

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

JERRY LEE ALSTON,	:	
	:	
Plaintiff,	:	C.A. No. 01C-07-050
	:	
v.	:	
	:	
NICHOLAS A. DIPASQUALE,	:	
DELAWARE DEPT. OF NATURAL	:	
RESOURCES AS AN ENTITY;	:	
KENT COUNTY PLANNING OFFICE;	:	
and LAWRENCE S. FOLEY and	:	
MARY FRANCIS FOLEY,	:	
	:	
Defendants.	:	

ORDER

This 19th day of October, 2001, after consideration of the motions to dismiss submitted by Defendants Kent County Planning Office and Lawrence S. and Mary Francis Foley (the Foley Defendants) in the above-captioned matter, Plaintiff's answer thereto, as well as the arguments of the parties, it appears that:

Facts

1. Plaintiff filed a complaint on July 31, 2001¹, naming the Foleys and Kent County Planning Office (hereinafter referred to as "KCPO") as Defendants in the above-referenced matter. This action appears to be about mandating State agencies to perform administrative functions to protect the environment/wetlands under Title 7 (Conservation) of the Delaware Code. Numerous statutory provisions are cited by Plaintiff under which he claims legal rights.
2. Defendant KCPO moves this Court to dismiss this action on the basis of

¹ This Court has already determined that this is not a class action matter.

insufficient and improper service under Del. Super. Ct. Civ. R. 12(b)(4), (5); because Plaintiff's complaint fails to name a necessary party under Del. Super. Ct. Civ. R. 12(b)(7); for the reason that it does not state a claim upon which relief can be granted under Del. Super. Ct. R. 12(b)(6); and because KCPO has immunity under 10 *Del. C.* § 4010, 4011.

3. KCPO argues that there are no facts in the complaint under which it may be held liable to Plaintiff. Plaintiff responds that there are allegations which impose liability.

4. The Foleys also move to dismiss under Del. Super. Ct. Civ. R. 12(b)(1), (4), (6), on the basis that Plaintiff has not sought relief that this Court can grant; has not stated a cause of action upon which relief can be granted; and that service was improper.

Improper Service

5. KCPO and the Foleys maintain that, under Rule 12 (b)(4), (5), the complaint may be dismissed because Plaintiff's service was insufficient. No Summonses were attached to the Complaint. Additionally, Plaintiff served the documents himself without requesting the appointment of a special process server as required under Rule 6. The Foleys move to dismiss on the basis that the complaint has never been served on either of the Foley Defendants.

7. The right to question irregularities in, or sufficiency of, service of process is well settled in Delaware.² The Sheriff's return is *prima facie* proof of proper

² *Cohen v. Brandywine Raceway Ass'n.*, Del. Super., 238 A.2d 320 (1968).

service;³ however, Plaintiff did not serve process by Sheriff here. Under Super. Ct. Civ. R. 4(a), (d), the process must be specified in the praecipe and issued by the Prothonotary to the Sheriff to effectuate service. Service by other than the Sheriff must be done by special process server—a person especially appointed by the Court to serve it. No person shall be specially appointed by the Court to make service unless the conditions are established as in Rule 4(d). The Plaintiff attempted to accomplish service here, himself, without permission of the Court. In this case, the Court may quash Plaintiff’s Writ as to both Defendants.⁴

8. However, the Court chooses to hear the merits of the motions to dismiss rather than simply dismiss this case on the basis of insufficient process.

Necessary Party

³ *Id.*

⁴ *Gosnell v. Whetsel*, Del. Super., 198 A.2d 924 (1964).

9. KCPO next alleges that Plaintiff cannot sue without the addition of Kent County; therefore, the action must be dismissed for failure to join a necessary party to the litigation. This, however, is not a fatal flaw as Kent County could possibly be joined under Rule 19.⁵ Although the real issue here is whether a cause of action could be stated against Kent County and KCPO, the Court encourages the Plaintiff, while acting *pro se*, to carefully review the Rules and to follow the Rules, as he is expected to do, as any other litigant in this Court.

Failure to State A Claim

10. The court must analyze Plaintiff's complaint to see if there is a viable cause of action. As this Court has previously stated:⁶

The test for sufficiency of a complaint challenged by a motion to dismiss under Superior Court Civil Rule 12(b)(6) is a general, broad test . . . "whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."⁷

When applying this test, all of the well-pleaded allegations must be accepted as true by the Court.⁸

11. It must be determined if Plaintiff alleged sufficient facts to recover under any reasonably conceivable set of circumstances susceptible to proof under the

⁵ *Kojro v. Sikorski*, Del. Super., 267 A.2d 603 (1970) (holding that dismissal must be granted where absence of indispensable party cannot be cured by joinder).

⁶ *Crowhorn v. Nationwide Mut. Ins. Co.*, Del. Super., C.A. No. 00C-06-010, Witham, J. (Apr. 26, 2001) Order at 4-5.

⁷ *Spence v Funk*, Del. Supr., 396 A.2d 967, 968 (1978).

⁸ *Id.*

complaint. The Court could exercise some degree of leniency with respect to *pro se* appeals.⁹ However, at a minimum, the pleading must be adequate so the Court may conduct a meaningful consideration of the merits of Plaintiff's claim.¹⁰

12. Here, Plaintiff has not alleged a cause of action under which he can recover. First, Plaintiff makes no specific allegations against the Kent County Planning Office or the Foleys other than identifying them as Defendants.

13. The only possible allegation as to KCPO appears at page 5 of the Petition and Complaint where Plaintiff alleges the Kent County Planning Office "has implemented such plans as are contrary to Delaware law under [7 Del. C. § 6618] and whereas inconsistent laws in the State of Delaware are superseded in specific reference to application of 7 § 6618 (sic)." This statute in the "Wetlands" section of Title 7 states that all laws or ordinances inconsistent with any provision of the wetlands chapter of Title 7 are superseded.

⁹ The Delaware Supreme Court (commenting upon the brief of a *pro se* appellant) "recognize[d] that some degree of leniency should be granted for *pro se* appeals, [however,] at a minimum, briefs must be adequate so that this Court may conduct a meaningful review of the merits of appellant's claim." *Forst v. Wooters*, Del. Supr., No. 181, 1993, 1993 WL 370865, Moore, J. (Sep. 9, 1993)(ORDER).

¹⁰ *Id.*

14. The test to deny a complaint for failure to state a claim is whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the Complaint. *Spence v. Funk*.¹¹ Plaintiff is suing the County and the Foleys to insure they act consistently with the provisions of the Delaware code as Plaintiff has interpreted it; however, he has not established a right to bring suit under any of the statutory provisions he has cited. No reasonable person would believe that Plaintiff has authority under statute or case law to do what he is trying to do.

¹¹ 396 A.2d 967.

15. The Court would also note that much of the relief that Plaintiff appears to be asking for is properly to be heard in the Court of Chancery, as opposed to the Superior Court, since Plaintiff is seeking an injunction, and indicates that he has some sort of adversary right (either by prescription or otherwise) to go on Mr. and Mrs. Foley's property to conduct his fishing.¹²

16. KCPO and the Foleys also maintain that Plaintiff incorrectly seeks injunctive relief under 7 *Del. C.* § 6615. Obviously, this is the wrong court for such relief (under the statute and under common law). This statute only authorizes *the Secretary* of the Department of Natural Resources to bring such a suit. Plaintiff has no right to injunctive relief on the basis he puts forth. Likewise, this Court cannot give such relief. Thus, it would not assist the Plaintiff to merely transfer this case to the Court of Chancery.

17. Therefore, for the reasons set forth above, the Court does not reach Defendants KCPO's claim that they are granted immunity, and the motions to dismiss of Kent County Planning Office and the Foleys are *granted*.

IT IS SO ORDERED.

J.

WLW/dmh

¹² At the hearing on the motions to dismiss Plaintiff testified: "I'm not trying to get any money out of Mr. Foley All I'm trying to do is to maintain use of a particular piece of property for a legal use that I have used for a 25-year undisturbed period. That's the issue . . ." Hr'g Tr. at 54-55

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oc: Prothonotary
xc: Mr. Jerry Lee Alston
Crystal L. Carey, Esquire
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