NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

EUREKA STONE QUARRY, INC. T/A J.D.M. MATERIALS COMPANY Appellant v. CLEAR CHANNEL OUTDOOR, INC. Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 39 EDA 2012

Appeal from the Order Entered December 5, 2011
In the Court of Common Pleas of Bucks County
Civil Division at No(s): 2011-05238

BEFORE: MUSMANNO, MUNDY and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: Filed: February 22, 2013

Appellant, Eureka Stone Quarry, Inc. t/a J.D.M. Materials Company, appeals from the order of Bucks County Court of Common Pleas that sustained the preliminary objections of Appellee, Clear Channel Outdoor, Inc., and dismissed, "with prejudice," the complaint filed by Appellant. In that complaint, Appellant sought damages for allegedly tortious conduct by Appellee with regard to permits for billboard advertisements on Appellant's property. We affirm in part, reverse in part, and remand this case for further proceedings.

* Former Justice specially assigned to the Superior Court.

By way of background to this appeal, Appellant owns a tract of land in Upper Southampton Township (hereinafter, the Township), Bucks County.[1] On January 12, 2000, Appellant and Appellee[2] entered into a twenty-year lease for the placement of billboards on Appellant's land. After entering into the lease, Appellee attempted to obtain approvals from the Township to construct the billboards on Appellant's land, as well as other properties along the Pennsylvania Turnpike. According to Appellee, it took nearly eight years after entering into the lease with Appellant to obtain the necessary approvals. That process also included extensive litigation, which ended on November 20, 2007, with the published decision of the Pennsylvania Supreme Court in ***Upper Southampton Twp. v. Upper Southampton Twp. Zoning***, 934 A.2d 1162 (Pa. 2007).

Appellee ultimately obtained permits for the construction of the billboards on Appellant's property in February and May of 2008. In light of the delay between the execution of the December 12, 2000, lease and the issuance of permits, Appellee and Appellant attempted, unsuccessfully, to negotiate a revised lease agreement, and the relationship between the parties deteriorated.

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[1] The background to this appeal is derived from the pleadings filed by the parties in the trial court.

[2] At the time the lease was entered into by the parties, Appellee was known as "Eller Media Company."

On September 1, 2008, Appellant entered into a separate lease agreement with a third party for billboards on Appellant's land. However, when the third party applied for permits for the billboards, the Township refused the application because Appellee had already obtained permits. On September 29, 2008, Appellant sent a letter to Appellee declaring that Appellee had breached the lease agreement by failing to pay any rent over the term of the lease. Appellant further asserted that Appellee no longer had authority to "proceed on [Appellant's] behalf" regarding permits to construct billboards, and denied Appellee permission to access the property. Appellee's Complaint, 1/20/09, at ¶ 13. Appellee responded that the January 12, 2000, lease agreement was in full force and effect, and attempted to pay rents that it believed were due under the lease. ***Id.*** at ¶ 14.

Appellee, on January 20, 2009, filed a complaint against Appellant in the Bucks County Court of Common Pleas (hereinafter, the "2009 Action"). In that complaint, Appellee sought a declaratory judgment that the lease agreement remained in force, and that Appellant was not entitled to interfere with Appellee's access to the land and construction of billboards. ***Id.*** at 4-5. Appellant answered Appellee's complaint and raised new matters. Additionally, Appellant set forth a "Counterclaim in the Alternative" seeking, *inter alia*, damages for the failure of Appellee to pay rent through

November 11, 2008. Appellant's Ans., New Matter and Countercl., 2/24/09, at ¶¶ 42–46. No further action was taken in the 2009 Action.

Two and a half years later, on June 10, 2011, Appellant filed in the trial court the complaint against Appellee that gives rise to this appeal (hereinafter, the "2011 Action"). In its complaint, Appellant asserted that Appellee obtained permits for billboards on its land, refused to transfer the permits, and subsequently terminated the permits after negotiations with the Township, all of which caused Appellant to suffer several harms. In particular, Appellant asserted that the Appellee's conduct: (1) interfered with the September 1, 2008, lease agreement Appellant entered into with the third party, as well as other prospective advertisers for the site; (2) constituted a conversion of its land; (3) resulted in an unjust enrichment to Appellee; and (4) constituted a breach of good faith and fair dealing. Appellant's Compl., 6/10/11, at ¶¶ 29–61. Appellant, in the alternative, asserted that Appellee owed all rents payable under the lease agreement. ***Id.*** at 9, ¶¶ 56–58.

Appellant, on August 15, 2011, filed an amended complaint setting forth the same substantive claims. In response, Appellee, on August 31, 2011, filed preliminary objections asserting, in relevant part, that "[Appellant's] amended Complaint in this matter [was] subject to dismissal based upon the pendency of [the 2009 Action], and any claims not presented in the [2009 Action] are waived." Appellee's Prelim. Objections,

8/31/11, at ¶ 15. Appellant filed an answer to the preliminary objections on September 20, 2011, asserting that the 2011 Action set forth distinct claims "based upon wrongful and tortious conduct of [Appellee] outside of its obligations under the Lease." Appellant's Ans. to Prelim. Objections to Am. Compl., 9/20/11, at ¶¶ 11-15.

On December 2, 2011, the trial court sustained the preliminary objections of Appellee, and ordered that Appellant's amended complaint be "dismissed, with prejudice." Order, 12/2/11. Appellant, on December 29, 2011, filed a notice of appeal and subsequently complied with the order of the trial court to submit a Pa.R.A.P. 1925(b) statement of errors complained of on appeal. The trial court filed a responsive opinion. This appeal followed.

Appellant, in the brief filed in support of this appeal, presents the following questions for our review:

> Did the Lower Court err in ruling that the Complaint in [the 2011 Action] is barred by the pendency of the Counterclaim in the [2009 Action], when five of the six Counts state different causes of action seeking different relief, which are based upon different facts and different conduct by [Appellee], which facts and conduct to a large extent had not occurred or were not known to [Appellant] at the time of the filing of [Appellant's] Counterclaim.
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> Did the Lower Court err in dismissing the Complaint "with prejudice"?
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> Did the Lower Court err in dismissing the Complaint rather than consolidating the two actions for trial?

Appellant's Brief at 4.

Since this appeal lies from the order that sustained Appellee's preliminary objections and dismissed Appellant's complaint "with prejudice," our review is governed by the following principles:

> [O]ur standard of review of an order of the trial court overruling or granting preliminary objections is to determine whether the trial court committed an error of law. When considering the appropriateness of a ruling on preliminary objections, the appellate court must apply the same standard as the trial court.
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> When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief.

See O'Donnell v. Hovnanian Enter., Inc., 29 A.3d 1183, 1186 (Pa. Super. 2011) (citations and internal quotations omitted).

Appellant first argues that trial court erred in concluding that the filing of its counterclaim in the 2009 Action barred the claims it stated in the amended complaint filed in the 2011 Action. Specifically, Appellant claims that the trial court erred in its application of Pa.R.C.P. 1020 and the doctrine of *lis pendens*. For the reasons that follow, we find that the trial court erred in its application of Rule 1020.

The "[a]ssessment of the applicability of a *lis pendens* defense is purely a question of law determinable from an inspection of the records in the two causes." ***See Rostock v. Anzalone***, 904 A.2d 943, 945 (Pa. Super. 2006) (citation and quotation marks omitted). Because this appeal raises

questions of law, our standard of review is *de novo*. ***See PNC Bank, Nat'l Ass'n v. Bluestream Technology, Inc.***, 14 A.3d 831, 836 (Pa. Super. 2010).

The specific question of whether the filing of a counterclaim in a prior pending action by a party bars the subsequent filing of a complaint by the same party is guided by the decision of this Court in ***Carringer v. Taylor***, 586 A.2d 928 (Pa. Super. 1990). In ***Carringer***, we acknowledged the general rule that the filing counterclaims are entirely permissive under the Pennsylvania Civil Rules of Procedure, but concluded that a defendant ***who elects to files*** a counterclaim in a prior pending action thereafter stands in the position of plaintiff for the purposes of Pa.R.C.P. 1020. ***Id.*** at 932. Therefore, we held the party who files a counterclaim becomes the subject of the rules of mandatory joinder set forth in Pa.R.C.P. 1020, and, in particular, the waiver provision of Pa.R.C.P. 1020(d). ***Id.*** In short, the ***Carringer*** Court held that "once the defendant asserts a counterclaim, he becomes a plaintiff and must join all counterclaims which arise from ***the same 'transaction or occurrence' upon which the counterclaim is based*** or such claims shall be deemed waived" under Pa.R.C.P. 1020(d).[3] ***Id.*** (emphasis added).

[3] Pa.R.C.P. 1020(d) currently provides:

> If a transaction or occurrence gives rise to more than one cause of action heretofore asserted in assumpsit and

In the present case, there is no dispute that Appellant filed a counterclaim in the 2009 Action commenced by Appellee, and subsequently brought the 2011 Action against Appellee. Therefore, pursuant to ***Carringer***, Pa.R.C.P. 1020(d) governs whether the filing of the counterclaim operates as a bar to the 2011 Action. Moreover, there is no dispute that the parties involved in the 2009 Action and 2011 Action are the same. Therefore, the sole question regarding the propriety of the application of Rule 1020(d) by the trial court in this case is whether the 2009 Action, in which Appellant filed a counterclaim, and the 2011 Action subsequently commenced by Appellant arise from the "same transaction or occurrence," that is, whether they "involve a common factual background or common

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> trespass, against the same person, including causes of action in the alternative, they shall be joined in separate counts in the action against any such person. Failure to join a cause of action as required by this subdivision shall be deemed a waiver of that cause of action as against all parties to the action.

Id. While Pa.R.C.P. 1020(d) has been amended since our decision in ***Carringer v. Taylor***, 586 A.2d 928 (Pa. Super. 1990), those amendments do not affect the holding that a defendant who elects to file a counterclaim in a prior pending action thereafter stands in the position of a plaintiff and becomes subject to the waiver provision of Pa.R.C.P. 1020(d) with claims brought in a subsequent suit.

However, the scope of the waiver provision under Pa.R.C.P. 1020(d) is broader than the common law doctrine of *lis pendens* since causes of action asserted in contact and negligence that arise for a transaction or occurrence are subject to waiver under the Rule. ***Compare*** Pa.R.C.P. 1020(d) ***with Rostock v. Anzalone***, 904 A.2d 943, 945 (Pa. Super. 2006) (noting "*lis pendens* is a valid defense only when the parties, the ***causes of action*** and ***the relief sought are the same*** in both actions." (emphasis supplied)).

factual or legal questions," or embrace an "'occurrence from which the same legal rights or obligations arise.'" ***See Hineline v. Stroudsburg Elec. Supply Co., Inc.***, 586 A.2d 455, 457 (Pa. Super. 1991) (citation omitted).

By way of background to the 2009 Action, Appellee filed a complaint in equity alleging, in relevant part, that:

- Appellant and Appellee entered into a twenty-year lease agreement in January of 2000, Appellee's Complaint, 1/20/09 at ¶ 5;
- Appellee, following litigation over the necessary approvals "unsuccessfully attempted to negotiate a Lease Extension" with Appellant in 2008, ***id.*** at ¶ 12;
- Appellee attempted to pay Appellant $170,400 for rent owed through December 31, 2008, ***id.*** at ¶ 14;
- Appellant refused payment and insisted that the January 2000 lease agreement had been terminated due to a breach by Appellee, ***id.*** at ¶ 16;
- Appellant apprised Appellee that it could no longer proceed with seeking approvals or permits for the construction of billboards on Appellant's property, or enter the property, ***id.*** at ¶¶ 13, 16; and
- Appellant failed to provide adequate notice of default or opportunity to cure its alleged breach of the January 2000 lease agreement. ***Id.*** at ¶ 19.

Thus, Appellee claimed (1) that the "Lease Agreement [was] still in full force and effect[,]" (2) that Appellant wrongfully "depriv[ed] it of its rights under the Lease Agreement to construct and maintain signs," and (3) that Appellant was "causing [Appellee] irreparable loss." ***Id.*** at ¶ 20–21.

Appellant, in its pleadings to Appellee's complaint, filed an answer and new matter, in which it set forth the following counterclaim:

> 43. [Appellee] defaulted under the Lease by failure to pay the full amount of rent due as of October 7, 2008.
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> 44. [Appellant] provided written notice of said default by its counsel's letter dated October 14, 2008.
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> 45. [Appellee] has failed to cure said default.
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> 46. Accordingly, there is rent due through November 11, 2008 in the sum of $280,833.26, plus late fees of 5% per month or $14,041.66.
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> 47. By virtue of said default, [Appellant] declares the Lease terminated.

Appellant's Ans., New Matter, and Countercl., 2/24/09, at ¶¶ 43-47. Thus, in light of the complaint filed by Appellee and the counterclaim asserted by Appellant, our review reveals (1) that the sole "transaction" at issue in the 2009 Action was the lease agreement, (2) that all of the asserted rights and liabilities in the 2009 Action arose under the lease agreement, (3) that all of the alleged conduct and occurrences pertained to the lease agreement, and (4) Appellant, in its counterclaim, merely contested the calculation of rents due under the lease agreement.

With regard to the 2011 Action, Appellant's amended complaint alleged several facts pertinent to a claim of Appellee's breach of the lease agreement. Appellant's Am. Compl., 8/15/11, at ¶¶ 3–10. Moreover, in Count V and Count VI of the amended complaint, Appellant asserted a claim based upon a breach of the lease agreement, and a breach of good faith and

fair dealing under that lease. Therefore, because those claims arise out of the same transaction as Appellant's counterclaim in the 2009 Action, we conclude that the trial court properly dismissed Counts V and VI of the amended complaint for breach of contract pursuant to the principles set forth in Pa.R.C.P. 1020(d) and ***Carringer***.

However, our review further reveals that Appellant set forth the following averments in its amended complaint:

- Appellee applied for and obtained billboard permits in February and May of 2008, and in April of 2009. Appellant's Am. Compl., 8/15/11, at ¶¶ 12, 14.

- Appellant sought new tenants for its property and, in September of 2008, entered into a new lease agreement with a third party. ***Id.*** at ¶¶ 15–16.

- The application of the third party to obtain permits was not accepted by the Township because permits had already been issued to Appellee. ***Id.*** at ¶ 18.

- Appellant made a demand to Appellee that the permits be transferred, but Appellee refused based on the assertion that the January 2000 lease agreement was in force. ***Id.*** at ¶¶ 20–22.

- Appellee subsequently "bargained away the permit rights for the [Appellant's] billboard sites in exchange for approval of more valuable digital billboards on other nearby properties[.]" ***Id.*** at ¶ 25.

Thus, in addition to the action for the alleged breach of the lease agreement, Appellant claimed that Appellee (1) "substantially reduced the value of the [billboard] sites on [its] property," due to the location of billboards on nearby properties, and (2) "caused the loss of valuable

property rights[.]" ***Id.*** at ¶¶ 27–28. Moreover, Appellant asserted that Appellee, by obtaining, withholding, and then terminating the permits, (1) tortiously interfered with prospective contractual relations (Count I), (2) tortiously interfered with existing contractual relations with the third party (Count II), (3) undertook a conversion of the property (Count III), and (4) unjustly enriched itself (Count IV).

Following our review of the record and the relevant decisional law, we conclude that Pa.R.C.P. 1020(d), as applied to Appellant by virtue of the counterclaim filed in the 2009 Action, did not bar Appellant from filing the 2011 Action in its entirety. The counterclaim filed in the 2009 Action involved legal question regarding the rights and liabilities based solely on the lease agreement arising out of the failure of Appellee to pay rent. The 2011 Action, however, stated claims that arose from a distinct occurrence, namely, Appellee's negotiations with the Township and the purposeful termination of the permits that Appellee had already obtained for billboard locations on Appellant's land.[4]

In sum, we agree with the trial court that Count V and Count VI for breach of contract and good faith and fair dealing as stated in the 2011 Action was barred by operation of Pa.R.C.P. 1020(d) and affirm that part of

[4] Moreover, we note that the common law doctrine of *lis pendens* would not bar the 2011 Action in its entirety because the 2011 Action involved distinct causes of action, *i.e.* contract versus negligence, and reliefs requested. ***See Norristown Auto. Co., Inc. v. Hand***, 562 A.2d 902, 905 (Pa. Super. 1989).

the order. However, since we conclude that Appellant's counterclaim in the 2009 Action did not bar to the remaining claims set forth in 2011 Action, we reverse those parts of the order of the trial court that sustained Appellee's preliminary objections to Counts I, II, III, and IV of the amended complaint filed by Appellant.[5]

Order affirmed in part, reversed in part. Case remanded. Jurisdiction relinquished.

[5] Since we find that the relevant transactions and occurrences pleaded in the 2009 Action and the 2011 Action do not support the application of Pa.R.C.P. 1020(d), we need not consider Appellant's remaining questions in this appeal. Moreover, we note that, after a long period of inactivity in the 2009 Action, Appellant has filed an amended answer, new matter, and counterclaim in that case in order to preserve the claims set forth above.

While we conclude that it was error to have dismissed the 2011 Action based upon Pa.R.C.P. 1020(d) and the doctrine of *lis pendens*, we note that 2009 and 2011 Actions may be ripe for consolidation under Pa.R.C.P. 213(a).