

COURT OF COMMON PLEAS, LYCOMING COUNTY, PENNSYLVANIA

MATTHEW M. MEYER,
Plaintiff

vs.

CODE INSPECTIONS, INC.,
Defendant

: NO. 16-1510

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: CIVIL ACTION - LAW

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: *Motion for Summary Judgment*

ORDER

AND NOW, following argument held June 26, 2020 on Defendant Code Inspection, Inc.’s Motion for Summary Judgment, the Court hereby issues the following ORDER.

Background

On October 25, 2016, Plaintiff Mathew M. Meyer (“Plaintiff”) initiated this action against Defendant Code Inspections, Inc. (“Defendant”) by the filing of a Complaint. Within the Complaint, Plaintiff avers that Fairfield Township hired Defendant to enforce Fairfield Township’s Zoning and Building Code Ordinances and Zoning Requirements. After Plaintiff submitted building plans, on June 12, 2008, Defendant approved those plans and submitted Construction Permit # LY/FA 208-342 to Plaintiff to build a new structure at 580 Lyons Barr Road, Montoursville, Fairfield Township, PA 17754, tax parcel # 12-331-156 (“construction site”).¹ The construction site was located on the bank of the Loyalsock Creek, in a floodplain. Plaintiff averred that beginning in 2008 and continuing over the course of construction, Defendant’s employee/agent John Brezan, while acting within the scope of his employment, provided Plaintiff with information regarding the construction code’s requirements and performed inspections at various phases of construction to ensure code compliance.

Mr. Brezan approved of the construction work he observed and inspected, and on or about February 20, 2013, issued Plaintiff a Certificate of Occupancy, which certified that “all work addressed in the permit documentation has been completed in

¹ See Amended Complaint (Ex. A – Construction Permit) (June 7, 2017).

compliance...with the uniform construction code.”² Upon receipt of the Certificate of Occupancy, Plaintiff was further notified that he had complied with all applicable Fairfield Township Zoning and Building Code Ordinances and Zoning Requirements. However, on November 3, 2014, Plaintiff received a letter from Matt Sauers, Fairfield Township Zoning Officer, notifying him that he was in violation of various provisions of Article 10 of the Fairfield Township Zoning Ordinances, relating to construction requirements for building in a floodplain.³ Plaintiff was required to undertake numerous corrective measures, which ultimately resulted in additional labor costs and expenses of \$30,000.00.

Plaintiff thereby asserted a count of Negligent Supervision and/or Observation of Construction against Defendant. Plaintiff alleged that by and through its employees, Defendant: 1. failed to properly review Plaintiff’s submitted building plans prior to issuing the construction permit on June 12, 2008; 2. improperly approved the building plans and consequently improperly issued the construction permit; 3. failed to inform Plaintiff of the proper building requirements under Article 10 of the Fairfield Zoning Ordinance as it relates to construction in a floodplain; 4. improperly approved the locations of the furnace, water heater, and electrical service panel; 5. failed to inform Plaintiff of the required flood vents and did not require Plaintiff to install flood vents; 6. failed to properly inspect the construction site to ensure compliance with Article 10 of the Fairfield Zoning Ordinances; 7. improperly issued the Certificate of Occupancy on February 20, 2013. Plaintiff sought damages in excess of the mandatory arbitration limits, or \$50,000.00.

Defendant filed Preliminary Objections to the Complaint on March 6, 2017. Defendant objected that Plaintiff had failed to join a necessary party to the action, namely Fairfield Township, which had hired Defendant to act of its behalf as building code inspectors. Defendant further objected in the nature of a demurrer that Plaintiff had failed to establish a legal obligation owed to Plaintiff that would support the claim for Negligent Supervision and/or Observation of Construction. Plaintiff filed a Response to Defendants’ Preliminary Objections on March 24, 2017, denying that Fairfield Township

² See Amended Complaint (Ex. B – Certificate of Occupancy).

³ See Amended Complaint (Ex. C – Notice of Violation Letter).

was a necessary party and denying that the Complaint had failed to establish a duty. On the date scheduled for argument on the Preliminary Objections, May 19, 2017, the parties filed a Joint Stipulation that provided that Plaintiff would file an Amended Complaint within twenty (20) days.

On June 7, 2017, Plaintiff filed an Amended Complaint, which added language providing that Defendant, by and through its employees, had violated its duty to Plaintiff to exercise reasonable care in the supervision, observation, and inspection of the construction site. Finding this amendment insufficient, on July 10, 2017, Defendant filed Preliminary Objections to Plaintiff's Amended Complaint, objecting again to Plaintiff's failure to join Fairfield Township and Plaintiff's failure to establish a duty. After briefing and argument, on October 12, 2017 the Court issued an Order overruling both objections. On November 2, 2017, Defendant filed both an Answer and New Matter to the Complaint, and a Joinder Complaint against Fairfield Township, alleging that Fairfield Township was liable for contribution or indemnity. Plaintiff filed a Reply to New Matter on November 13, 2017. Fairfield Township filed an Answer to the Joinder Complaint on January 2, 2018, and a Reply to New Matter on February 22, 2018.

On March 19, 2018, Fairfield Township filed a Motion for Judgment on the Pleadings, asserting that it was subject to immunity under, 42 Pa.C.S.A. § 8541, *et seq.*, the Political Subdivision Tort Claims Act ("Tort Claims Act"). Following a briefing schedule and argument, on May 16, 2018, the Court issued an Order granting Fairfield Township's Motion on the basis that Fairfield Township would be immune from a claim for contribution or indemnity under the Tort Claims Act.

Defendant thereafter filed an Amended Answer and New Matter, which added among the affirmative defenses provided in New Matter the defense of immunity under the Tort Claims Act.⁴ Plaintiff filed a Reply to New Matter on February 13, 2019. Thereafter, on February 21, 2019, Defendant filed a Motion for Summary Judgment, accompanied by a Brief in Support, asserting immunity from liability under the Tort

⁴ It is unclear upon this Court's review of the record whether Defendant obtained either permission from the prior presiding judge, Senior Judge Dudley A. Anderson, or the concurrence of Plaintiff's counsel, before filing the Amended Answer and New Matter. See Pa.R.C.P. 1033(a) ("A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, add a person as a party, correct the name of a party, or otherwise amend the pleading.") (emphasis added).

Claims Act. Plaintiff filed a Response on March 14, 2019, and a Brief in Opposition on May 17, 2019. The Court held argument on the Motion on May 24, 2019, and on that date, pursuant to the agreement of the parties, entered an Order providing that the Court would reschedule argument following the close of discovery.

Thereafter, on February 3, 2020, after the close of discovery, Defendant filed a Supplement to Motion for Summary Judgment (“Supplemental Motion”). Within the Supplemental Motion, Defendant asserted that in addition to its immunity defense, Plaintiff’s claim was subject to dismissal for Plaintiff’s failure to correctly identify Defendant’s agent. Specifically, Defendant asserted that pursuant to the deposition testimony of John Brezan, and the deposition testimony of a fellow code inspector, James B. Fenstermacher, Mr. Brezan was not involved in the oversight or inspection of the construction site until November 2010, and had only limited involvement thereafter. Defendant noted that this contradicted the Amended Complaint’s averments that Mr. Brezan was regularly involved in oversight and inspection of the construction site from 2008 onwards. Defendant further argued that Plaintiff had failed to demonstrate that construction was compliant with the approved plans.⁵ Defendant filed a Reply to Defendants’ Supplemental Motion on February 25, 2020. The Court held argument on the Motion for Summary Judgment and Supplemental Motion on June 26, 2020.

Standard of Review

A court may enter summary judgment after the close of the relevant pleadings if the court determines that there is no dispute as to material fact or if the record contains insufficient evidence of facts to make out a *prima facie* cause of action or defense.⁶ “In considering the merits of a motion for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.”⁷ However, the nonmoving party may not rest upon the mere allegations or denials of the pleadings, but must file a response to the motion for summary judgment within thirty days

However, as Plaintiff did not timely object to the Amended Answer and New Matter the Court will consider any objection waived.

⁵ While in the care of Fairfield Township, the original construction plans were destroyed in a flood.

⁶ *Petrina v. Allied Glove Corp.*, 46 A.3d 795, 798 (Pa. Super. 2012).

identifying: “(1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or; (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced.”⁸ The Court will only grant summary judgment “where the right to such judgment is clear and free from all doubt.”⁹

Analysis

Under the Tort Claims Act, a local agency is immune from liability for any injuries to a person or property caused by any act of the agency, an employee thereof, or any other person.¹⁰ There are certain enumerated exceptions to local agency immunity available under the section 8542 of the Tort Claims Act:

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):

(1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and

(2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b).¹¹

The categories listed under subsection (b) include: damages caused by any motor vehicle in possession or control of the local agency; damages to the personal property of others in the possession or control of the agency; damage to real property in possession of the local agency; damages to trees, traffic controls, and street lights; dangerous conditions of utility service facilities; dangerous conditions of streets owned by the local agency; dangerous condition of sidewalks owned by the local agency,

⁷ *Jones v. SEPTA*, 772 A.2d 435, 438 (Pa. 2001).

⁸ Pa.R.C.P. 1035.3(a)(1)-(2).

⁹ *Summers v. Certainteed Corp.*, 997 A.2d 1152, 1159 (Pa. 2010) (quoting *Toy v. Metro. Life Ins. Co.*, 928 A.2d 186, 195 (Pa. 2007)).

¹⁰ 42 Pa.C.S.A. § 8541.

¹¹ 42 Pa.C.S.A. § 8542(a).

damages caused by animals in the possession or control of the local agency; or sexual abuse resulting from the acts or omissions of the local agency.¹²

As previously noted, local agency employees are also immune under the Tort Claims Act. “An employee of a local agency is liable for civil damages on account of any injury to a person or property caused by acts of the employee which are within the scope of his office or duties only to the same extent as his employing local agency and subject to the limitations imposed by the Tort Claim Act.”¹³ An “employee” is defined as:

Any person who is acting or who has acted on behalf of a government unit whether on a permanent or temporary basis, whether compensated or not and whether within or without the territorial boundaries of the government unit, including any volunteer fireman and any elected or appointed officer, member of a governing body or other person designated to act for the government unit. Independent contractors under contract to the government unit and their employees and agents and persons performing tasks over which the government unit has no legal right of control are not employees of the government unit.¹⁴

Plaintiff does not assert that an exception under section 8542(b) of the Tort Claims Act applies here, nor do the pleadings support such a finding. However, Plaintiff asserts that Defendant is not an employee of Fairfield Township, but is instead an independent contractor hired to perform building code inspections on behalf of the Township. Further, Plaintiff contends that even if Defendant were an employee of Fairfield Township, in providing advice regarding the best means to meet building code requirements, Defendant, by and through its employees, acted outside the scope of employment. Plaintiff further asserts that in providing this advice, Defendant was not subject to the legal right of control of a governmental unit. Plaintiff therefore argues that Defendant is not immune from liability under the Tort Claims Act.

Defendant, citing the Pennsylvania Commonwealth Court’s decision in *Cornell Narberth, LLC v. Borough of Narberth*, counters that it served as an employee of Fairfield Township within the meaning of the Tort Claims Act, and that the alleged negligent acts and omissions of its employees and agents a part of Defendant’s position

¹² 42 Pa.C.S.A. § 8542(b).

¹³ 42 Pa.C.S.A. § 8545.

¹⁴ 42 Pa.C.S.A. § 8501.

as the Township's official building inspector. In *Narberth*, Narberth Borough ("the Borough") hired Yerkes Associates ("Yerkes") as its official building code inspector. The Court held that Yerkes was an employee of the Borough under the Tort Claims Act, stating that the Act's definition of an employee "does not require a person to be an employee in the traditional sense, but only that the employee is acting on behalf of the governmental entity."¹⁵ After determining that Yerkes was an employee of the Borough, the Commonwealth Court then addressed whether Yerkes was subject to immunity under the Tort Claims Act against appellant Cornell Narberth, LLC's ("Cornell") claim of negligent misrepresentation. This required a finding that the alleged negligent acts and omissions of Yerkes' employees and agents fell within the scope of employment, and further required a finding that Yerkes was subject to the Borough's legal right of control.

Pursuant to the facts alleged, Cornell, a real estate developer, applied to the Borough for a building permit. Before submitting the permit application, representatives from Cornell meet with representatives from the Borough and Yerkes to discuss construction plans. These representatives informed Cornell that building ordinances did not require installation of attached sprinkler systems in single-family residences. Cornell then submitted building plans to Yerkes showing several single-family residences that were to be built with pre-engineered wooden trusses, and which would not have automatic sprinklers. Yerkes approved these building plans and the Borough issued a construction permit.

Yerkes employees conducted regular site inspections during construction. At no time did Yerkes inform Cornell that construction was not code compliant. Following the final inspection, Yerkes notified the Borough to issue a certificate of occupancy. However, the Borough refused to issue the certificate of occupancy because Cornell had not installed a sprinkler system, as required for homes constructed with pre-engineered wood roof trusses under the fire code.

After reviewing the facts, the Commonwealth Court in *Narberth* affirmed the trial court and held that Yerkes would be immune from liability under the Tort Claims Act. In reaching this holding, the Commonwealth Court held that Yerkes had acted within the

¹⁵ *Cornell Naberth, LLC v. Borough of Narberth*, 167 A.3d 228, 241 (Pa. Commw. 2017) (quoting *Higby Dev., LLC v. Sator*, 954 A.2d 77, 85 (Pa. Commw. 2008)) (internal quotations omitted).

scope of employment when it: provided information to Cornell regarding how to be code compliant; approved Cornell's submitted building plans; conducted site inspections, and; recommended that the local agency issue a certificate of occupancy.

Pursuant to the opinion of the Commonwealth Court in *Narberth*, this Court similarly finds that Defendant functioned as an employee of Fairfield Township for the purposes of the Tort Claims Act, as Defendant acted on behalf of the governmental entity to perform an essential governmental function. Additionally, the Court finds that Defendant was subject to the oversight and control of Fairfield Township, as the Township exercised its autonomous power to issue Plaintiff a notice of violation letter even after Defendant had issued the Certificate of Occupancy.¹⁶

The Court similarly finds that Defendant's alleged acts and omissions fell within the scope of employment. Plaintiff in his Brief in Opposition to Defendant's Motion for Summary Judgment asserts that Defendant's employee, Mr. Brezan, acted outside the scope of his employment by endeavoring to "educate" Plaintiff on how to remain code compliant, rather than merely performing inspections. However, the Court does not see the distinction between Mr. Brezan's alleged erroneous advice to Plaintiff and Yerkes' representation to Cornell that it would not be required to install sprinkler systems. All of Defendants other purported actions, such as inspecting the property and issuing permits, would clearly fall within the purview of a building code inspector.

Nor does the Court find persuasive Plaintiff's argument that the contract between the West Branch Council of Governments and Defendant granted Defendant only limited authority to operate as building code inspector, rendering this matter distinguishable from *Narberth*. The Court is of the opinion that the contract as drafted grants Defendant those powers generally available to a building code inspector.¹⁷

Conclusion

¹⁶ This case is distinguishable from *Narberth* in one key respect. In the instant matter, Defendant had the autonomous authority to issue building permits and certificates of occupancy, while in *Narberth* the local agency ultimately retained these powers. However, the Court finds that Fairfield Township retained ultimate control over building code enforcement, as it retained the power to issue notices of violation even after Defendant issued the Certificate of Occupancy. This indicates that Fairfield Township's decision would supersede that of Defendant. Presumably, Fairfield Township could have chosen to suspend or revoke the Certificate of Occupancy if it found that the Certificate constituted a violation of the Uniform Construction Code. See 34 Pa. Code § 403.65(d).

¹⁷ See Motion for Summary Judgment (Ex. D – Contract) (Feb. 21, 2019).

Pursuant to the foregoing, the Court finds that Defendant is immune from prosecution under the Tort Claims Act. Having so decided, the Court declines to address the issues raised in Defendant's Supplemental Motion. Defendant's Motion for Summary Judgment is GRANTED and this case DISMISSED.

IT IS SO ORDERED this 28th day of July 2020.

BY THE COURT,

Eric R. Linhardt, Judge

ERL/crp

cc: Michael Dinges, Esquire

Faith Hammes, Esquire

P.O. Box 2121, Blue Bell, PA 19422

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