

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA

JOSEPH A. GRACE, JR.,	:
Plaintiff,	: CV 22-00546
v.	:
	:
PINE TOWNSHIP AND WS RIDGE	:
ROAD, LLC,	:
Defendants.	:

OPINION AND ORDER ON PRELIMINARY OBJECTIONS/MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT WS RIDGE ROAD, LLC

I. Introduction:

This matter came before this Court for argument on the Preliminary Objections/Motion for Summary Judgment filed by Defendant WS Ridge Road, LLC (hereinafter “Ridge Road”) on November 22, 2023. Since Ridge Road has never filed an Answer to the Complaint, the “relevant pleadings” in this matter with regard to that Defendant are not closed, as required by Rule 1035.2 of the Pennsylvania Rules of Civil Procedure. Therefore, to the extent that Ridge Road seeks summary judgement, the Motion will be denied as pre-mature, without prejudice to re-file after the close of the relevant pleadings. The Court will consider the Motion as if were intended to be Preliminary Objections to the Complaint.

II. Factual Background:

The Court earlier ruled on a Motion for Summary Judgement filed by Defendant Pine Township. As between the Plaintiff and Pine Township, the facts of this matter are substantially undisputed. The Court will review the facts in the light most favorable to the non-moving party. Pine Township (hereinafter “Township”) maintains a gravel public road situate in Pine Township, Lycoming County, known as Big Run Road (hereinafter the “Road”). On June 3, 2020, at approximately 6:30 p.m. Plaintiff (hereinafter “Grace”) was driving along the Road, and saw what he believed to be an animal run across the Road. Out of curiosity, Grace stopped his vehicle and

walked along the Road, in order to investigate the animal. He walked to an area that had “an opening” which permitted him to look into the surrounding wooded area. While Grace was standing very near the edge of the Road, the surface of the roadway gave out, causing Grace to fall and tumble approximately 20 feet or more down into a roadside ditch. As a result of the fall, Grace suffered injury. Several days thereafter, Grace advised the Township of his fall.

Grace testified that he was very familiar with the Road, having owned the nearby Second Chance Farm from 2001 through 2019. Grace testified that, during those years, he never noticed any problem with the Road.

Approximately one week after his fall, Grace returned to the site of the fall in order to investigate how he fell. He noticed that a drainage pipe that was formerly across the roadway had become detached from the Road. He returned to the same location several times. After a year after his fall, Grace noticed that the Township had performed a repair near the location of his fall, either replacing the drainage pipe or installing a new pipe, installing more rip rap stone, and installing a post with a reflector.

After briefing and oral argument, the Court granted in part and denied in part Township’s Motion for Summary Judgment. Simply stated, the Court entered summary judgement in favor of Pine Township on Plaintiff’s claim that the Road was poorly designed, but denied the Motion on Plaintiff’s remaining claims.

Defendant Ridge Road filed Preliminary Objections on November 22, 2023, seeking dismissal of the Complaint on two (2) separate grounds. First, Ridge Road claims that it was never properly served with the Complaint. Second, Ridge Road contends that it is entitled to judgment in its favor as a matter of law, due to the execution by Grace Family, LLP of a Settlement Agreement and General Release in favor of Walnut Street 2014-1 Issuer, LLC.

III. Questions Presented:

1. Whether Ridge Road Township is entitled to dismissal of the Complaint for failure of service of process.
2. Whether Ridge Road is entitled to a demurrer, based upon the execution by Grace Family, LLP of a Settlement Agreement and General Release in favor of Walnut Street 2014-1 Issuer, LLC.

IV. Brief Answer:

1. The question of whether Plaintiff has properly served the Complaint upon Ridge Road presents an issue of fact, which will require the Court to conduct an evidentiary hearing.
2. Ridge Road is not entitled to a demurrer on the basis of the Settlement Agreement and General Release in favor of Walnut Street 2014-1 Issuer, LLC, because the effect of that document may present issues of fact, and thus the defense must be asserted as the affirmative defense of release in New Matter, pursuant to Rule 1030 of the Pennsylvania Rules of Civil Procedure.

V. Discussion:

1. The question of whether Plaintiff has properly served the Complaint upon Ridge Road is an issue of fact, which will require the Court to conduct an evidentiary hearing.

On February 13, 2024, counsel for Plaintiff filed an “Affidavit of Return of Service,” which alleges that he served the Summons and Complaint upon Ridge Road at 409 Silverside Road, Suite 105, Wilmington, DE 19809. Attached to the Affidavit is a green certified mail receipt card with a postal service stamp dated July 1, 2022. The card is addressed to WS Ridge Road, LLC at 409 Silverside Road, Suite 105, Wilmington, DE 19809. The card bears the receipt signature of one “Stu Kendrick.” At oral argument, counsel for Ridge Road conceded that 409 Silverside Road, Suite 105, Wilmington, DE 19809 was a good address for Ridge Road on the

date of service, but contended that Stu Kendrick was not an authorized agent for Ridge Road, for purposes of service of process.

Rule 403 of the Pennsylvania Rules of Civil Procedure provides that “If a rule of civil procedure authorizes original process to be served by mail, a copy of the process shall be mailed to the defendant by any form of mail requiring a receipt signed by the defendant or his authorized agent. Service is complete upon delivery of the mail.” Rule 404 provides that original process may be served outside the Commonwealth within ninety days of the issuance of the writ or the filing of the complaint “by mail in the manner provided by Rule 403.”

Thus, it is undisputed that Plaintiff was entitled to serve Ridge Road by mail, that Plaintiff timely sent the summons and Complaint to Ridge Road at 409 Silverside Road, Suite 105, Wilmington, DE 19809, and that the address to which the summons and Complaint were mailed were a good address for Ridge Road. The only remaining question is whether the signatory for the certified mail, the “Stu Kendrick,” was an “authorized agent” as that term is set forth in Rule 403.

Naturally, the Court is in no position to speculate about the scope of authority of the person identified as “Stu Kendrick,” nor why he signed for the certified mail delivery. In Order for the Court to make any finding on that issue, the Court must Order the scheduling of an evidentiary hearing, at which time the parties can present relevant evidence.

2. Ridge Road is not entitled to a demurrer on the basis of the Settlement Agreement and General Release in favor of Walnut Street 2014-1 Issuer, LLC, because the legal effect of that document is a question of material fact, and must be asserted as an affirmative defense of release in New Matter, pursuant to Rule 1030 of the Pennsylvania Rules of Civil Procedure.

Rule 1030 of the Pennsylvania Rules of Civil Procedure provides that affirmative defenses, including the affirmative defense of release “shall be pleaded in a responsive pleading under the heading “New Matter.” The courts of our Commonwealth have repeatedly concluded that affirmative defenses should be

asserted as required in Rule 1030, and not by preliminary objection. *See Conway v. 20th Century Corporation*, 491 Pa. 189, 195, 420 A.2d 405, 408 (Pa. 1980); *Daniel v. City of Philadelphia*, 86 A.3d 955, 958 (Pa. Commw. Ct. 2014), citing *Miller v. Klink*, 871 A.2d 331, 333 (Pa. Commw. Ct. 2005); *Ferrari v. Antonacci*, 456 Pa.Super. 54, 57, 689 A.2d 320, 322 (Pa. Super. Ct. 1997).

The rationale for Rule 1030 is obvious. The bases for preliminary objection listed in Rule 1028, such as improper venue, lack of subject matter jurisdiction, insufficient specificity in the pleading, or the presence of an agreement for arbitration, are ordinarily clear from the face of the pleadings or attached agreements. Conversely, affirmative defenses often require that the Court or the jury make factual findings, based upon testimony presented in a deposition or evidentiary proceeding. Here, Ridge Road asserts the affirmative defense of release, based upon the terms of a Settlement Agreement and Mutual General Release, dated April 12, 2021, and signed by both Walnut Street 2014-1 Issuer, LLC and Grace Family LLP. The language of that Agreement clearly suggests that it arose out of an unrelated mortgage transaction. The Agreement is signed by the Plaintiff in this matter, but only in his representative capacity as a partner of a limited liability partnership known as Grace Family LLP. The Agreement provides that Grace Family LLP is releasing Walnut Street 2014-1 Issuer, LLC, and its “subsidiaries, associates, owners, stockholders, predecessors, successors, agents, directors, officers, partners, employees, representatives, lawyers and all persons by, through, under or in concert with them. . ..” It appears that the transaction which was the subject of that Agreement is wholly unrelated to the fall alleged in the Complaint in this action. The question of whether the Settlement Agreement and Mutual General Release, dated April 12, 2021, has any legal effect upon Plaintiff’s claim may require an examination of the circumstances under which that Agreement was executed. Thus, the affirmative defense of release should be properly raised in Defendant’s New Matter to the Complaint, and not through preliminary objection.

ORDER

And now, this 16th day of February, 2024, for the reasons more fully set forth above, is it hereby Ordered and Directed as follows:

1. To the extent that the Preliminary Objections/Motion for Summary Judgment filed by Ridge Road on November 22, 2023, seeks summary judgement, that Motion is denied as premature, without prejudice to re-file after the close of the relevant pleadings.
2. To that the extent that the Preliminary Objections filed by Ridge Road on November 22, 2023, seek dismissal of the Complaint as to that Defendant for improper service, those Objections are scheduled for an evidentiary hearing on June 4, 2024, at 1:30 PM in Courtroom 4 of the Lycoming County Courthouse. The scope of that hearing will be testimony or other relevant evidence on the subject of whether Plaintiff's certified mail delivery of the Summons and Complaint complied with the requirements for service by mail pursuant to Rule 403 of the Pennsylvania Rules of Civil Procedure. The parties are Ordered and Directed to conduct such discovery as they may elect, and to complete discovery no later than Friday, May 31st, 2024.
3. To that the extent that the Preliminary Objections filed by Ridge Road on November 22, 2023, seek dismissal of the Complaint as to that Defendant on the basis of the Settlement Agreement and Mutual General Release, dated April 12, 2021, those Objections are denied, without prejudice to raise that issue as an affirmative defense in New Matter.

By the Court,

Hon. William P. Carlucci, Judge

WPC/aml

cc: Court Administrator

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