IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY
38TH JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

DOROTHY RIVERA, an Individual, EDDY OMAR RIVERA, an Individual, KATHLEEN O'CONNOR, an Individual, ROSEMARIE O'CONNOR, an Individual, THOMAS O'CONNOR, an Individual, and STEVEN CAMBURN, an Individual, Plaintiffs, v. BOROUGH OF POTTSTOWN, and KEITH A. PLACE, in his official capacity as Pottstown Director of Licensing and Inspections, Defendants.	COURT OF COMMON PLEAS CIVIL ACTION NO: 2017-04992

PLAINTIFFS' SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

On September 24, 2018, this Court entered an order giving Defendants leave to file a reply brief in support of their motion for judgment on the pleadings. (Docket No. 48.) Plaintiffs had opposed the filing on the ground that it contained new arguments. (Docket No. 47.) On September 26, 2018, Defendants filed their Reply. (Docket No. 49.) Plaintiffs hereby refute Defendants' new—and/or legally incorrect—arguments presented in that Reply. Contrary to Defendants averments: (A) the posture of the case has not changed; (B) the disputed facts are within the scope of the pleadings; (C) a factual record is required; and (D) Keith Place has no immunity from suits for injunctive and declaratory relief.

A. The Posture of the Case Has Not Changed.

1) For the first time, Defendants claim that "the procedural posture has advanced with the filing of an Answer," such that judgment is now appropriate. (Reply Br. at 2.) Aside from not explaining how their admissions have advanced the posture of this case, the black-letter rule in Pennsylvania is that a defendant's admissions can never make a *defendant's* motion for judgment on the pleadings appropriate. Rather, "only those facts specifically admitted by the *nonmovant* may be considered against him." *Kerr v. Borough of Union City*, 614 A.2d 338, 339 (Pa. Commw. Ct. 1992) (emphasis added). This is because all of Plaintiffs' allegations are accepted as true for the purposes of demurrer and thus judgment on the pleadings. *Sinn v. Burd*, 486 Pa. 146, 149 (Pa. 1979); *Keil v. Good*, 356 A.2d 768, 769 (Pa. 1976) ("[A] motion for judgment on the pleadings is in the nature of a demurrer, the trial court must accept all of the well pleaded allegations of the party opposing the motion as true, while only those facts specifically admitted by the party opposing the motion may be considered against him."); 6 Standard Pennsylvania Practice 2d § 31:36 (in considering a motion for judgment on the pleadings "[a]ll of the averments of the plaintiff's complaint will be taken as true.").

2) By citing their Answer, however, Defendants confuse the summary judgment standard with the motion for judgment on the pleadings standard. On a motion for judgment on the pleadings, the answer is ignored. *See* 6 Standard Pennsylvania Practice 2d § 31:36 ("If the defendant moves for judgment on the pleadings, the averments of his or her answer will be ignored, and all of the

averments of the plaintiff's complaint will be taken as true.").

3) Accordingly, Defendants' Answer should not be considered for purposes of the instant motion.

B. The Disputed Material Facts Are Within the Scope of the Pleadings.

4) Defendants now argue, for the first time in their reply brief and in a conclusory fashion, that the disputed material facts that Plaintiffs point to "fall outside the allegations in the pleadings[] and should be disregarded." (Reply Br. at 4.) This is simply not correct. For instance, the Amended Complaint contains 14 full paragraphs detailing how intrusive the inspections are. (*See* Am. Compl. ¶¶ 51–64.) As demonstrated in the Response Brief, Defendants have repeatedly disputed these assertions, arguing that the inspections are minimally intrusive. *See Mun. Auth. of Borough of Midland v. Ohioville Borough Mun. Auth.*, 108 A.3d 132, 136 n.3 (Pa. Commw. Ct. 2015) (Noting that a dispute of material fact can be demonstrated by reference to a "complaint, an answer, a reply, a counter-reply, a preliminary objection, and a response to preliminary objection.").

5) Moreover, even if Defendants could point to a particular disputed fact that was not explicitly pleaded, that would not matter because the court is also required to take as true "every reasonable inference that the Court can draw" from those facts. *Pocono Summit Realty, LLC v. Ahmad Amer*, LLC, 52 A.3d 261, 267 (Pa. Super. Ct. 2012).

C. A Factual Record Is Required to Decide Plaintiffs' Facial and As-Applied Challenges.

6) Defendants now assert that there can never be a dispute of material fact in a case involving a facial constitutional challenge because the constitutionality of a statute is a "pure question of law," for which no factual record is needed. (Reply Br. at 3–4.) In keeping with this view of the case, Defendants incorrectly assert that "[d]iscovery pertaining to the level of invasiveness of the inspections, the Borough's interest in conducting rental inspections or whether alternatives to rental inspection exist is superfluous." (*Id.* at 4.)

7) These arguments, too, do not appear in Defendants' opening brief, which itself is replete with factual assertions regarding the supposedly "minimal" intrusiveness of the searches and the Borough's supposed need to conduct the searches. (*See, e.g.*, Mem. in Support of Mot. J. Pleadings 17–18 ("[P]eriodic rental-housing inspections are the only effective way to enforce property maintenance codes.")). These "facts," Defendants claim, demonstrate the constitutionality of the ordinance.

8) Now that Plaintiffs have pointed out in their response brief that these "facts" are disputed, Defendants have adopted a new position—that facts are simply irrelevant to a facial constitutional challenge. This argument misses the mark for two reasons: *First*, Plaintiffs' challenge is both facial and as-applied (*see* Am. Compl. ¶¶ 79–81), and Defendants do not argue that facts are irrelevant to an as-applied challenge. *Second*, Defendants are wrong about the law, as demonstrated by the Pennsylvania Supreme Court's recent decision in *League of*

Women Voters v. Commonwealth, 178 A.3d 737 (Pa. 2018).

9) In *League of Women Voters*, the Court held that Pennsylvania's congressional redistricting statute violated the Free and Equal Elections Clause of the Pennsylvania Constitution. It based its decision, in part, on extensive expert testimony regarding both the intent and effect of the statute. *Id.* at 821 ("[T]he evidence detailed above and the remaining evidence of the record as a whole demonstrates . . . [a] violat[ion] [of] the Free and Equal Elections Clause of the Pennsylvania Constitution.").

10) That case challenged the facial validity of a statute and, like the present case, it was brought under the *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991) framework for determining when the Pennsylvania Constitution provides more protection than the U.S. Constitution. Plaintiffs here are entitled, as were the plaintiffs in *League of Women Voters*, to develop a factual record to support their constitutional challenge.

11) Defendants cite several cases for the proposition that the constitutionality of a statute is a "pure question of law," (Reply Br. at 3), but none of those cases purport to hold that establishing a factual record through discovery is improper for a constitutional challenge. Those cases merely addressed the appropriate appellate standard of review for constitutional questions—which is *de novo*. *See 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); *Commonwealth v. Thompson*, 106 A.3d 742, 763 (Pa. Super. Ct.

2014); *see also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 n.27 (1984) (holding that appellate courts must exercise *de novo* review over "constitutional facts").

12) In none of the cases cited by Defendants were constitutional facts actually in dispute. But when disputed facts are relevant to the constitutionality of a statute, as here, Pennsylvania courts, like courts everywhere else, consider evidence tendered by the parties—as demonstrated by the *League of Women Voters* decision.

13) Facts matter here for consideration of whether the Borough has an interest in conducting these searches and how much of a burden those inspections impose on tenants and landlords.[1]

D. Keith Place Is Not Entitled To Official Immunity.

14) Keith Place is sued in his official capacity for declaratory and injunctive relief, not for damages, so the immunity statute does not apply. In their reply, the Defendants advance a new argument: that the text of the immunity statute contains no "exception" for suits for declaratory and injunctive relief. (Reply Br. at 5).

15) This is technically true, but incomplete. Defendants quote only part of

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[1] Even under the federal "rational basis test," the most deferential form of judicial review, which does not apply in the present action (*see* Pls.' Mem. in Supp. of Pls.' Answers to Defs.' Prelim. Objs. at 38–39), it is well established that Plaintiffs are entitled to develop a factual record through discovery to support their claim that a statute is unconstitutional. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) ("[P]laintiffs may . . . negate a seemingly plausible basis for the law by adducing evidence of irrationality.").

a sentence from the Pennsylvania code, (Reply Br. at 4–5), which does not permit immunity in cases of willful misconduct by the individual. But they do not quote the whole sentence, which reads:

> ***In any action against a local agency or employee thereof for damages*** on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply.

42 Pa. Cons. Stat. § 8550 (emphasis added). The plain text of the statute only provides immunity against claims for "civil damages." 42 Pa. Cons. Stat. § 8545; (*see* Pls.' Response Br. 42–43).

16) Plaintiffs, therefore, do not need to avail themselves of an "exception," from the immunity statute because the statute does not apply in the first place, as this is a case for injunctive and declaratory relief.

WHEREFORE, for the reasons stated above and in addition to the reason stated in Plaintiffs' Response (Docket No. 47), Plaintiffs respectfully request that this Court deny Defendants' Motion for Judgment on the Pleadings.

DATED: February 4, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this day a true and correct copy of *Plaintiffs' Sur-Reply in Opposition to Defendants' Motion for Judgment on the Pleadings,* served via electronic filing and U.S. first class mail, postage prepaid, addressed as indicated:

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