

# Franklin County Legal Journal

Vol. 35, No. 44

May 4, 2018

Pages 131 - 138

Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201-2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

## THE FRANKLIN COUNTY BAR ASSOCIATION

VISIT US AT ***WWW.FRANKLINBAR.ORG***

Our website includes:

- Calendar of Events
- Find a Lawyer Search
- FCL Journal Public Notices
- FCBA Members' Section
- 39th Judicial District Court Calendar

FOLLOW US ON FACEBOOK at  
[www.facebook.com/FranklinCountyBarAssociation](http://www.facebook.com/FranklinCountyBarAssociation)

CHECK OUT OUR TWEETS AT [@frankincobar](https://twitter.com/frankincobar)

### **Franklin County Legal Journal**

The Franklin County Legal Journal is published by the Franklin County Bar Association, 100 Lincoln Way East, Suite E, Chambersburg, PA 17201-2291. Subscriptions for the weekly advance sheets are \$35 per year.

Legal notices and all other materials must be received by noon on Monday of the week of publication. Send all materials to Executive Director, editor, at [legaljournal@franklinbar.org](mailto:legaljournal@franklinbar.org) or by mail to the above address.

**POSTMASTER:** Send address changes to the Franklin County Legal Journal, 100 Lincoln Way East, Suite E, Chambersburg, PA 17201-2291.

**Bradley E. Cook, Nancy S. Cook, George R. Harris, and Lorraine A. Lomman, Plaintiffs v. Ronald and Angela Effland, Defendants**

Court of Common Pleas of the 39th Judicial District of Pennsylvania,  
Fulton County Branch, Civil Action – Equity No. 2017-3064

**HOLDING:** Plaintiffs’ request for *Preliminary Injunction* is **GRANTED**; Defendant’s *Preliminary Objections* are **DISMISSED**; Plaintiff’s *Petition for Attorneys’ Fees* is scheduled to determine the appropriateness of an award of attorneys’ fees.

- a. The utilization of a straw-man to lease a building to an organization in violation of an uncontested restrictive covenant will not shield the homeowners from liability for the violation.
- b. The Court will dismiss preliminary objections, without reaching the merits of the objections, which are filed beyond twenty (20) days of the complaint, as required by Pa.R.C.P. 1026(a).

**HEADNOTES**

1. In order for the Court to grant a preliminary injunction, the requesting party must prove each of the six (6) requisite elements: 1) a clear right to relief; 2) immediate and irreparable harm in the absence of an injunction; 3) restoration of the status quo; 4) no adequate remedy at law exists and the injunction is appropriate to abate the alleged harm; 5) greater injury will result by not granting than by granting the injunction; and 6) the preliminary injunction will not adversely affect the public interest. *Wyland v. West Shore School District*, 52 A.3d 572, 582 (Pa. Cmwlth. 2012) (citing *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc.*, 828 A.2d 995 (Pa. 2003)).
2. The petitioner must establish each and every one of the elements; if the petitioner fails to establish even just one of them, there is no need to address the others. *Cnty of Allegheny v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988).
3. “A party’s right to relief is clear if the party seeking the preliminary injunction is likely to prevail on the merits of the permanent injunction.” *Dillon v. City of Erie*, 83 A.3d 467, 473 (Pa. Cmwlth. 2014)(citing *The Woods at Wayne Homeowners Association v. Gambone Brothers Construction Co., Inc.*, 893 A.2d 196, 204 (Pa. Cmwlth. 2006), *appeal denied*, 903 A.2d 1235 (Pa. 2006).
4. For purposes of injunctive relief, the status quo is “the last peaceable and lawful uncontested status preceding the underlying controversy between the parties or the alleged wrongful conduct of the parties sought to be enjoined.” *Wyland v. W. Shore Sch. Dist.*, 52 A.3d 572, 584 (Pa. Cmwlth. 2012)(citing *Tinicum Twp. v. Delaware Valley Concrete*, 812 A.2d 758, 762 n. 8 (Pa. Cmwlth. 2002).
5. If a property owner, deliberately and intentionally violates an express restriction running with the land or intentionally ‘takes a chance’, the appropriate remedy is a mandatory injunction to eradicate the violation. *Loeb v. Watkins*, 240 A.2d 513, 516 (Pa. 1968)(citing *Ventresca v. Ventresca*, 126 A.2d 515 (Pa. Super. 1956); *Moyerman v. Glanzberg*, 138 A.2d 681 (Pa. 1958)).

**Appearances:**

David W. Rahouser, Esq., *Attorney for Petitioner*

Jessica E. Weaver, Esq., *Attorney for Respondent*

## OPINION

Before Sponseller, J.

### PROCEDURAL HISTORY

This case concerns a *Complaint in Civil Action* and *Petition for Issuance of an Injunction* filed on August 4, 2017, by the Plaintiffs in which they request a preliminary injunction enjoining Ronald Effland and Angela Effland (hereinafter “the Defendants”) from allowing a non-profit organization to conduct business on Defendants’ residential property. Defendants filed Preliminary Objections in response to the Complaint, but did not file an Answer to the Complaint, and an Answer to the Petition for Preliminary Injunction. A hearing was held on October 18, 2017, in which evidence was presented and the Court heard testimony from numerous witnesses. As requested by the Court, each party submitted a brief, which were properly considered by the Court after briefs were filed, Plaintiff’s filed a Petition for Attorneys’ Fees. This matter is now ready for a decision.

### DISCUSSION

In order for the Court to order a preliminary injunction, the requesting party must prove each of the six (6) requisite elements: 1) a clear right to relief; 2) immediate and irreparable harm in the absence of an injunction; 3) restoration of the status quo; 4) no adequate remedy at law exists and the injunction is appropriate to abate the alleged harm; 5) greater injury will result by not granting than by granting the injunction; and 6) the preliminary injunction will not adversely affect the public interest. *Wyland v. West Shore School District*, 52 A.3d 572, 582 (Pa. Cmwlth. 2012) (citing *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mt., Inc.*, 828 A.2d 995 (Pa. 2003)). Due to the inherent nature of this extraordinary remedy, for a Court to grant a preliminary injunction, the petitioner must establish each and every one of the elements; if the petitioner fails to establish even just one of them, there is no need to address the others. *Cnty of Allegheny v. Commonwealth*, 544 A.2d 1305, 1307 (Pa. 1988). Here, the Court finds that the Plaintiffs have established the six required elements necessary for the issuance of a preliminary injunction. This Court will now address each element.

#### *I. Clear Right to Relief*

“A party’s right to relief is clear if the party seeking the preliminary injunction is likely to prevail on the merits of the permanent injunction.” *Dillon v. City of Erie*, 83 A.3d 467, 473 (Pa. Cmwlth. 2014)(citing *The Woods at Wayne Homeowners Association v. Gambone Brothers Construction Co., Inc.*, 893 A.2d 196, 204 (Pa. Cmwlth. 2006), *appeal denied*, 903 A.2d 1235 (Pa. 2006)). In the instant matter, it is uncontested that the Defendants’ property deed contains a recorded restrictive covenant prohibiting the usage of their property for non-residential purposes. Further, it is uncontested that the subject property is only zoned for residential use, and does not allow for the conduct of a commercial enterprise, with few exceptions, none of which are applicable to Defendants’ current use of the property. In fact, Defendants acknowledge that they were specifically informed by the Guilford Township Zoning Officer that commercial activities were a prohibited use of the property and in violation of the Guilford Township Zoning Ordinance.<sup>1</sup> Here, the Defendants’ do not argue that they have not violated the restrictive covenant, but rather they argue that they are not responsible for the violation(s) and that they are not the correct party to this action. Specifically, Defendants argue that this action should be brought against their “residential tenant” as it is the tenant, and the tenant alone, who “allows” a non-profit organization, PA Starz, Inc.,<sup>2</sup> a competitive cheerleading organization that charges its members a fee for participation and pays its contractor instructors, to use a large outbuilding on the subject property for cheerleading practice and instruction. The Court finds this argument meritless. From the evidence adduced at the hearing, it is clear to the Court that the Defendants knowingly leased the property to a family member of the PA Starz’ board of directors. The Defendants’ were aware that they were not permitted to lease the property directly to the organization and utilized this family member as a “straw man” specifically to avoid this issue.

Starting in as early as December of 2016, PA Starz showed an interest in leasing the Defendants’ property at 763 New Lane, Chambersburg, PA 17202 and Ronald Effland, one of the property owners, showed the board members of PA Starz’ the property and the outbuilding specifically. PA Starz, visited the property on numerous occasions through its individual board members. After doing so, the organization developed specific concerns prior occupying the property, including the requirement of an occupancy permit to utilize the outbuilding, the installation of a bathroom facility, and outdoor lighting. Effland personally improved the property to address these concerns and obtained the occupancy permit. While Defendants argue that the occupancy permit was needed to lease the property, the Court heard

---

<sup>1</sup> Hereinafter “Zoning Ordinance”

<sup>2</sup> Hereinafter “PA Starz”

testimony from a former Township Zoning Officer, Wayne Statler,<sup>3</sup> that an occupancy permit is not required for residential use and/or required to lease the property for residential purposes. Therefore, it is clear to this Court that Effland only obtained the occupancy permit to allow PA Starz to use the outbuilding. As further evidence of the true nature of the occupancy of the subject premises, the tenant of the property identified in the lease, Ronald Nalewak, an elderly parent of one PA Starz board members, entered into a three (3) year lease for this property with rent starting at \$2,000 a month (and increasing each subsequent year), even though he only receives a monthly social security payment in the amount of \$1,200.00. Nalewak never viewed the property prior to signing the lease, while PA Starz viewed the property multiple times. In fact, while Nalewak might be the signatory on the lease, Nalewak does not perform any of the rental obligations; PA Starz paid the security deposit, PA Starz pays the monthly rent directly to the property manager, and PA Starz has the million dollar liability insurance policy as required by the lease Nalewak signed. The Defendants knowingly permitted and in fact encouraged Nalewak to enter into the lease for the benefit of PA Starz in violation of the restrictive covenant and the Zoning Ordinance. Accordingly, Plaintiffs right to relief is clear and Plaintiffs' will likely succeed on the merits.

## *II. Immediate and Irreparable Harm in the Absence of an Injunction*

In the instant matter, the non-residential use is not slight, and thus is causing immediate and irreparable harm. This Court has heard uncontested testimony that several classes are held each day bringing in upwards of 20 to 30 participants for each class six (6) days a week. The President of PA Starz, Stacey Myers, testified that the classes were scheduled in order to stagger the influx and outflow of traffic to the property. However, due to the lack of parking available at the property, the staggering has done little to decrease the traffic congestion. In fact, most parents drop off and pick up their children as opposed to waiting for them at the property, which effectively doubles the amount of traffic the neighborhood experiences. Further, this Court heard credible testimony that the subject property's driveway is too narrow for multiple vehicles to pass each other, traffic backs up on the New Lane roadway as vehicles wait to enter or exit the property. Consequently, the non-residential use of the property has produced a significant increase in the number of vehicles using the neighborhood roadways.

Defendants argue that the traffic does not affect the Plaintiffs' use of their own property; however this Court finds this argument is without merit. The restrictive covenant and the Zoning Ordinances, respectively, are in

---

<sup>3</sup> Hereinafter "Zoning Officer"

place to ensure the residential nature of the individual properties and the neighborhood as a whole. Further, this Court heard credible testimony that the traffic and influx of individuals meandering around the 763 New Lane property is interfering with the Plaintiffs quiet use and enjoyment of their residential homes and the neighborhood. Therefore, the Plaintiffs have sufficiently demonstrated the immediate and irreparable harm caused in the absence of an injunction.

### *III. Restoration of the Status Quo*

“For purposes of injunctive relief, the status quo is “the last peaceable and lawful uncontested status preceding the underlying controversy between the parties or the alleged wrongful conduct of the parties sought to be enjoined.” *Wyland v. W. Shore Sch. Dist.*, 52 A.3d 572, 584 (Pa. Cmwlth. 2012)(citing *Tinicum Twp. v. Delaware Valley Concrete*, 812 A.2d 758, 762 n. 8 (Pa. Cmwlth. 2002)). In the instant matter, the Plaintiffs have shown that a preliminary injunction would preserve the status quo. Enjoining the Defendants from allowing the outbuilding to be used by PA Starz for their cheerleading practices, thus abating the commercial use of the property, brings the subject property to the last peaceable and lawful uncontested status. Defendants argue that a preliminary injunction will upend the status quo because a ‘residential lease’ is a permitted use of the property and therefore, they have not committed any wrongful conduct. However, as discussed above, permitting the use of the outbuilding by PA Starz does constitute contested and unlawful conduct. As for the ‘residential lease’ with Nalewak, an injunction prohibiting the Defendants from allowing PA Starz to utilize the outbuilding for the commercial use will in no way impact the ‘residential use’ permitted on the property. As stated another way, an injunction will not prohibit Nalewak from using the outbuilding for a residential purpose. Therefore, the issuance of an injunction would restore the status quo and thus, Plaintiffs have met this element.

### *IV. No Adequate Remedy at Law Exists and the Injunction is Appropriate to Abate the Alleged Harm*

‘If a property owner, deliberately and intentionally violates an express restriction running with the land or intentionally ‘takes a chance’, the appropriate remedy is a mandatory injunction to eradicate the violation. *Loeb v. Watkins*, 240 A.2d 513, 516 (Pa. 1968)(citing *Ventresca v. Ventresca*, 126 A.2d 515 (Pa. Super. 1956); *Moyerman v. Glanzberg*, 138 A.2d 681 (Pa. 1958)). As cited above, the Defendants knowingly and intentionally contracted with Nalewak through the residential lease for purposes of

allowing the PA Starz' to use the outbuilding in violation of the restrictive covenant and the Zoning Ordinance. The Plaintiffs have no legal remedy available in order to enforce the Zoning Ordinance and the restrictive covenants. Therefore, this Court finds that an injunction is the appropriate equitable remedy to abate the alleged harm. The Plaintiffs have satisfied this element.

*V. Greater Injury will Result by Not Granting than by Granting the Injunction*

As stated above, Plaintiffs have established that the conduct facilitated by the Defendants through their lease to Nalewak has resulted in the increase of visitors and traffic in the neighborhood and without regard to the safety and well-being of the residents. If a preliminary injunction was not granted, harm would continue to result and the Plaintiffs would be further denied the benefits associated with residential living. *See generally Grasso v. Thimons*, 559 A.2d 925 (Pa. Super. 1989). As such, the Plaintiffs have established that greater injury will result by not granting the injunction.

*VI. The Preliminary Injunction will Not Adversely Affect the Public Interest*

Finally, the Plaintiffs have established that a preliminary injunction would not adversely affect the public interest, but in fact, would promote the public interest. Here, Plaintiffs have raised several safety issues associated with the increased number of visitors to the neighborhood such as the lack of sufficient roadways to handle the increased traffic and a general lack of lighting for the increased pedestrian traffic. Simply put, granting a preliminary injunction in this instance would decrease the safety concerns and therefore enhance the public interest.

Moreover, it is in the public interest that restrictive covenants that preclude commercial activities in residential areas are upheld when challenged through conduct like that of the Defendants. The same can be said for zoning ordinances like the ones here which also restrict commercial activities in residential neighborhoods.

Finally, after having taken the evidence offered at the hearing of this matter, it is clear to the Court that the Defendants knowingly and willfully engaged in a course of conduct to defeat the covenants and ordinances by renting the property to a straw party. That is, the Defendants specifically endeavored to make use of their property in a way that is repugnant to the law. Certainly the public has an interest in making sure that fellow citizens comply with the law, and therefore the public interest is not adversely

affected by granting this injunction. For these reasons, Plaintiffs have sufficiently established this element.

### *VII. Preliminary Objections*

As discussed briefly above, the Defendants responded to the Complaint with preliminary objections. The Court notes, as pointed out in Plaintiffs' New Matter which was a part of their Answer to the Preliminary Objections, that the Defendants were served with the Complaint and Petition for Injunction on August 25, 2017. The Defendants filed their Preliminary Objections on October 6, 2017. Pennsylvania Rule of Civil Procedure 1026(a) provides that "[E]very pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading...." October 6 is more than 20 days after August 25. Therefore Defendants preliminary Objections were filed more than twenty days following the service of the Complaint. Accordingly, Defendant Preliminary Objections were not timely filed and the Court will dismiss the same without reaching the merits of the Objections.

### *VIII. Attorneys Fees*

Following the briefing period set by the Court, Plaintiffs filed a Petition for Attorneys' Fees based on 42 Pa.C.S.A. § 2503(9), which provides for the award of attorneys' fees and costs based upon the vexatious, arbitrary and bad faith conduct of a party. See 42 Pa.C.S.A. § 2503(9). Within this Petition, Plaintiffs allege approximately eighteen instances of vexatious and bad faith conduct on the part of the Defendants and counsel. At the conclusion of their Petition, Plaintiffs seek a hearing on the appropriateness of an award of attorneys' fees. The Court will grant this request for a hearing.

## **CONCLUSION**

In light of the foregoing, as the Plaintiffs have established each of the six requisite elements for the issuance of a preliminary injunction, the Plaintiffs' Request for Preliminary Injunction is **GRANTED**. The Defendants failed to timely file their Preliminary Objections, and therefore, the same will be **DISMISSED**. The Court finds that the Plaintiffs have adequately pled grounds for the award of attorneys' fees. Accordingly, the Court will **GRANT** Plaintiffs' request for a hearing on this issue. An appropriate Order follows.



## ORDER OF COURT

**NOW THIS** 14th day of November, 2017, having read and considered the Plaintiffs' *Petition for Issuance of an Injunction*, Defendants' *Answer to Plaintiff's Petition for Issuance of an Injunction*, Defendants' *Preliminary Objections*, Plaintiffs' *Answer to the Preliminary Objections* and the and *New Matter* attached thereto, Plaintiffs' *Brief*, and Defendant' *Brief in Opposition to Plaintiffs' Petition for Injunction*, and Plaintiffs' *Petition for Attorneys' Fees*, as well as the arguments of counsel at the hearing, the evidence presented, and the relevant law,

**IT IS HEREBY ORDERED** that Plaintiff's *Preliminary Injunction* is **GRANTED** pursuant to the attached Opinion.

**IT IS HEREBY FURTHER ORDERED** that Defendants' *Preliminary Objections* are **DISMISSED** pursuant to the attached Opinion.

**IT IS FURTHER ORDERED** that the Court will hold a hearing on Plaintiff's *Petition for Attorney's Fees* on the 11th day of January, 2018 at 1:30 p.m. in Courtroom 5 of the Franklin County Courthouse before the undersigned.

*Pursuant to the requirements of Pa. R.C.P. 236(a)(2)(b) and (d), the Prothonotary shall immediately give written notice of the entry of this Order, including a copy of this Order, to each party's attorney of record, or if unrepresented, to each party; and shall note in the docket the giving of such notice and the time and manner thereof.*