

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Lee Son Yom and Michele M. Yom, :
Appellants :
 :
v. : No. 413 C.D. 2010
 : SUBMITTED: October 22, 2010
Schuylkill Valley Sewer Authority, :
Suzanne Apanavage, James Wallbillich, :
and Michael Marinchak :

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: January 28, 2011

Lee Son Yom and Michele M. Yom, husband and wife, appeal *pro se* from the order of the Court of Common Pleas of Schuylkill County that sustained preliminary objections and dismissed, with prejudice, their amended complaint against Appellees, the Schuylkill Valley Sewer Authority (Authority); the Authority's employee, Suzanne Apanavage; the Authority's solicitor, James Wallbillich, Esquire; and State Trooper, Michael Marinchak. In the amended complaint, the Yoms sought compensatory and punitive damages against Appellees for tortious interference with contracts and violation of constitutional rights. The Yoms argue that the trial court abused its discretion in failing to rule on their motion for leave to file another amended complaint, which was filed after the court's dismissal of the amended complaint and before their appeal from the dismissal to this Court.

The Yoms owned a residential property containing six apartment units located at 50-52 Water Street (Water Street property) in the Borough of New Philadelphia, Schuylkill County. The property was the subject of the Authority's 2007 action against the Yoms, in which the Authority sought to compel the Yoms to connect their property to the public sewer system owned and operated by the Authority. The Authority also sought to collect unpaid sewer charges. In April 2008, the trial court granted the Authority's motion for summary judgment and ordered the Yoms to make a written sewer connection application, permitted the Authority to make the sewer connection at the Yoms' costs upon their failure to do so, and awarded the Authority \$11,358.60 for unpaid sewer charges. The Yoms did not appeal the court's order.

The Authority thereafter filed praecipes for entry of judgment and for writ of execution and scheduled a sheriff sale. The Yoms then filed a *pro se* "petition to strike and/or open judgment and counterclaim," which was denied by the trial court on April 16, 2009. At the sheriff sale held on April 24, 2009, the Authority purchased the Yoms' property for \$895, the amount of its costs, as the sole bidder. A sheriff's deed conveying the title to the property to the Authority was recorded in the Recorder of Deeds Office.¹ By a memorandum opinion and order filed at 781 C.D. 2009 on December 18, 2009, this Court affirmed the trial court's April 16, 2009 order denying the petition to strike and/or open the summary judgment and counterclaim.

On July 16, 2009, the Yoms commenced an action to compel the Authority to file an ejectment action. The Authority filed preliminary objections

¹ The Yoms subsequently filed a motion to set aside the sheriff's sale, which is still pending before the trial court.

alleging pendency of the prior action, in which the Yoms challenged the summary judgment entered against them and the subsequent sheriff's sale. Pursuant to Pa. R.C.P. No. 1028(c)(1), the Yoms filed an "amendment" complaint as of course, adding Apanavage, Wallbillich and Marinchak as defendants. The Yoms claimed tortious interference with contracts (Count I) and violation of constitutional rights (Count II) and sought punitive damages (Count III) against all defendants.

The Yoms alleged that the Authority told the tenants on the Water Street property that the Authority was a new landlord and that the Authority's solicitor, Wallbillich, demanded the tenants to provide a copy of their lease, asked them to pay rent to the Authority and cooperate with the Authority in changing locks and inspecting the property, and threatened them with eviction upon their failure to cooperate. The Yoms further alleged that Wallbillich and the Authority's employee, Apanavage, made malicious and false statements to the tenants that the Yoms were bankrupt and no longer their landlord and could not reclaim the ownership of the property. The Yoms averred against Trooper Marinchak that he failed to give them a Miranda warning during his investigation of criminal complaints filed by Wallbillich, who accused them of theft by deception and criminal trespass. The Yoms claimed that Appellees' actions damaged their reputation and business and that Appellees violated their constitutional due process rights and rights to be secure from unreasonable search and seizure.

Appellees filed preliminary objections in the nature of a demurrer. They alleged that the Yoms failed to state valid causes of action for Counts I and II, that Count III should be stricken because punitive damages are an element of damages, not a separate cause of action, and that the action was barred by governmental and sovereign immunity. By order entered on January 15, 2010, the

trial court sustained the preliminary objections and dismissed the amended complaint with prejudice. The court concluded that the Yoms failed to set forth legally sufficient causes of action and that Appellees were protected from the action by governmental and sovereign immunity. On February 4, 2010, the Yoms filed a "motion for leave to amend complaint" to claim slander (Count I), violation of constitutional rights (Count II) and punitive damages (Count III) and to add three state troopers as defendants. On February 16, the Yoms served a notice of appeal from the January 15 order upon the trial court. The Superior Court, which received the notice of appeal on February 18, transferred the appeal to this Court.²

On appeal, the Yoms do not challenge the trial court's conclusions that they failed to state valid causes of action in the amended complaint and that their action was barred by governmental and sovereign immunity. They argue only that the trial court abused its discretion by failing to rule on the motion for leave to file another amended complaint "after dismissing [their] 'amendment complaint' with prejudice." The Yoms' Brief at 7. They ask the Court to remand this matter to the trial court to consider the motion. The Authority, Apanavage and Wallbillich argue, *inter alia*, that the appeal should be dismissed because the Yoms have failed to raise any issues related to the January 15, 2010 order. They maintain that the trial court properly dismissed the amended complaint with prejudice because allowing further amendment would have been futile.³

² The Authority and Apanavage filed an application to quash the appeal, alleging that the appeal was not timely filed within the thirty-day appeal period. By order dated August 5, 2010, this Court denied the application.

³ The Yoms owned another property located at 12-18 Wiggan Street in the Borough of New Philadelphia, Schuylkill County (Wiggan Street property). On July 16, 2009, the Yoms filed a separate ejectment action against the Authority to quiet the title to the Wiggan Street property. After the Authority filed preliminary objections, the Yoms amended the complaint, setting forth **(Footnote continued on next page...)**

In a concise statement of the matters complained of on appeal filed pursuant to Pa. R.A.P. 1925(b), the Yoms raised only one issue: "Assuming Plaintiffs' pending Motion for Leave to Amend Complaint[] is denied[,] **[w]hether the trial court erred as a matter of law and abused it's [sic] discretion by not allowing Plaintiffs to amend their complaint as presented in their February 4, 2010 Motion for Leave to Amend Complaint.**" Certified Record (C.R.), Item No. 26 (emphasis in original). In a subsequent opinion filed pursuant to Rule 1925(a), the trial court noted that the Yoms filed the appeal only to challenge "an order which has yet to be issued" and failed "to assert any reason whatsoever for appealing" the January 15, 2010 order. Trial Court's March 15, 2010 Opinion at 5; C.R., Item No. 28.

Rule 1925(b) is an integral part of our appellate practice. *Tucker v. R.M. Tours*, 602 Pa. 147, 977 A.2d 1170 (2009). Rule 1925(b)(4)(ii) requires appellants to "concisely identify each ruling or error that the appellant intends to challenge with sufficient detail to identify all pertinent issues for the judge." The purpose of Rule 1925(b) is to aid the trial judge in identifying and focusing on those issues that the parties plan to raise on appeal and also to enable appellate courts to engage in meaningful and effective appellate review. *Commonwealth v. Johnson*, 565 Pa. 51, 771 A.2d 751 (2001). Further, "[i]ssue preservation is foundational to proper appellate review." *In the Interest of F.C. III*, ___ Pa. ___, ___, 2 A.3d 1201, 1211 (2010). Consequently, issues not timely raised in the Rule

(continued...)

the same causes of action against the same parties. The trial court sustained Appellees' preliminary objections and dismissed the amended complaint, and the Yoms appealed the dismissal, which is docketed at 414 C.D. 2010. Because the appeal filed in that action and the instant appeal involve the same parties, factual allegations, procedural history and issues, our discussion in this opinion also applies to the appeal involving the Wiggan Street property.

1925(b) statement are waived. Rule 1925(b)(4)(vii); *Tucker*. In the Rule 1925(b) statement, the Yoms did not raise any issue to challenge the trial court's January 15, 2010 order sustaining the preliminary objections and dismissing the amended complaint. Nor do they raise such issue in their brief filed on appeal. Hence, they waived their challenge to the January 15, 2010 order.

Even assuming that the Yoms' argument can be somehow construed as challenging the trial court's decision dismissing the amended complaint without allowing them to amend the amended complaint, such challenge must fail.

An amendment of pleadings must be liberally permitted to allow full development of a party's theories and averments. *Weaver v. Franklin County*, 918 A.2d 194 (Pa. Cmwlth. 2007).⁴ An amendment is properly refused, however, where permitting it would be futile. *Id.* Whether to allow an amendment is within discretion of the trial court. *Burger v. Borough of Ingram*, 697 A.2d 1037 (Pa. Cmwlth. 1997). In the proposed second amended complaint, the Yoms set forth virtually identical facts as those contained in the first amended complaint. The Yoms concede that the proposed amendment "contained essentially the same causes of action but added only additional parties." The Yoms' Brief at 8. The Yoms' claims against the three additional troopers, however, are not based on any new events that occurred after the dismissal of the first amended complaint.

⁴ Pa. R.C.P. No. 1033 provides:

A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, correct the name of a party or amend his pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted.

Hence, allowing further amendment would have been futile to cure the amended complaint. The trial court did not abuse its discretion in dismissing the amended complaint with prejudice.⁵

Accordingly, we affirm the trial court's January 15, 2010 order.

BONNIE BRIGANCE LEADBETTER,
President Judge

⁵ We note further that once the Yoms appealed the January 15, 2010 order to this Court, the trial court lacked jurisdiction to consider the motion for leave to amend the amended complaint. *See* Pa. R.A.P. 1701(a) (providing that "after an appeal is taken ..., the trial court ... may no longer proceed further in the matter," except for certain matters inapplicable to this matter); *In re F.C., III*, ___ Pa. at ___ n.7, 2 A.3d at 1212 n.7 (noting that the court lacked jurisdiction to act on a motion filed contemporaneously with the filing of the notice of appeal). Moreover, once the order of dismissal has been finally affirmed on appeal, the post-dismissal motion to amend is moot.

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ORDER

AND NOW, this 28th day of January 2011, the order of the Court of Common Pleas of Schuylkill County in the above-captioned matter is AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge