IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

GREY FOX PLAZA, THOMAS KROUSE, DONNA KROUSE and STEVEN KROUSE, Plaintiffs	:	NO. 13 – 00,961
vs.	:	
	:	CIVIL ACTION
LYCOMING COUNTY WATER & SEWER AUTHORITY, HERBERT, ROLAND & GRUBIC, INC., and DAVID SWISHER, P.E., Defendants	:	Preliminary Objections

OPINION AND ORDER

Before the court are preliminary objections filed on October 21, 2013, by Lycoming County Water and Sewer Authority ("the Authority") to Plaintiffs' Complaint. Argument thereon was heard December 17, 2013.

The crux of this matter was succinctly stated by Plaintiffs in their Complaint: "Plaintiffs bring the instant action seeking damages and injunctive relief as a result of Defendants' tortious conduct in installing and/or permitting a water main service line ("subject water line") to be installed through and under Plaintiffs' private property without permission or right of way in a location at which Defendants knew or should have known would interfere with Plaintiffs' planned development of Grey Fox Plaza. Despite the fact that the subject water line is undeniably encroaching upon Plaintiffs' private property, the Defendants have failed to remove or relocate the encroaching subject water line to a non-interfering location which has resulted in significant delays to the development of Grey Fox Plaza Phase II and the concomitant lost business profits from the sales/leases of that property."[1]

[1] Plaintiffs' Complaint, paragraphs 2 and 3.

Plaintiffs have brought claims against the Authority which they entitle (1) trespass, (2) negligence and recklessness, (3) injunctive relief/ejectment, and (4) unlawful taking, and seek damages, punitive damages, and ejectment (removal of the water line). In its preliminary objections, the Authority claims it is immune from suit, that lost profits are not recoverable in this instance, that punitive damages are not recoverable in this instance, that injunctive relief is not available to Plaintiffs against the Authority and that the claim for unlawful taking must be pursued through the vehicle of eminent domain. These claims will be addressed in turn.

The Authority claims immunity from suit under the Political Subdivision Tort Claims Act. 42 Pa.C.S. Section 8541. Plaintiffs admit that the Act applies, but contend that the Authority may be found liable under the real property and utility service facilities exceptions.[2] Those exceptions provide as follows:

> § 8542. Exceptions to governmental immunity.
>
> (a) Liability imposed. --A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):
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> (b) Acts which may impose liability. --The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:
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> (3) Real property. --The care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a

[2] Plaintiffs' Complaint, paragraphs 5 and 7.

> person intentionally trespassing on real property in the possession of the local agency. As used in this paragraph, "real property" shall not include:
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> (i) trees, traffic signs, lights and other traffic controls, street lights and street lighting systems;
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> (ii) facilities of steam, sewer, water, gas and electric systems owned by the local agency and located within rights-of-way;
>
> (iii) streets; or
>
> (iv) sidewalks.
>
> (5) Utility service facilities. --A dangerous condition of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within rights- of-way, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

42 Pa.C.S. Section 8542. Since the real property exception specifically excludes utility service facilities, however, Plaintiffs may not seek to impose liability under both sections, they must choose one or the other. And, since in their Complaint they contend that the water line is *not* located in the Authority's right-of-way,[3] it would appear they must bring their claims under the real property exception. In any event, neither section allows the claims as Plaintiffs have not alleged negligent care of property in the Authority's possession or a "dangerous condition" such as would support liability.

[3] Plaintiffs' Complaint, paragraph 7.

In Grieff v. Reisinger, 693 A.2d 195, the Court allowed a negligence claim to proceed under the real property exception where the plaintiff alleged negligent care of property under the control of the municipality being sued. Specifically, an employee of the municipality poured paint thinner on the floor of the building in an effort to clean it, the paint thinner ignited and injured the plaintiff. The Court found that the claim fell squarely within the real property exception as "Grieff's and the Fire Association's alleged negligent *care of the property* caused Reisinger's injury". Id. at 197 (emphasis added). In the instant case, however, Plaintiffs are claiming negligent installation of a water line, the negligence consisting of an alleged incorrect placement. The Authority is not exercising care, custody or control of any real property, but only of the water line. The real property exception does not apply.

In Le-Nature's, Inc. v. Latrobe Municipal Authority, 913 A.2d 988 (Pa. Commw. 2006), the Court did not allow a negligence claim to proceed under the utilities service facilities exception where the plaintiff alleged that the municipal authority's failure to comply with the One Call statute created a dangerous condition, that is, that excavation resulted in hitting the sewer line. The Court stated: "The relevant inquiry is whether the allegedly dangerous condition derived from, originated or had its source as the local agency's realty. Here, the dangerous condition was alleged to be derived from Latrobe's failure to comply with the One Call statute and the Contractor digging and hitting the sewer line. There was no allegation describing a dangerous condition of the sewer system itself but merely the contractor hitting the sewer line." Id. at 994. In the instant case, Plaintiffs allege that the dangerous condition arises "if Plaintiffs proceed with their planned development, the subject water line will be exposed above the

surface in the middle of a roadway."[4] This does not constitute a dangerous condition of the water line itself and the utilities service facilities exception does not apply. Thus, as Plaintiffs' claims do not fall within the confines of either exception, Plaintiffs are barred by the Political Subdivision Tort Claims Act from seeking damages from the Authority for injury[5] as a result of negligence or recklessness, and their claims for "trespass" and "negligence and recklessness" must be dismissed.[6]

The Authority also contends that Plaintiffs may not seek punitive damages, as such are not recoverable against a local agency. The court agrees. *See* Marko v. City of Philadelphia, 576 A.2d 1193 (Pa. Commw. 1990), and Township of Bensalem v. Press, 501 A.2d 331 (Pa. Commw. 1985). Plaintiffs' argument that punitive damages may be recovered pursuant to Smith v. Wade, 461 U.S. 30 (1983), and Pettit v. Namie, 931 A.2d 790 (Pa. Commw. 2007), is misplaced as both of those cases involved claims under 42 U.S.C. Section 1983. In any event, as the entire action itself is being dismissed as against the Authority (as will be explained hereinafter), the issue is moot.

The Authority's contention that Plaintiffs may not seek injunctive relief is also correct, but only because Plaintiffs have failed to bring their claims within

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[4] Plaintiffs' Complaint, paragraph 5.

[5] In light of this conclusion, the court need not decide whether "injury" includes lost profits, although in E-Z Parks, Inc. v. Philaelphia Parking Authority, 532 A.2d 1272 (Pa. Commw. 1987), the Commonwealth Court included economic injury in its discussion of the application of the Tort Claims Act's immunity.

[6] Although in Paragraph 55 of their Complaint, Plaintiffs contend "Defendants' invasion upon Plaintiffs' land was intentional", nowhere in the Complaint do they allege facts which would constitute willful misconduct. Therefore, to the extent the claim for trespass is based on intentional conduct, such fails to properly make out a claim which would support the imposition of liability in spite of the Tort Claims Act. *See* Balletta v. Spadoni, 47 A.3d 183, 196 (Pa. Commw. 2012)(For purposes of the Tort Claims Act, "willful misconduct" means "willful misconduct aforethought" and is synonymous with "intentional tort." Willful misconduct means the actor "desired to bring about the result that followed, or at least that he was aware that it was substantially certain to ensue.")(citations omitted). Plaintiffs' assertion in Paragraph 59 that "Defendants reckless and improper actions in installing the subject water line under and through Plaintiffs' property and in refusing to relocate the same after proper notice of Plaintiffs' complete right to possession is willful", is merely a conclusion of law.

the exceptions of the Tort Claims Act. Affirmative, injunctive relief, in general, *is* available to a plaintiff if liability under the Act is properly imposed. *See* Swift v. Department of Transportation, 937 A.2d 1162 (Pa. Commw. 2007)(affirmative action requires expenditure of funds which is equivalent to damages). Here, liability under the Act cannot be imposed and thus the claim for injunctive relief must be dismissed.

Finally, the claim for unlawful taking must also be dismissed, but not because Plaintiffs have failed to make out a claim for which relief may be granted. They may have a claim, and may be able to establish unlawful action on the part of the Authority, and indeed may be entitled to an order requiring the removal of the water line, but the instant lawsuit is not the proper vehicle for that claim. On the other hand, Defendants are *not* correct in their position that Plaintiffs must file a Petition for Appointment of a Board of Viewers under the Eminent Domain Code. In Blair Township Water & Sewer Authority v. Hansen, 802 A.2d 1284, 1288-89, the Commonwealth Court addressed a very similar situation, reviewed other cases in which similar situations had arisen, and, while stating that a landowner who "wants the land back in its original posture", and who has no declaration of taking to respond to, "must be given the opportunity to argue the validity and propriety of the initial taking", the court noted the proper procedure was to "file an action in equity to force the Authority to file a declaration of taking which Appellants may then challenge through preliminary objections." The Court also made it clear that an action in ejectment and trespass was not such an action, and that a petition for appointment of a board of viewers would also not suffice. Id. Therefore, although the instant action will be dismissed as against the Authority, it is without prejudice to Plaintiffs' right to

file an action in equity seeking to compel the Authority to file a declaration of taking. Plaintiffs may then challenge the placement of the water line in preliminary objections to that declaration.

ORDER

AND NOW, this 21st day of January 2014, for the foregoing reasons, the Complaint is hereby DISMISSED as against the Lycoming County Water & Sewer Authority, without prejudice to Plaintiffs' right to file an action in equity seeking to compel the Authority to file a declaration of taking.

BY THE COURT,

Dudley N. Anderson, Judge

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