

see no error in the Board's finding that appellant is not entitled to a variance from this 50 feet setback requirement. Pan Am did not establish that strict application of the Zoning Ordinance to the properties would so unreasonably and unnecessarily interfere with the continued use of the properties or would present such a practical difficulty to the continued use of those properties under the ordinance.

The final argument made by Pan Am is that public policy requires the least restrictive environment to provide adequate care for mentally retarded individuals. This environment, according to Pan Am's argument, is a one-family residential district. We have carefully reviewed the cases cited by appellant. We conclude that the Legislature did not intend that the Mental Health and Mental Retardation Act of 1966, Act of October 20, 1966, P.L. 96, 50 P.S. Sec. 4101 et seq., have priority over other public policies of the Commonwealth as expressed in other state statutes, for example the Municipalities Planning Code, Act of 1968, July 31, P.L. 805, 53 P.S. 10101 et seq. Furthermore, in the community, the required environment is that environment which, in compliance with other laws, is the least restrictive. There is nothing to suggest that the Chambersburg Zoning Ordinance totally excludes rooming houses or group homes from residential areas. They are only excluded from R-1 districts. Therefore, the fact that Pan Am may not set up a home in an R-1 district does not mean, as suggested in its brief, that mentally retarded people will remain subject to custody in state institutions. So the Chambersburg Zoning Ordinance does not frustrate Commonwealth policy regarding placement of mentally retarded adults.

In accordance with the foregoing, we conclude that the Zoning Hearing Board neither abused its discretion nor committed an error of law. We therefore affirm its action in denying Pan Am the relief sought in its appeals.

#### ORDER OF COURT

January 16, 1981, the order of the Chambersburg Zoning Hearing Board is affirmed. The costs of these proceedings shall be paid by Pan Am Corp.

HERSHBERGER CHEVROLET, INC. v. ROMALA CORP.,  
SUCCESSOR IN INTEREST TO ROMALA INVESTMENT  
CORPORATION, C.P. Franklin County Branch, A.D. 1979 -  
229 In Trespass

*Discovery - Pa. R.C.P. 4012 - Ex Parte*

1. The court is not given authority under Pa. R.C.P. 4102 to grant ex parte discovery.

*Michael E. Farr, Esq.*, Counsel for Plaintiff

*Wayne F. Shade, Esq.*, Counsel for Defendant

*Donald L. Kornfield, Esq.*, In Propria Persona

#### OPINION AND ORDER

KELLER, J., January 16, 1981:

On February 1, 1980, the plaintiff filed its complaint alleging a cause of action against the defendant in trespass for malicious abuse of civil process, and based upon the defendant's wrongful confession of judgment which had been stricken by Order of Court. On March 14, 1980, counsel for the defendant presented its petition for rules to be issued upon Donald L. Kornfield, Esq., defendant's counsel at the time of the confession of judgment, and the plaintiff herein to show cause why the respondent-Kornfield should not be required to respond to interrogatories set forth in paragraph eight of the petition with responses to be filed directly with the Court and counsel for the defendant herein to preserve the attorney-client privilege in favor of the defendant herein, and to show cause why the time for joining the respondent-Kornfield under Pa. R.C.P. 2253 should not be extended for twenty (20) days after the filing of responses to the interrogatories set forth in the petition or after any alternative disposition of the petition. An order was signed on the same date directing the issuance of the rule. Answers to the petition and rules issued thereon were filed by the respondent-Kornfield, and plaintiff herein on April 2 and 3, 1980, respectively praying for the discharge of the rules. The answer of the plaintiff herein specifically denies that the information requested in the interrogatories is privileged or protected by the attorney-client privilege rule; that if the information was privileged the defendant herein waived that privilege by seeking discovery from respondent-Kornfield; and there is no authority for the taking of *ex parte* discovery.

The matter was placed on the Argument List and is ripe for disposition.

We note that respondent-Kornfield did not file a brief in support of his answer to the rule and prayer that it be dismissed; nor did he appear at oral argument. We will, therefore,

consider that he has adopted the position of the plaintiff herein as set forth in its brief, and as presented in oral argument.

As above noted the narrow issue here raised is whether this Court has the authority to order respondent-Kornfield to answer the interrogatories set forth in paragraph 8 of the defendant's petition and file his answer only with the Court and with counsel for the defendant.

The defendant cites no cases in support of its position, and relies exclusively upon Pa. R.C.P. 4012(a) (2)(6) which provides:

“(a) Upon motion by a party or by the person from whom discovery or deposition is sought, and for good cause shown, the court may make any order which justice requires to protect the party or person from unreasonable annoyance, embarrassment, oppression, burden or expense, including one or more of the following:

(2) That the discovery or deposition shall be only on specified terms and conditions, including a designation of the time and place;

(6) That discovery or deposition shall be conducted with no one present except persons designated by the court;

(7) That a deposition shall be sealed and shall be opened only by order of the court . . .”

Counsel for the parties agree that under Pa. R.C.P. 4012 the Court does have broad supervisory powers over the conduct of discovery. However, the plaintiff contends that even if all of the interrogatories set forth in paragraph 8 of the petition were within the scope of the attorney-client privilege nevertheless the Court cannot exclude a party or counsel for a party from the discovery process, and to attempt to do so would be unconstitutional.

Pa. R.C.P. 4012 does undoubtedly vest broad supervisory powers in the court “to protect a party or person from unreasonable annoyance, embarrassment, oppression, burden or expense.” However, nothing in subparagraphs (2, 6 or 7) or any other language in the rule suggests any authority in the court to order *ex parte* discovery for any purpose. In 10 Goodrich Amram 2d page 327; “Sec. 4012(a): 6-Limitation of Persons Present,” we find:

“The court is authorized under Rule 4012(a) (6) to order, in

an appropriate case, that discovery or deposition shall be conducted with no one present except persons designated by the court. Under this provision prior to its amendment in 1978, the court was authorized to order that an examination on deposition by oral examination should be held with no one present *except the parties to the action and their counsel.*” (Italics ours)

In 5A Anderson Pa. Civil Practice, page 390, “Sec. 4012.45- Right of Parties to be Present” appears:

“While the court may provide for the examination of witnesses with no one present except counsel and the parties, the court cannot constitutionally exclude the parties.”

In our judgment this Court has no authority to grant the *ex parte* discovery prayed for by the defendant. Therefore, the rule requiring the respondent-Kornfield to respond to the interrogatories posed in paragraph 8 will be discharged.

The plaintiff has specifically indicated in its brief that it has no objection to the grant of an extension of time to join the respondent-Kornfield as an additional defendant. Therefore, the rule to show cause why the time for joining him under Pa. R.C.P. 2253 should not be extended for twenty (20) days will be made absolute.

#### ORDER OF COURT

NOW, this 16th day of January, 1981:

1. The rule to show cause why respondent-Kornfield should not be required to respond to the interrogatories posed in paragraph 8 of the petition with responses to be filed directly with the Court and with counsel for the defendant, is discharged.

2. The rule to show cause why the time for joining respondent-Kornfield under Pa. R.C.P. 2253 should not be extended for twenty (20) days after disposition of the petition is made absolute.

Exceptions are granted all parties.

STAMBAUGH v. SMITH, C.P. Franklin County Branch, A.D. 1980-180, In Trespass