

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

STEVEN DAYE, and	:	
JACQUELINE M. DAYE	:	
Plaintiffs	:	
	:	
v.	:	No. 07-01,014
	:	CIVIL ACTION
DARWIN WHITMOYER, and	:	
MARK WILLIAMS, and	:	
NANCY WILLIAMS, husband and wife,	:	
Defendants	:	

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a)
OF THE RULES OF APPELLATE PROCEDURE

Steven Daye, and Jacqueline M. Daye (Plaintiffs), appeal this Court’s Order of September 6, 2007, which sustained Darwin Whitmoyer’s (Defendant), July 3, 2007 Preliminary Objections and Mark Williams’ and Nancy Williams’ (Defendants) July 16, 2007 Preliminary Objections, and dismissed the above-captioned matter. Plaintiff’s Notice of Appeal and Statement of Matters Complained of on Appeal were timely filed on September 17, 2007 and October 5, 2007 respectively. In their Statement of Matters Complained of on Appeal, the Plaintiffs challenge the Court’s decision on five grounds.

Background

This dispute arises out of the construction of a dwelling by Defendants Mark Williams and Nancy Williams, on a parcel of real property, owned by the Defendants Mark Williams and Nancy Williams in Penn Township, Lycoming County. On September 14, 1999, Defendant Whitmoyer filed a subdivision plan for parcel number 44-336-157. The plan established Lots 4 and 5, and a residual lot containing 29.581 acres. The subdivision plan stated that the residual lot was dedicated for woodlot/agriculture use. On September 16, 2005, Defendant Whitmoyer filed a subdivision plan for

the residual of parcel # 44-336-151. On November 28, 2005, said parcel was approved by the Lycoming County Planning Commission for a single-family residential use. On December 21, 2005, Defendant Whitmoyer sold the parcel to Defendants Mark and Nancy Williams. Then on February 24, 2006, the Lycoming County Planning Commission revoked the approval to use the parcel for residential purposes. A letter dated February 24, 2006, from the Lycoming County Planning Commission, required that Defendant Whitmoyer inform the Buyer of this revocation. The Plaintiffs are owners of Lot 5 of the subdivision. The Plaintiffs allege that Defendants Mark Williams and Nancy Williams had actual or constructive notice of the restrictions on the residual lot and that Defendant Whitmoyer had actual or constructive notice of the construction on said parcel. As such, the Plaintiffs have sought a permanent injunction, to enjoin the Defendants from placing a residence on the residual parcel and from using the parcel in any way other than as a woodlot/agriculture use.

In opposition to the allegations in Plaintiffs' Complaint, Defendants Whitmoyer, Mark Williams, and Nancy Williams filed Preliminary Objections, which were sustained by this Court.

Discussion

Plaintiffs challenge this Court's rationale on the following grounds: first, the Court erred by sustaining Defendants' Preliminary Objections based on the Court's *sua sponte* res judicata/collateral estoppel argument when neither Defendant raised res judicata/collateral estoppel in their Preliminary Objections; second, the Court erred by sustaining the Preliminary Objection for a motion to strike; third, the Court erred by sustaining the demurrer for failure to allege sufficient facts to establish a cause of action for breach of covenant; fourth, the Court erred by sustaining the Preliminary Objection for lack of subject matter jurisdiction; fifth, the Court erred by sustaining the Preliminary Objection for failure to join an indispensable party.

First, the Court raised the issue of res judicata/collateral estoppel on its own, believing that if the Court permitted the Plaintiffs to amend their Complaint to include the Lycoming County

Planning Commission and Penn Township, the Court would be forced to dismiss the instant action for lack of jurisdiction, as this matter would become the identical action that was before the Honorable Kenneth D. Brown earlier this year for a Preliminary Injunction. However, the Court did not base any part of its decision to sustain the Defendants' Preliminary Objections on its res judicata/collateral estoppel argument.

Second, Pa. R.C.P. 1019(a) provides: "[t]he material facts on which a cause of action or defense is based shall be stated in a concise and summary form." Plaintiffs' Complaint fails to state any material facts to support their allegations that Defendant Whitmoyer has any ownership interest in or control over the Williams' parcel, has any role in building or placing a dwelling on said parcel or should be a party to this action. As such, the Complaint was stricken for failure to comply with the law.

Third, Pa.R.C.P. No.1028(a)(4) allows a preliminary objection for "legal insufficiency of a pleading (demurrer)." "A court should sustain preliminary objections in the nature of a demurrer only where: the complaint is insufficient to establish the pleader's right to relief" Willet v. Pa. Med. Catastrophe Loss Fund, 702 A.2d 850, 853 (Pa. 1997). The Court references its September 6, 2007 Order. The Court found that Plaintiff's complaint failed to allege sufficient facts to establish a cause of action for breach of covenant. The Court noted in its Order that the Complaint appeared on its face, "to be nothing more than a request for injunctive relief and that, but for statements made during the September 6, 2007 argument the Court would not have identified that instant action as a breach of covenant matter."

Fourth, this Court lacks subject matter jurisdiction pursuant to the Municipalities Planning Code. 53 P.S. § 10909.1, which states in relevant part: (a) [t]he zoning hearing board shall have exclusive jurisdiction to hear and render final adjudications in the following matters:

(3) Appeals from the determination of the zoning officer, including, but not limited to, the granting or denial of any permit . . .” As stated by Judge Kenneth D. Brown in his April 27, 2007, Opinion “. . . [the] Plaintiff failed to exhaust his administrative or statutory remedies by failing to file an appeal from the zoning administrator’s approval of the permit to the zoning hearing board.” Since subject matter jurisdiction lies exclusively in the Zoning Hearing Board, the Court did not err in sustaining Defendants’ Preliminary Objection.

Finally, Plaintiffs allege that Defendants Mark Williams and Nancy Williams should not have been permitted to construct a dwelling. The approvals to construct the dwelling were issued by the Lycoming County Planning Commission and Penn Township. The Plaintiffs have failed to join both the Lycoming County Planning Commission and Penn Township. Therefore, the Court did not err in sustaining Defendants Mark Williams’ and Nancy Williams’ Preliminary Objection for failure to join an indispensable party.

Conclusion

For the foregoing reasons, this Court respectfully suggests that it’s September 6, 2007 Order sustaining Defendant Whitmoyer’s and Defendants Williams’ Preliminary Objections and dismissing the case be affirmed.

DATE: _____

By the Court,

Nancy L. Butts, Judge

xc: Douglas N. Engelman, Esq./Gregory D. Drab, Esq.
Elliot B. Weiss, Esq.
Garth D. Everett, Esq.
James D. Casale, Esq.

Charles F. Greevy, III, Esq.
Eileen A. Dgien, DCA
Honorable Nancy L. Butts
Gary L. Weber, Esq. (LLA)
Trisha D. Hoover, Esq. (Law Clerk)