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, THE ESTATE OF 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' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Plaintiffs offer this short reply to make two points. First, the Borough has argued that, pursuant to the *Nanty-Glo*[1] rule, this court should disregard some of the record evidence that Plaintiffs relied on in their motion for summary judgment.

[1] *Nanty-Glo Borough v. American Surety Co.*, 163 A. 523 (Pa. 1932).

But *Nanty-Glo* does not apply unless Plaintiffs are relying solely on the testimony of their own witnesses to establish material facts. Where, as here, a party's motion for summary judgment is based primarily on the admissions of opposing witnesses and on documentary evidence, *Nanty-Glo* does not apply. Second, the Borough argues–as it did in its cross-motion for summary judgment–that Plaintiffs' case is now foreclosed by a recent decision of the Pennsylvania Supreme Court, *In re Y.W.-B.*, 265 A.3d 602 (Pa. 2021). But *Y.W.-B.* does not address, even in dicta, the question in this case. To the extent that *Y.W.-B.* does touch on issues relevant to this case, it cuts in Plaintiffs' favor.

A. *Nanty-Glo* does not apply.

The *Nanty-Glo* rule prohibits courts from granting summary judgment to a party who relies solely on the testimony of its own witnesses to establish the absence of genuine dispute of material fact. *Resol. Tr. Corp. v. Urb. Redevelopment Auth. of Pittsburgh*, 638 A.2d 972, 975 (Pa. 1994). The rationale for the rule is that "credibility determinations must be left to the finder of fact." *Woodford v. Ins. Dep't*, 243 A.3d 60, 69 (Pa. 2020). The rule does not apply, however, when summary judgment is based at least in part on the testimony of adverse witnesses. *Dep't of Env't Res. v. Bryner*, 613 A.2d 43, 46 n.4 (Pa. Commw. Ct. 1992) ("[T]he *Nanty-Glo* rule does not apply where, as here, the deposition testimony offered in support of a summary judgment constitutes an adverse admission of a non-moving party."). Nor does it apply where the moving party relies on documentary evidence or testimony that merely supports such evidence. *See VC RTL Holdings, LLC v. JBKK Enters.,*

LLC, 293 A.3d 601 (Pa. Super. Ct. 2023) ("Here, [the] affidavit references and attaches copies of the note, mortgage, mortgage assignments, and the Act 6 and Act 91 notices. Therefore, this was not a mere 'testimonial affidavit' barred by *Nanty-Glo*, but instead constitutes documentary evidence supported by the affidavit.").

Plaintiffs' motion for summary judgment is grounded primarily in the deposition testimony of Borough employees and on documents provided by the Borough. To the extent that Plaintiffs rely on their own testimony or that of friendly witnesses, they are simply bolstering conclusions that are amply supported by other evidence. The testimony of Plaintiffs' experts is also grounded in documentary evidence produced in discovery. Under such circumstances, *Nanty-Glo* is categorically inapplicable. *See Sonnier v. Daley*, 276 A.3d 245, 245 n.6 (Pa. Super. Ct. 2022) ("The *Nanty-Glo* rule does not apply where the moving party supports the motion by using admissions of the opposing party."); *Carringer v. Taylor*, 586 A.2d 928, 929 n.1 (Pa. Super. Ct. 1990) ("*Nanty-Glo* ... is inapposite presently ... .[E]ntry of summary judgment did not rest solely upon oral testimony of witness[.]") (emphasis added).

Even if *Nanty-Glo* had some potential application to this case, the Borough has waived the argument by failing to develop it. *See Sonnier*, 276 A.3d at 245 (holding that *Nanty-Glo* arguments are waivable); *Deutsche Bank Nat'l Tr. Co. v. Norton*, 276 A.3d 235 (Pa. Super. Ct. 2022) ("Baldly contending there has been a *Nanty-Glo* rule violation, without further elaboration, is insufficient and warrants no relief."). While the Borough repeatedly invokes the case, it never actually

explains how it applies here. It does not argue that the rule prevents this Court from granting Plaintiffs' motion; rather, the Borough implies that *Nanty-Glo* should be applied like a rule of evidence—a scalpel that precisely excises all of Plaintiffs' witnesses from this Court's consideration. That is not how the rule functions. So long as this Court does not grant summary judgment based *solely* on the testimony of friendly witnesses, nothing prevents this court from considering such testimony in conjunction with other evidence. *See VC RTL Holdings*, 293 A.3d 601 (considering testimonial evidence in conjunction with documentary evidence).

B. *In re Y.W.-B.* supports Plaintiffs' claim.

The Borough asserts that the Pennsylvania Supreme Court's decision in *In re Y.W.-B.*, 265 A.3d 602 (Pa. 2021) forecloses their claim in this case. That decision, however, does not address the issue in this case, even in dicta. If anything, the case is helpful to Plaintiffs.

In *Y.W.-B.*, the Pennsylvania Supreme Court held that, under both the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution, the government needs a warrant supported by individualized probable cause before it can conduct a non-consensual child welfare home visit. The government, for its part, agreed that individualized probable cause was necessary, but it argued that the standard should be significantly relaxed in comparison to the criminal standard. *Id.* at 619. The Pennsylvania Supreme Court rejected this argument, holding that "nothing short of probable cause, guided by the traditional principles that govern its federal and state constitutional limitations, will suffice when a trial court makes a

determination as to whether or not to authorize a home visit." *Id.* at 625.

Y.W.-B. did not address the only legal question in this case: Whether Pennsylvania's constitution should be interpreted as more protective of privacy than the Fourth Amendment in the context of residential housing inspections. To be sure, the court discussed the U.S. Supreme Court's *Camara* decision, and dragnet searches more generally, but it did so merely to explain why those precedents did not apply to the facts of the case, where the government was trying to search a particular house for a particular reason. *Id.* at 622 ("*Camara* has no application with respect to home visits to investigate allegations of child neglect."). The Court did not say that it agreed with *Camara* and its progeny; it simply explained that the facts of those cases were different and that those courts relied on justifications which, by their terms, did not apply in the context of child welfare home visits.

The Pennsylvania Supreme Court also declined to consider whether its own constitution was more protective than the federal constitution because the Court concluded that the petitioner prevailed even under the Fourth Amendment. *Id.* at 613 n.11. In the present case, of course, the Article I, Section 8 claim is squarely before this court, there is no alternative federal claim, and Plaintiffs have offered a fully developed argument about why the Pennsylvania Constitution is more protective than its federal counterpart. When such an argument is fully developed and where the Fourth Amendment would not apply, Pennsylvania courts take those arguments seriously. See Plfs.' Mem. Supp. Summ. J. 49-56.

Finally, the dicta in *Y.W.-B.* supports Plaintiffs here. The court emphasized

that:

> When it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core, we have said, stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion. Or again: freedom in one's own dwelling is the archetype of the privacy protection secured by the Fourth Amendment; conversely, physical entry of the home is the chief evil against which it is directed. The Amendment thus draws a firm line at the entrance to the house.

265 A.3d at 617–18 (cleaned up) (quoting *Lange v. California*, 141 S. Ct. 2011, 2018 (2021), and collecting cases). The court also reaffirmed the "basic principle ... that the requirement of probable cause to permit entry into a private home is not excused based upon any relative perceived societal importance." *Id.* at 619. The court also noted that the home visit at issue in the case "could result in criminal charges for child abuse." *Id.* at 624. The record in the present case similarly demonstrates that rental inspections can and do lead to criminal charges. *See* Plfs.' Mem. Supp. Summ. J. 70-71.

CONCLUSION

Plaintiffs' motion for summary judgment should be granted.

DATED: October 25, 2023

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' Reply in Support of their Motion for Summary Judgment* were served via electronic filing and U.S. first class mail, postage prepaid, addressed as indicated:

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