

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

DOREATHA HOWELL, :
 : C.A. No. K11A-06-002 RBY
Plaintiff/Appellant, :
 :
v. :
 :
LESLIE H. PERSANS, DALE JONES :
and MARK KOHOUT, :
 :
Defendants/Appellees. :

*Upon Consideration of Appellant's
Appeal of the Decision of
The Court of Common Pleas*
AFFIRMED

Submitted: November 1, 2011
Decided: February 8, 2012

ORDER AND OPINION

Doreatha Howell, Plaintiff/Appellant, *Pro Se*.

William W. Pepper, Sr., Esq., Schmittinger and Rodriguez, P.A., Dover, Delaware for
Defendants/Appellees.

Young, J.

SUMMARY

_____Doreatha Howell (Plaintiff) appeals the Court of Common Pleas' dismissal of her claims against Leslie Persans and Dale Jones (County Defendants) on summary judgment. She appeals the dismissal of her claims against Mark Kohout (Defendant Kohout) for failure to state a claim upon which relief may be granted. The Court of Common Pleas' decision is **AFFIRMED**.

FACTS

_____Plaintiff is the part-owner of real property located in Kent County. On September 17, 2007, the Kent County Department of Planning Services, by and through the Division of Inspection and Enforcement Services, condemned multiple structures on the property. County Defendants are employed by the County in the Division of Inspection and Enforcement Services. Plaintiff spoke with County Defendant Leslie Persans regarding the condemnation procedures.

The condemned structures were ordered to be demolished. Plaintiff failed to complete the demolition as instructed. Accordingly, the County solicited bids to complete the work. On February 7, 2008, Gateway Construction, Inc. (Gateway) was hired to demolish the structures. Mark Kohout (Defendant Kohout) owns Gateway.

On February 29, 2008, Gateway completed the demolition. County Defendant Dale Jones was present at the demolition site. According to Plaintiff, Gateway did not receive a permit to perform the demolition until after having completed.

_____On March 22, 2010, Plaintiff filed suit in the Court of Common Pleas, naming County Defendants and Defendant Kohout as defendants. The complaint asserts, roughly, four causes of action. The Court of Common Pleas characterized the claims

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as: 1) trespass to property; 2) demolition of the structures on her property; 3) failure to pay property taxes prior to demolition; and 4) failure to obtain a permit prior to demolition.

Pursuant to Court of Common Pleas Civil Rule 56, the Judge granted summary judgment in favor of County Defendants, holding that County Defendants were immune from suit in tort under the County and Municipal Tort Claims Act. The Judge stated that, insofar as he could deduce, Plaintiff's claims sounded in tort. He stated that, if the claims could not be classified as tort claims, he was unaware of any other viable theories of liability against County Defendants as alleged by Plaintiff.

Pursuant to Court of Common Pleas Rule 12(b)(6), the Judge dismissed the claims insofar as they were alleged against Defendant Kohout. In support thereof, he noted that, although Defendant Kohout was named as a defendant, the allegations in the complaint speak only to actions taken by Gateway, an incorporated entity. Accordingly, the Judge ruled that the complaint failed to assert a cause of action against individual Defendant Kohout.

STANDARD OF REVIEW

_____ “When considering an appeal from the Court of Common Pleas, this Court sits as an intermediate appellate court.”¹ “The Court’s role is to ‘correct errors of law and to review the factual findings of the court below to determine if they are sufficiently supported by the record and are the product of an orderly and logical deductive

¹ *Acute Nursing, Inc. v. Westminster Village*, 2007 WL 1653509 (Del. Super. Mar. 26, 2007) (citing *State v. Richards*, 1998 WL 732960 (Del. Super. May 28, 1998)).

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process.”² “Whether the grant or denial of a motion for summary judgment by the Court of Common Pleas is proper presents a question of law that this Court reviews *de novo*.”³ “The trial court’s decision granting summary judgment will be affirmed if it appears that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.”⁴ Similarly, as a question of law, a decision by the Court of Common Pleas to dismiss a claim pursuant to Court of Common Pleas Civil Rule 12(b)(6) is reviewed *de novo*.⁵

DISCUSSION

On appeal to this Court, Plaintiff raises a series of arguments. Those arguments do not address the grounds for the dismissal entered below. Moreover, as discussed herein, the Court of Common Pleas’ summary judgment and 12(b)(6) rulings were correct. Accordingly, the decision below is **AFFIRMED**.

I. County Defendants’ Motion for Summary Judgment Was Granted Properly Because County Defendants Are Immune from Suit in Tort.

_____Pursuant to the County and Municipal Tort Claims Act, all government entities

² *Id.* (quoting *State v. Huss*, 1993 WL 603365 (Del. Super. July 14, 1993)).

³ *Furniture And More, Inc. v. Hollinger*, 2007 WL 2318126 (Del. Super. July 31, 2007) (citing *Newtowne Vill. Serv. Corp. v. Newtowne Rd. Dev. Co.*, 772 A.2d 172, 174-75 (Del. 2001)).

⁴ *Id.*

⁵ See *Malpiede v. Townson*, 780 A.2d 1075 (Del. 2001) (reviewing, *de novo*, the Court of Chancery’s dismissal of a claim pursuant to Chancery Court Rule 12(b)(6)).

and employees are immune from suit in tort.⁶ “Employees” are persons “acting on behalf of a governmental entity in any official capacity,” but not where their capacity is that of an independent contractor.⁷ A “governmental entity” refers to, among other things, counties and municipalities.⁸ An employee may be liable for certain acts or omissions, even where the governmental entity is immune, “but only for those acts which were not within the scope of their employment or which were performed with wanton negligence or willful and malicious intent.”⁹

_____County Defendants are “employees” as defined by the Act. They work for a governmental entity as defined by the Act. Therefore, insofar as the causes of action against them sound in tort, they enjoy immunity from suit so long as their actions were within the scope of their employment, and made without wanton negligence or willful and malicious intent. The complaint does not allege circumstances that would serve to overcome immunity. Plaintiff does not address this issue in her appeal.

Accordingly, the Court of Common Pleas was correct in finding that County Defendants were immune from suit, so long as Plaintiff’s claims were, in fact, tort claims. This Court agrees with the Court of Common Pleas’ characterization of Plaintiff’s claims. Claim I seeks relief for trespass to property. Claim II seeks relief for the demolition of structures on Plaintiff’s property. These claims sound in tort.

⁶ 10 *Del. C.* § 4011(a).

⁷ 10 *Del. C.* § 4010.

⁸ *Id.*

⁹ 10 *Del. C.* § 4011(c).

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There is no allegation that they were performed outside the scope of County Defendants' employment. There is no allegation that they were performed with wanton negligence or wilful and malicious intent. Accordingly the Court was correct in granting summary judgment of these two claims.

Count III of the claim seems to seek relief for the County's failure to pay property taxes on the parcel prior to the demolition. Count IV seems to seek relief for the County's failure to obtain a permit prior to the demolition. If these claims are tort claims, then immunity applies as discussed above. If these claims are not tort claims, then Plaintiff has failed to allege a viable cause of action. Accordingly, the Court of Common Pleas was correct to grant summary judgment in favor of County Defendants.

II. Dismissal of Defendant Kohout Was Proper Because the Complaint Failed to State a Claim Against Him as an Individual.

Plaintiff's complaint names Defendant Kohout as a defendant in his individual capacity. However, the substance of the complaint addresses the corporate Gateway, and actions taken by the corporate Gateway, only. It does not allege facts or causes of action against Defendant Kohout as an individual.

Gateway is a corporate entity. Although Defendant Kohout owns Gateway, allegations against Gateway do not, without more, implicate Defendant Kohout as an individual. Without alleging a cause of action against Defendant Kohout as an individual, the complaint fails to state a claim against him upon which relief may be granted. Accordingly, the Court of Common Pleas was correct in granting the dismissal.

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CONCLUSION

The decision below is **AFFIRMED**.

SO ORDERED.

/s/ Robert B. Young

J.

RBY/sal

oc: Prothonotary

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