

ACLU of Pennsylvania ~ Clean Air Council Delaware Riverkeeper Network

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Court Dismisses SLAPP Lawsuit Over Fracking Against Butler County Homeowners and Parents of Mars Students

Pittsburgh, Pa: Defendants learned today that Judge Michael Yeager of the Butler County Court of Common Pleas dismissed, in its entirety, with prejudice, the SLAPP suit filed against five Middlesex Township residents, the Delaware Riverkeeper Network and the Clean Air Council. The judge's resolution of the case means it cannot be re-filed.

The lawsuit was originally filed May 22, 2015 in apparent retribution for the opposition the organizations and individuals demonstrated to a local pro-drilling/fracking zoning ordinance passed by Middlesex Township, Butler County, PA. The lawsuit brought by a developer, Dewey Homes & Investment Properties, and its co-plaintiffs claimed tortious interference with gas drilling contracts. The plaintiffs had sought to make local residents and the nonprofit organizations Delaware Riverkeeper Network and Clean Air Council pay them more than \$500,000 for pursuing a legal action challenging the ordinance that allowed gas drilling and fracking near the town's schools and residential neighborhoods.

In his ruling Judge Yeager said the actions of the Middlesex residents, the Delaware Riverkeeper Network and the Clean Air Council were clearly "protected activity", that they had "engaged in their basic and fundamental right to petition the government as is provided by the First Amendment" and that their actions were therefore not rightfully the subject of this kind of lawsuit.

The ACLU of Pennsylvania was part of the legal team that helped defend against the claims. The ACLU, Delaware Riverkeeper Network, and Clean Air Council characterized the lawsuit as a SLAPP suit (strategic lawsuit against public participation), which is a dangerous legal tactic designed to stifle dissent and punish core First Amendment-protected activities, such as speaking at public meetings and filing appropriate legal challenges to the proposed commercial activity.

Vic Walczak, lead counsel on the case for the ACLU, hailed the judge's decision. "Under the First Amendment, people who speak out and legally oppose government activity cannot be sued for engaging in these time-honored political and legal hallmarks of our democracy," stated Walczak.

"Judge Yeager's ruling is an important recognition of the legal right of people to legally challenge ordinances, regulations and laws they believe violate the laws and/or Constitutional provisions of the Commonwealth of Pennsylvania," said **Maya van Rossum, the Delaware Riverkeeper**, whose organization the Delaware Riverkeeper Network had been among the targets of the suit. "From day one, all we have been doing is seeking to enforce the environmental rights guaranteed and protected by Pennsylvania's Constitution, and working to protect our communities from dangerous pollution and hazards. Dewey Homes' efforts to misuse the law to try to scare us into silence was wrong. Judge Yeager has sent an important message that SLAPP suits designed to silence will not be tolerated," van Rossum added.

"One doesn't realize how important your First Amendment rights are until the day that someone attempts to silence you and take those rights away. We should all have a deep appreciation for attorneys and judges who fight to uphold these foundational freedoms and provide justice in our communities. Despite attempts to silence me, I continue to speak along side the innumerable voices who expect to raise families in communities that provide, at a minimum, a healthy and safe environment," said **Amy Nassif with the Mars Parent Group** and among those targeted by the SLAPP suit.

"People have a right to speak out to protect their communities and their children from industrial activities that threaten their health and safety," says **Joseph Otis Minott, Executive Director and Chief Counsel of Clean Air Council**. "Judge Yeager's opinion today gives comfort to all of those tireless advocates."

The complaint brought by Dewey Homes and co-plaintiffs stated that the defendants, by arguing against a zoning ordinance that would have allowed drilling and fracking operations, had interfered with leases they had with gas developers. The Mars residents, Delaware Riverkeeper Network and Clean Air Council argued in court that their actions were protected by the First Amendment to the U.S. Constitution, which protects the right to freedom of speech and to petition the government.

Judge Yeager's May 25, 2016 decision is the second time the SLAPP suit complaint had been dismissed. The first time was on September 22, 2015 by Judge Marilyn Horan, of the same court. That dismissal opened the door for Dewey Homes to amend and re-file their claims which they did on October 13, 2015. Judge Yeager's ruling does not provide that same opportunity to re-file the suit.

The controversial ordinance in question allows drilling, fracking and associated infrastructure in over 90% of Middlesex Township, including in residential communities, agricultural districts, and within a mile of the 3,200 elementary to high school students who attend the Mars Area schools. On October 10, 2014, four of the five Middlesex Township residents, who are homeowners and have children in the school district, the Delaware Riverkeeper Network, and Clean Air Council challenged the zoning amendment for removing core protections to residential neighborhoods from dangerous industrial activities; for violating the Environmental Rights Amendment of the Pennsylvania Constitution; and for failing to protect public health, safety, and welfare by allowing shale gas extraction, drilling, and gas infrastructure to occur so close to where children, families and residents live, learn, work, and play.

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IN THE COURT OF COMMON PLEAS BUTLER COUNTY, PENNSYLVANIA

DEWEY HOME AND INVESTMENT : CIVIL DIVISION
PROPERTIES, LLC, MARK T. VINSON, : A.D. No. 15-10393
JOSEPH P. ELM, MARK GISSENDANER, :
BRADLEY KRESS, BRIAN KRESS, :
ALBERT McKEE and CHARLOTTE :
McKEE, husband and wife, RONALD :
MOLINARO, JEAN UTZ, MATTHEW :
VINSON, DEAN WEIGLE and SHARON :
WEIGLE, husband and wife, :

Plaintiffs,

v.

DELAWARE RIVERKEEPER NETWORK, :
CLEAN AIR COUNCIL, DAVID DENK, :
JENNIFER CHOMICKI, ANTHONY :
LAPINA, JOANN GROMAN, and AMY :
NASSIF, :

Defendants.

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JENNIFER CHOMICKI
OFFICE- BUTLER CO.
ENTERED & FILED
JENNIFER CHOMICKI

Yeager, J.

May 25, 2016

MEMORANDUM OPINION

Before this Court for consideration is argument on Defendants', Delaware Riverkeeper Network, Clear Air Council, David Denk, Jennifer Chomicki, Anthony Lapina, and Joann Groman (hereinafter independently "Riverkeeper Defendants" or collectively "Defendants"), Preliminary Objections to Plaintiffs' Amended Complaint, and Defendant's, Amy Nassif (hereinafter individually "Defendant Nassif" or collectively "Defendants"), Preliminary Objections to Plaintiffs' Amended Complaint. Wiltold Walczak, Esquire,

appeared on behalf of the Riverkeeper Defendants, and Mark R. Lane, Esquire, appeared on behalf of Defendant Nassif. Richard B. Sandow, Esquire, appeared on behalf of the Plaintiffs, Dewey Homes and Investment Properties, LLC, Mark T. Vinson, Joseph P. Elm, Mark Gissendaner, Bradley Kress, Brian Kress, Albert McKee and Charlotte McKee, husband and wife, Ronald Molinaro, Jean Utz, Matthew Vinson, Dean Weigle and Sharon Weigle, husband and wife (hereinafter "Plaintiffs").

After argument on said Preliminary Objections, it is hereby ordered that the Plaintiffs' Amended Complaint is DISMISSED in its entirety, with prejudice.

I. Background

This case arises out of a Complaint as filed by the Plaintiffs on May 22, 2015, in the Court of Common Pleas Butler County, Pennsylvania, with counts alleging, inter alia, tortious interference with contract with respect to a series of oil and gas leases entered into between the thirteen named Plaintiffs and R.E. Gas Development, LLC, Range Resources, and Dale Properties, LP.

Plaintiffs' claims against Defendants concern allegedly wrongful activity undertaken by Defendants in opposition to Middlesex Township Ordinance No. 127 (hereinafter "Ordinance 127"). Following the enactment of Ordinance 127, Middlesex Township issued a permit to Rex Energy (hereinafter "the Permit") on or about September 26, 2014, permitting six unconventional natural gas wells to be drawn at the Geyer Well Site. The Riverkeeper Defendants filed an appeal to the Middlesex Township Zoning Hearing Board on or about October 9, 2014, with respect to Ordinance 127, and the Permit issued to Rex Energy. From November, 2014, through March, 2015, the Zoning Hearing Board held

public hearings to take evidence and testimony from the parties to this Appeal. On or about May 27, 2015, the Middlesex Township Zoning Hearing Board voted to deny the Appeal.

Upon denial of said appeal, the Riverkeeper Defendants then appealed to the Court of Common Pleas of Butler County, Pennsylvania. On or about June 8, 2015, the Riverkeeper Defendants filed a Petition for Stay of Permit and Ordinance requesting this Court stay the actions at the Geyer Well Site, pending final resolution of the underlying land use appeal. A stay of the activity at the Geyer Well Site was then granted by Order of Court under date of July 9, 2015. Ultimately, however, by Memorandum Opinion dated January 21, 2016, this Court denied the Riverkeeper Defendants appeal and upheld the Zoning Hearing Board of Middlesex Township's decision under date of May 27, 2015.

While the Riverkeeper Defendants' challenges to Ordinance 127 and the Permit were pending, the Plaintiffs filed the instant action naming the Riverkeeper Defendants and Defendant Nassif, alleging that the above described proceedings were an abuse of process used by the Defendants, as a whole, to harass, delay and interfere with the Plaintiffs' oil and gas contracts.

Subsequent to the filing of Plaintiffs' Complaint, the Defendants filed Preliminary Objections. By Order of Court under date of September 22, 2015, the Honorable Marilyn J. Horan heard argument on said Preliminary Objections and dismissed Plaintiffs' Complaint for lack of specificity, allowing Plaintiffs the opportunity to amend.

On or about October 13, 2015, Plaintiffs filed their Amended Complaint. Again, in response thereto, the Riverkeeper Defendants and Defendant Nassif filed Preliminary Objections to Plaintiffs' Amended Complaint. All parties briefed the issues presented, and oral argument was subsequently heard by this Court on May 19, 2016.

II. Standard of Review

When considering Preliminary Objections, the Court must accept all material facts set forth in the complaint, as well as all inferences reasonably deducible therefrom as admitted as true, and decide whether, based upon the facts averred, recovery is impossible as a matter of law. *Wiernik v. PHH U.S. Mortg. Corp.*, 736 A.2d 616 (Pa. Super. 1999). The pleader's conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinion are not admitted as true. *See Giordano v. Ridge*, 737 A.2d 350 (Pa. Comwlth. 1999). Further, preliminary objections should only be sustained in cases that are clear and free from doubt. *Pennsylvania AFL-CIO ex. Re. George v. Com.*, 757 A.2d 917 (Pa. 2000). Additionally, it should be clear from all the pleaded facts that the pleader will be unable to prove facts sufficient to legally establish a right to relief. *Id.* As such, any doubts should be resolved by refusing to sustain the objection. *Ellenbogen v. PNC Bank, N.A.*, 731 A.2d 175 (Pa. Super. 1999).

III. Discussion

A. Noerr-Pennington Doctrine

Collectively, Defendants argue that they are insulated from liability as the wrongful action alleged by Plaintiffs in their Amended Complaint is protected by *Noerr-Pennington* immunity.

According to the First Amendment of the United States Constitution "Congress shall make no law respecting ... or abridging the freedom of speech, or of the press; or of the

right of the people peaceably to assemble, and to petition the government for the redress of grievances.” U.S. Const. Amend I. In a meaningful effort by the Supreme Court of the United States to protect the democratic process, and act in accordance with the First Amendment, the Court has long held that an individual must be immune from liability with respect to the exercise of his or her rights under the Petition Clause to influence governmental agencies to adopt change or reform. *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (“*Noerr-Pennington*”). This protection has become known as the *Noerr-Pennington* Doctrine. In so holding, the Court provided that the right to petition is so recognized, “regardless of the defendants’ motivations” in engaging the activity because “[t]he right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so.” *Noerr*, 365 U.S. at 139.

The *Noerr-Pennington* Doctrine has since been extended to persons who petition all types of government agencies, including Pennsylvania Zoning Hearing Boards. See *VIM, Inc. v. Somerset Hotel Assoc.*, 19 F.Supp.2d 422. Similarly, the protective reach of *Noerr-Pennington* has been held to include that action which is ancillary to petitioning the government for redress, such as opposition in the form of publicity campaigns and private meetings. See *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155.

The only exception to the otherwise broad protections of *Noerr-Pennington* Doctrine exists where a Defendant uses the petition process as a means of harassment such that the Defendants’ actions are a “sham.” *Noerr*, 365 U.S. at 143. In order for proceedings to be considered a “sham,” they must be “objectively baseless in the sense that no reasonable

litigant could realistically expect success on the merits.” *Trustees of Univ. of Penn. v. St. Jude Children’s Research Hosp.*, 940 F.Supp.2d 233,244 (E.D. Pa. 2013). If it is determined that an objective party could believe the suit is reasonably calculated to lead to a favorable outcome, then the *Noerr-Pennington* Doctrine applies and the litigant having brought the action is immunized from liability. *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60-61 (U.S. 1993). However, where a suit is determined to be objectively without merit, the court can then examine the subjective intent of the filing litigant to determine whether said litigation is a “sham.”

In *Kottle v. Northwest Kidney Centers*, the Ninth Circuit of the United States Court of Appeals provided that it recognizes three more exceptions to the *Noerr-Pennington* Doctrine. 149 F.3d 1059 (9th Cir. 1998). One of those exceptions concerns intentional misrepresentations, or knowingly fraudulent representations, in an adjudicative proceeding. *Id.* The Court reasoned that any misrepresentations before a judicial body would undermine the proceedings, and thus the protection of the *Noerr-Pennington* Doctrine cannot be applied in such situations. *Id.*

In this case, it is clear to this Court that the Defendants engaged in protected activity. To begin, Defendant Nassif was not a party to the underlying appeal. Insofar as she aided the Riverkeeper Defendants in campaigning against and preparation for the appeals of Ordinance 127 and the Permit, both she and the Riverkeeper Defendants engaged in their basic and fundamental right to petition the government as is provided by the First Amendment as outlined above.

While Plaintiffs vehemently argue that Defendants actions with respect to the Zoning Hearing Board were a “sham,” this Court cannot, in good conscience accept such an

argument when it clearly found that the Riverkeeper Defendants “made a strong showing” that their challenges to Ordinance 127 and the Permit would succeed on the merits. Court of Common Pleas, Butler County, Docket A.D. No. 2015-10429, *Rule 1925(a) Opinion* under date September 2, 2015, p. 8. It is clear to this Court that the Riverkeeper Defendants did, and still do, believe in their cause as they have continued on with the appeal process to the Commonwealth Court of Pennsylvania.

Concerning the objective reasonableness of the Riverkeeper Defendants’ expectation of the success; while this Court ultimately chose to deny the Riverkeeper Defendants’ arguments with respect to the dangers of natural gas drilling, there are courts in this country that have chosen to uphold such arguments and regulate oil and gas accordingly. Thus, even if this Court had no knowledge on the underlying matter, the favorable outcome obtained by other litigants in this arena shows a clear reasonableness in the Riverkeeper Defendants expectation of success on the merits. In light of this determination, this Court need not engage in an analysis of said Defendants subjective motivations in filing the underlying appeal.

Further, Plaintiffs have argued that the Defendants cannot claim the protections of *Noerr-Pennington* because they presented knowingly fraudulent representations or intentional misrepresentations at an adjudicative proceeding, i.e., the Zoning Hearing Board of Middlesex Township. However, when charged with the task of providing details of these misrepresentations, the Plaintiffs provided vague and obscure conclusions, void of specific examples. *See Brief in Opposition to All Defendants’ Preliminary Objections to Amended Complaint*, ps. 11-16.

The only specific instance of known misrepresentation in the adjudicative proceedings provided by the Plaintiffs, in their Brief, concerns Defendant, Jennifer Chomicki (hereinafter “Defendant Chomicki”). *Id.* at 14. Plaintiffs allege that Defendant Chomicki made “sworn statements” that were in direct contradiction to previous statements made by Defendant Chomicki on the internet. *Id.* First, Defendant Chomicki did not testify at the Zoning Hearing Board hearings. Second, any Affidavit of Defendant Chomicki provided either to the Zoning Hearing Board, or to this Court would undoubtedly be deemed hearsay and would not be considered in that body’s final decision. Thus, Defendant Chomicki’s alleged sworn misrepresentations cannot meet the Plaintiffs’ burden with respect to the Ninth Circuit’s accepted exception to *Noerr-Pennington* immunity.

B. Procedural Posture

Both at argument and in their Brief, Plaintiffs argued that the determination of immunity via the *Noerr-Pennington* Doctrine is an improper one at the preliminary objection stage.

Generally, the question of whether litigation is a “sham” *can* be a factual inquiry for a jury. *Trustees*, 940 F.Supp.2d at 242. [emphasis added]. However, where there is no dispute over the facts of the underlying suit, courts have recognized that a determination of the filing parties reasonableness can be made on a motion to dismiss based on *Noerr-Pennington* immunity. *See, e.g., Id.; Pennwalt Corp. v. Zenith Laboratories, Inc.*, 472 F.Supp. 413,424 (E.D.Mich. 1979); *Nursing Registry, Inc. v. Eastern North Carolina Regional Emergency Medical Services Consortium, Inc.*, 959 F.Supp. 298, 305 (E.D.N.C.1997).

In this case, the facts of the underlying legal proceedings cannot be disputed because it is all of record. In fact, a good portion of the proceedings took place in front of this Court such that this Court is intimately familiar with the parties thereto and the factual allegations arising therefrom.

Obviously, the only remaining factual inquiry is the intent of the Riverkeeper Defendants in filing the underlying suit. However, as stated, that intent would only be of relevance in these proceedings were this Court to find that the Riverkeeper Defendants lacked any reasonable expectation of success on the merits. Thus, this Court finds it proper to determine the applicability of *Noerr-Pennington* immunity at this stage of the litigation.

C. Remaining Objections

Because this Court has determined that the Defendants are insulated from liability in this matter via the *Noerr-Pennington* Doctrine, this Court will abstain from addressing the Defendants' remaining Preliminary Objections as they are, affectively, moot.

III. Conclusion

In light of the foregoing, the Plaintiffs', Dewey Homes and Investment Properties, LLC, Mark T. Vinson, Joseph P. Elm, Mark Gissendaner, Bradley Kress, Brian Kress, Albert McKee and Charlotte McKee, husband and wife, Ronald Molinaro, Jean Utz, Matthew Vinson, Dean Weigle and Sharon Weigle, husband and wife, Amended Complaint is dismissed in its entirety, with prejudice.

Accordingly, We Find As Follows:

- I. Defendants', Delaware Riverkeeper Network, Clear Air Council, David Denk, Jennifer Chomicki, Anthony Lapina, and Joann Groman, first Preliminary Objection in the Form of a Demurrer and Motion to Strike Plaintiffs' Amended Complaint in its Entirety Pursuant to Pa.R.C.P. 1028(a)(4) [Legal Insufficiency of a Pleading—*Noerr-Pennington Doctrine*] is GRANTED.
- II. This Court abstains from ruling on Defendants', Delaware Riverkeeper Network, Clear Air Council, David Denk, Jennifer Chomicki, Anthony Lapina, and Joann Groman, second Preliminary Objection in the Form of a Motion to Strike Plaintiffs' Amended Complaint in its Entirety Pursuant to Pa. R.C.P. 1028(a)(2) [Failure of a Pleading to Conform to Law or Rule of Court or Inclusion of Scandalous or Impertinent Matter]; 1028(a)(3) [Insufficient Specificity]; and 1028(a)(4) [Legal Insufficiency-Demurrer].
- III. This Court abstains from ruling on Defendants', Delaware Riverkeeper Network, Clear Air Council, David Denk, Jennifer Chomicki, Anthony Lapina, and Joann Groman, third Preliminary Objection in the Form of a Demurrer and Motion to Strike Plaintiffs' Amended Complaint in its Entirety Pursuant to Pa. R.C.P. 1028(a)(4) [Legal Insufficiency of a Pleading – Failure of Indispensable Element of Claims].

Additionally, upon consideration of Defendant's, Amy Nassif, Preliminary Objections to Plaintiffs' Amended Complaint, Defendant's Brief in Support of Preliminary Objection to

Plaintiffs' Amended Complaint, Plaintiffs' Reply to Preliminary Objections of Defendant Amy Nassif to Plaintiffs' Amended Complaint, Brief in Opposition to All Defendants' Preliminary Objection to the Amended Complaint, and oral argument thereon the Court finds as follows:

- I. Defendant's, Amy Nassif, first Preliminary Objection, Preliminary Objection in the Form of a Demurrer and Motion to Strike Counts II and III of Plaintiffs' Amended Complaint Against Defendant Amy Nassif Pursuant to Pa.R.C.P. 1028(a)(4), is GRANTED.
- II. This Court abstains from ruling on Defendant's, Amy Nassif, second Preliminary Objection, Preliminary Objection in the Form of a Motion to Strike Counts II and III of Plaintiffs' Amended Complaint Pursuant to Pa.R.C.P. 1028(a)(2) and (3) for Failure to Plead Separate Facts Against Amy Nassif in Separate Counts.

In light of the foregoing Memorandum Opinion and Order of Court, the Plaintiffs', Dewey Homes and Investment Properties, LLC, Mark T. Vinson, Joseph P. Elm, Mark Gissendaner, Bradley Kress, Brian Kress, Albert McKee and Charlotte McKee, husband and wife, Ronald Molinaro, Jean Utz, Matthew Vinson, Dean Weigle and Sharon Weigle, husband and wife, Amended Complaint is dismissed in its entirety, with prejudice.

BY THE COURT,


S. MICHAEL YEAGER
JUDGE