

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

JAMES MARANSKY, ET.AL,	:	March Term 2017
	:	
Plaintiff,	:	
	:	
v.	:	No. 79
	:	
JOHN SCOTT,	:	Commerce Program
	:	
Defendant.	:	559 CD 2018
	:	
	:	

**OPINION**

**McINERNEY, S.J.**

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FIRST JUDICIAL DISTRICT OF PHILADELPHIA  
June 19, 2018

This opinion is submitted relative to this court's order dated April 9, 2018 denying defendant's Motion to Determine Immunity. For the reasons discussed below, the April 9, 2018 order should be affirmed. Plaintiff James Maransky, Kevin Baird, Moyer Street Associates, Icehouse LLC, FT Holdings LP and EPDG LP (collectively referred to as "Plaintiffs") purchased lots on 1247 East Columbia Avenue and Moyer Street with the intent to construct a condominium to be known as Icehouse Condominiums and townhouses.<sup>1</sup> The Philadelphia Zoning Board of Adjustment ("ZBA") reviewed and approved Phase 1 of the Icehouse Condominium development in 2007 and Phase 2 in 2009. The ZBA authorized the construction of 26 residential units with parking and a commercial unit. As part of the plan for construction, plaintiffs merged two additional lots located at 413 and 415 Moyer Street to construct a four story structure with 9 residential units.<sup>2</sup>

Defendant John Scott ("Defendant") is a real estate speculator, developer and neighbor in the Fishtown section of Philadelphia where plaintiffs intended to construct the condominium and

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<sup>1</sup> Plaintiffs' second amended complaint ¶¶26, 29.

<sup>2</sup> Id. at ¶¶ 18-25.

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townhouses.<sup>3</sup> Defendant did not object to the issuance of zoning permits for Phases 1 and 2 of the Icehouse Condominium project. On April 17, 2012, the Fishtown Neighbors Association (FNA) met to discuss Phase 3 of the Icehouse project. Defendant did not attend the meeting. On May 2, 2012, the ZBA held a public hearing with regard to variances requested to construct Phase 3 of the Icehouse Condominium project. At this hearing, defendant objected, via his attorney, who presented a letter of objection, to the Icehouse project for the first time. The objections were as follows: 1) inadequate notices for the hearing, 2) the lack of special circumstances or hardships to grant a dimensional variance for the construction<sup>4</sup>, and 3) a failure to present evidence that the construction will impact the traffic flow in the neighborhood.<sup>5</sup> After a hearing, the ZBA issued a notice of decision granting all the requested variances for Phase 3 of the Icehouse Condominium project to plaintiffs. On June 15, 2012, defendant appealed the grant of variances to the Philadelphia Court of Common Pleas. On December 3, 2012, plaintiffs filed a motion to quash the appeal. On January 9, 2013, the Honorable Leon Tucker of the Court of Common Pleas of Philadelphia County granted plaintiffs' motion to quash the appeal and dismissed the appeal based on defendant's lack of standing.<sup>6</sup>

Subsequently, defendant appealed Judge Tucker's decision to the Commonwealth Court of Pennsylvania. On March 21, 2014, the Commonwealth Court reversed the decision of Judge Tucker finding that the standing objection was waived by plaintiffs since it was not raised at the ZBA hearing. Thereafter, plaintiffs appealed the Commonwealth Court's decision to the

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<sup>3</sup> Plaintiffs' second amended complaint ¶ 17.

<sup>4</sup> Defendant objected to a height exceeding the maximum allowable height by more than 9 feet and the construction of nine units instead of two family dwellings. (Plaintiffs' second amended complaint Exhibit "A").

<sup>5</sup> Plaintiffs' second amended complaint ¶¶ 33-46. See also, Plaintiffs' second complaint Exhibit "A".

<sup>6</sup> Id.

Supreme Court of Pennsylvania which granted an allowance of appeal. On October 29, 2015, the Supreme Court of Pennsylvania reversed the Commonwealth Court and found that the issue of standing had not been waived. The matter was then remanded to the Commonwealth Court for further proceedings. Ultimately, the Commonwealth Court upheld Judge Tucker's order dismissing the appeal for lack of standing. Defendant filed an application for re-argument which was denied.<sup>7</sup>

In the meantime, in 2007, plaintiffs acquired 412-424 Moyer Street. Plaintiffs presented a plan for the construction of townhouses on the consolidated lots as part of the planned urban development. The ZBA held a public record hearing to review the requested variances on June 26, 2013. At the hearing, defendant presented testimony regarding his loss of a view and the nature of the surrounding properties. A notice of decision issued on October 22, 2013 granting the variance requested by plaintiffs. On November 21, 2013, defendant appealed the decision granting the variances to plaintiffs to the Philadelphia Court of Common Pleas in Philadelphia County. On February 6, 2015, the Honorable Nina Wright Padilla upheld the ZBA decision granting variances to Moyer Street. Defendant appealed the decision to the Commonwealth Court of Pennsylvania which upheld Judge Padilla's decision.<sup>8</sup>

Plaintiffs initiated this action by writ of summons. Plaintiffs filed a complaint and amended the complaint on several occasions. The second amended complaint was filed on November 27, 2017. The second amended complaint alleges that plaintiffs were damaged as a result of defendant's appeal of two zoning variances, one granted in 2012 for 413 and 415 Moyer Street and 1247 East Columbia Avenue ("Icehouse Project") and one granted in 2013 for 412-

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<sup>7</sup> Plaintiffs' second amended complaint ¶¶ 47-49.

<sup>8</sup> Plaintiffs' second amended complaint ¶¶ 59-71.

424 Moyer Street (“Moyer Street Project”). The claims asserted against defendant are for wrongful use of civil proceedings and tortious interference with contractual relationships. Defendant answered the second amended complaint with new matter and counterclaims. On February 27, 2018, defendant filed a motion to determine immunity under the Environmental Immunity Act, 27 Pa. C. S. A. § 8301 *et. seq.* On April 9, 2018, the court denied the motion to determine immunity. On April 13, 2018, defendant appealed this court’s order to the Commonwealth Court of Pennsylvania. Per order of this court, defendant filed a statement of matters complained of on appeal.<sup>9</sup> As will be discussed below, this court’s order dated April 9, 2018 should be affirmed.

## **DISCUSSION**

The Environmental Immunity Act, 27 Pa. C. S. § 8302 (a) provides in relevant part as follows:

Except as otherwise provided in subsection (b), a person that, pursuant to Federal or State law, files an action in the courts of this Commonwealth to enforce an environmental law or regulation or that makes an oral or written communication to a government agency relating to enforcement or implementation of an environmental law or regulation shall be immune from civil liability in any resulting legal proceeding for damages where the action or communication is aimed at procuring favorable governmental action.

In order to determine if immunity is appropriate in a given situation, the party seeking immunity must make a threshold showing the cause of action arose because he made an oral or

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<sup>9</sup> Defendant’s statement of matters complained of on appeal complains of six errors by the court. Of the six, only two are properly before the court since they directly address the denial of the motion to determine immunity. The remaining four matters are not properly raised since the errors address preliminary objections which are the subject of a separate order overruling preliminary objections which was not appealed and are interlocutory in nature and not subject to appeal at this time.

written communication (1) “to a government agency” *and* (2) the communication was made “in connection with the implementation and enforcement of environmental law and regulations.”<sup>10</sup> If the court determines that this threshold is satisfied, the party opposing immunity must then demonstrate one of the statutory exceptions applies or that some other overriding legal basis defeats the immunity claim. The court shall hold a hearing if the party seeking immunity files a motion requesting a hearing.<sup>11</sup>

In the case *sub judice*, defendant failed to make the threshold showing that his communication was made “in connection with the implementation and enforcement of environmental law and regulations”. Defendant did make objections to governmental agencies regarding the variances requested by plaintiffs from the ZBA and issued by the ZBA for the Icehouse Condominium and the Moyer Street properties. However, the objections made by defendant were not based on implementation or enforcement of environmental laws and regulations. Instead, defendant’s objections were based on a failure to provide proper notice of the ZBA hearing, failure to establish undue hardship regarding the issuance of a special variance, that the proposed structure violated height restrictions, that the proposed structure did not conform to the character of the neighborhood, that there would be less light on the street, that the proposed structure did not conform to the character of the neighborhood and that there would be parking and traffic issues.<sup>12</sup> Defendant, in his motion, identified numerous actions by plaintiffs, he allegedly “brought or attempted to bring” to the attention of the ZBA.<sup>13</sup> The acts allegedly

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<sup>10</sup> *Carlson v. Ciavarelli*, 100 A.3d 731, 736 (Pa.Cmwlt.,2014)

<sup>11</sup> *Id.* citing *Pennsbury Vill. Assocs. v. McIntyre*, 608 Pa. 309, 11 A.3d 906, 912 (2011).

<sup>12</sup> See, *Scott v. City of Philadelphia*, 1206-2091, p. 9 (Ct. Com. Pleas. Phila.) (March 25, 2013, Tucker, J.).

<sup>13</sup> See paragraph 14 of defendant’s motion to determine immunity.

identified by defendant are plaintiffs practice of dumping waste, plaintiffs' failure to provide detailed information on the extent of contamination at the subject site, plaintiffs' failure to provide any acceptable level of dust control while excavating the site and discovering buried asbestos, plaintiffs failure to contain contaminants within the property with a silt fence and dumping of purported contaminated soil in the Delaware River watershed and the back filling of new foundations with the same soil. The record from the underlying appeals in the cases captioned *Scott v. City of Philadelphia et. al.*, 1206-2091 and *Scott v. Zoning Board of Adjustments, et. al.*, 1311-2363 and the record in this action does not evidence any communication relating to the enforcement or implementation of environmental law or regulation. In fact, defendant in the zoning proceedings argued at one point that the ZBA's findings that the property was contaminated "is contrived and 'not supported by any evidence other than speculation..'"<sup>14</sup> Defendant was concerned with the projects' height, his view and light as well as traffic and parking. These concerns do not compare to the implementation or enforcement of environmental law and regulations.<sup>15</sup> This action is not an attempt to chill defendant's speech due to environmental laws or regulations. This action relates to defendant's filing of improper zoning appeals for which he lacked standing, using the court system to delay plaintiffs' projects, seeking financial recompense from plaintiffs and interfering with plaintiffs' contractual obligations and therefore is not subject to the protections of the Act.<sup>16</sup> Since,

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<sup>14</sup> See, *Scott v. Zoning Board of Adjustments*, 358 C.D. 2015, p. 19 (Cmwlth. Ct. April 13, 2017).

<sup>15</sup> See, *Pennsbury Vill. Assocs. v. McIntyre*, 608 Pa. 309, 11 A.23d 906, 912 (2011).

<sup>16</sup> Plaintiffs' memorandum of law in opposition to defendant's motion to determine immunity.


defendant did not identify any environmental laws or regulations to enforce, he is not entitled to immunity under the Environmental Immunity Act, 27 Pa. C. S. A. § 8301 *et. seq.*<sup>17</sup>

### CONCLUSION

For the foregoing reasons, this court's order dated April 9, 2018 should be affirmed.

Date: June 19 2018

BY THE COURT,

  
PATRICIA A. McINERNEY, S.J.

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<sup>17</sup> See, *Pennsbury Vill. Assocs. v. McIntyre*, 608 Pa. 309, 11 A.23d 906, 912 (2011)(Potential worries about future storm water run-off “cannot be equated with ‘the implementation or enforcement of environmental law and regulations.’”) See also, *Carlson v. Ciavarelli*, 100 A.2d3d 731 (Cmwth. Ct. 2014) (Applications and communications with Township and the zoning board concerning meeting special exception criteria was not connected to the implementation and enforcement of Township environmental programs and therefore not subject to immunity.).