

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Hubert J. Brewster and	:	
Barbara L. Brewster,	:	
Appellants	:	
	:	
v.	:	No. 2191 C.D. 2008
Highway Materials, Inc.,	:	
Marlborough Township and	:	
Marlborough Township Board	:	
of Supervisors	:	
	:	
Highway Materials, Inc.	:	
	:	
v.	:	No. 2192 C.D. 2008
	:	
Hubert J. Brewster and	:	Submitted: July 2, 2009
Barbara L. Brewster,	:	
Appellants	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE JAMES R. KELLEY, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE KELLEY

FILED: January 21, 2010

Hubert J. Brewster and Barbara L. Brewster (collectively, the Brewsters) bring the instant appeal¹ in which three orders of the Court of Common

¹ This matter was consolidated for disposition by the Trial Court. Additionally, by order dated March 26, 2009 this Court *sua sponte* consolidated the appeals *sub judice*.

Pleas of Montgomery County (Trial Court) are at issue. In the matter docketed in this Court at 2192 C.D. 2008, the Trial Court granted the Petition for Preliminary Injunction brought by Highway Materials, Inc., seeking to prevent the Brewsters from interfering with blasting at Highway Materials' neighboring quarry. In the matter docketed in this Court at 2191 C.D. 2008, the Trial Court denied the Brewsters' Petition for Preliminary Injunction, and sustained the Preliminary Objections to the Brewsters' Complaint filed by Marlborough Township (Township) and Marlborough Township Board of Supervisors (Board). The effect of the Trial Court's orders, essentially, was to permit Highway Materials to conduct blasting activity on their commercial quarry site, to prevent the Brewsters as neighboring landowners from interfering therewith, and to dismiss the Township and the Board as defendants to the Brewsters' Complaint in the Nature of a Writ of Mandamus. We affirm.

Highway Materials is a Pennsylvania corporation doing business as a quarry on 181.3 acres of land in Montgomery County, Pennsylvania. The quarry is bisected by a stream into two halves, known as the north and south sides. The Brewsters are residential landowners whose property adjoins the quarry's north side. As part of its preparation to continue excavating the north side of its quarry, Highway Materials removed a berm near its border with the Brewsters' property, and excavated down to the bedrock. The Brewsters protested these actions to the Township, asserting that no stone excavation should be permitted closer than 100

feet² from the quarry's property line with the Brewsters. Thereafter Highway Materials asserted to the Township that, as a property previously held to contain a nonconforming use,³ it was permitted to conduct surface mining operations on the north quarry side, and that Pennsylvania's Non-Coal Surface Mining Regulations and the quarry's permit thereunder entitled Highway Materials to excavate within 25 feet of the borderline.

During February and March of 2008, the Board held meetings to determine the appropriate setback distance for Highway Materials' activities. At a public meeting on April 9, 2008, the Board announced that the 100-foot setback described in Ordinance Section 825(D) did not apply to Highway Materials because it is a lawful nonconforming use. The Board concluded that the appropriate setback distance was 25 feet. The Brewsters did not appeal this determination.

Highway Materials then moved forward with its plans to mine within 25 feet from the Brewsters' property line, including its securing of blasting plan approval from the Pennsylvania Department of Environmental Protection (DEP).

² The Brewsters relied upon the surface mines and quarries setback distance of 100 feet from an abutting residential property line set forth in Section 825(D) of the Marlborough Township Zoning Ordinance (Ordinance). Original Record (O.R.) at Exhibit B-11. The Ordinance was enacted in 2004. The quarry has operated since 1916, ongoing.

³ The quarry was previously owned by Kibblehouse Quarries, a wholly owned subsidiary of Highway Materials. In R.K. Kibblehouse Quarries v. Marlborough Township Zoning Hearing Board, 630 A.2d 937 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 540 Pa. 609, 655 A.2d 996 (1994), Kibblehouse was recognized by this Court to enjoy a legal conforming use in its quarrying activities on its north side, in relation to the Township's prior zoning ordinance enacted in 1970.

The blasting plan included plans to backfill the benches mined onto the quarries slopes, and plans to rebuild, seed, and plant trees on the berm previously abutting the Brewsters' property.

On April 10, 2008, Highway Materials began to commence actual blasting through Maurer and Scott Sales, Inc. (Blasters). Present at that time were personnel from Highway Materials, Blasters, and the DEP. When the preparations for actual blasting were nearly complete, Mr. Brewster appeared on the corner of his property abutting the quarry, preventing the efforts to set off the blasts. DEP personnel explained the safety aspects of the pending blasts to Mr. Brewster, and requested that he step back from the area, which request he refused. Subsequent requests from local police to Mr. Brewster to move to a safe area were also refused, and he remained on the edge of his property videotaping the events. Following discussion between the present personnel, including the DEP, a determination was made that the blasts could be safely ignited despite Mr. Brewster's location, and the Blasters set off the planned blasts. Thereafter, DEP requested that Highway Materials prepare a further blasting plan to address its activities adjacent to the Brewsters' property.

On April 14, 2008, Highway Materials filed a complaint in the Trial Court and petitioned for a preliminary injunction against the Brewsters seeking to enjoin them from placing themselves in a position of personal danger in their efforts to prevent the blasting at the quarry. On April 18, 2008, the Brewsters filed a complaint, sounding in mandamus, and a preliminary injunction petition in the Trial Court against Highway Materials, the Township, and the Board, seeking to

halt all surface mining activities within 100 feet of the rear of their property, and seeking to terminate all surface mining activities on a five acre portion of Highway Materials' quarry adjacent to their property.

As a result of the DEP request of April 10, 2008, on April 18, 2008, Highway Materials submitted to DEP a new proposed plan with Interim Blasting Measures to be utilized henceforth. DEP approved the proposed Interim Blasting Measures, conditioning approval, *inter alia*, on the temporary restriction that no blasting would be conducted within 150 feet of the Brewsters' property as a temporary measure, and expressly reserving the right to rescind or modify the approval at its discretion. On April 22, 2008, Highway Materials supplemented its April 18th proposal by amending its proposed blasting distance to 1,000 feet within the Brewsters' property. On the same date, DEP informed Highway Materials that no blasting shall be conducted on the surface mining permit until the safety concerns that had arisen could be addressed by DEP. A meeting with Highway Materials and DEP personnel on the situation and proposed blasting plans ensued, and DEP thereafter commenced review and potential approval of ongoing plans. By approval dated May 15, 2008, DEP, *inter alia*, restricted blasting within 1,000 feet of the Brewsters' property, and granted approval for additional quarrying activities consistent with prior restrictions and the applicable regulations.

On May 16, 2008, the Township and the Board filed Preliminary Objections to the Brewsters' Complaint, which the Trial Court sustained by order dated May 23, 2008. In the order, the Township and the Board were dismissed as parties to the Brewsters' action. Highway Materials' and the Brewsters' respective

Petitions for Preliminary Injunction were consolidated by the Trial Court for subsequent hearing. Hearings ensued, at which each party was represented by counsel and presented evidence and testimony.

The Trial Court rejected the Brewsters' testimony, concluding that Mr. Brewster's stated motivation for filing the action – primarily, issues of safety, enjoyment of his property, and his understanding of the applicable Ordinance setbacks – was disingenuous. The Trial Court found the Brewsters' actual motivation to lie in their dissatisfaction with Highway Materials' prior termination of an agreement of sale for the purchase of the Brewsters' property and a concomitant desire to undermine the quarry's ability to conduct its business. By order dated May 23, 2008, the Trial Court denied the Brewsters' Petition for Preliminary Injunction. By separate order also dated May 23, 2008, the Trial Court granted Highway Materials' Petition for Preliminary Injunction subject to certain restrictions which included a 25 foot setback from the Brewsters' property for blasting activities subject to certain conditions and restrictions, compliance with all DEP regulations, and subsequent restoration of the removed berm to prior specifications; additionally, the Trial Court enjoined the Brewsters from interfering with any blast or lawful mining activity on quarry property, including a requirement that anyone on the Brewsters' property maintain a minimum 300 foot distance from future blast locations.

The Brewsters now appeal⁴ from the Trial Court's May 20, 2008, order dismissing the Township⁵ and the Board from their civil action, and from the two May 23, 2008 orders denying the Brewsters' injunction and granting the injunction of Highway Materials.⁶

The Brewsters' issues have been reordered in the interests of clarity. We will first address the Brewsters' argument that the Trial Court erred in sustaining the Township's Preliminary Objections and dismissing the Brewsters' Complaint sounding in Mandamus. Highway Materials argues that the Brewsters have waived this issue by failing to include it in their Concise Statement of Matters Complained of on Appeal, filed in response to the Trial Court's order pursuant to Pa.R.A.P. 1925(b). Our review of the Brewsters' Statement, as well as our review of the Brewsters' subsequent Amended Concise Statement of Matters Complained of on Appeal, reveals that the Brewsters did not preserve any issues in relation to the Trial Court's dismissal of their Complaint, notwithstanding the Trial Court's express notation within its Pa.R.A.P. 1925(b) order emphasizing that any such omission would result in a waiver of all issues not properly included within the Concise Statement. As such, the Brewsters have waived this issue. Pa.R.A.P. 1925(b)(4)(vii); Colombari v. Port Authority of Allegheny County, 951 A.2d

⁴ The appeals of the orders at issue herein were both originally appealed to Superior Court, which transferred the matter to this Court by order dated October 14, 2008.

⁵ The Township has not filed a brief with this Court in this matter.

⁶ The Trial Court has submitted an opinion in support of its orders pursuant to Pa.R.A.P. 1925(a).

409 (Pa. Cmwlth. 2008) (issues not included in Pa.R.A.P. 1925 statement are waived on appeal).

We next address the Brewsters' presented issues related to the Trial Court's grant of Highway Materials' Petition for Preliminary Injunction, which the Brewsters argue was error.

In Greater Nanticoke Area Educational Association v. Greater Nanticoke Area School District, 938 A.2d 1177, 1183-84 (Pa. Cmwlth. 2007), this Court addressed a trial court's standard for a grant of a preliminary injunction, as well as this Court's standard and scope of review thereof:

Initially, "[a] preliminary injunction is designed to preserve the subject of the controversy in the condition in which it is when the order is made, it is not to subvert, but to maintain the existing status quo until the legality of the challenged conduct can be determined on the merits." Sheridan Broad. Networks, Inc. v. NBN Broad., Inc., 693 A.2d 989, 994 (Pa. Super. 1997) (quoting In re Appeal of Little Britain, 651 A.2d 606, 611 (Pa. Cmwlth. 1994) [petition for allowance of appeal denied, 541 Pa. 645, 663 A.2d 696 (1995)]). There is, however, a distinction between mandatory and prohibitory injunctions. Mandatory injunctions command the performance of some positive act to preserve the status quo, and prohibitory injunctions enjoin a party from doing an act that will change it. Mazzie v. Commonwealth, 495 Pa. 128, 432 A.2d 985 (1981). As here, where the injunction at issue is merely prohibitory, we do not review the merits of the controversy but only determine if there are any reasonable grounds to support the trial court's action. Id. If no such grounds exist, only then will we reverse. Id.; Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc., 573 Pa. 637, 828 A.2d 995 (2003) (an appellate court reviews an order granting or refusing a preliminary injunction for an abuse of discretion).

In ruling on a preliminary injunction request, a trial court has “reasonable grounds” to grant relief where it finds all the essential prerequisites for a preliminary injunction are satisfied. There are six essential prerequisites a party must establish prior to obtaining preliminary injunctive relief:

- 1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages;
- 2) that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings;
- 3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct;
- 4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is like to prevail on the merits;
- 5) that the injunction it seeks is reasonably suited to abate the offending activity; and,
- 6) that a preliminary injunction will not adversely affect the public interest.

Addressing first Highway Materials’ injunction seeking to prevent the Brewsters from interfering with its quarrying activities, it is clear that the injunctive relief sought is prohibitive, and not mandatory. Highway Materials seeks to prohibit the Brewsters’ actions in interfering with Highway Materials’ quarrying activities, namely, the blasting at issue. We will review the Trial Court’s grant of the injunction accordingly.

The Brewsters challenge four of the six stated essential preliminary injunction prerequisites under Nanticoke. First, the Brewsters argue that no immediate and irreparable harm was shown by Highway Materials in satisfaction of the first Nanticoke prerequisite, and that the Trial Court failed to articulate any such elements. We disagree. In its combined discussion of both Highway Materials' and the Brewsters' injunctive petitions under Nanticoke's standard, the Trial Court found that Highway Materials stands to lose access to 2.5 million tons of stone valued at approximately \$15 million, which loss could result in the irreparable harm of the quarry going out of business "possibly a lot sooner than later," and that 25 jobs may be lost if the quarrying operations are shut down. Trial Court Opinion (Tr. Ct. Op.) at 30, 32. The record supports the Trial Court's findings on these points. This represents a reasonable ground founding the Trial Court's conclusion and as such, the first Nanticoke prerequisite has been met, and the Trial Court did not err.

The Brewsters next argue that, under factor three, the grant of Highway Materials' injunction would not properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct, but would in fact result in an irreparable destruction of the status quo in the form of the quarry's blasting activities. The Brewsters focus, in this argument, on maintaining the status quo of the actual land at issue in regards to the scheduled blasting, which focus is misguided. Highway Materials sought to prohibit the Brewsters from intentionally situating themselves upon the border of their land in their efforts to

prevent the scheduled blasting. The status quo that Highway Materials seeks to preserve in its injunctive efforts is its legal right to continue its quarrying activities.

In Kibblehouse, we addressed the very same property and nonconforming use status at issue herein. As noted above, the quarry at issue *sub judice* was previously owned by Kibblehouse Quarries, a wholly owned subsidiary of Highway Materials. In Kibblehouse, we first reviewed the quarry's history of being actively quarried on its north side from 1916 ongoing. In 1970, the Township adopted its first zoning ordinance, resulting in the north side being zoned in a district where quarrying was a permitted use, and the south side – which had not been quarried – zoned in a residential-agricultural district in which quarrying was not permitted. In 1990, a Township zoning officer declared the quarry operation on the north side as a valid nonconforming use. Kibblehouse sought to expand that nonconforming use to its south side, which expansion the zoning officer held valid only to the extent of a 25% increase beyond the existing 1970 limits under the zoning ordinance's terms. Although Kibblehouse did not address the issue of setbacks at issue in the instant matter,⁷ in part relevant hereto this Court recognized that Kibblehouse had established the northern portion of the quarry as a legal nonconforming use present at the time that the 1970 ordinance was enacted. Additionally, we affirmed the trial court's denial of an application to expand that nonconforming use to the south side of the quarry.

⁷ The Brewsters argues that Kibblehouse is not controlling herein, as the Brewsters were not a party to the Kibblehouse litigation and because no setbacks were at issue therein. However, it is beyond dispute that Kibblehouse does establish that the quarry currently enjoys a

(Continued....)

Turning back to Highway Materials' injunction, then, the status quo that the quarry sought to preserve with its prohibitive injunction was its right to continue its lawful quarrying business on its previously recognized nonconforming use, under Kibblehouse, upon the north side of the quarry. The injunction, on its face, sought to preserve that lawful nonconforming use by seeking a prohibition against the Brewsters' efforts to thwart its quarrying activities. For purposes of the injunctive relief reviewed herein, the nonconforming use recognized in Kibblehouse entitled Highway Materials to continue its quarrying activities subject only to any applicable DEP or Township regulation. The Brewsters are unable to advance any evidence, except for unsupported assertions to the contrary, that Highway Materials does not currently enjoy a nonconforming use status. The record shows that the quarry has complied with all DEP and Township regulations placed upon it, which the Brewsters do not dispute. It is that status quo, existing prior to the Brewsters' actions in blocking the continuing quarrying activities and existing prior to the litigation at issue, that Highway Materials' injunction seeks to preserve. As such, the Trial Court did not err in concluding that this Nanticoke prerequisite was met under the evidence of record.

Next, the Brewsters argue that prerequisite four, requiring a showing that the activity Highway Materials seeks to restrain is actionable, or put otherwise, that Highway Materials is likely to prevail on the merits, was not met. The

legally recognized nonconforming use of its northern operations.

Brewsters argue that their actions in standing on their own property are not unlawful. We agree with the Trial Court's salient analysis of this issue:

Highway Materials have set forth their claim for injunctive relief upon the theory of private nuisance. Injunctions lie to remedy nuisances. Restatement Torts, 2d, § 822.¹ One is subject to liability for a private nuisance if, but only if, his conduct is the legal cause of an invasion of another's interest in the private use and enjoyment of the land and the invasion is intentional and unreasonable, or unintentional and otherwise actionable. Restatement Torts, 2d, § 822. . .

Clearly, Highway Materials established the requirements of private nuisance. [] Brewster deliberately took up positions on his property line with the express intention of preventing Highway Materials from proceeding with their plans. [The Brewsters have] intentionally interfered with the lawful use of the adjoining property and with the lawful activities of the property owner. Highway Materials was permitted to mine the area adjacent to the Brewster property by the Marlborough Township Board of Supervisors, and all of the blasting plans were approved by DEP. . .

. . . [T]here could not be a clearer illustration of an individual impairing another's private right of use or enjoyment of land than Brewster's intentional actions. Neither is there a clearer demonstration of intentional and unreasonable interference with the [q]uarry's legal use of its land than that of [the Brewsters]. While DEP can designate where Highway Materials can and cannot blast, they do not have the authority to tell the Brewsters where they can and cannot stand. That is Highway Materials' chief purpose for seeking this injunction. . .

. . . Here, it is established that the [q]uarry has the right to mine and has established the impact of not being able to mine the area adjacent to the Brewster property. [The Brewsters'] obvious intention is to stand on the property line when Highway Materials intends to blast for the sole objective of obstructing Highway Materials from blasting.

Tr. Ct. Op. at 27-30 (footnote omitted). The Trial Court's analysis properly concludes that the Brewsters' activity is actionable, and that Highway Materials is likely to prevail on the merits thereof. As such, the Brewsters' argument on this issue must fail, and the Trial Court did not err in concluding that Nanticoke prerequisite four was satisfied.

Finally on this issue, the Brewsters argue that the issuance of Highway Materials' injunction would adversely impact the public interest, and that thusly prerequisite six under Nanticoke was not satisfied. In support, the Brewsters assert that the public would be endangered by the unsafe steep slopes that would result from the blasting at issue. This argument is without merit. The DEP, charged with regulation of the blasting at issue herein, has approved the multiple blasting plans submitted by Highway Materials in this matter, and has supervised the attempted and proposed blasting at every step required under the applicable regulations. As such, DEP can be seen as inherently discharging its responsibilities over the safety of the blasting activities in its approval of Highway Materials' plans, and has impliedly established that the public danger posed by any resulting steep slopes asserted by the Brewsters is manageable and acceptable. As such, the Trial Court did not err on this point.

Pursuant to our foregoing analysis of the Brewsters' issues in regards to Highway Materials' sought injunctive relief, we conclude that the Trial Court did not err in granting Highway Materials' Petition for Preliminary Injunction. Nanticoke.

Finally, the Brewsters argue that the Trial Court erred in denying their Petition for Preliminary Injunction seeking to enjoin Highway Materials from conducting any quarrying activities within a 100-foot setback of its adjacent property line, and/or to enjoin any quarrying activities on a five-acre parcel of Highway Materials' property adjacent to the Brewsters' property.

We first note that the Trial Court concluded that the Brewsters were unable to satisfy Nanticoke prerequisite two, requiring a showing that greater injury would result from refusing the injunction than from granting it. As noted, the Trial Court concluded that the irreparable harm to be suffered by Highway Materials consisted of the quarry potentially suffering irreparable economic injury and going out of business, and the resulting unemployment that would result from enjoining the quarry from continuing its operations. The Trial Court concluded that such consequences constituted substantial harm to another interested party to this action, namely Highway Materials. We agree.

Additionally, the Brewsters have failed to satisfy Nanticoke prerequisite four, requiring a showing that the activity sought to be restrained was actionable, and that the Brewsters were likely to prevail on the merits. The foundation of the Brewsters' sought relief was the prevention of quarrying activity, specifically the blasting at issue, within 25 feet of the adjacent property line shared by the parties. The Brewsters cite to various sections of the Ordinance, as well as case law applicable hereto under the Brewsters' view, establishing that the applicable setback for quarrying activities should be a minimum of 100 feet. However, the Brewsters do not dispute, and indeed do not address, the Trial

Court's conclusion that the Board determination of April 9, 2008, stated that Highway Materials "shall be permitted to blast within twenty-five (25) feet of [the Brewsters'] property line." Tr. Ct. Op. at 19. As the Trial Court further correctly notes, the proper remedy to object to the Board determination would have been a timely appeal to the Zoning Hearing Board, which the Brewsters failed to file. As such, any objection to the 25-foot setback determined by the Board has been waived. Bonner v. Upper Makefield Township, 597 A.2d 196 (Pa. Cmwlth. 1991) (failure to appeal to zoning hearing board from board of supervisors' approval in zoning matter constitutes waiver). The Brewsters are therefore unable to establish that blasting within the 25-foot setback is actionable under Nanticoke's standard, or that they are likely to prevail on the merits of a challenge thereto. For this independently dispositive reason, the Trial Court did not err in denying the Brewsters' Petition for Preliminary Injunction.

Accordingly, we affirm.

JAMES R. KELLEY, Senior Judge

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ORDER

AND NOW, this 21st day of January, 2010, the three orders of the Court of Common Pleas of Montgomery County entered in the above-captioned matter are affirmed.

JAMES R. KELLEY, Senior Judge