacobs failed to allege entitlement to any relief with required legal specificity and due to his failure to state a claim upon which relief may be granted in Counts One and Two of the Amended Complaint. Further, the Township asserted that Jacobs failed to allege a claim upon which any relief may be granted in Count Three because the gate was not a traffic calming device pursuant to Department of Transportation regulations and the portion of

² Pa.R.C.P. No. 1028(a)(7) provides, “(a) preliminary objections may be filed by any party to any pleading and are limited to the following grounds: . . . (7) failure to exercise or exhaust an administrative remedy.”

³ Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §11002-A(a). This Section was added by the Act of December 21, 1988, P.L. 1329.

Stover Road at issue was not dedicated to the Township, but was still owned by the developer. Also, the Township asserted that Jacobs had no right to relief because he did not allege that the original property owner appealed the grant of Plan approval that noted the condition of the installation of the gate.

VI. Trial Court Decision.

The trial court sustained the preliminary objections of both the Intervenor and the Township pursuant to Pa.R.C.P. No. 1028(a)(7) on the basis that Jacobs failed to exhaust available statutory remedies because there was no timely appeal of the condition of the installation of the gate under the MPC and dismissed the Amended Complaint:

Upon consideration of Plaintiff's [Jacobs] argument, the Court finds that the averments of Plaintiff's [Jacobs] Amended Complaint make it clear that the gate of which he complains was placed in conjunction with the enforcement of a condition on an approved subdivision plan, and therefore it is clearly a land use matter, subject to the requirements of the Municipalities Planning Code. On the basis of that finding the Court notes that under Section 11002-A of the Code, Plaintiff [Jacobs] had thirty (30) days from the date of the Board's decision regarding the gate to institute an appeal with this Court.

The Meadows Subdivision plan was approved in 2003, and recorded in 2005. The gate provision was enforced on July 16, 2008 and the instant case commenced nearly four (4) months from the date, on November 13, 2008 with the filing of the Complaint. In light of these facts as set forth in the Amended Complaint, the Court hereby grants the preliminary objections of Defendant [Township] and Intervenor with respect to Plaintiff's [Jacobs] failure to exhaust available statutory remedies pursuant to Pa.R.Civ.P. 1028. . .(a)(7).

Trial Court Opinion, August 19, 2009, at 5; R.R. at 121a.

VII. Jacobs's Appeal.

On appeal to this Court, Jacobs raises the following issues:

1. Have the interveners [sic] demonstrated they have a legally enforceable interest which would permit them to intervene in this case?
2. Do the interveners [sic] present a claim in this case that 'is not in subordination to and in recognition of the propriety' of plaintiff's [Jacobs] claim?
3. Are the interests of the interveners [sic] already adequately represented by the defendant [Township]?
4. Has the plaintiff [Jacobs] stated a cause of action under any of the four causes of action stated in his amended complaint (failure to comply with statutory and regulatory law, private nuisance, public nuisance, and prescriptive easement), or any other theory, sufficient to deny the granting of a demurrer?

Jacobs's Brief at 4.⁴

Jacobs contends that the Amended Complaint stated a cause of action sufficient to survive the demurrer.⁵

Section 1002-A(a) of the MPC, 53 P.S. §11002-A(a), provides:

⁴ With respect to the preliminary objections, this Court's review is to determine whether on the facts alleged the law states with certainty that no recovery is possible. Hawks by Hawks v. Livermore, 629 A.2d 270, 271 n.3 (Pa. Cmwlth. 1993). This Court must accept as true all well pled allegations and material facts averred in the complaint as well as inferences reasonably deducible therefrom and any doubt should be resolved in favor of overruling the demurrer. Id.

⁵ This Court has foregone the sequence of Jacobs's arguments.

All appeals from all land use decisions rendered pursuant to Article IX shall be taken to the court of common pleas of the judicial district wherein the land is located and shall be filed within 30 days after entry of the decision as provided in 42 Pa.C.S. §5572 (relating to time of entry of order) or, in the case of a deemed decision, within 30 days after the date upon which notice of said deemed decision is given as set forth in section 908(9) of this act. It is the express intent of the General Assembly that, except in cases in which an unconstitutional deprivation of due process would result from its application, the 30-day limitation in this section should be applied in all appeals from decisions.

In Luke v. Cataldo, 830 A.2d 655 (Pa. Cmwlth. 2003), McVile Mining Company and Buffalo Valley, Ltd. filed applications for conditional use permits to conduct coal mining in South Buffalo Township. The South Buffalo Township Planning Commission (Commission) held a public hearing and issued a written recommendation that the applications be approved. The South Buffalo Township Supervisors (Supervisors) approved the applications. Mining began in December 2000. On June 7, 2001, John R. Luke and other landowners (Luke) petitioned to review the Supervisors' grant of the conditional use permits in this Court's original jurisdiction. This Court granted the preliminary objections of the Supervisors because the matter was not properly within this Court's original jurisdiction. In October 2001, Luke filed a complaint in mandamus in the Court of Common Pleas of Armstrong County and alleged that the Commission did not have a quorum to conduct business and did not have authority to approve the applications for the conditional use permits. Luke also alleged that the Supervisors neither gave notice of their intention to act on the applications nor did they hold a public hearing, that the mining companies did not obtain required occupancy permits, conducted mining operations that were not permitted under the Zoning

Ordinance of South Buffalo Township (Ordinance), and that the residents of South Buffalo Township did not have the opportunity to express their positions as required by the Ordinance. Luke, 830 A.2d at 657.

On November 25, 2001, the Supervisors preliminarily objected on the basis that the mandamus action was a land use appeal subject to the provisions of the MPC. Therefore, the Supervisors argued, the complaint was untimely because it was not filed within thirty days after the approval of the conditional use permits. The Court of Common Pleas of Armstrong County dismissed the complaint. Luke, 830 A.2d at 657.

Luke appealed to this Court which affirmed:

Appellants [Luke] did not avail themselves of their statutory remedy. The Supervisors granted a conditional use permit on June 12, 2000. . . but Appellants [Luke] did not file a petition for review with this Court until June 7, 2001, eleven months later. After the dismissal of the petition, Appellants [Luke] then filed the instant complaint in mandamus on October 16, 2001, sixteen months after the Supervisors' decision.

One who allows his statutory appeal rights to expire cannot at a later date successfully assert those appeal rights under the guise of a petition for writ of mandamus. . . . Because Section 1001-A of the MPC provides a remedy for Appellants [Luke] to contest the Supervisors' decision and Appellants did not avail themselves of that remedy by filing a timely appeal, we must conclude that the trial court correctly sustained the Supervisors' preliminary objections. (Footnote and citation omitted).

Luke, 830 A.2d 659.⁶

Here, as in Luke, Jacobs's predecessor in ownership failed to appeal the Township decision within thirty days as required under the MPC. Even if one takes the date which Jacobs alleged the Recorded Plan was approved, September 7, 2005, as the date when the appeal period commenced, Jacobs did not appeal in a timely manner. The trial court did not err.

Jacobs, however, argues that this matter is not a land use issue but instead deals with a new area of law, that of traffic calming devices.⁷ With respect to this argument, Jacobs asserts that the Township failed to comply with the Department of Transportation's *Pennsylvania's Traffic Calming Handbook* (Department Publication 383).

The Department of Transportation defines "traffic calming" as "The combination of primarily physical measures taken to reduce the negative effects of motor vehicle use, alter driver behavior and improve conditions for nonmotorized

⁶ In Luke, our Pennsylvania Supreme Court reversed on the basis that the Supervisors' decision was void *ab initio* because it was made in violation of statutory procedural requirements and that an appeal could be brought outside the thirty day limit. Luke v. Cataldi, 593 Pa. 461, 932 A.2d 45 (2007). Here, there were no procedural irregularities alleged, so the thirty day time limit remained in effect.

⁷ Section 212.9(a) of the Pennsylvania Department of Transportation's regulations, 67 Pa. Code §212.9(a), provides: "*General Policy*. The Department on State-designated highways, and local authorities on any highway within their boundaries, may implement traffic calming measures in conformance with *Pennsylvania's Traffic Calming Handbook* (Department Publication 383)."

street users. The primary objectives of traffic calming measures are to reduce the volume of cut-through traffic on neighborhood streets.” 67 Pa.Code §212.1.

From the definition it does not appear that the gate constituted a traffic calming device. The definition brings to mind a speed bump which forces motorists to slow down when traveling and not a gate which restricts the entrance of all traffic. Further, even assuming that this gate constituted a traffic calming device, Jacobs failed to allege how he has standing to assert that the Township failed to comply with the regulations of the Department of Transportation. He did not allege that a private cause of action was set forth in any statute or regulation. Even if Jacobs overcame the failure to appeal the condition of the subdivision plan, he failed to state a valid cause of action. So, in any event, the preliminary objections could have been sustained pursuant to Pa.R.C.P. No. 1028(a)(4).⁸

Jacobs next alleges the trial court erred because the installation of the gate created a public nuisance.

In Muehlieb v. City of Philadelphia, 574 A.2d 1208 (Pa. Cmwlth. 1990), this Court adopted the following provision of the Restatement (Second) of Torts §821B (1977) as representing an accurate statement of the law.

(1) A public nuisance is an unreasonable interference with a right common to the general public.

⁸ Pa.R.C.P. No. 1028(a)(4) provides, “(a) Preliminary objections may be filed by any party to any pleading and are limited to the following grounds: . . . (4) Legal insufficiency of a pleading (demurrer).”

(2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:

(a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

(c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

So, the conduct must be an offense that annoys the community in general and not merely a particular person in order to constitute a public nuisance. Feeley v. Borough of Ridley Park, 551 A.2d 373 (Pa. Cmwlth. 1988).

Jacobs's allegations, if believed, did not establish the elements of a public nuisance. He did not allege any significant interference with the public health or public safety. Rather, he alleged that such interference may take place. He does not allege that the conduct of the installation of the gate was proscribed by a statute, ordinance, or administrative regulation. Further, while he alleged that the conduct would be of a continuing nature, the harm he complained of was purely speculative. Once again, Jacobs failed to state a valid cause of action.

Finally, Jacobs contends in Count Four that he and others have acquired a public and private easement over Stover Road because it was used for a

period in excess of one year. Jacobs alleged that the developer offered to dedicate Stover Road as a public street and that the offer was accepted by public use. Jacobs has conceded there has been no formal acceptance by the Township. In order for a dedication to take place, a municipality must accept the offer of the road to the municipality. A municipality indicates its acceptance generally through the adoption of an ordinance or the passage of a resolution. Lillo v. Moore, 704 A.2d 149 (Pa. Super. 1997), *petition for allowance of appeal denied*, 555 Pa. 713, 724 A.2d 349 (1998). Further, in order for a dedicated “paper street” to become a public thoroughfare, there either must be an opening of the street by the municipality or substantial public use of it. Lillo. Here, there has been no acceptance by the Township. Jacobs’s only argument is that the use by the public over the previous year was sufficient to establish that Stover Road is a public street.

Even if that were so, Count Four of the Complaint would still fail. The Township preliminarily objected to this count on the basis that Jacobs failed to allege entitlement to any relief with the required legal specificity under Pa. R.C.P. No. 1028(a)(3).⁹ Jacobs essentially seeks an injunction barring the installation of the gate. To obtain an injunction the plaintiff must establish a clear right to relief, that there is an urgent necessity to avoid injury which may not be compensated by damages, and that greater injury will result from refusing rather than granting the relief requested. Big Bass Lake Community Association v. Warren, 950 A.2d

⁹ Pa. R.C.P. No. 1028(a)(3) provides, “(a) Preliminary objections may be filed by any party to any pleading and are limited to the following grounds: . . . (3) insufficient specificity in a pleading.”

1137 (Pa. Cmwlth. 2008). Here, Jacobs did not allege any of these elements. The trial court could have sustained the Township's preliminary objection to Count Four, even if had not granted the preliminary objection for failure to exhaust available remedies.

The trial court did not err when it sustained the preliminary objections.¹⁰

Accordingly, this Court affirms.

BERNARD L. MCGINLEY, Judge

¹⁰ Jacobs also contends that the trial court erred when it granted the Intervenors' petition to intervene. However, because the Township preliminarily objected on the same basis as the Intervenors and this Court has determined that the trial court correctly sustained the preliminary objections, even if the trial court erred when it granted the petition to intervene, the end result would be no different. Therefore, this Court need not address Jacobs's arguments with respect to the grant of the petition to intervene.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard J. Jacobs,	:
Appellant	:
	:
v.	:
	:
The Township of Lower Saucon,	:
Timothy V. and Kori Lannon,	:
Bob and Michelle Dabundo,	:
David F. and Donna Lee	: No. 1742 C.D. 2009
Applolloni	:

ORDER

AND NOW, this 18th day of August, 2010, the order of the Court of Common Pleas of Northampton County in the above-captioned matter is affirmed.

BERNARD L. MCGINLEY, Judge