

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION**

DEVE DEVELOPMENT, INC.	:	
	:	JUNE TERM 2005
	:	
v.	:	NO: 969
	:	
	:	CONTROL NO: 101924
	:	
JOSEPH J. GARGIULO, et al.	:	COMMERCE PROGRAM
	:	

**O R D E R**

AND NOW, this 3rd day of January, 2006, upon consideration of Plaintiff Deve Development, Inc.'s Motion to Determine Preliminary Objections to Defendant Joseph J. Gargiulo's Counterclaim, and response thereto, and in accord with the Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the Preliminary Objections are SUSTAINED. Count III of Defendant Joseph J. Gargiulo's Counterclaim is DISMISSED.

FURTHER, Defendant Joseph J. Gargiulo's claim for counsel fees is STRICKEN without prejudice.

**BY THE COURT,**

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**HOWLAND W. ABRAMSON, J.**

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**OPINION**

Before the Court are Plaintiff Deve Development, Inc.’s Preliminary Objections to Defendant Joseph J. Gargiulo’s Counterclaim. For the reasons set forth below, said preliminary objections are sustained.

**Background**

In this quiet title action, plaintiff Deve Development, Inc. (hereinafter, “plaintiff”) seeks to quiet title to the property located at 1108-1114 Greenwich Street, Philadelphia, Pennsylvania. See Amended Complaint. Defendant Joseph J. Gargiulo (hereinafter, “defendant”) owns the adjacent property at 1106 Greenwich Street, Philadelphia, Pennsylvania. Id. at ¶ 6. The dispute concerns, *inter alia*, the boundary line between plaintiff’s property and defendant’s property and whether an alley exists between the properties (hereinafter, “the Alley”). Id. at ¶ 9; Answer to Amended Complaint at ¶ 9.

Plaintiff alleges that it owns the property located at 1108-1114 Greenwich Street pursuant to a deed dated July 26, 2002. See Amended Complaint at ¶ 5. Plaintiff contends that the deed includes the Alley. Id. at ¶ 10. Plaintiff claims that it has obtained

a variance to build new homes on the property at 1008-1114 Greenwich Street, but that defendant has opposed the project because he claims that the new construction will encroach upon the Alley between his property and plaintiff's property. See Plaintiff's Memorandum of Law in Support of Preliminary Objections at 1. Plaintiff asserts that the Alley no longer exists because defendant's residence was built on the Alley. See Amended Complaint ¶ 11. As support for this claim, plaintiff contends that a City of Philadelphia survey performed in December 2004 shows that defendant's residence was built on the Alley described in plaintiff's deed. Id. at ¶ 20. Defendant alleges that his deed dated January 26, 1999 conveyed fee simple title in the property at 1106 Greenwich Street to him. See Answer to Amended Complaint, ¶ 41. He contends that this conveyance included rights to the Alley, which provides the sole and necessary access to the rear of his property. Id. He claims that, as the record holder of fee simple title to his residence at 1106 Greenwich Street, he holds an appurtenant interest in the Alley. See Answer to Amended Complaint, ¶ 57.

Defendant filed a four-count counterclaim against plaintiff for declaratory judgment (Count I), quiet title (Count II), slander of title (Count III), and easement by necessity (Count IV). Plaintiff filed preliminary objections only to Count III of defendant's counterclaim for slander of title. Specifically, plaintiff raises two preliminary objections to Count III of the counterclaim. First, plaintiff claims that Count III should be dismissed for legal insufficiency (demurrer) pursuant to Pa. R.C.P.(a)(4). Second, plaintiff claims that Count III should be dismissed for lack of specificity pursuant to Pa. R.C.P.(a)(3). Plaintiff also claims that defendant's request for an award of counsel fees should be dismissed for legal insufficiency.

## **Discussion**

### **I. Slander of Title Claim**

Defendant's counterclaim for slander of title alleges that "plaintiff has made the following disparaging and slanderous statements and representations of and concerning the Alley and Answering Defendant's residence and Answering Defendant's title and appurtenant interests therein, in the presence and hearing of numerous persons:

(a) That Plaintiff is the exclusive owner of the Alley; and

(b) That Answering Defendant's building unlawfully encroaches upon the Alley."

Counterclaim at ¶ 67. The count also states that "plaintiff knew that the disparaging statements were false when made, or acted with reckless disregard or negligence regarding the veracity of said statements." Id. at ¶ 68. Defendant further alleges that "plaintiff published the disparaging statements intentionally for the purpose of injuring the Answering Defendant, causing the recipients of the disparaging statements to suspect and believe that Answering Defendant's estate and interest in 1106 Greenwich Street was defective or of diminished value; hindering and preventing the Answering Defendant from obtaining financing, selling or disposing of his estate or interest in 1106 Greenwich Street." Id. at ¶ 69. Alternatively, defendant alleges that plaintiff's publication of the disparaging statements was negligent. Id.

Slander of title is "is the false and malicious representation of the title or quality of another's interest in goods or property." Pro Golf Mfg. v. Tribune Review Newspaper Co., 570 Pa. 242, 247, 809 A.2d 243, 246 (2002). Section 651 of the Restatement (Second) of Torts sets forth the elements that a party must allege and prove in order to

succeed in a slander of title action.<sup>1</sup> See Forman v. Cheltenham Nat'l Bank, 348 Pa. Super. 559, 562, 502 A.2d 686, 688 (1985). One such element is “the defendant's intent to affect plaintiff's interests in an unprivileged manner.” Restatement 2d of Torts, § 651(k). A person has a conditional privilege to disparage another's property in land, chattels, or intangible things by an assertion of an inconsistent legally protected interest in himself. See Forman, 348 Pa. Super. at 562, 502 A.2d at 688; Narducci v. Regis Development Corp. 2005 Phila. Ct. Com. Pl. LEXIS 301, \*2, Commerce Program (2005).

Section 647 (Conditional Privilege of Rival Claimant) of the Restatement

(Second) of Torts states:

A rival claimant is conditionally privileged to disparage another's property in land, chattels or intangible things by an assertion of an inconsistent legally protected interest in himself.

Comment (c) of that section defines a “rival claimant” as follows:

A “claimant” is one who asserts that he has property in land, chattels or intangible things. If two persons claim one or more of the same legally protected interests, they are

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<sup>1</sup> § 651 (Burden of Proof) states:

- (1) In an action for injurious falsehood the plaintiff has the burden of proving, when the issue is properly raised,
  - (a) the existence and extent of the legally protected interest of the plaintiff affected by the falsehood;
  - (b) the injurious character of the falsehood;
  - (c) the falsity of the statement;
  - (d) publication of the falsehood;
  - (e) that the circumstances under which the publication was made were such as to make reliance on it by a third person reasonably foreseeable;
  - (f) the recipient's understanding of the communication in its injurious sense;
  - (g) the recipient's understanding of the communication as applicable to the plaintiff's interests;
  - (h) the pecuniary loss resulting from the publication;
  - (i) the defendant's knowledge of the falsity of the statement or his reckless disregard as to its truth or falsity;
  - (j) the defendant's motivation of ill will;
  - (k) the defendant's intent to affect plaintiff's interests in an unprivileged manner; and
  - (l) abuse of a conditional privilege.
- 2) The defendant has the burden of proving, when the issue is properly raised, that the publication was absolutely or conditionally privileged.

“rival claimants.”

Here, plaintiff brought this action to quiet title to the property located at 1108-1114 Greenwich Street. A quiet title action is, by definition, a “proceeding to establish the plaintiff’s title to land by bringing into court an adverse claimant and there compelling him either to establish his claim or be forever after estopped from asserting it.” Black’s Law Dictionary 1603 (6<sup>th</sup> Ed., West 1990). Plaintiff and defendant are rival claimants in that they both claim a legal interest in the property in dispute. Therefore, plaintiff is conditionally privileged to “disparage” defendant’s right to the property in question by the filing of a lawsuit which asserts an inconsistent legally protected interest in that same property. See Narducci, 2005 Phila. Ct. Com. Pl. LEXIS at \*3-4.

Plaintiff’s preliminary objection to Count III of defendant’s counterclaim is sustained.<sup>2</sup>

## **II. Attorneys’ Fees**

Plaintiff also preliminarily objects to defendant’s claim for counsel fees on the basis of legal insufficiency. Plaintiff argues that defendant’s counterclaim does not allege a statutory basis for an award of counsel fees, nor does it allege an agreement between the parties allowing an award of counsel fees. See Preliminary Objections at ¶¶ 20, 21. In response, defendant asserts that he has stated a legally sufficient claim for counsel fees under 42 Pa.C.S.A. § 2503(9) because plaintiff’s claims are vexatious and meant to harass defendant.<sup>3</sup> See Brief in Support of Defendant’s Answer to Plaintiff’s

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<sup>2</sup> Since the Court has sustained plaintiff’s preliminary objection on the basis of legal insufficiency, it need not address plaintiff’s preliminary objection for lack of specificity.

<sup>3</sup> 42 Pa.C.S.A. § 2503(9) states: The following participants shall be entitled to a reasonable counsel fee as

Motion to Determine Preliminary Objections at 8-9.

The general rule is that there can be no recovery of attorneys' fees from an adverse party, absent an express statutory authorization, a clear agreement by the parties, or some other established exception. See Merlino v. Delaware County, 556 Pa. 422, 425, 728 A.2d 949, 951 (1999); Sheriff v. Sheriff, 2002 Pa. Super. 207, P5, 802 A.2d 644, 645 (2002); Hart v. O'Malley, 2001 Pa. Super. 221, P14, 781 A.2d 1211, 1216 (2001). In defendant's counterclaim, defendant requests counsel fees in the "WHEREFORE" clauses. There is no statute, agreement by the parties, or any other basis that is alleged in the counterclaim that would allow for the recovery of counsel fees from plaintiff. It is only within his response to plaintiff's motion for summary judgment that defendant alleges that 42 Pa.C.S.A. § 2503(9) is the basis for the recovery of counsel fees. See Brief in Support of Defendant's Answer to Plaintiff's Motion to Determine Preliminary Objections at 8-9. In his response, defendant states:

Plaintiff's claims are vexatious in that such claims fail to recognize Defendant's legal and equitable right to the Alley and in essence seeks [sic] to deprive Plaintiff [sic] of his sole method of access to the rear of his property. Plaintiff's suit was brought solely in an effort to harass Defendant after Plaintiff's attempts to secure Defendant's consent to the termination of the Alley or to plaintiff's use of the Alley for construction purposes were unsuccessful.

Id. at 9.

Defendant has not sufficiently identified conduct on the part of plaintiff that would be considered arbitrary, vexatious, or in bad faith to allow recovery of counsel fees. See Shared Communication Services v. Greenfield & Co., 2001 Phila. Ct. Com. Pl.

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part of the taxable costs of the matter: (9) Any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.

LEXIS 63, \*14, Commerce Program (2001). Moreover, a claim asserted pursuant to 42 Pa.C.S. § 2503 “should be raised at the conclusion of the underlying action, utilizing the record and history in the underlying action as a basis to support the claim.” Shevchik v. Zwergel, 8 Pa. D. & C.4th 66, 67 (1990).<sup>4</sup> Therefore, plaintiff’s preliminary objection requesting that the Court dismiss defendant’s claim for counsel fees is sustained.

### **CONCLUSION**

For all the foregoing reasons, Plaintiff Deve Development, Inc.’s Preliminary Objections to Defendant Joseph J. Gargiulo’s Counterclaim are sustained. The Court will enter a contemporaneous Order consistent with this Opinion.

**BY THE COURT,**

**HOWLAND W. ABRAMSON, J.**

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<sup>4</sup> The issue in Shevchik was whether 42 Pa.C.S. § 2503(9) permits a claim in the underlying action or whether the claims arising thereunder must await the conclusion of the underlying action. Id. at 67. In Shevchik, the original defendants filed preliminary objections to additional defendants’ new matter, requesting that additional defendants’ prayer for counsel fees pursuant to 42 Pa.C.S. § 2503(9) be stricken from the new matter. Id. at 66-67. The Court held that a claim pursuant to 42 Pa.C.S. § 2503 is not properly raised in the underlying action, but should be raised at the end of the underlying action. Id. at 67. The Court stated, “The right to bring such a claim is preserved but separated and heard when all the facts in the underlying case are known.” Id.