

SHIPLEY FAMILY LIMITED PARTNERSHIP v. JOHN T. KEMPER and
KAREN S. KEMPER

Declaratory Judgment – Deed Restriction

1. Plaintiff Shipley filed a Complaint in Civil Action. At trial, Shipley characterized the action as a “quiet title” action. In its complaint, Shipley asks to have the Court enter a decree adjudicating that Lot 42 is free and clear of the deed restrictions and that the restrictions are null and void because the residential character of the neighborhood has been abandoned.
2. The Court found that, in essence, Shipley asked for a declaratory judgment concerning the continued viability of the deed restrictions.
3. At a bench trial, the Court held that, because Plaintiff has not provided facts that show their rights to the land have been affected by these deed restrictions, any opinion issued by this Court would be advisory and in violation of the Declaratory Judgment Act and case law.

IN THE COURT OF COMMON PLEAS YORK COUNTY PENNSYLVANIA

SHIPLEY FAMILY LIMITED PARTNERSHIP	:
<i>Plaintiff</i>	: 2010-SU-000209-08
	:
v.	: CIVIL DIVISION
	:
JOHN T. KEMPER and	:
KAREN S. KEMPER	:
<i>Defendants</i>	:

Appearances:

For Plaintiff Shipley:	Donald B. Hoyt, Esq.
For Defendants Kemper:	George W. Swartz, Esq.

ORDER DISMISSING PLAINTIFF'S COMPLAINT

AND NOW, this 11th day of July, 2017, after holding a civil non-jury trial on this matter on June 21, 2017 and reviewing relevant case law, this Court hereby **DISMISSES** Plaintiff's Complaint.

Factual and Procedural History

Plaintiff Shipley Family Limited Partnership is a Pennsylvania limited partnership that currently owns Lot 43 on Tax Assessment Map 8, District 53, Windsor Township, York County, Pennsylvania. It is located at the intersections of Mt. Rose Avenue, Prospect Road, and Rt. 24. The following undisputed facts are taken from Plaintiff's Pre-Trial Memorandum, "Statement of Undisputed Facts ...," p. 2.

Plaintiff had operated a gas station and convenience store on this property for approximately fifty years. On December 30, 2009, Plaintiff became the contract purchaser of two adjacent tracts of real estate designated as Lot 42 on Tax Assessment Map 8, District 53, Windsor Township, York County, Pennsylvania from Wachovia National Bank Association.

In 1958 and 1959, these two parcels that Plaintiff agreed to purchase from Wachovia were subjected to deed restrictions. The "1958 Deed Restriction", dated

July 23, 1958, states that the premises shall be used exclusively for residential purposes and no business will be conducted on the premises. That restriction burdens the “back” portion of Lot 42, which borders Henry Lane. The “1959 Deed Restriction”, dated January 2, 1959, prohibits the property from being used as a gasoline station and other commercial uses stated in paragraph 6 of the deed restriction. That restriction burdens the “front” portion of Lot 42 which borders on Edgewood Road.

Defendants John and Karen Kemper own the property 845 Henry Lane, Windsor Township, York County, Pennsylvania and have lived there since 1997. One of the two parcels of Lot 42 is directly across the street from the Defendants’ property.

On January 14, 2010, Plaintiff Shipley filed a Complaint in Civil Action. At trial, Shipley characterized the action as a “quiet title” action. In its complaint, Shipley asks to have the Court enter a decree adjudicating that Lot 42 is free and clear of the deed restrictions and that the restrictions are null and void because the residential character of the neighborhood has been abandoned. In essence, Shipley asks for a declaratory judgment concerning the continued viability of the deed restrictions. Plaintiffs served sixty-five different Defendants with the complaint, including the Kempers.

On February 18, 2010, Defendants John and Karen Kemper filed their answer. Eventually, the Court entered default or summary judgments against all remaining defendants except the Kempers. On March 31, 2015, Shipley filed a Motion for Summary Judgment against Defendants John and Karen Kemper. On May 24, 2016, the Honorable Joseph C. Adams denied Plaintiff's motion for summary judgment.

On June 21, 2017, this Court held a Civil Non-Jury Trial with Plaintiff represented by Donald B. Hoyt, Esq. and Defendants represented by George Swartz, Esq.

Issues:

At trial, Plaintiff advanced two issues for the Court to consider:

(a) Whether a specific deed restriction imposed upon the first tract of Plaintiff's property bordering Henry Lane on December 23, 1958 . . . has been abandoned by Defendants due to non-enforcement or whether its original purpose has been materially altered or destroyed by changed conditions in the neighborhood since December 23, 1958, such that the restriction no longer provides a substantial benefit to Defendants, owners of a neighboring property.

(b) Whether a portion of a specific deed restriction imposed upon the second tract of Plaintiff's property bordering Edgewood Road on January 2, 1959 . . . has had its original purpose materially altered or destroyed by changed conditions in the neighborhood since January 2, 1959, such that the restriction no longer provides a substantial benefit to Defendants, owners of a neighboring property.

Discussion

Plaintiff asked this Court to declare the deed restrictions on Lot 42 null and void because the conditions of the neighborhood have changed so much since the restrictions were enacted that Defendants no longer receive a substantial benefit from those restrictions. The Court, however, is unable to reach the merits of these issues in the context of the evidence presented to us at trial. It is clear that the deed restrictions do not prohibit all uses for Lot 42, and they do not prohibit all commercial uses for the “front” tract of Lot 42. Shipley admitted at trial that, at present, it has no specific plans for the use of Lot 42, and has no prospective tenant for that lot. Thus, Shipley could, in fact, make use of the lot which would not violate the deed restrictions.

For guidance, we look to the Declaratory Judgment Act, 42 Pa.C.S. § 7533 which states:

Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

Id.

“The granting of a petition for declaratory judgment under the DJA is a matter lying within the sound discretion of a court of original jurisdiction.”

Berwick Township v. O’Brien, 148 A.3d 872, 881 (Pa. Cmwlth. 2016); citing

Gmerek v. State Ethics Comm’n, 751 A.2d 1241 (Pa. Cmwlth. 2000). “The court

may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding . . .” 42 Pa.C.S.A. § 7537. Declaratory judgment is appropriate when there is “imminent and inevitable litigation.” *Berwick*, 148 A.3d at 881; citing *Silo v. Ridge*, 728 A.2d 394 (Pa. Cmwlth. 1999). “Declaratory judgment is not appropriate to determine rights in anticipation of events that may never occur.” *Id.* “Thus, an action brought under the DJA must allege an interest by a party seeking relief that is direct, substantial, and present and must show the existence of an actual controversy related to the invasion or a threatened invasion of one’s legal rights.” *Id.*; citing *Bd. of Comm’rs of Bedford Cnty. v. Ling*, 92 A.3d 112 (Pa. Cmwlth. 2014). “Without an actual imminent or inevitable controversy, a party lacks standing to maintain a declaratory action.” *Silo*, 728 A.2d at 398.

In *Philadelphia Entertainment and Development Partners, L.P. v. City of Philadelphia*, 937 A.2d 385 (Pa. 2007), Plaintiff PEDP applied to the Pennsylvania Gaming Control Board for a slot machine license at their property in Philadelphia that was zoned as C-3 Commercial, which allows for a variety of commercial uses.. On December 20, 2006, the Board approved Plaintiff’s license application. *Id.* at 388. On January 23, 2007, Plaintiff filed an application for a C-3

permit to construct a hotel on this property which would include an amusement arcade with licenses from the PA Liquor Control Board or the PA Gaming Control Board. *Id.* On the same date, Bill No. 070009 was introduced in City Council which later went into effect, to amend Philadelphia's Zoning Maps by changing zoning designations in certain areas from C-3 Commercial to R-10A Residential. *Id.* On June 1, 2007, Plaintiff filed an Emergency Application for Summary Relief pursuant to Pa.R.A.P. 1532(b) while Plaintiff's application for the C-3 Permit was pending. *Id.* at 389. Plaintiff argued that the ordinance was arbitrary, discriminatory, and constituted illegal spot zoning and special legislation. *Id.* Defendants filed a Motion to Dismiss, arguing that the ordinance had not been applied, the prior C-3 designation would be used to evaluate Plaintiff's property, and that the ordinance had no relevance in relation to developing gaming facilities. *Id.*

The Pennsylvania Supreme Court dismissed Plaintiff's petition because the case was not ripe for adjudication. *Id.* at 392-93. The Court stated that "courts should not give answers to academic questions or render advisory opinions or make decisions based on assertions to hypothetical events that might occur in the future." *Id.*; citing *Bliss Excavating Co. v. Luzerne County*, 211 A.2d 532 (Pa. 1965). The Court found that because the ordinance had not yet been applied

against Plaintiff's property, Plaintiff is only anticipating that the ordinance would hinder the use of the property as an amusement arcade and the case was not ripe for adjudication. *Id.*

In *Silo*, Plaintiff filed a petition for declaratory judgment and asked the Court to find that the Prison Medical Services Act was unconstitutional. 728 A.2d at 396-97. The Prison Medical Services Act created a co-pay program for inmate medical services that required an inmate to cover a portion of medical services they received. *Id.* The Act required the DOC to specify which medical services required fees, the amount of the fee, procedures for payment, which medical services were free, and fees applicable to medical emergencies, chronic care, and preexisting conditions. *Id.* at 397. The Act prohibited denying inmates access to medical services due to an inability to pay required fees. *Id.* Plaintiff argued that prisoners would forego medical treatment to avoid paying for medical services. Defendants Governor Tom Ridge and the Department of Corrections filed preliminary objections to Plaintiff's declaratory judgment action arguing that Plaintiff's complaint was legally insufficient for failing to state an actual controversy. *Id.*

The Commonwealth Court sustained Defendants' preliminary objections and dismissed Plaintiff's declaratory judgment action. *Id.* at 397-400. The Court

found that Plaintiff's action was "nothing more than mere conjecture and speculation." *Id.* at 398. Plaintiff had not alleged that he sought medical care and was denied care, or that he was provided with inadequate care under the Act. *Id.* The Court found that "[plaintiff] has engaged in nothing more than an intellectual exercise without having been adversely affected by the Act and Policy Bulletin that are the subject of his attack. *Id.*

The Court finds the *PEDP* and *Silo* cases persuasive in dismissing Shipley's complaint. In the present case, Plaintiff intends to purchase two tracts of land from Wachovia National Bank that are burdened with deed restrictions prohibiting certain, but not all, uses for the land, and with regard to one tract, not all commercial uses. Plaintiff does not have specific plans for the current lot. Plaintiff instituted this action to have the Court declare the deed restrictions null and void, but have not shown why the deed restrictions will directly, substantially, or presently affect their rights to develop Lot 42.

In *PEDP*, the ordinance had not been applied to Plaintiff's land. Plaintiff was only anticipating that its use of the land as an amusement arcade would be prohibited. In the present case, Shipley is only anticipating that the deed restrictions will prevent their use of the property in a certain way, but have not shown how they will actually use the land and how the deed restrictions will

actually hinder that proposed use of the land. Based on the failure of Plaintiff to demonstrate how their use of the property would put them in violation of the deed restrictions, we find that no actual controversy exists.

Conclusion:

Because Plaintiff has not provided facts that show their rights to the land have been affected by these deed restrictions, any opinion issued by this Court would be advisory and in violation of the Declaratory Judgment Act and case law. Therefore, this Court must dismiss Plaintiff's cause of action.

Copies of this Order shall be sent to counsel for the parties.

BY THE COURT:

Richard K. Renn, Judge