IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

GARY L. SMITH and HELEN E. SMITH, husband and wife, *Plaintiffs* v. BOROUGH OF MONTOURSVILLE, a Pennsylvania municipality, *Defendant*	CIVIL ACTON NO. 16 – 01,484 PRELIMINARY OBJECTIONS

OPINION AND ORDER

Before the Court are preliminary objections filed by the Defendant, Borough of Montoursville ("Montoursville"), on January 27, 2017. Plaintiffs, Gary and Helen Smith, ("Smiths"), filed a complaint containing three causes of action. Montoursville's preliminary objections are in the nature of a demurrer to all causes of action pursuant to Pa. R.C.P. 1028(a)(4). Argument was held on March 1, 2017. The Court provides the following opinion in support of its rulings.

BACKGROUND.

The Smiths filed their complaint in this matter after Montoursville appealed a magistrate judgment in favor of the Smiths in the amount of $11,663.50. In their complaint, the Smiths allege the following facts. The Smiths own property at 342-346 Broad Street, in the borough of Montoursville, Pennsylvania. Complaint, ¶ 6. Montoursville owns and operates the municipal water system in the borough of Montoursville.[1] Id. at ¶ 7. As the owner and operator of the municipal water system, Montoursville engages "in placing, repairing, monitoring and inspecting the waterlines" of its water system, including "the water service lines from the main to the curb box." Id.

[1]Article 1, § 154-3 d of the Water of the Borough of Montoursville Code defines the term "water system" as "the wells, pumping stations, reservoirs, treatment equipment, distribution lines and all related equipment, which serve the inhabitants of the Borough of Montoursville and which are owned by the Borough of Montoursville."

On March 13, 2014, the Smiths discovered water leaking into their basement. Id. at ¶ 8. The leak was in the service line between the main and the curb box. Id. at ¶ 15. That service line was copper and had been run through an old galvanized pipe. Id. at ¶ 16. The copper service line developed hole(s) and leaked. Id. at ¶ 16. The leak from the copper water service line leaked water into the galvanized pipe. Id. The water that leaked into the galvanized pipe then directly leaked into the Smiths' basement. Id. Montoursville either performed work on that copper water service line or inspected and approved such work. Id. at ¶ 28. Montoursville failed to ensure that the work was performed in accordance with all local state and federal ordinances. This failure caused the Smiths' damages. Id. at ¶ ¶ 35-36.

Upon discovering the leak in their basement, the Smiths immediately contacted the Montoursville waterworks department to turn off the water at the curb box. Id. at ¶ 9. Montoursville's employee arrived at the property and turned off the water at the curb box. Id. at ¶ 10. However, this did not stop the leak. Id. at ¶ 11. Montoursville's employee left without resolving the leak. The leak resulted in a dangerous condition: "water leaked into the basement in which a gas hot water heater and the electrical panel for the building were located." Id. at ¶ 14.

Chapter 154 of the Water of the Borough of Montoursville Code, Section 159-9(B) requires that the service line meet specific conditions in order for Montoursville to be responsible for repairs. Id. at ¶ 20. However, those conditions are not reasonable or attainable. Id. at ¶ 22. In addition, Montoursville had an implied policy that it would repair water service lines between the main and curb box even when the conditions are not met. Id. at ¶¶ 25-26. On December 7, 2015, Montoursville amended Section 159-9(B) to remove those conditions for Montoursville to maintain existing service lines from the main to the curb box. Id. at ¶ 27. This amendment was

consistent with their implied policy to repair water service lines between the main and curb box even when the conditions under the previous Section 159-9(B) were not met.

STANDARD FOR PRELIMINARY OBJECTIONS

When reviewing preliminary objections in the nature of a demurrer, the court must "accept as true all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts." Thierfelder v. Wolfert, 52 A.3d 1251, 1253 (Pa. 2012), *citing*, Stilp v. Commonwealth, 940 A.2d 1227, 1232 n.9 (Pa. 2007). "In order to sustain the demurrer, it is essential that the plaintiff's complaint indicate on its face that his claim cannot be sustained, and the law will not permit recovery . . . . If there is any doubt, this should be resolved in favor of overruling the demurrer." Gall v. Allegheny Cty. Health Dep't, 521 Pa. 68, 72, 555 A.2d 786, 788 (Pa. 1989), *quoting*, Gekas v. Shapp, 469 Pa. 1, 5-6, 364 A.2d 691, 693 (1976)(citations omitted). "Preliminary objections, the end result of which would be dismissal of a cause of action, should be sustained only in cases that are **clear and free from doubt**." Bower v. Bower, 611 A.2d 181, 182 (Pa. 1992)(emphasis added). "A demurrer should be sustained only when the complaint is clearly insufficient to establish the pleader's right to relief." B.N. Excavating, Inc. v. PBC Hollow-A, L.P., 71 A.3d 274, 278 (Pa.Super. 2013) (citations omitted).

DISCUSSION

The Court will discuss the demurrers in the order in which the causes of action are set forth in the complaint: (1) negligence, (2) unjust enrichment and (3) declaratory judgment.

1. NEGLIGENCE

Montoursville sets forth two reasons in support of its demurrer to the cause of action for negligence. First, Montoursville contends that the Smiths failed to allege facts that would allow a jury to determine that Montoursville owed a duty to the Smiths. Second, Montoursville

contends that the cause of action for negligence is barred by governmental immunity. The following discussion addresses these contentions.

a. DUTY ANALYSIS

First, Montoursville contends that Montoursville did not owe the Smiths a duty. A negligence claim requires that plaintiff establish that the defendant owed a duty to plaintiff.[2] Althaus v. Cohen, 562 Pa. 547, 552, 756 A.2d 1166, 1168 (Pa. 2000).

> Whether a duty exists in a particular case involves the weighing of several discrete factors which include: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution. Althaus v. Cohen, supra, 562 Pa. at 553, 756 A.2d at 1169. (citations omitted).

A duty may arise from an undertaking to perform services for another. Reeser v. NGK N. Am., Inc., 14 A.3d 896, 898 (Pa. Super. 2011), *quoting*, Section 324A of the RESTATEMENT (SECOND) OF TORTS, entitled "Liability to Third Person for Negligent Performance of Undertaking."[3]

In the present case, the Smiths alleged facts which, if true, establish that Montoursville owed them a duty. In their complaint, the Smiths allege that Montoursville undertook services with respect to placing, repairing, monitoring and inspecting the waterlines of its municipal water system, and specifically, performing work on the water service line between the main and curb box or inspection and approval of such work. *See, Complaint*, ¶¶ 28, 35-36. For purposes of the demurrer, the Court must accept these facts, and all reasonable deductions from these,

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[2]For a negligence claim, Plaintiff must establish four elements: (1) the defendant owed a duty to plaintiff, (2) the defendant breached that duty, (3) that the breach was the cause of plaintiff's injury and (4) that the plaintiff suffered damages. *See, e.g.,* Reeves v. Middletown Ath. Ass'n, 866 A.2d 1115, 1126 (Pa. Super. 2004); Toney v. Chester Cty. Hosp., 961 A.2d 192, 198 (Pa. Super. 2008).

[3] 324A of the RESTATEMENT (SECOND) OF TORTS provides the following.

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

facts as true. Such facts raise a jury question as to whether Montoursville undertook services which required them to exercise reasonable care in the undertaking.

b. GOVERNMENTAL IMMUNITY ANALYSIS

Next, Montoursville contends that the negligence claim is barred by governmental immunity pursuant to the Political Subdivision Tort Claims Act ("Tort Claims Act"), 42 Pa.C.S. §§ 8541-8542, and that the Smiths failed to allege facts supporting an exception.[4] The Smiths assert that the exception to the Tort Claims Act for utility service facilities applies as set forth at § 8542 (5).

In order for the exception for utility service facilities to allow recovery, a dangerous condition of the municipality's sewer and water system must exist within its rights-of-way and the dangerous condition must have "created a reasonably foreseeable risk of the kind of injury which was incurred." 42 Pa. C.S.A. § 8542 (5). In addition, the municipality must have "had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition." Id.

Montoursville contends that the utility service facilities exception does not apply because the Smiths failed to allege facts supporting: (a) that a dangerous condition of the borough's water system existed and (2) that the borough had actual notice or could reasonably be charged with notice under the circumstances. The Court will address these contentions in turn.

A. DANGEROUS CONDITION

Whether sufficient facts have been alleged for a jury to find the existence of a dangerous condition of a water system is a question of law to be determined by the Court. Our

[4] The Tort Claims Act generally provides that "no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." 42 Pa.C.S. § 8541. § 8542 of the Tort Claims Act sets forth exceptions.

Pennsylvania Courts have analyzed what constitutes a dangerous condition of the water systems under the exception as follows. The failure "to enclose the water retaining systems and/or piping systems … [and] …to filter the giardia infested water [and] …. to eliminate the possibility of giardia infestation" was a sufficient allegation to constitute a dangerous condition in Gall v. Allegheny Cty. Health Dep't, 521 Pa. 68, 71, 555 A.2d 786, 787 (Pa. 1989). In that case, our Pennsylvania Supreme Court reversed the Superior Court's affirmance of the trial court's sustaining the demurrer as to allegations of a dangerous condition.

Recovery was permitted when a city's storm drainage system that had been filled dirt and mud caused an overflow into a basement. City of Washington v. Johns, 81 Pa. Commw. 601, 474 A.2d 1199 (Pa. Cmwlth. 1984). The city's negligent maintenance of a sewer raised a jury question as to dangerous condition in McCarthy v. City of Bethlehem, 962 A.2d 1276, 1280 (Pa. Cmwlth.. 2008). By contrast, a two-headed tap causing 500,000 gallons of water to run through a building was not a dangerous condition in Falor v. Sw. Pa. Water Auth., 102 A.3d 584, 588, 590 (Pa. Cmwlth. 2014). Similarly, sanitary sewer surcharges that caused raw sewage to flow into a building was not a dangerous condition. Gibellino v. Manchester Twp., 109 A.3d 336, 339 (Pa. Commw. 2015). Nonetheless, a failure to properly maintain a hydrant was a dangerous condition in Rice v. Phila. Elec. Co., 514 A.2d 951, 952-53 (Pa. Cmwlth. 1986). In that case, the Commonwealth Court reversed the trial court's order sustaining the demurrer. Additionally, backfill that had settled in the trench formed to fix water pipes was sufficient to raise a jury question as to it being a dangerous condition in Miller v. Commonwealth, 690 A.2d 818, 820-21 (Pa. Cmwlth. 1997). In Nomura, cited by the Smiths, the Lehigh County Court concluded that a water main break was a dangerous condition because it must be repaired as soon as possible to

avoid the potential for damage. Nomura v. Northampton Borough Mun. Auth. Water Dep't, No. 2005-C-2324 (C.P. Lehigh June 13, 2007).

In this case, the Smiths allege that a leak developed from the copper water service line between the main and curb box that leaked into the galvanized pipe and then directly leaked into the Smiths' basement. Montoursville either performed work on that copper water service line or inspected and approved such work. Montoursville failed to ensure that the work was performed in accordance with all local state and federal ordinances, causing the damage. The Smiths allege that "[t]he leak resulted in a dangerous condition on [their property] … as the water leaked into the basement in which a gas hot water heater and the electrical panel for the building were located." *Complaint*, at ¶ 14. In their answer to the preliminary objections, the Smiths further assert that the "defendant's employees shut off the water at the curb stop but left the property with knowledge that the water was still leaking into plaintiffs' basement which contained the gas hot water heater and electrical panel, which resulted in the dangerous condition." See, *Answer of Plaintiffs Gary L. Smith and Helene E. Smith to Defendant's Preliminary Objections*, ¶ 25.

At this stage of the proceedings, it is not clear and free from doubt that no recovery is available for a dangerous condition under the exception to the Tort Claims Act for utility service facilities. This Court finds the facts underlying Nomura, supra, most analogous to the allegations set forth in the present case at this stage.

B. NOTICE

Montoursville contends that the Smiths have not alleged sufficient facts to satisfy the notice requirements for utility exception to the Tort Claims Act. The exception requires "that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken

measures to protect against the dangerous condition." 42 Pa.C.S. § 8542(b)(5). It is sufficient that municipality "could reasonably be charged with notice under the circumstances." Nomura, supra. In the present case, the Smiths allege that Montoursville had actual knowledge of the leak because the Smiths reported it and an employee left their property without resolving it.[5] In addition, the Smiths allege that Montoursville either performed work on that copper water service line or inspected and approved such work and engaged in repairing, monitoring and inspecting the waterlines of its water system. As such, the Court believes that the allegations were sufficient to raise a jury question as to notice.

2. UNJUST ENRICHMENT

Montoursville demurs to the unjust enrichment claim because it contends that the Smiths were obligated to repair and maintain the service line, not Montoursville, and because Montoursville received no benefit from the repairs the Smiths were obligated to make themselves.

"A claim for unjust enrichment arises from a quasi-contract. "A quasi-contract imposes a duty, not as a result of any agreement, whether express or implied, but in spite of the absence of an agreement, when one party receives unjust enrichment at the expense of another."" Stoeckinger v. Presidential Fin. Corp. of Del. Valley, 948 A.2d 828, 833 (Pa. Super. 2008), *quoting*, AmeriPro Search, Inc. v. Fleming Steel Co., 787 A.2d 988, 991 (Pa. Super. 2001).

Pennsylvania Courts have recognized the following elements for unjust enrichment: "benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable

[5] Montoursville contends that the Smiths failed to allege how it would be aware of the copper line through the galvanized pipe or the leak because its only notice occurred after the leak occurred. See, Montoursville's brief at 6. The Smiths damages arose from fixing the pipe which it did after providing notice to Montoursville of the leak in sufficient time for Montoursville to remedy the leak by fixing it before the Smiths did.

for defendant to retain the benefit without payment of value." Id. The primary focus for the Court is whether the defendant has been unjustly enriched, not the intent of the parties. "The doctrine does not apply simply because the defendant may have benefited as a result of the actions of the plaintiff." Styer v. Hugo, 422 Pa. Super. 262, 619 A.2d 347, 350 (Pa. Super. 1993) (quotation marks omitted).

In this case, Montoursville owns the water service lines between the main and the curb stop. An inference fairly deducible from ownership is that Montoursville benefits from repairs to water service lines it owns. In addition to benefiting by mere ownership, the Smiths also allege that Montoursville benefitted from the Smith's satisfying an obligation owed by Montoursville to maintain and repair the water service lines between the main and the curb stop. Accepting these facts as true for purposes of deciding the demurrer, a fact-finder could find that Montoursville received, accepted and retained benefits under circumstances in which a fact-finder could find to be inequitable and unjust for Montoursville to retain without payment. As such, the Court believes the claim is not free from doubt and will overrule the demurrer.

3. DECLARATORY JUDGMENT – CONSTITUTIONALITY OF THE CODE

The Smiths seek "a declaration that Chapter 154 – Water of the Borough of Montoursville Code, Section 159-9(B) *as applied to plaintiffs*, is unconstitutionally invalid[.]" *Complaint*, ¶ 55. (emphasis added).[6] Montoursville contends that Section 159-9(B) was valid because it was enacted pursuant to the Municipal Authorities Act, 53 Pa.C.S. § 5607(d)(9), (17). The Smiths challenge the requirement that they pay for repairs and maintenance of a water supply line that is owned by Montoursville, especially when Montoursville pays for repairs and maintenance for others under similar conditions.

[6] It is important to note that the instant challenge is to the prior code, before December 7, 2015 when Montoursville amended Section 159-9(B) to remove the conditions at issue in this case.

To establish that a municipal code is unconstitutional, the challenger "must establish that it is arbitrary, unreasonable and has no substantial relation to the promotion of the public health, safety, morals or general welfare of the [municipality.]" Herrit v. Code Mgmt. Appeal Bd., 704 A.2d 186, 188-89 (Pa. Cmwlth. 1997). Where the Municipal Authorities Act empowers a municipal authority with "the exclusive power to determine the services and improvements required to provide adequate, safe and reasonable service[,]" a water authority may require its customers to repair water lines absent an abuse of discretion in promulgating rules and regulations. Glennon's Milk Serv., Inc. v. W. Chester Area Mun. Auth., 538 A.2d 138, 140 (Pa. Cmwlth. 1988).[7] The Municipality Authorities Act of 1945 governed the outcome in Glennon's Milk. In its current form, the Municipal Authorities Act, 53 Pa.C.S. § 5607(d)(9) empowers municipalities to fix "reasonable and uniform rates" and under § 5607(d)(17) to adopt "reasonable rules and regulations that apply to water and sewer lines located on a property owned or leased by a customer."

In this case, the Smiths contend that Montoursville imposed unattainable conditions in Section 159-9(B) and did not uniformly apply them. They also allege the water and sewer lines are not located on property owned or leased by a customer. At this stage in the proceedings the Court cannot as a matter of law state that the Smiths have not set forth a cause of action to invalidate the prior Ordinance as it was applied to them.

Accordingly, the Court enters the following Order.

[7] In Glennon's Milk Serv., Inc , the rules and regulations were enacted pursuant to the rights and powers vested in the Authority by Section 4B(h) of the Municipality Authorities Act of 1945 (Act), Act of May 2, 1945, P.L. 382, as amended, 53 P.S. § 306B(h). In that case, Glennon contended "that the Authority abused its discretion by failing to provide reasonable service to the customers, in that it refused to repair that part of its facilities line between the main and the curb line." The Court concluded that the Municipality Authorities Act of 1945 permitted the enactment of those regulations absent an abuse of discretion.

ORDER

AND NOW, this **27th** day of **April 2017**, upon consideration of Defendant's preliminary objections, it is ORDERED and DIRECTED that the objections are OVERRULED. Montoursville shall file an ANSWER within twenty (20) days.

BY THE COURT,

April 27, 2017
Date

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Richard A. Gray, J.

c: Christopher H. Kenyon, Esquire (for Plaintiffs)
Joshua J. Cochran, Esquire (for Defendant)