

WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY,
PLAINTIFF vs WAYNESBORO BOROUGH AUTHORITY
AND ZULLINGER WATER ASSOCIATION, DEFENDANTS,
Franklin County Branch, Civil Action-Equity No. A.D. 1996-37
Action for Declaratory Judgment

Washington Township Municipal Authority v. Waynesboro Borough Authority and
Zullinger Water Association

Declaratory Judgment; Preliminary Objections; Contract Interpretation.

1. The Declaratory Judgments Act authorizes the Court to declare, settle, and make certain the rights, status and other legal relations between the parties. Declaratory relief may be granted where an actual controversy exists or is imminent or inevitable. 42 Pa. C.S. section 7531 *et seq.*
2. Preliminary objections in the nature of a demurrer should be sustained where, considering all well-pleaded, material and relevant facts, and every inference fairly deducible from those facts, it is clear that no recovery is possible under any theory of law, and this standard applies with equal force to requests for declaratory relief.
3. The construction of written contracts, such as an Intermunicipal Agreement involving water service territories within a municipality, is a proper subject for a declaratory judgment action. 42 Pa.C.S. section 7533. Where the terms of a contract are ambiguous, extrinsic evidence may be considered to determine the parties' intent at the time the contract was signed.
4. Latent ambiguity occurs where seemingly clear words have a meaning which is hidden until placed in proper factual context. The Court must consider extrinsic evidence in order to decide whether there are objective indications that the terms of the contract are subject to different meanings or interpretations.
5. A latent ambiguity may exist in an Intermunicipal Agreement which contains a provision prohibiting the alteration or modification of water service territories without the unanimous consent of all contracting parties, but also contains a provision which does not specifically prohibit any contracting party's acquisition, without such consent, of an independent neighboring water system. A demurrer is inappropriate where evidence about the factual circumstances surrounding the Agreement's execution has not yet been developed.
6. Plaintiff has a direct, present and substantial interest in whether defendant Waynesboro Borough Authority breached the Intermunicipal Agreement by contracting with an independent neighboring water system, and may therefore maintain its action for declaratory relief.

Scott T. Wyland, Esquire, Counsel for Plaintiff

G. Bryan Salzmann, Esquire, Counsel for Defendant Zullinger

D. L. Reichard, II, Esquire, Counsel for Defendant Waynesboro

OPINION AND ORDER

HERMAN, J., September 12, 1996:

OPINION

Washington Township Municipal Authority ("WTMA") filed this action against Waynesboro Borough Authority ("WBA") and Zullinger Water Association ("Zullinger") seeking a declaratory judgment pursuant to an Intermunicipal Agreement signed September 7, 1978 by Washington Township, WTMA, WBA and the Borough of Waynesboro. Zullinger was not a party to the Agreement, but is joined here as an indispensable party.¹

WTMA and Zullinger provide water service in Washington Township. WBA provides that service in the Borough of Waynesboro (which is situated within Washington Township) as well as portions of Washington Township.² WTMA alleges that WBA breached paragraph #5 of the Agreement by entering into a contract with Zullinger on December 11, 1995 whereby WBA was to acquire Zullinger's water system. WBA and Zullinger filed preliminary objections in the nature of a demurrer. Counsel submitted briefs to the Court and argument was held on April 14, 1996.

Paragraph 5 of the September 7, 1978 Agreement provides:

After the date of the execution of the within Agreement by the respective parties, no party to this agreement shall institute, or cause to be instituted, or voluntarily participate in, either directly or indirectly, proceedings before the [Pennsylvania Public Utility] Commission or any other administrative or governmental agency or in the courts to modify or alter in any manner whatsoever the water service territories as agreed upon herein, and if a modification or alteration of said water service territories shall be deemed necessary by any of the parties hereto, it shall be accomplished only after unanimous consent of all of the parties hereto.

WTMA argues that the defendants breached this provision by acquiring Zullinger, because that action constituted a "modification" "alteration" of water service territories without the unanimous

¹ 42 Pa.C.S. section 7540.

The Borough of Waynesboro is not a party to this action.

consent of all the parties to the Agreement, including Washington Township and the Borough of Waynesboro.

At the time the Agreement was executed, Zullinger operated an independent water system. WBA and Zullinger contend the purpose of the 1978 Agreement was to delineate the respective water service territories of the WTMA and WBA. WTMA did not consent to the Zullinger Agreement and contends that the acquisition of Zullinger by WBA will expand the WBA's water service territory beyond the area delineated by the 1978 Agreement. (Plaintiff's complaint, paragraph #13).

Paragraph #2 of the 1978 Agreement provides:

The land mass of the Township [Washington Township] less the water service territory referred to in said exhibits and the water service territory of the Zullinger Water Association shall be deemed to be the water service territory of the Township Authority [WTMA] except as hereinafter provided.

The defendants argue the Intermunicipal Agreement's purpose was to ensure that the two independent municipal authorities, WTMA and WBA, would not enter or infringe upon each other's water service territory. The defendants contend that paragraph #2 specifically excluded Zullinger from WTMA's territory and WBA was therefore free to acquire Zullinger.

The Declaratory Judgments Act³ authorizes the Court to declare, settle and make certain the rights, status and other legal relations between the parties. Section 7532; *Fidelity Bank v. Pennsylvania Turnpike Commission*, 498 Pa. 80, 444 A.2d 1154 (1982). Declaratory relief may be granted where an actual controversy exists or is imminent or inevitable. *Hain v. Board of School Directors*, 163 Pa. Commw. 479, 641 A.2d 661 (1994). The Court may declare the respective rights and liabilities of the parties before a situation develops which might require the unnecessary expenditure of funds or before harm actually occurs. *Mid-Centre County Authority v. Boggs*, 34 Pa. Commw. 494, 384 A.2d 1008 (1978).

42 Pa. C.S. section 7531 et seq.

Defendants assert WTMA lacks standing to pursue declaratory relief and that the complaint fails to state a cause of action. A demurrer should be sustained where considering all well-pleaded material and relevant facts and every inference fairly deducible from those facts, it is clear that no recovery is possible under any theory of law. *Rutherford v. Presbyterian-University Hospital*, 417 Pa. Super. 316, 612 A.2d 500 (1992). Any doubt as to whether the demurrer should be sustained should be resolved in favor of refusing to grant it. *Commonwealth Department of Environmental Resources v. Peggs Run Coal Company*, 55 Pa. Commw. 312, 423 A.2d 765 (1980). This standard applies with equal force to requests for declaratory relief. *Pennsylvania Institutional Health Service, Inc. v. Commonwealth Department of Corrections*, 158 Pa. Commw. 221, 631 A.2d 767 (1993), *affirmed*, 536 Pa. 544, 640 A.2d 413. The existence of factual questions does not preclude the Court from permitting a declaratory judgment action. Section 7539(a); *Liberty Mutual Insurance Co. v. S.G.S. Co.*, 224 Pa. Super. 12, 302 A.2d 501 (1973), vacated on other grounds, 456 Pa. 94, 318 A.2d 906; *Delaware Valley Apartment Owners' Association v. Commonwealth, Department of Revenue*, 36 Pa. Commw. 615, 389 A.2d 243 (1978).

The construction of written contracts is a proper subject for a declaratory judgment action. 42 Pa.C.S. section 7533; *New London Oil Co. Inc. v. Ziegler*, 336 Pa. Super. 380, 485 A.2d 1131 (1984). Where the terms of a contract are ambiguous and susceptible of more than one reasonable interpretation, extrinsic or parole evidence may be considered to determine the intent of the parties at the time the contract was signed. *Z & L Lumber of Atlasburg v. Nordquist*, 348 Pa. Super. 580, 502 A.2d 697 (1985).

Contract law recognizes two kinds of ambiguities in written instruments, patent ambiguity and latent ambiguity. Latent ambiguity occurs when seemingly clear words actually have a meaning which is hidden until placed in proper factual context. The Court must consider extrinsic evidence from both parties in order to decide whether there are objective indications that the terms of the contract are subject to different meanings or interpretations. *Krizovensky v. Krizovensky*, 425 Pa. Super. 204, 624 A.2d 638 (1993); *Summary of Pennsylvania Jurisprudence*, sections 1:99; 1:109.

There are indications of a latent ambiguity between paragraphs #2 and #5 of the 1978 Agreement. On its face, paragraph #2 does not prevent WBA from acquiring Zullinger, but paragraph #5 explicitly mandates that any alterations or modifications of water service territories requires the unanimous consent of all parties to the Agreement. We are inclined to agree with the defendants that paragraph #5 conflicts with the Agreement's purpose, which appears to have been to demarcate the respective water service territories of WTMA and WBA. A demurrer would be inappropriate at this juncture, however, in as much as evidence about the factual circumstances surrounding the Agreement's execution has yet to be developed.⁴

The defendants contend that WTMA has no direct, present and substantial interest in the existence of the Zullinger Agreement because the 1978 Agreement did not confer upon WTMA the right to object to WBA's acquisition of Zullinger. However, this contention presupposes that the 1978 Agreement is unambiguous, a matter which has not yet been clarified. We find that at present WTMA has a direct, present and substantial interest in the question of whether WBA has breached the 1978 Agreement in contracting with Zullinger and therefore WTMA may continue to seek declaratory relief.

Both WBA and Zullinger assert in their briefs that WTMA unsuccessfully "courted" Zullinger to join its own water service territory and vindictively initiated this suit after Zullinger voted to join WBA's territory instead. At oral argument the defendants argued that unless the Zullinger water system is absorbed by either WBA or WTMA, it could never modernize because Zullinger is too small and such a constraint would be contrary to public policy. WTMA responded that Zullinger need not be absorbed by WBA in order to modernize. The defendants also maintained that Zullinger has never been a basis for rate structure or fees charged to WTMA customers and there are no physical connections between WTMA and Zullinger.

These matters are beyond the scope of these preliminary objections and cannot be considered here. Goodrich-Amram section 1017(b)(29). If there are facts which illuminate this dispute, they should be pled in an answer under New Matter.

In the alternative, the defendants contend that no alteration or modification of water service territories has in fact occurred because WBA and Zullinger have simply been "amalgamated," and this amalgamation does not constitute an "alteration or modification" of WBA's territory. At this stage of the litigation, it cannot be established that there is an actual distinction between amalgamation on the one hand and alteration and/or modification on the other.

WTMA may seek declaratory relief in this matter. The defendants' demurrer will be denied and they shall answer the complaint and plead new matter where appropriate.

An appropriate Order of Court will be entered as part of this Opinion.

ORDER OF COURT

NOW this 12th day of September 1996, the demurrer filed by defendants Waynesboro Borough Authority and Zullinger Water Association to the plaintiff's complaint and request for declaratory judgment is hereby DENIED. The defendants are directed to file answers to the complaint.