TERRY E. HOSE AND GWENDOLYN L. HOSE VS. ANTRIM TOWNSHIP, C.P., Franklin County Branch, No. A.D. 1995-82

Civil Action-Law-Preliminary Objections-Demurrer-Political Subdivision Tort Claim Act, 42 Pa.C.S.A. Section 8541-Equitable Estoppel

1. In ruling on a demurrer, the court must deem that the demurring party has admitted as true all relevant facts sufficiently pleaded in a preceding pleading, and all inferences reasonably deductible therefrom.

2. Equitable estoppel has been recognized only as a defense and not as the basis of a cause of action.

Donald L. Kornfield, Esquire, Counsel for Plaintiffs
Jered L. Hock, Esquire and *Steven P. Miller, Esquire,* Counsel for Defendant

OPINION AND ORDER

KAYE, J., May 12, 1995:

OPINION

In this case, Terry E. Hose and Gwendolyn L. Hose ("plaintiffs") have sued Antrim Township ("defendant") seeking an award of money damages, counsel fees, costs, and expenses. Defendant has filed preliminary objections asserting the following: 1/ plaintiffs failed to join a necessary party; 2/ plaintiffs failed to assert a cause of action against defendant; 3/ impertinent matter is pleaded; 4/ the complaint is insufficiently specific; and 5/ the complaint does not conform to Pa.R.C.P. No. 1019 in paragraph 39 in that it pleads conclusions of law, and not material facts. The matter was before the Court for argument following receipt of briefs, and the preliminary objections are now in a posture for disposition.

The instant action was initiated on February 24, 1995 by the filing of a complaint. Thereafter, defendant filed the preliminary objections to the compliant which were referenced above which, as noted above, contained a demurrer to the compliant which we will address herein.

In ruling on a demurrer, the Court must deem that the demurring party has admitted as true all relevant facts sufficiently

pleaded in a preceding pleading, and all inferences reasonably deducible therefrom. *County of Allegheny v. Commonwealth,* 507 Pa. 360, 490 A.2d 402 (1985), later proceeding 517 Pa. 483, 538 A.2d 873, later app. 518 Pa. 556, 544 A.2d 1305, cited in *Goodrich-Amram 2d* §1017(b):28. Thus, assuming as true all assertions of fact contained in the compliant, and all reasonably determinable inferences, the facts upon which this claim is bases are as follows:

On July 28, 1993, plaintiffs executed a written contract with Renaissance Associates to purchase real estate in Antrim Township, with the intention of erecting a residence thereon. The contract consists mostly of a printed form contract with an addendum attached thereto containing the following, *inter al.-:* "D. Buyers are aware that said lot is perced for a sand mount septic system and request a copy of the all perc tables and rates. Buyer is aware that property needs well drilled for water service to lot." [Exhibit P-1 at 4]. Thereafter, plaintiffs acquired a copy of the report of testing conducted by Antrim Township Sewage Enforcement Officer Thomas E. Shelly. The testing, titled "Site Investigation and Percolation Test Report for On-Lot Disposed of Sewage" has a block checked "Suitable" on the face thereof. Plaintiffs relied on this report to complete the purchase of the real estate.

Early in 1994, plaintiffs applied for a building permit from Antrim Township, and were told they would need a "sewage permit". They entered into a contract for a residence to be constructed on the real estate. Subsequently, Vincent Elbel, new Sewage Enforcement Officer for Antrim Township, informed plaintiffs that he had found a sinkhole on the property, rendering it unsuitable for an on-site sewage disposal system.

Ultimately, plaintiffs did not obtain the requisite permit, and filed suit against Antrim Township, seeking an award of money damages and attorney fees.

This cause of action is one founded upon the alleged negligence of the former Antrim Township Sewage Enforcement Officer, which plaintiffs seek to attribute to the Township. As this is the basis for the claim, which sounds in tort, we note initially that the

Political Subdivision Tort Claim Act, 42 Pa.C.S.A. §8541 et seq. bars claims of this type against municipalities.

This precise issue was dealt with in *Bendas v. Upper Saucon Township,* 127 Pa.Cmwlth. 378, 561 A.2d 1920 (1989). In *Bendas,* the landowners filed suit against the Township which had issued a permit for on-site sewage disposal after it was determined that the system prescribed in the permit did not provide for adequate disposal of the sewage, which then percolated upward, rendering a large part of the lot unsuitable for use. Commonwealth Court sustained the granting of the Township's demurrer on the ground that the statute cited above barred the suit, and that there was no applicable exception which would permit the suit to proceed. The holding in *Bendas* is controlling herein, and compels that the Township's demurrer be sustained.

Plaintiffs seek to avoid the statutory bar to the suit by asserting that the cause of action is founded upon an estoppel theory. This assertion previously has been considered, and rejected by the Commonwealth Court:

> Equitable estoppel can be asserted where one, by his acts, representations or admissions or by his silence when he has the duty to speak out, has intentionally or by culpable negligence induced another to believe that certain facts exist and the other rightfully relies and acts on such belief to his prejudice if the former is permitted to deny the existence of such facts. *Blofsen v. Cutaiar*, 460 Pa. 411, 333 A.2d 841 (1975). *The problem with this argument by the appellants is that equitable estoppel has been recognized only as a defense and not as the basis of a cause of action in itself.* Prosser, Law of Torts, p. 691-92 (4th ed. 1971). The appellees' alleged conduct in this matter gives rise to both the defense or equitable estoppel and a cause of action that sounds in tort but does not fall under one of the enumerated exceptions to governmental immunity. Because of the latter fact, we must conclude that the appellants' action against the appellees is barred.
>
> *Gilius v. Board of Supervisors of Fairview Township,* 122 Pa.Cmwlth. 371, 377, 552 A.2d 327, 330 (1988), allocatur denied 523 Pa. 633, 564 A.2d 1262 (1989) [Emphasis added].

> See also, *Graham v. Pennsylvania State Police*, 160 Pa.Cmwlth. 377, 382, 634 A.2d 849, 851-852 (1993), allocatur denied, Pa. 648 A.2d 791 (1994).

For the foregoing reasons, plaintiffs have failed to state a cause of action against defendant upon which relief can be granted, and the demurrer must be sustained. Because of this disposition of the matter, further consideration of the other issues raised will not be required.

ORDER OF COURT

NOW, May 12, 1995, the Court having considered defendant's preliminary objections, counsel's briefs and oral argument, upon the opinion attached hereto, defendant's demurrer is GRANTED.