D. Hammer

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

THORNHILL, L.L.C. and
HIGHLAND FARM, L.L.C.,

Plaintiffs,

v.

RICHARD L. LATTERELL,
SHERRY CRAIG, and
MARY L. MacELWEE,

Defendants and Third Party Plaintiffs,

v.

GENE CAPRIOTTI,
individually, and
HERB JONKERS,
individually,

Third Party Defendants.

JEFFERSON COUNTY
CIVIL ACTION 04-C-191
JUDGE WILKES

ORDER GRANTING DEFENDANTS' MOTION TO FILE SUMMARY JUDGMENT OUT OF TIME, ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, ORDER DENYING DEFENDANTS' RULE 11 MOTION FOR SANCTIONS, AND ORDER FINDING PLAINTIFFS' MOTION TO BIFURCATE MOOT FOR REVIEW

I. INTRODUCTION

This matter came before the Court this 27 day of April 2007, upon written motion and without a hearing, pursuant to Defendants' Motion to File Summary Judgment out of

Time, Defendants' Motion for Summary Judgment, Defendants' Rule 11 Motion for Sanctions, and Plaintiffs' Motion to Bifurcate.

Upon the appearance of Plaintiffs, Thornhill LLC and Highland Farm LLC (individually "Thornhill" and "Highland Farm," collectively "Plaintiffs"), by counsel James P. Campbell, Esq., Defendants and Third Party Plaintiffs Richard L. Latterell, Sherry Craig, and Mary L. MacElwee (collectively "Defendants"), by counsel David M. Hammer, Esq., and Third Party Defendants Gene Capriotti and Herb Jonkers ("Third Party Defendants"), also by counsel Mr. Campbell.

II. FINDINGS OF FACT

A. Background

1. Plaintiffs are applicants for a conditional use permit ("CUP") for the development of 541 acres in Jefferson County. (*See* Compl. ¶ 3.)
2. On August 13, 2002, the Jefferson County Planning Commission ("Commission") granted the CUP for Thornhill. (*See* Thornhill v. NVR, Pls. Compl. Decl. J., Attached as Exhibit 1 to Defs. Mot. Summ. J. in the instant case.)
3. Defendant Mary L. MacElwee, Tina Fritts, Defendant Richard L. Latterell, Chauncey Craig, and Defendant Sherry Craig appealed the grant of the CUP to the Board of Zoning Appeals ("BZA"). (*See id.*)
4. The BZA upheld the Commission's grant of the CUP to Thornhill. (*See id.*)

5. The same citizens, including Defendants, appealed the BZA decision to Circuit Court in MacElwee, et al. v. Jefferson County Board of Zoning Appeal, Case No. 02-C-40. (*See id.*)

6. On October 10, 2003, the West Virginia Supreme Court of Appeals decided *Corliss v. Jefferson County Board of Zoning Appeals*, 591 S.E.2d 93. In *Corliss*, the Supreme Court remanded the case to the Circuit Court to reinstate the CUP. (*See id.*)

7. Pursuant to *Corliss*, Judge Gray Silver III, remanded MacElwee and ordered the Commission to reinstate the CUP.

B. Dispute regarding Sewer Service for Plaintiffs

1. On June 9, 2003, Susanne Lawton, General Manager of the Jefferson County Public Service District ("PSD"), wrote a letter to Paul Raco, with the Commission. (*See* Defs. Mot. Summ. J. Ex. 4.) In the letter, the PSD advised the Commission that Plaintiffs would contribute land, labor, and a sewage treatment facility to serve the Thornhill development. (*See id.*)

2. On November 6, 2003, the PSD mailed another letter to the Commission regarding sewer service for Thornhill. The letter read as follows:

> Dear Mr. Raco:
>
> Jefferson County Public Service District (PSD) will provide service to the proposed Thorn Hill development. Two alternatives are currently under consideration for this provision.

The first, and preferred alternative, is a small plant sized to serve Thorn Hill, which will be constructed at the site. This plant will be owned and operated by PSD, but paid for by the Developer. This will allow the District to provide service while the cost of this provision will not impact our current customers. This alternative, called a Cooperative Venture Agreement ("Agreement"), is currently being considered at the West Virginia Public Service Commission ("PSC"). We hope to have a response from them shortly.

Should this agreement not be accepted by the PSC, flows from Thorn Hill will be directed to the Charles Town Waste Water Treatment Plant. As you are aware, this plant is producing extremely high quality effluent. Upgrades currently in the design stage will ensure that this high quality continues.

Should you have additional questions, please feel free to call.

Susanne Lawton

General Manager

(*See* Defs. Mot. Summ. J. Ex. 5.)

3. On March 4, 2004, the PSD withdrew its Agreement application before the PSC. (Defs. Mot. Summ. J. Ex. 3, bates 071.)

4. On March 24, 2004, the PSC dismissed the Agreement application. (Defs. Mot. Summ. J. Ex. 3, bates 072 – 078.)

5. Thereafter, Plaintiffs entered into an Agreement with the PSD whereby Plaintiffs agreed to construct a sewage treatment facility for the PSD, without expense to the PSD. (*See* Thornhill v. NVR, Pls. Statement Undisputed Facts ¶ 43, Attached as Exhibit 2 to Defs. Mot. Summ. J. in the instant case.)

6. On July 6, 2004, Susan Rissler Sheely filed a complaint with the PSC against the PSD and Plaintiffs ("PSC Appeal"), challenging the Agreement between Plaintiffs and PSD for the construction of a sewer facility. (*See* Thornhill v. NVR, Pls. Statement Undisputed Facts ¶ 44, Attached as Exhibit 2 to Defs. Mot. Summ. J. in the instant case; *see also* Defs. Mot. Summ. J. Ex. 3, bates 002.)

7. On February 28, 2005, Plaintiffs applied for a Certificate of Necessity. (*See* Defs. Mot. Summ. J. at 6 n.3.)

8. On June 28, 2005, in the PSC Appeal originally filed July 6, 2004, the PSC upheld the Agreement between PSD and Plaintiffs for the construction of the sewer facility. (*See* Thornhill v. NVR, Pls. Statement Undisputed Facts ¶ 49, Attached as Exhibit 2 to Defs. Mot. Summ. J. in the instant case.)

9. On July 18, 2005, Plaintiffs asserted the following argument in Thornhill v. NVR, in its Statement of Undisputed Material Facts:

"The delay associated with the PSC Appeal has been a period beginning on July 6, 2004 and ending on June 28, 2005, a continuous period of eleven (11) months and twenty-two (22) days."

"The delays associated with the PSC Appeal prevented the development of Thornhill."

(*See* Thornhill v. NVR, Pls. Statement Undisputed Facts ¶¶ 50-51, Attached as Exhibit 2 to Defs. Mot. Summ. J. in the instant case.)

10. On August 1, 2005, Plaintiffs' expert in Thornhill v. NVR, R. Michael Shepp, P.S., provided the following opinion:

"Public sewer facilities to serve Thornhill were unavailable from approximately December 2003 through the completion of upgrades at the City of Charles Town Waste Water Treatment Plant, which Charles Town expected to complete in January 2006."

(*See* Thornhill v. NVR, Pls. Disclosure Expert Wit. at 2, Attached as Exhibit 14 to Defs. Mot. Summ. J. in the instant case.)

11. Plaintiffs allege that on December 12, 2005, the PSD obtained substantial additional capacity at the Waste Water Treatment Plant. (*See* Pls. Opp'n Mot. Summ. J. at 2.)

C. NVR Contracts

1. In November 2001, Plaintiffs contracted with NVR, Inc. d/b/a Ryan Homes ("NVR") for the purchase of 380 fully developed single family lots. (*See* Thornhill v. NVR, Pls. Compl. Decl. J., Attached as Exhibit 1 to Defs. Mot. Summ. J. in the instant case.)
2. On May 6, 2004, Plaintiffs sent a letter to NVR to terminate their contracts. (*See id.*)
3. On May 11, 2004, NVR responded with a letter to Plaintiffs stating there was no basis to terminate the contracts. (*See id.*)
4. On March 31, 2005, Plaintiffs filed a declaratory judgment action to declare the NVR contracts null and void. (*See* Defs. Mot. Summ. J. Ex. 1.)
5. On March 27, 2006, Defendants deposed Third Party Defendant and Plaintiffs' manager, Herb Jonkers.
6. At the March 27, 2006 deposition, Mr. Jonkers made the following representation:

> **Q:** Did the individual defendants in this case cause you to terminate those three contracts [with NVR]?
>
> **A:** No, that just gave me a reason to terminate them.

(*See* Jonkers. Dep. at 178.)

D. LESA Calculation

1. On March 1, 2004, Mr. Raco, the Zoning Administrator, completed his Land Evaluation and Site Assessment ("LESA") Score and assessed a score of 45.72 for Plaintiffs. (*See* Defs. Mot. Summ. J. Ex. 3, bates 019.)

2. In particular, Mr. Raco gave Plaintiffs a score of "0" for sewer, which designated that public sewer was available or will be built to the site. (*See* Defs. Mot. Summ. J. at 10.)

3. Properties scoring less than sixty (60) points were entitled to the issuance of a CUP. (*See* Pls. Opp'n Mot. Summ. J. at 9.)

4. On March 30, 2004, 14 citizens appealed the LESA calculation, including the three (3) Defendants.

5. On April 21, 2004, Plaintiffs wrote a letter to all 14 citizens who filed the appeal. (*See* Compl. Ex. A.)

6. In the April 21, 2004 letter, Plaintiffs cautioned the 14 citizens that the appeal contained false statements of fact. (*See id.*)

7. Specifically, Plaintiffs alleged that the appealing citizens inaccurately labeled the adjacent property "undeveloped" and erroneously contended that public sewer was completely nonexistent. The appealing citizens claimed that the zoning administrator should have scored an "11" for sewer, which Plaintiffs alleged would have been an impossible score under the Zoning Ordinance. Plaintiffs argued that the misstatements of fact demonstrated bad faith on the part of the 14 appealing citizens. (*See id.*)

8. Subsequent to the April 21, 2004 letter, three (3) citizens withdrew their appeal and 11 appellants remained.

9. Defendants are among the remaining 11 citizens.

10. On October 6, 2004, the BZA issued its decision for the LESA appeal. The BZA rejected the majority of the citizens' arguments but remanded the case to the zoning administrator to rescore sewer availability. (*See* Defs. Mot. Summ. J. at 10.)

11. Upon remand, Mr. Raco assessed a score of "3" for sewer, which signifies a central sewer system. (*See id.*)

12. The citizens then appealed the revised LESA score. (*See id.*)

13. On September 2, 2005, the BZA mailed an order denying the second LESA appeal. (*See id.*)

14. The appeal of the two (2) BZA decisions regarding LESA, which involves Defendants and other citizens, remains pending before this Circuit Court in Rissler et al. v. Jefferson County Board of Zoning Appeals, Case No. 05-C-316.

E. Procedural History of the Case, *sub judice*

1. On June 4, 2004, Plaintiffs filed the Complaint in the case, *sub judice*.

2. In Plaintiffs' Complaint, Plaintiffs allege:

   Count I – Interference with Business Expectancy and Count II – Conspiracy.

3. On August 9, 2004, the Honorable Thomas W. Steptoe recused from the instant case.

4. On August 31, 2004, the Honorable Gray Silver, III recused from the instant case.

5. On September 29, 2004, the Honorable David H. Sanders issued a Scheduling Order and set a trial date for May 10, 2005.

6. On November 8, 2004, Judge Sanders recused from the instant case.

7. On January 21, 2005, Plaintiffs subpoenaed documents from Paul Edmund Burke.

8. On February 2, 2005, Defendants answered the complaint in the instant case and filed a counterclaim for abuse of process.

9. On March 2, 2005, Plaintiffs filed a motion to dismiss Defendants' counterclaim.

10. On March 28, 2005, Defendants filed a Motion for Rule 11 Sanctions, alleging that Plaintiffs' Motion to Dismiss was frivolous and filed to harass Defendants.

11. On April 5, 2005, Plaintiffs filed a Motion to hold Paul Burke in Contempt and a Motion to Compel Paul Burke to Comply with Subpoena Duces Tecum.

12. On April 25, 2005, this Court vacated Judge Sanders' Scheduling Order due to scheduled trials that would take precedence over this case.

13. On May 9, 2005, the Court entered a Discovery Commissioner Reference Order.

14. On May 11, 2005, Defendants filed a Motion Objecting to the Discovery Commissioner Reference Order.

15. On June 1, 2005, the Court entered a Scheduling Order, requiring the parties to mediate by April 3, 2006 and setting a trial date for May 16, 2006.

16. On August 17, 2005, Defendants filed their Third Party Complaint.

17. On April 28, 2006, Plaintiffs and Third Party Defendants filed a Motion to Bifurcate.

18. On May 3, 2006, Defendants filed a Motion to file for Summary Judgment Out of Time and an accompanying Motion for Summary Judgment.

19. On May 5, 2006, Defendants filed their Pretrial Memorandum.

20. On May 5, 2006, Plaintiffs and Third Party Defendants filed their Pretrial Memorandum.

21. On May 5, 2006, Defendants filed a Supplemental Motion for Summary Judgment.

22. On May 10, 2006, this Court continued the May 10, 2006 scheduled pretrial and the May 16, 2006 scheduled trial due to the number of late filings and because the parties did not mediate.

23. In the Court's May 10, 2006 Order, the Court ordered the parties to file responses to the pending motions, which the Court will address in this instant April 2007 order.[1]

24. On the same date as this order in April 2007, this Court vacated the May 9, 2005 Discovery Commissioner Reference Order.

III. FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Court Grants Defendants' Motion to File Summary Judgment Out of Time

> To determine what will constitute an appropriate sanction for failure to adhere to time constraints enumerated in pretrial orders, court may consider seriousness of conduct, impact conduct had in case and in administration of justice, any mitigating circumstances, and whether conduct was isolated occurrence or was pattern of wrongdoing throughout case. Rules Civ. Proc., Rule 16(f).

Hadox v. Martin, 209 W. Va. 180, 544 S.E.2d 395 (2001). Although Defendants' motion for summary judgment was untimely under the prior scheduling order, the Court does not consider this prejudicial to Plaintiffs. Defendants allege the motion was late due to being unable to

[1] The Court notes that all parties failed to copy this Court with the responses and the replies to the pending motions in May and June 2006. The Court recently ascertained that the motions were ripe for ruling upon a routine review of its pending Jefferson County cases.

schedule depositions with Plaintiffs. The Court notes that both parties did not adhere to the prior scheduling order. In addition, this case currently does not have a scheduled trial. Finally, Plaintiffs agreed it was better to address Defendants' motion on its merits. (*See* Pls. Opp'n Mot. Summ. J. Out Time at 1.) The Court admonishes Defendants' counsel for his tardiness, but in the Court's discretion, it will GRANT Defendants' Motion to File Summary Judgment Out of Time.

B. Summary Judgment Standard

"Motion for summary judgment should be granted only when it is clear that there are no genuine issues of material fact to be tried and inquiry concerning facts is not desirable to clarify application of law. Rules Civ. Proc., Rule 56(c)." *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). Summary judgment is appropriate when there are no disputes of material fact, and the only issues that remain are matters of law.

"Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Johnson v. Killmer*, 219 W. Va. 320, 633 S.E.2d 265 (2006). With this standard in mind, the Court considers Defendants' Motion for Summary Judgment.

C. The Court Grants Defendants' Motion for Summary Judgment

1. Plaintiffs Fail to Satisfy the Elements of Tortious Interference with Business Expectancy

Plaintiffs and Defendants agree on the elements to establish tortious interference with business expectancy:

> To establish prima facie proof of tortious interference, a plaintiff must show:
>
> (1) existence of a contractual or business relationship or expectancy;
>
> (2) an intentional act of interference by a party outside that relationship or expectancy;
>
> (3) proof that the interference caused the harm sustained; and
>
> (4) damages.

Torbett v. Wheeling Dollar Sav. & Trust Co., 173 W. Va. 210, 314 S.E.2d 166 (1983).

a. Existence of Contractual or Business Relationship or Expectancy

Plaintiffs contend that Defendants interfered with a contract or expectancy, specifically, the Agreement between Plaintiffs and PSD for sewer service. In the alternative, Plaintiffs contend that the mandatory stay pursuant to W. VA. CODE 8A-8-12[2] interfered with Plaintiffs' business expectancy to develop its property.

In Plaintiffs' complaint, Plaintiffs demand $1,650,000 for the cost of sewer facilities. (*See* Pls. Compl. ¶ 22.) However, Defendants produced evidence to show that they did not cause

[2] When an appeal has been filed with the board of zoning appeals, all proceedings and work on the premises in question shall be stayed, unless the official or board from where the appeal was taken certifies in writing to the board of zoning appeals, that a stay would cause imminent peril to life or property. If the written certification is filed, proceedings or work on the premises shall not be stayed. Nothing in this section prevents obtaining a restraining order. W. VA. CODE 8A-8-12 (2004) (amended by 2007 West Virginia Laws S.B. 475).

Plaintiffs to expend money for a sewer facility. First, Plaintiffs already agreed to "contribute land, labor, and a sewage treatment facility to serve the Thornhill development." (*See* Defs. Mot. Summ. J. Ex. 4.) "The first, and preferred alternative, is a small plant sized to serve Thorn Hill, which will be constructed at the site. This plant will be owned and operated by PSD, but paid for by the Developer." (Defs. Mot. Summ. J. Ex. 3, bates 071.)

Second, another citizen, Susan Rissler Sheely, was responsible for filing the complaint with the PSC against the PSD and Plaintiffs. (*See* Thornhill v. NVR, Pls. Statement Undisputed Facts ¶ 44, Attached as Exhibit 2 to Defs. Mot. Summ. J. in the instant case; *see also* Defs. Mot. Summ. J. Ex. 3, bates 002.) Plaintiffs even assert that the PSC Appeal prevented the development of Thornhill. (*See* Thornhill v. NVR, Pls. Statement Undisputed Facts ¶¶ 50-51, Attached as Exhibit 2 to Defs. Mot. Summ. J. in the instant case.)

Third, Plaintiffs' own expert in Thornhill v. NVR, R. Michael Shepp, P.S., opined that there was an unavailability of public sewer facilities to serve Thornhill from approximately December 2003 through the completion of upgrades at the City of Charles Town Waste Water Treatment Plant, which Charles Town expected to complete in January 2006. (*See* Thornhill v. NVR, Pls. Disclosure Expert Wit. at 2, Attached as Exhibit 14 to Defs. Mot. Summ. J. in the instant case.)

Thus, if there was an unavailability of public sewer facilities in December 2003, Defendants could not have caused Plaintiffs to build a sewer facility when Defendants filed their LESA appeal in March 2004. Furthermore, Plaintiffs had already promised to build a sewer

facility. Therefore, this Court cannot see how Defendants were responsible for Plaintiffs paying for a sewer facility that was already required and that Plaintiffs already agreed to fund.

Plaintiffs alternative theory for interference with business expectancy is a broad assertion that imposing a stay on development harmed Plaintiffs.

> Where real estate developer was claiming interference by another property owner and his attorney with expectations of profit from property development that were wholly contingent upon decisions of two governmental bodies, which were required to make such decisions only after hearing interested parties and which consequently invited opposition to any application, "expectancies" for which developer sought to recover were simply too remote, depending as they did on governmental approval, and thus could not be protected by cause of action for tort of interference with prospective advantage.

Carr v. Brown, 395 A.2d 79 (D.C. 1978). This Court finds that Plaintiffs' alternative theory of injury due to the stay on the LESA Appeal is too remote to provide the basis for a cause of action against Defendants.

b. An Intentional Act of Interference by a Party Outside that Relationship or Expectancy

> Types of wrongful or unlawful acts, required...to establish claim of intentional interference with economic relationships, include

> common law torts and violence or intimidation, defamation, injurious falsehood or other fraud, violation of criminal law, and institution or threat of groundless civil suits or criminal prosecutions in bad faith.

Ultrasound Imaging Corp. v. American Society of Breast Surgeons, 358 F. Supp. 2d 475 (D. Md. 2005). Plaintiffs allege Defendants made false statements in the LESA appeal.

> While defamation is not a necessary element for a cause of action for tortious interference with business relationship, defamation may, in certain cases, be a part of the interference. As set forth above, one of the elements for a cause of action for tortious interference is "an intentional act of interference by a party outside that relationship or expectancy." The "intentional act of interference" could consist of defamatory statements or writings.

Garrison v. Herbert J. Thomas Memorial Hosp. Ass'n, 190 W. Va. 214, 438 S.E.2d 6 (1993). Therefore, if Plaintiffs' allegations are true, Defendants' alleged acts are the type that would qualify as interference by an outside party. However, even if Plaintiffs' allegations are true, this Court found that Plaintiffs did not establish a contract under the first element. Consequently, even if Defendants made false statements, they could not have interfered with a nonexistent contract.

c. Proof that the Interference Caused the Harm Sustained

"Establishing causation in a tortious interference case requires that the plaintiff bring forth sufficient facts so that the evidence, and logical inferences drawn from the evidence, support a reasonable probability that the defendant's acts or omissions were a substantial factor in bringing about injury." *Richardson-Eagle, Inc. v. William M. Mercer, Inc.*, 213 S.W.3d 469 (Tex. App. 2006). In the case, *sub judice*, Plaintiffs allege that Defendants caused Plaintiffs to purchase a sewer facility and caused a stay in development. As this Court discussed, *infra*, Plaintiffs failed to establish that Defendants caused the alleged injury.

d. Damages

In Plaintiffs' response to the motion for summary judgment, Plaintiffs allege that their damages are $2,800,000 for the cost of the sewer facility and the pipeline. (*See* Pls. Opp'n Mot. Summ. J. at 8.) This Court discussed, *infra*, that the Agreement between Plaintiffs and PSD and the opinion of Plaintiffs' expert demonstrate that Defendants did not cause Plaintiffs to build the sewer facility. The Agreement shows that Plaintiffs already promised to build the facility and Plaintiffs' expert opined that Charles Town already lacked sewer capacity in December 2003, which falls before Defendants filed their LESA appeal in March 2004.

Plaintiffs also allege that "...the calculation of damages is to be determined by the jury." To some degree this may be true, but the Court will not permit the Plaintiffs to simply assert that they were damaged by the delay in the appeal, without some evidence of damages. "It is of the essence in an action for wrongful interference with contractual relationships that the plaintiff

suffer damages as a consequence of the defendant's conduct, and these damages cannot be speculative or conjectural losses." *Meridian Mortg., Inc. v. First Hawaiian Bank*, 109 Haw. 35, 122 P.3d 1133 (Haw. App. 2005). "Proof of damages on claim for tortious interference with business relationship must provide such certainty as nature of particular case may permit to enable trier of facts to make fair and reasonable estimate of amount of damage." *Lynn v. Soterra Inc.*, 802 So.2d 162 (Miss. App. 2001).

The Court notes that this case has been pending for three (3) years, there have been two (2) trial dates, and Plaintiffs still do not have sufficient proof of damages for a claim of tortious interference with business expectancy.

The Court notes that Plaintiffs sought to compel information from Mr. Burke, but Plaintiffs did not ask for more time for discovery before responding to Motion for Summary Judgment. In addition, it appears that any information obtainable from Mr. Burke would only reference actions by the Defendants and not assist Plaintiffs in proving any damages.

2. Defendants have an Inherent Right, Privilege, and Immunity to Appeal before County Boards

> The First Amendment right to petition has been applied to immunize various forms of administrative and judicial petitioning activity from legal liability in subsequent litigation. Recently, the Colorado Court of Appeals, relying on the First Amendment right to petition, upheld the dismissal of a complaint in negligence, abuse of process, and tortious interference with business

> expectancies, filed by a developer against several property owners for opposing a variance granted to the developer and for later unsuccessfully filing a C.R.C.P. 106(a)(4) proceeding to overturn the variance. *Anchorage Joint Venture v. Anchorage Condominium Association*, 670 P.2d 1249 (Colo. App. 1983). Courts of other jurisdictions have immunized petitioning activity from legal liability in analogous contexts...*Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980) (attempts by property owners to prevent construction of plaintiff's housing complex by seeking zoning amendment and spreading allegedly false and derogatory reports about project immunized from liability in civil rights action based on owners' activities).

Protect Our Mountain Environment, Inc. v. District Court in and for the County of Jefferson, 677 P.2d 1361 (Colo. 1984). This Court notes that the rights, privileges, and immunities of citizens to litigate before county boards are not absolute. Plaintiffs allege that Defendants' LESA appeal lacked merit, but the Court notes that the BZA did remand the case to rescore sewer availability. Plaintiffs contend that changing the sewer score from "0" to "3" was futile because Plaintiffs still scored well below sixty points, which was the requirement to pass LESA. (*See* Pls. Opp'n Mot. Summ. J. at 9.) The Court finds that even though Defendants did not disprove the entire LESA

calculation, Defendants were still able to amend the score to meet the definitions of the Zoning Ordinance. This shows that their appeal was not devoid of merit.

> The right of access to the courts seeking redress from actions of a governmental entity is one aspect of the right to petition guaranteed by the First Amendment. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S. Ct. 609 (1972). As distinguished from suits between private parties, interested persons who protest governmental action have a lawful right to do so, and the motive, even if malicious, is unimportant if legal grounds existed upon which to predicate their protest. *Matossian v. Fahmie*, 101 Cal. App. 3d 128, 161 Cal. Rptr. 532 (1980). To allow the exercise of this right to be tested on a theory of good or bad motive, or likelihood of success would operate only to chill its use. *See Sierra Club v. Butz*, 349 F. Supp. 934 (N.D. Cal. 1972); *see also Matossian, supra.*

Anchorage Joint Venture, 670 P.2d at 1250-51. Therefore, even if Defendants acted with ill purpose, they had legal grounds to bring the appeal.

3. Conclusion

In essence, this Court is able to grant summary judgment on the basis of undisputed facts, which prevent Plaintiffs from meeting the elements of tortious interference with business expectancy.

First, Plaintiffs admit that Charles Town lacked sewer capacity in December 2003. Second, Plaintiffs agreed to construct the sewer facility. Third, Plaintiffs were unable to obtain approval of their Agreement with the PSD until June 28, 2005 because of the PSC Appeal. Fourth, Charles Town did not obtain additional sewer capacity until December 12, 2005. Therefore, Defendants' LESA Appeal, initiated March 30, 2004, could not have been the basis for Plaintiffs having to build a sewer facility.

Therefore, the Court GRANTS Defendants' Motion for Summary Judgment.

D. The Court Denies Defendants' Rule 11 Motion for Sanctions

Defendants move for sanctions because Plaintiffs filed a motion to dismiss Defendants' Third Party Complaint. In support of the motion to dismiss, Plaintiffs alleged that Defendants failed to allege damages. The Court notes that Defendants' Counterclaim does demand damages. Although the motion to dismiss may have lacked merit, in the Court's discretion, it will not assess sanctions against Plaintiffs. Therefore, the Court DENIES Defendants' Rule 11 Motion for Sanctions.

E. The Court Finds Plaintiffs' Motion to Bifurcate Moot for Review

Plaintiffs moved to bifurcate their claim from Defendants' Counterclaim. Since this Court granted summary judgment against Plaintiffs, this issue is now moot. Therefore, the Court finds Plaintiffs' Motion to Bifurcate MOOT for Review.

IV. RULING

1. The Court GRANTS Defendants' Motion to File Summary Judgment Out of Time.
2. The Court GRANTS the Defendants' Motion for Summary Judgment.
3. The Court DENIES Defendants' Rule 11 Motion for Sanctions.
4. The Court finds Plaintiffs' Motion to Bifurcate MOOT for Review.

The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court directs the Circuit Clerk to enter this order and distribute attested copies to the following counsel of record:

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2cc 4/30/07 AP

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CHRISTOPHER C. WILKES, JUDGE
TWENTY-THIRD JUDICIAL CIRCUIT

ATTEST:
PATRICIA A. NOLAND
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.
BY _____
DEPUTY CLERK