

GEORGE LINS and PATRICIA LINS, his wife,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiffs	:	
	:	
vs.	:	NO. 98-01,064
	:	
FREDERICK WHEELER and DEBRA WHEELER, his wife, and	:	
BOROUGH OF DUBOISTOWN,	:	PRELIMINARY OBJECTIONS DEFENDANT
Defendants	:	BOROUGH OF DUBOISTOWN

OPINION AND ORDER

This Opinion and Order are entered on June 15, 1999, following argument on the Preliminary Objections of the Borough of Duboistown to the Plaintiffs’ Second Amended Complaint.¹

Procedural and Factual Background²

Plaintiffs assert that their neighbors, Defendants Frederick Wheeler and Debra Wheeler, constructed an in-ground swimming pool in their backyard in the spring of 1997, pursuant to terms of a permit issued by the Borough of Duboistown. The permit, attached as Exhibit “A” to the Second Amended Complaint, indicates a zoning permit was approved March 13, 1997, with the signature of Norman J. Cowden on the line designated for signature by “Zoning Adm.” Plaintiffs assert the said Norman J. Cowden was the Chief of Police of the Borough of Duboistown at that time and issued the permit on behalf of the Borough. Plaintiffs also assert Chief Cowden was not the duly appointed zoning officer of the Borough and was not empowered to issue such a permit. It is further asserted that during the construction process and

¹ The Preliminary Objections were filed on May 5, 1999. Briefs were filed by the Borough on June 8, 1999. Plaintiffs did not file a brief in opposition.

² The following is substantially restated from the Brief of Defendant Borough of Duboistown filed June 8, 1999.

excavation for the pool, Defendant Wheelers raised their backyard by approximately five feet, increasing the downward slope between their yard and Plaintiffs’.

Plaintiffs claim the Borough of Duboistown’s Zoning and Land Use officials “negligently failed to adequately monitor the construction of the [Defendant Wheelers’] swimming pool and did not require the Wheelers to provide for drainage of the water runoff.” Plaintiffs assert that, as a result of the construction of the swimming pool, water runoff from Defendant Wheelers’ property onto the Plaintiffs’ property has resulted in the Plaintiffs suffering damages.

On July 10, 1998, Plaintiffs filed their original Complaint in this matter. Defendants filed Preliminary Objections pertaining to the lack of an exhibit referenced in the Complaint but not attached, the lack of specificity in the pleadings, and in the nature of a demurrer as to Defendant Borough of Duboistown. In lieu of conducting oral argument on the Preliminary Objections, Plaintiffs filed their first amended Complaint on October 28, 1999. Defendant Borough of Duboistown filed Preliminary Objections to the First Amended Complaint asserting Local Agency Immunity, as well as lack of specificity as to ordinances and/or statutes alleged to have been violated by the Borough of Duboistown but not specified in the Complaint. On March 30, 1999, this Court sustained Duboistown’s objections in their entirety.

Plaintiffs filed a Second Amended Complaint on April 29, 1999. The averments of Plaintiffs’ Second Amended Complaint were another attempt to create a cause of action not barred by governmental immunity. On May 5, 1999, the Borough of Duboistown timely filed Preliminary Objections to the Second Amended Complaint.

Discussion

The Court finds that the demurrer of the Defendant Borough of Duboistown must be sustained, as Plaintiffs have failed in their endeavor to assert a cause of action against the Borough, inasmuch as the Borough is protected from the allegations set forth in the Second Amended Complaint by governmental immunity.

In order to pursue an action against the Borough, the Political Subdivision Tort Claims Act, 42 Pa. C.S. §8541 *et seq.*, requires that (1) the damage claimed would be recoverable under common law or statute if the defense of governmental immunity was not available; and (2) the injuries were caused by the negligent acts of the Borough or its employee, acting within the scope of his office or duties, under one of the eight enumerated exceptions to governmental immunity set forth in the Act. 42 Pa.C.S. §8542(a) and (b). Plaintiffs' claim fails to fall within one of these eight recognized exceptions to governmental immunity.

The eight stated exceptions, appearing under 42 Pa. C.S. §8542(b), can be simply stated as follows: vehicle liability; care, custody or control of personal property; care, custody or control of real property in possession of the Local Agency; utility service facilities; streets; sidewalks; care, custody or control of animals. Plaintiffs argue the issuance of a permit under a building and zoning ordinance places the Defendant Borough in control of real property and thus fits within the exception set forth under 42 Pa. C.S. §8542(b)(3).

The Court finds this is not a tenable position. In the first instance, the statutory provisions provides as follows: “(3) *Real property*. – The care, custody or control of real property *in the possession* of the local agency. . .” (emphasis added). 42 Pa. C.S. §8542(b)(3). At no time does Plaintiffs' Complaint aver the Borough possessed the real property.

Furthermore, the mere ability to issue permits for the subject property under building code and zoning ordinances does not vest control of that property in the Borough. See *Mentzer v. Ognibene*, 126 Pa., Cmwlth. 178, 559 A.2d 79, (1989), *allocatur denied*, 523 Pa. 644, 565 A.2d 1168 (1989); *Buffalini v. Shrader*, 112 Pa. Cmwlth. 228, 535 A.2d 684 (1987); *Smith v. Neshamy Holding Co.*, 41 D&C3d. 255 (Bucks Co. 1984); see also, *Bendas v. Upper Saucon Tp.*, 127 Pa. Cmwlth. 378, 561 A.2d 1290 (1989).

In *Bendas*, the Commonwealth Court made clear that regardless whether an action was set forth in tort or in contract as a breach of warranty claim, where the underlying facts revolved around the issuance by the municipality of a permit (in that case by a sewage permit officer which ostensibly violated a criminal law provision of the Sewage Enforcement Act) the municipality was not exposed to civil liability because of the improper issuance of that permit.

Accordingly, the demurrer must be sustained.³

The Court rejects the Borough of Duboistown's argument that this suit against it was brought in bad faith, constituting obdurate, vexatious conduct pursuant to 42 Pa. C.S. §2503. Although the Second Amended Complaint is not upheld, the Court cannot say the assertion that the Borough acted improperly and had control of the property through the issuance of a permit is such a bad faith claim as to warrant imposition of attorney's fees. Accordingly, the Defendant Borough's request for attorney's fees must be denied.

³ Defendant also asserts there is no common law right to recover damages. This Court does not make its determination based upon that issue. However, as noted in *Bendas, supra*, at 1292, fn. 4, court decisions decided subsequent to the 1973 abrogation of governmental immunity by the Pennsylvania Supreme Court in *Ayala v. Philadelphia Board of Public Education*, 453 Pa. 584, 305 A.2d 877 (1973) and prior to the legislative enactment of the Political Subdivision Tort Claims Act in 1978 did hold local agencies liable for negligent acts of its employees committed in the course of their employment relating to issuing sewage permits.

ORDER

AND NOW, this 17th day of June 1999, the Defendant Borough of Duboistown's demurrer to Plaintiffs' Second Amended Complaint is *SUSTAINED*. Based upon the demurrer being sustained on the grant of governmental immunity, the claims against the Borough of Duboistown arising in this litigation are dismissed. The Borough of Duboistown's request for attorney's fees is *DENIED*.

BY THE COURT,

William S. Kieser, Judge

cc: Court Administrator
R. Matthew Patch, Esquire
Joseph R. Musto, Esquire
Stephen C. Sholder, Esquire
Brett O. Feese, Esquire
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)