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**ATTORNEYS FOR DEFENDANTS
BOROUGH OF POTTSTOWN
AND KEITH A. PLACE**

DOROTHY RIVERA, et al.	:	
	:	IN THE COURT OF COMMON PLEAS
Plaintiffs,	:	MONTGOMERY COUNTY, PENNSYLVANIA
	:	
v.	:	
	:	No. 2017-04992
POTTSTOWN OF POTTSTOWN, et al.	:	
	:	
Defendants.	:	
	:	

**DEFENDANTS, BOROUGH OF POTTSTOWN AND KEITH A. PLACE’S
REPLY BRIEF IN SUPPORT OF THE MOTION FOR JUDGMENT ON
THE PLEADINGS PURSUANT TO P.A.R.CIV.P. 1034**

Defendants, Borough of Pottstown and Keith A. Place (“Pottstown Defendants”), by and through their attorneys, Siana, Bellwoar & McAndrew, LLP, hereby file this Reply Brief in support of their Motion Judgment on the Pleadings pursuant to Pa.R.Civ.P. 1034.

I. ARGUMENT

The purpose of the Motion for Judgment on the Pleadings is to expedite justice and to obviate the need for pursuing to trial cases where the pleadings demonstrate that no genuine issue of fact exists and that the moving party is entitled to judgment as a matter of law. *Parish v. Horn*, 768 A.2d 1214, 1215 n.1 (Pa. Cmwlth. 2001). A Motion for Judgment on the Pleadings should be granted where the law is clear and trial would be a “fruitless exercise.” *Bata v. Central-Penn Nat’l Bank*, 224 A.2d 174, 178 (Pa. Super. 1966). Plaintiffs attempt to manufacture “material” issues of *fact* to avoid judgment on legal issues. However, as noted, the legal claims raised in the Amended Complaint present pure legal questions, requiring no development of evidence.

A. Defendants' Motion for Judgment on the Pleadings is Appropriate.

While it is denied that this Motion for Judgment on the Pleadings is based upon the same allegations, and contrary to Plaintiffs' assertions, the procedural posture has advanced with the filing of an Answer. Specifically, the Pottstown Defendants admitted certain of Plaintiffs' allegations and/or made the following relevant admissions:

- All residential rental units in the Borough of Pottstown are subject to registration, licensing and a systematic inspection, registration, and licensing program for lawful rentals to third parties and occupancy by third parties of any rental unit unless the residential rental unit is exempt from the licensing provisions. (Defs' Ans, #32, ¶¶ 17, 66).
- The purpose of the Pottstown Rental Ordinance is to "protect and promote the public health, safety and welfare of its citizens, to establish rights and obligations of owners and occupants relating to residential rental units in the Pottstown and to encourage owners and occupants to maintain and improve the quality of life and quality of rental housing within the community. As a means to these ends, this Part provides for a systematic inspection program, registration and licensing of residential rental units and penalties." (Defs' Ans, #32, ¶¶ 41, 64).
- The Pottstown Ordinance requires that an owner shall permit an inspection at a reasonable time with reasonable notice. If the owner does not permit such inspection, application for an administrative search warrant is permitted. (Defs' Ans, #32, ¶ 45).
- Plaintiffs Riveras/Camburn did not consent to their biennial inspection of the Property located at 326 Jefferson Avenue, a violation of the Ordinance. (Defs' Ans, #32, ¶¶ 20, 68).
- The Borough applied for an administrative warrant when Plaintiffs Riveras/Camburn did not consent to an inspection. (Defs' Ans, #32, ¶ 21).
- Plaintiffs O'Connors did not consent to their biennial the inspection of the Property located at 466 North Franklin Street. (Defs' Ans, #32, ¶¶ 39, 68).
- The Pottstown Ordinance states that it is the duty of every owner to maintain all residential units in compliance with all applicable codes and provisions of all applicable state laws and regulations and local ordinances and to keep such property in good and safe condition. (Defs' Ans, #32, ¶¶ 51, 54).

As the preliminary objections were filed before an answer, neither Defendants' Answer

to Plaintiffs’ allegations nor their admissions were available or considered by the Court in ruling upon preliminary objections. Consideration of all of the pleadings¹ in this matter, in conjunction with the language of the relevant Ordinance itself, demonstrate that Defendants’ motion is appropriate and the Pottstown Defendants are entitled to judgment as a matter of law.

B. The Constitutionality of the Borough’s Rental Inspection Ordinance is a Question of Law for the Court to Resolve.

It is well-settled that the constitutionality of a statute presents a pure question of law for the court to resolve. *Commonwealth v. Turner*, 80 A.3d 754, 759 (Pa. 2013); *Ario v. Ingram Micro, Inc.*, 965 A.2d 1194, 1200 (Pa. 2009); *Buffalo Twp. v. Jones*, 813 A.2d 659, 664 n.4 (Pa. 2002); *Com. v. Thompson*, 106 A.3d 742, 763 (Pa. Super. 2014). A purely legal question is appropriately disposed in the context of a judgment on the pleadings. *Id.*

To avoid judgment, Plaintiffs posit several “material” factual disputes that they contend should preclude dismissal of their Amended Complaint because discovery is on-going. (Pls’ Opposition, Dkt. #43, p. 38-40). Plaintiffs specifically contend that (1) the *level* of invasiveness of rental inspections; (2) whether the Borough has an *interest* in conducting rental inspections; and (3) whether there are alternative methods for the Borough to *enforce* its Housing and Building Codes preclude judgment at this time. *Id.* None of these contentions address the seminal issue, *i.e.*, the constitutionality of the Ordinance.

Since the constitutionality of Pottstown’s Ordinance is purely a question of law, there is no need to resolve these “material” facts. Further, Plaintiffs’ contention that “material” disputed facts preclude judgment is belied by Plaintiffs’ constitutional attack upon the Pottstown Rental

¹ Pursuant to Rule 1017(a), “pleadings” are limited to a complaint, a reply, a counter-reply, a preliminary objections and response to preliminary objection. Pa.R.Civ.P. 1017(a).

Ordinance.² Indeed, Plaintiffs allege that the Pottstown Ordinance could *never* be applied in a *constitutional* manner. (Am. Cmplt., #19, ¶¶ 2, 78). Discovery pertaining to the level of invasiveness of the inspections, the Borough’s interest in conducting rental inspections or whether alternatives to rental inspections exist is superfluous. As such, the resolution of these “on-going” discovery issues have no impact on the legal question before the court.

C. The “Material Facts” Raised by Plaintiffs are Beyond the Pleadings.

As detailed above, Plaintiffs raise several issues of alleged disputed “material facts” that they request the court to consider in denying the Pottstown Defendants’ motion. These disputed “material facts” fall outside the allegations in the pleadings, and should be disregarded. The applicable standard of review mandates that in determining whether there is a dispute as to facts, the court must confine its consideration to the pleadings and relevant documents.³ Pa.R.Civ.P. 1034(a); *Pocono Summit Realty, LLC v. Ahmad Amer, LLC*, 52 A.3d 261, 267 (Pa. Super. 2012). These asserted facts are impermissible and must be disregarded.

D. Keith Place is Entitled to Official Immunity.

Plaintiffs’ denial of Official Immunity for Mr. Place lacks legal basis. Official Immunity can be defeated only if the employee engages in crime, actual fraud, actual malice, or willful misconduct. 42 Pa.C.S.A. § 8550. Plaintiff have not alleged *any* malicious or reckless acts

² Constitutional challenges are of two kinds: facial challenges or as applied challenges. *Lehman v. Pennsylvania State Police*, 839 A.2d 265, 275 (Pa. 2003); *Commonwealth v. Thompson*, 106 A.3d 742, 763 (Pa. Super. 2014), *appeal denied*, 134 A.3d 56 (Pa. 2016). A facial challenge asserts that a law “always operates unconstitutionally.” BLACK’S LAW DICTIONARY 223 (7th ed. 1999); *Commonwealth v. McKown*, 79 A.3d 678, 687 (Pa. Super. 2013), *appeal denied*, 91 A.3d 162 (Pa. 2014). “[A]n as-applied attack . . . does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right.” *Nigro v. City of Philadelphia*, 174 A.3d 693, 699–700 (Pa. Cmwlt. 2017).

³ The court also may take judicial notice of public documents. *Bykowski v. Chesed, Co.*, 625 A.2d 1256, 1258 (Pa. Super. 1993); *Solomon v. U.S. Healthcare Systems of Pennsylvania, Inc.*, 797 A.2d 346, 352 (Pa. Super. 2002).

against Mr. Place. (*See* Am. Cmplt.). Therefore, Mr. Place is entitled to Official Immunity, and he should be dismissed as a matter of law.

Even if the Pottstown Ordinance is unconstitutional, as alleged by Plaintiffs, which is specifically denied, Mr. Place’s alleged conduct in applying the mandatory rental inspections to Plaintiffs’ properties does not amount to willful misconduct. Plaintiffs have failed to allege any specific conduct by Mr. Place, much less any willful conduct against him. Indeed, Plaintiffs only generally allege that the “Defendants” applied the Borough’s Ordinance (Am. Cmplt., #19, at ¶ 78), and the “mandatory inspection requirements of the Ordinances.” *Id.* at ¶¶80-81. Implementation of an ordinance in the course and scope of one’s employment does not rise to willful misconduct to abrogate Official Immunity.

Finally, the Tort Claims Act provides local agencies and its employees with immunity except for negligent acts that fall within one of the specifically enumerated exceptions found in Section 8542(b). The Pennsylvania Supreme Court has held that the exceptions to the Tort Claims Act must be construed narrowly given the expressed legislative intent to insulate political subdivisions and their employees from tort liability. *Finn v. City of Philadelphia*, 664 A.2d 1342, 1344 (Pa. 1995). Plaintiffs’ request for injunctive relief does not fall within one of the Tort Claims Act’s exceptions.⁴ *See* Section 8542(b); *see also Jones v. SEPTA*, 772 A.2d 435, 439 n.1 (Pa. 2001); *Rooney v. City of Phila.*, 623 F.Supp.2d 644, 662 (E.D. Pa. 2009). Further, Plaintiffs plea for injunctive relief is not a cause of action, but rather a form of relief. *Rooney*, 623 F.Supp.2d at 647 n.2. Therefore, Mr. Place is entitled to Official Immunity, and he should be dismissed as a matter of law.

⁴ The eight (8) exceptions to governmental immunity are: 1) Vehicle liability; 2) Care, custody or control of personal property; 3) Real property; 4) Trees, traffic controls and street lighting; 5) Utility service facilities; 6) Streets; 7) Sidewalks; and 8) Care, custody or control of animals. 42 Pa.C.S.A. § 8542(b).

II. CONCLUSION

For the reasons set forth herein, and in Defendants' Motion for Judgment on the Pleadings and supporting Brief, the Pottstown Defendants respectfully request this Honorable Court enter an Order granting their Motion for Judgment on the Pleadings, and dismiss Plaintiffs' Amended Complaint, with prejudice.

Alternatively, Defendant Place is entitled to Official Immunity.

Respectfully Submitted,

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Date: September 26, 2018 By: /s/ Sheryl L. Brown

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