

PIATT TOWNSHIP,	:	IN THE COURT OF COMMON PLEAS OF
		LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 02-02,234
	:	
SHEDDY FAMILY TRUST,	:	
LOUIS & BEATRICE SHEDDY,	:	
	:	
Defendants	:	PRELIMINARY OBJECTIONS

PIATT TOWNSHIP,	:	IN THE COURT OF COMMON PLEAS OF
		LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 02-01,805
	:	
SHEDDY FAMILY TRUST,	:	
LOUIS & BEATRICE SHEDDY,	:	
	:	
Defendants	:	PRELIMINARY OBJECTIONS

Date: May 8, 2003

OPINION and ORDER

Before the Court are various objections and motions relating to the two complaints filed by Piatt Township in this matter both of which seek to assess a civil penalty against Defendants Shеды Family Trust and Louis & Beatrice Shеды (hereafter “Sheddys”), for violation of the Piatt Township Zoning Ordinance. In this case, there is no question that Sheddys have violated the Ordinance by the operation of a Junk Yard on their property. An enforcement notice was duly issued by the Township and Sheddys took no appeal of that Order to the Piatt Township Zoning Hearing Board. By Order of this Court entered to case #02-02,226, filed March 6, 2003, this Court denied Sheddys’ Petition which sought to allow them to

file an appeal from the Zoning enforcement notice *nunc pro tunc*. Sheddys have not appealed that decision, so it has become a final order.

The Complaint filed by Piatt Township to case No. 02-01,805 seeks the assessment of a \$500/day penalty for each day after the enforcement order had become final from July 14-29, 2002, plus attorney's fees and costs as a penalty for Sheddys' violation of the Zoning Ordinance by the continued maintenance of the Junk Yard. The Complaint filed to No. 02-02,224 is similar to the first seeking the same penalty plus attorney's fees and costs from the date of July 29th through the date of trial, or, for such a period of time as Sheddys are shown to have continued the operation of the Junk Yard in violation of the enforcement notice.

On March 25, 2003 Sheddys filed preliminary objections to both Complaints. Sheddys also on that date filed a motion to join the two actions and to toll the per diem fine. On April 9, 2003 Piatt Township filed preliminary objections to Sheddys' preliminary objections.

Argument was held on May 2, 2003.

At that time the parties agreed that the actions should be joined.

At argument, Sheddys also withdrew their preliminary objection to the complaints asserting that Sheddys are individually responsible for damages. Sheddys also withdrew the preliminary objection that asserted the Township could not pursue penalties over and above that which they had initially sought from an action brought before District Justice Lepley. Sheddys were well advised to withdraw those preliminary objections as they were in fact without merit. The preliminary objections that remain before this Court for decision are whether or not the complaints are sufficient as matters of law. Sheddys object that the complaints are not divided into separate counts, allege conclusions of law, do not allege

material facts, and altogether do not state a cause of action. Sheddys also have preliminarily objected to lack of appropriate verification to the complaints inasmuch as they are verified by the Township Zoning Officer, rather than by a supervisor.

Also for resolution by this Court is whether or not to grant Sheddys' request to toll the per diem fine. Sheddys argue that it is excessive and that the Court's failure to toll the per diem fine acts to frustrate their ability to seek relief by asserting their legal rights to defend the action since the per diem fine would be an unbearable penalty considering the lengthy time anticipated for the litigation. In this regard, Sheddys assert that the Municipalities Planning Code 53 P.S. §10617.2(b) authorizes this Court to toll the per diem fines until a judgment of a violation is entered.

The Township seeks to strike the preliminary objections on the basis that the preliminary objections were not filed until after a notice of intent to enter a default judgment was served and filed. The Township asserts that while it may have impliedly agreed to an extension of time to file an answer to the complaints until such time as this Court entered its ruling on Sheddys' Petition to Appeal *Nunc Pro Tunc*, the Township had contemplated and agreed to an answer being filed and not preliminary objections. The Township asserts that once the notice of intent to file default action was filed of record and served the only way to prevent a default judgment from being entered would be for Sheddys to file an answer to the complaint. The Township also objects to tolling the per diem fine on the basis that a final determination has been made that a violation has occurred, and, as such, the statute, and the reasons behind the statute relied upon by Sheddys, is not applicable. Further, the Township asserts it is now entitled to have the Junk Yard cease operations as it is a finally determined violation and that

failure to impose a per diem fine will allow the Junk Yard to operate until the litigation is completed without sanction.

The Court finds that the preliminary objections by Sheddys are without merit. Inasmuch as the preliminary objections of Sheddys are to be dismissed, the preliminary objections of the Township become moot. The Court also finds there is no appropriate basis either by statute or reason for the per diem fines to be tolled at this time.

Discussion

The issue to be resolved in this litigation is the appropriate amount of fine to be imposed because of Sheddys' operation of a Junk Yard in contravention of a valid zoning enforcement order, which has become final. The litigation will determine an appropriate fine, up to a \$500 per day maximum, and the number of days for which it should be imposed, that is, for what length of time have Sheddys operated the Junk Yard in defiance of the enforcement notice. The litigation will also determine what Sheddys should pay in the way of costs and attorney's fees.

The facts of this case are very similar to the situation brought before the Pennsylvania Commonwealth Court in the case of *Erie v. Freitus*, 681 A.2d 840 (Pa. Cmwlth. 1996). The decision in that case made it clear that once a landowner was given notice of a zoning violation the violation notice could be contested only by way of appeal to the zoning hearing board. The Court made it clear that the violation cannot be defended when a municipality seeks violation fines before a district justice or a civil action before this Court. *Id.* at 842.

The Court in *Erie* went on to point out that neither the District Justice nor this Court may conduct a *de novo* review of the merits of a violation notice where an appeal was not taken to the zoning hearing board. 681 A.2d at 842. Both a district justice and this Court are limited to imposing appropriate fines under the Municipalities Planning Code provisions, 53 P.S. §10617.2 when an action, such as that now before us, is brought. This is because the landowner's failure to appeal to the zoning hearing board rendered the violation notice unassailable and thereafter a court's inquiry is limited only to the assessment of appropriate penalties. *Erie* also points out that the determinate factor concerning assessing a fine is whether or not the landowner has complied with the zoning ordinance, and in *Erie* the Commonwealth Court indicated that since the landowner had not produced any evidence to demonstrate that he had brought his property into compliance with the ordinance that a per diem fine would be appropriate. *Id.* at 843.

Accordingly, the complaints filed in this action state a sufficient cause of action for collection of the appropriate penalties under the Zoning Ordinance. The complaints recite the entry of the enforcement order and assert that the violation has continued to exist after the enforcement order was issued. This, combined with an order that was not appealed and an ongoing violation, sufficiently sets forth a cause of action.

The Court also believes that the verification to the complaints by the zoning officer, David Hines, is valid. A zoning officer is authorized to bring civil enforcement proceedings to enforce the municipality's zoning ordinance. 53 P.S. § 10614. It is apparent from the complaints that David Hines was the zoning officer who issued the enforcement notices and would have knowledge of the facts necessary to set forth the cause of action. Hines

is an agent of Piatt Township, and his verification on behalf of the township is appropriate. *Kensington Mfg. Co. v. Thermal Seal Window Corp., Inc.*, 20 Pa. D. & C. 3d 733 (Lehigh Cty. 1981); *Hess v. Wyoming Valley Cold Storage and Ice Company, Inc.*, 70 Pa. D. & C. 399 (Luzerne Cty. 1949). Sheddys have not cited this Court any case, statute or rule, which supports their claim that the verification by the zoning officer is insufficient.

Conclusion

For the reasons noted above, as well as the reasoning of the Commonwealth Court in *Erie, supra*, this Court believes it is inappropriate to toll the per diem fine. A final judgment has been made as to Sheddys' actions in maintaining the Junk Yard being a violation of the Township Ordinance. Even though they have not appealed the determination Sheddys allegedly are continuing to operate the Junk Yard in defiance of that determination. If they do so, they are subject to per diem fines for their knowing violation. This is particularly true inasmuch as there is no on-going litigation, which could result in the overturning of the enforcement notice, and determination that Sheddys are in violation of the Township Ordinance.

Accordingly, the following Order will be entered.

ORDER

1. The above-captioned actions filed to #02-01,805 and #02-02,224 are hereby consolidated for further purposes.

2. The preliminary objections of Defendants Sheddy Family Trust and Louis & Beatrice Sheddy filed March 25, 2003 are hereby denied.

3. The preliminary objections of Plaintiff Piatt Township filed April 9, 2003 are hereby determined to be moot.

4. The motion of Defendants Sheddy Family Trust and Louis & Beatrice Sheddy to toll the per diem fine filed April 17, 2003 is hereby denied.

5. The Defendants shall file an answer to each complaint within twenty days after notice of this Order is given.

BY THE COURT:

William S. Kieser, Judge

cc: Christopher M. Williams, Esquire
Matthew Zeigler, Esquire
Judges
Christian J. Kalas, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)