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

EAST PENN TOWNSHIP, Appellee	:	No. 18-1214
v.	:	
SYNAGRO, DENNIS CUNFER, WANDA CROSTLEY, JUSTIN CUNFER, KATHERINE HETHERINGTON-CUNFER, DEANNA CUNFER and CUNFER FARM a/k/a NEVER DONE FARM, Appellants	:	

Robert S. Frycklund, Esquire	Counsel for Appellee
Mark L. Freed, Esquire	Counsel for Appellee
Keith R. Pavlack, Esquire	Counsel for Appellants
Andrew C. Silton, Esquire	Counsel for Appellant Synagro
Megan R. Brillault, Esquire	Counsel for Appellant Synagro

OPINION

Serfass, J. - September 23, 2020

Defendants, Synagro Central, LLC (hereinafter "Synagro"), Dennis Cunfer, Wanda Crostley, Justin Cunfer, Katherine Hetherington-Cunfer, Deanna Cunfer, and Cunfer Farm a/k/a Never Done Farm, collectively filed a "Notice of Appeal" on July 23, 2020. The appeal concerns this Court's order of June 24, 2020, in which we denied Defendants' motion for judgment on the pleadings. We file the following opinion pursuant to Pennsylvania Rule of Appellate Procedure 1925(a) and recommend that Defendants'

interlocutory appeal be dismissed for the reasons set forth hereinafter.

FACTUAL AND PROCEDURAL HISTORY

On May 1, 2018, Plaintiff, East Penn Township, (hereinafter "Appellee") filed a complaint against Defendants (hereinafter "Appellants") alleging that they had "communicated their intentions to commence waste operations, including the storage and land-application of sewage sludge, in and upon Cunfer Farm a/k/a Never Done Farm, without applying for and obtaining a registration certificate from East Penn Township in accordance with the requirements of Ordinance No. 77" (Appellee's Motion to Dismiss Appeal). On that same day, Appellee filed an "Emergency Petition for Special Relief" seeking the issuance of a preliminary injunction to enjoin Appellants from conducting any waste operations, including but not limited to the storage and land-application of biosolids materials or sewage sludge, on the Cunfer Farm property pending the final disposition of the action.

Pursuant to Pa.R.C.P. 1531(a), this Court initially granted a preliminary injunction *ex parte* pending a hearing on the matter. However, Appellants agreed to the continuation of the preliminary injunction prior to the scheduled 1531(d) hearing, and we therefore ordered, on June 1, 2018, that the preliminary injunction remain in effect pending final disposition of the case by this Court.

The Appellants filed separate answers to the Complaint in which New Matter was raised challenging the validity and enforceability of East Penn Township Ordinance No. 77. Throughout the pleadings, Appellants have argued that Ordinance No. 77 is preempted by the Solid Waste Management Act (SWMA) (35 P.S. § 6018.101) and the Agriculture Communities and Rural Environments Act, Act 38 of 2005 (ACRE).

On September 30, 2019, Appellants filed a motion for judgment on the pleadings. In response to that motion, Appellee argued that SWMA regulations were a floor, and not a ceiling, on local authority to address local environmental conditions (Brief in Opposition to Defendant's Motion for Judgment on the Pleadings, 10/28/19). Additionally, Appellee argued that Ordinance No. 77 is valid under ACRE because "1. Land application of biosolids is not a "normal agricultural operation" under ACRE and, thus, ACRE does not apply; 2. The Township is neither prohibited nor preempted from enforcing Ordinance No. 77's requirements; and 3. The Township has express and implicit authority for the requirements" (Court Order Denying Motion for Judgment on the Pleadings, 6/24/20).

Ultimately, we denied Appellants' motion for judgment on the pleadings because we could not "… find that the [Appellants'] right to prevail is certain and that the case is free from doubt at this stage of the proceedings." The matter was then scheduled for a non-jury trial on January 15, 2021 and Appellants filed the instant

appeal. On or about July 24, 2020, we instructed Appellants to file of record and serve upon this Court a Concise Statement of Matters Complained of on Appeal within twenty-one (21) days pursuant to Pa.R.A.P. 1925(b). Appellants timely complied with our order, filing their Concise Statement on August 14, 2020.

ISSUES

Appellants raise the following issues in their Concise Statement of Matters Complained of on Appeal:

1. The Court erred in failing to hold that the issue of whether Pennsylvania's Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.* ("SWMA"), and its implementing regulations preempt application of East Penn Township Ordinance No. 77 to land application of biosolids is a pure question of law and not a matter that is subject to factual dispute. Pennsylvania case law establishes that (i) preemption turns purely on the scope of the ordinance and that any local permitting requirement for biosolids is preempted *per se, see Liverpool Twp. v. Stephens,* 900 A.2d 1030, 1034-38 (Pa. Cmwlth, 2006); and (ii) the question of preemption is purely a legal question, *see In re Estate of Sauers*, 32 A.3d 1241 (Pa. 2011) ("Issues of preemption comprise pure questions of law[.]"; *Holt's Cigar Co., Inc. v. City of Philadelphia,* 608 Pa. 146, 152-53 (Pa. 2011) (whether state law preempted local

enactment "presents a pure question of law"); *Nutter v. Dougherty*, 938 A.2d 401, 411-12 n.20 (Pa. 2007) (issue of conflict preemption is a "question of law");

2. The Court erred in failing to hold that the issue of whether Pennsylvania Environmental Rights Amendment, Pa. Const. art. I, § 27 (the "ERA" or "Amendment"), defeats preemption of Ordinance No. 77 by the SWMA also presents a pure question of law, as the Commonwealth Court of Pennsylvania has repeatedly recognized that the Amendment does not protect local regulation from preemption by conflicting state statutes and regulatory regimes implemented by the Pennsylvania Department of Environmental Protection. *See Del. Riverkeeper Network v. Sunoco Pipeline L.P.*, 179 A.3d 670, 695-96 (Pa. Cmwlth. 2018); *UGI Utils. Inc. v. City of Reading*, 179 A.3d 624, 631 (Pa. Cmwlth. 2017);

3. The Court erred in failing to hold that SWMA preempts application of Ordinance No. 77 to biosolids because its application to this beneficial practice would impermissibly impose a local permitting regime governing to the generation, transportation, storage, and land application of biosolids over and above the requirements of the SWMA. *See, e.g., Liverpool Twp.*, 900 A.2d at 1034-38;

4. The Court erred in failing to hold that the ERA does not defeat preemption of Ordinance No. 77 by the SWMA because the ERA does not immunize local enactments from a legal finding of preemption. *See, e.g., UGI Utils.*, 179 A.3d at 631; and
5. The Court erred in failing to dissolve the injunction it entered on May 1, 2018 and renewed via order on June 1, 2018 because the injunction is based solely on allegations that Defendants planned not to comply with Ordinance No. 77, and Ordinance No. 77 is preempted by the SWMA and its implementing regulations.

DISCUSSION

As a general rule, appellate courts have jurisdiction only over appeals taken from final orders. Commonwealth v. White, 910 A.2d 648, 653 (Pa. 2006). Pa.R.A.P. 341(b) defines a final order as any order that either disposes of all claims and of all parties or is entered as a final order pursuant to paragraph (c) of said rule. Pa.R.A.P. Rule 341(b).

"An appeal will lie only from a final order unless otherwise permitted by statute or rule. A final order is usually one which ends the litigation or, alternatively, disposes of the entire case. The purpose of this policy is to avoid piece-meal litigation and the consequent protraction of litigation." Jenkins v. Hospital of Medical College of Pennsylvania, 634 A.2d 1099, 1102 (Pa. 1993)

(citations omitted). While there are exceptions to this rule, those exceptions are limited to well-defined categories. Under Pa.R.A.P. 311(a), an interlocutory appeal may be taken as a matter of right under certain limited circumstances. In one such circumstance, an appeal may be taken as of right if the order appealed from grants or denies, modifies or refuses to modify, continues or refuses to continue, or dissolves or refuses to dissolve an injunction. Pa.R.A.P. 311(a)(4). Otherwise, an interlocutory appeal may only be taken with the permission of the court or other government unit, who are of the opinion that "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter." 42 Pa. C.S.A. § 702. See also Pa.R.A.P. 312 and Pa.R.A.P. 1311.

In this case, Appellants claim that they may appeal as of right concerning what is characterized as this Court's refusal to dissolve the preliminary injunction entered by agreement of the parties. However, circumstances surrounding the appeal suggest that they are, in fact, attempting to appeal this Court's denial of their motion for judgment on the pleadings without first seeking or obtaining from this Court a determination of finality, which is required for such an appeal pursuant to Pa.R.A.P. 341(c), or by seeking permission to appeal an interlocutory order in the

appellate court pursuant to Pa.R.A.P. 1311. The exceptions to the general rule against interlocutory appeals should not be invoked frequently or haphazardly. Otherwise, the policy which seeks to minimize fragmentary appeals would be undermined. Schaeffer v. American States Insurance Co., 414 A.2d 672, 674 (Pa.Super. 1979).

Initially, we note that, although the Court scheduled a hearing pursuant to Pa.R.C.P. 1531(d) to determine whether the preliminary injunction should be continued, Appellants ultimately agreed to the continuance of said injunction as set forth in our Order of June 1, 2018. Appellants failed to object to the Court's order that the preliminary injunction remain in place pending final disposition of the case until their motion for judgment on the pleadings was denied on June 24, 2020.

Secondly, the purpose of the Court's order of June 24, 2020 was not to deny any request concerning the preliminary injunction. Rather, Appellants' request to dissolve the injunction was one of five ancillary relief requests made contingent on the Court's grant of their motion for judgment on the pleadings and the entry of judgment against Appellee. At no time did Appellants file a separate answerable motion which specifically sought to dissolve the preliminary injunction. (Pursuant to Pa.R.C.P. 1531(c), "[a]ny party may move at any time to dissolve an injunction").

Thirdly, of the five issues that Appellants raise in their Concise Statement of Matters Complained of On Appeal, only one

issue concerns the preliminary injunction. Further, Appellants claim that the injunction should be dissolved based solely on their assertion that East Penn Township Ordinance No. 77 is invalid. Therefore, Appellants have structured their argument so that the Commonwealth Court must find Ordinance No. 77 invalid in order to grant relief in dissolving the preliminary injunction.

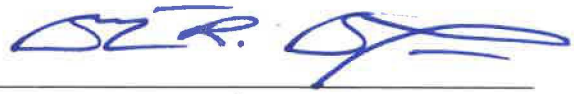
Finally, in their "Motion to Stay Proceedings Pending Appeal", Appellants assert that "[d]isposition of the appeal may obviate the need for any further litigation in this Court. Specifically, the Commonwealth Court may determine that the preliminary injunction issued by this Court on May 1, 2018 and renewed on June 1, 2018 should have been dissolved on the basis that Ordinance No. 77 is invalid as applied to biosolids because it is preempted by the SWMA and its implementing regulations. If it does so, the proceedings in this Court necessarily must be dismissed because they are based solely on allegations that the Defendants planned not to comply with the Ordinance." It is apparent from this assertion that Appellants intend for the instant appeal to go beyond the scope of dissolving a preliminary injunction into adjudication and final disposition on the merits of the underlying action thereby removing this case from the jurisdiction of this Court and effectively barring our further consideration of these matters up to and including a non-jury trial in less than four (4) months.

Generally, an order is not final unless it effectively puts the moving party out of court. Ventura v. Skylark Motel, Inc., 246 A.2d 353 (Pa. 1968). A party is not out of court unless he is precluded from presenting the merits of his claim to the lower court. Marino Estate, 269 A.2d 645 (Pa. 1970). Because this Court's order of June 24, 2020 merely denied Appellants' motion for judgment on the pleadings and the underlying case is still pending in this Court, with a non-jury trial scheduled to commence on January 15, 2021, we submit that the aforesaid order is not a final order and that Appellants may not appeal as a matter of right under Pa.R.A.P. 341(a) or Pa.R.A.P. 311(a)(4).

CONCLUSION

For the reasons set forth hereinabove, we respectfully recommend that the instant appeal be dismissed.

BY THE COURT:



Steven R. Serfass, J.