

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

STEVEN RHINEHARDT )  
and FRANCES RHINEHARDT, )  
 )  
Plaintiffs, )

v. )

C.A. No. 03C-05-005 RBY

CHARLES BRIGHT, a/k/a Speedy )  
Bright, MARK MERKLE, and THE )  
STATE OF DELAWARE, )  
DEPARTMENT OF )  
TRANSPORTATION, an agency of the )  
State of Delaware, )  
 )  
Defendants. )

***OPINION***

Submitted: June 17, 2005

Decided: August 3, 2005

William D. Fletcher, Jr., Esquire, Schmittinger & Rodriguez, P.A., Dover, Delaware,  
for the Plaintiffs.

Frederick H. Schrank, Esquire, Delaware Department of Transportation, Dover,  
Delaware, for the Defendant, State of Delaware, Department of Transportation.

Glenn E. Hitchens, Esquire, Morris, James, Hitchens & Williams, for the  
Defendant, Charles Bright, a/k/a Speedy Bright.

**UPON CONSIDERATION OF DEFENDANT  
STATE OF DELAWARE, DEPARTMENT OF  
TRANSPORTATION' S MOTION TO DISMISS  
*DENIED***

YOUNG, Judge

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This Motion to Dismiss arises from a dispute between neighboring landowners over an entrance permit granted by The State of Delaware, Department of Transportation (“ Defendant DelDOT”), to Defendant Charles Bright a/k/a Speedy Bright (“ Defendant Bright”). Plaintiff Frances Rhinehardt alleges that the entrance permit encroached on her property at 359 Grygo Road, Marydel, Delaware. At all times pertinent to this Complaint, Plaintiff Steven Rhinehardt was in possession of the subject property, with the full consent of his mother, Frances Rhinehardt (hereinafter “ Plaintiffs”).

Plaintiffs’ Complaint alleges: 1) Willful and malicious use of the criminal process against Defendants Bright and Merkle; 2) Intentional Infliction of Emotional Distress against Defendants Bright and Merkle; 3) Negligent Infliction of Emotional Distress against Defendants Bright and Merkle; 4) A Taking of Plaintiff’ s property without just compensation under Article I, § 8 of the Delaware Constitution by trespassing and otherwise physically interfering with Plaintiff’ s property (against all defendants); 5) An Action in Ejectment pursuant to 10 *Del. C.* § 6701 against Defendants Merkle and DelDOT; 6) A Nuisance Action against Defendants Bright and Merkle; and 7) An Action for Punitive Damages against Defendants Bright and Merkle.

On April 17, 2001, Defendant Bright obtained, from DelDOT, a permit for a highway driveway entrance to the property adjoining Plaintiffs’ property. This entrance permit allegedly authorized Defendant Bright to enter onto Plaintiff’ s property in order to gain access to the adjoining land. DelDOT also allegedly, on

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April 24, 2001, installed approximately eight feet of underground culverts on land belonging to Plaintiff in order to allow Defendant Bright to build a driveway which encroached on Plaintiff's land. Plaintiff Steven Rhinehardt dug out the eight feet of culverts on May 8, 2001. On May 11, 2001, DelDOT re-installed the culverts at Defendant Bright's request. Plaintiffs maintain that DelDOT justified its actions by asserting that Defendant Bright's new driveway was located on a public right-of-way because it was within DelDOT's 25-foot setback easement on Plaintiff's property. Defendant, DelDOT of Delaware, now moves the Court for Dismissal of Plaintiffs' Complaint under Superior Court Civil Rule 12(b)(6) for failure to state a claim upon which relief may be granted because the State of Delaware is entitled to sovereign immunity.

The Discovery cut-off was originally set in this case for July 16, 2004. Trial was scheduled for October 25, 2004. The date of Discovery cut-off is now set for September 16, 2005. Trial is scheduled for December 12, 2005.

### **STANDARD OF REVIEW**

When reviewing a motion to dismiss for failure to state a claim, all well-pleaded allegations in the complaint must be accepted as true.<sup>1</sup> A motion to dismiss cannot be granted if a plaintiff may recover under any reasonably conceivable set of

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<sup>1</sup> *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995).

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circumstances susceptible of proof under the complaint.<sup>2</sup> Additionally, every reasonable factual inference must be drawn in favor of the non-movant.<sup>3</sup> If it is clear that the plaintiffs cannot prove a set of facts that would entitle them to relief, the Rule 12(b)(6) motion should be granted.<sup>4</sup>

### **DISCUSSION**

The Superior Court of Kent County Civil Case Management Plan specifies, in section IV (A)(3)(b), that responses to civil motions are “ due no later than 4 days prior to the hearing date. If no response is filed by the due date, the motion will be deemed unopposed.” Counsel for Plaintiff filed his reply at 3:25 p.m. the day before the scheduled hearing for this motion. The motion is, therefore, deemed unopposed.<sup>5</sup> The fact that Defendant DelDOT’ s motion is unopposed, however, does not mean that the motion will automatically be granted. The Court must still consider the merits of Defendant’ s arguments.

Only two counts of Plaintiffs’ Complaint involve the moving Defendant, DelDOT. Plaintiffs allege in Count IV that the State of Delaware, through DelDOT, “ trespassed, and/or ha[s] violated [Plaintiff’ s] constitutional rights against taking

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<sup>2</sup> *Id.*

<sup>3</sup> *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

<sup>4</sup> *Id.*

<sup>5</sup> *Accord Joyner v. Kmart Corp.*, C.A. No. 04C-03-140, Ableman, J. (April 13, 2005)(ORDER).

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property without just compensation, by making an unauthorized entry upon Rhinehardt' s property and otherwise physically interfering with Plaintiff Frances Rhinehardt' s right to possession, use, and enjoyment and title . . . .” Plaintiffs allege that DelDOT' s actions in granting Defendant Bright an entrance permit and installing culverts on Plaintiff' s land constitute a taking of property without just compensation under Article I, § 8 of the Delaware Constitution. In Count V, Plaintiffs have brought an action in ejectment against the State of Delaware pursuant to 10 *Del. C.* § 6701. Plaintiff claims she is out of possession of the disputed property to which she has title and therefore seeks an action in ejectment.

Sovereign immunity is an absolute bar to liability claims against the State of Delaware unless such immunity is waived by the General Assembly.<sup>6</sup> Generally, the State' s immunity may only be waived in cases where the General Assembly, by Legislative Act, expressly waives it.<sup>7</sup> Sovereign immunity has been waived in certain situations by 18 *Del C.* §6511 which provides that the State' s immunity is waived as to “ any risk or loss covered by the state insurance coverage program, whether same be covered by commercially procured insurance or by self-insurance, and every commercially procured insurance contract shall contain a provision to this effect, where appropriate.” The Delaware Supreme Court has held that this waiver only applies in instances where the State has obtained insurance to cover the specific

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<sup>6</sup> *Turnbull v. Fink*, 668 A.2d 1370, 1374 (Del. 1995).

<sup>7</sup> *Doe v. Cates*, 499 A.2d 1175, 1176 (Del. 1985).

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risk and there is no presumptive waiver of immunity.<sup>8</sup> In accordance with this holding, Debra Lawhead, Insurance Coverage Officer for the State of Delaware, has filed an Affidavit stating that the State of Delaware does not carry insurance coverage for any possible liability for such claims as alleged in this complaint.

The Delaware Supreme Court has noted, however, that the provisions of Article I, Section 8 of the Delaware Constitution (concerning an unconstitutional taking of property) are a self-executing waiver of immunity on the part of the state.<sup>9</sup> Accordingly, where there is a taking of property without a condemnation proceeding, “the filing of a separate action for damages against the State by the landowner as a matter of law has been consented to by the State.”<sup>10</sup> Therefore, Defendant DelDOT’s Motion to Dismiss must be denied as to Count IV of Plaintiffs’ Complaint.

The ejectment action in Count V of Plaintiffs’ Complaint is closely tied to Plaintiffs’ takings claims. It is also a property action, similar to the takings action, and “thus not barred by sovereign immunity.”<sup>11</sup> Therefore, Defendant DelDOT’s Motion to Dismiss must be denied on this count as well.

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<sup>8</sup> *Id.* at 1178-79.

<sup>9</sup> *Donovan v. Delaware Water and Air Resources Commission*, 358 A.2d 717, 722 (Del. 1976) (quoting *State v. 0.24148 Acres*, 171 A.2d 228, 231 (Del. 1961)).

<sup>10</sup> *State v. 0.24148 Acres*, 171 A.2d 228, 231 (Del. 1961)

<sup>11</sup> *Town of South Bethany v. Cat Hill Water Co. Ltd.*, 1997 Del. Super. LEXIS 7, at \*6.

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### **CONCLUSION**

Therefore, because the State of Delaware may not employ the doctrine of sovereign immunity for either Plaintiffs' takings claim or action for ejectment, Defendant DelDOT' s Motion to Dismiss is DENIED.

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Judge

oc: Prothonotary  
cc: Counsel  
Opinion distribution  
Notebook