COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION

No. 265 IP of 2015
Control No. 151100

In re: Wissahickon Playground

OPINION SUR APPEAL

OVERTON, J.

Gregory Paulmier, Melissa Graham, Dean Brown, Wayne Allen, Karletha Brooks, Ronald Hays, Henry Sawyer, Mirian L. Rollins, Dock Brown, Helen Jones, and Rodney Haines (collectively "Appellants") have filed an appeal of this Court's November 3, 2015 Decree denying their Petition for Preliminary Injunctive and Declaratory Relief.[1] They appeal this Court's decision not to enjoin the City of Philadelphia, the Philadelphia Housing Authority, and the Philadelphia Authority for Industrial Development from continuing to build low-density rental housing units at the 5326 Pulaski Avenue, Philadelphia, PA 19144 location.

Facts

The parties prepared a Joint Stipulation of Facts, which was submitted to the Court. In lieu of a full recitation of facts, the Court relies on the Joint Stipulation of Facts entered into evidence, attached hereto as Exhibit P-12.

By way of brief introduction, this matter concerns a piece of land bordered by Pulaski Avenue, Queen Lane, Priscilla Street, and Penn Street in the Germantown section of Philadelphia. In the 18th century, this land was used as a burial ground for "strangers, negroes, and mulattos."

[1] The Court notes that only two Petitioners attended the hearing. Petitioners Melissa Graham, Dean Brown, Wayne Allen, Karletha Brooks, Ronald Hays, Mirian L. Rollins, Dock Brown, Helen Jones, and Rodney Haines were not present. (N.T. 10/14/15, 67:24-69:17).

(N.T. 10/14/15, 4:14-16). Beginning in 1915, the land became used as a playground. (N.T. 10/14/15, 6:2). On August 8, 1935, the land was deeded to the City of Philadelphia (hereinafter "the City"). (N.T. 10/14/15, 6:5-9). On July 9, 1953, half of the property was sold to the Philadelphia Housing Authority (hereinafter "PHA") to build high-rise housing projects. (N.T. 10/14/15, 7:17-20).

Beginning in 2005, the City and PHA began to examine the property for possible redevelopment (hereinafter "Redevelopment Plan"). (Joint Stipulation of Facts, ¶2). Between 2005 and 2010, the Redevelopment Plan was refined with resident and community participation. (Joint Stipulation of Facts, ¶4). On March 4, 2010, City Council introduced Ordinance No. 100130 which proposed the City's conveyance of 5326 Pulaski Avenue to Philadelphia Authority for Industrial Development (hereinafter "PAID"). (Joint Stipulation of Facts, ¶5). City Council passed this Ordinance on April 8, 2010. (Joint Stipulation of Facts, ¶6). Eventually the Redevelopment Plan proposed that the 120-unit rental high-rise building be replaced by 55 lower density public housing rental units. (Joint Stipulation of Facts, ¶¶3-4, 8).

From at least 2011 onward, Petitioners "complained" about the proposed construction at the public meetings. (N.T. 10/14/15, 9:21-22); *see also* (Joint Stipulation of Facts, ¶¶11-13; 22-24). On June 27, 2012, Petitioner Paulmier stated that the Westside Neighborhood Council intended to file a lawsuit. (Joint Stipulation of Facts, ¶27).

No legal action was taken until September 11, 2014 when Attorney Samuel C. Stretton sent a letter to Kelvin Jeremiah, President and CEO of PHA and Councilwoman Cindy Bass stating that he represented Petitioners and that it was "his position that this [property] has been used as a playground for many years and the use should not be changed without Orphans' Court approval." (Joint Stipulation of Facts, ¶36). On December 2, 2014, Attorney Stretton informed Attorney Starr

Marshall Cash, Senior Council at PHA, that he would be "filing something shortly." (Joint Stipulation of Facts, ¶41). On March 3, 2015, Petitioners commenced this action. (Joint Stipulation of Facts, ¶47).

Procedural History

On March 3, 2015, Petitioners filed a Complaint Seeking Injunctive and Declaratory Relief. On March 19, 2015, the Court informed Petitioners that the Complaint was filed incorrectly, and that the action should have been commenced by petition and citation, pursuant to Local Orphans' Court Rule 1.2.P(1). On March 26, 2015, Petitioners filed a Petition for Citation seeking a preliminary and permanent injunction and declaratory relief. The Petition for Citation sought to enjoin the City of Philadelphia (hereinafter "the City"), the Philadelphia Housing Authority (hereinafter "PHA"), and the Philadelphia Authority for Industrial Development (hereinafter "PAID") (collectively "Appellees") from developing the property into low-density rental housing units. The Petition for Citation also sought to have the Court order the Appellees to reopen the property as a playground. A hearing was held from October 14-15, 2015. The Court issued a Decree with its findings on November 3, 2015. A Notice of Appeal was timely filed on November 12, 2015.

Statements of Matters Complained of on Appeal were requested and properly tendered on November 25, 2015. Petitioners raised the following issues in their Statement of Matters Complained of on Appeal pursuant to Pa. R.A.P. 1925(b):

1. Did the Honorable George Overton err in denying the request for preliminary injunction and declaratory relief when he dismissed the case on the Doctrine of Laches? Did Judge Overton err in placing an inexcusable delay on Petitioners?

2. Was the Doctrine of Laches not applicable? The Plaintiffs are residents surrounding the playground that was demolished. The Defendants, The City of Philadelphia Housing Authority, had the duty and obligation to seek Orphans' Court approval to sell the property, which was an actively used playground and park. As a result, the Defendants erred and failed in not seeking Orphans' Court approval. Judge Overton erred in not addressing that issue. The requirement would have been pursuant to the Public Trust Doctrine and pursuant to the Dedicated and Donated Property Act (53 P.S. 3382, 3382, 3384, and 3385), and the Inalienable Property Act (20 Pa. C.S.A. 8301). The requirement to seek Orphans' Court approval was established in the case of *In re Erie Golf Course*, 992 A.2d 75 (Pa. 2010). The Public Trust Doctrine was established by the case of *Board of Trustees of the Philadelphia Museum v. Trustees of University of Pennsylvania*, 96 A.2d 123 (Pa. 1915). Therefore, the Doctrine of Laches would not apply since the Defendants did not have clean hands. This was not addressed by Judge Overton. The Defendants had the obligation to seek court approval and not sell the property illegally since the property had been [and] was still being used as an active playground and park. The Doctrine of Laches, therefore would not apply. Further, the case law, as set forth in *Sprague v. Casey*, 550 A.2d 184 (Pa. 1988), states that the Doctrine of Laches would not apply if the opposing party failed to take the appropriate action. Further Judge Overton failed to recognize that the neighbors did not have any real assets or funds. The neighbors, through Mr. Paulmier, complained repeatedly at meetings in 2011, 2012, 2013, and 2014. The neighbors told the Defendants to seek court approval. The neighbors said they had a lawyer. Mr. Stretton sent letters in September of 2014 and filed the lawsuit in March of 2015. The Court failed to recognize that residents surrounding this area have limited funds and assets to retain an attorney. The Court failed to realize that

it takes time for neighbors to get the monies together to be able to do this and Mr. Stretton was doing this on a quasi pro bono basis. Further, the Court ignored the evidence that the building was advertised to be built at the end of 2014. Further, for several years, the project could not proceed because of the various certifications needed and review because of the burial ground issue. Therefore, this is not intentional or excusable (sic) delay. This case involves a situation where the Defendants had an absolute duty under case law to seek court approval before they did anything, and did not do so. This is a case where the Defendants were notified by the Plaintiffs repeatedly at meetings over a three year time period of that obligation, and they didn't do anything. The Plaintiffs, who are neighborhood residents without money for legal fees, retained Mr. Stretton, who is an extremely busy lawyer, to do this on a quasi pro bono basis. It took time to get monies together and Mr. Stretton, during that time period, had numerous pro bono matters, many of which were pending in the Commonwealth and the Supreme Court of Pennsylvania. Therefore Judge Overton erred in finding the Doctrine of Laches would apply under those circumstances.

3. Judge Overton erred since the elements of a preliminary injunction were met by the Plaintiffs and there was irreparable harm since case law was violated and an active playground was sold and rebuilt on.

Discussion

A. The Court Properly Applied the Equitable Doctrine of Laches

Appellants assert that the Court incorrectly applied the equitable doctrine of laches to the instant case. This is without merit.

It is well-settled that equity has established the doctrine of laches to preclude actions that are brought without due diligence and result in prejudice to the non-moving party. *Brodt v. Brown*, 172

A.2d 152, 153-54 (Pa. 1961). There are two essential elements of the laches defense: (1) a delay arising from the petitioner's failure to exercise due diligence and (2) prejudice to the respondents resulting from the delay. *Fulton v. Fulton*, 106 A.3d 127, 131 (Pa. Super. 2014). The rationale of the doctrine is that "acquiescence is presumed from delay." *Leuschen v. Cook,* 21 A.2d 496, 499 (Pa. Super. 1941). Its application is dependent upon the specific facts and circumstances of each case. *In re Estate of Scharlach,* 809 A.2d 376, 382-83 (Pa.Super.2002) (quoting *Sprague v. Casey*, 550 A.2d 184, 187-88 (Pa. 1988)).

Unlike the application of the statute of limitations, exercise of the doctrine of laches does not depend on a mechanical passage of time. *Fulton*, 106 A.3d at 131. Additionally, the party asserting laches as a defense must present evidence demonstrating prejudice from the lapse of time. *Id.* Such evidence may include establishing that the respondent has changed his position in anticipation that the opposing party has waived his claims. *Id.* (quoting *Commonwealth ex rel. Baldwin v. Richard,* 751 A.2d 647, 651 (Pa. 2000)).

1. Appellants Failed To Exercise Due Diligence

When analyzing whether a party exercised due diligence, "the focus is on what the party reasonably should have known "by the use of the means of information within his reach, with the vigilance the law requires," not on what he actually knew." *Fulton*, 106 A.3d at 134 (internal citations omitted). The Pennsylvania Supreme Court found that in terms of the time element, a lack of due diligence in prosecuting a claim, along with the lack of due diligence in instituting it, can activate laches. *Nilon Bros. Enterprises v. Lucente*, 461 A.2d 1312, 1314 (Pa. Super. 1983).

In *Nilon Bros. Enterprises v. Lucente*, a three to four year delay triggered the application of laches. *Id.* In 1966 the City of Philadelphia leased Veterans' Stadium to the Philadelphia National League Club (Phillies). *Id.* at 1313. In 1970, after a bidding process as required by the

Philadelphia Home Rule Charter, plaintiff caterer was granted concession rights. *Id.* In 1971, platintiff caterer became aware that defendant caterer had begun to cater at the stadium. *Id.* Plaintiff caterer did not initiate the lawsuit seeking to enjoin defendant caterer's activities until 1975. *Id.* After plaintiff caterer's request for preliminary injunction was denied, it did not pursue the case for another year and three-quarters. *Id.* The Court ultimately found that the application of laches was appropriate because plaintiff caterer delayed approximately three and a half years in instituting its suit and delayed a further year and a half in prosecuting its suit following the rejection on appeal of its request for a preliminary injunction. *Id.* at 1314.

In the instant case, there was a lack of due diligence by Appellants. Appellants knew or should have known about the Redevelopment Project, as it had been highly publicized for over a decade. (Joint Stipulation of Facts, ¶4). At minimum, Appellants were aware of the plan to demolish the high-rise on March 4, 2010 when City Council first introduced Ordinance No. 100130. (Joint Stipulation of Facts, ¶5). Furthermore, City Council gave advanced public notice of the session in which Ordinance No. 100130 was voted upon. (Joint Stipulation of Facts, ¶6). Said session occurred on April 8, 2010. (Joint Stipulation of Facts, ¶6). The PHA Board of Commissioners approved the Ordinance on October 21, 2010. (Joint Stipulation of Facts, ¶8). At the June 27, 2012 public meeting regarding the Redevelopment Project, Appellant Paulmier stated that "the Westside Neighborhood Council indend[ed] to file a lawsuit." (Joint Stipulation of Facts, ¶27). At the January 24, 2013 public meeting, Appellant Paulmier again informed Appellees that he intended to file a lawsuit. (Joint Stipulation of Facts, ¶31).

It was not until September 11, 2014, two days before the scheduled implosion, that Attorney Samuel Stretton sent a letter by regular mail to Kelvin Jeremiah, President and CEO of the Philadelphia Housing Authority and Councilwoman Cindy Bass stating "it is my position that this

has been used as a playground for many years and the use should not be changed without Orphans' Court approval." (Joint Stipulation of Facts, ¶36). PHA did not receive said letter until September 17, 2014, four days after the implosion. (Joint Stipulation of Facts, ¶39).

This Court finds that the near three-year delay between June 27, 2012 and the initial filing on March 3, 2015 constitutes a lack of due diligence in prosecuting this claim. Attorney Stretton also waited until three days before the scheduled implosion to send a letter to PHA. He then waited an additional six months after construction began to file the instant action. Therefore, the Court found that clear and convincing evidence satisfied the lack of due diligence element.

2. Appellants Prejudiced Appellees By Their Delay

It is not enough to show delay arising from failure to exercise due diligence because "[l]aches will not be imputed where no injury has resulted to the other party by reason of the delay." *Brodt v. Brown,* 172 A.2d 152, 154 (Pa. 1961); *Kehoe v. Gilroy*, 467 A.2d 1, 4 (Pa. Super. 1983). Prejudice is evidenced when a change in the condition or relation of the parties occurs during the time the complaining party failed to act. *Koter v. Cosgrove*, 844 A.2d 29, 34 (Pa. Commw. Ct. 2004).

In *Wilson v. King of Prussia Enterprises, Inc.*, executors agreed to sell a 35-acre tract of land with the agreement that the defendant corporation would reconvey a small portion of the land back to the plaintiffs. *Wilson v. King of Prussia Enterprises, Inc.*, 221 A.2d 123, 124 (Pa. 1966). After obtaining title, it was learned that under township ordinances, it was impossible to reconvey the land without prior approval of the Board of Township Supervisors. *Id.* at 124-25. The plaintiff tried to submit the plan to the Board on June 27, 1962, but the Board informed him that the plan had to be submitted by the record owner. *Id.* at 125. After conversations between the parties in June and July of 1962, there were no further communications until June 27, 1963 when the defendant

corporation informed the plaintiff that the agreement had lapsed on June 30, 1962. *Id.* The plaintiff did not file suit until June 9, 1964. *Id.* In the one year between June 1963 and June 1964 that the plaintiff did not file suit, the corporate defendant executed a note with a mortgage company in the sum of $350,000, which was filed of record and became a lien on the entire 35 acres. *Id.* Therefore, the Court found that due to the plaintiff's delay, "innocent third parties" acquired rights in the property, and the application of laches protected these rights as well as the prejudice against the corporate defendant that acted based on an understanding that the agreement had been nullified. *Id.* at 125-26.

Here, in the years after Ordinance No. 100130 was approved in 2010, Appellees spent over $4.5 million on the Redevelopment Project. (Respondent's Brief at p. 31). Additionally, at the time of the filing of the lawsuit, the high rise had already been imploded, the property had already been excavated, with concrete poured. (N.T. 10/15/15, 146:3; 95:15-17; *See* Exhibit R-16). Furthermore, if the construction on the low-density housing units was not permitted to be completed, PHA would have to repay a loan to Wells Fargo Bank in the amount of $10,125,000.00, which was obtained after years of refining the Plan with the help of community members. (N.T. 10/14/15, 149:18-24; Respondent's Brief at p. 31). In total, $22,000,000.00 was invested to complete the Redevelopment Project. (N.T. 10/14/15, 149:16). Therefore, the Court finds clear and convincing evidence that Appellants' delay resulted in prejudice to Appellees as there had been a significant change in Appellees' position in the years between the initial notice of the Redevelopment Project and the filing of the lawsuit by Appellants. Given the factual circumstances of this matter, this Court properly applied the doctrine of laches.

B. Appellees Were Not Required to Obtain Orphans' Court Approval

As stated above, this Court's application of the equitable doctrine of laches is appropriate. Therefore, the Court need not reach the analysis regarding whether declaratory relief should be granted. Notwithstanding the laches defense, the Court finds that Appellants' reliance on *In re Erie Gold Course* to demonstrate that Appellees were required to gain Orphans' Court approval prior to the City's conveyance of the property to PHA. This claim is without merit.

In *In re Erie Gold Course*, the Court found that the Donated or Dedicated Property Act (DDPA) applies to the sale of a municipal golf course and park. *In re Erie Golf Course*, 992 A.2d 75, 89 (Pa. 2010). The recorded deed for the golf course land included a restrictive covenant that stated the land must be preserved indefinitely as a golf course and/or for park purposes. *Id.* at 77. Ultimately, the Court found that the City was permitted to sell the property because it first obtained Orphans' Court approval under the DDPA. *Id.* at 89.

Appellants rely on the Court's finding that the DDPA permits political entities to sell at least certain donated or dedicated property upon orphans' court approval. *Id.* at 77. However, this case is easily distinguishable from the instant matter. The concrete lot with a high-rise in the heart of Philadelphia's urban surroundings is far from the expansive green park land considered in *In re Erie Golf Course.* (N.T. 10/15/15, 153:4-8). Additionally, if Appellants seek to argue that Orphans' Court approval should have been sought before the 1953 sale to PHA for combined residential and recreational use, then this too would be barred by laches. Therefore, this Court finds that *In re Erie Golf Course* is inapposite and does not apply. Appellant's claim is without merit.

Plaintiffs argue that the inexcusable delay element was not satisfied because the project required "various certifications" and "because of the burial ground issue." (1925(b) Statement at

¶2). The Court did not find this argument to be a compelling justification for the delay in the filing of this action.

Plaintiffs also argue that the delay resulted in part because of their lack of funds to retain counsel and in part because Mr. Samuel Stretton, Esquire was "an extremely busy lawyer." (1925(b) Statement at ¶2). The Court does not find these arguments to be compelling to justify their lack of due diligence. Therefore, this claim is without merit.

C. Appellants Provided Insufficient Evidence To Support A Preliminary Injunction

The Court applied the Doctrine of Laches, precluding the need to complete the preliminary injunction analysis. Notwithstanding the Court's findings, Appellants state that the evidence presented satisfies the elements for a preliminary injunction. This claim is without merit.

In order to be successful in obtaining a preliminary injunction, the moving party must show (1) that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; (2) greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits; (5) the injunction it seeks is reasonably suited to abate the offending activity; and (6) a preliminary injunction will not adversely affect the public interest. *Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.*, 828 A.2d 995, 1001 (Pa. 2003). "For a preliminary injunction to issue, every one of the... prerequisites must be established; if the petitioner fails to establish any one of them, there is no need to address the others. *County of Allegheny v. Commonwealth,* 544 A.2d 1305, 1307 (Pa. 1988).

The Court finds that Appellees were unable to prove the first element for a preliminary injunction, therefore, the Court need not address the other five elements. *Id.* The first element requires that an injunction be able to prevent immediate and irreparable harm. *Summit Towne Ctr.*, 828 A.2d at 1001. In the instant case, by the time the action was filed, the high-rise had already been demolished, the land had been excavated and concrete had been poured. (N.T. 10/15/15, 146:3; 95:15-17; *See* Exhibit R-16). In the ensuing months after the initial filing, construction had continued. (N.T. 10/14/15, 146:2-20). The granting of an injunction after that activity would not have been able to prevent the transformation of the original concrete space into the new low-income housing development.

The Court also finds that Appellants had not established that an immediate and irreparable harm would have resulted but for the grant of a preliminary injunction because two additional brand new state of the art playground spaces were built in close proximity to the previous site. (N.T. 10/15/15, 66:18-25; 89:16-90:8; 92:15-19). As with the rest of the Redevelopment Project, these new playground spaces had been conceptualized with community involvement. (N.T. 10/14/15, 123:8-127:2)

Furthermore, Pennsylvania courts have been reluctant to enjoin projects with ongoing construction. *See Martin v. Adams County Area Vocational Tech. Sch. Auth.*, 313 A.2d 785,787 (Pa. Commw. Ct. 1973) (preliminary objections were properly sustained when plaintiffs waited 13 months to file suit during which time defendant spent $3 million); *Mansfield Area Citizens Grp. v. United States*, 413 F. Supp. 810, 824 (M.D. Pa. 1976) (injunctive relief denied when plaintiffs waited ten years after a dam and highway construction project was announced to file the action when tens of millions of dollars had already been spent in the interim); *Larrecq v. Van Orden*, 346 A.2d 922, 925 (Pa. Commw. Ct. 1975) (injunctive relief denied when plaintiffs waited until nine

months after construction began to seek an injunction). The Court properly denied the grant of a preliminary injunction. Therefore, this claim is without merit.

Conclusion

Based on the record, Appellants failed to prove by clear and convincing evidence that a preliminary injunction was appropriate. In addition, due to near three year delay, the application of the doctrine of laches was applied to prevent further prejudice against Appellees. Therefore, this Court's order dated November 3, 2015 should be **AFFIRMED**.

BY THE COURT:

Date: 2/3/16

OVERTON, J.

Jordan Rand, Esquire
Samuel C. Stretton, Esquire
Eleanor N. Ewing, Esquire
Kristin Kathryn Bray, Esquire
Andrew J. Kenis Esquire
Marc J. Weinstein, Esquire