

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL DIVISION

FRANKLIN TOWNSHIP,	:	
Plaintiff	:	
v.	:	No. 14-0879
NATIONAL GENERAL	:	
PROPERTIES, INC.,	:	

Civil Law - Pennsylvania Construction Code Act - Uniform  
Construction Code - Equitable Jurisdiction -  
Injunction - Unclean Hands

1. The Pennsylvania Construction Code Act (the "Act"), 35 P.S. §§ 7210.101 - 7210.1103, was enacted by the State Legislature with the goal of implementing statewide requirements for construction and construction materials consistent with nationally recognized standards for the protection, safety and welfare of the consumer, general public and the owners and occupants of buildings and structures.
2. Pursuant to the Act, the Department of Labor and Industry was directed to adopt and has adopted the 1999 BOCA National Building Code, 14th Edition, as Pennsylvania's Uniform Construction Code (the "UCC").
3. The Act authorized the Department of Labor and Industry to promulgate separate regulations with respect to Chapter 1 of the 1999 BOCA National Building Code, 14th Edition, relating to its administration. The Department has promulgated such regulations, which are codified at 34 Pa. Code §§ 401.1-405.42.
4. Under the Act, Pennsylvania municipalities can opt by a duly enacted ordinance to adopt the UCC as their municipal building code.
5. Under the UCC, any person who intends to construct, alter, demolish, occupy or change the occupancy of any building or structure is required to first apply to the local building code official and obtain a permit authorizing such construction, alteration, demolition, occupancy or change of occupancy.
6. Under the UCC, before any occupancy or change in occupancy of a building or structure can occur, the building or structure must first be inspected by the local building

code official to ensure that the building or structure meets the standards for occupancy as set by the UCC.

7. Before an injunction will issue to close a building and evict its tenants, the plaintiff "must establish that [its] right to relief is clear, that an injunction is necessary to avoid an injury that cannot be compensated by damages, and that greater injury will result from refusing rather than granting the relief requested."
8. In denying Plaintiff's request for the immediate closure of a business building subject to the UCC, and eviction of its tenants who operate commercial businesses therein, where the owner failed to comply with the Code by not requesting an inspection of the building following its construction and allowed tenants to occupy the building before a certificate of occupancy had issued, the court, in balancing the equities, took into account the effect on the tenants, the lack of evidence as to whether a danger or hazard in fact existed, and Plaintiff's delays in enforcing the Code notwithstanding its awareness of the owner's renovations to the building and occupancy of the building by innocent tenants whose livelihood was at stake.
9. Rather than ordering the immediate closure of a building used for business purposes until such time as the owner obtained an occupancy permit as requested by Plaintiff, the court, instead, directed the owner to make the building available for inspection by the local building code official within thirty days of the entry of its order, and further ordered that if the owner failed to permit the inspection of the building within such thirty day period or failed to rectify any violations of the UCC discovered upon inspection within such reasonable time as set by the building code official, the Plaintiff could proceed with all enforcement remedies provided by law, including the immediate closing of the building and eviction of its tenants, as appropriate.

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FRANKLIN TOWNSHIP,  
Plaintiff

v.

NATIONAL GENERAL  
PROPERTIES, INC.,  
Defendant

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No. 14-0879

Eric James Filer, Esquire  
National General Properties, Inc.

Counsel for Plaintiff  
Pro se

DECISION

AND NOW, this 3rd day of June, 2016, after a trial without a jury held on January 28, 2016, at which Defendant was not represented and no one appeared on its behalf,<sup>1</sup> the court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Plaintiff, Franklin Township ("Township"), is a Pennsylvania township of the second class located in Carbon County, Pennsylvania.

2. The Defendant, National General Properties, Inc., is a Pennsylvania corporation, with its principal place of business

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<sup>1</sup> Defendant's attorneys were granted leave to withdraw on December 11, 2015. No new counsel has since entered an appearance on Defendant's behalf. As a corporation, Defendant "may appear in court only through an attorney at law admitted to practice before the court." Walacavage v. Excell 2000, Inc., 480 A.2d 281, 284 (Pa. Super. 1984). This rule applies even to those corporations which have a single shareholder. Id

located at 450 Interchange Road, Lehighton, Franklin Township, Carbon County, Pennsylvania.

3. Defendant is the owner in fee simple of real property located at 450 Interchange Road, Lehighton, Franklin Township, Carbon County, Pennsylvania. A commercial building (the "Building") renovated by Defendant to accommodate four tenants is located on this property. Three of the rental units within the Building Defendant leases to various tenants who operate commercial businesses therein.

4. Pamela Fludgate is a principal and the President of the Defendant corporation.

5. Carl E. Faust serves as the Building Code Official for Franklin Township. His duties include administering and enforcing the provisions of the Uniform Construction Code, 34 Pa.Code §§ 401.1 - 405.42, within the Township.

6. On February 6, 2012, Mr. Faust sent a letter to Ms. Fludgate, informing her that Defendant had not obtained a building permit for the renovations Defendant made to the Building creating the separate tenant spaces and that the Building was being occupied without an "occupancy permit" (*i.e.*, a certificate of occupancy), as required under UCC § 403.46. (Plaintiff's Exhibit "A"). Mr. Faust informed Ms. Fludgate that appropriate plans, a building permit application, and a letter from the Sewage Enforcement Officer dealing with the added loads

to the existing septic system needed to be submitted in order to obtain a building permit, and if Defendant did not provide him with those materials by February 24, 2012, he would initiate proceedings to have the Building vacated under UCC § 403.83. *Id.*

7. Mr. Faust sent additional correspondence to F. Peter Lehr, Esquire, Defendant's counsel at that time, informing him that the Building had been altered and was being occupied by tenants in violation of the Uniform Construction Code and that he had given Defendant until February 24, 2012 to submit the requested information for building permits to be issued. (Plaintiff's Exhibits "B" and "C").

8. Defendant failed to provide the information requested by the February 24, 2012 deadline, and on February 25, 2012, Mr. Faust sent Ms. Fludgate a letter-order informing her that he was initiating an action to have the Building vacated and that Defendant could appeal his order to vacate by submitting a written answer within 30 days. (Plaintiff's Exhibit "D").

9. Defendant timely appealed Mr. Faust's letter - order to the Joint UCC Appeals Board ("Appeals Board") on or about March 23, 2012. A hearing before the Appeals Board was originally scheduled for May 9, 2012, but was continued to June 20, 2012, at Defendant's request.

10. On May 2, 2012, Defendant filed a complaint in mandamus with this court seeking a preliminary injunction compelling the Township to issue a certificate of occupancy for the Building. That mandamus action was docketed to 12-0948. By order dated December 31, 2012, the undersigned denied Defendant's request for a preliminary injunction on the grounds that it had not exhausted its administrative remedies (*i.e.*, a hearing before the Appeals Board) and had failed to show that such remedies were inadequate.

11. A hearing on Defendant's appeal was held before the Appeals Board on May 7, 2013. On May 14, 2013, the Appeals Board decided, *inter alia*, that Defendant was not entitled to a certificate of occupancy, and that within sixty days of the Board's decision Defendant must submit one or more applications for construction permits and a highway occupancy permit to the relevant agencies. (Plaintiff's Exhibit "E"). The Board further held that "inspections shall be conducted in accordance with 34 Pa.Code § 403.45 and Certificate(s) of Occupancy shall be issued within 5 business days after receipt of a final inspection report that indicates compliance with the Uniform Construction Code." *Id.* Lastly the Appeals Board held that "[i]n the event that [Defendant] fails to submit application(s) . . . within sixty (60) days of the date of [its] Decision, then

the Township may proceed with all enforcement remedies as provided by law." *Id.*

12. Defendant did not appeal the decision of the Appeals Board to the Court of Common Pleas.

13. Defendant did not submit the documents required under the Code for Mr. Faust to issue a construction permit within the required sixty days from the date of the Appeals Board's decision.

14. Notwithstanding Defendant's failure to timely comply with the Appeals Board's decision, Mr. Faust did not proceed with another enforcement action against Defendant. Instead he continued to work with Defendant and Defendant's architect to obtain the necessary documents and estimates of the construction costs in order for him to calculate the permit fee. Once that information was finally submitted and the permit fee paid, Mr. Faust issued a construction permit for the Building on June 29, 2014.

15. On May 5, 2014, before the construction permit was issued on June 29, 2014, Plaintiff filed its Complaint for Injunction in the instant action seeking an order compelling Defendant to vacate the Building until it complies with the terms of the Appeals Board's decision and requesting, *inter alia*, any other equitable relief that the court deems to be reasonable, necessary and just under the circumstances.

16. Defendant filed an Answer, New Matter and Counterclaim on June 12, 2014. Therein, Defendant requested, *inter alia*, that this court order Plaintiff to calculate the construction permit fee to be paid by Defendant for the issuance of a construction permit and further order Plaintiff to issue a Certificate of Occupancy for the Building in accordance with the Appeals Board's decision.

17. Between June 29, 2014, the date the construction permit for Defendant's Building was issued, and January 28, 2016, the date of trial, Defendant had not contacted Mr. Faust to inform him that construction was completed and ready for inspection.

18. Further, at the January 28, 2016 trial, Mr. Faust testified that as of June 19, 2014 not all construction for two of the tenant spaces had been completed, without giving any detail as to what was incomplete.

19. As of January 28, 2016, Mr. Faust had not completed an inspection of Defendant's Building and no certificates of occupancy for the Building had been issued.

20. The Building has been occupied, without a certificate of occupancy, up to the present time.

#### CONCLUSIONS OF LAW

1. In order to receive an injunction, Plaintiff "must establish that his right to relief is clear, that an injunction



is necessary to avoid an injury that cannot be compensated by damages, and that greater injury will result from refusing rather than granting the relief requested." Kuznik v. Westmoreland County Bd. of Comm'rs, 902 A.2d 476, 489 (Pa. 2006) (citation and quotation marks omitted).

2. The General Assembly enacted the Pennsylvania Construction Code Act ("the Act") in order to, *inter alia*, "provide standards for the protection of life, health, property and environment and for the safety and welfare of the consumer, general public and the owners and occupants of buildings and structures" and "encourage standardization and economy in construction by providing requirements for construction and construction materials consistent with nationally recognized standards." 35 P.S. § 7210.102(b)(1), (2).

3. The Act required the Department of Labor and Industry to adopt the 1999 BOCA National Building Code, Fourteenth Edition, as Pennsylvania's Uniform Construction Code, but allowed the Department to promulgate separate regulations with respect to Chapter 1 of the Code relating to its administration. 35 P.S. § 7210.301(a). The Department has promulgated such regulations, which are codified at 34 Pa.Code §§ 401.1-405.42 and govern the administration of the Code.

4. The Act allows municipalities to enact ordinances in order to adopt the Uniform Construction Code as their municipal

building codes as well as several options for municipalities to enforce the Code. 35 P.S. § 7210.501(a)(1). Franklin Township enacted such an ordinance, Number 2004-01, on June 15, 2004. (Plaintiff's Exhibit F).<sup>2</sup> Therefore, at all times relevant to the determination of this action, the Code was in effect in Franklin Township.

5. Defendant's Building is subject to the Act and the Code's provisions. See 34 Pa.Code § 403.1(a)(1) ("The Uniform Construction Code applies to the construction, alteration, repair, movement, equipment, removal, demolition, location, maintenance, occupancy or change of occupancy of every building or structure which occurs on or after April 9, 2004, and all existing structures that are not legally occupied") and 35 P.S. § 7210.104(a) (The Act "shall apply to the construction, alteration, repair and occupancy of all buildings in this Commonwealth.").

6. Under the Code, any owner who "intends to construct, enlarge, alter, repair, move, demolish or change the occupancy of a commercial building, structure and facility . . . regulated by the Uniform Construction Code shall first apply to the building code official and obtain the required permit under § 403.42a. . . ." 34 Pa.Code § 403.42(a).

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<sup>2</sup> Additionally, 42 Pa.C.S.A. § 6107(a) states that "[t]he ordinances of municipal corporations of this Commonwealth shall be judicially noticed."

7. The Code requires that applications for a construction permit include, *inter alia*, construction documents such as plans and specifications as well as any other data the building code official requires to be submitted with the application. 34 Pa.Code § 403.42a(b). Furthermore, an issued permit is not valid until the required fees have been collected. 34 Pa.Code § 403.43(m).

8. The permit holder, or an authorized agent thereof, is required to notify the building code official when work is ready for inspection and provide access for the inspection. 34 Pa.Code § 403.45(c). As of the date of trial, Defendant had not notified Mr. Faust, or any other individual designated by the Township to conduct building inspections, that the work performed on the Building was ready for inspection.

9. Once the inspection has been completed, if the inspector finds that the construction complies with the Code, the inspector is required to file a final inspection report with his/her findings. 34 Pa.Code § 403.45(e). Within five business days after receipt of such report, the Building Code Official must issue a certificate of occupancy. 34 Pa.Code § 403.46(b). Without a final inspection report, the Building Code Official is unable to determine whether or not the subject building or structure is in compliance with the Code and therefore unable to issue a certificate of occupancy.

10. The Code mandates that "[a] building, structure or facility may not be used or occupied without a certificate of occupancy issued by a building code official." 34 Pa.Code § 403.46(a).

11. Defendant has failed to comply with the Code by not requesting an inspection of its Building following construction pursuant to a duly issued construction permit and by allowing tenants to continue occupying its Building even though the Building lacks a certificate of occupancy. See 34 Pa.Code §§ 403.45(c), 403.46(a).

12. Under the Code, a building code official has the authority to initiate action to vacate or close a building or structure for a violation(s) of the Code. 34 Pa.Code § 403.83(a). Such an action was initiated with respect to Defendant's Building on February 25, 2012. Following the decision of the Joint UCC Appeals Board, Defendant has still not brought its building fully into compliance with the Code.

13. The Township has requested an injunction ordering that the Building be vacated until such time as Defendant brings the Building into compliance with the Code. At trial, Mr. Faust alternatively suggested that we order Defendant to allow inspection of the Building within thirty days of our decision.

14. The Township has established that its right to relief is clear: Defendant's Building is subject to both the

requirements of the Pennsylvania Construction Code Act and the Uniform Construction Code, and Defendant has allowed the Building to be occupied despite being on notice since February 6, 2012 that doing so violated the Code.

15. The Township's injury, Defendant's ongoing violation of the Code, cannot be adequately compensated by damages.

16. As to the last element necessary for the grant of a permanent injunction: whether a greater injury will result from refusing rather than granting the relief requested, we must carefully weigh the equities of the situation. "It is axiomatic that an equity court is primarily interested in effecting fairness between the parties." Bold v. Bold, 574 A.2d 552, 555 (Pa. 1990). Furthermore, "[e]quity [will not] lend its aid to further an improper objective which will likely cause great detriment or irreparable harm to the other party." Hagy v. Premier Mfg. Corp., 172 A.2d 283, 286 (Pa. 1961). "It is equally plain that in order to do this, the court will consider, of necessity, all of the circumstances of the case." Bold, 574 A.2d at 555. The tenants who occupy the Building are not parties to this action; however, any order to close and/or vacate Defendant's Building for violations of the Code will adversely affect those tenants: their businesses will be forced to close until such time as Defendant, their landlord, brings the Building into compliance with the Code. Conversely,

Defendant's failure to bring its Building into compliance with the Code creates a heightened risk to consumers who enter the Building, the owners and occupants of the Building, and the general public, as the Code mandates various safety features, including fire protection, and it cannot be ascertained whether the Building complies with these provisions without an inspection. See, e.g., 34 Pa.Code § 403.46(e). No evidence has been introduced indicating whether the tenants occupying the Building are aware of Defendant's violations of the Code or that the occupation of the Building is prohibited in the absence of a certificate of occupancy. At the same time, any further delay in the inspections is harmful to both the Township's interest in ensuring all subject buildings and structures within its boundaries are in compliance with the Code as well as the general public's interest that places of business open to the public comply with the Code's uniform standards for health and safety. Nevertheless, the primary relief Plaintiff seeks, the immediate closure of the Building until such time as Defendant complies with the Code, would result in a greater injury than if we refused Plaintiff that relief. The alternate relief that Mr. Faust suggested at trial, ordering Defendant to allow inspections within a set period of time from the date of our decision before ordering the Building to be closed, will not

result in a greater injury than if we denied Plaintiff this alternative injunctive relief.

17. The Township's reliance on Section 403.84 to evict the tenants and close the Building is misplaced. Section 403.84(b) requires the Building Code Official to order the vacating of a building or structure if the official determines the existence of an unsafe condition, and Section 403.84(a) allows the Building Code Official to determine that a building or structure is unsafe because of "illegal or improper occupancy." Such determination is discretionary, not mandatory. To order immediate eviction of the tenants in this case without proof that the Building is in fact a danger or hazard disregards the interests of the tenants and the public generally and ignores the Township's admitted failures in adhering to the Code notwithstanding its awareness of the renovations of the Building undertaken by the Defendant and occupancy by innocent tenants whose livelihood is at stake. These circumstances, we believe, justify that before the Building is closed and the tenants evicted, an inspection of the Building first be conducted by the Building Code Official. If this inspection uncovers real dangers, or if the Defendant refuses to permit the inspection in accordance with this Decision, immediate closing of the Building and eviction of the tenants is appropriate.

18. In Defendant's Answer, New Matter and Counterclaim,<sup>3</sup> Defendant requested that the Township be ordered to calculate the appropriate fee that Defendant would have to pay in order to obtain a construction permit. Defendant was issued a construction permit for its Building on June 29, 2014, therefore this request is moot.

19. With respect to Defendant's request that the Township be ordered to issue a certificate of occupancy for Defendant's Building, as pled in Defendant's Answer, New Matter and Counterclaim, that request is denied for the reasons stated above.

#### ORDER

In accordance with the foregoing, it is hereby ORDERED and DECREED that:

1. Defendant shall, within thirty days of the entry of this order, make arrangements for Carl E. Faust, Building Code Official for Franklin Township, and/or an inspector that either he or the Township designates to act in his stead, to conduct and complete an inspection of the Building located at 450 Interchange Road, Lehighton, Franklin Township, Carbon County, Pennsylvania. The inspection shall be conducted in accordance with 34 Pa.Code §§ 403.45, 403.86. The Building Code Official

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<sup>3</sup> Defendant did not set forth separate averments and a cause of action under the heading "Counterclaim," as required by Pa.R.C.P. 1031(a). Rather Defendant requested relief in two separate "wherefore" clauses, one located at the end of its Answer and the other at the end of its New Matter.



and/or his designee shall inform Defendant, its principal or its agent, in writing, if the construction complies with or fails to comply with the Uniform Construction Code. See 34 Pa.Code §§ 403.45(d), 403.82.

2. Within fourteen days of the inspection, regardless of whether the construction is found to be in compliance with or not in compliance with the Uniform Construction Code, Defendant shall pay any and all outstanding fees relating to its Building, assessed pursuant to the Uniform Construction Code and/or applicable municipal ordinances, to the Township.

3. If Defendant fails to either permit the inspection of the Building within the time limits set forth in this order, fails to rectify any violations of the Uniform Construction Code assessed by the Building Code Official and/or his designee within a reasonable time set by the Building Code Official and/or his designee, and/or fails to pay any outstanding fees within the time limits set forth herein, the Township may proceed with all enforcement remedies as provided by law. Nothing in this order shall be construed as preventing the Building Code Official from issuing a certificate of occupancy for a portion of the Building if that portion independently meets the Uniform Construction Code pursuant to 34 Pa.Code §§ 403.46(c).

Pursuant to Pa.R.C.P. No. 227.4, the Prothonotary shall, upon praecipe, enter judgment on this Decision and mark the order as final if no motion for post-trial relief has been filed under Pa.R.C.P. No. 227.1 within ten days after notice of the filing of this Decision and order.

BY THE COURT:

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P.J.