

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Keith Dougherty, :
Appellant :
v. :
North Hopewell Township : No. 94 C.D. 2010
Submitted: July 2, 2010

OPINION NOT REPORTED

MEMORANDUM OPINION
PER CURIAM

FILED: August 5, 2010

Keith Dougherty (Dougherty), *pro se*, appeals the order of the Court of Common Pleas of York County (common pleas court) that sustained the preliminary objections of North Hopewell Township and the North Hopewell Township Board of Supervisors (collectively, the Township) and dismissed Dougherty's January 2, 2009, complaint in mandamus with prejudice.

I. Initial Complaint.

Initially, Dougherty petitioned for a writ of mandamus in this Court, No. 553 M.D. 2007, on November 19, 2007. Dougherty alleged the following:

1. On or about 8/17/2006 Kenneth Brady (beneficial owner of property in question, president of related corporation, and subcontractor for Docson Consulting LLC) properly applied for a building permit in accord with PA UCC Act 45 as amended (hereafter 'Act').
2. In violation of the administrative requirements of the Act no determination with regard to the permit was accomplished until 10/14/2006. . . .
3. On or about 4/15/2007 in violation of the Act a verbal stop work order was issued.

4. When questioned as to the reasoning for the stop Jonathan Snyder declared 'work was being done not authorized by the original permit'.

....

6. A determination was made that all work was properly authorized however the Zoning Enforcement Officer was unfamiliar and suspicious of the new engineered lumber being utilized.

....

8. A request to return to work on the project was denied.

....

12. A personal visit to the Zoning Enforcement Office was made by Keith Dougherty whereby he was informed no further inspections would be completed until a septic system permit had been obtained in violation of the Act as Inspections are specifically referred to in the allotted time mandates. . . .

13. In no fewer than four (4) subsequent phone conversations arrangements were made with the Zoning Enforcement Officer whereby the Officer scheduled inspections on either a specific day or made an assurance to have the inspection completed by the end of the week in question ultimately not showing up and not providing any explanation.

14. At a meeting of the Board of Supervisors 11/05/2007 Jonathan Snyder falsely represented to the board that his actions were in compliance with the Act and proceeded to perjure himself in utilizing as an excuse for the subsequent refusal to perform the required and requested inspections that he was not aware that the original plan application called for the expansion of the existing 3 bedroom home to a 4 bedroom home. Beginning as a 1250 square ft home 3 bedroom with a clear proposal to expand to 2000 sq ft of finished living space and 750 sq ft of unfinished living space.

15. At the conclusion of the proceedings Jonathan Snyder declared and it was seeming [sic] confirmed by at least one of the board members as well as the attorney present the 'old building code has been superseded by the Pennsylvania Uniform Construction Code and the permit

issued on 10/14/2006 for the 12534 Mt. Olivet Rd project had expired' in accordance with the terms of the Act that specifically prohibits duplication of effort and fees. . . . And then it was declared Keith Dougherty never had a permit while 'Ken Brady is no longer in the picture'. . . the inference being Keith Dougherty lacks standing. There exists and is on file a properly executed POA [Power of Attorney] whereby Jean Brady has named Ken Brady and Keith Dougherty to act on her behalf. Jean Brady suffered a heart attack on 2/12/2007 and her doctor has deemed these proceedings too stressful for her to be directly involved. (Citations omitted).

Petition for a Writ of Mandamus, November 16, 2007, Paragraph Nos. 1-4, 6, 8, and 12-15 at 2-5. Dougherty sought a writ of mandamus to direct Jonathan Snyder (Snyder), the building code official, to declare that Dougherty's building permit was still valid.

This Court determined that it did not have jurisdiction and transferred the controversy to the common pleas court. Snyder received a copy of the petition, but the sheriff never served him. Dougherty then sent a ten day notice to Snyder pursuant to Pa.R.C.P. No. 237.1(a)(2). Snyder preliminarily objected. The common pleas court sustained the preliminary objection because of lack of required service. Dougherty appealed to this Court but withdrew his appeal on the same date that the common pleas court issued an opinion.

II. Amended Complaint.

On May 14, 2008, Dougherty filed an amended complaint against Snyder and added the Board of Supervisors of North Hopewell Township (Board) as a party and alleged:

. . . .

3. On or about April 2004 North Hopewell Township “opted in” as it relates to PA UCC Act 45 PA Uniform Construction Code (hereafter “Act”).

....

4. Sometime thereafter the board properly hired Jonathan Snyder to act as the entity charged with the enforcement of the technical provisions of the ACT.

5. The board thereafter adopted a hands off approach in violation of the ACT as it pertains to the obligations of the administerial [sic] duties “To assure officials charged with administration and enforcement of the technical provisions of this ACT are adequately trained and supervised.”

....

10. Further it was announced there was no longer a valid permit as it had expired (under the old building code permits had a stated duration of 12 months unless a written request was submitted prior to the expiration and petitioner had provided a written request which was ignored as not being from the home owner).

11. Upon review of the ACT it was revealed permits are required to last 5 years and therefore Snyder’s actions were in violation of the Act identified as preempting the old building code.

12. On or about 11/19/2007 a petition for writ of mandamus was entered in the commonwealth court and hand delivered to Snyder and the Township Secretary.

....

17. The matter has since been transferred to York County Common Pleas and preliminary objections (based on a lack of return of service was granted in violation of rule 405 which is unnecessary if original process is accepted).

18. Appeal of the order in question (without prejudice against re-filing) is pending in the Commonwealth Court. (emphasis added).

....

22. To petitioner’s [Dougherty’s] dismay the investigators informed “if Snyder is decertified they lack authority to force the Township to validate the permit and

requested inspections whereby petitioner [Dougherty] would be required to start the process yet again.

.....

23. . . . Mandamus complaints are required to stand on their owns [sic] as they are eligible for immediate determination upon submittal under Peremptory Judgment. If the Board had required the terms of the law complied with none of the actions from 11/03/07 to this point would have been required. It is clear Permits under the ACT are required to last 5 years unless abandoned for 180 days (which has never occurred)

Amended Complaint in Mandamus, May 14, 2008, Paragraphs 3-5, 10-12, 17-18, and 22-23 at 2-6.

The Board and Snyder each preliminarily objected to the amended complaint in mandamus.

On July 7, 2008, the common pleas court sustained Snyder's and the Board's preliminary objections and dismissed Dougherty's amended complaint in mandamus. Dougherty appealed to this Court. This Court affirmed. Dougherty v. Snyder, (Pa. Cmwlth. No. 1450 C.D. 2008, Filed March 6, 2009).¹

¹ This Court has heard two other appeals by Dougherty relating to the same set of facts. On July 24, 2008, Dougherty also filed a complaint in mandamus against the Township and alleged that the Township's issuance of the Stop Work Order and failure to perform inspections constituted an illegal taking. Dougherty alleged he was entitled to damages of \$405,000. The Township preliminarily objected in the nature of a demurrer. The common pleas court sustained the preliminary objection and dismissed the complaint. The common pleas court subsequently directed the prothonotary to enter judgment in favor of the Township, against Dougherty, and to mark the case "dismissed" after Dougherty filed neither an amended complaint nor an appeal in a timely manner. Dougherty then appealed to this Court which affirmed. Dougherty v. North Hopewell Township, No. 629 C.D. 2009, filed December 18, 2009.

(Footnote continued on next page...)

III. January 2, 2009, Complaint.

On January 2, 2009, Dougherty filed another complaint in mandamus pursuant to Pa. R.C.P. No. 1095² against the Township. In Count I of the complaint he sought peremptory judgment against the Township and the new building code officer and sought a determination that the building permit issued on October 14, 2006, was still valid, with 177 days remaining, that all necessary inspections be conducted at the Township's expense, that the Stop Work Order was invalid as to content and jurisdiction and shall be immediately rescinded, and that all fines associated with the invalidated Stop Work Order be returned. In Count II, Dougherty sought damages in the amount of \$171,790.30 to date with an increase of a minimum of \$3,000 per month. In Count III of the complaint, Dougherty sought "lost opportunity damages" in the amount of \$100,000.³

On January 26, 2009, the Township preliminarily objected in the nature of a motion to dismiss pursuant to res judicata and collateral estoppel and asserted:

(continued...)

On March 26, 2009, Dougherty filed a complaint in mandamus in the common pleas court and sought reinstatement of the initial complaint. This new complaint was filed at the original docket number in the common pleas court and also listed this Court's docket number, No. 1450 C.D. 2008, where this Court had affirmed the dismissal of Dougherty's amended complaint. On April 8, 2009, Snyder preliminarily objected. By order dated May 22, 2009, the common pleas court sustained the preliminary objection and dismissed the complaint and directed that the case be marked "Discontinued." Dougherty then appealed to this Court which affirmed. Dougherty v. Snyder, 1200 C.D. 2009, filed January 29, 2010.

² Pa. R.C.P. No. 1095 states the procedural requirements for a complaint in mandamus.

³ This complaint contains ninety-four paragraphs and twenty-seven pages, not counting exhibits.

12. Plaintiff [Dougherty] previously filed an Amended Complaint in Mandamus which raised the identical issues raised in the present matter.

13. Plaintiff [Dougherty] is barred by collateral estoppel from re-litigating issues addressed in the dismissal of the Amended Complaint. . . .

14. Plaintiff [Dougherty] is barred by res judicata from attempting to litigate matters previously decided including any matters that should have been litigated in the prior action. . . . (Citations omitted).

Preliminary Objections of Township, January 26, 2009, Paragraph Nos. 12-14 at 3.

The Township also preliminarily objected on the basis that Dougherty lacked standing and demurred because the complaint was legally insufficient.

On December 22, 2009, the common pleas court sustained the Township's preliminary objection on the basis of res judicata and dismissed the complaint in mandamus with prejudice. The common pleas court reasoned:

Res judicata could not apply more cleanly to a case than this one. First, a final judgment on the merits was reached regarding the 2008 Amended Complaint. This Court sustained all the Preliminary Objections raised against the 2008 Amended Complaint – including a demurrer as to legal sufficiency—and dismissed it on July 7, 2008. On March 9, 2009, the Commonwealth Court rejected Plaintiff's [Dougherty] appeal when it affirmed this Court's July 7, 2008 Orders dismissing the 2008 Amended Complaint. Plaintiff [Dougherty] did not appeal the Commonwealth Court's March 9, 2009 decision. Therefore, the Commonwealth Court's March 9, 2009 decision constitutes a final decision on the merits for res judicata purposes. . . . That decision dismissed Plaintiff's [Dougherty] 2008 Amended Complaint on the merits.

Next, Plaintiff's [Dougherty] pleadings satisfy all the required elements of technical res judicata. Plaintiff's [Dougherty] 2008 Amended Complaint accused Snyder and North Hopewell Township of various allegedly illegal and corrupt practices concerning the building permit issued to Kenneth Brady and the renovation of the Property. These are precisely the same issues raised in Plaintiff's [Dougherty] 2009 Complaint. Thus, the identities of the things sued upon—the building permit and the renovation of the Property---are the same in each action. Both actions request mandamus relief and money damages. Therefore, type of action is identical in each case. . . . Keith Dougherty is the plaintiff in each action and North Hopewell Township and its agents are defendants in each action. Therefore, the parties to each are identical. There is no difference in the quality or capacity of the entities to the suit: in each action, Plaintiff [Dougherty] and the Defendants are North Hopewell Township and its agents. These two actions are almost identical in every way, and therefore, technical res judicata applies here. . . .

Accordingly, Defendants' [Township] preliminary objection regarding res judicata will be sustained because Plaintiff [Dougherty] filed the 2009 Complaint after a final decision on the merits was reached in an earlier action involving the identical item sued upon, the identical claims raised and identical parties with identical capacities. Despite any changes in the wording or organization of the two pleadings, the subject matter (the building permit and renovation) and the ultimate issues (whether North Hopewell Township and its agents violated the Act entitling Plaintiff to mandamus and money damages) are the same in both pleadings.

In addition, the new claims raised in the later pleading should have been brought up in the earlier pleading. . . . The events giving rise to Plaintiff's [Dougherty] action took place between October 2006 and December 2007. As such, claims arising from these events should have been raised in the 2008 Amended Complaint. Technical res judicata bars claims that should have been brought in the earlier action, and as a result, all new claims raised in

Plaintiff's [Dougherty] 2009 Complaint are barred. . . .
(Citations and footnote omitted).

Common Pleas Court Opinion, December 22, 2009, at 11-13.

Before this Court, Dougherty raises seven issues⁴ in the Statement of Questions Involved⁵ in his brief.⁶

⁴ The issues Dougherty raises include:

1. Does the incompetence and lack of clearly identified process associated with a claim of 'inverse condemnation' provide a valid excuse for the Pennsylvania Unified Judicial system to void the requirements of 'Procedural Due Process' enumerated in a plethora of cases from the Supreme Court of the United States?
2. Can an 'assigned Judge' in a proceeding under Pa. R.C.P. 1099 assert a lack of statutory familiarity as a defense for judicial conduct violations?
3. Where as here a plaintiff/appellant has asserted an unlawful voiding of a valid building permit (resulting in a de facto seizure of the valuable personal property, and 'inverse condemnation'); can the presiding Judge be sustained on his assertion 'mandamus is not a valid procedure for permit reinstatement and seeking damages resulting therefrom' be sustained in 629 CD 2009 leading to a voiding of procedural due process (with prejudice) related to the interference with private property even though the Supreme Court of Pennsylvania has repeatedly ruled mandamus is a proper process?
4. Whereas Pennsylvania practice advises any alleged taking not preceded by official notice is termed 'de facto' and de facto may not include 'inverse condemnation' (other than a statute that removes all value see Monterey City v. Del Monte Dunes) be used as a device or scheme to avoid payment of 'fair value' mandated by First Evangelical?
5. Can the Unified Judicial System void equal protection of pro se litigants establishing as here one standard 'no protection' when a pro se litigant claims a gap in the required procedure to proceed

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Dougherty appealed the common pleas court's dismissal of his complaint on the basis of res judicata. However, a careful review of his Statement of Questions Involved reveals that not one of the issues addresses the order which was appealed. Any issue not raised in the Statement of Questions Involved is waived. See Pa. R.A.P. 2116. Dougherty has waived any challenge to the common pleas court's determination.

Accordingly, this Court affirms.

(continued...)

and a broad policy of protection under Rule 708 for counseled litigants filing defective pleadings in matters of Complaint, appeal or other proper process?

6. Can a Judge as here protect himself from the revelation that improper voiding of Appellants [sic] [Dougherty] procedural due process has resulted in the taxpayers being exposed to a demand for an additional \$600,000 that could have been avoided by a mere compliance with the PCCA be sustained by denial of actual due process owing to a defect in the request or demand?

7. Can as here a Judge assert 'legal insufficiency' on the merits when there is as here no record whatsoever to support such incompetent assertions whose departure from procedure and subsequent determination are not discretionary or permissible owing to minimum due process requirements as articulated by the United States Supreme Court?

⁵ Dougherty terms this section of this brief, "Questions For The Court."

⁶ This Court's standard of review of an order of the common pleas court sustaining preliminary objections in the nature of a demurrer is limited to a determination of whether the common pleas court abused its discretion or committed an error of law. In ruling on preliminary objections, the court must accept as true all well pled allegations of material fact. A demurrer should be sustained only in cases that are free from doubt and only when it appears with certainty that the law permits no recovery under the allegations set forth. Smith v. Pennsylvania Employees Benefit Trust Fund, 894 A.2d 874 (Pa. Cmwlt. 2006).

