

COMMONWEALTH OF PENNSYLVANIA
BOARD OF PROPERTY

DELAWARE AVENUE, LLC, :
Petitioner :
 :
 : Docket Number: BP-2007-003
v. :
 :
COMMONWEALTH OF PENNSYLVANIA, :
Defendant :

MEMORANDUM AND ORDER

Petitioner Delaware Avenue LLC (Delaware Avenue) has filed a Complaint against the Commonwealth seeking to quiet title to a riparian parcel on the Delaware River in the City of Philadelphia. Presently before the Board for disposition are the preliminary objections of Department of Conservation and Natural Resources (DCNR) and Department of Environmental Protection (DEP).

Procedural History

On July 13, 2007, Delaware Avenue filed a Complaint with the Board of Property (Board)¹ naming as Defendant “Commonwealth of Pennsylvania, Commonwealth Keystone Building, 400 North Street, 4th Floor, Harrisburg, PA”.² Delaware Avenue averred that it named the Commonwealth defendant in the action “to foreclose its interest in a parcel of land” created by the placement of fill during the construction of the Betsy Ross Bridge in Philadelphia.

¹ On August 22, 2006, Delaware Avenue filed an action to quiet title in the United States District Court for the Eastern District of Pennsylvania in *Delaware Avenue, LLC v. United States of America*, Case, Case No. 2:2006bcv03728. In addition to the Federal government, the named defendants included the Commonwealth of Pennsylvania, the Delaware River Port Authority and the City of Philadelphia. No further record is available on the public website. See www.paed.uscourts.gov.

² The address is the location of the filing office of the Board of Property in the Department of Community and Economic Development.

Because proof of service was not attached to the Complaint³ Counsel for Delaware Avenue was notified that until proof of service was filed in accordance with the Pennsylvania Rules of Civil Procedure the Complaint would not be docketed. On July 16, 2007, Counsel for Delaware Avenue filed a Certificate of Service stating that he had served "Pennsylvania Department of Environmental Protection, Rachael Carson State Office Building, 400 Market Street, 7th Floor, Harrisburg PA 17104" by first class mail. On August 3, 2007, Counsel filed Certificates of Service wherein Counsel certified that he had served copies of the Complaint via first class mail to the following: "Attorney General⁴, 21 S. 12th Street, 3rd Floor, Philadelphia, PA 19107; Conservation and Natural Resources, Rachael Carson State Office Building, 400 Market Street, 7th Floor, Harrisburg PA 17104."

On August 28, 2007, DEP and DCNR, through their respective counsel, requested an extension of time to file a response to the Complaint indicating that DEP and DCNR intended to file motions to dismiss the Complaint based on improper service. The request was granted. On November 5 and December 10, 2007, Delaware Avenue filed identical motions for default judgment asserting that service had been accomplished and that defendants failed to file a timely response. In light of the Departments' request, the motions were denied.

On December 10, 2007, DEP and DCNR filed Preliminary Objections to the Complaint. Delaware Avenue filed an Answer on December 21, 2007. Memoranda of Law were filed by the

³ On June 18, 2007, Delaware Avenue attempted to file a Complaint against the Commonwealth in an identical caption. In a letter and in numerous telephone conversations, Counsel was advised that service against the Commonwealth must be established in accordance with the Rules of Civil Procedure applicable to the Commonwealth as a party and the Complaint was returned for compliance with the Rules.

⁴ No one has entered an appearance on behalf of the Attorney General, nor has the Attorney General filed a response or any paper in this matter.

Section 204(c) of the Commonwealth Attorneys Act, Act of October 15, 1980, P.L. 950, 71 P.S. § 732-204(c), provides in relevant part: The Attorney General shall represent the Commonwealth and all Commonwealth agencies in any action brought by or against the Commonwealth or its agencies.

parties on January 14 and February 21, 2008. On September 9, 2008, Delaware Avenue filed a Supplemental Brief to which DEP and DCNR filed a reply on October 17, 2008.

Preliminary Objections

In disposing of preliminary objections, the Board must accept as true all material and well-pleaded facts of the Complaint, as well as all inferences reasonably deduced therefrom. *Giordano v. Ridge*, 737 A.2d 350 (Pa. Cmwlth. 1999), *affd*, 559 Pa. 283, 739 A.2d, 1052 (1999). To sustain a preliminary objection it must appear with certainty that the law will not permit recovery and that any doubt shall be resolved by refusal. *Envirotech Partners, Inc. v. Department of Transportation*, 644 A.2d 208 (Pa. Cmwlth. 1995)

This is an action to quiet title. (Complaint ¶3) It avers that Delaware Avenue is a Pennsylvania corporation doing business at 4233 Richmond Street, Philadelphia, Pennsylvania and that the Commonwealth is named as defendant in this matter in order to “foreclose its interest in a parcel of land.” (Complaint ¶s 1&2) Delaware Avenue owns a large industrial tract identified in the Complaint as 4301 North Delaware Avenue immediately north of the Betsy Ross Bridge; the tract adjoins land owned by the Delaware River Port Authority, the owner of the bridge, and the Delaware River. (Complaint ¶4) The Complaint avers that in the 1960s approximately four acres of land were created between its property and the Delaware River by fill that was used to extend the shoreline of the Delaware River for building support structures for the Bridge during its initial construction. (Complaint ¶5)

I. Failure to conform to Pa. R.C.P. 2102 (Commonwealth as Defendant)

We begin with the Departments' first preliminary objection alleging that Delaware Avenue has improperly identified the "Commonwealth of Pennsylvania" as defendant, citing Section 8522 of the Judicial Code, 42 Pa. C.S. § 8522 and Pa. R.C.P. (a)(2).

Delaware Avenue contends in its Answer to the Objection that because this is an action to quiet title and an action against an agency of the Commonwealth will not bind the Commonwealth.

Pa. R.C.P. (a)(2) provides

2) An action against a Commonwealth agency or party shall be styled in the following manner: Plaintiff v. “

of the Commonwealth of Pennsylvania.”

Commonwealth party” is defined under 42 Pa. C.S. § 8501 as a Commonwealth agency. Under 42 Pa. C. S. § 102, “Commonwealth agency” is defined as any executive agency or independent agency. Under that same section, "**Executive agency**" is defined as “The Governor and the departments, boards, commissions, authorities and other officers and agencies of the Commonwealth government, but the term does not include any court or other officer or agency of the unified judicial system, the General Assembly and its officers and agencies, or any independent agency.” “Independent agency” is defined as boards, commissions, authorities and other agencies and officers of the Commonwealth which are not subject to the policy supervision and control of the Governor.

The Departments cite Hall v. Acme Markets, Inc., 532 A.2d 893 (Pa. Cmwlth Ct. 1987). There, the Commonwealth Court sustained the objection of the Department of Transportation, which was not identified in the Complaint as a party in the action. The Court held that the failure

to name a Commonwealth agency or party was a fatal, albeit technical defect. In that case, the Court concluded that plaintiff should be allowed to remedy by amendment because DOT had participated in all aspects of the litigation after the case had been filed.

In answer to the preliminary objections, counsel for Delaware Avenue he made telephone calls to determine which agency was responsible for defending the action and at this point, having served the departments and the Attorney General⁵, “plaintiff . . . is at a loss to determine which other departments to serve. (Answer to Preliminary Objections ¶ 5) Delaware Avenue contends that it does not matter which department claims the duty or right to represent the Commonwealth as long as the Commonwealth is a party for the purpose of establishing a res judicata ruling as to the fee simple title to the land at issue. The Board finds no merit in these arguments.

A Commonwealth agency should not be required to dissect original process to determine if it may be a party; rather, all parties, including Commonwealth parties, are entitled to rely on the face of original process to determine if further action is warranted consistent with the Rules of Civil Procedure Nos. 1018 and 1018.1.⁶

In *Glover v. SEPTA*, 794 A.2d 410 (Pa. Cmwlth. 2002), a passenger brought an action against the transportation authority, the City of Philadelphia and the “Commonwealth of Pennsylvania Attorney General’s Office” for damages sustained in a fall resulting from uneven asphalt when exiting a bus. Count IV of the Complaint titled “Bernice Glover v. Commonwealth of Pennsylvania” but did not refer to DOT by name. DOT was elsewhere

⁵ The Board notes that the Departments do not agree that they were served and the Attorney General has not responded in any fashion to the Complaint. The record is devoid of any attempt by Plaintiff to ascertain whether the Attorney General is aware of the existence of the Complaint.

⁶ See *Piehl v. City of Philadelphia*, 930 A.2d 607 (Pa. Cmwlth. 2007), (Judge Simpson, dissenting), *Petition for Allowance of Appeal granted*, 596 Pa. 460, 944 A.2d 751 (2008).

identified the agency responsible for care and maintenance of state highways. Service was made on the Commonwealth of Pennsylvania but not DOT. Plaintiff argued she should be permitted to amend the Complaint. The Court held that the rule allowing amendment of pleadings would not stand when the amendment would substitute a Commonwealth agency for the Commonwealth because it amounts to adding a new party, not merely correcting the caption.

Responsibility for suit against the proper defendant rests upon the plaintiff and, in the absence of discovery directed to such issues, the defendant is under no duty to inform plaintiff whom he or she should sue. Amending a complaint to substitute a commonwealth agency for the Commonwealth amounts to adding a new party, not merely correcting the caption. *Taylor v. Humble Oil and Refining Co.*, 225 Pa. Superior Ct. 177, 311 A.2d 324, 325 (1973).

For the foregoing reasons the first preliminary objection is sustained.

II. Improper Service

Department's second preliminary objection asserts improper service citing Pa. R.C.P 422 which provides:

Rule 422. The Commonwealth and Political Subdivisions.

(a) Service of original process upon the Commonwealth or an officer of the Commonwealth, or a department, board, commission or instrumentality of the Commonwealth, or a member thereof, shall be made at the office of the defendant and the office of the attorney general by handing a copy to the person in charge thereof.

Delaware Avenue concedes that its service on the Departments did not comport with the Pennsylvania Rules of Civil Procedure. It contends that the Board of Property as an administrative agency of the Commonwealth is governed solely by the General Rules of

Administrative Practice and Procedure and that it accomplished service in accordance with the 1 Pa. Code §§ 33.31 and 33.32⁷. These provisions read as follows:

§ 33.31. Service by the agency.

Orders, notices and other documents originating with an agency, including forms of agency action, complaints and similar process and other documents designated by the agency for this purpose, shall be served by the office of the agency by mail, except when service by another method shall be specifically required by the agency, by mailing a copy thereof to the person to be served, addressed to the person designated in the initial pleading or submittal at his principal office or place of business. ...If service is not accomplished by mail, it may be effected by anyone authorized by the agency in the manner provided in 231 Pa. Code Rules 400—441 (relating to service of original process).

§ 33.32. Service by a participant.

Pleadings, submittals, briefs and other documents, filed in proceedings pending before an agency, when filed or tendered to the agency for filing, shall be served upon all participants in the proceeding. The service shall be made by delivering in person or by mailing, properly addressed with postage prepaid, the requisite number of copies to each participant as provided in § 33.37 (relating to number of copies).

GRAPP § 33.31 applies only to service of documents *originating with* the agency. The Board is an administrative tribunal; as such, unlike many administrative agencies, it does not originate process against anyone. To the contrary, the Board serves only as a tribunal to hear cases under the Public Lands Act and cases in which the Commonwealth is a defendant under the Administrative Code.

Section 1207 of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 337, sets forth the jurisdiction and the powers and duties of the Board as follows:

⁷ GRAPP § 33.32 applies to documents filed in a pending proceeding. A proceeding does not become pending until service is obtained on the party against whom the action is brought. The regulation is not germane to this proceeding.

The Board of Property shall, subject to any inconsistent provisions in this act contained, continue to exercise the powers and perform the duties by law vested in and imposed upon the said board.

It shall hear and determine, in all cases of controversy on caveats, in all matters of difficulty or irregularity touching escheats, warrants on escheats, warrants to agree, rights of preemption, promises, imperfect titles, or otherwise, which heretofore have or hereafter may arise in transacting the business of the Land Office in the Department of Community Affairs: Provided, however, That no determination of the Board of Property shall be deemed, taken and construed to prevent either of the parties from bringing their action at the common law, either for the recovery of possession or determining damages for waste or trespass.

The Board of Property shall also have jurisdiction to hear and determine cases involving the title to land or interest therein brought by persons who claim an interest in the title to lands occupied or claimed by the Commonwealth.

The Board has regulations governing procedures in proceedings of disputed caveats or warrants⁸, but these regulations do not cover cases involving title or interest in land in which the Commonwealth has occupied or claimed an interest or title. These cases when filed against the Commonwealth before the Board of Property are most analogous to actions governed by the Rules of Civil Procedure. For that reason the Board has adopted these rules for all land disputes not involving controversies on caveats.

Moreover, counsel for Delaware Avenue was advised by the Board before he filed the Complaint at issue that service of original process should conform to the Rules of Civil

⁸ See 4 Pa. Code §§ 137.1-137.9.

Procedure.⁹

Accordingly, the Departments second preliminary objection is sustained.

III. Failure to State a Claim

The Departments next contend that Delaware Avenue is not entitled to claim ownership to the filled land under Pennsylvania Law and the facts alleged in the Complaint. First, the Departments assert that the Delaware is a public navigable river as a matter of law¹⁰, a proposition to which Delaware Avenue agrees. The Departments cite *Black v. American International Corp.*, 264 Pa. 260, 107 A. 737 (1919) for the proposition that the ownership of the

⁹ On April 26, 2007, Delaware Avenue attempted to serve the Commonwealth as defendant by filing the Complaint with the Board. The Board through its counsel, responded to Counsel for Delaware Avenue in pertinent part as follows:

You state in your letter "my delivery to you constitutes 'service' on the Board." Permit me to advise that under Section 1207 of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 337, the Board has jurisdiction to hear and determine interests in property in which the Commonwealth or one of its agencies is a defendant. This includes actions to quiet title. The Board of Property also has jurisdiction to hear and determine an appeal from a denial of an application for vacant lands under the Public Lands Act. In actions to quiet title the Board requests that the parties comply with Pa. R.C.P. 1063-1068 and 422 regarding service on the Commonwealth. With regard to general matters, the Board has adopted the General Rules of Administrative Practice and Procedure, 1 Pa. Code Part II.

In accordance with 1 Pa. Code § 31(c), the Board has determined that your filing does not comply with its rules. The Board is therefore returning your letter and its attachments to you unfiled. If you have any questions regarding the above, please call or write. Thank you.

See letter of Joyce McKeever, Board Counsel, May 22, 2007.

In subsequent correspondence, the Board Administrator wrote to counsel for Delaware Avenue:

Per our conversation yesterday, in order to be able to docket your Complaint we need a Certificate of Service showing that you served this Complaint to a person or entity representing the Commonwealth. In your Complaint you state Delaware v. the Commonwealth; you must have a specific person to serve this document to who would represent the Commonwealth.

Please refer to 1 Pa. Code Sec. 33.36, under this section it states that you are required to serve the other party that you are filing against. The Board of Property cannot be named as a party.

¹⁰ The Delaware River is specifically declared a common highway for purposes of navigation by the acts of March 9, 1771 (1 Smith's Laws, p. 322), and September 20, 1783 (2 Smith's Laws, p. 77), to be a 'common highway for the purposes of navigation.'

land underneath the water of a navigable river lies in the Commonwealth in trust for the people. Delaware Avenue¹¹ contends that *Black* is distinguishable, being an action to recover damages. It also contends that the Departments rely on “old” case law whereas the modern view as expressed by the Supreme Court in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973).

At issue in *Black* was property on Hog Island in Chester and Delaware counties. The United States Government used the bottom of the Delaware River as the dumping ground for materials dredged from the Delaware and Schuylkill rivers in 1895 and 1906 raising the bottom of the river bed until making fast land, adding 54 acres to Hog Island. The Court affirmed the principle that the gradual, natural accretion of soil, gravel, stone or other natural element inures to the riparian landowner, but that accretion of land resulting from man-made improvements to a navigable river inures to the Commonwealth.

In *McKeen v. Delaware Division Canal Co.*, 49 Pa. 424 (1895) the Court observed: “Everyone who buys property upon a navigable stream purchases subject to the superior right of the Commonwealth to regulate and improve it for the benefit of all its citizens...[a riparian owner] may make use of the water ...but he does so at his own risk, and cannot complain when the Commonwealth, for the purposes of improvement chooses to maintain the waters of the stream at a given height.”

The General Assembly specifically declared the Delaware River a “common highway for the purposes of navigation” beginning with legislation enacted in the 1700s. Since that time the

¹¹ In a submittal filed after the close of the briefing schedule, Delaware argued that the recent decision of our Supreme Court, *HSP Gaming, L.P. v. City of Philadelphia*, 598 Pa. 118, 954 A.2d 1156 (2008) supported its position. That case concerned whether Act 231 of 1907 granting Philadelphia the authority to issue licenses to riparian landowners on the Delaware River was repealed by the 1978 Dam Safety and Encroachments Act. A related issue concerned the authority of the city to revoke a license. Delaware is not seeking a license in this case; nor is it seeking permission from the Commonwealth to access the river. It asks for a declaration that the claimed four acres of land used to fill the bed of the Delaware River to construct the Betsy Ross Bridge belongs to it, to the exclusion of the Commonwealth. Therefore, its reliance on *HSP Gaming* is misplaced as is its argument that Act 231 of 1907 deprives the Commonwealth of standing to oppose its action to quiet title.

General Assembly has made provisions for rights of riparian landowners granting authority to the City of Philadelphia and DEP to issue licenses to riparian owners.

In *Bonelli*, the federal government conveyed a parcel of land abutting the east bank of the Colorado River to the Santa Fe Railroad Company. On admission to the Union the State of Arizona in 1912 succeeded in title to the riverbed of the Colorado. From 1912 to 1958 the path of the river gradually crept eastward covering most of the riparian land of the then owner cattle company. The Court held that the ownership of the subject land is governed by federal law, and that the land surfaced by the narrowing of the river channel belongs not to the State, as owner of the riverbed, but to Bonelli, as riparian owner.

Quoting *Arkansas v. Tennessee*, 246 U.S. 158, 176 (1918):

"[I]t is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. . . ."

the Court noted:

We continue to adhere to the principle that it is left to the States to determine the rights of riparian owners in the beds of navigable streams which, under federal law, belong to the State. But this doctrine does not require that state law govern the instant controversy. The issue before us is not what rights the State has accorded private owners in lands which the State holds as sovereign, but, rather, how far the State's sovereign right extends under the equal-footing doctrine and the Submerged Lands Act [or] whether that title is defeasible by the withdrawal of those waters.

414 U.S. 319-20.

Thus, the *Bonelli* decision was decided as a matter of Federal law and reaffirmed the principle that the states determine the rights of riparian owners in lands which the State holds as sovereign.

The Board also finds Delaware Avenue's related argument— that the Departments rely on cases which are “old,” and hence of questionable value— unpersuasive for the following reasons.

In *Warren Sand & Gravel Co., Inc. v. Commonwealth, Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975) the Court affirmed that the land under the navigable streams belong to the Commonwealth, quoting Chief Justice Tilghman in an 1826 opinion: “The soil over which our great rivers flow...has never been granted to anyone either by William Penn or his successors, or the state government. Care seems to have been taken from the beginning to preserve the waters from [sic] public uses, both of fishery and navigation....”¹² *Black*, the case with the most analogous fact pattern to this matter was cited with approval by our Supreme Court in *HSP Gaming, L.P. v. City of Philadelphia*, 598 Pa. 118, 954 A.2d 1156 (2008).

Although the Departments argue in their Memorandum in support of its preliminary objections that Delaware Avenue may apply for a license in accordance with the Dam Safety and Encroachments Act¹³, it is plain in its response to the Preliminary Objection that it seeks solely to obtain clear title to the land created by the placement of fill to the bed of the Delaware River. Plaintiff does not dispute that the Commonwealth owned the land in the bed of the Delaware River. Its sole contention is that, by the happenstance of the state adding fill to the riverbed, it was the beneficiary of some four acres of Commonwealth land. Under longstanding statutes and case law, our Legislature and our Supreme Court have plainly stated that this land belongs to the Commonwealth. Therefore, this preliminary objection is sustained. In accordance therewith, the Complaint is dismissed.

¹² *Shrunk v. Schuylkill Navigation Co.*, 14 S.&R 71, 80 (1826).

¹³ Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27.

COMMONWEALTH OF PENNSYLVANIA

BOARD OF PROPERTY

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COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
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ORDER

And now, this sixth day of November, 2009, the Board hereby SUSTAINS the Preliminary Objections of the Department of Conservation and Natural Resources and the Department of Environmental Protection. It is ORDERED that the Complaint in the above-captioned matter be, and the same hereby is, DISMISSED.

BY ORDER:



Kathleen M. Kotula, Esquire
Pennsylvania Department of State
Designee of Pedro A. Cortés
Secretary of the Commonwealth
Chairman
Board of Property

DATE OF MAILING: November 6, 2009

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