United States Court of Appeals, Third Circuit.

Carolyn J. FLORIMONTE, Appellant
v.
BOROUGH OF DALTON, also known as Borough Council

No. 18-1490

Submitted Pursuant to Third Circuit LAR 34.1(a) August 23, 2018(Opinion filed: August 24, 2018)

On Appeal from the United States District Court for the Middle District of Pennsylvania, (D.C. Civil Action No. 3-17-cv-01063), District Judge: Honorable Robert D. Mariani

Attorneys and Law Firms
Carolyn J. Florimonte, Pro Se
Mark T. Sheridan, Esq., Margolis Edelstein, Scranton, PA, for Defendant-Appellee

Before: SHWARTZ, KRAUSE and FUENTES, Circuit Judges

OPINION*

PER CURIAM

Carolyn Florimonte appeals the District Court's order dismissing her complaint. For the reasons below, we will affirm the District Court's order.

The procedural history of this case and the details of Florimonte's claims are well known to the parties, are set forth in the Magistrate Judge's Report and Recommendation, and need not be discussed at length. Briefly, Florimonte filed a lawsuit in state court complaining of drainage pipes that Appellee Borough of Dalton allegedly installed on her property before she purchased it and which discharged water that damaged her property. She obtained equitable relief (the filling and capping of the pipes), but waived her right to damages.[1] She filed eight more actions in the state court which were dismissed because she was suing over the same set of facts. In 2014, Florimonte filed a complaint in the United States District Court for the Middle District of Pennsylvania. The District Court dismissed her claims as barred by the doctrine of res judicata. Florimonte appealed, and we affirmed the District Court's decision. See Florimonte v. Borough of Dalton, 603 F. App'x 67 (3d Cir. May 20, 2015) (per curiam).

In June 2017, Florimonte filed another complaint in the District Court. Seeking to undermine the res judicata ruling, she alleged that the Borough prevailed in all the prior cases due to fraud and requested that all the state and federal judgments against her be vacated. She contended that the District Court had the power under Fed. R. Civ. P. 60(d)(1) and (3) to entertain the action. She listed over thirty documents which she believed were "self-explanatory" and provided a "comprehensive history of the frauds." The Borough filed a motion to dismiss, and Florimonte filed an amended complaint. A Magistrate Judge recommended

that the motion to dismiss be granted for failure to state a claim. The District Court adopted the Magistrate Judge's Report and Recommendation and dismissed the complaint. Florimonte filed a timely notice of appeal.

We have jurisdiction pursuant to 28 U.S.C. § 1291. In his Report and Recommendation, the Magistrate Judge set forth the lengthy litigation history between the parties and performed a thorough analysis of Florimonte's arguments. We have little to add to his analysis. We agree with the District Court that Florimonte has failed to state claims for relief under Fed R. Civ. P. 60(d)(1) & (3) and, therefore, has not shown that the District Court's earlier res judicata ruling should be set aside.

Pursuant to Rule 60(d)(1), an independent action is available to relieve a party from a judgment, but "only to prevent a grave miscarriage of justice." United States v. Beggerly, 524 U.S. 38, 47, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998). Under Rule 60(d)(3), a court may set aside a judgment for fraud on the court. Fraud on the court must be intentional, directed at the court, and committed by an officer of the court. In re Bressman, 874 F.3d 142, 150 (3d Cir. 2017). A finding of fraud on the court requires "egregious conduct" and must be supported by "clear, unequivocal, and convincing evidence." Id. The fraud must deceive the court. Id.

In her brief, Florimonte explains that the fraud she complains of is the Borough's alleged failure to admit that it installed the drainage pipes on her property. Br. at 10. While she alleges that the Borough destroyed documents, her evidence in support is a letter *she* wrote to her attorney alleging that an anonymous source told her that unspecified documents were being shredded at the Borough's office. Likewise,

she suggests that her own statements in her complaint provide proof of fabrication of evidence. Br. at 19. Moreover, the documents she points to as evidence were available to her at the time she filed her first federal complaint. Thus, she could have brought this alleged fraud to the District Court's attention during the proceedings addressing her first federal complaint.

Florimonte has failed to set forth facts suggesting a grave miscarriage of justice. Nor has she alleged egregious conduct or intentional fraud that deceived the District Court. As noted by the Magistrate Judge in his Report and Recommendation, "[a]ll of the conduct alleged occurred prior to the initiation of that federal civil action, none of it was directed at this Court, and none of it can be said to have deceived this Court." Report and Recommendation at 17. Florimonte has not shown that the District Court erred in refusing to set aside its prior judgment.[2]

For the above reasons, we will affirm the District Court's judgment.[3] Florimonte's motion to strike Appellee's brief is denied.

Footnotes

*This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

1The Commonwealth Court determined that Florimonte "abandoned her claim for money damages, specifically objected to the inclusion of damages, and stated she would only continue with her equitable claim. Accordingly, Appellant has affirmatively waived her right to recover money damages." Florimonte v. Borough of Dalton, No 987 C.D. 2012, 2013 WL 3973727, at *11 (Pa. Commw. Ct. April 4, 2013) (citations omitted).

2In her brief, Florimonte repeatedly criticizes the Magistrate Judge for mentioning that her witness, Robert Fisher, testified at the state court trial. She emphasizes that Fisher died in 2010 and state court trial was in 2011. However, Florimonte herself asserted in her amended complaint that "[o]n April 3, 2009, Fisher would testify that defendant secretly installed the pipes ... and that the owners were angry with the Borough." Am Compl. at 8. While Fisher may have died before the state court trial, he was available and provided testimony for Florimonte at a hearing for a preliminary injunction. This very minor issue does not undermine the Magistrate Judge's thorough analysis of Florimonte's arguments.

3In Florimonte's prior appeal, we declined the Borough's request that she be restricted from filing additional appeals. We noted that:

> Although Florimonte has filed several actions in state court on this matter, this is her first in federal court, and thus an injunction on her access to this Court seems premature. If Florimonte files additional duplicative or frivolous actions on this matter in the future, then we will reconsider whether to restrict her access to this Court or to impose other appropriate sanctions, including monetary penalties.

Florimonte, 603 F. App'x at 68. We strongly warn Florimonte that continued duplicative or vexatious litigation will lead to monetary sanctions and filing restrictions.

United States District Court, M.D. Pennsylvania.

Carolyn Jane FLORIMONTE, Plaintiff,
v.
BOROUGH OF DALTON, Defendant.
3:17-CV-1063

Signed 02/09/2018

Attorneys and Law Firms
Carolyn J. Florimonte, Dalton, PA, pro se.
Mark T. Sheridan, Margolis Edelstein, Scranton, PA, for Defendant.

ORDER
Robert D. Mariani, United States District Court Judge

AND NOW, THIS 9th DAY OF FEBRUARY, 2018, upon *de novo* review of Magistrate Judge Saporito's Report & Recommendation, (Doc. 14), **IT IS HEREBY ORDERED THAT:**

1. The Report & Recommendation ("R&R"), (Doc. 14), is **ADOPTED** for the reasons stated therein.
2. Plaintiff's Objections, (Docs. 15, 17), are **OVERRULED.** As the Third Circuit has previously concluded, "Florimonte's action is barred by the doctrine of res judicata. She is suing the same defendants over the same set of facts and raising the same claims that were previously decided on the merits or claims that could have been raised in her first action." *Florimonte v. Borough of Dalton*, 603 Fed.Appx. 67, 68 (3d Cir. 2015). The R&R correctly determined, for the reasons stated therein, that Plaintiff's late invocation of inadequately pleaded

allegations of fraud do not upset the Third Circuit's conclusion.

3. Defendant's Motion to Dismiss and Motion for Sanctions, (Doc. 5), is **GRANTED IN PART AND DENIED IN PART** as follows:

a. Defendant's Motion to Dismiss is **GRANTED.** Plaintiff's Amended Complaint, (Doc. 10), is **DISMISSED WITH PREJUDICE.**

b. Defendant's Motion for Sanctions is **DENIED.**

4. The Clerk of Court is directed to **CLOSE** this case.

United States District Court, M.D. Pennsylvania.

Carolyn Jane FLORIMONTE, Plaintiff,
v.
BOROUGH OF DALTON, a.k.a. Borough Council, Defendant.

CIVIL ACTION NO. 3:17-CV-01063

Signed 12/14/2017

Attorneys and Law Firms
Carolyn J. Florimonte, Dalton, PA, pro se.
Mark T. Sheridan, Margolis Edelstein, Scranton, PA, for Defendant.

REPORT AND RECOMMENDATION

JOSEPH F. SAPORITO, JR., United States Magistrate Judge

This is the twelfth civil action initiated by the *pro se* plaintiff, Carolyn Jane Florimonte, in a property dispute that has more lives than a cat. It is the second federal civil action; the other ten cases were filed in state court. Florimonte claims that the municipal defendant, the Borough of Dalton (the "Borough"), has deprived her of her property interests without due process or just compensation. Florimonte claims that the Borough has redirected a substantial volume of storm water runoff on to her land, depriving her of its use and damaging her home. She further claims that the Borough has participated in a fraudulent scheme in past court proceedings, depriving her of the fair adjudicatory process to which she is entitled.

I. Background

A. The First Action, Case No. 2003-CV-06611

Florimonte filed her first lawsuit against the Borough on March 4, 2003, asserting negligence and trespass claims and seeking money damages and injunctive relief. *Florimonte v. Borough of Dalton*, Docket No. 2003-CV-06611 (Lackawanna Cty. C.C.P. filed Mar. 4, 2003). (Doc. 1-1, at 38–42). Initially, she was represented by counsel, but her attorney was permitted to withdraw in June 2009, and she proceeded *pro se* thereafter. (Doc. 10, at 33). A bench trial was held on August 10, 2011, and on December 28, 2011, the trial court entered an opinion and order denying relief for both claims. (Doc. 10, at 84–99).

The trial court entered its judgment on April 25, 2012, and Florimonte appealed to the Commonwealth Court of Pennsylvania. *Florimonte v. Borough of Dalton*, No. 987 C.D. 2012, 2013 WL 3973727, at *1 & n.1 (Pa. Commw. Ct. Apr. 4, 2013). On April 4, 2013, the Commonwealth Court affirmed the trial court decision with respect to Florimonte's negligence claim, but reversed it with respect to her equitable claim for trespass; the appellate court also expressly held that Florimonte had affirmatively waived her takings claim and any claims for money damages at trial. *Id.* at *3–*4, *11. The case was remanded back to the Lackawanna County Court of Common Pleas, with instructions that the trial court fashion equitable relief to abate the continuing trespass created by the Borough's unlawful concentration and discharge of surface water through two pipes. *Id.*

On July 25, 2013, the trial court entered an opinion and order directing the Borough to remove one of the two pipes from Florimonte's property (the other

was not located on her property, but merely directed concentrated water onto it), and to seal and cap both pipes to prevent any further trespass by the diverted storm water runoff. (Doc. 7-1, at 13–20). No further appeal was filed by either party.

B. The Second Action, Case No. 10-CV-5981

While the first action remained pending before the trial court, Florimonte filed a second, *pro se* lawsuit in state court on August 26, 2010, seeking damages for emotional distress and suffering due to the effect the excess water had on her home and for financial distress/hardship because the excess water had rendered her property unmarketable and she had been forced to borrow money to maintain the property. *Florimonte v. Borough of Dalton*, Docket No. 10-CV-5981 (Lackawanna Cty. C.C.P. filed Aug. 26, 2010); *see also* Florimonte v. Borough of Dalton, No. 266 C.D. 2011, 2012 WL 8666764, at *1 (Pa. Commw. Ct. Jan. 27, 2012) (reciting procedural history). On January 18, 2011, the trial court dismissed the action under the state-law doctrine of *lis pendens*.[1] Florimonte, 2012 WL 8666764, at *1. Florimonte appealed, and the Commonwealth Court affirmed the trial court decision on January 27, 2012. *Id.* at *2, *4. Florimonte petitioned the Supreme Court of Pennsylvania for *allocatur*, which was denied on July 3, 2012. Florimonte v. Borough of Dalton, 47 A.3d 849 (Pa. 2012) (table decision). She then petitioned the Supreme Court of the United States for a writ of *certiorari*, which was denied on December 3, 2012. Florimonte v. Borough of Dalton, 133 S.Ct. 764 (2012). The Supreme Court subsequently denied her petition for rehearing on January 14, 2013. Florimonte v. Borough of Dalton, 133 S. Ct. 974 (2013).

C. The Third Action, Case No. 2010-CIV-7822

While the first two actions remained pending before the trial court, Florimonte filed a third, *pro se* lawsuit in state court on November 1, 2010, seeking injunctive relief and statutory damages for a Fifth Amendment takings claim, for equal protection claims under the Fourteenth Amendment and the Pennsylvania state constitution, and for purported violations of the Pennsylvania eminent domain code. *Florimonte v. Borough of Dalton*, Docket No. 2010-CIV-7822 (Lackawanna Cty. C.C.P. filed Nov. 1, 2010); *see also Florimonte v. Borough of Dalton*, No. 2273 CD 2011, 2012 WL 8704477, at *1 (Pa. Commw. Ct. Sept. 18, 2012) (per curiam) (reciting procedural history). On November 9, 2011, the trial court dismissed the action under the state-law doctrine of *lis pendens*. *Florimonte*, 2012 WL 8704477, at *2. Florimonte appealed, and the Commonwealth Court affirmed the trial court decision per curiam on September 18, 2012. *Id.* at *3–*4. Florimonte petitioned the Supreme Court of Pennsylvania for *allocatur*, which was denied on March 28, 2013. *Florimonte v. Borough of Dalton*, 72 A.3d 605 (Pa. 2013) (table decision).

D. The Fourth Action, Case No. 2010-CV-8001

While the first three actions remained pending before the trial court, Florimonte filed a fourth, *pro se* lawsuit in state court on November 5, 2010, seeking damages and injunctive relief for personal injuries, including a spinal injury caused by a falling branch, an internal injury suffered while cleaning up debris from fallen trees, and splinters and infection suffered from picking up the debris, all of which she attributed to damage

inflicted upon the trees by the excessive water directed onto her property by the Borough. *Florimonte v. Borough of Dalton*, Docket No. 2010-CV-8001 (Lackawanna Cty. C.C.P. filed Nov. 5, 2010); *see also* Florimonte v. Borough of Dalton, No. 2323 C.D. 2011, 2012 WL 8704489, at *1 (Pa. Commw. Ct. Oct. 16, 2012) (per curiam) (reciting procedural history). On November 9, 2011, the trial court dismissed the action under the state-law doctrine of *lis pendens*. Florimonte, 2012 WL 8704489, at *2. Florimonte appealed, and the Commonwealth Court affirmed the trial court decision per curiam on October 16, 2012. *Id.* at *3–*4. Florimonte petitioned the Supreme Court of Pennsylvania for *allocatur*, which was denied on March 28, 2013. Florimonte v. Borough of Dalton, 91 A.3d 1240 (Pa. 2013) (table decision).

E. The Fifth, Sixth, Seventh, and Eighth Actions

While her first four actions against the Borough remained pending before the trial court, Florimonte filed four additional *pro se* lawsuits in state court in January 2011, asserting state and federal civil rights claims against four of her neighbors, individually. *Flourimonte v. Salva*, Docket Nos. 2011-CV-404, 2011-CV-405, 2011-CV-570, 2011-CV-571 (Lackawanna Cty. C.C.P. Jan. ___, 2011); *see also* Florimonte v. Salva, Nos. 1305 CD 2012, 1306 CD 2012, 1307 CD 2012, 1308 CD 2012, 2013 WL 3973699 (Pa. Commw. Ct. Apr. 4, 2013) (reciting procedural history). On June 6, 2012, the trial court dismissed all four complaints for failure to state a claim. Florimonte, 2013 WL 3973699, at *1–*2. The trial court entered judgment in each of these four cases on June 20, 2012, and Florimonte appealed to the Commonwealth Court of Pennsylvania, which affirmed

the trial court decisions on the merits on April 4, 2013. *Florimonte*, 2013 WL 3973699, at *2–*3. Florimonte petitioned the Supreme Court of Pennsylvania for *allocatur*, which was denied on September 17, 2013. *Florimonte v. Salva*, 74 A.3d 1032 (Pa. 2013) (table decision).

F. The Ninth Action, Case No. 2011-CV-7601

While the previous eight actions remained pending before the trial court, Florimonte filed her ninth, *pro se* lawsuit in state court on December 14, 2011, against the Borough Council and its individual members in their official capacities, asserting an action for mandamus and requesting an award of punitive damages. *Florimonte v. Council of Borough of Dalton*, Docket No. 2011-CV-7601 (Lackawanna Cty. C.C.P. filed June 7, 2013); *see also* *Florimonte v. Council of Borough of Dalton*, No. 1786 C.D. 2012, 2013 WL 3156566, at *1 (Pa. Commw. Ct. June 7, 2013) (reciting procedural history). On August 16, 2012, the trial court dismissed the action under the state-law doctrine of *lis pendens*. *Florimonte*, 2013 WL 3156566, at *1–*2. Florimonte appealed, and the Commonwealth Court affirmed the trial court decision on June 7, 2013. *Id.* at *2–*3. Florimonte petitioned the Supreme Court of Pennsylvania for *allocatur*, which was denied on October 29, 2013. *Florimonte v. Borough of Dalton*, 78 A.3d 1092 (Pa. 2013) (table decision).

G. The Tenth Action, Case No. 3:CV-14-0341

After the dust had settled and each of the nine previous lawsuits had reached its conclusion in state court, Florimonte brought her land dispute into federal court

on February 25, 2014, filing her tenth, *pro* se lawsuit in this Court. *See* Florimonte v. Borough of Dalton, Civil Action No. 3:CV-14-0341, 2014 WL 3114071, at *2 (M.D. Pa. July 7, 2014), *aff'd*, 603 Fed.Appx. 67 (3d Cir. 2015) (per curiam). In her first federal complaint, Florimonte asserted federal civil rights claims under 42 U.S.C. § 1983 based on the allegedly unlawful taking of her property in violation of the Fifth and Fourteenth Amendments and the deprivation of her Fourteenth Amendment equal protection rights; she also asserted civil rights conspiracy claims under 42 U.S.C. § 1985(2) and (3). *Id.* As relief, Florimonte sought damages and injunctive relief. *Id.* On July 7, 2014, this Court dismissed Florimonte's first federal civil action on *res judicata* grounds. *Id.* at *3–*4. Florimonte appealed, and the United States Court of Appeals for the Third Circuit affirmed this Court's decision on May 20, 2015. Florimonte v. Borough of Dalton, 603 Fed.Appx. 67, 68 (3d Cir. 2015) (per curiam).

H. The Eleventh Action, Case No. 2016 CV 3588

About one year later, Florimonte filed an eleventh, *pro se* lawsuit in state court on June 16, 2016, seeking damages and injunctive relief for the Borough's allegedly willful failure to correct a dangerous condition with respect to storm water flooding along the street on which her residence and land parcel are situated, and allegedly defamatory statements to other residents attributing the flooding to Florimonte's litigation against the Borough. *Florimonte v. Borough of Dalton*, Docket No. 2016 CV 3588 (Lackawanna Cty. C.C.P. filed June 16, 2016) (Doc. 5-4). On September 30, 2016, the trial court dismissed the action on *res judicata* grounds. *Florimonte v. Borough of Dalton*, Docket No.

2016 CV 3588 (Lackawanna Cty. C.C.P. dismissed Sept. 30, 2016) (Doc. 5-6). Florimonte did not appeal.

I. The Twelfth Action, Case No. 3:17-CV-01063

On June 16, 2017, Florimonte filed her original, *pro se* complaint in this action, her twelfth lawsuit concerning the very same property dispute with the Borough of Dalton. (Doc. 1). On July 21, 2017, the Borough filed the instant motion to dismiss and for sanctions. (Doc. 5). On August 1, 2017, the Borough filed a brief in support of the motion, arguing that this action is barred by *res judicata*, by the applicable statute of limitations, and by the *Rooker-Feldman* doctrine, and that Florimonte's takings claim is unripe because she has not pursued available remedies under the state's eminent domain code. (Doc. 7). The Borough has further argued that Florimonte's repeated and abusive filing of frivolous lawsuits such as this one merits imposition of a "serious and substantial monetary sanction" against Florimonte, as well as an injunction barring her from filing any future civil actions in the federal district courts of Pennsylvania. (*Id.*). On August 3, 2017, Florimonte filed a brief in opposition to the Borough's motion. (Doc. 8). On September 25, 2017, Florimonte proffered an amended complaint, which purportedly clarified the basis of her claims that prior litigation outcomes could be vacated due to "fraud on the court" and "extrinsic fraud." (Doc. 10). On December 4, 2017, we granted Florimonte leave to file the amended complaint, finding that the allegations of the amended complaint did not moot the Borough's motion to dismiss. (Doc. 13).[2] Accordingly, the Borough's motion to dismiss and for sanctions is ripe for disposition.

II. Legal Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes a defendant to move to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "Under Rule 12(b)(6), a motion to dismiss may be granted only if, accepting all well-pleaded allegations in the complaint as true and viewing them in the light most favorable to the plaintiff, a court finds the plaintiff's claims lack facial plausibility." *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 84 (3d Cir. 2011) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)). Although the Court must accept the fact allegations in the complaint as true, it is not compelled to accept "unsupported conclusions and unwarranted inferences, or a legal conclusion couched as a factual allegation." *Morrow v. Balaski*, 719 F.3d 160, 165 (3d Cir. 2013) (quoting *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007)). Under Rule 12(b)(6), the defendant has the burden of showing that no claim has been stated. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991); *Johnsrud v. Carter*, 620 F.2d 29, 32–33 (3d Cir. 1980); *Holocheck v. Luzerne County Head Start, Inc.*, 385 F. Supp. 2d 491, 495 (M.D. Pa. 2005). Although a plaintiff is entitled to notice and an opportunity to respond to a motion to dismiss, he has no obligation to do so—he may opt to stand on the pleadings rather than file an opposition. The Court must nevertheless examine the complaint and determine whether it states a claim as a matter of law. *Stackhouse v. Mazurkiewicz*, 951 F.2d 29, 30 (3d Cir. 1991); *Anchorage Assocs. v. Virgin Islands Bd. of Tax Review*, 922 F2d 168, 174 (3d Cir. 1990). In deciding the motion, the Court may consider the facts alleged on the face of the complaint, as well as

"documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

III. Discussion

In this, her twelfth effort to litigate the same property dispute, Florimonte has attempted to circumvent the *res judicata* bar by alleging that the outcome of her previous eleven lawsuits were tainted by "extrinsic fraud" or "fraud on the court."

A. Rule 60 and Fraud on the Court

In her complaint, Florimonte has purported to bring this action under the auspices of Rule 60(d)(1) and Rule 60(d)(3) of the Federal Rules of Civil Procedure.

Under Rule 60, a federal district court may relieve a party from a judgment or order obtained by fraud, misrepresentation, or other misconduct by an opposing party. Fed. R. Civ. P. 60(b)(3). This authority under Rule 60(b)(3), however, is limited to motions for relief made no more than a year after the entry of judgment or order from which relief is sought. Fed. R. Civ. P. 60(c). Moreover, Rule 60(b) only authorizes a federal district court to set aside one of its own judgments or orders—it does not authorize it to vacate a *state court* judgment or order. *See Burnett v. Amrein*, 243 Fed.Appx. 393, 395 (10th Cir. 2007) (per curiam); *Gochenaur v. Juniata Valley Bank*, Civil No. 1:17-CV-743, 2017 WL 3405114, at *3 (M.D. Pa. June 22, 2017) ("Rule 60 simply does not provide a vehicle for vacating a state court judgment in federal court....").

Rule 60(d), presumably because this action was filed well more than one year after the close of the eleven state and federal court judgments it seeks to vacate. In relevant part, Rule 60(d) provides that:

> This rule does not limit a court's power to:
>
> (1) entertain an independent action to relieve a party from a judgment, order, or proceeding; ... or
> (3) set aside a judgment for fraud on the court.

Fed. R. Civ. P. 60(d)(1) & (3).

1. Rule 60(d)(1): Independent Action in Equity

The language of Rule 60(d)(1) is not an affirmative grant of power, but merely allows continuation of whatever power the court would have otherwise had to entertain an independent action for relief from judgment if the rule had not been adopted. *See Hess v. Cockrell*, 281 F.3d 212, 217 (5th Cir. 2002). The elements of an independent action in equity for relief from judgment are:

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

In re Machne Israel, Inc., 48 Fed.Appx. 859, 863 n.2 (3d Cir. 2002). Moreover, "an independent action [is]

available only to prevent a grave miscarriage of justice." *United States v. Beggerly*, 524 U.S. 38, 47 (1998). Finally, an independent action in equity for relief from judgment is strictly limited to relief from *federal* judgments or orders, as the federal courts are prohibited from enjoining the enforcement of state court judgments except under narrow circumstances not present in this case. *See Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 286–87 (1970); *Warriner v. Fink*, 307 F.2d 933, 936 (5th Cir. 1962).[3]

Here, Florimonte has failed to allege sufficient facts with respect to elements (3) and (4). The only fraud alleged relates to the underlying state court actions; none is alleged in connection with obtaining the only federal decision properly subject to an independent action in equity. Moreover, Florimonte cannot claim to be free from fault or neglect, as she affirmatively waived her claims for damages and any additional injunctive relief not requested at trial in the first state court action. Finally, Florimonte has failed to allege any harm arising to the level of a "grave injustice": She actually prevailed in the first state court action, obtaining substantial injunctive relief, and her damages claims there were waived by her own failure to put on evidence at trial, rather than by reason of any fraud.

Accordingly, it is recommended that Florimonte's claim for an independent action in equity for relief from judgment, as referenced in Rule 60(d)(1) of the Federal Rules of Civil Procedure, be dismissed for failure to state a claim upon which relief can be granted.

2. Rule 60(d)(3): Inherent Power of the Court

The language of Rule 60(d)(3) reflects a similar avenue for relief: invoking the inherent power of a court to set aside its own judgment or order if procured by fraud upon the court. *See United States v. Buck*, 281 F.3d 1336, 1341 (10th Cir. 2002). Fraud on the court constitutes "(1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) that in fact deceives the court." *Herring v. United States*, 424 F.3d 384, 390 (3d Cir. 2005). Such conduct must be "egregious misconduct ... such as bribery of a judge or jury or fabrication of evidence by counsel." *Id.* "[Mere] perjury by a witness is not enough to constitute fraud upon the court." *Id.* Moreover, "a determination of fraud on the court ... 'must be supported by clear, unequivocal and convincing evidence.' " *Id.* at 386–87.

Here, Florimonte has failed to allege any misconduct whatsoever before this Court in connection with her previous federal civil action, Case No. 3:CV-14-0341, filed in February 2014. All of the conduct alleged occurred prior to the initiation of that federal civil action,[4] none of it was directed at this Court, and none of it can be said to have deceived this Court. Such allegations of misconduct in *state-court proceedings* do not constitute egregious conduct directed at the court itself or which deceived it, and thus the alleged misconduct does not justify reopening of our decision in Florimonte's prior federal civil action. *See In re Kovalchick*, No. 3:06cv1066, 2006 WL 2707428, at *5 (M.D. Pa. Sept. 19, 2006).

Accordingly, it is recommended that Florimonte's claim for exercise of this Court's inherent power to set aside its *own* judgment or order if procured by fraud upon the court, as referenced in Rule 60(d)(3) of the Federal Rules of Civil Procedure, be

dismissed for failure to state a claim upon which relief can be granted.

B. *Res Judicata* and Extrinsic Fraud

Florimonte's remaining, substantive claims are barred by the doctrine of *res judicata*. Under this doctrine, a claim is barred where three circumstances are present: "(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action." *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 963 (3d Cir. 1991).

With respect to the first factor, Florimonte's first action, Case No. 2003-CV-06611, went to trial and a final judgment on the merits was entered by the Lackawanna County Court of Common Pleas. Thus, the first *Lubrizol* factor has been satisfied in this case.

With respect to the second factor, the Borough of Dalton was the sole party defendant in Florimonte's first action, just as in this case. Thus, the second *Lubrizol* factor has been satisfied in this case.

Finally, with respect to the third factor, in determining whether a subsequent suit concerns the same cause of action as an earlier one, the analysis does not rest on the specific legal theories invoked, but rather it turns on "the essential similarity of the underlying events giving rise to the various legal claims." *Davis v. U.S. Steel Supply*, 688 F.2d 166, 171 (3d Cir. 1982). In conducting this inquiry, the analysis focuses on "whether the acts complained of were the same, whether the material facts alleged in each suit were the same, and whether the witnesses and documentation required to prove such allegations were the same." *Lubrizol*, 929 F.2d at 963 (quoting *United*

States v. Athlone Indus., Inc., 746 F.2d 977, 984 (3d Cir. 1984)). Moreover, *res judicata* bars not only claims that were actually brought in the previous action, but also claims that, "although not litigated, *could have been raised* in the earlier proceeding." *CoreStates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187, 194 (3d Cir. 1999) (emphasis in original). In this action, Florimonte literally seeks to reopen and relitigate the very same legal claims arising out of the very same factual scenario involved in the first action. The only appreciable difference is her claim that misconduct by the defendant, by counsel for both parties, and by the state-court judge constitutes extrinsic fraud or fraud on the court. Thus, the third *Lubrizol* factor has been satisfied in this case.

"Nevertheless, a federal court may refuse to honor a state court judgment if the judgment was void *ab initio*." *Levine v. Litman*, 91 Fed.Appx. 217, 220 (3d Cir. 2004); *see also Pepper v. Litton*, 308 U.S. 295, 301–03 (1939) (allowing debtor to challenge state court judgment in bankruptcy court on ground that state court judgment obtained by fraud was void *ab initio* for procedural reasons); *In re Highway Truck Drivers & Helpers Local Union No. 107*, 888 F.2d 293, 299 (3d Cir. 1989) (noting that a state court judgment may only be enjoined or upset by a federal court if the issuing state court would uphold the challenge).

It is clear from her pleadings that Florimonte seeks to invoke the "fraud exception" to *res judicata*. "If a judgment has been procured by fraud or collusion, *res judicata* will not usually be an impediment to litigating a claim anew." *In re Razzi*, 533 B.R. 469, 480 (Bankr. E.D. Pa. 2015) (quoting *Wilkes ex rel. Mason*, 902 A.2d 366, 387 (Pa. 2006) (citing *Morris v. Jones*, 329 U.S. 545, 550–51 (1947))).

Under Pennsylvania law, a final judgment challenged on the basis of fraud may be voided only for acts of extrinsic fraud, not for intrinsic fraud. Extrinsic fraud typically addresses procedural matters "collateral to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered." Examples of extrinsic fraud might include a party securing a default judgment after falsely certifying that it served the defendant with a complaint; an attorney "selling out" his client's interest to benefit the opposing party; or a party keeping an opposing party away from court on the false promise of a compromise.

Levine, 91 Fed.Appx. at 220 (citations omitted).

Typically, the plaintiff seeking to avoid *res judicata* must demonstrate that they "failed to include claims in their first lawsuit *because of* fraud, concealment, or misrepresentation." *Wicks v. Anderson*, Civil Action No. 14-0143, 2014 WL 11456596, at *7 n.18 (M.D. Pa. Nov. 25, 2014) (emphasis in original).

Moreover, "[o]nce a party has evidence of extrinsic fraud for purposes of voiding a Pennsylvania court judgment, it must act promptly. If the party has not acted promptly, it must provide a reasonable explanation for the delay." *Levine*, 91 Fed.Appx. at 220 (citations omitted). "An absence of prejudice toward the opposing party can also strengthen the position of the [plaintiff]." *Id.*

In her complaint, Florimonte has failed to allege the sort of extrinsic fraud that might permit her to circumvent the *res judicata* bar. She has alleged various acts by Borough officials predating her first lawsuit, which she implies were intended to deflect or delay her from litigating rather than correct the storm water flooding she sought to remedy. But this is not

extrinsic fraud—nothing prevented her from raising these claims in the original state proceeding. Indeed, it appears from the complaint that she did raise these claims during proceedings on her first lawsuit.

In conclusory fashion, Florimonte has alleged that the Borough withheld information (insofar as it denied knowing who had originally installed the drainage pipes at issue) and destroyed documents during discovery during state court proceedings.[5] But once again, this is not extrinsic fraud—nothing prevented her from raising these claims in the original state proceeding. Moreover, in the instant complaint, Florimonte has failed to allege any facts whatsoever from which one might plausibly infer that any misconduct occurred.

Florimonte has alleged that the Borough made false promises of compromise on multiple occasions between 2000 and 2007, but there is nothing to suggest that any of these offers to settle kept Florimonte from pursuing relief in state court. Indeed, she obtained substantial injunctive relief from the state court following trial in her first lawsuit.

Florimonte has alleged that counsel for the Borough unreasonably delayed proceedings in state court by untimely responding to discovery requests and by cancelling depositions on two separate occasions. But these are just ordinary delays common to litigation, and there is nothing in the pleadings to suggest that they ultimately prevented Florimonte from raising any of her claims in state court proceedings.

Florimonte claims that her attorney colluded with counsel for the Borough. In support, she points to her attorney's refusal to pursue the issue of document destruction by the Borough, her attorney's delay in pursuing discovery sanctions or a hearing on

preliminary injunctive relief, her attorney's "chatting" with opposing counsel, and her attorney's failure to attend an inspection of her property attended by the state court trial judge and opposing counsel. None of the alleged conduct supports a reasonable inference that her attorney "sold out" Florimonte's interests to benefit the Borough. At most, it suggests a difference of opinion between client and counsel with respect to litigation strategy, and a regrettable inattentiveness of counsel to his professional obligations, but not collusion with her opponent. In any event, there is nothing to suggest that any of the alleged conduct prevented Florimonte from raising her claims in state court.

Florimonte has alleged in conclusory fashion that the Borough presented perjured testimony by an engineer who claimed no knowledge of why, when, how, or by whom the two pipes were installed—here, Florimonte has insinuated, without elucidation, that the Borough in fact knew this information—but she has failed to proffer any facts or evidence to support her claim of perjury. She has further proffered disputed facts (e.g., whether Florimonte's parcel of land was the lowest spot on the street or not) in support of her claims that the Borough "fabricated" evidence, but nothing to suggest the actual falsification of evidence.

Florimonte has claimed that the original state-court judge presiding over her first action was discourteous to her and biased against her. She presented this very issue on appeal to the Commonwealth Court, which expressly found "no evidence that established bias, prejudice, or [conflict of] interest" on the part of the state trial judge. *Florimonte*, 2013 WL 3973727, at *4–*5. Florimonte has reiterated the same claims of bias in her amended complaint, but here also she has failed to allege any

facts to suggest actual bias, prejudice or conflict of interest—at most, she has established only her own personal dissatisfaction with the trial judge's temperament and decisions. Ultimately, moreover, the trial judge ruled in her favor on remand, granting her substantial injunctive relief.

Not only has Florimonte failed to allege sufficient facts to establish any extrinsic fraud, she also has failed to act promptly. *See Levine*, 91 Fed.Appx. at 220. All of the purported misconduct upon which her extrinsic fraud claim is based occurred during the state court proceedings on her first lawsuit, which ended in July 2013. The original complaint in this action was not filed until June 2017, nearly four years later, and she has offered no reason for the delay. *See id.* Moreover, Florimonte has not alleged an absence of prejudice, and none can be inferred given the death of at least one witness who testified at trial (Robert Fisher) and the fact that the Borough changed its position (i.e., sealed and capped the storm water drainage pipes at issue) in reliance upon the original state court judgment, which Florimonte did not appeal. *See id.* at 220–21.

Accordingly, having satisfied all three *Lubrizol* factors and having failed to adequately allege extrinsic fraud, Florimonte's substantive claims are barred by the doctrine of *res judicata*. Therefore, it is recommended that all of Florimonte's substantive claims be dismissed for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

C. Leave to Amend

The Third Circuit has instructed that if a civil rights complaint is vulnerable to dismissal for failure to

state a claim, the district court must permit a curative amendment, unless an amendment would be inequitable or futile. *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir. 2002). Based on the facts alleged in the complaint and the plaintiff's litigation history, it is apparent that amendment in this case would be futile. It is therefore recommended that the complaint be dismissed *without* leave to amend.

D. Rule 11 Sanctions

The Borough has moved for sanctions pursuant to Rule 11(c) of the Federal Rules of Civil Procedure on the grounds that Florimonte's claims are legally frivolous and that this is the twelfth in a series of duplicative and harassing lawsuits filed against the Borough regarding this very same property dispute.[6] The Borough requests that a "serious and substantial monetary sanction" be imposed, as well as a permanent vexatious-litigant injunction prohibiting Florimonte from filing any other lawsuit against the Borough and its officers concerning the storm water runoff issue and her person or her home.

In her opposition brief, Florimonte has objected that the Borough has failed to comply with the specific procedural requirements imposed by Rule 11(c)(2). Her objection is well taken.

The procedural requirements for a Rule 11 sanctions motion are clearly stated in the rule itself:

> A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it must not be filed or presented to the court

> if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service ....

Fed. R. Civ. P. 11(c)(2).

Here, the Borough has failed to file a separate motion for Rule 11 sanctions, combining it instead with its Rule 12(b)(6) motion to dismiss. The reason for the "separate motion" requirement imposed in the first sentence quoted above becomes clear upon considering the primary defect in the Borough's Rule 11 motion: its failure to comply with the "safe harbor" requirement imposed in the second sentence above, which requires that a Rule 11 motion for sanctions be served on the opposing party at least twenty-one days before presenting it to the Court, thus depriving Florimonte of "the opportunity to correct [her] errors." *In re Schaefer Salt Recovery, Inc.*, 542 F.3d 90, 99 (3d Cir. 2008). "[S]trict compliance with the safe harbor rule is required." *In re Miller*, 730 F.3d 198, 204 (3d Cir. 2013). "If the twenty-one day period is not provided, the motion must be denied." *Schaefer Salt Recovery*, 542 F.3d at 99; *see also Cannon v. Cherry Hill Toyota, Inc.*, 190 F.R.D. 147, 159 (D.N.J. 1999) (denying Rule 11 motion where the court could not determine if movant had complied with the safe harbor provision); *Carofino v. Forester*, 450 F. Supp. 2d 257, 274 (S.D.N.Y. 2006) (denying Rule 11 motion that did not comply with the separate motion provision).

Accordingly, it is recommended that the Borough's request for sanctions under Rule 11(c) of the Federal Rules of Civil Procedure be denied.

IV. Recommendation

For the foregoing reasons, it is recommended that:

1. The Borough's motion to dismiss and for sanctions (Doc. 5) be **GRANTED in part and DENIED in part;**
2. The Borough's request for dismissal be **GRANTED** and all of the plaintiff's claims be **DISMISSED with prejudice** for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure;
3. The Borough's request for sanctions under Rule 11(c) of the Federal Rules of Civil Procedure be **DENIED;** and
4. The Clerk be directed to mark this case as **CLOSED.**

Footnotes

1"When two lawsuits are pending, the common law doctrine of *lis pendens* permits the dismissal of the newer suit if both suits involve the same parties, the same relief requested, the same causes of action, and the same rights asserted." *Barren v. Commonwealth,* 74 A.3d 250, 253 (Pa. Super. Ct. 2013).

2We note that the substance of original complaint was expressly incorporated by reference into the body of the amended complaint, thus the operative complaint in this case is comprised of both pleadings, construed together. (Doc. 1; Doc. 10).

3The appropriate avenue for relief from a purportedly fraudulently obtained state-court judgment is through state-court trial and appellate proceedings and *certiorari* review by the Supreme Court of the United States, not collateral proceedings in federal district court. *See Atl. Coast Line,* 398 U.S. at 287; *Warriner,* 307 F.2d at 936.

4Moreover, we note that the purported misconduct is not alleged with requisite particularity, *see generally* Fed. R. Civ. P. 9(b), does not rise to the level of "egregious misconduct," *see Herring*, 424 F.3d at 390, and it falls well short of alleging the "clear, unequivocal and convincing evidence" required to set aside judgment, *see id.* at 387.

5Notably, Florimonte has stopped short of explicitly alleging that the documents were relevant to the litigation or responsive to her discovery requests, relying instead on the reader to infer that the destruction of documents may have had some nefarious purpose. But in the exhibits to her original complaint, she has included a copy of a March 2006 letter in which she apparently raised this issue with her attorney of record at the time, advising him that she had been informed by an unnamed person that documents were being shredded at the Borough Office, but further admitting that "[w]hat the purpose of this is or if it has any bearing on my lawsuit, I don't know." (Doc. 1-1, at 77). Florimonte's attorney responded, advising that he did not believe the documents being shredded could be relevant to her claims, noting that "[t]hey have already responded to discovery and the most important documents that would be in their defense (i.e. signed easements or right of ways) would be filed in the Courthouse." (*Id.* at 78).

6The Borough has not cited or relied on any other statute, rule, or other source of authority for the imposition of sanctions.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

CAROLYN JANE FLORIMONTE, Plaintiff, v. BOROUGH OF DALTON, a.k.a. BOROUGH COUNCIL, Defendant.	CIVIL ACTION NO. 3:17-CV-01063 (MARIANI, J.) (SAPORITO, M. J.)

NOTICE

NOTICE IS HEREBY GIVEN that the undersigned has entered the foregoing Report and Recommendation dated December 14, 2017. Any party may obtain a review of the Report and Recommendation pursuant to Local Rule 72.3, which provides:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written

objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Failure to file timely objections to the foregoing Report and Recommendation may constitute a waiver of any appellate rights.

Dated: December 14, 2017

s/Joseph F. Saporito. Jr.
JOSEPH F. SAPORITO, JR.
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

CAROLYN JANE FLORIMONTE, Plaintiff, v. BOROUGH OF DALTON, a.k.a. BOROUGH COUNCIL, Defendant.	CIVIL ACTION NO. 3:17-CV-01063 (MARIANI, J.) (SAPORITO, M. J.)

ORDER

This matter comes before the Court on the *pro se* plaintiff's motion for leave to file an amended complaint (Doc. 9). The plaintiff, Carolyn Jane Florimonte, has also submitted a complete copy of her proposed amended complaint. (Doc. 10).

Under Rule 15(a) of the Federal Rules of Civil Procedure, "[t]he court should freely give leave [to amend pleadings] when justice so requires." Fed. R. Civ. P. 15(a)(2); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) ("[T]his mandate is to be heeded."). But even under this liberal standard, a motion for leave to amend may be denied when it is futile. "'Futility' means that the complaint, as amended, would fail to state a claim upon which relief could be granted." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1434 (3d Cir. 1997). In addition, "[a]n amendment would be futile, and leave to amend should be denied, where the statute of limitations or some other affirmative defense would

compel dismissal of the claim." *Ridge v. Campbell*, 984 F. Supp. 2d 364, 372 (M.D. Pa. 2013); *see also Cowell v. Palmer Twp.*, 263 F.3d 286, 296 (3d Cir. 2001).

The defendants oppose the motion, but they do not contend that the proposed amendment is futile in any manner. Rather, they oppose the motion solely on the technical ground that it was filed without an accompanying motion for leave of court to amend the complaint. (Doc. 11). A subsequent letter from the plaintiff, however, clarifies that the service copy of her motion was damaged in transit and returned to her by the U.S. Postal Service. (Doc. 12). Since then, she has re-mailed the service copy of her motion to amend, and the defendants have no doubt received a copy of the motion to amend via the Court's CM/ECF system. In the several weeks since then, the defendants have failed to file any additional opposition papers.

The amended complaint is substantively much the same as the original complaint. Indeed, much of it is reproduced from the original complaint word-for-word, merely adding some additional material to the complaint's introductory section and additional allegations regarding a state-court judge's alleged "fraud on the court." (Doc. 11).

The defendants' have fried a motion to dismiss (Doc. 5) in response to the original complaint. All allegations regarding the plaintiff's other claims in the proposed amended complaint are identical to those of the original complaint. Acceptance of the proposed amended complaint will not moot the defendants' motion to dismiss. Accordingly, that motion remains pending and will be the subject of a forthcoming report and recommendation.

Accordingly, **IT IS HEREBY ORDERED THAT:**

1. The plaintiff's motion for leave to amend the complaint (Doc. 9) is **GRANTED**; and

2. The Clerk shall file the proposed document (Doc. 10) as the amended complaint in this action.

Dated: December 4, 2017

JOSEPH F. SAPORITO, JR.
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1490

CAROLYN J. FLORIMONTE,
Appellant

v.

BOROUGH OF DALTON,
also known as Borough Council

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 3-17-cv-01063)
District Judge: Honorable Robert D. Mariani

Submitted Pursuant to Third Circuit LAR 34.1(a)
August 23, 2018

Before: SHWARTZ, KRAUSE and FUENTES,
Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on August 23, 2018. On consideration whereof, it is now hereby.

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered February 9, 2018, be and the same is hereby affirmed. Costs taxed against the appellant.

All of the above in accordance with the opinion of this Court.

ATTEST:
s/ Patricia S. Dodszuweit
Clerk

Dated: August 24, 2018

Seal: Certified as true copy and issued in lieu
of a formal mandate on October 18, 2018

Teste: Patricia Dodszuweit
Clerk, U.S. Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1490

CAROLYN J. FLORIMONTE,
Appellant

v.

BOROUGH OF DALTON,
also known as Borough Council

(M.D. Pa. No. 3-17-cv-01063)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge. McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR, SHWARTZ, KRAUSE, RESTREPO, BIBAS, and FUENTES,* Circuit Judges

The petition for rehearing filed by appellant, in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the

panel and the Court en banc, is denied.

Footnote

* Pursuant to Third Circuit I.O.P. 9.5.3., Judge Fuentes's vote is limited to panel rehearing.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carolyn Jane Florimonte,	:	
	:	
Plaintiff,	:	No. 987 C.D. 2012
	:	
v.	:	
	:	
Borough Of Dalton,	:	

ORDER

AND NOW, this 4th day of April, 2013, the order of the Lackawanna County Court of Common Pleas denying Carolyn J. Florimonte's claim for relief in the above-captioned matter is affirmed, in part, as Carolyn J. Florimonte has failed to offer sufficient evidence of negligence and reversed, in part, as Carolyn J. Florimonte has demonstrated a continuing trespass and is entitled to equitable relief.

The matter is remanded to the Lackawanna County Court of Common Pleas to fashion equitable relief consistent with the attached opinion that will abate the trespass created on Carolyn J. Florimonte's property situated at 219 Third Street in the Borough of Dalton, Lackawanna County, Pennsylvania, by the unlawful concentration and discharge of surface water thereon through and from the two pipes, referred to in the record as the ninety-degree and forty-five degree pipes, laid under Third Street and terminating near or upon the property.

Jurisdiction relinquished.

JAMES GARDNER COLINS, Senior Judge

Commonwealth Court of Pennsylvania.
Carolyn J. FLORIMONTE, Appellant
v.
BOROUGH OF DALTON.
No. 987 C.D.2012.

Submitted Oct. 26, 2012.Decided April 4, 2013.

BEFORE: PELLEGRINI, President Judge, and SIMPSON, Judge, and JAMES GARDNER COLINS, Senior Judge.

MEMORANDUM OPINION

JAMES GARDNER COLINS, Senior Judge.

Carolyn J. Florimonte (Appellant), *pro se*, appeals from the December 28, 2011 Lackawanna County Court of Common Pleas (Trial Court) opinion and order denying her claim for relief against the Borough of Dalton (Borough) for trespass and negligence.[1]

Appellant is the owner of a parcel of land situated at 219 Third Street in the Borough of Dalton, Lackawanna County, Pennsylvania (Property). In the Borough of Dalton, Third Street runs between Fuller Road and Lake Street. The Property is flat, but located

on Third Street between two significant slopes that place the Property at the bottom of a bowl. (Notes of Testimony (N.T.) at 147, 215–216, Reproduced Record (R.R.) at 302b, 370b–371b.) As a result of the surrounding topography, surface water drains naturally from the twenty-six acres above the Property to the area of Third Street where the Property is situated. (N.T. at 99, 218–219, R.R. at 254b, 373b–374b.)

Appellant purchased the Property by deed dated May 5, 2000, from Stanley and Josephine Hedrick. (N.T. at 27–28, R.R. at 182b–183b, Appellant's Trial Exhibit 4.) The Property consists of three lots, each a hundred feet wide: Lot 16 contains Appellant's residence and borders upon Third Street; Lot 17 is adjacent to Lot 16 and also borders upon Third Street; and Lot 30 is situated directly behind Lot 16. (N.T. at 57, 222, R.R. at 212b, 377b.) At the time of purchase, the Property had stood vacant for five years and Lot 17, which is at the heart of this appeal, was wooded and overgrown with brush. (N.T. at 46–19, 184–186, R.R. at 201b–204b, 339b–341b.)

Shortly after purchasing the Property, Appellant grew concerned about excess surface water and traced the source of the water to the interior of Lot 17. (N.T. at 151, R.R. at 306b.) Appellant discovered two plastic sluice pipes carrying water onto the Property. The first sluice pipe travels underground at a ninety-degree angle to Third Street and outlets on the surface about seven to nine feet from the boundary line, within the Borough's right of way. (N.T. at 151, 190–191, 219–220, 226, R.R. at 306b, 345b–346b, 374b–375b, 381b .) Appellant contacted the Borough. (N.T. at 154, R.R. at 309b.) In April 2001, Appellant discovered the second sluice pipe. (N.T. at 188, R.R. at 343b.) This second sluice pipe is partially visible on the surface of

Lot 17, before it continues underground, crossing Third Street at a forty-five degree angle, and continuing toward Lake Street. (N.T. at 188, 219–220, 223, R.R. at 343b, 374b–375b, 378b.)

The side of Third Street on which the Property is located does not have culverts or a swale; however, the opposite side of Third Street has a swale running parallel to the street and the bordering properties, and most of the driveways have culverts underneath to allow surface water to travel freely through the swale. (N.T. at 59, 63, 65, R.R. at 214b, 218b, 220b.) The surface water running down the opposite side of Third Street through the swale is then conveyed underneath Third Street and onto Lot 17 via the sluice pipes. (N.T. at 130, R.R. at 285b.) Both pipes are a part of the Borough's storm water management system. (N.T. at 226, R.R. at 381b .)

Initially, Appellant gave permission for Borough representatives to enter the Property and attempt to work a solution to the flooding caused by the discharge of water on Lot 17 from the two pipes. (N.T. at 155, R.R. at 301b.) Borough representatives entered the Property, cut back brush on Lot 17, and dug a trench at the point where the discharge from the two pipes was closest, to allow the water exiting the pipes to traverse the length of Lot 17, and outlet into an existing channel located on the property behind Lot 17. (N.T. at 153, 157, 195, 222, R.R. at 208b, 250b, 312b, 377b.) The trench failed to lessen the effect of the flooding on the Property and, dissatisfied with this result, Appellant subsequently rescinded permission for the Borough to enter the Property. (N.T. at 159, 191–193, R.R. at 314b, 346b–348b, Appellant's Trial Exhibit 59.)

The flooding and standing water on Lot 17 continued, and when Lot 17 became saturated, the

water traveled onto Appellant's other lots. (N.T. at 198, R.R. at 353b.) Appellant's residence, situated next to Lot 17 on Lot 16, is a former barn constructed of cinder block and the water traveled under the foundation, causing damage to the residence. (N.T. at 178–180, 198, R.R. at 333b–335b, 353b.) Over time, Appellant took steps to protect the residence, such as adding a silicone coating to the siding, constructing a stone wall at the Property line, raising Lot 16, and putting down gravel to absorb the water, but the flooding continued to impact her residence. (N.T. at 180, 196, 198, 204, 335b, 351b, 353b, 359b.) Ultimately, Appellant's residence suffered significant water damage, Lot 17 remained saturated, and none of the steps Appellant undertook lessened the damage caused by the excess surface water discharged onto her Property.

On March 4, 2003, Appellant, represented by counsel, filed a complaint in equity alleging that the Borough is the owner of a water drainage system that is located, in part, on her property, that the Borough's placement of the water drainage system was without consent, and that the water drainage system continually deposits excessive quantities of water onto her land. (Complaint ¶ ¶ 4–8, R.R. at 12a–13a.) Appellant claimed that the excessive quantity of water deposited by the drainage system amounted to a continuing trespass, rendering a portion of her land unusable and interfering with her enjoyment of the Property. (Complaint ¶¶ 15–16, R.R. at 13a–14a.) Appellant further alleged that the Borough altered the natural flow of surface water by concentrating the discharge of surface water onto the Property, causing a dangerous condition, and that the Borough had negligently constructed and maintained its water drainage system. (Complaint ¶¶ 18–19, R.R. at 14a.)

Appellant asked for both monetary damages and equitable relief.

On April 18, 2007, Appellant petitioned for preliminary and/or permanent injunctive relief, requesting that the Borough be ordered to remove the pipes discharging water onto the Property and/or abate the continuous discharge of water. Hearings were held before the Trial Court on April 3, 2009, and May 1, 2009, and the Trial Court conducted a view of the Property on May 1, 2009. On October 6, 2009, the Trial Court issued an opinion and order denying Appellant's petition for injunctive relief. The Trial Court reasoned that an injunction was inappropriate because (1) the record failed to establish the status quo, (2) Appellant had an adequate remedy at law, and (3) it was not clear from the record that removal would not harm the public interest. (October 6, 2009, Opinion and Order (Injunction Op.), at 9–10, R.R. at 262a–263a.) The Trial Court also stated that its opinion and order was limited to Appellant's entitlement to a mandatory injunction and was not intended to address Appellant's entitlement to the relief requested in her complaint. (Injunction Op. at 9, R.R. at 262a.)

Appellant was represented by counsel up to and including the two hearings and the view conducted as a part of the Trial Court's review of Appellant's petition for injunctive relief. On May 28, 2009, Appellant's counsel filed a petition for leave to withdraw as counsel. The petition was granted on June 16, 2009, at which time Appellant elected to proceed *pro se*.

On August 10, 2011, the Trial Court held a single-day non-jury trial on Appellant's claims. Appellant testified and submitted into evidence a series of photographs of the pipes at issue, the water collecting on the Property, and the damage to her

residence. Appellant, however, chose not to submit evidence concerning monetary loss. Both Appellant and the Borough presented the testimony of the Borough's engineer, John Seaman. The Borough also presented photographs, a street profile of Third Street, and a topographical map of the area surrounding the Property. The Borough did not dispute the water problems and the damage to the Property alleged by Appellant, but sought instead to demonstrate throughout the trial that the excess surface water on Appellant's Property was a result of the natural watercourse and not due to any act for which the Borough was liable.

Following the non-jury trial, the Trial Court concluded that Appellant had "failed to meet her burden," writing: "There simply is no credible evidence of record which supports a cause of action in negligence or trespass. For this reason, Plaintiff's claim for relief is hereby denied." (December 28, 2011, Opinion and Order (Trial Court Op.) at 14, R.R. at 677a.) Appellant appealed to this Court.

Before this Court, Appellant argues a right to recover under the Storm Water Management Act[2] (SWMA), and contends that the Borough's actions constitute a taking in violation of the United States and Pennsylvania Constitutions. Appellant also contends that the Trial Court's denial of her recusal request was an abuse of discretion. Finally, Appellant contends that the Trial Court committed an error of law and abused its discretion in finding that she failed to meet her evidentiary burden and denying her claim for equitable relief based on negligence and trespass.[3] For the reasons that follow, although we conclude that Appellant procedurally waived her takings claims and her claim under the SWMA, and we affirm the Trial

Court's denial of Appellant's claim for relief based in negligence, we must reverse and remand this matter to the Trial Court, as we conclude that the Trial Court committed an error of law in denying Appellant equitable relief for her claim of trespass.

Appellant argues that the Borough violated the SWMA by diverting surface water over her land, creating a nuisance, and by failing to file a storm water management plan. Appellant is procedurally barred from recovery under the SWMA. Appellant did not allege a right to recover under the SWMA in her complaint. Appellant's complaint contains only claims for trespass and negligence and Appellant has never amended her complaint to include other claims. Appellant contends that the SWMA has "been a part of the Pleadings since June, 2007," and cites to portions of the reproduced record that contain her counseled brief in support of a petition for preliminary injunction and her post-hearing *pro se* brief in support of a request for preliminary injunction. (Appellant Br. at 32.) Neither of the briefs cited by Appellant are proper pleadings or vehicles with which to raise a claim for relief. *See* Pa. R.C .P. No. 1017(a).[4] Regardless of whether Appellant may have at one time had a substantive basis upon which to claim a right to recover under the SWMA, Appellant waived any such claim in these proceedings.[5]

Similar procedural deficiencies bar Appellant's takings claim. In her brief to this Court, Appellant alleges that her rights under the Fifth and Fourteenth Amendment of the United States Constitution and under Article 1, Section 10 of the Pennsylvania Constitution have been violated.[6] As with Appellant's argument concerning the SWMA, Appellant may well have had a substantive basis upon which to pursue a claim against the Borough for taking the Property or a

portion thereof without the payment of just compensation. However, Appellant has failed to follow the proper procedural law in advancing her claim. Appellant filed a civil action in equity alleging claims of negligence and trespass. Nowhere in her complaint does Appellant raise any counts related to the Pennsylvania or United States Constitution. More importantly, Appellant did not and has never filed a petition with the common pleas court for the appointment of a board of viewers in accordance with the Eminent Domain Code.[7] In order to advance her claims that the Property or a portion thereof was taken without just compensation, Appellant needed to file a petition for appointment of a board of viewers.[8] *Id.* Accordingly, Appellant's state and federal constitutional claims are not properly before this Court. Next, Appellant contends that the Trial Court Judge demonstrated a bias against her and that it was therefore an abuse of discretion to deny her motion for recusal. As a general rule, a motion for recusal is initially addressed to and ruled upon by the jurist whose impartiality is being challenged. *Commonwealth v. White*, 589 Pa. 642, 657, 910 A.2d 648, 657 (2006). The party requesting recusal has the burden to produce evidence establishing bias, prejudice, or interest. *Reilly by Reilly v. Commonwealth*, 507 Pa. 204, 222, 489 A.2d 1291, 1300 (1985). The jurist will then make an independent, self-analysis of the ability to be impartial and decide whether continued involvement in the case "creates an appearance of impropriety and/or would tend to undermine public confidence in the judiciary." *Commonwealth v. Druce*, 577 Pa. 581, 589, 848 A.2d 104, 108 (2004). An appellate court, such as this one, presumes judges are fair and competent and will only disturb the decision to deny a request for recusal where

it is shown to be an abuse of discretion. *White*, 589 Pa. at 657, 910 A.2d at 657. Nonetheless, there is no need to find actual prejudice; the appearance of impropriety alone is sufficient justification to grant new proceedings. *In Interest of McFall*, 533 Pa. 24, 34, 617 A.2d 707, 712 (1992).

Appellant first requested that the Trial Court Judge recuse himself as one of several claims raised in a petition for a writ of mandamus that was filed at the same term and number as Appellant's civil action. The Trial Court Judge orally denied the writ *in toto* prior to the commencement of the August 10, 2011, non-jury trial and on September 13, 2011, issued a written opinion detailing the grave procedural and substantive deficiencies in the petition that supported denial. However, at the August 10, 2011 hearing and in the December 28, 2011 opinion, the Trial Court Judge separately addressed the recusal request, placing in the record Appellant's request and his reasons for denying the recusal request. (N.T. at 10–11, R.R. at 165b–166b); *see also* Trial Court Op. at 3 n. 2, R.R. at 666a.)

Before the Trial Court, Appellant requested that the Trial Court Judge recuse himself on the basis that his denial of her request for a stenographer at the October 26, 2010 summary judgment hearing reflected a bias against her. The Trial Court Judge stated that he had no independent recollection of denying the request for a stenographer and that his practice is to always grant such requests. (N.T. at 11, R.R. at 166b.) In addition, the Trial Court Judge stated that even if Appellant's recollection was correct, the summary judgment proceedings were for the purpose of legal argument, not fact finding, and that Appellant was not prejudiced by the lack of fact finding at the summary

judgment hearing, nor was a conflict created that would prevent him from serving as a fact-finder at trial. (*Id.*) Before this Court, Appellant argues that recusal was necessary "for the very reason that he knew of belief by Appellant of bias on his part and therefore he could not possibly render an impartial verdict." (Appellant Br. at 23.) Appellant also contends that the Trial Court Judge's impartiality is reflected in references to her lack of legal knowledge contained in the December 28, 2011 opinion. (Appellant Br. at 23–25.)

We find no abuse of discretion in the denial of Appellant's recusal motion. Appellant offered no evidence to support the request, let alone evidence that established bias, prejudice, or interest. Moreover, a jurist's knowledge that a party before him or her believes the jurist is partial is not grounds for recusal; if such knowledge alone were sufficient grounds for recusal, any party could recuse any jurist simply by making the motion.

Separately, the record in this case reveals a long journey from the clarity of the allegations pled to the opacity of what exactly was evinced at trial. The discussion in the December 28, 2011 opinion of Appellant's *pro se* status speaks to the difficulty the Trial Court Judge here faced in trying to ensure Appellant access to the courts without also providing her assistance in the prosecution of her case, thereby depriving the Borough of its right to a fair trial. The transcript of the August 10, 2011 hearing memorializes repeated instances where Appellant's lack of legal training and confusion over what can be offered as evidence and what is a legal argument worked to the detriment of her case. (N.T. at 29–36, 83–86, 120–121, 132, 141, 144–145, 148–150, 169; R.R. at 184b–192b, 238b–241b, 275b–276b, 287b, 296b, 299b–300b, 303b–

305b, 324b.) Unfortunately, such difficulty is all too common among *pro se* litigants, a fact which reflects on the enormity of their task rather than on the litigants themselves, but does not and cannot relieve a party unrepresented by counsel of the obligation to follow procedural and substantive law. The Trial Court Judge's discussion of the law concerning the role of the trial court and the obligations of *pro se* litigants in the December 28, 2011 opinion is a necessary discussion of the context within which the record on appeal was created and serves to aid our review of a record that he aptly described as "convoluted." (Trial Court Op. at 5, R.R. at 668a.)

Next, Appellant contends that the Trial Court committed an error of law and abused its discretion in finding that she failed to meet her evidentiary burden and in denying her claims for equitable relief based on negligence and trespass. The Borough argues that Appellant failed to meet her evidentiary burden on both claims.

Under Pennsylvania common law, the owner of upper land is not liable to an owner of lower land for damage from surface water that flows through the natural water course; however, there are two well-settled exceptions to this rule of loss without injury. *Shamoski v. P.G. Energy, Div. of Southern Union Co.*, 579 Pa. 652, 669, 679, 858 A.2d 589, 599, 606 (2004). First, a landowner may not alter the natural flow of surface water by concentrating it in an artificial channel and discharging it on the land of another, even though no more water is collected than would naturally have flowed upon another's land in a diffused condition. *Rau v. Wilden Acres, Inc.*, 376 Pa. 493, 494–495, 103 A.2d 422, 423–424 (1954); *Chamberlain v. Ciaffoni*, 373 Pa. 430, 96 A.2d 140 (1953); *Pfeifer v. Brown*, 165 Pa. 267,

273, 30 A. 844, 845 (1895); *Kauffman v. Griesemer*, 26 Pa. 407 n.a (1856) (*quoting Martin v. Riddle*, "[N]or has the owner of the upper ground a right to make excavations or drains by which the flow of water is directed from its natural channel, and a new channel made on the lower ground; nor can he collect into one channel water usually flowing off into his neighbour's fields by several channels, and thus increase the wash upon the lower fields.").[2] Second, a landowner may not unreasonably increase the quantity of water or change the quality of water discharged upon a lower landowner. *Lucas v. Ford*, 363 Pa. 153, 156, 69 A.2d 114, 116 (1949); *Tom Clark Chevrolet, Inc. v. Dept't of Environmental Protection*, 816 A.2d 1246, 1252 (Pa.Cmwlth.2003); *LaForm v. Bethlehem Township*, 346 Pa.Super. 512, 499 A.2d 1373, 1378 (Pa.Super.1985). These common law rules of surface waters bind all landowners, including municipalities. *Rau*, 376 Pa. at 494–494, 103 A.2d at 423–424 ("Even a municipality, while not liable to a property owner for an increased flow of surface water over his land arising merely from changes in the character of the surface produced by the opening of streets and the building of houses in the ordinary and regular course of the expansion of the city, may not divert the water onto another's land through the medium of artificial channels."); *Marlowe v. Lehigh Township*, 64 Pa.Cmwlth. 587, 441 A.2d 497 (Pa.Cmwlth.1982).

While Pennsylvania municipalities are bound by the same common law rules of surface waters as other landowners, our municipalities do not have a common law duty to provide storm water management systems. *Carr v. Northern Liberties*, 35 Pa. 324 (1860); *City of Washington v. Johns*, 81 Pa.Cmwlth. 601, 474 A.2d 1199, 1202 (Pa.Cmwlth.1984); *Yulis v. Borough of*

Ebensurg, 182 Pa.Super. 423, 128 A.2d 118, 120 (Pa.Super.1956). As a result, a municipality cannot be held negligent if harm befalls another due to the inadequacy of a storm water management system constructed and maintained by the municipality; but, if harm is due to negligence in the construction of the system, a municipality may face liability. *Tom Clark Chevrolet, Inc.*, 816 A.2d at 1252.

For example, in *Al Staffaroni v. City of Scranton*, 153 Pa.Cmwlth. 188, 620 A.2d 676, 677, 679 (Pa.Cmwlth.1993), the plaintiff claimed the city negligently constructed its storm water management system after the city placed a 15–inch drainage pipe underneath a road running alongside the plaintiff's property in an attempt to alleviate an icing problem on the roadway. The placement of the pipe allowed surface water that had previously traveled across the road in a diffuse manner to be collected, channeled underneath the road, and discharged in a concentrated fashion on plaintiff's land creating a gully and causing erosion. *Id.* At trial, the plaintiff demonstrated through photographs, oral testimony, and documentary evidence that the city installed the pipe despite the foreseeable injury to the plaintiff, the concentration of water created the gully and caused the erosion on plaintiff property, and the gully and erosion constituted actual economic damage to the property. *Id.* With these proofs, the plaintiff demonstrated that the city was negligent in the construction of its storm water management system and, accordingly, the trial court ordered that the city block off the pipe and compensate the plaintiff for the damage done to the property. *Id.* at 678.

Similarly, once a municipality has constructed or taken ownership and control over a storm water

management system, the municipality must take steps to maintain that system, such as replacing cracked pipes and preventing blockages, or the municipality may be liable for harm caused by the failure to do so. *Morton v. Borough of Ambridge*, 375 Pa. 630, 101 A.2d 661 (1954) (borough's failure to maintain lateral connections allowed water to seep around sewer, which weakened the fill, and caused sewer to collapse, creating a jury question as to whether resulting harm was due to borough's negligence); *Tom Clark Chevrolet, Inc.*, 816 A.2d at 1252.

In *City of Washington v. Johns*, the plaintiffs repeatedly lodged complaints with the city because a portion of the city's drainage system caused storm water to back up in the basement of the plaintiffs' private home. 474 A.2d at 1201. The city responded to the plaintiffs' complaints on only one occasion and at that time removed large quantities of dirt that had accumulated in the public sewer. *Id.* Following a heavy rainstorm, the plaintiffs' private home suffered interior water and structural damage, for which the plaintiffs brought an action against the city for negligent maintenance of its storm water management system. *Id.* This Court concluded that the plaintiffs had produced sufficient evidence to demonstrate that it was the city's failure to keep the sewer free of dirt, rather than the inability of the system to adequately manage the amount of storm water, that caused injury to the plaintiffs' property. *Id.* at 1202–1203.

In her complaint, Appellant alleges extensive damage to the Property caused by the Borough's negligent construction and maintenance of its drainage system and requests money damages and equitable relief. (Complaint ¶¶ 18, 20.) To prove her negligence cause of action, Appellant had the burden to establish

at trial: (1) a duty recognized by law, requiring the actor to conform to a certain standard of conduct; (2) a failure of the actor to conform to that standard; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss or damages to the interests of another. *Fazio v. Fegley Oil Co., Inc.*, 714 A.2d 510, 512 (Pa.Cmwlth.1998). However, unlike the plaintiff in *Al Staffaroni v. City of Scranton*, Appellant failed to offer the requisite proof to support her allegations.

Under Appellant's claim for negligent construction, the duty on the Borough was to construct or install its storm water management system without altering the natural flow of surface water by concentrating it in an artificial channel and discharging it onto the Property. Although there was no question that both of the pipes direct surface water onto the Property, there was not sufficient evidence at trial to demonstrate that the Borough installed the pipes. The only evidence concerning the initial installation or construction of the two pipes consisted of the Borough's response to Appellant's interrogatories, which states: "The original drainage system was installed at least thirty (30) years ago. The precise date of the installation is unknown. New piping was installed approximately fifteen (15) years ago, by the Sewer Author [sic]." (N.T. at 90, R.R. at 245b; Appellant's Trial Exhibit 33.) At no time during the course of this litigation did the Borough represent that it installed the pipes or that it had knowledge of who may have installed the pipes. Without proof that the Borough performed the act of installation or construction, Appellant's negligence claim cannot be sustained; without the act, there is no duty, and without a duty, there can be no breach.

Likewise, Appellant's claim for negligent maintenance must fail due to insufficient evidence. There was no evidence at trial that showed or suggested a failure by the Borough to maintain its storm water management system, such as cracks or sags in the pipes, clogs in the culverts, erosion of the swale, or the like. Instead, it is clear from the record that the system functions just as it was intended and it is this system that causes the damage Appellant complains of, rather than a failure to maintain the system amounting to negligence.

Appellant's final argument is that the Trial Court erred in denying her claim for trespass due to insufficient evidence. Liability in trespass is created where one intentionally causes a thing to enter the land of another or causes a thing to remain on the land or fails to remove a thing from the land in violation of a duty. Restatement (Second) of Torts § 158.[10] *Rawlings v. Bucks County Water and Sewer Authority*, 702 A.2d 583 (Pa.Cmwlth.1997). In addition, liability for a continuing trespass is created by continued presence on the land of a thing "which the actor has tortiously placed there, whether or not the actor has the ability to remove it," or "which the actor's predecessor in legal interest therein has tortiously placed there, if the actor, having acquired his legal interest in the thing with knowledge of such tortious conduct or having thereafter learned of it, fails to remove the thing." Restatement (Second) of Torts § 161 (1965); *see also Miller v. Stroud Township*, 804 A.2d 749, 754 (Pa.Cmwlth.2002); *Rawlings*, 702 A.2d at 586; *Graybill v. Providence Township*, 140 Pa.Cmwlth. 505, 593 A.2d 1314, 1316–1318 (Pa.Cmwlth.1991); *Marlowe*, 441 A.2d at 500–501.

Appellant contends that she established a continuing trespass by demonstrating that the Borough owns and maintains a water drainage system that is located, in part, on her property, that the system was placed without consent, and that the water drainage system continually deposits a concentration of surface water onto her land. We agree.

The Borough produced a street profile and topographical map demonstrating that the Property is located below twenty-six acres in the flat slope of a "bowl" and that surface water naturally traverses the higher land in the direction of Third Street and the Property. (N.T. at 147, 211, 217, Borough Trial Exhibit 3, 4, R.R. at 302b, 366b, 372b.) The Borough engineer testified that the topography of Third Street has not changed in the last fifteen years and that the only change to Third Street was an inch and a half of pavement added in 2009. (N.T. at 245, R.R. at 400b.) The Borough engineer admitted that the Property and the properties directly across Third Street share the same elevation or flat slope. (N.T. at 236–239, R.R. at 391b–394b.) The Borough engineer further stated that "the pipe is conveying water from the northeast side of Third Street onto your property. That's what we testified to time and time again." (N.T. at 241, R.R. at 396b.) The Borough engineer admitted that if the pipes were removed, surface water would collect on the opposite side of Third Street, and with a big enough rain fall, run over top of Third Street and onto Appellant's Property. (N.T. at 234–241, R.R. at 389b–396b.) The Borough engineer stated that "these engineering drawings, Ms. Florimonte, indicate that the waters [sic] coming your way. There's no way to get around it. Until the good Lord reverses gravity the waters [sic] going to cross Third Street." (N.T. at 239;

Trial Court Op. at 12–13.) In denying her claim for trespass, the Trial Court stated:

> [Appellant] did not present any evidence, expert or otherwise, that addressed the natural flows of water before pipe installation or the natural flow of water after installation. There was no evidence of record that addressed the amount of water discharged, the nature and relative flow rate and/or velocity of same, both before and after installation. What was clear to this Court was that the removal of the pipe would not abate [Appellant's] problem and would likely create a safety hazard on Third Street, especially in the winter months.

(Trial Court Op. at 13–14.) Had Appellant based her trespass claim on a change in the quantity or quality of surface water deposited on the Property, Appellant would have had to produce evidence akin to that delineated by the Trial Court concerning the nature and relative flow rate and/or velocity or volume of water discharged on the Property. Here, Appellant's theory is based on the collection, concentration, and diversion of surface water onto the Property via an artificial channel. As a result, to prove trespass, Appellant needed to demonstrate the natural flow of water before and after installation of the pipes. We conclude that the Trial Court committed error by applying the incorrect law to the evidence at trial.

Here, Appellant was able to prove her claim in large part due to the evidence presented by the Borough. The testimony of the Borough's engineer, credited and cited by the Trial Court, (Trial Court Op. at 11–12.), and the supporting exhibits offered into evidence by the Borough, establish that surface water

traveled through the watershed to the area of Third Street where the Property is located, it did so in a diffuse condition, and that the water only flowed onto the Property in a concentrated fashion because it was collected by the culverts and swale and diverted through an artificial channel, the sluice pipes, onto the Property. *See* Marlowe, 441 A.2d at 501 ("We disagree with this rationale to the extent that it implies, as the township vigorously argues, that the [plaintiffs] have not suffered an actionable wrong because the water now flowing over their property is the same storm runoff, albeit in a concentrated state, which was present before the township acted.").

Furthermore, the evidence clearly shows that the Borough maintains this artificial diversion of surface water onto the Property for the benefit of Third Street. The Borough argues that a central point in this case is the fact that removal of the pipes would cause water to pond on Third Street and would create freezing and icy road conditions in winter, amounting to a public hazard. However, the fact that the Borough's diversion of surface water onto the Property benefits the road is not material in an analysis of whether or not the Borough is liable for trespass, nor does a benefit to the road or the public transform a recoverable loss into a loss without injury. Moreover, if the Borough wishes the public benefit to be central to an analysis of its use of the Property, the Borough can of course make use of its powers of eminent domain.

Finally, the evidence shows that the Borough's artificial diversion of surface water onto the Property continues without consent. (N.T. 255, R.R. at 410b.) Before the Trial Court, Appellant entered into evidence the deed to the Property, which reflected an absence of formal easements. (N.T. at 28, R.R. at 183b, Appellant's

Trial Exhibit 4.) The Borough's engineer testified that the two pipes discharging water onto the Property were part of the Borough's storm water management system. (N.T. at 91–92, 225–226, R.R. at 246b–247b, 380b–381b.) The Borough also abandoned its claim that a prescriptive easement had been acquired by adverse, open, notorious, continuous and uninterrupted use of Lot 17 for 21 years. (N.T. at 28, 250–251, R.R. at 183b, 405b–406b); *compare* Gehres v. Falls Township, 948 A.2d 249 (Pa.Cmwlth.2008) (municipality acquired a public, prescriptive easement to artificially collect, concentrate, and discharge storm water runoff onto plaintiff's private property by adverse, open, notorious, continuous and uninterrupted use of plaintiff's private property for storm water drainage for 21 years). Appellant and the Borough's engineer testified that she allowed the Borough onto the Property in 2001 to remove the surface water, but subsequently rescinded permission in March 2002 when the Borough failed to do so. (N.T. at 159, 191–193, R.R. at 314b, 346b–348b, Appellant's Trial Exhibit 59; Trial Court Op. at 13.) Clearly, the Borough does not have permission to divert surface water onto the property.

Appellant has demonstrated a continuing trespass. The Borough is liable to Appellant for trespass due to surface waters it concentrates in an artificial channel and discharges onto the Property as a part of its storm water management system. Appellant is entitled to equitable relief. *St. Andrews Evangelical Lutheran Church of Audubon v. Township of Lower Providence*, 414 Pa. 40, 198 A.2d 860 (1964).

Left is the issue of damages. Appellant's complaint was filed in equity prior to our Supreme Court's December 16, 2003 order merging actions in equity with civil actions effective July 1, 2004. *See*

Supreme Court Order, December 16, 2003, No. 402 Docket No. 5 (In re Consolidation of the Action in Equity with the Civil Action). In her complaint, Appellant requested both money damages and equitable relief compelling the Borough "to remove that portion of its drainage system which is located on [the Property] in such a manner that an excessive amount of water is no longer deposited on [the Property]," along with any other relief the court deemed necessary under the circumstances. (Complaint ¶¶ 16, 20, R.R. at 14a–15a.) The Borough did not challenge Appellant's right to claim equitable and legal relief in the same action. (N.T. at 38, R.R. at 193b.) Prior to trial, neither Appellant nor the Borough requested that the Trial Court bifurcate the presentation of evidence. (N.T. at 120, R.R. at 275b; *See also* Docket Entries 2003–EQ–2011.) Yet, at trial, Appellant abandoned her claim for money damages, specifically objected to the inclusion of damages, and stated that she would only continue with her equitable claim. (N .T. at 36–38, 120, R.R. at 191b–193b, 275b.) Accordingly, Appellant has affirmatively waived her right to recover money damages.

We affirm in part, reverse the Trial Court's denial of Appellant's claim for relief in trespass, and remand to the Trial Court to fashion an equitable remedy that will abate the trespass created on Appellant's Property by the unlawful concentration and discharge of surface water thereon through and from the two pipes, referred to in the record as the ninety-degree and forty-five degree pipes, laid under Third Street and terminating near or upon the Property.[11] We also note that nothing in this opinion should be construed to affect the right of the Borough to exercise its power of eminent domain.

ORDER

AND NOW, this 4th day of April, 2013, the order of the Lackawanna County Court of Common Pleas denying Carolyn J. Florimonte's claim for relief in the above-captioned matter is affirmed, in part, as Carolyn J. Florimonte has failed to offer sufficient evidence of negligence and reversed, in part, as Carolyn J. Florimonte has demonstrated a continuing trespass and is entitled to equitable relief.

The matter is remanded to the Lackawanna County Court of Common Pleas to fashion equitable relief consistent with the attached opinion that will abate the trespass created on Carolyn J. Florimonte's property situated at 219 Third Street in the Borough of Dalton, Lackawanna County, Pennsylvania, by the unlawful concentration and discharge of surface water thereon through and from the two pipes, referred to in the record as the ninety-degree and forty-five degree pipes, laid under Third Street and terminating near or upon the property.

Jurisdiction relinquished.

Footnotes

1Judgment was entered in favor of the Borough on April 25, 2012.

2Act of October 4, 1978, P.L. 864, *as amended,* 32 P.S. §§ 680.1–680.17.

3"Our appellate role in cases arising from non-jury trial verdicts is to determine whether competent evidence supports the trial court's findings or whether the court committed an error of law. The trial court's findings of fact must be given the same weight and effect on appeal as the verdict of a jury. Further, we consider the evidence in a light most favorable to the verdict

winner." *James Corp. v. North Allegheny School District*, 938 A.2d 474, 483 n. 6 (Pa.Cmwlth.2007) (internal citations omitted).

4Pennsylvania Rule of Civil Procedure No. 1017(a) states: "Except as provided by Rule 1041.1, the pleadings in an action are limited to (1) a complaint and an answer thereto, (2) a reply if the answer contains new matter, a counterclaim or a cross-claim, (3) a counter-reply if the reply to a counterclaim or cross-claim contains new matter, (4) a preliminary objection and a response thereto."

5Section 15 of the SWMA, with certain exceptions, allows private individuals aggrieved by violations of the act to bring suit for damages or equitable relief. 32 P.S. § 680.15.

6The Fifth Amendment to the United States Constitution provides, in relevant part, "[N]or shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the United States Constitution provides, in relevant part, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." *See also Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 241, 17 S.Ct. 581, 586, 41 L.Ed. 979 (1897). Article 1, Section 10 of the Pennsylvania Constitution provides, in relevant part, "[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured."

7At the time Appellant filed her civil action, Section 502 of Article V, the Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, *as amended*, 26 P.S. §§ 1–101–1–903, providing for the appointment of a board of viewers was still in effect. The Act has since been repealed and replaced with the Act of May 5, 2006, P.L. 112, § 1, 26 Pa.C.S. § 502(c).

8A *de facto* taking occurs when an entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of his or her property. *Capece v. City of Philadelphia*, 123 Pa.Cmwlth. 86, 552 A.2d 1147, 1148 (Pa.Cmwlth.1989). In order to sustain a taking as a result of excess surface water, the water must constitute an actual, permanent invasion of the land amounting to an appropriation. *Oxford v. Commonwealth Dep't. of Transp.*, 96 Pa.Cmwlth. 68, 506 A.2d 990, 994 (Pa.Cmwlth.1986). If the condition is abatable and preventable, it is not permanent, and amounts to an injury to the property rather than an appropriation. *Colombari v. Port Authority of Allegheny County*, 951 A.2d 409, 413 (Pa.Cmwlth.2008).

9In *Tom Clark Chevrolet, Inc. v. Department of Environmental Protection*, 816 A.2d 1246, 1252 n. 15 (Pa.Cmwlth.2003) (internal citations omitted) we stated that "surface water means water from rain, melting snow, springs, or seepage, or detached from subsiding floods, that lies or flows on the surface of the earth but does not form a part of a watercourse or lake," and that "watercourse means a stream of water of natural origin, flowing constantly or recurrently on the surface of the earth in a reasonably definite natural channel." We also examined the difference between "natural" and "artificial" in the context of watercourses:

By "natural" watercourses are meant those watercourses whose origin is the result of the forces of nature. (But see Comment g [relating to new channels]). By artificial waterways are meant all waterways that owe their origin to acts of man, such as canals, drainage and irrigation ditches, aqueducts, flumes and the like. Many "natural" watercourses have in some respects been altered by acts of man. The phrase "natural origin" also includes a natural watercourse that has in

some measure been so altered. Widening, narrowing, deepening or straightening the natural channel, or changing the course in part, are alterations that do not change its classification as a watercourse. Likewise the addition of water that, but for the act of man, would never have become part of the stream, does not destroy its character as a natural watercourse. These changes may, however, affect the legal relations of persons who perform or may be affected by those acts.

Id. (*quoting* Restatement (Second) of Torts § 841 comment h (1979)).

10The Restatement (Second) of Torts § 158 (1965) states: "One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove."

11Our opinion in this matter is consistent with a prior unpublished opinion addressing equitable relief for a continuing trespass by a local government's artificial diversion of surface water in a concentrated form onto the property of another, *Medallis v. Northeast Land Development, LLC, et al.*, (Pa.Cmwlth. No. 1479 C.D.2009, Filed July 23, 2010), where we affirmed on the basis of the trial court's opinion, *Grace Medallis and Robert A. Medallis v. Northeast Land Development, LLC, CJS DEV, Inc., Tripp CIDC, Inc., CDC-1, LLC and City of Scranton*, 8 Pa. D. & C. 5th 411 (Dkt. No.2003 EQ 60063, Filed December 4, 2008 and June 26, 2009) (C.P.Lackawanna). As we have here, the trial court stated in its opinion in *Medallis* the principle that a landowner who diverts surface water in violation of the applicable common law rules is liable,

even if the landowner is not guilty of negligence. *Id.* at 416. Also relevant to the matter before us, the trial court in *Medallis* addressed the inapplicability of the governmental immunity provisions of the Judicial Code, 42 Pa.C.S. §§ 8541–842, which extend to liability for *damages*, to certain types of *injunctive* relief. *Medallis*, 8 Pa. D. & C. 5th at 425; *see also Rawlings*, 702 A.2d at 587; *E–Z Parks Inc. v. Larson*, 91 Pa.Cmwlth. 600, 498 A.2d 1364, 1370 (Pa.Cmwlth.1985), *affirmed*, 509 Pa. 496, 503 A.2d 931 (1986) ("Since governmental immunity under Section 8541 of the Judicial Code extends only to liability for *damages*, Petitioner must be permitted to pursue his claim against the Authority for injunctive relief.")

Excerpt of the Preliminary Objections Hearing of September 26, 2016, p. 22.

that has been done is -- it's frivolous, and I don't know how to stress that enough, Judge. And, you know, ray frustrations with this matter having had to do now eight or nine court appearances over the exact same thing, is getting to the point where there is no fairness. If the Court doesn't stop Ms. Florimonte and doesn't require her to pay the $4,000.00 that -- and, Judge, that is a small amount of the overall number of hours that I have had to spend and selective insurances had to pay to represent the Borough in this now the eleventh lawsuit. She will not stop. When you grant the preliminary objections, Judge, that -- she will not stop. She will file another suit. And I believe, and I don't think I'm speaking off the record here, or out of school, despite how painstaking Judge Mazzoni was, and how gracious he was to her at trial, I believe he ended up on the wrong side of the stick with a complaint being made against him to the Judicial Board. So she may come across very sweet and very pleasant today, but she will not stop unless

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February 12, 2009

Carolyn Florimonte
219 Third Street
Dalton, PA 18414

RE: **Florimonte v. Borough of Dalton**

Dear Carolyn:

This correspondence will confirm this office's appearance and participation in a scheduled Settlement Conference in front of Judge Mazzoni. Mr. Seamens presented a new plan in an attempt to work out a resolution of your surface water problems. After some discussions, the Borough agreed to modify the amended plan to reflect a right angle discharge from Third Street to the stone wall and extend the piping an additional twenty feet to a dissipation swale. The purpose of the rock lined swale was to slow down the water before it enters Mr. Fisher's property. Unfortunately, the parties were unable to agree on modifications to the plan.

As I advised you, Judge Mazzoni has begun to research the issues raised in my Request for Preliminary Injunction. In particular, he has raised the issue of whether or not we can even pursue the damage claim, based on the fact that this was an existing water drainage system that existed when you purchased the property. I had strongly recommended the

modifications that I suggested, and Dennis Peters approved, to the amended plan. After discussing my concerns, you advised me that you still would not agree to ending the pipe prior to your property line.

Please be advised that Judge Mazzoni has scheduled a Hearing for Friday, April 3, 2009 beginning at 1:00 p.m. in the Lackawanna County Courthouse, second floor. Please make arrangements to meet me at 12:30 p.m. on that date. Should we run over, he has reserved Monday, April 6, 2009 at 9:00 a.m. for a continuation of the Hearing.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Robert J, Murphy, Esquire

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January 29, 2009

Carolyn Florimonte
219 Third Street
Dalton, PA 18414

RE: **Florimonte v. Borough of Dalton**

Dear Carolyn:

This correspondence will confirm this office's appearance and participation in a rescheduled Hearing in regard to the above water damage matter. At that time, discussions were held in an attempt to resolve the distinctions between Dennis Peters' plan to alleviate water damage on your property, and that of John Seamans, from the Borough of Dalton. One of your objections was that one of John Seamans' plan extended well into your property prior to gradually curving over towards the stone wall, which all parties agree is to where the water should be directed to. Dennis Peters plan provides a right angle along the front of your property line which may not be suitable to convey water.

It was agreed that Mr. Seamans would devise a plan in which the water conveyance is not done by open ditch, but is contained within an fifteen to eighteen inch pipe. The angle of the pipe, from Third Street, would be closer to the front of your property line, but not necessarily on a right angle. The pipe would continue

along the stone wall and connect to the discharge pipe that accepts water from above your property. The pipe would continue to approximately fifty feet from the rear of your property line where it would discharge into, a rock lined swale. The purpose of the rock line swale is to slow the velocity of the water before it enter your neighbors property. The water would then discharge into your neighbors existing swale.

Please be advised that a continued Hearing has been scheduled for February 11, 2009, beginning at 8:30 a.m. Please make arrangements to meet me on the second floor of the Lackawanna County Courthouse at that time. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Robert J. Murphy, Esquire

Trial Transcript of August 10, 2011

I don't think there's any dispute as to that.

MS. FLORMINOTE: I'm indicating to you why I'm not bringing forth damages today in this suit because they could not be addressed at that time when my original suit was filed in March of 2003.

Under pleadings. Rule 1020. I just want to cover this so that there's no question –

THE COURT: So if you want relief what relief are you going to be asking for? The removal of the drainage ditch and the pipe, is that what you're requesting?

MS. FLORIMONTE: Yes, and I have included in there for trespass I asked for some sort of compensation for trespassing of those years.

Under rule 1020. Well, actually rule 1001 – no, let's go back to 1020. Sorry about that. Okay. Down under official note. Mandatory joinder is limited to related causes of action heretofore asserted in assumpsit and trespass. There is no mandatory joinder of related causes of

Exact text: p. 4

Storm Water Management System
As it pertains to Third Street, Dalton, Pa, the Borough of Dalton has never implemented a Storm Water Management System that is legal. In diverting water onto lot # 17, in the 1980's the Defendant disregarded the 1978 Environmental Protection Act, converted a wetland and illegally seized lot # 17, 219 Third Street, Dalton, PA, without the owners' consent or knowledge.

This illegal seizure/Taking makes any and all claims of an easement invalid.
Substantial permit fees were paid, when lots were sold/homes built, to the Borough of Dalton, to provide for proper establishment of the community on Third street, Dalton, PA, which would include provisions for adequate storm water containment and protection of residents' properties. That would have been the time to institute a Storm water Management System. The Borough of Dalton has failed in this responsibility.

No less than five other properties near or surrounding Plaintiff are currently affected by this illegal method of handling storm water and although Defendant, in Section 4 of Response to Motion of May 21, 2009, would have the Court believe that Plaintiff is acting irresponsibly and endangering others' properties, in actuality these other properties are already continually flooded. Plaintiff has also investigated the cost of the "elaborate and expensive remedy" alluded to by the Defendant and has learned the true cost is closer to one half of what the Defendant has stated.

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In Section 6 of the Defendant's Response to the Motion of May 21, 2009, Defendant claims that various contractors can correct the flooding for Plaintiff. This, however, makes

Plaintiff vulnerable to lawsuits by others. And not doubt there would be necessary blasting, because of the vast amount of bedrock underground, again risking lawsuits for Plaintiff.

U.S. Army Corp of Engineers
Under the provisions of the Environmental Protection Act of 1978, before any wetland/swampy area is ever touched or altered, the United States Army Corp of Engineers must be contacted. The U.S. Army Corp of engineers then performs a study to determine if the area is indeed a wetland or not. Then and only then can plans proceed.

At the April 3, 2009, Injunction Hearing, Plaintiff's witness, Robert Fisher, testified that the area across from 219 Third Street was a swamp and Defendant's witness, Stanley Hedrick, testified that the location where the home at 224 Third Street, Dalton, PA, now stands was a wet, swampy area and that the conversion and redirection of water onto lot # 17, 219 Third Street, Dalton, PA, occurred in the 1980's.

Lucretia Tallman, who currently owns, 224 Third Street, Dalton, PA, can verify that prior to purchasing her home in the late 1980's, she was told that the area had been a swamp.

If, as testimony indicates, the area, now known as 224 Third Street, Dalton, PA, was a true wetland, the proposed alteration must have included an alternate site, provided by the altering party, of significantly larger size to replace the actual wetland.

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The U.S. Army Corp of Engineers would never approve the Taking of a property owners land for that purpose, without a firm, signed agreement, which would shield the Environmental Protection Agency from the possibility of loss of the alternate wetland, which replaced the original

wetland. The Defendant did not contact the EPA and no signed agreement exists regarding the use, by Defendant, of lot # 17, 219 Third Street, Dalton, PA, for any purpose at all. The use by Defendant of Plaintiffs property is illegal.

Plaintiff's Motion of May 21, 2009, thoroughly examined the various Easement claims, Adverse Possession, Grandfather's, prescriptive and implied presented by Defendant at the April 3, 2009, Injunction Hearing, as well as Plaintiff's Property Rights guaranteed by the Fifth Amendment of the Constitution of the United States and in every instance, refuted the Defendant's claim of an easement.

Defendant's Borough Manager knew that Defendant did not have an easement for lot #17, when in 2001, he requested that Plaintiff sign an easement, which Borough's attorney would prepare. And Defendant's own witness, testified, at the May 1, 2009 Injunction Hearing that the Defendant in exchange for $1.00, wanted the Hedricks to sign a deed conveying the entire of lot #17 to the Defendant. The Hedricks refused.