



BRIAN O'NEILL, O'NEILL
PROPERTIES and CONSTITUTION
DRIVE PARTNERS, LP
Plaintiffs

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PA

VS.

NO. 2017-03836-MJ

MAYA VON ROSSUM, CARLA
ZAMBELLI and DELAWARE
RIVERKEEPER NETWORK
Defendants

CIVIL ACTION - LAW

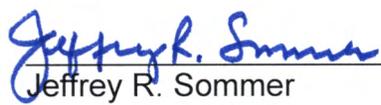
James C. Sargent, Esquire, Attorney for Plaintiffs
Jordan B. Yeager, Esquire and Mark L. Freed, Esquire, Attorneys for Defendants

ORDER OF COURT

AND NOW, this 22 day of August, 2017, upon review and consideration of the Preliminary Objections of Defendants Maya Van Rossum and Delaware Riverkeeper Network to the Complaint, and any response thereto, it is hereby ORDERED said Preliminary Objections are **SUSTAINED**.¹

Plaintiff's Complaint is hereby DISMISSED with prejudice.

BY THE COURT:


Jeffrey R. Sommer J.

¹ Defendants Maya Van Rossum and Delaware Riverkeeper Network (hereinafter, "DRN") have asserted a total of nine (9) Preliminary Objections to the Complaint. Plaintiff filed Preliminary Objections to the Preliminary Objections on the basis that DRN's objections have alleged facts outside of the Complaint. In the interest of expediency, we overrule the Preliminary Objections of Plaintiff and address DRN's Preliminary Objections under the well-established standard requiring us to accept

Plaintiff's well-pleaded allegations as true. Plaintiff asserts three causes of action against the Defendants: (1) Defamation/Commercial Disparagement; (2) Tortious Interference with Contractual or Business Relations; and (3) Civil Conspiracy.

DRN's first objection is a demurrer to all counts of the Complaint on the basis that the claims are barred by the *Noerr-Pennington* Doctrine. Pursuant to the *Noerr-Pennington* Doctrine, an individual is immune from liability for exercising his First Amendment right to petition the government. Our Commonwealth Court laid out the history of the *Noerr-Pennington* Doctrine in *Penllyn Greene Assocs., L.P. v. Clouser*, as follows:

The *Noerr-Pennington* Doctrine originated with the United States Supreme Court's decisions in *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657, 669-70, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). In recognition that the "right of petition is one of the freedoms protected by the Bill of Rights," the U.S. Supreme Court held that individuals and organizations are immune from liability under antitrust laws for actions constituting petitions to the government. *Noerr*, 365 U.S. at 138, 81 S.Ct. 523. Over the years, courts have extended this immunity doctrine, referred to as the *Noerr-Pennington* Doctrine, to protect political activity against tort claims. *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (First Amendment protected against a civil conspiracy claim by white merchants whose businesses were being boycotted); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155 (3d Cir.1988) (defendants were immune from conspiracy liability for damages resulting from inducing official action to decertify a nursing home).

The sole exception to the *Noerr-Pennington* Doctrine is the "sham exception" under which a defendant will not be protected if he is simply using the petition process as a means of harassment. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380, 111 S.Ct. 1344, 113 L.Ed.2d 382, (1991). "A 'sham' situation involves a defendant whose activities are not genuinely aimed at procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means." *Id.* Therefore, under the "sham" exception, an individual will be liable if he

“use[s] the governmental process-as opposed to the outcome of that process-as [a] ... weapon.” *Id.* See e.g. *Wawa, Inc. v. Litwornia, et al.*, 817 A.2d 543 (Pa. Super. 2003). (dissemination of false information aimed at interfering directly with the business relationships of a competitor triggered “sham” exception to the *Noerr-Pennington* Doctrine).

890 A.2d 424, 430 (Pa. Commw. Ct. 2005). The *Noerr* Court held such immunity existed “regardless of the defendants' motivations” in waging their campaigns, as it recognized that the right of individuals to petition the government “cannot properly be made to depend on their intent in doing so.” *Noerr*, 365 U.S. at 139. Thus, “parties may petition the government for official action favorable to their interest without fear of suit, even if the result of the petition, if granted, might harm the interests of others.” *Tarpley v. Keistler*, 188 F.3d 788, 794 (7th Cir.1999).

Based upon the allegations of the Complaint, we find that the *Noerr-Pennington* Doctrine applies here to bar Plaintiff's claims. The Complaint basis its claims on DRN's efforts in resisting Plaintiff's proposed soil clean up, remediation, and repurposing of the Bishop Tube site, a former industrial site which has been rezoned “residential” and which Plaintiff intends to develop additional residential housing within the East Whiteland community. See, *Complaint at* ¶23-24. The Complaint described DRN's activities as a conspiracy “to engage in a campaign of misinformation that is designed to mislead, and have misled, the residents of East Whiteland Township and other surrounding townships, the officials of East Whiteland Township, and the officials of the PADEP (“Pennsylvania Department of Environmental Protection”) into believing that any improvements that are proposed by Plaintiffs will be dangerous because of the contaminants currently present at the site...” *Id. at* ¶24. Despite the descriptive language attached to the allegations of DRN's conduct, what is clear based upon the Complaint is that DRN is engaged in the petitioning of the government in opposition of Plaintiff's development efforts. DRN has the right to petition its local and state governments as advocates for environmental safety and public health. This is true even if it means that DRN's efforts are adverse to Plaintiff. This is what we call constitutionally protected free speech under the First Amendment of the United States Constitution and the Pennsylvania Constitution. See, U.S. Const. Amend. I, and Article I, Section 7 of the Pennsylvania Constitution, Pa.Const. Art. I, §7.

Because the Complaint makes evident that DRN petitioned the local government in order to influence policy and obtain favorable government action, the sham exception does not apply. See, *Chantilly Farms Inc. v. West Pileland Twp.*, 2001 W.L. 290645 (E.D. Pa. 2001). Moreover, even if we were to consider whether the alleged conduct constituted a “sham”, the challenged activities must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. *Trustees of the University of Pennsylvania v. St. Jude*

Children's Research Hospital, 940 F. Supp.2d 233, 240-41 (E.D. Pa. 2013), quoting *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 380 (1991). From the allegations in the Complaint, we conclude that DRN's concern for the proposed remediation plan and soil clean up is not an objectively baseless concern. Plaintiff has conceded that "chlorinated solvent contamination...remains today in Site soils and groundwater" and that "contamination in groundwater has migrated significant distances beyond the boundaries of the Site" to the surrounding community. See, *Complaint at* ¶14-15. Moreover, Plaintiff has made clear it does not intend to conduct a full clean up of the site, but only a partial one, based upon its belief that it has no legal obligation to do more. See, *Id. at* ¶29. Although Plaintiff avers that it plans to clean up the soils above the water table at the site in accordance with PADEP's standards, it notes that the party who caused the groundwater contamination that bears the responsibility for cleaning it up – and that entity is not Plaintiff. See, *Id. at* ¶28. Given that there is no dispute regarding the fact that groundwater contamination on the site exists and that it has spread beyond the site, DRN's concern cannot be objectively baseless. The dispute remains over who is responsible for cleaning it up and to what degree. That question is not before this Court at this juncture.

In light of the above discussion, we have, therefore, determined that the conduct described in the Complaint is protected by the *Noerr-Pennington* Doctrine and DRN is immune from Plaintiff's tort claims. We need not address the remaining eight preliminary objections as they have been rendered moot by the dismissal of Plaintiff's Complaint against DRN.