Campbell v. Chevy 21

Deceptive practices — Pro se litigants — Sufficiency of pleadings

A pro se litigant's complaint regarding allegedly deceptive conduct by a car dealership was legally insufficient where plaintiff failed to cite any statute or other legal authority, and the nature of his claim was not obvious from the face of the complaint. Plaintiff received a iscratch and wini mailing from defendant, an automobile dealership. Believing that he had won his choice of a new Chevy Camaro or $25,000, plaintiff contacted defendant to claim his prize. Defendant never responded to plaintiff.

Plaintiff filed this action pro se, claiming defendant was deceptive and seeking to claim his prize. Defendant filed preliminary objections, asserting that the complaint failed to state a valid cause of action.

Although pleadings filed by pro se litigants are held to a less stringent standard under Pennsylvania law than that applied to pleadings filed by attorneys, the court held that plaintiff's complaint did not state a claim for relief. The court noted that plaintiff's averment that ìdefendant was deceptivei suggested plaintiff intended to bring a tort action or a claim under state unfair trade practices law, but no statute was referenced by citation, number, or title. The complaint required defendant and the court to guess at the nature of the claims asserted. Plaintiff attempted to provide the legal context for his claims in his response to defendant's objections, but the court held that later filed briefs did not cure the legal insufficiencies of his complaint.

Also, defendant objected that plaintiff failed to attach to the complaint a copy of the writing upon which he was relying, in violation of Pa.R.C.P. 1019(i). The court indicated that the complaint in the court's file did have two exhibits attached to it.

The court dismissed plaintiff's complaint, but stated that in the event plaintiff filed an amended complaint, he was required to attach copies of any exhibits to the documents served on defendant.

C.P. of Northampton County, No. CV-2016-8070

MURRAY, *J*., Feb. 14, 2017—

ORDER OF COURT

AND NOW, this 14th day of February, 2017, upon consideration of the Preliminary Objections to Plaintiff's

Complaint and the Brief in Support of the same filed by Defendant, Chevy 21 ("Defendant"), and the Complaint and the filings titled "Response to Defendant's Notice to Plead" and "Introduction" filed by Plaintiff, Leroy Campbell ("Plaintiff"), it is hereby ORDERED as follows:

1. Defendant's first Preliminary Objection, which is raised pursuant to Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure, is SUSTAINED.

2. Defendant's second Preliminary Objection, which is raised pursuant to Rule 1028(a)(3) of the Pennsylvania Rules of Civil Procedure, is SUSTAINED.

3. Defendant's third Preliminary Objection, which is raised pursuant to Rule 1028(a)(2) of the Pennsylvania Rules of Civil Procedure, is OVERRULED.

4. Plaintiff shall have twenty (20) days from the date of this Order to file an Amended Complaint.

STATEMENT OF REASONS

I. Factual and Procedural History

The following facts are averred by Plaintiff. On a date not specified, Plaintiff received by mail a "scratch & win" from Defendant, an automobile dealership. Compl. ¶ 3. Plaintiff played the "scratch & win" and believed that he won his choice of a brand new Chevy Camaro or $25,000.00. *Id.* Plaintiff contacted Defendant for the purpose of claiming his prize and was told Defendant's manager would return Plaintiff's call. *Id.* at ¶ 4. Plaintiff's call was not returned. *Id.* at ¶ 5. Plaintiff's Complaint

concludes with the following averment: "I seek award of my prize. Defendant was deceptive. I also seek to recover costs." *Id.* at ¶ 7.

Plaintiff initiated suit at the Magisterial District Court. Default Judgment was entered in favor of Plaintiff. Defendant filed a Notice of Appeal and Rule to File Complaint on September 12, 2016. Plaintiff filed his Complaint on September 29, 2016. Defendant filed its Preliminary Objections and Brief in Support of the same on October 18, 2016. Plaintiff filed two responsive briefs, the first on October 25, 2016, titled, "Response to Defendant's Notice to Plead" ("Response"), and the second on December 27, 2016, titled, "Introduction."

This matter was placed on the November 29, 2016, Argument List and was submitted on brief.

II. Discussion

A. Standard of Review

A court may properly grant preliminary objections when the pleadings are legally insufficient for one or more of the reasons enumerated in Rule 1028 of the Pennsylvania Rules of Civil Procedure. In ruling on preliminary objections, "we will consider as true all well-pleaded facts and inferences reasonably deducible therefrom, but not conclusions of law, argumentative allegations or opinions." *Erie Cty. League of Women Voters v. Com., Dep't of Envtl. Res.*, 525 A.2d 1290, 1291 (Pa. Commw. 1987). In considering a preliminary objection that seeks the dismissal of a cause of action, a court must only sustain such a preliminary objection "in cases in

which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief." *Feingold v. Hendrzak*, 15 A.3d 937, 941 (Pa. Super. 2011).

A demurrer tests the legal sufficiency of the evidence. Pa.R.C.P. 1028(a)(4). A preliminary objection in the nature of a demurrer "is deemed to admit all well-pleaded facts and all inferences reasonably deduced therefrom." *Penn Title Ins. Co. v. Deshler*, 661 A.2d 481, 482 — 83 (Pa. Commw. Ct. 1995). "In determining whether to sustain a demurrer, the court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion." *Id.* at 483. Further, "[i]f any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections." *Feingold*, 15 A.3d at 941.

A. Preliminary Objection in the Nature of a Demurrer

Defendant's first Preliminary Objection is in the nature of a demurrer and asserts that Plaintiff's Complaint fails to articulate a valid cause of action. Defendant also notes that Plaintiff is a *pro se* litigant. It is well-settled that the "allegations of a *pro se* complainant are held to a less stringent standard than that applied to pleadings filed by attorneys." *Danysh v. Dep't of Corr.*, 845 A.2d 260, 262 — 63 (Pa. Commw. 2004), *aff'd*, 881 A.2d 1263 (Pa. 2005). Thus, "[i]f a fair reading of the complaint shows that the complainant has pleaded facts that may entitle him to relief, the preliminary objections will be overruled." *Id.*

The lone legal averment contained in Plaintiff's

Complaint is that "Defendant was deceptive." One might guess that Plaintiff intends to bring a tort action or perhaps an action under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"). However, no statute is referenced by citation, number, or title. Defendant cannot be expected to guess the nature of Plaintiff's claims against it. Plaintiff's responses to Defendant's Preliminary Objections further highlight the inadequacy of Plaintiff's Complaint. In Plaintiff's Response, he references false and deceptive advertising, "state and federal laws" that pertain to such advertising, "bait and switch" tactics, and a "reasonabl[e] expect[ation] to receive the prize advertise." Pl.'s Resp. ¶¶ 1-3 10. Plaintiff's Introduction further elaborates on these same arguments, directly citing to the UTPCPL as well as the Federal Trade Commission. *See* Intro. 3, 5.

While Plaintiff's Response and Introduction appear to provide legal context for his Complaint, these later filed briefs cannot cure the legal insufficiencies in his Complaint. Even under the applicable "less stringent standard," we must sustain Defendant's first Preliminary Objection and dismiss Plaintiff's Complaint. Despite this ruling, we briefly consider the balance of Defendant's Preliminary Objections.

B. Preliminary Objection to Insufficient Specificity

Defendant's second Preliminary Objection is raised on the grounds of insufficient specificity. For the same reasons stated upon in our consideration of Defendant's demurrer, we sustain Defendant's second Preliminary Objection. That is, Plaintiff avers facts without specifying

a cause of action. Thus, we sustain Defendant's second Preliminary Objection.

C. Preliminary Objection for Failure to Conform to Law or Rule of Court

Defendant's third and final Preliminary Objection maintains that Plaintiff failed to comply with Rule 1019(i) of the Pennsylvania Rules of Civil Procedure. Rule 1019(i) requires that when a claim is based upon a writing, "the pleader shall attach a copy of the writing, or the material part thereof," unless the writing is not accessible to the pleader, in which case "it is sufficient so to state, together with the reason, and to set forth the substance in writing." Pa.R.C.P. 1019(i). The thrust of Defendant's argument is that the Complaint references exhibits "yet no exhibits were included or served upon Defendant." Def.'s Prelim. Objections ¶ 18.

Upon review of the official court file, two exhibits are, in fact, attached to the Complaint. Exhibit One contains a copy of a document titled, "Play the Scratch & March Game!" Compl. Ex. One. Exhibit Two contains a copy of a document titled, "Scratch & Win!" *Id.* at Ex. Two. It is unclear as to why Defendant's copy of the Complaint omits these exhibits. Accordingly, we overrule Defendant's final Preliminary Objection, but in the event Plaintiff files an Amended Complaint, any exhibits that are attached to the original must be attached to the copy served upon Defendant.

Atlantic Wind, LLC v. Penn Forest Twp. Zoning Hearing Bd.

Zoning — Equity jurisdiction — Exclusive statutory remedy

State law provided that plaintiff had an exclusive statutory remedy before a local zoning board. Plaintiff did not provide sufficient evidence of bias or lack of due process sufficient to warrant an exercise of equity jurisdiction by the court. Defendant's preliminary objections were sustained and plaintiff's complaint was dismissed.

Plaintiff filed a zoning application with Penn Forest Township Zoning Hearing Board ("ZHB") seeking a special exemption to construct and operate a wind turbine project. Five hearings were held before the ZHB regarding plaintiff's application. Alleging threats of violence that affected its ability to receive a fair and meaningful hearing before the ZHB, plaintiff filed a complaint seeking a court order providing injunctive relief that would require all future hearings to take place at the county courthouse, and further requiring that an independent hearing office be appointed to handle the matter.

ZHB filed preliminary objections, arguing that the court lacked equity jurisdiction because plaintiff failed to utilize and exhaust an exclusive statutory remedy. Plaintiff responded that the ZHB's inability or unwillingness to provide a safe hearing venue impaired plaintiff's due process rights and required the court to exercise its equity jurisdiction.

Sec. 909.1(a)(6) of the Municipalities Planning Code provided that the ZHB had exclusive jurisdiction over zoning matters, including special exemptions such as the one sought by plaintiff. The court held that plaintiff failed to exhaust its exclusive statutory remedy.

Plaintiff argued threats of violence at the hearings had tainted the proceedings before the ZHB, and therefore it was not possible for the ZHB to render a fair and impartial decision. The court found no indication in the record that plaintiff previously raised its claims of bias before the ZHB, and the record did not contain any specific allegations of bias on the part of any member of the ZHB. Plaintiff did not allege that the ZHB prevented it from presenting evidence or interfered with plaintiff's right to cross-examination. The court concluded plaintiff failed to plead facts sufficient to support a finding of bias.

The statute provided ZHB had authority over this zoning matter, and plaintiff's equity action was an improper attempt to circumvent the mandatory statutory review process. The court sustained ZHB's preliminary objections and dismissed plaintiff's complaint with prejudice.

C.P. of Carbon County, No. 16-2305

Debra A. Shulski, Esquire, Co-Counsel for Atlantic Wind, LLC

Jonathan W. Bradbard, Esquire, Co-Counsel for Atlantic Wind, LLC

Matthew Rapa, Esquire, Counsel for Penn Forest Township ZHB

Bruce K. Anders, Esquire, Counsel for Christopher Mangold

Phillip C. Malitsch, pro se

James F. Preston, Esquire, Counsel for Bethlehem Authority

SERFASS, *J*., Feb. 17, 2017—This matter is presently before the Court on Defendant, Penn Forest Township Zoning Hearing Board's preliminary objections to Plaintiff, Atlantic Wind, LLC's amended complaint which was filed in this Court on November 7, 2016. Defendant's preliminary objections arise under Pennsylvania Rule of Civil Procedure 1028(a)(1) relating to lack of jurisdiction over the subject matter of the action and improper venue, and Pennsylvania Rule of Civil Procedure 1028(a)(7) relating to a failure to exhaust statutory remedies. For the reasons that follow, Defendant's preliminary objections will be sustained and Plaintiff's amended complaint will be dismissed with prejudice.

I. FACTUAL AND PROCEDURAL HISTORY

On April 4, 2016, Plaintiff filed a zoning application with Penn Forest Township seeking a special exception to construct and operate a wind turbine project on approximately

two hundred sixty (260) acres of land which is owned by Bethlehem Authority and is situated north and south of Hatchery Road. Hearings before the Penn Forest Township Zoning Hearing Board (hereinafter "ZHB") commenced on May 12, 2016. Five (5) public hearings were held before the ZHB at the Penn Forest Township Volunteer Fire Company No. 1 (hereinafter "fire hall"). The hearings were held at the fire hall, rather than at the township building, to accommodate the large number of attendees who desired to observe and/or participate in the proceedings.

Alleging that threats of violence have affected Plaintiff's ability to receive a fair and meaningful hearing before the ZHB, on September 26, 2016, Plaintiff filed a complaint seeking injunctive relief in the form of a court order requiring that all future hearings take place at the Carbon County Courthouse and that an independent hearing officer be appointed to hear the matter and issue a decision thereon.

On October 4, 2016, Plaintiff filed an "Expedited Petition for Preliminary Injunction" seeking a preliminary injunction barring the ZHB from holding further hearings on Plaintiff's zoning application until such time as the relief sought in the complaint could be considered by this Court. After we had scheduled a hearing on Plaintiff's petition for October 18, 2016, Plaintiff and the ZHB filed a stipulation pursuant to which the ZHB agreed to hold no further hearings pending resolution of Plaintiff's claims before this Court. On October 18, 2016, we entered an Order approving the parties' stipulation and staying further proceedings before the ZHB. On that same date, the ZHB

filed preliminary objections to Plaintiff's complaint.

On November 7, 2016, Plaintiff filed an amended complaint to which the ZHB filed the instant preliminary objections on November 14, 2016. Counsel for the parties appeared before the undersigned on December 20, 2016 for oral argument on the aforementioned preliminary objections. At the conclusion of oral argument, we granted Defendant's counsel two (2) weeks within which to provide the Court with a supplemental brief or additional case law in support of the position of the ZHB. We also granted Plaintiff's counsel one (1) week thereafter within which to furnish a responsive brief or case law on behalf of Atlantic Wind. No supplemental briefs nor additional cases were submitted for our consideration and Defendant's preliminary objections are now ripe for disposition.

II. DISCUSSION

Defendant argues that this Court lacks equity jurisdiction because Plaintiff has failed to utilize and exhaust an exclusive statutory remedy set forth in the Pennsylvania Municipalities Planning Code. 53 P.S. §10101-11202 (hereinafter "MPC"). Plaintiff counters that the ZHB's inability or unwillingness to provide a safe hearing venue conducive to securing its rights to procedural due process requires this Court to exercise equity jurisdiction in order to ensure compliance with Plaintiff's constitutional rights.

We begin our analysis of this issue with a recognition that section 909.1(a)(6) of the MPC provides that the zoning hearing board shall have exclusive jurisdiction to hear and render final adjudications in matters involving

special exceptions under the zoning ordinance. 53 P.S. §10909.1(a)(6). Moreover, the procedures for a land use appeal set forth in Article X-A of the MPC constitute "the exclusive mode for securing review of any decision rendered pursuant to Article IX (Zoning Hearing Board and other Administrative Proceedings) or deemed to have been made under this act." 53 P.S. §11001-A. This would include all decisions made in the course of special exception hearings.

It is to be noted that since May 12, 2016, a total of five (5) public hearings on Plaintiff's special exception application have been held before the ZHB[1]. While counsel informed the Court at oral argument that each of the public hearings has lasted several hours and that the record is nearly complete, to date, the record remains open and no decision has been rendered by the ZHB.

The Commonwealth Court of Pennsylvania has long recognized that interference with the actions of a municipal body is to be undertaken only in extremely limited circumstances. *Prin v. Counsel of Municipality of Monroeville*, 645 A.2d 450, 452 (Pa. Cmwlth. 1994). Moreover, it is well-settled that where the Pennsylvania General Assembly provides a "statutory remedy which is mandatory and exclusive, equity is without power to act." *DeLuca v. Buckeye Coal Company*, 345 A.2d 637 (Pa. 1975). See also *Borough of Green Tree v. Board of Property Assessments, Appeals and Review of Allegheny*

1. The five (5) public hearings before the ZHB were held on the following dates: May 18, 2016, June 23, 2016, July 14, 2016, July 21, 2016 and August 25, 2016.

County, 328 A.2d 819 (Pa. 1974).

When, as here, there is a challenge that the statutory remedy does not meet the requirements of due process, the claim is essentially an assertion of the inadequacy of the statutorily prescribed remedy. *Cedarbrook Realty, Inc. v. Nahill*, 399 A.2d 374 (Pa. 1979). We note that due process principles apply to quasi-judicial or administrative proceedings, such as the zoning hearings at issue in the matter *sub judice*, and require an opportunity, *inter alia*, to hear evidence adduced by the opposing party, cross-examine witnesses, introduce evidence on one's own behalf and present argument. See *Kowenhoven v. County of Allegheny*, 901 A.2d 1003 (Pa. 2006). Specifically, section 908(5) of the MPC provides that "[t]he parties shall have the right to be represented by counsel and shall be afforded the opportunity to respond and present evidence and argument and cross-examine adverse witnesses on all relevant issues." 53 P.S. §10908(5).

In this matter, the exclusive mode of review for a special exception application is before the ZHB. Section 908(2) of the MPC provides that the "hearings shall be conducted by the board or the board may appoint any member or an independent attorney as a hearing officer." 53 P.S. §10908(2), emphasis added. While Atlantic Wind filed its special exception application with the ZHB, it has failed to exhaust this exclusive statutory remedy claiming that the remedy is not adequate.

In its amended complaint, Plaintiff asserts that the hearing venue and threats of violence have tainted the

proceedings and the ZHB itself. With regard to the fire hall, Plaintiff argues that it "...should not be forced to continue to put forth its "[a]pplication through witnesses and engage in cross-examination of the opposition in an unsafe setting." See "Plaintiff's Memorandum of Law in Opposition to Defendant, Penn Forest Township Zoning Hearing Board's Preliminary Objections to Plaintiff's Amended Complaint", at page 12. Plaintiff maintains that "[t]he risk of harm would be greatly reduced by holding these hearings at a secure location with a police presence and metal detectors, such as the Carbon County Court of Common Pleas." Id. As to its request for the appointment of an independent hearing officer, Plaintiff claims that "[i] t is simply not possible for the current ZHB to render a fair, impartial, detached decision in the face of threats of violence..." Id., at page 14.

In reviewing the amended complaint, we find no averments that Plaintiff previously raised its claims of bias before the ZHB in an attempt to determine whether the ZHB would remain impartial in deciding Plaintiff's special exception application in the face of any actual or perceived intimidation or threats. Plaintiff has also failed to aver that any member of the ZHB has displayed an inability to remain fair and impartial. Moreover, the amended complaint contains no averments that the ZHB has infringed upon Plaintiff's rights to present evidence and argument or that it has taken action to improperly limit Plaintiff's right to cross-examine adverse witnesses. Therefore, Plaintiff has failed to plead facts sufficient to support a finding of bias on behalf of the members of the ZHB.

Both parties cite to *HYK Construction Co., Inc. v. Smithfield Twp.*, 8 A.3d 1009 (Pa. Cmwlth. 2010), in support of their respective positions concerning the appointment of an independent hearing officer. In *HYK Construction Co.*, the Commonwealth Court vacated a final order issued by the Court of Common Pleas of Monroe County which granted equitable relief via the appointment of an independent hearing officer in place of a township board. The plaintiff in *HYK* filed a conditional use application with Smithfield Township to construct and operate a concrete manufacturing facility, and public hearings on that application were commenced before the township's board of supervisors. While the hearings before the board were proceeding, HYK filed a complaint seeking equitable relief with the trial court. Within its claim for equitable relief, the plaintiff requested that the trial court void the ongoing hearings, preclude and enjoin the township board from hearing the application due to a possible conflict of interest, and to appoint an independent hearing examiner to rule on the application. *HYK Construction Co., Inc.*, 8 A.3d at 1013.

Finding in favor of Smithfield Township on appeal, the Commonwealth Court held that the facts of the case did not rise to the level necessary to invoke equity, since they did not involve a commingling of the township's prosecutorial and adjudicative functions. Moreover, the Court found that HYK had failed to exhaust the statutory remedies mandated by the MPC.

Similarly, we conclude that the facts in this matter do not rise to the level necessary to invoke equity. As in the *HYK* case, we find that Atlantic Wind's equity

action represents an improper attempt to circumvent the mandatory statutory review process. The matter here before us amounts to an improper interlocutory appeal and a usurpation of the clear statutory authority of the ZHB. As the Commonwealth Court stated in the *HYK* decision:

> To allow equity jurisdiction to usurp the power of the Board would create infinite challenges to interlocutory determinations and defeat or, at the very least, disrupt the Commonwealth's structure for review of zoning decisions by local boards and governing bodies...Any claims of unfairness or bias should be raised first before the hearing tribunal, in this case the Board, and then ultimately on appeal...

HYK Construction Co., Inc., 8 A.3d at 1021.

CONCLUSION

Having concluded that an adequate remedy at law exists in this matter, we find no justification for the exercise of equity jurisdiction. We will, therefore, sustain the instant preliminary objections and enter the following

ORDER OF COURT

AND NOW, to wit, this 17th day of February, 2017, upon consideration of Defendant, Penn Forest Township Zoning Hearing Board's Preliminary Objections to Plaintiff's Amended Complaint, Plaintiff's Answer thereto, review of the briefs of counsel, and after oral argument thereon, it is hereby

ORDERED and DECREED that the aforesaid

Preliminary Objections are SUSTAINED and that Plaintiff's Amended Complaint is DISMISSED with prejudice.

IT IS FURTHER ORDERED and DECREED that the stay on further proceedings before the Penn Forest Township Zoning Hearing Board imposed by this Court, pursuant to the parties' stipulation and our Order dated October 18, 2016, is hereby LIFTED[2].

Bell v. Butkovitz

Governmental Immunity — Defamation — Opinion

Plaintiff did not make out a claim for defamation where the alleged defamatory remark had already been published following a governmental investigation. Defendants were entitled to absolute governmental immunity where they were responsible for large sums of money and were engaged in policy-making decisions.

Plaintiff was the executive director of the mayor's fund for Philadelphia from 2012 to 2015. Defendant Butkovitz was the city controller of Philadelphia. His office conducted an evaluation of the propriety of certain expenditures made by the mayor's fund during the time plaintiff was in charge. The evaluation resulted in a report which concluded that the funds had been improperly used, because the controls and protective procedures had been circumvented. Butkovitz held a press conference to present his findings.

Plaintiff contended that the investigation and press conference were political stunts intended to embarrass her and harm her reputation. She filed this action, alleging claims for defamation, false light, and injurious

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2. During oral argument on Defendant's preliminary objections, counsel for the ZHB stated that the board has no objection to Plaintiff's request that future hearings concerning its special exception application be held at the Carbon County Courthouse. In that regard, we are willing to entertain a written stipulation prepared by counsel memorializing the parties' agreement, with the understanding that use of county facilities and the scheduling of public hearings must be coordinated with the Court, the Sheriff's Department and the Office of the Carbon County Commissioners.

falsehood or disparagement.

Defendants filed preliminary objections. First, Butkovitz and plaintiff's successor, defendant DelBianco, argued they were immune from suit because they were high public officials. Plaintiff admitted that Butkovitz qualified as a high public official. The court determined that DelBianco also qualified as a high public official, because her duties involved managing substantial sums of public and private funds on behalf of the city, and she engaged in policy-making decisions. As such, both Butkobitz and DelBianco had absolute immunity from civil suit.

Next, plaintiff argued Butkovitz was acting outside the scope of his official duties and was not entitled to immunity. The court rejected this argument, because Butkovitz was acting within his authority in conducting the investigation, and the new conference was intended to provide the public with information regarding his official acts.

In a television interview, DelBianco stated that some of the previous spending on a holiday celebration was not appropriate in regard to the mayor's policies and procedures. Plaintiff asserted this statement was defamatory and put her in a false light. At the time of DelBianco's statement, the city controller's report had been published and the press conference had already taken place. The court found that DelBianco fully disclosed the facts upon which she based her opinion, and that she did not imply the existence of undisclosed facts. Under these circumstances, plaintiff did not establish that the remark at issue was false. The court dismissed plaintiff's entire complaint with prejudice.

C.P. of Philadelphia County, August Term, 2016, No. 3265

MASSIAH-JACKSON, *J*., Feb. 21, 2017—

A. Factual Background and Procedural History

Plaintiff-Desiree Peterkin Bell was the Executive Director of the Mayor's Fund for Philadelphia and City Representatives from 2012 through 2015. The Marathon Reserves account was established in 2014. Defendant-Alan Butkovitz has been and continues to be the elected City Controller of Philadelphia. Defendant-Ashley DelBianco was appointed the Executive Director of the

Mayor's Fund for Philadelphia in 2015. She is also the Chief Grants Officer for the City of Philadelphia.

* * *

In the Summer of 2016, the Office of the City Controller of Philadelphia, conducted an evaluation of the propriety of certain expenditures made by the Marathon Reserves of the Mayor's Fund for Philadelphia for the two year period ending December 31, 2015. Complaint, Paragraphs 34-47. The Controller's Office conducted this review at the request of the current Executive Director of the Mayor's Fund for Philadelphia, Ms. DelBianco.

The Controller's Office prepared an eighteen page Report and concluded, as per the Executive Summary (Exhibit 1 of Plaintiff's Complaint):

> "Based solely on the agreed-upon-procedures performed for 66 percent of the expenses ($393,000 out of $593,000 for 2014 and 2015), the Controller's Office found that during 2015 the chairperson of the Mayor's Fund under the prior mayoral administration substantially circumvented all the policies and control activities that had been designed and adopted for the fund. In short, the former board chair operated autonomously and was allowed almost exclusive discretion for awarding grants and incurring expenses charged to the account."

The City Controller held a press conference on August 16, 2016, to present his findings and recommendations to the public. Complaint, Paragraphs 49-74. It is the contention of the Plaintiff that the investigation and press

conference were part of a "political stunt," designed to embarrass her and harm her reputation. One week later, on August 24, 2016, Ms. Desiree Peterkin Bell, the former Executive Director, initiated this civil litigation asserting claims of defamation, false light, and injurious falsehood or disparagement.

The Defendants filed Preliminary Objections to the Complaint in the nature of a demurrer, per Rule 1928(a)(4) of the Pennsylvania Rules of Civil Procedure. The guidelines for evaluating a demurrer are well settled. This Court will accept the material facts and reasonable inferences set forth in the Plaintiff's Complaint. A demurrer may be granted only when it is determined that the recovery is impossible as a matter of law. If any doubt exists, the demurrer will be overruled. *Schemberg v. Smicherko*, 85 A.3d 1071, 1073 (Pa. Superior Ct. 2014).

After careful consideration of the Memoranda submitted by the parties, and, after Oral Argument held on February 15, 2017, and, for the reasons set forth herein, the Preliminary Objections filed by the Defendants are Sustained in their entirety and all claims are Dismissed With Prejudice.

B. Legal Discussion

1. Mr. Butkovitz and Ms. DelBianco are High Public Officials and They are Immune From Civil Suit.

The doctrine of absolute immunity set forth in Pennsylvania common law was designed to foreclose even the possibility of suit. It insulates high ranking public officials from all statements made and all actions taken

in the course of their official duties. When statements are made which are closely related to a matter pending within the office, the absolute privilege is applicable.

The Appellate Courts have been consistent when providing the explanation of the doctrine of absolute immunity and when explaining the purposes for absolute immunity for high public officials. See generally, *Durham v. McElynn*, 772 A.2d 68 (Pa. 2001); *Lindner v. Mollan*, 677 A.2d 1194 (Pa. 1996); *Montgomery v. City of Philadelphia*, 140 A.2d 100 (Pa. 1958); *Matson v. Margiotti*, 88 A.2d 892 (Pa. 1952); *McKibben v. Schmotzer*, 700 A.2d 484 (Pa. Superior Ct. 1997); *McCormick v. Specter*, 247 A.2d 688 (Pa. Superior Ct. 1971); *Feldman v. Hoffman*, 107 A.3d 821 (Pa. Commonwealth Ct. 2014) *Azar v. Ferrari*, 898 A.2d 55 (Pa. Commonwealth Ct. 2006); *Osiris Enterprises v. Borough of Whitehall*, 877 A.2d 560 (Pa. Commonwealth Ct. 2005); *Rok v. Flaherty*, 527 A.2d 211 (Pa. Commonwealth Ct. 1987).

In *Lindner*, *supra*, 677 A.2d at 1195, the Supreme Court quoted *Matson*, *supra*, 88 A.2d at 895:

> "[Absolute privilege] as its name implies, is unlimited and exempts a high public official from all civil suits for damages arising out of false defamatory statements and even from statements or actions motivated by malice, provided the statements are made or the actions are taken in the course of the official's duties or powers and within the scope of his authority, or as it is sometimes expressed, within his jurisdiction."

When an official is entitled to absolute immunity/privilege,

personal or political motivations are not material. Even if a statement is erroneous or false or made with malice, the privilege is absolute and constitutes a complete defense to Counts I, II, and III of this Peterkin Bell Complaint, e.g. *Matson*, *supra*, 88 A.2d at 899. In *Montgomery*, *supra*, the Supreme Court explained the purpose of the absolute immunity doctrine, at 140 A.2d 102:

> "is designed to protect the official from the suit itself, from the expense, publicity, and danger of defending the good faith of his public actions before a jury. And yet, beyond this lies a deeper purpose, the protection of society's interest in the unfettered discharge of public business and in full public knowledge of the facts and conduct of such business. Absolute immunity is thus a means of removing any inhibition which might deprive the public of the best service of its officers and agencies."

Now, we must determine whether Mr. Butkovitz and Ms. DelBianco are high public officials. In written and oral responses, Plaintiff-Peterkin Bell acknowledges that City Controller Alan Butkovitz is a high public official. Next, to determine whether Defendant-DelBianco is a high public official, the focus is on the nature of her particular duties, the importance of her office, and whether or not she has policy-making functions. e.g. *Durham*, *supra*, 772 A.2d at 69; *Feldman*, *supra*, 107 A.3d at 827.

The Plaintiff's Complaint and Exhibits provide the underlying and fundamental basis for this Court to conclude that the broad duties of the Executive Director of

the Mayor's Fund are significant in managing, coordinating and spending substantial sums ($10 million) of public and private monies on behalf of the City of Philadelphia, see Complaint, Paragraphs 15-20. This "behind the scenes" 501(c)(3) organization advances the sitting Mayor's priorities while requiring Executive Director DelBianco to engage in policy-making decisions relating to expenditures and management for all of the 50-plus City Department Accounts. See, Complaint, Paragraphs 21-33; Exhibit "About The Fund — Our History" at Paragraph 21, attached hereto as Court Exhibit "A." Significantly, it is in the public interest that the Executive Director of the Mayor's Fund not be impeded in the performance of her important duties while managing City initiatives and City expenditures. With these considerations in mind, this Court concludes that Defendant-DelBianco is a "high public official." This Defendant is afforded absolute immunity from civil suit.

Finally, it must be noted that at our Hearing, Plaintiff-Peterkin Bell acknowledged that if Defendant-DelBianco is a high public official then her words did fall within the scope of her official duties and that no viable cause of action exists against her.

2. Defendant-Butkovitz Was Not Acting Outside of the Scope of His Jurisdiction.

Plaintiff-Peterkin Bell contends that even if Defendant-Butkovitz is a high public official his actions and words were not protected by an absolute privilege. This Court does not agree.

The City Controller conducted an investigation as part of his official duties. His office issued a written Report and made certain findings and recommendations about spending and disbursements from the Marathon Reserves account (one of the funds within the Mayor's Fund). It is the Plaintiff's position that when Mr. Butkovitz held a press conference, sent out notices on the Controller's Official Twitter Account, and was interviewed on the radio to discuss his Report with the public, this Defendant was acting "outside the scope of the Controller's investigation." Complaint, Paragraphs 45-48.

In 1952, the Pennsylvania Supreme Court relied on precedent from the United States Supreme Court to hold that official communications made by high ranking officials to the press or on the radio are protected by the principle of absolute immunity "when engaged in the discharge of duties imposed upon them by law." *Matson*, *supra*, 88 A.2d at 204-205:

> "We believe it is in the public interest to permit the Attorney General to keep the public advised of his official acts and conduct where such actions are in the course of and within the scope of his official duties or powers."

Accordingly, where as here Defendant-Butkovitz was acting in the course of and scope of his legal duties as the City Controller of Philadelphia, it is in the public interest to afford him absolute immunity from suit. The privilege of official immunity extends to those statements and actions which are "closely related" to the performance of

his official duties. *Osiris Enterprises*, *supra*, 877 A.2d at 568. When considering the forum where the words were spoken, as well as the legitimate subject of governmental concern it is clear that the Controller's news conference, the Official Twitter announcements, and the radio interview were statements made to the public about expenditures, charges and grants for City programs and projects. These initiatives include but were not limited to those set forth in Plaintiff's Complaint at Paragraphs 16 and 17. Defendant-Butkovitz was keeping the public advised of his official acts.

Rok v. Flaherty, 527 A.2d 211 (Pa. Commonwealth Ct. 1987), relied on by Plaintiff-Peterkin Bell, is not a per se prohibition against news conferences and press releases. Rather, the Appellate Court held that when an elected official refused to perform his mandated duties and in conjunction with his refusal that Controller also took actions and made certain disputed statements, there was no immunity to protect him from suit. That Controller was not acting in his official capacity by refusing to sign certain documents.

In contrast, when a District Attorney held a press conference, summary judgment was affirmed because it was within the public interest to be informed and to know "of matters pending in that office." *McCormick v. Specter*, 275 A.2d 688, 689 (Pa. Superior Ct. 1971). The rational for official immunity is for the protection of the public interests and not that of the government official. See also, *Lindner*, *supra*, 677 A.2d at 1199, citing *Mosley v. Observer Publishing Co.*, 619 A.2d 343 (Pa. Superior

Ct. 1993). Under the circumstances present here, where the interviews and announcements were made by City Controller Butkovitz of matters and recommendations pending in that office and relating to the Controller's duties to examine the City's financial affairs and expenditures for City sponsored events, those were matters within the scope of his duties and the scope of his authority. *Azar*, *supra*, 898 A.2d at 61. His actions and statements are protected by absolute privilege.

Finally, as noted at our Hearing on February 15, 2017, this Court has not been presented with the texts of either the Twitter announcement or the radio interview. The only evidence is Paragraph 64 of Plaintiffs Complaint which is accepted as true for purposes of Rule 1028(a)(4).

3. Defendant-DelBianco's Statement Was an Expression of Her Opinion About Known Facts.

In an August, 2016, television interview held after the Controller's Report and after the Controller's news conference, it was reported, in part, on the evening news:

> "DelBianco said she asked for the probe after $45,000 was spent to pay vendors for a holiday celebration. She said some of the spending wasn't "'appropriate in support of the mayor's policies and procedures.'"

Plaintiff contends that the phrase in bold, above, was defamatory and placed her in a false light. Complaint, Paragraph 70. It is this partial sentence which forms the basis for the entire cause of action, and, which Ms. Peterkin Bell asserts is suggestive that she "committed a crime, stole money and/or was otherwise dishonest in her

job." Complaint, Paragraph 71.

On February 16, 2017, Plaintiff provided the Court with the video disc of the news report and the full two page transcript. See Court Exhibit "B", attached hereto.

In *Balletta v. Spadoni*, 47 A.3d 183 (Pa. Commonwealth Ct. 2012), the Appellate Court issued a comprehensive overview of defamation and protected communications, as adopted by Pennsylvania in Restatement. (Second) of Torts, §566. In an action for defamation, a plaintiff's burden of proof is to demonstrate:

> "(1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of the defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff; (6) special harm resulting to the plaintiff from its publication; and (7) abuse of a conditionally privileged occasion."

Balletta, *supra*, 47 A.3d at 196.

A communication may be considered defamatory if it tends to harm the reputation of another. Although offensive, certain types of communications are not actionable. Whether a challenged phrase is capable of defamatory meaning must be viewed in its factual context. In *Feldman v. Lafayette Green Condo. Association*, 806 A.2d 497 (Pa. Commonwealth Ct. 2002), the Court cited numerous cases to affirm the Trial Court's dismissal of Plaintiff's Complaint, noting that an expression of opinion based on disclosed facts is not sufficient for a cause of action for

defamation — no matter how unreasonable or unjustified the Plaintiff may consider the remarks. See also, comments b and c to Restatement §566.

Here, as in *Balletta*, *supra*, the Controller's Report had already been published. The press conference had already been held. The information Plaintiff-Peterkin Bell complains of was fully disclosed prior to the interview on the evening newscast. Based on the context of the quoted phrase of Paragraph 70 of Plaintiff's Complaint, Defendant-DelBianco's statement is non-actionable statement of opinion. The newscast fully disclosed the facts upon which the Executive Director of the Mayor's Fund based her opinion and did not imply the existence of undisclosed facts. See, *Balletta*, *supra*, 47 A.3d 196-201 for extensive discussion.

Further, Plaintiff-Peterkin Bell failed to plead sufficient facts to clearly and convincingly establish that the remark at issue from Defendant-DelBianco was false. When viewed in the context of the television interview, Plaintiff cannot create a cause of action from the words of the journalist or the reporter's "voice over." See, *Jones v. City of Philadelphia*, 893 A.2d 837, 844-846 (Pa. Commonwealth Ct. 2006). In fact, the challenged remark paraphrases the same language written in the Executive Summary of the City Controller's Report. That Executive Summary is attached by Plaintiff to the Complaint and it words have not been challenged in any Count of the Complaint. See, Complaint, Paragraph 41. Accordingly, even if Ms. DelBianco is not a high public official, the Plaintiff is unable to establish a viable cause of action.

C. Conclusion

For all of the reasons set forth above the Preliminary Objections are Sustained in their entirety and Plaintiff's Complaint is Dismissed With Prejudice.

ORDER

And Now, this 21st day of February, 2017, after considering the Preliminary Objections filed by Alan Butkovitz and Ashley DelBianco and Plaintiff's Response thereto, and after oral argument held February 15, 2017, and for the reasons set forth in the Memorandum filed this date, it is hereby ORDERED that the Preliminary Objections are SUSTAINED in their entirety and the Complaint of Desiree Peterkin Bell is DISMISSED With Prejudice.

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631 N. Broad St., LP v. Congregation Rodeph Shalom

Party wall — Quiet title — Injunction

Defendant was entitled to a preliminary injunction preventing plaintiff neighboring property owner from demolishing the party wall between their lots that lay partially on defendant's property because the wall was a party wall, even though it was no longer used to support two buildings, the property line ran under the wall and opening a hole in the wall would create an immediate and irreparable harm. Injunction granted.

Defendant sought a preliminary injunction to stop plaintiff from demolishing the south wall of plaintiff's building. The wall extended five inches over the property line onto defendant's lot. Both parties stipulated that the property line ran underneath the wall, that the wall was built in the 1860s and was marked on the relevant deeds. At the time plaintiff's building was constructed, Pennsylvania's party wall statute allowed for the construction of party walls up to six and one-half feet over a property

boundary. The building on defendant's lot that was attached to plaintiff's wall was demolished in the 1950s and no building on that lot had been physically connected to the wall since then. Defendant believed that the existing wall consisted of two different walls constructed separately by the adjacent landowners. Plaintiff asserted that it was built as a single wall. Defendant had paid $350,000 to repair the wall in 2011 and collected a portion of the repair costs from plaintiff's predecessor in interest. Plaintiff filed an action to quiet title to clear title to the entirety of the wall and allow demolition plans to proceed. Defendant sought a preliminary injunction to preserve the status quo while the legal suit was being litigated.

Defendant correctly argued that it was likely to prevail on the merits because the wall was a party wall and defendant owned part of the wall. Part of the wall was on defendant's side of the property line and the wall supported buildings belonging to owners on both sides of the property line for many years. Additionally, defendant had not abandoned its rights to the wall as demonstrated by its repair of the wall.

The court concluded that the wall remained a legal party wall even though it was no longer used to connect two buildings. It was undisputed that the property line ran under the wall and that part of the wall was on defendant's side of the property line. There was no evidence of any easements or covenants or statutes that addressed the use of the wall in the event that one of the adjoining buildings was demolished. Nothing said that the ownership of the wall was with the owner of the last building standing. Since the wall remained a party wall, both plaintiff and defendant owned the wall and defendant was entitled to legal recognition of its property rights. Furthermore, a party wall had to be a solid wall unless the parties agreed otherwise. The unilateral opening of a large hole in the wall would be an immediate and irreparable harm.

C.P. of Philadelphia County, April Term, 2016, No. 02632

DJERASSI, *J*., March 1, 2017—Before this court is defendant Congregation Rodeph Shalom's Motion for a Preliminary Injunction and 631 North Broad Street's Complaint for Declaratory Judgment and in Quiet Title. This is a dispute between adjacent landowners concerning their respective rights in a wall that straddles the property line separating two lots.

This Memorandum Opinion explains why we are granting a preliminary injunction and also entering an order which if counterclaims were withdrawn would be entered as a final declaratory judgment in favor of Congregation Rodeph Shalom and against grant of quiet title to 631 N. Broad Street.

Background

Plaintiff 631 North Broad Street, LP ("631 North Broad Street") is a Pennsylvania limited partnership that owns real property located at 631 North Broad Street in Philadelphia. Defendant Congregation Rodeph Shalom ("Congregation Rodeph Shalom") owns real property at 619 North Broad Street. Their property is immediately south and adjacent to 631 North Broad Street.

631 North Broad Street plans to redevelop a brick building that has occupied their lot on North Broad Street since the 1860s. Plans include a proposal to convert the existing building into residences while also preserving historical portions of the building, including its original facade. As part of this plan, 631 North Broad Street sought approval from the Department of Licenses & Inspections of the City of Philadelphia (L&I) to demolish a portion of the south wall of the building. L&I has granted a demolition permit authorizing removal of three floors inside the building, and the removal of the existing building's roof, and a portion of the south wall facing 619 North Broad. ("South Wall").[1] 631 North Broad Street asserts that the partial demolition of the South Wall is

1. NT 12/2/16, p. 97.

necessary to accommodate windows in their design plans for certain apartments, which must be set back ten feet from the property line pursuant to building code.[2] The partial demolition is sought to open up light and air for several residential apartments. The South Wall, however, sits directly on the property line of both litigants. The South Wall extends approximately five inches over the property line onto Congregation Rodeph Shalom's 619 North Broad Street lot.

Both litigants stipulated to the fact that the property line runs underneath the South Wall. They agree the wall was built in the 1860's, and that the property line location is clearly marked on relevant deeds.[3] The parties also agree that approximately five inches of brick wall lies on Congregation Rodeph Shalom's side of the property line.[4] The parties, however, disagree about other circumstances regarding the timing and nature of the South Wall's construction.

The building located at 631 North Broad was built to be a stable. At the time, Pennsylvania's party wall statute allowed for the construction of party walls up to 6 1/2 feet over a property boundary.[5] It is unknown precisely when a building was built on the adjacent lot at 619 North Broad, but eventually a commercial bakery is known to have existed there during the first half of the 20th Century. This bakery and the stable were adjoined along the South Wall until the bakery was demolished in the 1950s and

2. NT 12/2/16, p. 68.
3. NT 12/2/16, p. 193.
4. NT 12/2/16, p. 193.
5. Plaintiffs Proposed Findings of Fact, parag. 5.

the wall was left standing attached to the stable building.[6] From the 1950s through the present time, no building on the 619 N. Broad Street lot has physically connected to the South Wall.

The South Wall as it exists today is attached to the original stable building at 631 North Broad. It is three stories and approximately 17 inches thick; 5 inches of the wall are over the 619 North Broad Street side of the property line.[7] It is disputed who originally built the wall on Rodeph Shalom's property. There is a small gap existing between two horizontal layers, or "wythes" of brick, and these brick wythes are linked together by metal ties. Congregation Rodeph Shalom believes that this is evidence that there are two different walls constructed separately by the adjacent landowners.[8] 631 North Broad's position is that the current wall was built entirely by the owner of the stable as a single wall.[9] 631 North Broad Street, LP's expert testified that it was his opinion that the South Wall on 631 N. Broad was constructed, in its entirety, at the same time.[10] We agree with 631 North Broad and find that the South Wall was built in its entirety at the same time by the owner of the stable.

Congregation Rodeph Shalom purchased 619 North Broad Street in 2009. At that time, the neighboring property at 631 North Broad Street was being used as an art gallery and was not owned by plaintiff 631 North Broad

6. NT 12/2/16, p. 198.
7. NT 12/2/16, p. 50.
8. NT 12/2/16, p. 54.
9. NT 12/21/16, p. 15.
10. NT 12/21/16, p. 46.

Street, LP. Today, there is a one story building located on the 619 Broad Street lot. This building has been used by Congregation Rodeph Shalom as an early learning center for young children. The existing building is separated from the South Wall by an alleyway. In 2011, the South Wall on the 619 North Broad Street side required repair due to falling brick and masonry. Congregation Rodeph Shalom paid $350,000 to fix the brickwork and to add new meshing and a layer of stucco.[11] Congregation Rodeph Shalom also initiated a lawsuit against the prior owners of 631 North Broad and recovered a portion of these repair costs through settlement.[12]

Procedural History

The legal action in this case was initiated by plaintiff 631 North Broad Street, LP to obtain clear title to the entirety of the South Wall and end uncertainty relating to their demolition plans for the South Wall. A Complaint seeking Declaratory Judgment and in Quiet Title was filed on April 22, 2016. Congregation Rodeph Shalom filed its Answer, New Matter and Counterclaim on May 24, 2016; the counterclaims are not being considered here by agreement of the parties with the result we are unable to render a final judgment at this time, as all claims are not decided.

Congregation Rodeph Shalom filed a motion for preliminary injunction on November 17, 2016, seeking equitable relief while the legal suit was being litigated. The

11. NT 12/21/16, p. 128.
12. NT 12/21/16, p. 128.

preliminary injunction seeks to prevent 631 North Broad Street from carrying out any demolition of the South Wall pending adjudication on the Quiet Title action. The court initially granted a temporary restraining order pending hearing which was extended after the evidentiary hearing until decision on the preliminary injunction. The parties have submitted proposed findings of fact and conclusions of law.

This Opinion explains two separate orders filed today: 1) an order in equity granting preliminary injunction against partial or total demolition of the South Wall, and 2) an order declaring that the South Wall is a party wall with specific property rights belonging to the owners of 619 N. Broad Street and denying quiet title to plaintiff. Regrettably, this declaration and order is not yet final as remaining counterclaims preclude a final order and judgment. Pa. R.A.P. 314(b) (1). We are also entering a self-explanatory order today denying an appeal by Congregation Rodeph Shalom to a variance granted by the Zoning Board of Adjustment.

Discussion

Congregation Rodeph Shalom moves for a preliminary injunction restraining 631 North Broad, LP from demolishing a portion of the South Wall and creating a large opening in the wall.

The purpose of a preliminary injunction is to preserve the status quo as it exists or previously existed before the acts complained of in the complaint.[13] By preserving the

13. *Ambrogi v. Reber*, 932 A.2d 969, 974 (Pa. Super. 2007).

status quo, the preliminary injunction attempts to avoid imminent and irreparable harm pending final adjudication of the underlying controversy.[14] A preliminary injunction is "an extraordinary, interim remedy that should not be issued unless the moving party's right to relief is clear and the wrong to be remedied is manifest."[15]

Pennsylvania law requires that:

> [t]o obtain a preliminary injunction, a petitioner must establish that: (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages; (2) greater injury will occur from refusing to grant the injunction than from granting it; (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct; (4) the petitioner is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and (6) the public interest will not be harmed if the injunction is granted.[16]

As the parties have extensively briefed the fourth requirement, whether the petitioner Congregation Rodeph Shalom is likely to prevail on the merits, we address this issue first.

Congregation Rodeph Shalom argues it is likely to prevail on the merits. They are correct because the South Wall is a party wall which Congregation Rodeph Shalom

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14. *Id.*
15. *Id.*
16. *Brayman Const. Corp. v. Com., Dep't of Tramp.*, 13 A.3d 925, 935 (Pa. 2011) (citing *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003)).

owns in part.

The South Wall partially lies on their side of the property line as stipulated.[17] For many years the South Wall supported buildings belonging to owners on both sides of the property line. And since it acquired ownership of 619 North Broad, Congregation Rodeph Shalom has not abandoned its rights to the wall as demonstrated by its repair of the south facade of the South Wall in 2011.[18]

We, therefore, do not agree with 631 North Broad Street's argument that it is entitled to quiet title and denial of preliminary injunction on grounds that Congregation Rodeph Shalom has no property interest in the South Wall. 619 North Broad Street has two grounds for this position. First, they argue the South Wall is not a party wall. Second, they argue that even if the South Wall is a party wall, Congregation Rodeph Shalom has no remaining interest in the wall because it is no longer used for its original purpose. They claim that in these circumstances, the wall returns to the property lot whose owner originally built the wall.

In reaching our own conclusions, we first look back to our own court precedent. As Judge C. Darnell Jones, II summarized when he served on Commerce Court, "A party wall sits between adjoining properties. Each property is servient to the service of the other with respect to the property wall. The primary factor in determining whether a wall is a party wall is the intent of the builder. Other factors

17. NT 12/21/16, p. 196.
18. NT 12/21/16, p. 128.

include the wall's location with reference to the boundary line between adjoining properties... the understanding of the adjoining owners at the time it was built, and its use for a long number of years."[19] Ordinarily, a party wall is constructed upon the division line, and each adjoining lot owner has an easement on his neighbor's premises for the support or extent of use made of the party wall.[20] "It is not necessary that such a wall be used to support the roof or floors of both buildings. It is enough that the wall be used as a curtain wall, protecting the buildings from the elements and protecting the spread of fire."[21]

Here, the South Wall is clearly a party wall. Evidence established the South Wall was built as a party wall in accordance with relevant Pennsylvania statutes and Philadelphia ordinances authorizing builders to encroach over property lines when building party walls. Photo evidence also established actual use of the South Wall as a party wall for many years connecting a bakery and a stable. After the bakery was demolished, the South Wall was left standing and no evidence shows any of the subsequent 619 North Broad Street owners contractually sold, or otherwise devised their interest in the South Wall. But, the counter argument is that since the South Wall is

19. *Turchi v. MCW Washington Square Partners*, Aug. Term 2004, No. 1187, p. 4 (Phila. Ct. of Common Pleas, Commerce Program, Jan. 3, 2006) (Jones, C. Darnell, II, J.) (memorandum opinion published on FJD website and available at http://www.courts.phila.gov/PDF/cpcvcomprg/040801187.pdf) (citing *Lukens v. Lasher*, 51 A.887 (Pa. 1902); *Appeal of Western National Bank*, 102 Pa. 171 (Pa. 1883); *McClernan v. Greenberg*, 182 A.59, 61, 64 (Pa. Super. 1935)), *aff'd* 919 A.2d 985 (Pa. Super. 2007) (unpublished).

20. *Sobien v. Mullin*, 783 A.2d 795, 798 (2001) (citing *Bright v. Morgan*, 67 A. 58 (1907)).

21. *Gimbel Bros. v. Markette Corp.*, 307 F.2d 91, 93 (3d Cir. 1962).

no longer used as a party wall, it is not a party wall in law today.

Upon research, we find the South Wall is a legal party wall today, even though it is not used as it once was. Again, it is undisputed that the property line between the two properties runs under the wall, with approximately 5 inches on the 619 North Broad Street side. There is no evidence of any easements or covenants that address the status or use of the party wall in the event one of the adjoining buildings is demolished. Nothing states that ownership of the wall lies with the property owner that owns the last building standing. There is no easement running personally or with the land granting the right to break into the wall and create a hole or opening as proposed by 631 North Broad.[22] Finally, there is no evidence that one party has contracted with the other to alter the legal status of the wall from party ownership to sole ownership.

Given that the South Wall as it exists today is a party wall, both 631 North Broad and Congregation Rodeph Shalom own it. As stated by the winning appellee attorney in *Turchi*, "It is black letter law that land covered by a party wall remains the several property of the owners of each half, subject to implied reciprocal agreements by which each owner is entitled to support for this building by means of half of the wall belonging to his neighbor."[23]

In this context and in absence of any express

22. *Compare Turchi*, Aug. Term 2004, No. 1187, at p. 6 (Court found existence of express easements in applicable deeds).

23. Brief for Appellees, 2006 WL 3368324, at 19, *Turchi v. MCW Washington Square Partners*, 919 A.2d 965 (Pa. Super. 2007) (unpublished).

agreements, Congregation Rodeph Shalom is entitled to legal recognition of its property rights in the wall. Moving to the question of one party unilaterally opening a hole in the wall without the other's permission, the Pennsylvania Supreme Court long ago in *Milne's Appeal* said no.[24] When a party wall exists, an owner of the party wall is entitled to a solid wall.

In *Milne*, defendant built a party wall on a Lombard Street property. The wall's foundation encroached over his property line with plaintiff. When defendant's wall was finished, he constructed window openings along the wall, annoying plaintiff and provoking a lawsuit. Even though the party wall ended behind defendant's own property line, the *Milne* Court held it made no difference. Because the wall had infringed on plaintiff's property at some point, the entire wall was a party wall. The Court then issued an injunction to remove the window openings created by the defendant and restore to plaintiff the benefits he possesses as owner of his side of the party wall. The *Milne's Appeal* Court cited *Vollmer's Appeal*, which a few years earlier had held that a party wall in Philadelphia must be a solid wall of brick or stone, without openings and that if a builder does not comply, "he becomes a trespasser and a wrongdoer:"[25] In explanation, *Vollmer's Appeal*'s author, Justice John M. Read, reviewed statutory history going back to The Building Acts in England under King Charles II and Queen Anne whose governments were responding

24. *Milne's Appeal*, 81 Pa. 54, 56 (1876) (another benefit of a party wall owner "is the right to have a solid wall (without openings) of brick or stone or other non-combustible materials").

25. *Vollmer's Appeal*, 61 Pa. 118, 129(1869).

to the Great Fire of London in 1666. The Building Acts were sources for Pennsylvania's colonial legislation of 1721 that set the Commonwealth's first rules for party walls applicable to Philadelphia. Statutory law governing party walls existed when the South Wall was built and they were enforced by courts like *Milne's Appeal* and *Vollmer's Appeal*.[26]

As a party wall must be a solid wall unless the parties agree otherwise, 631 Broad Street may not create any opening to the party wall without the consent of defendant Congregation Rodeph Shalom.

While these conclusions dispose of the plaintiff's declaratory judgment and quiet title actions, preliminary injunction analysis also requires a balancing of relative harm. *Vollmer's Appeal* provides clear guidance. There, the mere creation of an opening in a party wall without the other side's permission was an irreparable harm, apparent on its face without further evidentiary proof.

"Of the injurious effect on the comfort and convenience of the adjoining owner and the tenants, there needs no proof, nor as to the damaging effect upon the value and price of the house and lot of the plaintiff."[27]

The Court in *Vollmer's Appeal* continued, "But the

26. *See* the Acts of February 2, 1854, April 21, 1855 and May 13, 1856 followed by an enactment on May 7, 1855, Pampl. L. 464 in which the legislature passed, "An act to provide for the regulation and inspection of buildings in the city of Philadelphia, and for the better preservation of life and property", followed by additional acts on April 11, 1856 (Pamph. L. 319, May 20, 1857, Pamph. L. 590, and April 13, 1858, Pamph. L. 244) to form the supervisory system in Philadelphia that was in place when the party wall in this case was built.

27. *Vollmer's Appeal*, 61 Pa. at 130.

windows in this party wall are wrongfully and illegally put there, contrary to law, and with a direct intention to do an unlawful act for the private benefit of the defendant. Using the language of the English Building Act, it is a nuisance, both public and private, and is clearly within the restraining powers of a court of chancery."[28]

631 North Broad Street, nonetheless, claims otherwise, citing *Roberts v. Bye*, 30 Pa. 375 (Pa. 1858) and *Masson and Besanson's Appeal*, 70 Pa. 26 (Pa. 1871). 631 North Broad Street cites these cases for the proposition that the party who built the wall is entitled to ownership of a party wall if the other party has not paid his share of the costs of the wall's construction. Both of these cases, however, address different legal issues than those reviewed here. Over two full days of testimony, no evidence was presented on whether the construction costs of the South Wall were paid, or not, by the adjoining landowner. As the South Wall's initial construction costs are not in evidence, neither *Roberts v. Bye* nor *Masson and Besanson's Appeal* is helpful here. *Milne's Appeal* does not cite either case, and *Vollmer's Appeal* which was decided after *Roberts v. Bye* makes no mention of *Besanson's Appeal*.[29]

Congregation Rodeph Shalom has, therefore, demonstrated that a preliminary injunction is necessary

28. *Id.*

29. *Compare Cohen v. Perrino*, 355 Pa. 455 (Pa. 1947) ("If a property owner builds a wall entirely on her own property, the wall is not a party wall and the property owner may create windows and openings through the wall as she pleases; however if the adjoining property owner retaliates by building a wall on his side of the property line, and the new wall obstructs the other property owner's air and light, the obstructing property owner has every right to do so, even if her motive is malicious.").

to prevent immediate and irreparable harm. The unilateral opening of a large hole in the South Wall by 631 North Broad Street harms Congregation Rodeph Shalom and impacts its "unlimited right to enjoy the use of its own property for any lawful purpose...."[30] This harm cannot be measured and as noted in *Milne's Appeal*, no proof is needed to show the "damaging effect upon the value of the lot" if Congregation Rodeph Shalom were to sell 619 N. Broad Street.

Finally, a preliminary injunction stopping partial or total demolition of the South Wall until final judgment does not harm public interest. Testimony is persuasive that the wall is not in danger of imminent collapse on its own. There are no safety issues implicated by maintaining the status quo until the parties resolve the dispute amicably or a court has entered final judgment. Additionally, by Order filed today, the Zoning Board of Adjustment's grant of a use variance in favor of 631 North Broad Street is affirmed. 631 North Broad Street has zoning approval to go forward with its project. Because preliminary injunction does not change the use approved by the Zoning Board, there is no harm to the public interest. The project can still be built upon resolution of property issues and/or modification of architectural plans.

631 North Broad Street is, therefore, enjoined from demolishing the South Wall, in its entirety or partially, absent agreement otherwise by the property owner of 619 North Broad Street, their assignees, heirs, and successors.

30. *Schick v. Girard Trust Co.* 33 Pa. D & C 464, 465 (Phila. Ct. of Common Pleas, 1938) (Parry, J.).

This preliminary injunction enjoins any demolition of the South Wall, partial or complete, whether authorized by lawful demolition permit, or not, until further order of court.

As noted, both parties have asked the court to issue an adjudication on the merits of the quiet title Complaint. We are constrained from doing so because a final order generally requires the disposition of all claims and all parties. Pa. R.A.P. 314(b) (1). Nevertheless, we are filing an Order today that addresses both Counts of plaintiff's Complaint.

Specifically, while there are limited exceptions that give a party wall owner permission to alter a party wall, these exceptions do not apply to 631 North Broad Street's goals. Typically, permitted alterations derive from a party wall owner's implied duty to maintain its side of the wall, as Congregation Rodeph Shalom did three years ago. Permitted alterations also derive from an implied reciprocal easement obligating party wall owners to protect a building from exposure to the elements, or risk of fire.[31]

In proposing to demolish a portion of the party wall for purposes solely related to its own architectural design choices, 631 North Broad Street is proposing something it may not do unless the property owner of 619 North Broad Street agrees. There are simply no implied or expressed easements or covenants giving 631 North Broad Street the right to unilaterally alter the party wall. As seen in *Milne's Appeal* and *Vollmer's Appeal*, the South Wall must remain

31. *See Sobien v. Mullin*, 783 A.2d 795, 798 (Pa. Super. 2001); *See Gimbel Bros. v. Markette Corp.*, 307 F.2d 91, 93 (3d Cir. 1962).

solid until agreed otherwise.[32] Congregation Rodeph Shalom prevails on the merits of both plaintiff claims at Count 1 and Count 2 in its Complaint.

In sum, the South Wall is a party wall which is not subject to unilateral changes.

ORDER

AND NOW, this 1st day of March, 2017, upon consideration of plaintiff Congregation Rodeph Shalom's Motion for Preliminary Injunction, defendant 631 North Broad Street, LP's Response in Opposition, their respective Memoranda of Law, and following a two day hearing on December 2 and December 21, 2016, and for reasons explained in a Memorandum Order filed today, it is hereby ORDERED and DECREED that defendant's Motion for Preliminary Injunction is GRANTED as follows:

1. Plaintiff 631 North Broad Street, LP is preliminarily enjoined from demolishing the South Wall, in its entirety or partially, absent agreement by the property owner of 619 North Broad Street, its assignees, purchasers and successors.

2. This preliminary injunction enjoins any demolition of the South Wall, partial or complete, whether authorized by lawful demolition permit, or not, until further signed order of court. This preliminary injunction may not be dissolved by praecipe.

32. In *Appeal of Vollmer*, the Supreme Court held that a builder violated Pennsylvania's party wall statute by building windows into a party wall because only solid walls further the purpose of permitting party walls. *Appeal of Vollmer*, 61 Pa. 118 (Pa. 1869).

Abdullah v. Davids

Racial discrimination by financial institutions — Motion to dismiss — Repeated, vexatious litigation

Trial court dismissed plaintiff's seventh complaint against defendants and related entities arising from his allegation of racial discrimination, after prior complaints had been dismissed on both procedural technicalities and substantive merits, and barred plaintiff from further suit upon finding that his serial litigation constituted the frivolous, vexatious litigation prohibited by Rule 233.1.

Walidyyuddin Abdullah appealed from the trial court's grant of appellees Justin Davids', Katlin Elwood's, and Brendan McMoran's motion to dismiss, which dismissed appellant's complaint against appellees and barred appellant from filing similar complaints in the future without advance leave of court. In January 2013, appellant filed his first suit against Wells Fargo and Bank of America in federal court, alleging that he had visited branches of both banks seeking a small business loan, and that neither bank responded to his inquiries or applications. Appellant alleged that the banks' failure to provide him with a loan was the product of racial discrimination. The federal district court dismissed the complaint after appellant's attempt to amend his complaint, finding that it failed to plead facts supporting appellant's allegations of racial discrimination.

Appellant filed a second and a third complaint against the banks, both of which were again dismissed for failure to plead more than a speculation that the banks' refusal to provide appellant a loan was the product of racial discrimination. The third complaint was also dismissed "as malicious." Appellant filed a fourth and fifth complaint in state court that the banks removed to federal court, which again dismissed the complaint. Appellant then filed a sixth suit naming appellees, two of the banks' local branch locations, and "Mr. McMoran's Bank Branch Manager" as defendants. When that action was removed to federal court, appellant then filed this current action, his seventh, only deleting the banks as defendants.

Appellees moved to dismiss the complaint under Pa.R.C.P. 233.1(a) and to bar appellant from pursuing additional pro se litigation against the same or related parties raising the same or related claims without leave of court. The trial court granted appellees' motion. Appellant then appealed.

The trial court argued for denial of appellant's appeal, asserting that appellant's repeated suits were textbook examples of frivolous, vexatious

pro se litigation that Rule 233.1 was designed to address. The trial court contended that it properly dismissed appellant's complaint because appellant had raised substantially the same claims that he had raised in prior actions against appellees and other related parties, all of which had been dismissed by the courts. The court argued that each dismissal of appellant's actions had resulted in him filing a new complaint raising the same allegations. Thus, because appellant's claim had devolved from being legally dubious to abusive and vexation, the trial court argued that it properly barred him under Rule 233.1 from filing further litigation of similar type without leave of court.

C.P. of Philadelphia County, No. 161100075

CEISLER, *J*., March 1, 2017—

I. FACTS AND PROCEDURAL HISTORY

This appeal, filed by *pro se* Plaintiff-Appellant Waliyyuddin S. Abdullah ("Appellant") on January 17, 2017, stems from this Court's January 6, 2017 decision to grant Justin Davids, Katlin Elwood, and Brendan McMoran's (collectively "Appellees") Motion to Dismiss, pursuant to *Pa. R.C.P. 233.1*, which dismissed Appellant's case against Appellees and barred him from instituting similar actions in the future without advance leave of court. This Court's ruling was entirely proper and completely justified, due to Appellant's repeated attempts to improperly coopt the judicial system, at both the state and federal levels, by hounding Appellees and their employers with redundant, vexatious lawsuits. Accordingly, this Court respectfully requests that this appeal be denied.

The relevant facts in this matter are as follows:

> On January 18, 2013, [Appellant] filed his first lawsuit against [Wells Fargo and Bank of America in federal court]. He alleged that, in December of 2012, he visited

branches of Wells Fargo and Bank of America seeking a small business loan, and that neither bank responded to his inquiries or applications. [Appellant] alleged that [the Banks'] failure to provide him with a loan must have been the product of race discrimination.

[The District] Court construed the complaint as raising race discrimination claims under *42 U.S.C. § 2000d* and *42 U.S.C. § 1981*, and concluded that [Appellant] had failed to state a claim under either statute. [Appellant] was given leave to file an amended complaint, which he did. However, that pleading was also deficient in that it failed to plead facts supporting [Appellant]'s bald allegations of race discrimination, so the [District] Court dismissed it without leave to amend. On appeal, the Third Circuit summarily affirmed the dismissal of [Appellant]'s claims. *See Abdullah v. Small Business Banking Dep't of Bank of Am.*, 532 F. App'x 89, 90 (3d Cir. 2013) (per curiam).

On September 19, 2014, [Appellant] filed a [second] lawsuit against the [Banks]. In his complaint, [Appellant] reiterated the facts that formed the basis for his initial lawsuit. He also added new information reflecting that he again contacted the [Banks] about obtaining a loan in August of 2013 and during the summer of 2014. However, despite meeting and communicating with bank employees, [Appellant] was not offered a small business loan. The [District] Court dismissed [Appellant]'s complaint for failure to state a claim, concluding that [Appellant] was "once again, speculating that the [Banks'] failure to give him

> a small business loan is motivated by discrimination." [Appellant] was not given leave to amend.
>
> Apparently dissatisfied with [this] ruling, [Appellant] filed [a third lawsuit in federal court] against the [Banks on October 20, 2014]. The factual allegations of [this] complaint and attached exhibits [did] not differ in any meaningful way from [those averred in Appellant's second suit.]

Abdullah v. The Small Bus. Banking Dep't of the Bank of Am. et al., No. 2-14-cv-05931, slip op. at 1-2 (E.D. Pa. October 31, 2014) (some citations omitted).

The District Court dismissed Appellant's third suit "as malicious and for failure to state a claim[,]" noting that it constituted "the fourth complaint in three actions that [Appellant] has filed against the [Banks] based on their failure to provide him with a loan." *Id.* at 3. Appellant appealed this decision to the Third Circuit; however, he "failed to pay the requisite fee or file the Motion for Leave to Proceed In Forma Pauperis as directed[,]" causing the Third Circuit to dismiss his appeal for lack of prosecution. *Motion to Dismiss*, Ex. H.

Undeterred, Appellant filed a *fourth* suit in February 2015 against Wells Fargo and Bank of America in the Court of Common Pleas, Philadelphia County,

> which [the Banks] removed to [federal court]. In [this fourth action], [Appellant] alleged that the [Banks] violated his rights under the Pennsylvania Human Relations Act when they refused to grant him a small-business loan...After...[removal], [Appellant]

> filed a motion to remand the matter to state court. He claimed that the removal had been untimely and that he did not assert a federal claim. The [Banks] opposed [Appellant's] remand motion and also filed a motion to dismiss under *Fed. R.Civ.P. 12(b)(6)*. [Appellant] did not respond to the [Banks'] motion to dismiss, and the District Court granted the motion to dismiss pursuant to *E.D. Pa. Local Rule 7.1(c)*, which states that "[i]n the absence of timely response, [a] motion may be granted as uncontested."

Abdullah v. Small Bus. Banking Dep't of Bank of Am., 628 F. App'x 83, 83-84 (3d Cir. 2016). Appellant challenged this ruling via another appeal to the Third Circuit, which affirmed the Honorable J. Curtis Joyner's ruling on the basis that Appellant's suit was barred by the doctrine of claim preclusion. *Id.* at 84.

Appellant addressed this setback by suing the Banks a *fifth* time in late February 2016, again in the Court of Common Pleas, Philadelphia County, filing a complaint that was *virtually identical* to the one he had filed in his fourth suit, down to the spelling and punctuation errors; indeed, the only substantive changes were a tenfold increase in the requested amount of punitive damages, to $100,000,000 from a slightly more reasonable $10,000,000, and the deletion of Appellant's request that his complaint be forwarded to both the Department of Justice and the Pennsylvania Human Rights Commission. *Compare Motion to Dismiss, Ex. I* with *id.*, Ex. L. Once again, the Banks removed the matter to federal court, after which Judge Joyner dismissed the suit on May 3, 2016 on the basis of claim preclusion, a decision the Third Circuit

summarily affirmed on September 7, 2016. *See Abdullah v. The Small Bus. Banking Dep't of the Bank of Am.*, No. 16-2489, 2016 WL 4655737, at *1-*2 (3d Cir. Sept. 7, 2016).

Appellant then submitted a *sixth* suit in the Court of Common Pleas, Philadelphia County on September 27, 2016, this time naming Appellees, two of the Banks' local branch locations, and "Mr. McMoran's Bank Branch Manager" as defendants. *See Motion to Dismiss*, Ex. O. The Banks then removed the case to Federal Court on November 9, 2016, prompting Appellant to docket the instant, *seventh* suit on November 13, 2016. *Id.* at 5-6. While Appellant did not list the Banks as defendants in this matter, and maintained that he was making a claim for relief pursuant to Article I, Section I of the Pennsylvania Constitution, the essence of Appellant's argument was, again, that the Banks and their employees had discriminated against him and had unlawfully refused to loan him money. *See id.*, Ex. P.

On December 5, 2016, Appellees filed their Motion to Dismiss, stating succinctly:

> This is [Appellant's] *seventh* attempt over the past three and a half years to prevail on the same meritless claim against the same or related defendants. Although [Appellant's] previous suits have involved claims under different constitutional and statutory provisions, the operative factual allegations in each suit have been the same: Bank of America, N.A. and Wells Fargo Bank, N.A. (and their employees) did not respond to [Appellant's] inquiries regarding a small business loan.

Motion to Dismiss at 1 (emphasis in original). Consequently, Appellees requested that

> this Court [either] dismiss [Appellant's] action under [Pa. R.C.P.] 233.1(a), [and] bar [Appellant] from pursuing additional *pro se* litigation against the same or related defendants raising the same or related claims without leave of court under [Pa. R.C.P.] Rule 233.1(c)...[or] dismiss [Appellant's] Complaint for legal insufficiency pursuant to a preliminary objection under [Pa. R.C.P.] 1028(a)(4).

Motion to Dismiss at 11. In response, Appellant stated that his *seventh* suit was not frivolous or legally insufficient, offering a disjointed argument, one backed by unexplained citations and seemingly random bits of law, that basically boiled down him believing that he had a valid basis for pursuing his action against Appellees. *See Response to Preliminary Objections* at 1-2; *Memorandum of Law in Support of Response to Preliminary Objections* at 3-6. After reviewing the record, as well as the parties' respective arguments, this Court granted Appellees' Motion to Dismiss on January 6, 2017, thereby dismissing Appellant's seventh action and barring him from filing any similar suits in the future without first seeking and obtaining judicial permission. *Ceisler Order, 1/6/17* at 1-2. Appellant then appealed this ruling to the Superior Court on January 17, 2017, whereupon this Court ordered him to submit a Statement of Errors pursuant to *Pa. R.A.P. 1925(b)*. *Ceisler Order, 1/18/17* at 1. Appellant's response was received by this Court on January 30, 2017, and is attached to this opinion as Appendix A.

II. DISCUSSION

This Court respectfully requests that the instant appeal be denied for the following reason:

1. Appellant's repeated suits against Appellees and their employers are textbook examples of frivolous, vexatious *pro se* litigation, and represent precisely the kind of behavior *Pa. R.C.P. 233.1* was designed to address.

Given the purpose and language of *Pa. R.C.P. 233.1*, as well as Appellant's history of repeatedly filing substantially similar suits against the Banks and its employees, this Court appropriately chose to grant Appellees' Motion to Dismiss. As permitted by this Rule:

> (a) Upon the commencement of any action filed by a *pro se* plaintiff in the court of common pleas, a defendant may file a motion to dismiss the action on the basis that
>
> (1) the *pro se* plaintiff is alleging the same or related claims which the *pro se* plaintiff raised in a prior action against the same or related defendants, and
>
> (2) these claims have already been resolved pursuant to a written settlement agreement or a court proceeding...
>
> (c) Upon granting the motion and dismissing the action, the court may bar the *pro se* plaintiff from pursuing additional *pro se* litigation against the same or related defendants raising the same or related claims without leave of court.

Pa. R.C.P. 233.1. The Pennsylvania Supreme Court issued *Pa. R.C.P. 233.1*

in 2010 to stem a noted increase in serial lawsuits of dubious merit filed by *pro se* litigants disaffected by prior failures to secure relief for injuries they perceived but could not substantiate. *See Pa. R.C.P. 233.1*, Comment. Accordingly, the drafting committee constructed the Rule with attention to potential manipulation of the legal process by those not learned in its proper use, seeking to establish accountability for *pro se* litigants commensurate with that imposed upon members of the Bar. *See id.* Thus, the Rule operates to spare potential defendants the need to defend spurious claims, first, by allowing the expeditious dismissal of duplicative *pro se* actions and, second, by empowering the trial court to ban the *pro se* litigant's commencement of further actions against such defendants. *See id.*..

[T]he language of [this] Rule... [does not] mandate the technical identity of parties or claims imposed by res judicata or collateral estoppel; rather, it merely requires that the parties and the claims raised in the current action be "related" to those in the prior action and that those prior claims have been "resolved." *Pa. R.C.P. 233.1(a)*. These two terms are noteworthy in their omission of the technical precision otherwise associated with claim and issue preclusion; whereas parties and/or claims are to be "identical" under the purview of those doctrines, Rule 233.1 requires only that they be sufficiently related to inform the trial court, in the exercise of its discretion, whether the plaintiff's claim has in fact been considered and "resolved."... In the Rule's requirement that the matter have been "resolved pursuant to a written settlement agreement or a court proceeding,"

> the language assures that the *pro se* litigant is availed of a chance to address his claim subject to the contractual guarantee of a settlement agreement or to the procedural safeguards that attend a court proceeding. It does not require, however, that the matter has progressed to a "final judgment on the merits," [*Columbia Med. Grp., Inc. v. Herring & Roll, P.C.*, 829 A.2d 1184, 1189-90 (Pa. Super. Ct. 2003)], nor does it require the "identify of the quality or capacity in the persons for or against whom the claim is made." [*Daley v. A.W. Chesterton, Inc.*, 37 A.3d 1175, 1189-90 (Pa. 2012)].

Gray v. Buonopane, 53 A.3d 829, 835-36 (Pa. Super. Ct. 2012).

As noted above, Appellant has elected to file *seven separate actions* over the course of four years against various permutations and arrangements of the Banks and/or its employees, all of which emanate from a singular grievance: Appellant's belief that these entities and individuals unlawfully refused to provide him with the loan or loans he desired. Though the first five of these actions were dismissed for various substantive and procedural reasons in federal court, and the sixth is likely to meet the same fate, none of these rulings have deterred Appellant, who has consistently reacted to each defeat by filing a new, substantially similar lawsuit. To be blunt, Appellant attempted, albeit unsuccessfully, to make a case against the Banks and/or its employees back in January 2013 and lost in federal court at both the district and circuit court levels. Since then, his efforts to use the judicial system to seek redress have devolved from legally dubious to abusive and vexatious, evincing either a lack of legal

knowledge and expertise, a malicious intent to harass those he believes have treated him poorly, or both. Regardless, it remains that Appellant's behavior is precisely the kind which the Pennsylvania Supreme Court sought to address by adopting *Pa. R.C.P. 233.1*. Consequently, this Court properly granted Appellees' Motion to Dismiss.

III. CONCLUSION

For the aforementioned reason, this Court respectfully requests that the instant appeal be denied.

Alloway v. The Franklin Inst.

Business invitees — Latent defect — Duty of care — Assumption of risk

A patron injured while visiting defendant's educational exhibit did not provide sufficient evidence to demonstrate defendant breached its duty of care to business invitees. The atypical nature of the exhibit itself called for a reasonable patron to exercise a heightened degree of attention in preventing injury. The court granted defendant's motion for summary judgment.

Plaintiff filed this action to recover for injuries when she fell while exiting defendant's exhibit. She claimed the exhibit was inherently dangerous and had an abnormal step or uneven floor.

Defendant argued plaintiff failed to prove the existence of an inherently dangerous condition because she did not provide any empirical evidence to support her theory. The only evidence of a dangerous condition was from plaintiff's own deposition testimony, so defendant asserted that her claim was speculative and insufficient as a matter of law.

The case involved defendant's exhibit called the "Neural Cimb." Plaintiff claimed the floor was uneven and the exhibit lacked adequate lighting and a warning regarding the slant or unevenness of the floor of the exhibit. Defendant argued that a reasonable patron would be expected to know that navigating the attraction would require heightened alertness with regard to potential dangers, and that a reasonable person would act

with a reasonable degree of care in response.

On defendant's motion for summary judgment, the court found that plaintiff had failed to provide sufficient evidence of the dangerous nature of the exhibit. She did not provide any expert testimony or technical data relating to condition of the floor. Plaintiff did not even submit a photograph of the area where she was injured, although she did provide a photograph of another area of the exhibit. The testimony provided by plaintiff was also somewhat inconsistent, in that she admitted that the exhibit required climbing rather than simply walking.

Defendant's representative, Harmon, testified that no other person had claimed an injury by the allegedly unsafe conditions since the exhibit opened. Between 850,000 and 900,000 patrons typically visited this exhibit annually. Harmon acknowledged the floor might have had a slight slant, but was overall fairly uniform.

The court concluded that nothing plaintiff presented would enable a reasonable jury to find that defendant deviated from its duty of reasonable care, as there was no concrete data pointing to a latent dangerous condition. At most, plaintiff's evidence suggested only an obvious defect, and a business invitee such as plaintiff assumed the risk of danger with regard to such a condition.

C.P. of Philadelphia County, August Term 2016, No. 150801092

NEW, *J.*, March 17, 2017—Appellant, Christina Alloway, appeals from this Court's granting of Appellee, The Franklin Institute's motion for summary judgment. For the reasons set forth below, the Order granting Appellee, The Franklin Institute's motion for summary judgment should be affirmed.

PROCEDURAL HISTORY

The complaint for the civil action *Alloway v. The Franklin Institute* was filed in the First Judicial District of Pennsylvania, Civil Trial Division, on August 10, 2015.

A series of Preliminary Objections and Amended Complaints followed. Eventually, on April 19, 2016, the

court entered an order sustaining some of the preliminary objections and dismissing others as moot. Under this order, subparagraphs" 12(f), 12(G), 12(1), 12(J) and paragraph 14 of the then current Amended Complaint were stricken without prejudice.

Plaintiff-Appellant filed an amended complaint on May 20, 2016. Defendant-Appellee filed an answer with new matter to plaintiff's amended complaint on June 3, 2016. Plaintiff-Appellant filed a reply to new matter on June 10, 2016.

Defendant-Appellee maintains that Plaintiff-Appellant failed to prove the existence of such inherently unreasonably dangerous conditions as an "abnormal step" or an "uneven floor." It is asserted that the only evidence attesting to these defects is the deposition testimony of Plaintiff-Appellant. Defendant asserted that, as a matter of law, the testimony was unworthy of belief, as it was speculative and without empirical backing. Defendant-Appellee's representative Mark Harmon disclosed [in Exhibit B] that no other patron has claimed injury caused by these alleged conditions since the exhibit's opening, despite the large volume of patrons. Plaintiff-Appellant's own deposition testimony [in Exhibit C] is said to be internally inconsistent with respect to whether the exhibit called for climbing or for walking. Moreover, Plaintiff-Appellant attested to her measurement of the distance between step and floor by eyes alone rather than the arguably obvious method of stretching out one's legs to gauge the distance.

Plaintiff-Appellant's deposition testimony regarding the

alleged unevenness of the floor is said to be insubstantial. First, Plaintiff-Appellant failed to provide a photograph of the exact location of the injury, on the basis of deficient lighting in the area, although a photograph is provided of a different location in the vicinity. In addition, Defendant-Appellee's representative Mark Harmon [in Exhibit B] stressed the overall uniformity of the ground in his deposition testimony, noting that existing slants would not render the floor uneven as a whole. By contrast, Plaintiff-Appellant's testimony [in Exhibit C] failed to provide relevant technical data that could convince a finder of fact. Instead, it relied merely on speculation.

Defendant-Appellee asserted that a violation of the standard of reasonable care was not established by Plaintiff-Appellant. A possessor of land must exercise a high duty of care in warning of or correcting unreasonably risky defects on the premises of which the premises owner has actual or constructive knowledge to the exclusion of a reasonable business invitee. A business invitee is burdened with the duty of self-protection only if it is reasonably expected that defects on the premises can be discovered by the invitee alone. *Campisi v. Acme Markets*, 915 A.2d 117, 120 (Pa. Super. Ct. 2006). Defendant-Appellee contended that, even if Plaintiff-Appellant were able to prove that hazards existed, she would reasonably be expected to apprise herself of the risk and act accordingly. The name of the exhibit suggests the atypical nature of the steps, which do not resemble an ordinary staircase just as the floor does not resemble an ordinary floor. Defendant-Appellee asserted that a reasonable patron would know or

be expected to know that navigating the attraction would require heightened alertness with regard to potential dangers instead of the degree of alertness associated with walking a normal staircase or walkway. Hence, Defendant-Appellee sought summary judgement on the grounds that, granting the possibility of intrinsic hazards, these hazards would be obvious to any reasonable patron who would act with a reasonable degree of care in response.

SUMMARY OF PLAINTIFF-APPELANT'S POSITION

Plaintiff-Appellant contends that sufficient evidence exists for a jury to find Defendant-Appellee liable for breaching its duty to business invitees to warn of or rectify defects that are or should be obvious to possessors of land but not to business invitees themselves.

In her response to Defendant-Appellee's motion for summary judgment, Plaintiff-Appellant alleged that she was a business invitee, entitling her to the highest duty of care owed by a premises owner. A business invitee is invited to enter the premises of another and does so for a purpose connected to the reason for the property being open to the public. Plaintiff-Appellant purported to show that Defendant-Appellee could not have expected business invitees to discover the hazardous conditions on their own. For instance, Plaintiff-Appellant maintained that the reduced lighting and lack of warning signs rendered the defect latent, therefore beyond the awareness of reasonable and prudent business invitees. A premises owner is subject to liability if he fails to protect his business invitees from hazards of which he should be aware and that cannot be

discovered by said business invitees.

Negligence liability is imposed on a possessor of land when plaintiff can prove the existence of a legally cognizable duty, breach of duty, that the breach caused the plaintiff's injury, and actual damages. In her response in opposition to defendant's motion for summary judgment, Plaintiff-Appellant cited to the deposition of Defendant-Appellee's representative Mark Harmon [Exhibit B] as evidence attesting to Defendant-Appellee's actual knowledge of the alleged hazardous conditions. Furthermore, Plaintiff-Appellant's deposition testimony [Exhibit C] was offered to suggest that, had warning signs been present, Plaintiff-Appellant might have been sufficiently made aware of the alleged defects. Plaintiff-Appellant brought to attention Mark Harmon's admission in deposition [Exhibit B] that there were no warning signs at the exit. However, Plaintiff-Appellant did not cite to case law either mandating or strongly encouraging the placement of warning signs in similar circumstances. Lastly, Plaintiff-Appellant asserted that the breach of duty she alleged to have taken place resulted in her injury.

Plaintiff-Appellant regarded the submission of pictures of the exit step and floor with measurements by the Defendant-Appellee as an indication of at least one genuine issue of material fact. Likewise, Plaintiff-Appellant directed attention to questions of liability for injuries and obviousness of the alleged hazardous condition to the premises owner as issues of material fact which should be presented to a finder of fact. Therefore, her position was that summary judgment should be precluded by the

existence of these genuine issues of material fact.

LEGAL ANALYSIS

Pursuant to PA R. Civ. P. 1035.2, a moving party is entitled to summary judgment "whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report." The trial court views the record in the light most favorable to the non-moving party, and all doubts regarding a genuine issue of material facts must be resolved in favor of the non-moving party. *Dorovich v. West American Insurance Co.*, 403 Pa. Super. 412, 589 A.2d 252 (1991); *Marks v. Tasman*, 527 Pa. 132, 589 A.2d 505 (1991). The appellate scope of review with respect to a trial court's order granting a motion for summary judgment is plenary. *Stanton v. Lackawanna Energy, Ltd.*, 820 A.2d 1256, 1258 (Pa. Super. Ct. 2003). Thus, the appellate court, in reviewing the trial court's findings, does not defer to these findings but reviews them de novo.

Appellant ("Alloway"), claiming that genuine issues of material fact exist in the underlying matter, alleges that the trial court has abused its discretion and committed errors of law in granting Appellee The Franklin Institute's ("Franklin Institute") motion for summary judgment. This trial court affirms that its ruling, granting Franklin Institute's motion for summary judgment is justified by law, for the reasons set forth below.

First, Alloway alleges that genuine issues of material fact exist as to whether Franklin Institute violated a duty

owed to her while the latter was a business invitee on the former's premises. A business invitee enters another's premises upon the other party's invitation and in order to accomplish a purpose for which that land is open to the public. *Updyke v. BP Oil Company*, 717 A.2d 546, 549 (1998). That Alloway was a business invitee is not under dispute, nor is its corollary that Franklin Institute owed Alloway the highest duty of care. The primary question is whether sufficient evidence has been provided that could potentially direct a finder of fact to decide in Alloway's favor with respect to an alleged breach of this duty by Franklin Institute. This hinges on whether a finder of fact could find the existence of a latent defect which was or should have been known to the premises owner.

In support of Alloway's allegation that sufficient proof exists with respect to Franklin Institute's alleged awareness of a defect and failure to exercise reasonable care, Alloway directs attention to the deposition testimony of Mark Harmon, agent of Franklin Institute. From Harmon's testimony, avowing his familiarity with the exhibit, Alloway weakly infers his knowledge of an alleged intrinsic defect. *See* Exhibit "B", Deposition of Mark Harmon, pp. 25:23-27:1. Moreover, Alloway infers from Harmon's avowal of darkened conditions that it would be unreasonable to expect business invitees to discover hazards on their own. *See* Exhibit "C", Deposition of Alloway, pp. 25:11-14; 32:10-13. Alloway stresses the absence of signs warning patrons of alleged defects. This, according to Alloway, breaches Franklin Institute's duty to prevent injury to its patrons that may arise from latent

conditions.

This line of reasoning ignores the unequivocal testimony of Harmon regarding the general levelness of exhibit's floor. As Alloway fails to provide technical data regarding a hazardous slant or unevenness, the eventual fact finder's analysis must hinge on more subjective evidence and testimony. While Harmon was willing to concede to the existence of unlevel areas on the exhibit's floor, he stressed that the ground itself was largely uniform in evenness. Hence, he says, "Uneven? No. ... Pretty much every place where you step down is even.... There might be a slight slant.... It's even — you know, if — you know, even to me is the whole floor, you know, is pretty uniform.... Yes, I'll agree [that there are some exits and entrances into the Neural Climb that are unlevel." *See* Exhibit "B", Deposition of Mark Harmon, 26:19, 21-22, 24; Exhibit "B", Deposition of Mark Harmon, 27:0-11; 28:3.

Moreover, Alloway's deposition testimony failed to establish unreasonable dangers in the exhibit. Her choice to step down "normally" from an allegedly "abnormal step" is inconsistent with her conduct throughout the rest of the exhibit. She acknowledges that the exhibit requires climbing, rather than normal walking or stepping. *See* Exhibit "C", Deposition of Alloway, pp. 24:9-11, 19-20. Yet she reverted to normal" walking even as she attests that the exhibit was "abnormal" to the very end. *Id.* Since Alloway's testimony hinges on speculation, it is impossible to establish the unevenness and abnormality of the constituents of this part of the exhibit. Harmon's testimony establishes that, since the opening of the exhibit, Alloway

has been the only patron to claim injury arising from the exhibit's alleged dangerous condition. Note that annual attendance at this exhibit ranges between 850,000 and 900,000 visitors per year. Given the magnitude of annual patrons and the paucity of similar incidents, the absence of concrete data provided by Alloway seems starker. Alloway's opinion that the distance between platform and ground posed an unreasonable danger to reasonably dutiful patrons is devoid of any empirical grounding that could be provided through expert testimony or other means. Mere speculation alone is not evidence tending to lend weight to a theory. *Daniels v. Sears*, Civ. No. 15-4821, 2016 WL 521205, at *3 (E.D. Pa. Feb. 10, 2016) (citing Rest. (2d) of Torts § 343). Even Alloway's assertion that a handrail would have disposed of Franklin Institute's duty of care does not rest on any data. Nor is any proof offered that a handrail would actually prevent potential injury.

Nothing presented by Alloway would enable a reasonable jury to conclude that Franklin Institute has deviated from its duty of reasonable care, as there is no concrete data attesting to a latent dangerous condition of which only Franklin Institute would have opportunity to know. Were there such information presented by Alloway, then perhaps there would be a genuine issue of material fact regarding the existence of a latent defect and the concomitant duty of the premises owner toward the invitee. As it stands, the evidence, as viewed by an impartial jury, cannot reasonably lead to this conclusion.

Even granting the possibility that Alloway could establish the existence of an intrinsic hazardous defect, she

fails her burden of producing evidence that could persuade a reasonable jury of a duty owed her by Franklin Institute with respect to that condition. As the evidence presented would only persuade a reasonable jury of the existence of an obvious defect, the standard of care owed a business invitee with respect to a latent defect is not applicable. Where a hazardous condition on the premises is known or obvious to a reasonable business invitee, the business invitee assumes the risk of danger associated with the condition obvious to her. *Campisi v. Acme Markets*, 915 A.2d at 120.

Alloway directs our attention to the darkened conditions of the room, which, in conjunction with the absence of warning signs, allegedly raises a genuine dispute of material fact as to whether a reasonable business invitee should have been aware of the defect. Yet again, the weight of evidence provided by both parties establishes that no finder of fact could find otherwise than that, in the circumstances, a reasonable patron would have been aware of the atypical nature of the exhibit and would have adjusted his or her behavior accordingly. Alloway distinguishes between the exit and the exhibit itself, thus claiming that climbing may not necessarily be viewed as warranted movement when exiting the exhibit. She suggests that a factfinder could find that any reasonable patron would exit the exhibit exactly as she had done and thus incur the risk of injury. Nevertheless, the very name of the exhibit, The Brain Exhibit's Neural Climb, as well as the nature of the exhibit and Alloway's own testimony regarding her experience in the exhibit, unequivocally testify to the expected behavior of a visitor. In her own

deposition testimony, Alloway indicates that her conduct throughout the attraction was consistent with its name until she exited. She states, regarding the exhibit itself, that "It's a dark place, very few lights, with some netting and platforms to climb through...I climbed in after [my son]. We climbed around for a few minutes." *See* Exhibit "B", Deposition of Alloway, pp. 24:9-11, 19-20. Repeated use of the verb "climb" suggests that Alloway's enjoyment of the exhibit necessarily was bound with an awareness of the attraction's demand for unusual movement. Furthermore, the exhibit-exist distinction Alloway makes is completely artificial, as the exit is built into the exhibit.

Moreover, Alloway states that in walking rather than climbing down the exit, she estimated the distance with her eyes rather than carefully lowering her leg as one might expect of a reasonable patron. Her awareness of the attraction's unique nature, requiring climbing motion, would indicate to an impartial factfinder that she ought to have expected to discover intrinsic risks and act in ways to prevent injury. Any attraction calling for motion not normally associated with everyday activities calls for a heightened degree of attention to the surrounding environment. That any impartial factfinder would conclude that Alloway did not discharge her own duty to cognize herself of her uniquely challenging surroundings is quite evident.

WHEREFORE, for the reasons stated above, the Order entering judgment should be affirmed[1].

1. The Court acknowledges the participation of Philip D. Glass, a co-op student at Drexel University Thomas R. Kline School of Law for his assistance with the research and writing of this opinion.

Commonwealth v. Cave

Post-conviction relief — Ineffective assistance of counsel — Suppression of evidence

Defendant was not entitled to post-conviction relief for ineffectiveness of counsel where defendant lacked a sufficient privacy expectation with regard to a motion to suppress.

Defendant was a passenger in his girlfriend's car when police stopped the vehicle for speeding. Based on their observations during the stop, the police called in a K-9 unit. The dogs alerted police to the presence of narcotics. Defendant and his girlfriend were transported to police barracks. A search warrant was obtained, and police uncovered twelve pounds of marijuana and 91 clear plastic bags in the vehicle. Police then arrested defendant and charged him with the crime of possession with intent to deliver a controlled substance.

Defendant retained experienced private counsel. He and his attorney discussed the possibility of filing a motion to suppress the results of the search, as well as the relative merits of accepting a plea versus going to trial. Defendant's attorney believed a suppression motion would likely not be successful because defendant lacked the requisite expectation of privacy to challenge the search because he was neither the owner nor the driver of the vehicle. The discussions between defendant and his attorney also took into consideration defendant's strong and consistent desire to protect his girlfriend.

Eventually defendant pled guilty to the possession with intent to deliver charge. His plea was effectuated with a written form and was accompanied by an oral colloquy conducted by the court. Defendant was sentenced to between 18 and 60 months in prison. He did not file a direct appeal.

Defendant timely filed a motion for post-conviction relief, claiming ineffective assistance of counsel for failing to file a suppression motion, which he claimed resulted in a coerced guilty plea. Defendant also contended that he believed he was pleading guilty to a lesser charge.

At the hearing, defendant's prior attorney testified he met several times with defendant to discuss various aspects of the case, including the option of a suppression motion. Counsel indicated that defendant was well-aware of the nature of the charge to which he pled guilty. Counsel further testified that defendant repeatedly refused strategies that would have implicated his co-defendant girlfriend.

The court held defendant's assertion of ineffectiveness of counsel with a without merit. The circumstances of the case indicated defendant

lacked the requisite expectation of privacy to succeed on the suppression motion. Defendant failed to demonstrate either prejudice or a lack of a reasonable basis for counsel's actions. His conviction for post-conviction relief was properly denied.

C.P. of Monroe County, No. 22337 CR 2014

MARK, *J*., Mar. 10, 2017—Defendant, Shermaine Cave ("Defendant"), has appealed from our order dated January 5, 2017, that denied his petition under the Post-Conviction Relief Act ("PCRA"), 42 Pa. C.S.A. Section 9541 *et. seq*. After the appeal was filed, we issued an order directing Defendant to file a statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b). Defendant complied. We now file this opinion in accordance with Pa.R.A.P. 1925(a).

Background

On November 11, 2014, Pennsylvania State Police troopers stopped the car in which Defendant was riding as a passenger for speeding. The car was owned and driven by Defendant's girlfriend or ex-girlfriend. Based on observations made and information learned by the troopers during the stop, as well as their interactions with Defendant and the driver, the troopers called in a K-9 unit to perform an exterior sniff of the vehicle. The dog alerted to the presence of narcotics and actually jumped into the vehicle through an open window.

The vehicle, Defendant, and the driver were transported back to the police barracks. A search warrant was obtained and a search of the vehicle uncovered approximately twelve pounds of suspected marijuana and ninety-one clear plastic baggies. During a subsequent interview, Defendant

was *Mirandized* and admitted that the marijuana was his. The suspected marijuana was later confirmed through testing.

Defendant was arrested and charged with Possession with Intent to Deliver (PWID) a Controlled Substance and related offenses. He retained experienced, private counsel of his choosing ("Plea Counsel").

Defendant and Plea Counsel discussed the possibility of filing a motion to suppress the results of the search, a plea to PWID being offered by the Commonwealth, and the relative merits of accepting the plea versus going to trial. Discussions took into consideration Plea Counsel's considered opinion that a suppression motion would likely not be fruitful because counsel believed, among other things, that Defendant lacked the requisite expectation of privacy to challenge the search since he was neither the owner nor operator of the vehicle that was searched. Discussions also took into consideration Defendant's admission and his strong and consistent desire to protect his ex-girlfriend. Plea Counsel gave Defendant a full assessment of his case and trial prospects. In the end, Defendant made a conscious decision to accept the Commonwealth's plea offer and to insulate, or at least minimize the criminal consequences for, his friend.

On July 16, 2015, after several defense delays, Defendant pled guilty to PWID. The plea was effectuated through a written guilty plea form that was signed by Defendant and Plea Counsel and was accompanied by a thorough oral colloquy conducted by the Court. Plea Counsel went over and explained the form to Defendant and was present with

Defendant for the colloquy and acceptance of the plea.

Defendant was subsequently sentenced to eighteen to sixty months in a State Correctional Institution (SCI). Defendant did not file a direct appeal.[1] He remains incarcerated on the sentence imposed.

On August 19, 2016, Defendant filed a *pro se* PCRA petition alleging ineffective assistance of counsel. Defendant claims that Plea Counsel was ineffective for failing to file a suppression motion challenging the search of his friend's car. According to Defendant, Plea Counsel's failure to file such a motion resulted in a "coerced" guilty plea. In addition, Defendant alleges that, at the time he entered his plea, he believed he was pleading to simple possession rather than PWID.

After the PCRA petition was filed, we scheduled a hearing and appointed the Monroe County Public Defender's Office to represent Defendant. On October 6, 2016, the assigned Public Defender filed a *Turner-Finley* no merit letter. The initial PCRA hearing was convened, as scheduled. However, appointed counsel had not made arrangements for defendant to participate in the proceeding in person or by videoconference, and further, had not yet filed the motion to withdraw that should have accompanied her *Turner-Finley* letter. Accordingly, the hearing was recessed.

Subsequently, appointed counsel filed a motion to

1. While no appeal was filed, the judgment of sentence was subsequently amended to deem Defendant eligible for the RRRI program and set his alternate minimum sentence at thirteen and one-half months.

withdraw. Thereafter, on December 19, 2016, the PCRA hearing was held. Defendant participated by video-conference. During the hearing, we granted appointed counsel's motion to withdraw, informed Defendant of his right to hire an attorney or proceed *pro se*, and confirmed that Defendant wanted to pursue his claims *pro se*.

Plea Counsel testified that he met with Defendant several times to discuss the various aspects of his case, including the vehicle stop, counsel's opinion that suppression was highly unlikely, and counsel's belief that, if an unsuccessful suppression motion was filed, the favorable deal offered by the Commonwealth would change or be withdrawn. Plea Counsel further testified that, before the guilty plea was entered, he discussed with Defendant the options of accepting the plea offer or going to trial, Defendant's chances at trial, and counsel's belief that Defendant was "falling on his sword" for the driver.

During the hearing, we asked Plea Counsel questions about Defendant's assertion that he was unaware he was pleading to PWID and his contention that his lea was unlawfully coerced. Plea Counsel testified that Defendant knew he was leading guilty to PWID and recalled that when Defendant asked him if a plea to misdemeanor possession might be possible, counsel advised that:

> under the circumstances [a plea to a misdemeanor] was not on the table inasmuch as I believe his co-defendant, because of him — actually because of him taking full responsibility as he did before I even met him — I believe received an ARD. She was the driver.

(N.T., 12/19/2016, pp. 16-17). Plea Counsel further testified that he was aware of no coercion. Plea Counsel also stated that he had discussed with Defendant plausible defense trial strategies and theories and reiterated Defendant had repeatedly stated that trial was not an option because he refused to implicate his co-defendant. (N.T., 12/19/2016, p. 17-18).

We informed Defendant of his right to testify and to provide any additional legal argument he desired. Defendant opted for argument and again recited his belief that the search was illegal and that Plea Counsel should have filed a suppression motion. At the close of Defendant's argument, we asked some additional questions in an attempt to clarify Defendant's claims. Defendant acknowledged that his remaining claims regarding the voluntary and knowing nature of his plea are not independent claims, but rather, flow from his assertion that counsel was ineffective in failing to file a motion to suppress. (N.T., 12/19/2016, p. 23).

At the end of the hearing, we denied Defendant's petition. We articulated our reasoning on the record. (N.T., 12/19/2016, pp. 8-10 and 25-29). Subsequently, Defendant filed this appeal.

Discussion

On appeal, Defendant lodges only the single claim that Plea Counsel was ineffective for failing to file a suppression motion.[2] (Defendant's Rule 1925(b) Statement, filed

2. As noted, Defendant's *pro se* PCRA petition had two additional claims. While not completely clear, it appears that Defendant's Rule

2/21/2017, ¶¶ 1 and 2). His claim is without merit for the reasons we articulated on the record during the December 19, 2016 hearing. (N.T., 12/19/2016, pp. 8-10 and 25-29). To what we stated on the record, we highlight, amplify, or add only the following:

In stating our reasons for denial, we referenced certain standards and principles of law regarding ineffective assistance of counsel claims and found that Defendant had not met his burden. In more expanded terms, the law we referenced and applied is as follows:

Defendant's ineffective assistance of counsel claim implicates *Strickland v. Washington*, 466 U.S. 668 (1984), as adopted in Pennsylvania by *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987), which requires a defendant

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1925(b) statement does not include these additional claims. To the extent Defendant attempts to argue the additional claims on appeal, we believe the claims have been waived by his failure to specifically assert them in his appeal statement. In this regard, it is well-settled that in order to preserve claims for appellate review, [a]ppellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Rule 1925. Any issues not raised in a 1925(b) statement will be deemed waived. Pa.R.A.P. 1925(b)(4)(vii); see also *Commonwealth v. Lord*, 719 A.2d 306, 309 (Pa. 1998) *superseded by rule on other grounds as stated in Commonwealth v. Burton*, 973 A.2d 428, 431 (Pa. Super. 2009); *Com. v. Butler*, 571 Pa. 441, 812 A.2d 631, 633 (2002); *Commonwealth v. Castillo*, 888 A.2d 775, 780 (Pa. 2005); *Commonwealth v. Berry*, 877 A.2d 479, 485 (Pa. Super. 2005); *Commonwealth v. Salisbury*, 823 A.2d 914, 917 (Pa. Super. 2003). Waiver under Rule 1925 is automatic. The same is true in PCRA appeals, despite the recitation of issues within a PCRA petition. This is because the purpose of Rule 1925 is "to aid trial judges in identifying and focusing upon those issues that the parties plan to raise on appeal." *Lord* supra at 308; see also *Commonwealth v. Johnson*, 771 A.2d 751, 755 (Pa. 2001) (Opinion Announcing the Judgment of the Court). Further, at the PCRA hearing, Defendant acknowledged that these claims are linked to and based on, and therefore rise or fall with, his primary contention. In any event, the other claims are meritless for the reasons stated on the record during the hearing.

alleging ineffectiveness to demonstrate that he was prejudiced by an act or omission of his attorney. In cases where the *Strickland/Pierce* test applies, the analysis begins with

> the presumption that counsel rendered effective assistance. *Commonwealth v. Basemore*, 560 Pa. 258, 277 n. 10, 744 A.2d 717, 728 n. 10 (2000). To obtain relief on a claim of ineffective assistance of counsel, a petitioner must rebut that presumption and demonstrate that counsel's performance was deficient, and that such performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687-91, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In our Commonwealth, we have rearticulated the Strickland Court's performance and prejudice inquiry as a three-prong test. Specifically, a petitioner must show: (1) the underlying claim is of arguable merit; (2) no reasonable basis existed for counsel's action or inaction; and (3) counsel's error caused prejudice such that there is a reasonable probability that the result of the proceeding would have been different absent such error. *Commonwealth v. Pierce*, 515 Pa. 153, 158- 59, 527 A.2d 973, 975(1987).

Commonwealth v. Dennis, 17 A.3d 297, 301 (Pa. 2011). *See Commonwealth v. Dennis*, 950 A.2d 945, 953 (Pa. 2008); *Commonwealth v. Gwynn*, 943 A.2d 940, 945 (Pa. 2008).

A corollary to the first element, counsel cannot be found ineffective for failing to pursue a baseless or meritless claim. *Commonwealth v. Roney*, 79 A.3d 595, 604 (Pa.

2013); *Commonwealth v. Washington*, 927 A.2d 586, 603 (Pa. 2007); *Commonwealth v. Harvey*, 812 A.2d 1190, 1199 (Pa. 2002). With regard to the second, the

> reasonable basis element, we do not question whether there were other more logical courses of action which counsel could have pursued; rather, we must examine whether counsel's decisions had any reasonable basis." [*Commonwealth v.*] *Hanible*, [30 A.3d 426,] 439 [(Pa. 2011)] (citation omitted). We will conclude that counsel's strategy lacked a reasonable basis only if the petitioner proves that a foregone alternative "offered a potential for success substantially greater than the course actually pursued." [*Commonwealth v.*] *Spotz*, [18 A.3d 244] 260 [Pa. 2011] (citation omitted). To establish the third, the prejudice element, the petitioner must show that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's action or inaction. *Id.*

Roney, 79 A.3d at 604.

In this case, as we indicated on the record, Defendant's claims lacked arguable merit. Therefore, Defendant failed to establish the first element. In any event, and for many of the same reasons, he failed to demonstrate either prejudice or the lack or a reasonable basis for counsel's actions. Neither buyer's remorse nor an after-the-fact claim that a defendant who has been thoroughly advised of his rights took the fall for another constitutes ineffective assistance of counsel.

We also referenced and relied upon certain principles of

law regarding whether or not Defendant could demonstrate the requisite reasonable expectation of privacy to contest the search of his girlfriend's car. The principles which we referenced and applied may be summarized as follows:

A defendant charged with a possessory drug offense has automatic standing to contest the search. *See Commonwealth v. Sell*, 470 A.2d 457 (Pa. 1983). *See also Commonwealth v. Jones*, 874 A.2d 108 (Pa. Super. 2005); *Commonwealth v. Perea*, 791 A.2d 427 (Pa. Super. 2002), *appeal denied*, 798 A.2d 1288 (Pa. 2002). However, in order to prevail, he must demonstrate a legitimate privacy interest in the area searched. *Commonwealth v. Brundidge*, 620 A.2d 1115 (Pa. 1993); *Commonwealth v. Sell*, *supra*; *Commonwealth v. Perea*, *supra*. In determining the scope of protection afforded under the search-and-seizure provision of Pennsylvania Constitution, the Supreme Court of Pennsylvania employs the same two-part test employed by the United States Supreme Court when interpreting the Fourth Amendment. Specifically, the, defendant must demonstrate: (1) a subjective expectation of privacy; (2) that society is prepared to recognize as reasonable and legitimate. *Commonwealth v. Gary*, 91 A.3d 102 (Pa. 2014). When determining the legitimacy of an expectation of privacy, as required for a constitutionally-protected right in an item seized, a reviewing court will consider the totality of the circumstances and carefully weigh the societal interests involved. *Commonwealth v. Johnson*, 727 A.2d 1089 (1999).

Here, for the reasons stated, Defendant lacked the requisite expectation of privacy.

For the reasons recited on the record, as supplemented in this Opinion, we believe that our denial of Defendant's PCRA petition was correct under the facts and the law and that the issues raised by Defendant are without merit. Accordingly, we believe that the denial should be affirmed.

Aster Inv., LLC v. Blain

Appeal — Pennsylvania rules of civil procedure 227.1 — Post-trial motion — Waiver

Court argued that its decision should be affirmed in landlord tenant action because landlord failed to file any post-trial motions as required by Pa.R.C.P. 227.1 and thus, waived any issue on appeal.

Landlord sued tenant for unpaid rent, late fees and possession of the property. Tenant counterclaimed for full abatement of all rent paid due to a breach of the implied warranty of habitability. The municipal court entered judgement in favor of tenant. Landlord appealed from the municipal court judgment. Landlord filed a complaint, tenant answered and counterclaimed and the court found in favor of tenant. Landlord filed a motion for reconsideration and then a timely notice of appeal to the Superior Court. Landlord filed a concise statement of matters complained of on appeal, raising nine issues.

The court found that while landlord timely filed a notice of appeal, it did not file post-trial motions. Pennsylvania law required a party to file post-trial motions at the conclusion of a trial in any type of action in order to preserve claims that the party wished to raise on appeal. Landlord did not file any post-trial motions pursuant to Pa.R.C.P. 227.1. The fact that landlord filed a motion for reconsideration and a concise statement of matters complained of on appeal did not change the fact that it failed to file any post-trial motions. Landlord failed to preserve any issues for appeal.

C.P. of Philadelphia County, September Term, 2016, No. 02847

PADILLA, *J.*, March 16, 2017—Aster Investments,

LLC (Appellant) appeals from this court's January 9, 2017 Order finding in favor of Michelle Blain (Appellee).

FACTUAL AND PROCEDURAL HISTORY

On July 6, 2016, Appellant filed a Landlord Tenant Complaint against Appellee, a tenant at 5821 Magnolia Street, Apartment 1, Philadelphia, PA 19144, for unpaid rent in the amount of $3,200, late fees in the amount of $320.00, and court costs in the amount of $112.00. Thus, Appellant's Landlord Tenant Complaint sought to recover $3,632 in monetary damages. Appellant also sought a judgment for possession of the subject property. *See* Appellant's Landlord Tenant Complaint filed in the Philadelphia Municipal Court; Philadelphia Municipal Court Docket.

On July 19, 2016, Appellee filed a Counterclaim seeking full abatement of all rent paid to Appellant due to a breach of the Implied Warranty of Habitability. *See* Appellee's Landlord Tenant Counterclaim filed in the Philadelphia Municipal Court; Philadelphia Municipal Court Docket.

On July 21, 2016, Appellant filed an Affidavit of Service, reflecting that personal service of the Landlord Tenant Complaint upon Appellee was effectuated on July 16, 2016 at 3:46 p.m., by serving Appellee at 5821 Magnolia Street, Apartment 1, Philadelphia, PA 19144. *See* Philadelphia Municipal Court Docket; Affidavit of Service filed July 21, 2016.

On August 4, 2016, Appellee filed an Affidavit of Service, reflecting that personal service of the Counterclaim upon Appellant was effectuated on July 30, 2016 at 1:25 p.m.,

by serving Appellant at 2424 E. York Street, Suite 301H, Philadelphia, PA 19115. *See* Philadelphia Municipal Court Docket; Affidavit of Service filed August 4, 2016.

On September 16, 2016, the Philadelphia Municipal Court entered a judgment in favor of Appellee. *See* Philadelphia Municipal Court Docket.

On September 23, 2016, Appellant commenced this action by filing an appeal from the September 16, 2016 Municipal Court judgment. *See* Philadelphia County Court of Common Pleas Docket ("Docket").

On October 19, 2016, Appellant filed its Complaint. *See* Appellant's Complaint filed in Philadelphia County Court of Common Pleas; Docket.

On November 7, 2016, Appellee filed its Answer to the Complaint, asserting a New Matter and Counterclaim. *See* Appellee's Answer; Docket.

On December 6, 2016, Appellant filed its Answer to the Counterclaim. *See* Appellant's Answer; Docket.

On January 10, 2017, this court entered an Order finding in favor of Appellee and awarded $9,600.00 for rent that Appellee had paid Appellant and $1,000.00 in attorney's fees, for a total award of $10,600.00. *See* Order dated January 9, 2017, but docketed January 10, 2017.

On January 17, 2017, Appellant filed a Motion for Reconsideration of this court's January 9, 2017 Order. *See* Docket.

On February 3, 2017, Appellant timely filed a Notice of

Appeal to the Superior Court. *See* Docket.

On February 7, 2017, this court issued its Order pursuant to Pa. R.A.P. 1925(b), directing Appellant to file his Concise Statement of Matters Complained of on Appeal within twenty-one (21) days. *See* Docket.

On February 28, 2017, Appellant timely filed a Concise Statement of Matters Complained of on Appeal raising nine (9) issues. *See* Appellant's Concise Statement of Matters Complained of on Appeal.

DISCUSSION

As a preliminary matter, while Appellant timely filed a Notice of Appeal from this court's January 9, 2017 Order, the record reveals that Appellant did not file post-trial motions. Pursuant to Pennsylvania law and Pa. R.C.P. 227.1, "a party must file post-trial motions at the conclusion of a trial in *any* type of action in order to preserve claims that the party wishes to raise on appeal." *Chalkey v. Roush*, 569 Pa. 462, 469, 805 A.2d 491, 496 (2002) (citing Pa. R.C.P. 227.1). Put another way, "a trial court's order at the conclusion of a trial, whether the action is one at law or in equity, simply cannot become final for purposes of filing an appeal until the court decides any timely post-trial motions." *Id. See L.B. Foster Co. v. Lane Enters, Inc.*, 551 Pa. 307, 307, 710 A.2d 55 (1998) ("If an issue has not been raised in a post-trial motion, it is waived for appeal purposes."). The Pennsylvania courts have stated that "[t]he importance of filing post-trial motions cannot be overemphasized." *Diamond Reo Truck Co. v. Mid-Pac. Indus., Inc.*, 806 A.2d 423, 428 (Pa. Super.

Ct. 2002). "[T]his is not blind insistance [sic] on a mere technicality since post-trial motions serve an important function in adjudicatory process in that they afford the trial court in the first instance the opportunity to correct asserted trial error and also clearly and narrowly frame issues for appellate review." *Id.* (quoting *Fernandes v. Warminster Mun. Auth.*, 442 A.2d 1174, 1175 (Pa. Super. Ct. 1982)) (internal quotation marks omitted). "Even when a litigant files post-trial motions but fails to raise a certain issue, that issue is deemed waived for purposes of appellate review." *Id.* (citation omitted). In addition, "the filing of a [Pa. R.A.P.] 1925(b) statement does not excuse the failure to file post-trial motions and does not revive or preserve issues that are waived for failure to file post-trial motions." *Diamond Reo Truck Co.*, 806 A.2d at 429. Further, under Pennsylvania law it is clear that "[a] motion for reconsideration is not a post-trial motion." *Moore v. Moore*, 634 A.2d 163, 166 (Pa. 1993); *see Crystal Lake Camps v. Alford*, 923 A.2d 482, 487-88 (Pa. Super. Ct. 2007).

Here, the record is clear. Appellant did not file any post-trial motions pursuant to Pa. R.C.P. 227.1. The fact that Appellant filed a Motion for Reconsideration and timely filed a Concise Statement of Matters Complained of on Appeal in accordance with Pa. R.A.P. 1925(b) does not change the fact that Appellant failed to file any post-trial motions. Thus, Appellant has failed to preserve any issues for appeal and all issues raised in his Concise Statement are waived.

CONCLUSION

For all of the reasons stated above, this court's decision should be affirmed.

Caldwell v. Delaware Cnty. Tax Claim Bur.

Petition to set aside judicial tax sale — Notice — Reasonable effort — Due process

In Petition to Set Aside Judicial Sale, tax claim bureau's unreasonable inaction in making no effort to contact petitioner at the phone number or email address provided and available to the bureau negatively impacted petitioner's due process rights and foreclosed his opportunity to be heard.

Petitioner's father purchased property in 2013 for petitioner to live in while studying. Petitioner never occupied the property as his father was in the process of renovating it. Sheriff mailed a Notice of Judicial Sale to petitioner by certified mail at the address of the property in March 2015, and it was returned as unclaimed. The sheriff went to the address and determined that the property was vacant and the property was sold at a Judicial Tax Sale to appellant in 2015. Petitioner testified that the Tax Claim Delinquent Tax Application contained his father's handwriting and his father's telephone number and email address. The Judicial Sale Coordinator testified that the property was brought to judicial sale because "it was no bid at a previous upset sale." No efforts were made to contact petitioner or his father at either the telephone number or email address on the Tax Claim Delinquent Tax Application. Title was transferred to appellant in exchange for a bid price of $5,000 and recorded. Petitioner filed a petition to set aside the judicial tax sale.

The court found that the failure of the bureau to make any effort to contact petitioner at the phone number or email address provided and available to the bureau was not reasonable. The bureau's unreasonable inaction negatively impacted the due process owed to petitioner and foreclosed his opportunity to be heard.

C.P. of Delaware County, No. 2015-009952

Patrick T. Hennigan, Esquire, for appellant/respondent

Barry W. Van Rensler, Esquire, Counsel for appellee/

petitioner

GREEN, *J.*, March 16, 2017—Appellant/Respondent Marvin D. Newtown appeals from this court's December 21, 2016 Decision and Order.

PROCEDURAL AND FACTUAL HISTORY

Appellant/Respondent is Marvin D. Newton ("Newton") and Appellee/Petitioner is Terrance H. Caldwell, Jr. ("Caldwell"). The Tax Claim Bureau of Delaware County ("Bureau") took no position on the underlying Petition to Set Aside Judicial Sale. (07/14/16, N.T., p. 5). On or about May 14, 2015, the property commonly known as 2019 West 7th Street, Chester, Pennsylvania, being Tax Folio No. 49-10-00451-00 ("Subject Property) was sold at Judicial Tax Sale to Newton. (Stipulation of Facts, Court-1). Title vested in Caldwell by Deed dated May 22, 2013 and recorded in the Office of the Recorder of Deeds in and for Delaware County, Pennsylvania in Deed Book 5348 at Page 0912. (Stipulation of Facts, Court-1).

The Subject Property was initially purchased from a relative with the intent Caldwell and other roommates would occupy the Subject Property while completing their post-secondary education. (07/14/16 N.T., p. 10). All of the financial dealings regarding the subject property where handled by his father, Terrance H. Caldwell, Sr. (07/14/16 N.T., p.10). Caldwell never occupied the Subject Property as his father was in the process of renovating the home. (07/14/16 N.T., p. 19). Mr. Caldwell, Sr. estimated he spent between $40,000.00 and $45,000.00 on the rehabilitation of the Subject Property. (07/14/16 N.T., p. 19-20).

The Sheriff of Delaware County ("Sheriff") mailed a Notice of Judicial Sale to Caldwell by Certified Mail on or about March 11, 2015 and reported the mail was returned as unclaimed. (Stipulation of Facts, Court-1). At the record hearing, Newton introduced into evidence a Tax Claim Delinquent Tax Application as R-1. Said Application provided: (1) a mailing address as 2019 W. 7th Street, Chester Pennsylvania 19013, (2) the following telephone number — "267-563-0452" and (3) an email address — "tcaldwell34@yahoo.com". Terrance H. Caldwell, Jr. testified R-1 contained his father's handwriting and confirmed 267-563-0452 was a telephone number belonging to his father. (07/14/16 N.T., p. 13).

Kim Kenney is the Judicial Sale Coordinator for the Bureau. (Stipulation of Facts, Court-1). Ms. Kenney testified the Subject Property was brought to judicial sale because "it was no bid at a previous upset sale." She further testified "title searches are generated for the Tax Claim Bureau on owner and lien holders and from there the service is distributed to the Sheriff's Department to the last known addresses on record to serve the taxpayer." (03/15/16 N.T., p. 7). The Delaware County Sheriff obtained a Return of Service on March 4, 2015 stating a sheriff did go to the Subject Property on February 18, 2015 and determined the Subject Premises was vacant. (03/15/16 N.T., p. 7). The Sheriff later issued notice to Terrance H. Caldwell, Jr. at 2019 W. 7th St, Chester, PA 19013 via registered mail on or about March 11, 2015 that was returned "NOT DELIVERABLE AS ADDRESSED — UNABLE TO FORWARD." (03/15/16 N.T., p. 8 &

R-2).

Ms. Kenney confirmed no efforts were made to contact Caldwell at either the telephone number (267-563-0452) or email address (tcaldwell34@yahoo.com) provided. (03/15/16 N.T., p. 9). No internet search or social media inquiry was attempted. (03/15/16 N.T., p. 9). Title was transferred to Newton by the Bureau in exchange for the bid price of $5,912.00 by Deed dated July 24, 2015 and recorded in the Office of the Recorder of Deeds in and for Delaware County in Deed Book 5677 at page 0792. (Stipulation of Facts, Court-1).

STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

The issues raised in Appellant Newton's Concise Statement of Matters Complained of on Appeal are as follows:

1. Did the court err in failing to dismiss the Petition where the six month Statute of Limitations set forth in 42 Pa.C.S.A. § 5522 had expired prior to the filing of the Petition?

2. Did the court err in granting the relief requested where the true owner of the property never responded to the original notice of delinquency?

3. Did the court err in granting relief based upon the actions of a third party, Terrance H. Caldwell, Sr. who had no written Power of Attorney to act on behalf of Petitioner, Terrance Caldwell, Jr.?

4. Did the court err in imposing duties on the Tax Claim Bureau in searching for information of the owner of a property where the Bureau is provided with fraudulent information and never had any accurate information for the true owner of the property?

5. Did the court err in granting relief in light of the clearly fraudulent conduct of Terrance Caldwell, Sr.?

6. Did the court err in granting relief where the owner, Terrance Caldwell paid no consideration for the property, paid no outstanding taxes due on the property when it was transferred in his name, made no attempt to satisfy outstanding taxes and provided no information to the Tax Claim Bureau as to his residence?

7. Did the court err in granting relief when the entire proceeding is an attempt to commit fraud on the court and Tax Claim Bureau from the initiation including use of an address which is not that of the true owner of the property on the Caption and Cover Sheet but rather is that of Terrance Caldwell, Sr. who submitted fraudulent records and committed perjury by intentionally submitting information to the Tax Claim Bureau which he knew to be false and incorrect in an attempt to halt the sale of the property.

DISCUSSION

Appellant first contends the trial court erred in failing to dismiss the Petition to Set Aside Judicial Tax Sale as the six month statute of limitations set forth in 42 Pa.C.S.A. § 5522 expired prior to the filing of the Petition. Appellant

failed to raise this argument at hearing and failed to seek reconsideration of the trial court's December 21, 2016 Decision and Order focusing on the statute of limitations issue. As such, this issue has been waived on appeal. "[I] f an issue has not been raised in a post-trial motion, it is waived for appeal purposes." *Diamond Reo Truck Co. v. Mid-Pacific Industries, Inc.*, 806 A.2d 423, 428 (Pa. Super. 2002) (*quoting L.B. Foster Co. v. Lane Enterprises, Inc.*, 551 Pa. 307, 307, 710 A.2d 55, 55 (1998)). "Even when a litigant files post-trial motions but fails to raise a certain issue, that issue is deemed waived for purposes of appellate review." *Diamond Reo Truck Co.*, *supra* at 428 (*citing Hall v. Owens Corning Fiberglass Corp.*, 779 A.2d 1167, 1169 (Pa.Super.2001)); *Sovereign Bank v. Valentino*, 914 A.2d 415, 426 (Pa. Super. 2006).

Nevertheless, the Judicial Tax Sale was May 14, 2015. Six months thereafter was Saturday, November 14, 2015. Appellee's Petition to Set Aside Judicial Tax Sale was filed the next business day — Monday, November 16, 2015. Appellant's statute of limitations argument is without merit.

Appellant's remaining issues on appeal focus on the notice afforded to Caldwell by the Bureau and will therefore be addressed collectively. The forfeiture of property for failure to pay taxes is a "momentous event" under the United States and Pennsylvania Constitutions. *Tracy v. Cnty. Of Chester Tax Claim Bureau*, 507 Pa. 288, 489 A.2d 1334, 1339 (1985). The Real Estate Tax Sale Law (RETSL) was never intended to punish delinquent taxpayers by stripping them of their property; rather, it was intended to

ensure the collection of taxes. *Id.* "The collection of taxes, however, may not be implemented without due process of law that is guaranteed in the Commonwealth and federal constitutions." *Id.* Due process requires, at an absolute minimum, notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). In the case of a judicial tax sale, the opportunity to be heard occurs at the rule to show cause hearing. *Montgomery Cnty. Tax Claim Bureau v. Mermelstein Family Trust*, 836 A.2d 1010, 1014 (Pa. Cmwlth.2003) ("The [RETSL] requires an owner receive service of the rule, not notice of the actual date of judicial sale, because that proceeding is the sole opportunity for interested parties to appear and contest the validity of a judicial sale."); *In re Serfass*, 651 A.2d 677, 679 (Pa. Cmwlth.1994)(holding the RETSL requires a rule to show cause be served on an owner, but does not require the owner to have notice of the actual date of a judicial tax sale). Pennsylvania courts have consistently held compliance with the RETSL is required in order to protect a property owner's due process rights. *Smith v. Tax Claim Bureau of Pike Cnty.*, 834 A.2d 1247, 1251 (Pa.Cmwlth.2003).

Under the RETSL, a tax bureau may petition the court for permission to sell at judicial tax sale a property which fails to sell for the required price at an upset sale. Section 610 of the RETSL, as amended, 72 P.S. § 5860.610. Upon petition, the court grants a rule, directing the interested parties to appear at a hearing on the return date to show cause as to why the property should not be sold at a judicial tax sale. *Id.*

Section 611 of the RETSL provides:

> Service of the rule shall be made in the same manner as writs of scire facias are served in this Commonwealth. When service cannot be made in the county where the rule was granted, the sheriff of the county shall deputize the sheriff of any other county in this Commonwealth, where service can be made. If service of the rule cannot be made in this Commonwealth, then the rule shall be served on the person named in the rule by the sheriff, by sending him, by registered mail, return receipt requested, postage prepaid, at least fifteen (15) days before the return day of the rule, a true and attested copy thereof, addressed to such person's last known post office address. The sheriff shall attach to his return, the return receipts, and if the person named in the rule has refused to accept the registered mail or cannot be found at his last known address, shall attach evidence thereof. This shall constitute sufficient service under this act.

72 P.S. 5860.611

Importantly, Section 607(a) of the RETSL, as amended, 72 P.S. § 5860.607a(a), requires a tax bureau to take additional reasonable efforts to locate and notify an owner or lienholder under any circumstances "raising a significant doubt as to the actual receipt of such notification" before the sale can take place. Thereafter, "[i]f upon hearing, the court is satisfied that service of the rule has been made upon the parties named in the rule, in the manner provided by this act...it shall order and decree said property be sold

. . .." Section 612 of the RETSL, as amended, 72 P.S. § 5860.612.

In sum, the RETSL requires a rule to show cause issued under Section 610 of the RETSL to be served upon the owner and lienholder by a sheriff, in person if possible. The sheriff must then file with the court the return receipt, indicating whether service was successful. If service was not successful, additional steps under Section 607a(a) must be taken to notify the interested party of the rule to show cause, because that is the owner or lienholder's opportunity to be heard. Lastly, the court may order the judicial tax sale, if and only if, the court is satisfied service of the rule has been made.

Although the bureau need not engage in extraordinary efforts to notify an owner or lienholder, *In re Tax Claim Bureau of Beaver County Tax Sale September 10, 1990*, 600 A.2d 650, 654 (Pa.Cmwlth. 1991), the bureau bears the burden of proving it took all the reasonably necessary steps to locate and notify the interested parties of the rule and hearing. *McElvenny v. Bucks Cnty. Tax Claim Bureau*, 804 A.2d 719, 721 (Pa.Cmwlth.2002), *appeal denied*, 572 Pa. 768, 819 A.2d 549 (2003); *In re Tax Claim Bureau of Lehigh Cnty. 2012 Judicial Tax Sale*, 107 A.3d 853, 857-59 (Pa.Cmwlth. 2015), *appeal denied*, 632 Pa. 674, 117 A.3d 299 (2015).

Here, the Bureau made no additional efforts to contact Mr. Caldwell by telephone, email or other social media. (03/15/16 N.T., p. 9). The failure of the Bureau to attempt to contact Caldwell at either the phone number (267-563-0452) or email address (tcaldwell34@yahoo.com) provided

and available to the Bureau is simply not reasonable. The trial court is aware the interplay between Caldwell and his father may have clouded the situation. Nevertheless, the Bureau's unreasonable inaction negatively impacted the due process owed to Caldwell and effectively foreclosed his opportunity to be heard.

For the foregoing reasons, the December 21, 2016 Decision and Order should not be disturbed.

Aloosh, Inc. v. Lancaster Mews Partners. L.P

Partial destruction of the premises — Lease — Ejectment

Trial court requested the Superior Court to affirm its decision to deny tenant's petition for special injunctive relief to enjoin landlord from ejecting tenant and to require landlord to repair the premises after a fire because the lease gave the landlord the right to terminate the lease and eject tenant after a partial destruction of the property.

After a fire occurred at a property, landlord hired an architect to determine the extent of the damage. Architect found that the building did not present an immediate public safety hazard but that part of a bay window needed to be demolished and replaced. Landlord sent tenant a termination notice to vacate the property. Tenant filed a motion for special injunctive relief to enjoin landlord from proceeding with the ejectment and to require the landlord to repair the damage from the fire. The court heard the petition on an emergency basis and denied tenant's petition because he had not shown a clear right to relief. Tenant appealed.

The lease did not require the landlord to restore the property or to allow the tenant to restore the property. Paragraph 11 of the lease provided that for partial destruction of the property, "Lessor may, at Lessor's option, restore" the property. The lease also required the lessor to make his "election to repair the premises or terminate [the] lease by giving notice thereof" within 30 days.

Landlord complied with the lease by hiring the licensed architect who determined that the fire caused only a partial destruction. Landlord chose to terminate the lease and provided notice within the required 30-

day period.

Tenant argued that paragraph 11 was ambiguous but the lease was not ambiguous and gave landlord a clear right to eject tenant in the event of a partial destruction of the property.

C.P. of Philadelphia County, February Term 2017, No. 07303

FLETMAN, *J*., March 17, 2017—This appeal arises from this Court's decision to deny the petition of plaintiff Aloosh Inc. ("Aloosh") for special injunctive relief by order dated March 1, 2017. Aloosh filed its petition for relief on February 28, 2017, asking the Court to enjoin defendant Lancaster Mews Partners, L.P. ("Lancaster Mews") as assignee of Touchstar Partners L.P. ("Touchstar") from ejecting Aloosh from the premises of 3600, 3602 and 3604 Lancaster Avenue, Philadelphia, PA 19104 ("the Property"). The Court denied the petition following a hearing on March 1, 2017, because plaintiff Aloosh had not shown a clear right to relief. Aloosh filed a timely appeal to the Pennsylvania Superior Court on March 3, 2017. The Court committed no error in entering its March 1, 2017 order and respectfully requests that the Superior Court affirm its decision for the reasons set forth in this opinion.

FACTS

In March 2013, Aloosh and Touchstar entered into a lease agreement for the rental of the Property from owner Touchstar to renter Aloosh (the "Lease").[1] A copy of the

1. As the notes of testimony from the March 1, 2017, hearing have not yet been transcribed this Court relies on its memory and cites to the Petition of Aloosh for Special Injunctive Relief, dated February 28, 2017 ("Aloosh's Petition").

Lease was entered into evidence at the March 1 hearing and is attached as Exhibit A. The Lease allowed Aloosh to operate a restaurant in the Property for a five-year term with a right of renewal. Touchstone later assigned the agreement to Lancaster Mews, which became Aloosh's landlord.

A fire occurred in the Property in December 2016.[2] In compliance with paragraph 11 of the Lease, regarding total and partial destruction of the Property, Lancaster Mews hired a licensed architect to determine the extent of the damage. In his report, the architect found that "based on [his] observations... the structure in its current condition does not present an immediate public safety concern. However, there has been enough section loss of the wood members that [he] recommend[s] the entire bay window area of framing...be demolished and replaced." Aloosh Restaurant Fire Survey, dated January 24, 2017 at 3 (attached to Aloosh's Petition as Exhibit C).

Under paragraph 11(b) of the Lease, Lancaster Mews on or about January 26, 2017 sent a termination notice to Aloosh to vacate the Property on or before February 28, 2017 (attached to Aloosh's Petition as Exhibit B).

On February 28, 2017, Aloosh filed its motion for special injunctive relief to enjoin Lancaster Mews from going forward with the ejectment and to require the landlord to repair the damage resulting from the fire. This Court heard the petition on an emergency basis on March 1, 2017 and afterwards denied the petition as Aloosh had

2. There is some dispute as to the date of the fire, but Aloosh admits in its petition that it occurred between December 27 and 30, 2016, 2016. Aloosh's Petition at 8, N. 1.

not shown a clear right to relief. Aloosh filed this timely appeal to the Superior Court on March 3, 2017.

DISCUSSION

An appellate court shall review the decision of a trial court refusing a request for special injunctive relief for abuse of discretion, "disturbing the trial court's decision only if it is plain that no grounds exist to support the decree or that the rule of law relied upon was palpably erroneous or misapplied." *Turner Const. v. Plumbers Local*, 690 A.3d 47, 58 (Pa. Super. 2015). One of the six prerequisites that the movant must meet for a court to grant a preliminary injunction is that "the activity to be restrained is actionable, the right to relief is clear, and that the wrong is manifest, or, in other words, must show that it likely to prevail on the merits." *Summit Town Centre, Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003).

Aloosh claims that Lancaster Mews breached the Lease by either not restoring the Property to its condition before the fire or allowing Aloosh to do so. The Lease, however, imposes no such requirement on the landlord.

The relevant part of the Lease is paragraph 11, which governs the responsibility of the landlord if the Property is totally or partially destroyed. It provides:

> (a) Total Destruction of Premises:
>
> In the event the demised premises are totally destroyed or so damaged by fire or other casualty that, in the opinion of a licenses architect retained by Lessor/the same cannot be repaired and restored within ninety days from the happening of such injury this lease shall

> absolutely cease and determine and the rent shall abate for the balance of the balance of the term.
>
> (b) Partial Destruction of Premises
>
> If the damage be only partial and such that premises can be restored, in the opinion of a licensed architect retained by Lessor, to approximately their former condition within ninety days from the date of the casualty loss Lessor *may*, at Lessor's option, restore the same with reasonable promptness, reserving the right to enter upon the demised premises for that purpose [emphasis added]...
>
> (c) Repairs by Lessor
>
> Lessor shall make such election to repair the premises or terminate this lease by giving notice thereof to Lessee at the lease premises within thirty days from the day Lessor received notice that the demised premises had been destroyed or damaged by fire or other casualty.

Exhibit A, at 5-6.

In compliance with the Lease, Lancaster Mews hired a licensed architect, who determined that the fire caused only partial destruction of the Property. Aloosh's Petition, Exhibit C at 3. In the event of partial destruction, paragraph 11(b) permits but does not require Lancaster Mews to restore the Property to its former condition with reasonable promptness. Exhibit A at 6. Paragraph 11(c) of the Lease unambiguously allows Lancaster Mews to decide whether to repair the premise or terminate the Lease in the event of partial destruction. Paragraph 11(c) requires Lancaster Mews to notify Aloosh whether it

intends to repair or terminate within 30 days of it having received notice of the fire. Notice that Lancaster Mews had chosen to terminate the Lease was mailed on January 26, 2017, within the required 30-day period, the fire having occurred between December 27 and 30, 2016.

In its petition, Aloosh contends that paragraph 11 of the Lease is ambiguous and therefore should be construed on behalf of the non-drafting party, Aloosh. Aloosh's Petition at 8. The Lease, however, is not ambiguous. To the contrary, paragraph 11 gives Lancaster Mews a clear right to eject Aloosh in the event of partial destruction of the Property. This Court accordingly did not err in denying Aloosh's petition for special injunctive relief. Exhibit A at 5-6. Since Lancaster Mews gave the requisite 30 day notice under the Lease, this Court did not err in its determination that Aloosh had no clear right to relief as there was no evidence of record that Lancaster Mews breached its terms.

CONCLUSION

For the reasons stated above, this Court respectfully requests that the Superior Court affirm its decision to deny plaintiff Aloosh Inc.'s petition for special injunctive relief.