

The complaint at bar fails to extract or even paraphrase the language of the Consumer Protection Law provided in section 201-2(4) (xvii) which prohibits fraudulent conduct. In fact, no where in the plaintiff's complaint is the word "fraud" ever used. We must hold that this is insufficient to satisfy the requirements of Pa. R.C.P. 1019(b).

Turning our attention now to Stine Davis' demurrer, we are mindful that its preliminary objection has the effect of admitting as true all relevant facts which are sufficiently pleaded in plaintiff's complaint, but not conclusions or averments of law or unjustified inferences. *Ross v. Shawmut Development Corp.*, 46 Pa. 328, 331, 333 A.2d 751, 752 (1975). The preliminary objection should be sustained only if it is clear and free from doubt that, upon the facts averred, the law will not permit recovery. *Allstate Ins. Co. v. Fioravanti*, 451 Pa. 108, 111, 299 A.2d 585, 587 (1973).

Assuming that defendant did in fact misrepresent to the plaintiff that it had sent renewal notices to his New Cumberland address and withheld notice of cancellation, are those facts alone sufficient to authorize a suit under the Consumer Protection Law? This court holds that it is not.

Again, we must note that unless the alleged misrepresentations were in some way fraudulent, the facts averred would be inadequate to make out a cause of action under the Consumer Protection Law. The plaintiff fails to aver any facts which show fraud on the defendant's part.

The Commonwealth Court has just recently held that there must be some showing of intentional misconduct on the part of the defendant to violate the catchall provisions of the Consumer Protection Law, *Chatham Racquet Club v. Commonwealth*, 116 Pa. Cmwlth. 55, 541 A.2d 51 (1988). There, the trial court granted a preliminary injunction on the basis that the club's increase in fees violated the fraudulent conduct provision. The court vacated the injunction because there was no express finding of fraud, saying:

It is only when the confusion and misunderstanding created by the actor is fraudulent that the provisions of the Act may be activated. . . . Our review of the trial judge's comments during the course of the hearing indicate that he was not convinced that the Club had done any intentional wrong but rather that there was a valid reason for a

bona fide difference of opinion in interpreting what was intended in the purchase agreement by the words "subject to" existing memberships. In our judgment such circumstances fall short of fraud or fraudulent conduct.

*Id.*, 116 Pa. Cmwlth. at 60, 541 A.2d at 54.

Fraud consists of some intentional and deceitful practice, or, at the very least, some facts that might allow us to imply that the defendant intentionally misrepresented the situation to the plaintiff. This court is unaware of any insurance company that would deliberately not collect premiums due. The plaintiff offers no facts averring that this is what occurred.

It may well be that plaintiff can indeed aver facts that will overcome the deficiencies in his complaint. We are at a loss to understand why he did not do so when afforded the opportunity. As the complaint presently stands, the facts alleged, even when viewed in light most favorable to the plaintiff, do not state a possible cause of action for fraud.

Accordingly, Stine Davis' preliminary objection to plaintiff's amended complaint is sustained and count 2 of the complaint must be dismissed.

#### ORDER OF COURT

September 10, 1990, Stine Davis' preliminary objection to count 2 of the plaintiff's amended complaint is sustained.

Count 2 of the amended complaint is dismissed.

Plaintiff is, once again, granted twenty (20) days to file an amended complaint.

IN RE: CONDEMNATION BY THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION OF RIGHT OF WAY FOR STATE ROUTE 0075, SECTION 001, IN THE TOWNSHIP OF FANNETT, C.P. Franklin County Branch, No. A.D. 1990-114

*Declaration of Taking - Preliminary Objections - Jurisdiction of Court  
-Power of Condemnor*

1. The statutory authority to file preliminary objections is found in 26 P.S. 31-406 (a).
2. PennDot has the authority to condemn property without obtaining prior environmental permits.
3. Obtaining environmental permits is collateral to the authority to condemn under the Eminent Domain Code and the Court does not have the authority to consider preliminary objections based on that issue.

*Stuart A. Liner, Esq., Counsel For Commonwealth  
Michael A. Meloy, Esq., Counsel For Condemnees*

**OPINION AND ORDER**

Kaye, J., September 14, 1990:

**OPINION**

We have before the Court Condemnor's (hereafter, "PennDOT") petition to dismiss preliminary objections filed by Condemnee (hereinafter, "Meloy"), in the above captioned matter.

The pertinent facts are as follows: In late 1989, PennDOT notified Meloy that it intended to build or improve a bridge along State Route 0075, section 001, Fannett Township, Franklin County, approximately one (1) mile north of Doylestown. The bridge crosses Burns Creek and is flanked to the south and northeast by land owned by Meloy.

The project involved replacing the existing steel bridge with a reinforced concrete structure, widening approximately 425 feet of roadway forming the approaches to the bridge, and constructing a temporary roadway and stream crossing to the east of the existing road and bridge. On January 10, 1990, PennDOT made an offer of compensation for the property affected by the project. Meloy requested PennDOT provide additional information concerning the nature of the proposed construction and its impact on the property and surrounding environment.

On March 6, 1990, PennDot filed a declaration of taking, condemning 12,903 square feet of the property in fee simple to

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accommodate the proposed bridge project. PennDOT also condemned 19,064 square feet of property for a temporary construction easement to construct the proposed temporary roadway and crossing.

On May 11, 1990, Meloy filed preliminary objections with this Court to PennDOT's declaration of taking. Before us we now have PennDOT's petition to dismiss preliminary objections filed May 30, 1990. For the reasons set forth herein, we will grant PennDOT's petition.

The objections raised by the petition to dismiss can be found in the context of two issues.

I. Does this Court have jurisdiction to consider preliminary objections under the Pennsylvania Eminent Domain Code (26 P.D. §1-406) that challenge PennDOT's power and right to condemn property due to a lack of necessary environmental permits for the project associated with the condemnation?

II. Is PennDOT required to obtain approval from the Agricultural Lands Condemnation Approval Board prior to condemning prime farm land for a bridge replacement project?

Section 2003(e) of the Administrative Code provides statutory authority for PennDOT to take Meloy's land for public improvement. That section reads in pertinent part:

The Department of Transportation in accord with appropriations made by the General Assembly, and grants of funds from Federal, State, regional, local or private agencies, shall have the power, and its duty shall be: . . .

(e) (1) To acquire, by gift, purchase, condemnation or otherwise, land in fee simple or such lesser estate or interest as it shall determine, in the name of the Commonwealth, for all transportation purposes, including marking, rebuilding, relocating, widening, reconstructing, repairing and maintaining State designated highways and other transportation facilities, and to erect on the land thus acquired such structures and facilities, including garages, storage sheds or other buildings, as shall be required for transportation purposes. Land shall not be acquired for any capital project unless the project is itemized in an approved capital budget. Notwithstanding any other provisions of this or any other act, when the department seeks to take by appropriation real property or an interest in

real property which the department intends to use for other than operating right-of-way for facilities such as maintenance buildings and construction facilities and such real property or interest therein belongs to a railroad, the department shall show by clear and convincing evidence that the activity contemplated on the site proposed to be appropriated could not have been conducted economically at an alternate location.

71 P.S. 513 (e) (2)

The statutory authority for the Condemnee to file preliminary objections to the declaration of taking can be found in 26 P.S. §1-406(a). The pertinent parts of that section read:

(a) Within thirty days after being served with notice of condemnation, condemnee may file preliminary objections to the declaration of taking. The court upon cause shown may extend the time for filing preliminary objections. Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the declaration of taking. Failure to raise these matters in preliminary objections shall constitute a waiver thereof.

To determine whether this Court has jurisdiction to rule on Meloy's preliminary objections, we must first engage in an examination of the issue which is the crux of the preliminary objections, i.e., does PennDOT have the power and authority to condemn property without obtaining prior environmental permits? Counsel for Meloy skillfully has intertwined this issue with the jurisdictional question which arises due to differing interpretations of 26 P.S. §1-406 (a) (1). The Court must rule on whether Meloy's preliminary objections are collateral to the Commonwealth's power or right to take private property, or whether they flow directly to the issue of PennDOT's power or right to exercise eminent domain over the land of a property owner.

Meloy argues that PennDOT must comply with a vast array of federal and state environmental statutes and regulations which constrain and control the Commonwealth *prior* to the exercise of its condemnation powers. For example, Meloy contends that the

Commonwealth's proposed construction activities in streams, wetlands, and wet meadows are prohibited in the absence of the appropriate permit or authorization pursuant to the federal Clean Water Act, 33 U.S.C. §1311. Similarly, Meloy maintains that without prior written permit from the Pennsylvania Department of Environmental Resources, (DER), "[n]o person shall construct, operate, maintain, modify, enlarge, or abandon and dam, water obstruction, or encroachment." See, Pennsylvania Dam Safety and Encroachments Act, (DSEA), 32 P.S. §693.1-693.27.

In summation, Meloy argues that PennDOT's power to undertake projects such as the one at issue, is subject to prior compliance with applicable environmental statutes and regulations, and that without the requisite environmental permits and approvals, the Commonwealth lacks the power or right to carry out construction projects regardless of the nature of need for the projects.

A thorough analysis of Meloy's argument indicates that it does not flow directly to PennDOT's power or right to take property, albeit the argument is skillfully framed that way, but rather to PennDOT's power or right to exercise use of the property subsequent to the taking. Instantly, there is a dispute regarding the statutory application or interpretation of the wording, "...power or right of the condemnor to appropriate the condemned property." 26 P.S. §1-405 (a) (1).<sup>2</sup> Meloy argues the language encompasses or permits a preliminary objection challenge to PennDOT's power to conduct construction projects that bottoms the State's reason for taking the land. Condemnee has framed her argument in terms of the Commonwealth's "power and authority to condemn property associated with the project." (Meloy's brief p. 14). We do not agree that 26 P.S. §1-405(a) grants this Court jurisdiction to decide a preliminary objection in the nature of the aforementioned argument which we find collateral to the Commonwealth's power or right to appropriate land.

In *In re: Condemnation by The Commonwealth of Pennsylvania, Department of Transportation, of Right of Way for Legislative Route 201*, 22 Pa. Cmwlth. 440, 349, A.2d 819 (1974), the condemnees claimed that they have been deprived of personal notice of a hearing under Section 2002(b) during the design phase of a highway project and argued the preliminary objections under Section 406 constituted, the proper means for asserting such a

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claim. The appellate court refuted that argument. As stated by President Judge Bowman, speaking for a unanimous Court en banc:

"Considering the first type of allowable preliminary objection, the power or right of the condemnor, the appellants are not actually challenging the power or right of PennDOT to take their land. This is provided by statute, Act of May 29, 1945, P.L. 1108 as amended, 36 P.S. §2391.9. More accurately, *they are challenging a collateral procedure to be followed as part of highway planning.* Likewise, the challenge is not to sufficiency of the security or the declaration of taking itself. Therefore, if appellants' argument is to fit into one of the allowable categories of preliminary objections, it must qualify as an objection to 'any other procedure followed by the condemnor.'" (emphasis added).

However, in *Simco Stores, Inc. v. Philadelphia Redevelopment Authority*, 8 Pa. Cmwlth. 374, 379, 302 A.2d 907, 910 (1973), aff'd, 455 Pa. 438, 317 A.2d 610 (1974), this Court stated:

"The term 'any other procedure' refers to procedures such as are set forth in Sections 403 and 405, inclusive, and other procedures that may be directly related to the filing of the declaration of taking."

*Id.* at 445, 349 A.2d at 821. See also, *In re: Condemnation of Route 58018*, 31 Pa. Cmwlth. 275, 375 A.2d 1364 (1977).

As in the above-cited case, reduced to its essence, the instant challenge is founded upon a matter which is collateral to the authority of the Commonwealth under the Eminent Domain Code, 26 P.S. §1-101 et seq., i.e., it relates to the various statutory and regulatory schemes with which the Commonwealth must comply to put the condemned property to its intended use. However, these schemes do not go to the statutory authority of the sovereign to exercise the power of eminent domain.

We would also point out that if we were to hold otherwise, i.e. if a condemnor were required to obtain all the requisite statutory and

<sup>2</sup> "[T]he scope of preliminary objections under section 406(a) is to be limited." *Simco Stores v. Redevelopment Authority*, 445 Pa. 438, 443, 317 A.2d 610, 613 (1974). See also, *Commonwealth* appeal, 429 Pa. 254, 239 A.2d 343 (1968).

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regulatory permits and approvals as a condition precedent to the taking of property by Eminent Domain, challenges to that process could place a cloud on the title to property that could remain for years, until the issues involved were ultimately decided. This would place a burden on landowners who wished to dispose of property by sale, and would create a long-term emotional burden, as well, due to the uncertainty as to the ultimate outcome of the proceeding. We note that, in construing statutes, the Court must attempt to ascertain and effectuate the intent of the General Assembly, 1 Pa. C.S.A. §1921(a), and in ascertaining the intention of the General Assembly in enacting a statute, the Court should presume that it did not intend a result that is absurd, impossible of execution or unreasonable. 1 Pa. C.S.A. §1922(1).

If we were to adopt the position of the condemnee herein, not only would the sovereign's ability to take private property for public purposes be seriously eroded, but the condemnee could suffer serious hardship and inconvenience. We do not think this was the intent of the statutory or regulatory schemes, and thus reject condemnee's position.

#### ORDER OF COURT

NOW, September 14, 1990, for the reasons set forth in the accompanying opinion, the preliminary objections of Condemnee, Alice M. Meloy, are dismissed.

TURNER VS. TURNER, C.P. Franklin County Branch, Eq. Doc. Vol. 7, Page 552

#### **Equity - Divorce Code - Sec. 401.1 - Property Settlement Agreement**

1. Section 401.1 of the Divorce Code preserves the Court's ability to modify an agreement concerning child support, visitation or custody.
2. Section 401.1 of the Divorce Code removes the Court's ability to modify a property settlement agreement relating to property rights and interests, alimony, alimony pendente lite, counsel fees or expenses.

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