

**IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION**

ATLANTIC WIND, LLC,	:	
	:	
Plaintiff	:	
	:	
v.	:	No. 16-2305
	:	
PENN FOREST TOWNSHIP ZONING	:	
HEARING BOARD, CHRISTOPHER	:	
MANGOLD, PHILLIP C. MALITSCH,	:	
BETHLEHEM AUTHORITY,	:	
	:	
Defendants	:	
Debra A. Shulski, Esquire	Co-Counsel for Atlantic Wind, LLC	
Jonathan W. Bradbard, Esquire	Co-Counsel for Atlantic Wind, LLC	
Matthew Rapa, Esquire	Counsel for Penn Forest Township ZHB	
Bruce K. Anders, Esquire	Counsel for Christopher Mangold	
Phillip C. Malitsch	Pro Se	
James F. Preston, Esquire	Counsel for Bethlehem Authority	

MEMORANDUM OPINION

Serfass, J. - May 12, 2017

Plaintiff, Atlantic Wind, LLC, (hereinafter "Plaintiff"), has taken this appeal from the Order of Court entered on February 17, 2017 sustaining the preliminary objections of Defendant, Penn Forest Township Zoning Hearing Board (hereinafter "ZHB") and dismissing Plaintiff's amended complaint with prejudice. We file the following Memorandum Opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(a) and recommend that the aforesaid Order of Court be affirmed for the reasons set forth hereinafter.

FACTUAL AND PROCEDURAL HISTORY

On April 4, 2016, Plaintiff filed a zoning application with Penn Forest Township seeking a special exception to construct and operate a wind turbine project on approximately two hundred sixty (260) acres of land which is owned by Bethlehem Authority and is situated north and south of Hatchery Road. Hearings before the ZHB commenced on May 12, 2016. Five (5) public hearings were held before the ZHB at the Penn Forest Township Volunteer Fire Company No. 1 (hereinafter "fire hall").¹ The hearings were held at the fire hall, rather than at the township building, to accommodate the large number of attendees who desired to observe and/or participate in the proceedings.

Alleging that threats of violence had affected Plaintiff's ability to receive a fair and meaningful hearing before the ZHB, on September 26, 2016, Plaintiff filed a complaint seeking injunctive relief in the form of a court order requiring that all future hearings take place at the Carbon County Courthouse and that an independent hearing officer be appointed to hear the matter and issue a decision thereon.

On October 4, 2016, Plaintiff filed an "Expedited Petition for Preliminary Injunction" seeking a preliminary injunction

¹ The five (5) public hearings before the ZHB were held on the following dates: May 12, 2016, June 23, 2016, July 14, 2016, July 21, 2016 and August 25, 2016.

barring the ZHB from holding further hearings on Plaintiff's zoning application until such time as the relief sought in the complaint could be considered by this Court. After we had scheduled a hearing on Plaintiff's petition for October 18, 2016, Plaintiff and the ZHB filed a stipulation pursuant to which the ZHB agreed to hold no further hearings pending resolution of Plaintiff's claims before this Court. On October 18, 2016, we entered an order approving the parties' stipulation and staying further proceedings before the ZHB. On that same date, the ZHB filed preliminary objections to Plaintiff's complaint.

On November 7, 2016, Plaintiff filed an amended complaint to which the ZHB filed preliminary objections on November 14, 2016. Counsel for the parties appeared before the undersigned on December 20, 2016 for oral argument on the aforementioned preliminary objections. At the conclusion of oral argument, we granted Defendant's counsel two (2) weeks within which to provide the Court with a supplemental brief or additional case law in support of the position of the ZHB. We also granted Plaintiff's counsel one (1) week thereafter within which to furnish a responsive brief or case law on behalf of Atlantic Wind. No supplemental briefs nor additional cases were submitted for our consideration.

On February 17, 2017, we issued a Memorandum Opinion and Order of Court sustaining Defendant's preliminary objections and dismissing Plaintiff's amended complaint with prejudice.

On March 23, 2017, Plaintiff filed a Notice of Appeal and, on March 27, 2017, this Court ordered Plaintiff to file a concise statement of the matters complained of on appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b).

On April 17, 2017, Plaintiff filed its concise statement in compliance with our 1925(b) order, raising the following four (4) issues on appeal:

1. Whether this Court erred in sustaining Defendant's preliminary objections on the bases of lack of subject matter jurisdiction and improper venue;
2. Whether this Court erred in finding that Plaintiff failed to exhaust all administrative remedies and therefore, had an adequate remedy at law;
3. Whether this Court erred in declining to address the safety of the fire hall as an independent issue; and
4. Whether this Court erred in dismissing Plaintiff's amended complaint, with prejudice.

DISCUSSION

I. Lack of Subject Matter Jurisdiction, Improper Venue, and Adequate Remedy at Law

The first two issues raised by Plaintiff on appeal were specifically addressed in our February 17, 2017 Memorandum Opinion. Relying upon the reasoning contained therein, we have

attached a copy of the aforesaid opinion for the convenience of the Honorable Commonwealth Court.

II. Venue Safety as an Independent Issue

Plaintiff avers that this Court erred in failing to address whether their safety concerns regarding the fire hall lead to a violation of their due process right to a fair and meaningful hearing before the ZHB. Initially, we note that our February 17, 2017 Memorandum Opinion addressed this issue by determining that Plaintiff's amended complaint made no averments that Plaintiff raised claims of bias before the ZHB in an attempt to determine whether the ZHB could remain impartial, that any member of the ZHB displayed an inability to remain fair and impartial, or that Plaintiff's rights to present evidence and argument or to cross-examine witnesses were diminished in any manner.

While it is true that we previously determined there has been no evidence of bias, we are cognizant of the fact that the mere appearance of bias or impropriety is sufficient to eschew Plaintiff's due process right in this situation. Kuszyk v. Zoning Hearing Board Of Amity Township, 834 A.2d 652 (Pa. Cmwlth. 2003). Additionally, a fundamental aspect of Plaintiff's due process right is a trial before a fair tribunal. Joseph v. North Whitehall Township Board of Supervisors, 16 A.3d 1209 (Pa. Cmwlth. 2011).

However, we do not find in this case that Plaintiff has presented evidence sufficient to prove even the appearance of bias. In Plaintiff's oral argument, counsel contended that members of the public openly carrying firearms in the fire hall and making veiled threats against ZHB members creates an implicit bias which prevents the ZHB from being able to impartially decide this matter. Yet, none of the ZHB members have stated that they cannot render a fair and impartial decision in this matter. Absent evidence that the board members feel unsafe and that, as a result, they are unable to impartially decide this matter, we do not find that Plaintiff's right to due process has been violated by the alleged unsafe environment at the fire hall.

III. Dismissal of Plaintiff's Amended Complaint With Prejudice

Plaintiff next contends that this Court should have afforded it an opportunity to further amend the amended complaint rather than dismissing it with prejudice after sustaining Defendant's preliminary objections. Here we note that a trial court enjoys broad discretion in determining whether to permit a party to amend its complaint. See Somerset Community Hospital v. Allan B. Mitchell & Associates, Inc., 685 A.2d 141, 454 (Pa. Super. 1996); and Maddux v. Commonwealth Department of Agriculture, Bureau of Animal Industry, 386 A.2d 620, 622 (1978). Moreover, amendments are properly refused when there is prejudice or surprise to the opposing party, or when an amendment appears futile. Biglan v.

Biglan, 479 A.2d 1021 (Pa. Super. 1984); and Lutz v. Springettsbury Township, 667 A.2d 251 (Pa. Cmwlth. 1995). Our courts are not required to allow successive amendments when it is clear that the claim asserted cannot be established. Behrend v. Yellow Cab Company, 271 A.2d 241 (Pa. Cmwlth. 1970).

Despite the contentions raised in the amended complaint and at oral argument, for the reasons stated in our February 17, 2017 Memorandum Opinion, this Court does not have equity jurisdiction to address Plaintiff's claim.² Therefore, dismissing Plaintiff's amended complaint without prejudice and allowing Plaintiff to again amend its complaint would be futile because counsel would not be able to alter the fact that this Court does not have jurisdiction to address Plaintiff's claim.

We recognize that our determination concerning Plaintiff's failure to prove the appearance of bias could be used to contest our decision to dismiss Plaintiff's complaint with prejudice. It might be argued that our decision was in error because Plaintiff could possibly amend its complaint further to show the appearance of bias on behalf of the ZHB and, as a result, that the ZHB is unable to render an impartial decision on Plaintiff's special

² In sum, the case at bar does not fit into one of the extremely limited circumstances in which a court of equity may interfere with the actions of a municipal body because Plaintiff has not exhausted their statutory remedy pursuant to 53 P.S. §10908(2), and Plaintiff has not set forth evidence to show the appearance of bias which would prevent the ZHB from reaching a fair and impartial decision in this matter.

exception application. Despite this consideration, we find that allowing Plaintiff to further amend its amended complaint would be futile. The thrust of Plaintiff's argument throughout this action has been that the fire hall is an unsafe venue which, in turn, has caused the ZHB to become biased based upon the large crowds attending the public hearings. It is illogical to maintain that Plaintiff would not have immediately produced evidence proving that it had brought its concern to the attention of the ZHB, that a ZHB member or members had displayed an inability to remain fair and impartial, or that Plaintiff's rights to cross examine witnesses and present evidence and argument at the zoning hearings had been hindered. It is only logical to find that Plaintiff would have already produced such evidence if it indeed exists. Therefore, granting Plaintiff leave to further amend its amended complaint would be futile and would only cause unnecessary delay in these proceedings.³

Because Plaintiff has not provided sufficient evidence to prove that the ZHB cannot fairly and impartially decide this matter, this Court lacks equity jurisdiction. Therefore, our dismissal of Plaintiff's amended complaint with prejudice was

³ We note that the ZHB has scheduled a sixth public hearing on Plaintiff's special exception application which is to be convened at the fire hall on May 17, 2017.

appropriate as permitting further amendments by Plaintiff would be a futile exercise.

CONCLUSION

For the foregoing reasons, we respectfully recommend that Plaintiff's appeal be denied and that our Order of Court dated February 17, 2017, sustaining Defendant's preliminary objections and dismissing Plaintiff's amended complaint with prejudice, be affirmed accordingly.

BY THE COURT:

Steven R. Serfass, J.