

**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE BOARD OF PROPERTY**

HAZLE PENN, INC.	:	
and JAMES J. JUSTOFIN,	:	
Appellant	:	
	:	
v.	:	Docket No. BP-2004-0002
	:	
DEPARTMENT OF CONSERVATION	:	
AND NATURAL RESOURCES,	:	
Appellee	:	

MEMORANDUM OPINION AND ORDER

Before the Board for disposition are Preliminary Objections and Motion to Dismiss and request for Counsel Fees of the Department of Conservation and Natural Resources (DCNR).

Procedural History

On November 2, 2004¹, Hazle Penn, Inc. and James J. Justofin, as its President, (collectively Hazle Penn) filed an action captioned as an appeal from a decision of DCNR.²

Hazle Penn averred that on September 9, 2004 it filed an application for Warrant of Acceptance and Application for a General Warrant for Unimproved Vacant Land allegedly located in the Townships of Black Creek and Sugar Loaf in Luzerne County, Pennsylvania, with the Bureau of Facility Design and Construction, Division of Field Engineering (Bureau).

(Appeal ¶ 1) It further averred that it was denied a Warrant when it received a letter from the

¹ Filing was attempted on October 29, 2004 and perfected and docketed on November 2, 2004. For the purpose of appeal to this Board under 68 Pa. C.S. § 6104(c), the appeal has been timely filed.

² Hazle Penn captioned its action as follows: "Appeal of Hazle Penn Inc. & James Justofin from the Decision of the Decision of the Bureau of Facility Design and Construction, Division of Field Engineering, of the Commonwealth of Pennsylvania Department of Conservation and Natural Resources (as successor to the Pennsylvania Historical and Museum Commission and the Bureau of Land Records) For Refusal to Issue a Warrant of Acceptance & General Warrant for Certain Vacant Lands." The Board has recaptioned the action in the interest of brevity.

Bureau stating that “Due to limitations on available resources, this office is not now actively reviewing and processing vacant land warrant/patent applications.” (Appeal ¶ 2)

On December 21, 2004³, DCNR filed Preliminary Objections in the nature of a demurrer for failure to state a cause of action for which relief may be granted and a Motion to Dismiss and a request for costs and counsel fees.

On March 21, 2005, Hazle Penn filed a Reply to the Preliminary Objections and Motion.

On September 6, 2005, the Board issued a scheduling order for the filing of memoranda of law in support of the positions of the parties. DCNR filed its memorandum on October 13, 2005. On December 15, 2005, Hazle Penn filed its memorandum.

Preliminary Objection

This is an action brought under Chapter 61 (Vacant and Unimproved Public Lands), 68 Pa. C.S. §§ 6101-6114.⁴

On September 9, 2004, Hazle Penn filed with the Bureau of Facility Design and Construction, Division of Field Engineering of DCNR an Application for a General Warrant for a vacant parcel of land consisting of 821.912 acres in Black Creek and Sugar Loaf Townships in Luzerne County. (Motion to Dismiss/Appellants’ Reply ¶ 3)

On September 30, 2004, DCNR notified the Appellant that “due to limitations on available resources, [the DCNR] is not now actively reviewing and processing vacant land/warrant applications.” (Complaint ¶ 2) The letter further stated: “Please be assured that when this situation eases in the future, your application, along with others, will be processed with the appropriate attention and communication.” (Complaint Exhibit A)

³ A number of extensions of filing deadlines were requested from the initial filing. In the interest of brevity, they will not be detailed here.

⁴ Section 3 of Act 2000-88 states: “The addition of 68 P.S. Ch. 61 is a codification of the Act of July 9, 1959, P.L.

Hazle Penn asserts that the letter is a denial of the application under 4 Pa. Code § 133.4.⁵

(Complaint ¶ 3)

In its preliminary objection, DCNR asserted that Hazle Penn's Complaint⁶ is legally insufficient on the grounds that DCNR has not denied Hazle Penn's application. Appellants contend that DCNR's letter is an effective denial.

In ruling on a preliminary objection, the Board must accept as true all factual averments of the plaintiff as well as all reasonable inferences deduced from well-pleaded facts. *Mariani v. Department of Environmental Resources*, 566 A.2d 385 (Pa. Cmwlth. 1989). In ruling on a preliminary objection in the nature of a demurrer, the Board need not accept as true, conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinions. *Larry Pitt & Associates, P.C. v. Butler*, 785 A.2d 1092 (Pa. Cmwlth. 2001).

The procedure to obtain a warrant is set forth in 68 Pa. C.S. §§ 6103 and 61304 as follows:

Section 6103. Application

(a) Commonwealth rights.--The right of a person to a patent for vacant or unappropriated lands is subject to the right of the department to formally acquire for the department on behalf of the Commonwealth and have vacant or unappropriated lands patented

510, known as the Pennsylvania Public Lands Act, and shall be construed as a continuation of that Act."

⁵§ 133.4 Issuance of warrant.

(a) If no caveat is entered on the land, or after disposition of caveat in favor of the applicant, and upon receipt of the prescribed fees, the Commission will prepare and transmit the warrant to survey, at least 10 days after the date of last publication of the notice of filing, to the surveyor or engineer designated by the applicant to complete the warrant.

(b) The applicant shall receive each of the following:

- (1) Connected draft of area.
- (2) Return of survey form.
- (3) Calculation sheet form.
- (4) Report of the Commission.
- (5) Receipt for warrant fee.

⁶Hazle Penn has captioned its action as an "Appeal," which DCNR contends should be recaptioned a Complaint. The Board agrees that the "Appeal" may be more accurately described as a complaint in mandamus. Nonetheless, the Board will not disturb Hazle Penn's caption.

to the Commonwealth for State forest purposes or State park purposes

(b) Survey.--A person may apply for a warrant to have a survey made of any tract of vacant or unappropriated land.

(c) Investigation.--The department, with the cooperation of the [Historical] commission, shall investigate to determine whether office rights have been granted for a tract of land and whether the tract of land is vacant or unappropriated *if* an applicant does all of the following:

- (1) Completes an application prescribed by the department.
- (2) Gives 30 days notice of the filing of the application by publication once a week for three successive weeks in a newspaper of general circulation in the area where the land is situated. The applicant must furnish proof of publication to the department.
- (3) Submits a certified abstract of title.
- (4) Submits the survey under subsection (b).

(Emphasis added.)

Section 6104. Report

(a) Total.--If the department determines that the land applied for is not vacant or unappropriated, it shall file its report.

(b) Partial.--If the report discloses that a part only of the land applied for is not vacant or unappropriated, the applicant may proceed with respect to the balance under section 6106 (relating to State forests).

(c) Appeal.--The report shall be conclusive upon the applicant, subject to the right of the applicant to appeal to the board within 30 days under regulations of the board [of Property].

In its prayer for relief, Hazle Penn asks that the “denial” of DCNR be overruled and that it be awarded a Patent from DCNR and the Commonwealth of Pennsylvania for the vacant land.

(Appeal of Hazle Penn, p.9)

In an action in mandamus involving an administrative agency’s exercise of discretion this Board may only direct an agency to perform an administrative act; it may not compel an agency

to exercise its discretion in a particular manner or to reach a particular result. *Micken-Thomas v. Commonwealth, Board of Probation and Parole*, 699 A. 2d 792 (Pa. Cmwlth. 1997).

Hazle Penn has not averred that it has meet the preconditions of 68 Pa. C.S. § 6103(c)(1)-(4). More importantly, the Board concludes that DCNR's statutory duties under Sections 6103 and 6104 are discretionary in nature both in terms of time of completion or result.

Accordingly, the Board sustains the preliminary objection of the Commonwealth.

Motion to Dismiss

In its motion, DCNR asserts that the res judicata applies to the present action. In addition, it has requested that the Commonwealth be awarded costs and fees under 42 Pa. C. S. §§ 1726 and 2503. Its motion alleges, and Hazle Penn admits that on or about August 7, 2004,⁷ Hazle Penn and Justofin submitted an application for a general warrant and an application for a warrant of acceptance to DCNR for a claimed vacant tract of land comprising 821.912 acres in Black Creek and Sugarloaf Townships in Luzerne County.

DCNR contends that the Board's decision in *James J. Justofin v. Pennsylvania Historical and Museum Commission*, Docket No. BP-98-0004 and the decision of the Commonwealth Court which upheld the opinion and order of the Board recaptioned *Hazle Penn, Inc. v. Pennsylvania Board of Property*, Docket No. 394 M.D. 2004. constitute final decisions which bar the present action under Respondent judicata.⁸

The procedural history of *Justofin* is summarized as follows.

⁷ The date of the filing of the application pleaded by Hazle Penn in its Appeal to the Board is September 9, 2004. In its response to DCNR's motion Hazle Penn has admitted the August 7, 2004 date. The date is not material to the resolution of the motion.

⁸ The decision of the Court was an unreported opinion. Under Rule 414 of the Internal Operating Procedures of the Commonwealth Court, unreported opinions may be relied upon or cited when it is relevant under the doctrine of the law of the case, res judicata or collateral estoppel.

On December 15, 1978, Appellant Justofin filed with the Pennsylvania Historical and Museum Commission Application No. 722 for a warrant for 821.912 acres in Black Creek and Sugarloaf Townships in Luzerne County.⁹ On March 21, 1979, the Commission issued a decision advising Justofin that the land had been warranted, surveyed and patented that no vacant land existed as claimed in the application. On October 5, 1981, Appellant Justofin filed a Petition with the State Board of Property (Board) at docket number BP-81-02, seeking review of the Commission's determination. On August 3, 1983 and May 12, 1986, the Board directed that Justofin give notice to the record title holder of the land. On April 30, 1987, the Board dismissed Justofin's Petition for failure to give the required notice; Justofin requested reconsideration. In 1988, Justofin appeared before the Board with the Commission and a hearing was held on the merits of his Application. His request was denied based upon survey evidence provided by the Commission showing that no vacant land existed in the area which Justofin claimed.

On October 22, 1991, Justofin filed a Petition with the Board to reinstate Application No. 722. On November 14, 1991, the Board issued an order which denied the Petition finding that Appellant failed to take appropriate action to prosecute his application.

On April 23, 1992, Justofin filed a new application, Application No. 725, for a warrant for the same 821.912 acres in Black Creek and Sugarloaf Townships. Application No. 725 did not contain a survey and description by a land surveyor of the tracts. The Commission notified Justofin that a survey and description was required before the Commission could act on the Application. The survey and description was not filed and the Commission has never ruled on Application No. 725.

⁹Hazle Penn does not dispute that this is the same land that it contends in this action is vacant unappropriated land.

On March 18, 1997, Justofin filed a third application, Application No. 781, for a warrant for the same 821.912 acres in Black Creek and Sugarloaf Townships. As in 1978, the Commission determined that no vacant land existed in the area, and on April 14, 1997, the Commission issued its denial of Application No. 781.

More than one year later, on April 24, 1998, Justofin filed an appeal with the Board seeking a review of the April 14, 1997 Commission decision.

On July 31, 1998, the Board issued a preliminary order in which it questioned its jurisdiction to hear the appeal and requested that the parties file briefs on their positions regarding the question. In his brief, Justofin argued that the procedural history of the case is long because Commonwealth agencies “sat on his application for literally years.” He asserted that the Board has authority to hear the appeal under Section 5 of the Pennsylvania Public Lands Act, Act of July 9, 1959, P.L. 510, 64 P.S. §605.

The Board determined that Justofin failed to file his applications under the Pennsylvania Public Lands Act, 64 P.S. §601 et seq. which provides for procedures for the sale of vacant and unimproved public lands.¹⁰

Section 605, 64 P.S. § 605, provides:

Upon the receipt of an application on a form approved by the department for vacant or unappropriated public lands, together with abstract of title, duly certified and survey, the department shall cause an investigation to be made to determine whether any office rights have been granted for the land described in said application, and to determine whether or not the land is vacant or unappropriated. If the department shall determine that the land applied for is not vacant or unappropriated, it shall file a report, which shall be conclusive upon the

¹⁰ The Public Lands Act originally placed administrative powers and duties in the Department of Internal Affairs. Those duties were subsequently transferred to the Department of Community Affairs by amendments to the act under the Act of July 18, 1968, P.L. 424. The powers and duties of the Secretary of Community Affairs with regard to public lands was transferred to the Pennsylvania Historical and Museum Commission under Reorganization Plan No. 2 of 1981, 71 P.S. §751-29.

applicant, subject to the right of the applicant to appeal to the Board of Property under such rules as the Board may adopt.

It concluded that Justofin's appeal was barred by principles of res judicata and collateral estoppel.

In *McCarthy v. Township of McCandless*, 300 A. 2d 815, 819-20 (1973), the Commonwealth Court stated:

Res judicata literally means a matter adjudged or a thing judicially acted upon or decided. From long usage it has come to encompass generally the effect of one judgment upon a subsequent trial or proceeding. Two quite distinct aspects are included: first, the effect of a judgment in a subsequent action between the parties based upon the same cause of action; second, the effect on the parties in a trial on a different cause of action. See, e.g., *Piro v. Shipley*, 33 Pa. Superior Ct. 278, 281--283 (1907); Restatement of Judgments §§ 47--55, 68--72 (1942).

Where the same cause of action is involved, the doctrine can be summarized: plaintiff's cause of action is merged in a final judgment if he wins, or barred by it if he loses. The scope of the merger or bar includes not only matters actually litigated but also all matters that should have been litigated. Frequently this doctrine is referred to by the generic name of res judicata but it is sometimes termed 'technical' res judicata to distinguish it from 'collateral estoppel', discussed infra. For 'technical' res judicata (or simply res judicata) to prevail, there must be a concurrence of four conditions: 1) Identity in the thing sued upon or for; 2) Identity of the cause of action; 3) Identity of persons and parties of the action; and 4) Identity of the quality or capacity of the parties suing or sued. (Citations omitted)

Hazle Penn appealed the Board's order to the Commonwealth Court along with a complaint in the Court's original jurisdiction against numerous state officials alleging a violation of Justofin's constitutional rights. The appeal was quashed as untimely. However, the Court also noted: "[T]his appeal could be quashed under principles of Respendent judicata because this is Justofin's third, if not fourth, bite at the apple....Although Hazle, not Justofin, is named in the caption, counsel readily admits that Justofin is the correct party and indeed even requested an amendment to change the caption to reflect Justofin as the petitioner. Other than that, Hazle has

no counter to the contention that res judicata applies.” *Hazle Penn, Inc. v. Pennsylvania Board of Property, supra*, at p. 6.

In this case the records of the Board show that in two prior Applications, Nos. 722 and 725 Justofin asked for a warrant for the same 821.912 acres of asserted vacant land in Black Creek and Sugar Loaf Townships in Luzerne County. The Commission informed him when these applications were filed that no such vacant land exists. This determination was appealed to the Board in Application No. 722. A hearing¹¹ was held before the Board in 1988. The Board found in favor of the Commission and against Justofin and issued an order denying the application. Justofin did not appeal this order. Instead, in 1991, he filed a Petition for reconsideration which was denied in a November 14, 1991 order. Justofin did not appeal that order.

DCNR contends that principles of res judicata should bar an appeal of the Commission’s denial based upon the criteria summarized in *McCandless Township v. McCarthy*. In its memorandum of law, Hazle Penn does not counter this argument, except to assert that it now has “irrefutable proof that vacant land exists where he [Justofin] says it does.” (Memorandum, p. 2) However, the inquiry in a proceeding in which res judicata is in question is “whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties had an opportunity to appear and assert their rights.” *Rawlings v. Bucks County Municipal Authority*, 702 A.2d 583 (Pa. Cmwlth. Ct. 1997).

¹¹ In this action, Hazle Penn argues that he was not given a hearing. He states that a search of Board records does not contain a transcript of the proceedings. Hazle Penn acknowledges that at this time Justofin and the Commission attended a conference where the Commission and Justofin explained their respective positions and the evidence each relied on. Justofin was advised that he needed to file a survey in order for his appeal to go forward; the Board also urged him to obtain counsel. In any event, alleged deficiencies in the prior proceedings before the Board were fully litigated in the Commonwealth Court action.

Here, the parties are the same, the same land is at issue, the cause of action is the same, and the parties suing and being sued are identical as in the 1988 proceeding which became final when no appeal was taken from the Board's original denial in 1988 or its denial of reconsideration in 1991.¹²

Counsel Fees

DCNR requests the award of costs and counsel fees under 42 Pa. C.S. § 1726, relating to the establishment of taxable costs and the award of counsel fees under 42 Pa. C.S. § 2503. The Board finds that the award of costs and counsel fees is not appropriate in disposing of preliminary objections and motions to dismiss.

Based upon the foregoing, the following order shall be entered.

¹² The gist of Hazle Penn and Justofin in all of the actions is that a gore of vacant land exists between lands titled by warrants and surveys made in the 1700 when the calls for warrants are placed on the ground. In its answer to DCNR's motion Hazle Penn contends that Justofin has obtained a Global Positioning Satellite survey that "proves" the existence of a gore between the warrants. This same factual averment was presented in the action before the Board and the Commonwealth Court. Its existence did not affect the application of res judicata to Justofin's appeal.

Date of Mailing: July 6, 2006

For Appellant:

Michael F. McQuigan, Esquire
Stack & Stack PC
1600 Locust Street
Philadelphia, PA 19103

For Appellee:

Martha R. Smith, Esquire
Assistant Counsel
7th Floor Rachel Carson State Office Building
P.O. Box 8767
Harrisburg, PA 17105-8767