IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Allan J. Nowicki, Appellant v. Tinicum Township, Bucks County, Pa., Nicholas Forte, Tinicum Township Supervisor, Nicholas Forte, Linda M. McNeill, Tinicum Township Manager, Linda M. McNeill, Stephen B. Harris, Esquire, Harris and Harris, Township Solicitor Tom Fountain, P.E., Keystone Municipal Engineering, Inc., Township Engineer Shawn McGlynn, Keystone, Municipal Services, LLC, Boyce Budd, Gary V. Pearson, Delaware Valley Landscape Stone, Inc., Joseph Busik, J. Kevan Busik, Keith Keeping, Bunnie Keeping v. Eastburn and Gray, P.C., Michael J. Savona, Michael E. Peters, Esquire, Michael T. Pidgeon, Esquire, James J. Sabath, James J. Sabath, Chief of Police	:	No. 1749 C.D. 2019 Submitted: September 11, 2020

BEFORE:

HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ANNE E. COVEY, Judge
HONORABLE J. ANDREW CROMPTON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COVEY FILED: December 8, 2020

Allan J. Nowicki (Nowicki) appeals pro se from the Bucks County Common Pleas Court's (trial court) October 22, 2019 order sustaining the preliminary objections (Preliminary Objections) filed by Keystone Municipal Engineering, Inc. (Keystone) and Tom Fountain, P.E. (Fountain); Tinicum Township, Bucks County, Pa. (Township), Township Supervisor Nicholas Forte (Supervisor), Township Manager Linda M. McNeil (Manager), Boyce Budd (Budd), Crary V. Pearson (Pearson) and Police Chief James J. Sabath (Chief Sabath); Township Solicitor Stephen B. Harris, Esquire, Harris and Harris (collectively, Solicitor); Delaware Valley Landscape Stone, Inc. (Landscape, Inc.); Joseph Busik and J. Kevan Busik (collectively, Busiks); and Keith Keeping and Burnie Keeping (collectively, Keepings),[1] to Nowicki's eighth amended complaint (Final Amended Complaint) against the Township, Township Supervisor, Township Manager, Township Solicitor, Fountain, Keystone, Township

[1] According to the docket entries, preliminary objections were also filed by "nominal defendants." March 21, 2019 Docket Entry. Because the trial court also sustained those preliminary objections, they are included among the Preliminary Objections herein under review.

Engineer Shawn McGlynn, Keystone Municipal Services, LLC, Budd, Pearson, Landscape, Inc., the Busiks, the Keepings, Eastbum and Gray, P.C., Michael J. Savona, Michael E. Peters, Esquire, Michael T. Pidgeon, Esquire and Chief Sabath (collectively, Defendants), and dismissing the Final Amended Complaint. The sole issue before this Court is whether the trial court erred by sustaining the Preliminary Objections. After review, we quash the appeal.

Background

In the spring of 2009, Nowicki started a mulch operation on a 3-acre parcel of land (3-acre parcel) that he owned in the Township. On June 26, 2009, a Township Zoning Officer issued Nowicki an enforcement notice, informing him that the mulch operation violated the Township's Zoning Ordinance. Thereafter, Nowicki suspended the mulch operation on the 3-acre parcel. In the spring of 2011, Nowicki resumed the mulch operation on the 3-acre parcel. On October 13, 2011, the Township's Zoning Officer issued Nowicki a second enforcement notice (Notice). The Notice stated that Nowicki was in violation of the Township's Zoning Ordinance for operating a non-permitted use on the 3-acre parcel in the Extraction Zoning District. Nowicki appealed from the Notice to the Township Zoning Hearing Board (Board), which upheld the Notice on January 26, 2012, concluding that Nowicki's mulch operation was not permitted on the 3-acre parcel.

Nowicki appealed from the Board's decision to the Bucks County Common Pleas Court (Common Pleas).[2] On October 22, 2012, Common Pleas affirmed the Board's decision. On November 15, 2012, Nowicki appealed from Common Pleas' October 22, 2012 order to this Court. – On January 14, 2013, Common Pleas preliminarily enjoined the manufacturing and selling of mulch and firewood on Nowicki's 3-acre parcel. On September 9, 2014, this Court affirmed Common Pleas' October 22, 2012 order. *See Tinicum Twp. v. Nowicki*, 99 A.3d 586 (Pa. Cmwlth. 2014).

Thereafter, Nowicki moved his mulch operation to a 56-acre parcel of land (56-acre parcel) purchased through an entity that Nowicki's wife owned. The 56-acre parcel was located in the Township and surrounded the 3-acre parcel. In August 2013, the Township learned that Nowicki had resumed his mulch operation on the 56-acre parcel. Consequently, on August 20, 2013, the Township brought another enforcement action against Nowicki for violating the Township's Zoning Ordinance by conducting the mulch operation on the 56-acre parcel. Nowicki sought a zoning permit for the mulch operation on the 56-acre parcel. The Board ultimately denied Nowicki's permit request because of environmental concerns, including Nowicki placing wood material in the Delaware River's floodway.

---

[2] The Opinion references the Bucks County Common Pleas Court as Common Pleas at this juncture, to differentiate it from the trial court that ruled on the Preliminary Objections.

The Township filed another petition for a preliminary injunction, seeking therein: to enjoin the processing, manufacturing and sale of mulch on the 3-acre parcel and the 56-acre parcel; to order Nowicki to remove all of the materials placed in the Delaware River's floodway; and to find Nowicki in contempt of Common Pleas' January 14, 2013 injunction order. By October 15, 2014 order, Common Pleas: enjoined Nowicki from conducting any further mulch operations on the 3-acre parcel and the 56-acre parcel, including bringing any further raw materials onto the parcels, processing any materials into mulch or firewood, and selling any mulch or firewood from the parcels; and directed Nowicki to remove all the wood materials whether raw materials, decomposing materials," or finished product – from the 3-acre and the 56-acre parcels within 30 days from the date of the order. On March 31, 2015, Common Pleas entered an order finding Nowicki in contempt of Common Pleas' January 14, 2013 order and imposing $14,685.70 in sanctions.

Nowicki appealed from Common pleas' October 15, 2014 and March 31, 2015 orders to this Court. On March 31, 2016, this Court affirmed Common Pleas' October 15, 2014 and March 31, 2015 orders. *See Tinicum Twp. v Nowicki* (Pa. Cmwlth. No. 2114 C.D. 2014, filed March 31, 2016).

Facts

On August 29, 2017, Nowicki filed a pro-se complaint against Defendants. Since that time, Defendants have filed-numerous preliminary objections resulting in Nowicki filing seven amended complaints. On January 21, 2019, Nowicki filed the Final Amended Complaint, alleging therein: abuse of process, wrongful use of civil proceedings, civil conspiracy, racketeer influenced and corrupt organization, civil rights violations, breach of contract, and violations of the implied duty of good faith and fair dealing. Defendants filed the Preliminary Objections, alleging that Nowicki failed to plead the factual basis to support his claims, and requested oral argument, which the trial court held on August 16, 2019. After hearing argument, during which the parties made admissions and concessions, the trial court entered an order (Order) directing Nowicki to file a concluding memorandum of law that focused on two remaining issues: (1) whether the allegations in the Final Amended Complaint state a cause of action for a civil rights violation; and (2) whether specific language in the Final Amended Complaint alleges sufficient facts to support a claim that there was a breach of an oral contract. The Order also directed Defendants to file their responses seven days thereafter, focusing on whether Nowicki pled sufficient facts.

On October 22, 2019, after consideration of Defendants' Preliminary Objections, Nowicki's response thereto, oral argument, and subsequent concluding briefs from the parties, the trial court sustained

Defendants' Preliminary Objections, striking all claims and dismissing Nowicki's Final Amended Complaint in its entirety.

On October 31, 2019, Nowicki filled a Motion/Petition for Reconsideration, asserting therein that the trial court's dismissal of his Final Amended Complaint at the preliminary objection stage of the litigation was a manifest injustice. On November 8, 2019, the trial court denied Nowicki's Motion/Petition for Reconsideration. On November 20, 2019, Nowicki appealed to this Court.[3] On December 10, 2019, Nowicki filed his Concise Statement of Errors Complained of on Appeal in accordance with Pennsylvania Rule of Appellate Procedure (Rule) 1925(6). On March 16, 2020, the trial court' issued its opinion.

Discussion

Before addressing the merits of Nowicki's appeal, this Court must determine whether, by failing to adhere to Rules 2118 and 2119 in the submission of his brief to this Court, Nowicki waived his claim that the trial court erred by sustaining the Defendants' Preliminary Objections.

---

[3] "'When reviewing a trial court's order sustaining preliminary objections in the nature of a demurrer, our standard of review is *de novo* and our scope of review is plenary.' *Young v. Estate of Young*, 138 A.3d 78, 84 (Pa. Cmwlth. 2016)." *Renner v. Court of Common Pleas of Lehigh Cray.*, 195 A.3d 1070, 1073 n.7 (Pa. Cmwlth. 2018), *aff'd*, 234 A.3d 411 (Pa. 2020).

Rule 2118 provides: "The summary of argument shall be a concise, but accurate, summary of the arguments presented in support of the issues in the statement of questions involved." Pa.R.A.P. 2118. Rule 2119 requires, in relevant part:

> **(a) General rule.** The argument shall be divided into as many parts as there are questions to be argued; and *shall have at the head of each part* – in distinctive type or in type distinctively displayed – *the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent.*
>
> **(b) Citations of authorities.** Citations of authorities in briefs shall be in accordance with [Rule] 126 governing citations of authorities.
>
> **(c) Reference to record.** *If reference is made to the pleadings*, evidence, charge, opinion or order, or any other – matter appearing in the record, *the argument must set forth*, in immediate connection therewith, or in a footnote thereto, *a reference to the place in the record where the matter referred to appears* (*see* Pa.R.A.P. 2132).
>
> **(d) Synopsis of evidence.** *When* the finding of, or *the refusal to find, a fact is argued, the argument must contain* a synopsis of all the evidence on the point, with *a reference to the place in the record where the evidence may be found.*

Pa.R.A.P. 2119 (italic and underline emphasis added).

Here, the entirety of Nowicki's Summary of Argument is as follows: "The trial [c]ourt erred when it issued its[] [o]rder on October 22, 2019, which sustained the Preliminary Objections of all of the Defendants. The result of the trial [c]ourt's [o]rder resulted in a manifest injustice to the Plaintiff [Nowicki]." Nowicki Br. at 6 (internal record citation omitted). In the Argument section of his brief, consisting of 21 sentences, *see* Nowicki Br. at 7-9, in which Nowicki recites a partial procedural history of the case, beginning with the trial court sustaining preliminary objections on December 27, 2018, he then "directs" the Court to read 2 letters without any record citations thereto, Nowicki Br. at 7, and states:

> [Nowicki's] Final Amended Complaint contained 1,116 paragraphs. ([T]he Seventh Amended Complaint contained 384 paragraphs). [Nowicki] pled sufficient facts together with numerous exhibits and-incorporated prior cases into the record as if fully set forth herein to prove his case and [sic] should not have been thrown out of court at the [p]reliminary [(Abjection stage of the proceedings.

Nowicki Br. at 7. Nowicki concludes his Argument section: "[Nowicki] hereby incorporates all of his pleadings, exhibits, references and inferences in his Final Amended Complaint as if fully set forth herein." Nowicki Br. at 9.

Finally, in the brief's Conclusion section, Nowicki declares:

> The [trial] court erred when it sustained the Preliminary Objections of all [] Defendants. The Preliminary Objections of all Defendants should have been overruled because [Nowicki's] Final Amended Complaint alleged facts together with exhibits sufficient to support his claims and contained inferences that where [sic] reasonably deducible [therefrom].
>
> For the reasons set forth above[,] the [trial] court's ruling should be reversed.

Nowicki Br. at 10.

> '[T]his Court has held that any party to an appeal before [it] who fails to strictly comply with all provisions of the Pennsylvania Rules of Appellate Procedure . . . is in peril of having its appeal dismissed; nevertheless, the Court will consider the defect and whether meaningful review has been precluded.' *Union Twp. v. Ethan Michael, Inc.*, 979 A.2d 431, 436 (Pa. Cmwlth. 2009). Thus, **this Court may waive even 'egregious violations' of the appellate rules when the errors 'do not substantially interfere with our review of the appellate record.'** *Seltzer v. Dep't of Educ.*, 782 A.2d 48, 53 (Pa. Cmwlth. 2001). This Court has deemed meaningful review of the merits possible when it [can) discern a pro se appellant's argument, or where the interests of justice require it. *See Woods v. Office of Open Records*, 998 A.2d 665 (Pa. Cmwlth. 2010) . . . Moreover, we can limit our review to those cognizable arguments we can glean despite

> the briefs noncompliance. *See Woods; Commonwealth v. Adams*, 882 A.2d 496 (Pa. Super. 2005).

Richardson v. Pa. Ins. Delft, 54 A.3d 420, 426 (Pa. Cmwlth. 2012) (emphasis added).

Here, Nowicki's "'egregious violations' of the appellate rules . . . 'substantially interfere with our review of the appellate record.'" *Richardson*, 54 A.3d at 426 (quoting *Seltzer*, 782 A.2d at 53).

The Pennsylvania Supreme Court has explained:

> Our rules of appellate procedure are explicit that the argument contained within a brief must contain 'such discussion and citation of authorities as are deemed pertinent.' Pa.R.A.P. 2119(a). **'[W]here an appellate brief fails to provide any discussion of a claim with citation to relevant authority or fails to develop the issue in any other meaningful fashion capable of review, that claim is waived.** It is not the obligation of [an appellate court . . .] to formulate [a]ppellant's arguments for him.' *Commonwealth v. Johnson*, . . . 985 A.2d 915, 924 ([Pa.] 2009) (internal citations omitted). Moreover, because the burden rests with the appealing party to develop the argument sufficiently, an appellee's failure to advocate for waiver is of no moment. *See Connor v. Grozer Keystone Health Sys.*, 832 A.2d 1112, 1118 (Pa. Super. 2003).

Wirth v. Commonwealth, 95 A.3d 822, 837 (Pa. 2014) (emphasis added).

Here, Nowicki's brief "fails to provide any discussion of a claim with citation to relevant authority [and] fails to develop the issue in any other meaningful fashion capable of review." *Wirth*, 95 A.3d at 837. Due to the defects in Nowicki's brief that "substantially interfere with our review of the appellate record," *Richardson*. 54 A.3d at 426, Nowicki has waived his claim that the trial court erred by sustaining Defendants' Preliminary Objections.[4] Accordingly, this Court quashes Nowicki's appeal. *See* Rule 2101 (If the defects in the appellant's brief are substantial, the appeal may be quashed.)

For all of the above reasons, Nowicki's appeal is quashed.

---

[4] In addition, Nowicki failed to comply with Rule 2117(a)(1), which mandates that the Statement of the Case shall contain "[a] statement of the form of action, followed by a brief procedural history of the case." Pa.R.A.P. 2117(0(1). Nowicki's Form of Action and Procedural History stated in its entirety:

> On March 12, 2015[,] Plaintiff, Allan .1. Nowicki commenced this law-suit by filing a Writ of Summons in the Bucks County Court of-Common Pleas [trial court]. Plaintiff ultimately filed his Complaint and Amended Complaint(s). The docket entries of the Bucks County Court of Common Pleas in case number 2015-01776 correctly describes the history of the case.

Nowicki Br. at 5.

IN THE COMMONWEALTH
COURT OF PENNSYLVANIA

Allan J. Nowicki,	:	
Appellant	:	
v.	:	
Tinicum Township, Bucks County, Pa., Nicholas Forte, Tinicum Township Supervisor, Nicholas Forte, Linda M. McNeill, Tinicum Township Manager, Linda M. McNeill, Stephen B. Harris, Esquire, Harris and Harris, Township Solicitor Tom Fountain, P.E., Keystone Municipal Engineering, Inc., Township Engineer Shawn McGlynn, Keystone, Municipal Services, LLC, Boyce Budd, Gary V. Pearson, Delaware Valley Landscape Stone, Inc., Joseph Busik, J. Kevan Busik, Keith Keeping, Bunnie Keeping	:	
v.	:	
Eastburn and Gray, P.C., Michael J. Savona, Michael E. Peters, Esquire, Michael T. Pidgeon, Esquire, James J. Sabath, James J. Sabath, Chief of Police	:	No. 1749 C.D. 2019

ORDER

AND NOW, this 8th day of December, 2020, Allan J. Nowicki's appeal from the Bucks County Common Pleas Court's October 22, 2019 order is QUASHED.

/s/ Anne E. Covey
ANNE E. COVEY, Judge

IN THE COMMONWEALTH
COURT OF PENNSYLVANIA

Allan J. Nowicki,	:	
Appellant	:	
v.	:	No. 1749 C.D. 2019
Tinicum Township, Bucks County, Pa., Nicholas Forte, Tinicum Township Supervisor, Nicholas Forte, Linda M. McNeill, Tinicum Township Manager, Linda M. McNeill, Stephen B. Harris, Esquire, Harris and Harris, Township Solicitor Tom Fountain, P.E., Keystone Municipal Engineering, Inc., Township Engineer Shawn McGlynn, Keystone, Municipal Services, LLC, Boyce Budd, Gary V. Pearson, Delaware Valley Landscape Stone, Inc., Joseph Busik, J. Kevan Busik, Keith Keeping, Bunnie Keeping	:	
v.	:	
Eastburn and Gray, P.C., Michael J. Savona, Michael E. Peters, Esquire, Michael T. Pidgeon, Esquire, James J. Sabath, James J. Sabath, Chief of Police	:	

ORDER

NOW, February 11, 2021, having considered Appellant's application for reargument and Appellees' answers in response thereto; the application is denied.

/s/ P. Kevin Brobson
P. KEVIN BROBSON,
President Judge

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

ALLAN J. NOWICKI *Plaintiff*, vs. TINICUM TOWNSHIP, et al. *Defendants.*	:	No. 2015-01776

OPINION

I. INTRODUCTION

Appellant/Plaintiff Allan J. Nowicki (herein "Appellant") filed this lawsuit acting pro se in which he sues numerous individuals and entities asserting claims based on his belief that he was wrongly treated in prior litigation. The prior litigation was appealed but did not end in his favor. This subsequent litigation is Appellant's attempt to obtain damages from the people who successfully litigated against him in prior actions. Appellant is now appealing this Court's Order of October 22, 2019 sustaining all of the Defendants' Preliminary Objections to Plaintiff Nowicki's Eighth Amended Complaint.

For the reasons stated herein, the Court did not err in its Order and Appellant's appeal should be denied.

II. FACTUAL AND PROCEDURAL HISTORY

The instant appeal arises out of the dismissal of Appellant Nowicki's Eighth and Final Amended Complaint, filed on January 21, 2019, which bad originally asserted eleven (11) separate Counts.[1] Each of the Amended Complaints incorporated the record of the prior litigation, and therefore, many facts were established and subject to this Court's review for purposes of the Preliminary Objections.[2] Defendants

---

[1] *See* Plaintiff's Eighth Amended Complaint:

- Count I-II: Abuse of Process
- Count III: Wrongful Use of Civil Proceedings (Dragonetti)
- Count IV-A&B; Civil Conspiracy
- Count V: RICO (dismissed);
- Count VI-X: Civil Rights
- Count XI: Breach of Contract and the Implied Duty of Good Faith and Fair Dealing

[2] *See* Plaintiff's Eighth Amended Complaint at ¶ 166, 167, 174, 175, 177, 187 (Plaintiff incorporates the entire record of *Tinicum Township v. Allan J. Nowicki, et al.* as if fully set forth herein, which is a reference to and incorporation of the following eases: (a) *Tinicum Township v. Allan J. Nowicki and River Road Quarry, LLC*, No. 2011-07848; (b) *River Road Quarry, LLC & Pennswood Hauling, LLC v Tinicum Township Zoning Hearing Board*, No. 2012-01750, in the Court of Common Pleas of Bucks County, and (c) *Tinicum Township v. Allan .1 Nowicki, River Rood Quarry, LLC, Pennswood Hauling, LLC and RRQ. LLC*, No 2013-07685 in the Court of Common Pleas of Bucks County). *See also* 127 ("Plaintiff hereby incorporates by reference all of the files, legal pleadings, depositions, applications, transcripts, plans, surveys, judicial decisions and any other written documents of all of the land owners that have had their property rights stolen by Tinicum Township as if fully set forth herein"); ¶ 181 ("Plaintiff incorporates the entire record of Delaware Valley Landscape

Stephen B. Harris, Esq. and Harris and Harris, Township Solicitor, also incorporated the record of the prior litigation, in accordance with Pa. R.C.P. § 1019(g).[3] Because the record of the other litigation has been incorporated, the facts available for the Court's review went beyond the mere allegations pled within the four corners of the Complaint.

During oral arguments and in their memorandums of law, the parties acknowledged and agreed as to what happened in the prior litigation, which has been incorporated by reference into this case by Appellant's and Defendants pleadings. The following facts are taken from both parties' averments of facts, as well as the incorporated records of the prior litigation.

A. Factual History

In the spring of 2009, Appellant started a mulch operation on property he owned, located in Tinicum Township, Bucks County, Pennsylvania. Tinicum

---

Stone, Inc. vs. Allan I. Nowicki and RRQ, LLC as if fully set forth herein"); and ¶ 184 (citing Pa, R.C.P. k 1019(g)).

[3] *See* Defendants Stephen E. Harris, Esq. and Harris and Harris, Township Solicitor's Preliminary Objections, at p. 2, ¶ 1 (" . . . Objecting Defendants hereby incorporate all matters of record in the lawsuits captioned as *Tinicum Township v. Alan Nowicki*, filed in Bucks County Court of Common Pleas, Case #: 2011-07848 ("2011 action"); *River Road Quarry, LLC v. Tinicum Township Hearing Board*, filed in Bucks County Court of Common Pleas, Case #: 2012-1750 ("2012 action'); and *Tinicum Township v. Alan Nowicki*, filed in Bucks County Court of Common Pleas, Case #: 2013-07685 ("2013 action") . . . ").

Township was alerted to Appellant's mulch operation and on June 26, 2009, a Township Zoning Officer issued an enforcement notice to Appellant, informing him that the mulch operation violated the Township's Zoning Ordinance. Instead of appealing the notice, Appellant chose to suspend the mulch operation on the 3-acre parcel. Thereafter, in the spring of 2011, the Township was alerted again that Appellant had resumed the mulch operation on the 3-acre parcel. On October 13, 2011, the Township's Zoning Officer issued Plaintiff a second enforcement notice. The notice stated that Appellant was in violation of Sections 601.2 and 1302 of the Township's Zoning Ordinance for operating non-permitted uses on the 3-acre pared in the E (Extraction) Zoning District. Appellant appealed this enforcement notice to the Tinicum Township Zoning Hearing Board, which upheld the enforcement notice on January 26, 2012, concluding that Appellant's mulch operation was not permitted on the 3-acre parcel.

Appellant appealed the Board's decision to the Bucks County Court of Common Pleas. Tinicum Township also filed for a preliminary injunction in the Bucks County Court of Common Pleas to enjoin Appellants mulch operation. The Honorable Susan Devlin Scott held several hearings on Appellant's appeal. Appellant was afforded the opportunity to present several witnesses and evidence at these hearings. On October 22, 2012, Judge Scott affirmed the Tinicum Township Zoning Hearing Board's decision by way of an Order and Pa. R.A.P. § 1925(a)

Opinion.[4] On November 15, 2012, Appellant appealed Judge Scotts Order and supporting Opinion to the Pennsylvania Commonwealth Court. On September 9, 2014, the Commonwealth Court affirmed Judge Scotts October 22, 2012 Order and Opinion.[5]

While Appellant's appeal to the Commonwealth Court regarding Judge Scott's October 22, 2012 Order and Opinion was pending, there was still ongoing litigation between the parties. On January 14, 2013, Judge Scott entered an Order preliminarily enjoining the manufacturing and selling of mulch and firewood on Appellants 3-acre parcel.[6] Following the January 14, 2013 Order, Appellant moved his mulch operation to a different parcel of land (the "56-acre parcel"), recently purchased through RRQ, LLC, which is an entity Appellant's wife owned. The 56-acre parcel surrounded the 3-acre parcel and was also located in Tinicum Township

In August 2013, the Township learned that Appellant had resumed his mulch operation on the

---

[4] *See* The Honorable Judge Susan Devlin Scott's October 22, 2012 § 1925(a) Opinion in Case #: 2011-07848, incorporated by reference in Appellant Nowicki's Eighth Amended Complaint.

[5] *See* September 9, 2014 Order and Memorandum Opinion by the Honorable Judge Cohn Jubelirer of the Commonwealth Court regarding Ducks County Court of Common Pleas Cases #: 2011-07848 and 2012-01750, incorporated by reference in Appellant Nowicki's Eighth Amended Complaint.

[6] *See* January 14, 2013 Civil Court Sheet and Judge Scots Order granting Preliminary Injunction. and Plaintiff's Petition for Contempt in Case it: 2011-07848, incorporated by reference in Appellant Nowicki's Eighth Amended Complaint.

56-acre parcel. Consequently, on August 20, 2013, the Township brought another enforcement action against Appellant for conducting the mulch operation on the 56-acre parcel in violation of the Township's Zoning Ordinance. The Board ultimately denied Appellants permit request because of environmental concerns about the location of the mulch operation on the 56-acre parcel, including Appellant placing wood material in the floodway of the Delaware River.

The Township then filed another preliminary injunction to enjoin Appellant from manufacturing and selling mulch on the 56-acre parcel. On October 15, 2014, Judge Scott entered an Order enjoining Appellant from conducting any further mulch operations on the 3-acre parcel and the 56-acre parcel, including bringing any further raw materials onto the parcels, processing any materials into mulch or firewood and selling any mulch of firewood from the parcels and further ordering Appellant to remove all the wood materials whether raw materials, decomposing materials, or finished product – from the 3-acre and the 56-acre parcels within thirty (30) days from the date of the Order.[7]

On March 31, 2015, Judge Scott entered an Order finding Appellant in contempt of the Court's Order of January 14, 2013, and imposed sanctions in the total

---

[7] *See* Judge Scotts October 15, 2014 Order in Case #: 2013-07685, incorporated by reference in Appellant Nowicki's Eighth Amended Complaint.

amount of $14,685.70.[8] Appellant then appealed the October 15, 2014. Order and the March 31, 2015 Order to the Commonwealth Court. On March 31, 2016, the Commonwealth Court affirmed the October 15, 2014 and the March 31, 2015 Orders, thus concluding the underlying actions with final rulings, completely contrary to much of what Appellant has asserted in this subsequent action.[9]

B. Procedural History

Appellant Nowicki initiated this case by filing a Writ of Summons on March 12, 2015, and later filed a Complaint on August 29, 2017, against a number of Defendants. Ultimately, this case was assigned to the undersigned at which point the litigants had been on a see-saw wherein Appellant Nowicki would file a complaint, the Defendants would file Preliminary Objections, then the Appellant would file an amended complaint to which the Defendants filed Preliminary Objections followed by the Appellant filing another amended complaint followed by the Defendants filing Preliminary Objections to the amended Complaints.

---

[8] *See* Judge Scotts March 31, 2015 Order in Case it: 2013-07685, incorporated by reference in Appellant Nowicki's Eighth Amended Complaint.

[9] *See* March 31, 2016 Order and Memorandum Opinion by the Honorable Judge Cohn Jubelirer of the Commonwealth Court regarding Bucks County Court of Common Pleas Case #: 2013-07685, incorporated by reference in Appellant Nowicki's Eighth Amended Complaint.

After six Preliminary Objections and amended complaints had been filed on April 23, 2018, the undersigned met with the parties in Court and entered an Order permitting Appellant to file one more amended complaint, with the limitation that he would not be permitted to file another Amended Complaint, before the Court could rule on the Preliminary Objections being reasserted by the Defendants after each of these numerous filings. On December 11, 2018, the Court heard Oral Argument and questioned the Appellant at length with respect to the basis of his claims Appellant Nowicki explained to the Court that he believed that all of the named Defendants conspired with one another to initiate litigation against him and in the process, they lied to the Court in the prior litigation. He conceded that he lost the litigation, both at the Court of Common Pleas level and on Appeal and conceded those were final decisions against him. The Court discussed with him the elements of the various causes of action and pointed out the legal weaknesses in his position.

Thereafter, the Court issued an Opinion permitting Appellant to file one last amended pleading within twenty-five (25) days of the Court's Order, contingent upon its conformance with the Court's Supplemental Opinion dated December 31, 2018.

Appellant filed the Eighth and Final Amended Complaint on January 21, 2019, alleging eleven (11) Counts, as outlined in Footnote 1. Defendants filed Preliminary Objections, requesting oral argument, which was held on August 16, 2019. After hearing oral

arguments during which the parties made admissions and concessions, the Court entered an Order directing the Appellant to file a Concluding Memorandum of Law that focused on two (2) remaining issues: (1) identify the allegations in the Complaint that specifically define a cause of action for a Civil Right violation; and (2) identify specific language in the Complaint which alleges sufficient facts to support a claim that there was a breach of an oral contract The Order then directed the Defendants to file their responses to Appellant's Concluding Memorandum seven (7) days thereafter, "focusing on whether or not sufficient facts have been pled for purposes of sustaining their Preliminary Objections."[10]

On October 22, 2019, upon consideration of Defendants' Preliminary Objections to the Eighth Amended Complaint, Appellants Response, oral argument, and subsequent concluding briefs from both parties, this Court sustained Defendants' Preliminary Objections and dismissed Appellant's Eighth and Final Amended Complaint in its entirety, striking all claims. (Appellant repeatedly incorporated by reference pleadings from other actions thereby creating an extensive record available to the Court in its consideration of the Preliminary Objections). Appellant filed a Motion/Petition for Reconsideration on October 31, 2019, suggesting that dismissing his Complaint at the Preliminary Objections stage of the litigation was a "manifest injustice." On November 8, 2019, this

---

[10] *See* August 16, 2019 Order at ¶ 4.

Court denied Appellants Motion for Reconsideration This appeal to the Commonwealth Court was filed on November 20, 2019. Appellant filed his Concise Statement of Errors Complained of on Appeal in accordance with Pa. R.A.P. § 1925(b) on December 10, 2019.

III. STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

On December 10, 2019, Appellant Nowicki filed his Concise Statement of Matters Complained of on Appeal, which we recite verbatim herein:

1. The Trial Court erred in sustaining the Defendants Preliminary Objections in the nature of a demurrer as Plaintiff's Final Amended Complaint met the extremely low standard for surviving a demurrer.

2. The Trial Court erred in sustaining the Defendants Preliminary Objections in the nature of a demurrer based on the facts and factual inferences made in Plaintiff's Final Amended Complaint.

3. The Trial Court erred in sustaining the Defendants Preliminary objections in the nature of a demurrer since under the facts pled Plaintiff could recover under the cause of actions brought forth in Plaintiff's Final Amended Complaint.

4. Appellant, Allan J. Nowicki hereby incorporates by reference as it fully set forth herein Plaintiff's Motion for

Reconsideration fled on October 31, 2019 in further support of the Errors Complained of on Appeal.

IV. STANDARD OF REVIEW

The instant case was brought before the Court by Defendants' Preliminary Objections to Appellant's Eighth Amended Complaint. All of Appellant's Amended Complaints incorporated various Court records from other litigation, making those records the subject matter for review within the context of the Preliminary Objections. Pursuant to Rule 1028(a) of the Pennsylvania Rules of Civil Procedure, "Preliminary objections may be filed by any party to any pleading" based upon grounds including "insufficiency in a pleading" and "legal insufficiency of a pleading (demurrer)." Pa. R.C.P. § 1028(a). The Pennsylvania Rules of Civil Procedure also provide That the Preliminary Objections "shall state specifically the grounds relied upon and may be inconsistent. Two or more Preliminary Objections may be raised in one pleading." Pa. R.C.P. § 1028(b).

Rule 1028(a)(2) empowers a party to file Preliminary Objections based upon failure of a pleading to conform to law or rule of court. Pa. R.C.P. § 1028(a)(2). Rule 1028(a)(4) empowers a party to contest the legal sufficiency of a pleading (demurrer). Pa. R.C.P. § 1028(a)(4). Pennsylvania's standard of review when a party seeks demurrer of an action is well settled:

> Preliminary Objections in the nature of a demurrer require the court to resolve the issues solely on the basis of the pleadings; no testimony or other evidence outside of the complaint may be considered to dispose of the legal issues presented by the demurrer. All material facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true.

Kirschner v. K & L Gates LLP, 46 A.3d 737, 747 (Pa. Super. 2012) (quotations and citations omitted). When considering Preliminary Objections, all material facts set forth in the challenged pleadings are admitted as true, as well as inferences reasonably deducible therefrom. Haun v. Community Health System, Inc., 14 A.3d 120, 123 (Pa. Super. 2011). Preliminary Objections which seek the dismissal of a cause of action should be granted only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. Id.

Additionally, Pennsylvania is a fact-pleading state; a complaint must not only give the defendant notice of what the plaintiff's claim is and the grounds upon which it rests, but the complaint must also formulate the issues by summarizing those-facts essential to support the claim. Lerner v. Lerner, 954 A.2d 1229, 1235 (Pa. Super. 2008) (citations omitted); *See* Pa. R.C.P. No. 1019. The purpose of the rule is to require the pleader to disclose the 'material facts' sufficient to enable the adverse party to prepare his

ease. Landau v. W. Pennsylvania Nat. Bank, 282 A.2d 335, 339 (Pa. 1971). The pleading must be sufficiently specific so that the defers party will know how to prepare its defense. Commonwealth v. Peoples Benefit Servs. Inc., 895 A.2d 683, 689 n. 10 (Pa. Cmwlth. 2006). To survive Preliminary Objections, a complaint must be supported by factual allegations and not just legal conclusions. Ashcroft v. Iqbal, 556 'U.S. 662, 679 (2009).

For the following reasons, Appellant's Final Amended Complaint was thoroughly deficient with respect to all of its claims, and this Court properly sustained Defendants' Preliminary Objections and dismissed Appellant's Final Amended Complaint with prejudice.

V. DISCUSSION

This Opinion will address the Counts which were contained in Plaintiff's Final Amended Complaint Appellant's Statement of Matters Complained of limits itself to the Final Amended Complaint. There were Counts which were dismissed by the Court in earlier versions of the Complaint. Each Order dismissing previous Counts was accompanied by a Supplemental Opinion or Decision, explaining the basis for same. The Court's Supplemental Opinion dated December 27, 2018 and Supplemental Decision dated October 22, 2019 are incorporated herein by reference; however, they will not be attached as an Exhibit in that the undersigned believes this Opinion will be lengthy

covering the matters referenced broadly in Appellant's. Statement of Matters Complained of. There is, however, further discussion and legal authority in the record in this Court's Supplemental Decision and Supplemental Opinion previously filed with respect to prior Orders which were not appealed.

A. APPELLANT FAILED TO PROPERLY PLEAD AN "ABUSE OF PROCESS" CLAIM

Pennsylvania common law defines a cause of action for abuse of process as "the use of legal process against another primarily to accomplish a purpose for which it is not desi Lerner, 954 A.2d at 1238 (quoting Shiner v. Moriaty, 706 A.2d 1228, 1236 (Pa. Super. 1998), *appeal denied*, 729 A.2d 1130 (1998)). To establish a claim for abuse of process it must be shown that the defendant:

1) used a legal process against the plaintiff;

2) primarily to accomplish a purpose for which the process was not designed; and

3) harm has been caused to the plaintiff.

Shiner, 706 Ad 1236. "Thus, the gravamen of [Abuse of Process] is the perversion of legal process to benefit someone in achieving a purpose which is not an authorized goal of the procedure in question." Werner v. Platee-Zyberk, 799 Aid 776, 785 (Pa. Super. 2002) (citing McGee v. Feege, 535 Aid 1020, 1026 (Pa. 1987)).

To allege a proper Abuse of Process claim, Appellant needed to plead sufficient facts in his Final

Amended Complaint to show that Defendants used the aforementioned litigation to enforce the zoning ordinance for another purpose other than that which it was desi ed to accomplish, i.e. something other than to enforce the ordinance. This Court's December 31, 2018 Supplemental Opinion specifically directed Appellant to do the following in relation to the Abuse of Process claim:

> If Plaintiff wishes to pursue this cause of action, Plaintiff must identify plausible facts that support a justified inference to sustain his cause of action, alleging specific facts by specific people on specific dates. In averring said facts, specific fraudulent conduct alleged should be averred with specificity.[11]

In attempting to plead an Abuse of Process claim in his Final Amended Complaint, Appellant yet again used conclusory language. He offered no facts to warrant a reasonable inference that the purpose of Defendants' litigation *was* primarily to accomplish a purpose Other than to enforce the Township's zoning ordinance. Instead, Appellant lists boilerplate legal conclusions. By way of example, paragraph 190 of Appellant's Final Amended Complaint avers the following:

> 190. The Defendants' objective in filing this lawsuit (Case No. 2013-07685) was to put the Defendants out of business, and not to enforce the ordinances of the Township.[12]

---

[11] *See* December 31, 2018 Supplemental Opinion, p. 7.

[12] *See* Plaintiff's Final Amended Complaint, ¶ 190.

It is well-settled law that "[i]n determining whether to sustain a demurrer, the court need not accept as true conclusions of law, unwarranted *inferences* from facts, argumentative allegations, or expressions of opinion." Penn Title Ins. Co. v. Deshler, 661 A.2d 481, 483 (Pa. Cmwlth. 1995). Such conclusory language, in the absence of facts that would warrant a valid inference of an improper purpose to adduce an abuse of process claim, is rejected by this Court.

Additionally, the Pennsylvania' Municipalities Planning Code ("MPC"), 1987 Pa. SB 535, authorizes towns in Pennsylvania "to plan their development and to govern the *same* by zoning, subdivision and land development ordinances[.]" 53 P.S. § 10105. It is clear that Tinicum Township had the power to enact the ordinances that were enforced and formed the basis for the litigation which Plaintiff asserts was the foundation for Plaintiff's Abuse of Process claim. Appellant's issue is with the ordinances' purpose. In his Final Amended Complaint, Appellant incorporates the litigation and the record from the complained of actions where the Township brought suit to enforce the ordinances. From the Court's review of these incorporated records, there is no finding that the litigation was used for any other purpose but to enforce the ordinance. The incorporated record supports this Court's conclusion that the Commonwealth Court upheld the Township's proper enforcement of the ordinances and no-factual allegations identify an abuse of the process used to enforce the ordinance.

The Court is satisfied, based on Appellant's numerous failed attempts to plead a factual basis for an abuse of process cause of action (even with the benefit of the Court's December 31, 2018 Opinion discussing the law and informing Appellant what was required to amend his complaint) that Appellant will never be able to properly amend his Complaint to plead facts to support a claim for abuse of process.

Therefore, the Court acted properly sustaining Defendants' Preliminary Objections to Appellant's eighth attempt to plead a cause of action for Abuse of Process and dismissing same with prejudice.

B. APPELLANT FAILED TO PROPERLY PLEAD A CLAIM FOR "WRONGFUL USE OF CIVIL PROCEEDINGS" (ALSO KNOWN AS A "DRAGONETTI" CLAIM)

Wrongful Use of Civil Proceedings is a tort which arises when a person institutes civil proceedings with a malicious motive and without probable cause. Hart v. O'Malley, 647 A.2d 542, 547 (Pa. Super. 1994), aff'd, 676 A.2d 222 (Pa. 1996). In Pennsylvania, Wrongful Use of Civil Proceedings, also called a Dragonetti claim, is codified as follows:

Wrongful Use of Civil Proceedings

> (a) Elements of action. – A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to

> the other for wrongful use of civil proceedings:
>
> > (1) he acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
> >
> > (2) the proceedings have terminated in favor, of the person against whom they are brought.
>
> (b) Arrest or seizure of person or property not required. – The arrest or seizure of the person or property of the plaintiff shall not be a necessary element for an action brought pursuant to this subchapter.

42 Pa. C.S.A. § 8351.

To allege a proper Wrongful Use of Civil Proceedings claim, Appellant needed to plead sufficient facts in his Final Amended Complaint showing that Defendants initiated the above-referenced lawsuit in a grossly negligent manner or without probable cause. Appellant also needed to show in his Complaint that the litigation, proceedings terminated in his favor. Appellant failed to plead sufficient facts that satisfy those elements.

Appellant offers no facts in his Final Amended Complaint to warrant a reasonable inference that

Defendants initiated the lawsuits in either a grossly negligent manner or without probable cause. Instead, Appellant offers boilerplate conclusions, which are rejected by this Court. As way of example, paragraphs 209 and 210 of Appellant's Final Amended Complaint aver the following:

> 209. Defendant's lawsuit was filed with a malicious motive and lacking probable cause.
>
> 210. All of the Defendants wrongfully named Allan J. Nowicki as a Defendant to the above referenced case:[13]

In so alleging, Appellant referenced responses that he had made to the Defendants' First Amended Complaint in their lawsuit against him, which he suggested put Defendants on notice that he was improperly named. These are legal conclusions that, without facts pled to substantiate said legal conclusions, are rejected by this Court. In fact, the record of the prior litigation establishes the exact opposite. The record shows that the Defendants did not act in a grossly negligent manner or lack probable cause in pursuing the lawsuits against Appellant Nowicki. The prior court in those cases entered judgment against Appellant Nowicki and upheld the Township's ordinances. The prior court also did not find that Appellant Nowicki was improperly named. Any objections as to proper party should have been raised in the prior litigation and are now waived. The prior court's finding against Appellant Nowicki in the complained of actions

---

[13] *See* Plaintiff's Final Amended Complaint at ¶¶ 209-210.

necessitates the finding that the Defendants' had probable cause to pursue the actions. Appellant cannot now attempt to collaterally attack a decision by the court by instituting a Dragonetti claim. *See* Lerner, 954 A.2d at 1240 ("We note the trial court saw Appellant's "Dragonetti" complaint as a transparent attempt to engage the court in another episode in the long saga of disagreements between the parties. The court saw the current dispute as just a new hat on an old horse and treated it accordingly.").

As to the second element of the Dragonetti action, Appellant failed to adduce enough facts that would warrant a reasonable conclusion that the lawsuits were terminated in Appellant's favor. It is acknowledged that some counts were withdrawn in one action by one or more of the Defendants. In its December 31, 2018 Supplemental Opinion, this Court allowed Appellant to amend his Complaint and directed Appellant to do the following:

> If Plaintiff chooses to replead, Plaintiff must set forth the specific claims that he claims were wrongfully filed, the factual background of said claims and their subsequent withdrawal, the date of the withdrawal, the specific harm caused to Plaintiff by what factual event, the specific damages to Plaintiff, and the surrounding context of the alleged wrongfully filed claims and their withdrawal.[14]

---

[14] *See* December 31, 2018 Supplemental Opinion, p. 8.

It must also be noted that "[a] withdrawal of proceedings stemming from a compromise or agreement does not, as a matter of law, constitute a termination favorable to the party against whom proceedings have been brought originally." D'Elia v. Folino, 933 A.2d 117, 122 (Pa. Super. 2007). "[W]hether a withdrawal or abandonment constitutes a favorable, final termination of the case . . . initially depends on the circumstances under which the proceedings are withdrawn." Id. It was for this primary reason that this Court directed Appellant to set forth the factual background of the claims and their subsequent withdrawal that would warrant a reasonable inference that the lawsuit *was* terminated in Appellant's favor. Appellant failed to comply with the Court's directives.

In his Final Amended Complaint, Appellant avers the following:

> 213. On August 29, 2017 by the Order of the Honorable Judge Robert J. Mellon Counts II, III, and IV of the Plaintiff's Complaint were DISMISSED by consent of the Plaintiff (Delaware Valley Landscape Stone, Inc.) (see Exhibit W)
>
> 214. The proceedings in Count II, III, and IV of Delaware Valley Landscape Stone, Inc.'s First Amended Complaint have been terminated in favor of Allan J. Nowicki and RRQ, LLC.[15]

---

[15] *See* Plaintiff's Final Amended Complaint, ¶¶ 213-214.

Exhibit W is an order of the court in the complained of lawsuit that does not adduce the circumstances surrounding the dismissal of the claims.[16] In his Final Amended Complaint, Appellant does not offer facts or circumstances to warrant a reasonable inference that the dismissal was in his favor. Thus, his conclusory allegations are rejected by the Court and do not support a Dragonetti claim.

Despite this Court's December 31, 2018 Opinion discussing the law and specifically outlining how Appellant could amend his Complaint, Appellant once again failed to plead any facts in his Final Amended Complaint to support the legal conclusion that Defendants initiated the lawsuits in a grossly negligent manner or without probable cause, causing him damages, and that the proceedings terminated in his favor. The Court is satisfied that Appellant will never be able to honestly amend his Complaint with facts to plead a proper claim for, Wrongful Use of Civil Proceedings.

Therefore, the Court acted properly in sustaining Defendants Preliminary Objections to Appellant's cause of action for Wrongful Use of Civil Proceedings and dismissing same with prejudice.

---

[16] *See* The Honorable Judge Robert J. Mellon's August 29, 2017 Order in Case #: 2013-07218, incorporated by reference in Appellant Nowicki's Eighth Amended Complaint.

C. APPELLANT FAILED TO PROPERLY PLEAD A CLAIM FOR "CIVIL CONSPIRACY"

In order to state a cause of action for civil conspiracy, a plaintiff must show "that two or more persons combined or a with intent to do an unlawful act or to do an otherwise lawful act by unlawful means." Skipworth by Williams v. Lead Indus. Ass'n, Inc., 690 A.2d 169, 174 (Pa. 1997). A cause of action for conspiracy thus requires the following:

1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose;

2) an overt act done in pursuance of the common purpose; and

3) actual legal damage.

Weaver V. Franklin Cty., 918 A.2d 194,202 (Pa. Cmwlth. 2007). "[A]bsent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act" Pelagatti v. Cohen, 536 A.2d 1337, 1342 (Pa. Super. 1987). "Proof of malice, i.e., an intent to injure, is essential in proof of a conspiracy." Thompson Coal Co. v. Pike Coal Co., 412 A.2d 466, 472 (Pa. 1979) (citations omitted).

To properly state a cause of action for Civil Conspiracy, Appellant was required to plead sufficient facts showing that Defendants committed an unlawful act, or a' lawful act by unlawful means, and that they

did so with malice and intent to injure. Appellant also needed to state averments of fraud or mistake with particularity. Pa. R.C.P. § 1019. The Court's December 31, 2018 Supplemental Opinion specifically directed Appellant to do the following:

> The Court will allow the Plaintiff to replead this cause of action but in so doing, the Plaintiff must first identify, by name, a recognized "cause of action" and then the specific facts which support it. Conclusory statements will not be accepted. When setting forth the specific facts that support the specific cause of action, Plaintiff must identify which person or persons committed the specific acts. Conclusory statements that Defendants worked together to act will not be sufficient The date the conduct allegedly occurred must be pled as well. If fraud is being alleged, the specific fraud must be stated.[17]

In attempting to plead a Civil Conspiracy claim in his Final Amended Complaint, Appellant fails to specify what recognized cause of action supports the alleged civil conspiracy. Appellant instead simply uses conclusory statements with no facts to support the claim for civil conspiracy. These statements are rejected by this Court. The only allegations that can be construed as a cause of action are found in paragraphs 224 and 227 of Appellant's Final Amended Complaint, which state:

---

[17] *See* December 31, 2018 Supplemental Opinion. p. 10.

> 224. With malice the Defendants entered into a plan of conspiracy against Allan J. Nowicki that led to an *Abusive Process*.
>
> . . .
>
> 227. The Defendants objective in filing this lawsuit (Case No. 2013-07685) was to put the Defendants out of business, and not to enforce the ordinances of the Township. (see Exhibits D & H).[18]

There is no cause of action for "abusive process." The core of this action is Tinicum Township's various zoning ordinances, which Appellant argues were specifically enacted to harm his personal interests. If Appellant meant to aver the cause of action of "abuse of process" in attempting to color a claim for civil conspiracy, Appellant's argument necessarily fails.

If the underlying tort is found not to exist, the related claim for civil conspiracy to commit that tort necessarily fails. In Rose v. Wissinger, the Pennsylvania. Superior Court affirmed the lower court order sustaining Preliminary Objections in the nature of a demurrer for civil conspiracy because the plaintiff had not set out a cause of action for the underlying tort, defamation. 439 A.2d 1193 (Pa. Super. 1982). In so holding, the Rose court stated:

> We conclude that appellants' complaint fails to set forth a cause of action for defamatory remarks made in a court filing, not protected by privilege, or a cause of action for

[18] *See* Plaintiff's Final Amended Complaint. ¶ 224, ¶ 227.

> outrageous conduct causing emotional distress under Restatement of Torts, Second, § 46(1) (1965). Inasmuch as we do not find any basis for the defamation or the outrageous conduct theories, there could not be any conspiracy to commit those acts.

Id. at 1199. Appellant's Final Amended Complaint fails to set out a claim for Abuse of Process, and, therefore, the claim of Civil Conspiracy based on abuse of process necessarily fails. Like in Rose, because there is no valid cause of action for the underlying tort (abuse of process), there cannot be a valid cause of action for civil conspiracy.

There are no facts in Appellant's Final Amended Complaint to support Appellant's legal conclusion that Defendants engaged in a civil conspiracy of any cognizable and valid cause of action. Thus, this Court is satisfied, based on Appellant's numerous failed attempts to plead a Civil Conspiracy action (even with the benefit of the Court's December 31, 2018 Opinion discussing the law and specifically directing Appellant how to amend his Complaint) that Appellant will never be able to amend his Complaint to plead a proper claim for Civil Conspiracy.

Therefore, this Court acted properly in sustaining Defendants Preliminary Objections to Appellant's cause of action for Civil Conspiracy and dismissing same with prejudice.

D. APPELLANT FAILED TO PROPERLY PLEAD AN E UAL PROTECTION CLAIM UNDER 42 U.S.C. § 1983.

Appellant also filed a Civil Rights Action against Defendants under 42 U.S.C. § 1983, which provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.

42 U.S.C. § 1983. The Act prescribes two elements as requisite for recovery: (1) the conduct complained of must have been done by some person acting under the color of law; and (2) such conduct must have subjected the complainant to the deprivation of rights, privileges, or immunities secured to him by the Constitution or laws of the United States. *See* Parrett v. Taylor, 451 U.S. 527, 535 (1981); *See* Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995). Section 1983 does not create substantive rights. Instead, it is the procedural mechanism for bringing an action based on an underlying violation of a federal right *See* Howlett v. Rose, 496 U.S. 356, 358 (1990).

Appellant very correctly does not assert a due process argument in his Final Amended Complaint because he has not sought redress in other forums

available to him (which in fact would have provided him due process). Rather, in his Final Amended Complaint, Appellant relies on the Equal Protection Clause of the Fourteenth Amendment to bring his Civil Rights claim against Defendants. As outlined below, Appellants argument fails.

i. Appellant's Claim Does Not Fall under the Equal Protection Clause

Both the United States and Pennsylvania Constitution's guarantee equal protection of the laws. U.S. Const. Amend. XIV, § 1; Pa. Const. Art. I, § 26. The Pennsylvania Supreme Court treats equal protection claims under the Fourteenth Amendment to the U.S. Constitution the same as equal protection claims brought under the Pennsylvania Constitution. *See* Probst v. Dep't of Transp. Bureau of Driver Licensing, 849 A.2d 1135, 1143 (Pa. 2004).

Simply put, "equal protection requires that 'all persons similarly situated should be treated alike.'" Commonwealth v. Becker, 172 A.3d 35, 42-43 (Pa. Super. 2017) (quoting Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985)). Appellant alleges that Tinicum Township denied him permits to conduct operations on his property but granted permits for the same activity to other similarly situated residents. Appellant also alleges that Defendants took legal action against him for his operations but did not take legal action against similarly situated residents for the same activities.

Appellant's Final Amended Complaint fails to plead an action for Civil Rights under the Equal Protection Clause of the Fourteen Amendment because: (1) Appellant failed to adequately plead he is a protected class, or a "Class of One;" and (2) Appellant failed to allege that a custom or policy of the Township is unconstitutional on its face or was the "driving force" of the alleged constitutional violation.

a. Appellant Failed to Adequately Plead that He is a "Class of One"

Appellant is not alleging that he is a member of a protected class. During oral arguments, Appellant did not, or could not, assert that he is a member of a protected class. However, "[w]here a plaintiff does not allege membership in a protected class, [plaintiff] may assert an equal protection claim under the 'class of one' theory." Cornell Narberth, LLC v. Borough of Narbeth, 167 A.3d 228,243 (Pa. Cmwlth. 2017), appeal denied, 177 A.3d 818 (Pa. 2017) (quoting Village of Willowbrook v. Olech, 528 U.S. 562, 564, (2000)).

To assert a viable equal protection claim under a "class of one" theory, the claim must demonstrate that: (1) the defendant treated the plaintiff differently from others similarly situated; (2) the defendant did so intentionally; and (3) any differential treatment was without rational basis. *See* Hill Borough of Kutztown, 455 F.3d 225, 239 (3d Cir. 2006); Village of Willowbrook, 528 U.S. at 563. The Third Circuit Court in Startzell v. City of Philadelphia explained that, "[p]ersons are

similarly situated under the Equal Protection Clause when they are alike in all relevant aspects." 533 F.3d 183, 203 (3d Cir. 2008).

In Parker Ave., LP. v. City of Phila., the Third Circuit Court of Appeals affirmed a trial court order that dismissed the plaintiff's complaint for failure to state an equal protection claim. 660 Fed. Appx. 156 (3d Cir. 2016). In Parker. the plaintiff owned land in Philadelphia and sought to build residential units. Id. at 157. Two bills were introduced to pave a street that would have provided the necessary ingress to and egress from the property. Id. However, the bills were removed from the agenda after an association opposed the development plan. Id. The bill was never reintroduced, and the plaintiff brought a complaint against Philadelphia, alleging that it had intentionally treated it differently from other similarly situated landowners without any rational basis, resulting in it being unable to develop its property. Id. The plaintiff brought its equal protection claim under a "class of one" theory. Id.

The District Court in Parker dismissed the plaintiff's claim for "failure to allege that Parker was treated differently from landowners who were alike in all relevant aspects." Id. at 159. The District Court noted that the plaintiff's amended complaint identified a number of paving ordinances, including some for residential developments, but it failed to allege whether the others were opposed by neighbors or whether the other approved ordinances were similar regarding locations or surroundings, including issues

such as noise and size of the residential development. Id. The District Court found, and the Third Circuit affirmed, that without more specific facts, the plaintiff failed to allege the landowners were similarly situated and therefore failed to state an equal protection claim. Id. In Parker, the plaintiff's second amended complaint was dismissed, with prejudice, because the plaintiff failed to cure the deficiencies identified by the District Court, and 'the District Court reasonably found that a second opportunity to amend would prove to be futile." Id. at 160.

The Third Circuit affirmed another District Court Order that dismissed a plaintiff's equal protection claims from the complaint in Zitter v. Petruccelli, 744 Fed. Appx. 90 (3d Cir. 2018). In Zitter, an oyster fanner ("Zitter") encountered problems with the Department of Environmental Protection ("DEP"), which resulted in the closure of his oyster operation. Id. The DEP had designated some waters "approved for oyster farming and some waters "prohibited." Id. at 92. An oyster farmer had the ability to remain compliant with the regulations of the DEP by moving oysters from prohibited waters to approved waters if the oyster farmer got a permit from the DEP and went through a purification process. Id. Zitter moved 'Oysters from prohibited waters to approved waters, then sold the oysters, without getting a permit Id. A DEP Conservation Officer, Petruccelli, issued a summons to Zitter, charging him of violating the DEP regulation. Id. Petruccelli shut down Zitter's oyster operation and confiscated his harvester and dealer tags. Id. at 93.

Zitter brought an equal protection claim against Petruccelli, alleging he was treated differently than other similarly-situated oyster farmers based on theories of selective enforcement *and* a "class of one" theory. Zitter alleged that the other oyster farmers were treated more favorably even when they moved oysters from prohibited waters to approved waters. Id. at 96. He claimed that a competitor, Cash, moved oysters from the same prohibited waters at the same time Zitter moved his oysters, and Cash was not prosecuted. He further claimed that another competitor, ACF, had even more oysters in different prohibited waters that were also moved to approved waters for purification, and ACF was also never prosecuted. Id.

The District Court rejected Zitter's selective enforcement claim and his equal protection claim under a "class of one" theory because he failed to allege his competitors were alike in all relevant aspects, as he did not allege Cash or ACF violated storage, monitoring, and tagging rules. Id. Accordingly, the Third Circuit drained, holding that the District Court properly dismissed Zitter's claim because "litter did not allege any similarly-situated person was treated differently." Id. at 97.

In this case, Appellant Nowicki failed to plead sufficient facts to support his equal protection claims. He also failed to allege the existence of *facts* to support that anyone was similarly situated to him or that Defendants intentionally treated him differently without a rational basis. All of Appellant's civil rights

claims are based on the same operative allegation; that is, Defendants selectively enforced the Township Zoning ordinance against Appellant In each one of Appellant's counts, he includes a different anecdote of Defendants' alleged selective enforcement In particular, Appellant alleges that the Township denied him building permits for certain tax parcels he owned in the Township, bum t zoning enforcement actions against him but not others, and did not enforce a stipulation agreement between the Township and other named individuals and entities.

An equal protection claim fails when a property owner "merely alleges that state laws could have been applied against its predecessor in title but were not." Cornell Narberth, 167 A.3d at 244-45. Further, and most important, the "Equal Protection Clause of the Fourteenth Amendment does not require uniform enforcement of an ordinance." Id. Notably, "a land use ordinance that does not classify by race, alienage, or national origin, will survive an attack based on the equal protection clause if the ordinance is reasonable, not arbitrary and bears a reasonable relationship to a legitimate state objective." *See* Bawa Muhaiyaddeen Fellowship v. Phila. Zoning Bd. of Adjustment, 19 A.3d 36, 42 (Pa. Cmwlth. 2011). Finally, as stated previously, persons are only "similarly situated under the Equal Protection Law when they are alike in all relevant aspects." Startzell, 533 F.3d at 203.

Appellant failed to plead facts to show that he was similarly situated "in all relevant aspects" to the new owners of Tax Map Parcel Numbers 44-36-6, 44-36-7,

and 44-36-8, who were apparently granted building permits that were denied thirty-five years prior, or to three other different families, who were apparently permitted to place wood chips, branches, logs, and stumps within the floodplain of the Delaware River and processed wood fibers into landscape mulch.[19] In particular, Appellant does not allege that these families' properties were also located within the E (extraction) Zoning District or that their respective parcels were subject to the same exact zoning restrictions as Appellant. Finally, Appellant does not allege facts that show he was similarly situated "in all relevant aspects" to two other individual entities who entered into a stipulation with the Township regarding restrictions on extraction on their property. Appellant specifically does not allege that he entered into a stipulation agreement with the Township that the Township then enforced against him.

In all of Appellant's Complaints, he argues that the "custom or policy" of Tinicum Township is as follows: "Whatever Tinicum Township and its agents can do to cause harm to Allan J. Nowicki they will do." The allegations in Appellant's Final, Amended Complaint and Concluding Memorandum do not support that there is any custom or policy like this. Rather, Appellant's continued and insistent refrain that the Township caused him harm is in fact grounded in three zoning cases in which he repeatedly lost at

---

[19] *See* Appellant's Eighth Amended Complaint, Counts VI–X.

every level of adjudication: 2011-07848, 2012-01750, and 2013-07685.

Not only has Appellant not averred sufficient facts to show that he has a "Class of One" Equal Protection claim, but he also has not complied with the Court Others of December 27, 2018 or August 16, 2019. His Final Amended Complaint, as well as his Concluding Memorandum, set forth very few relevant facts. hi determining whether to sustain a demurrer, the Court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion, which is what much of Appellant's Final Amended Complaint contains Deshler, 661 A.2d at 483. After eight amendments to the Complaint and a Concluding Memorandum, Appellant still was unable to plead a factually adequate complaint *See* Parker, 660 Fed. Appx. at 156; Zitter, 744 Fed. Appx. at 90.

Additionally, in the three zoning cases Appellant lost to Tinicum Township, it was shown that Appellant violated federal regulations with his mulching Operation. Exhibit T-30A, introduced at the hearing on April 30, 2014 before the Honorable Judge Susan Devlin Scott in Case #: 2013-07685, demonstrates that the Federal Emergency Management Agency, an agency of the U.S. Department of Homeland Security, found in a September 2013 Community Assistance Visit to Tinicum Township that Appellant Nowicki's properties, TMP 44-007-048-003 and 44-007-048-001.

were in violation of floodway regulations.[20] The Exhibit states that the Township "must pursue all its enforcement mechanisms as per its zoning code and NFIP regulatory requirement"[21] Appellant was in violation of not only the Township's zoning ordinance, but he was in violation of federal regulations because of his storage of materials in the Delaware River floodway. This demonstrates why Appellant is unable to allege a factual basis that he is similarly situated in all relevant aspects to the other property owners.

b. Appellants Complaint Involves a Zoning Ordinance Issue, a Matter of Local, not Constitutional, Concern

Moreover, courts which routinely decide equal protection claims are reluctant to validate such claims against Defendants based on zoning regulations:

> [C]ourts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws. The Constitution presumes that absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted.

---

[20] *See* Defendants Tinicum Township, Nicholas Forte, Linda M. McNeill, Boyce Budd, Gary V. Pearson, and James Sabath's Response to Plaintiff's Concluding Memorandum of Law, at Exhibit "A" (FEMA Report previously marked as Exhibit T-30A in Case #: 2013-07685).

[21] *See* Id.

American Fabricare v. Township of Falls, 101 F. Sapp. 2d 301, 306 (RD. Pa. 2000) (citing Vance v. Bradley, 440 U.S. 93, 97 (1979)). Additionally, federal courts should not be "east in the role of a 'zoning board of appeals.'" United Artists Theatre Circuit, Inc. v. Township of Warrington, 316 F.3d 392, 402 (3d Cir. 2003) (quoting Creative Billets, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir, 1982)). "Land use decisions are matters of local concern, and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper' motives." Id.

The prior litigation were clear land use matters, issues of local concern, which were fully litigated. Appellant Nowicki's Final Amended Complaint does not plead facts with sufficient particularity to transform this case into a substantive due process claim taking into consideration the full record established by the prior litigation which was incorporated into Plaintiff's pleadings.

c. Appellant Failed to Plead that Defendants Acted under the "Color of Law"

Furthermore, it should be noted that the "acts of private contractors do not become the acts of the government by reason of their significant or even total engagement in performing public contracts." Rendell-Baker v. Kohn, 457 U.S. 830, 841 (1982). *See* Bowman v. Franklin, 980 F.2d 1104, 1108 (7th Cir. 1992)

(holding that a consulting engineer on a public works project is not a state actor). For there to be a viable claim under Section 1983, the defendants must have acted "under the color of state law while engaging in the conduct now complained of." *See* Kost v. Kozakiewicz, 1 F.3d 176, 184 (3d Cir. 1993); Sameric Corp. v. City of Phila., 142 F.3d 582 (3d. Cir. 1988); Flagg Brothers. Inc. v. Brooks, 436 U.S. 149, 155 (1979). The exception to the private contractors rule is when a government has "exercise[d] coercive power or provide[d] significant encouragement" in engaging in the conduct complained of state compulsion, nexus, and/or the joint action tests. Walker v. Johnson, 891 F. Supp. 1040, 1050 (M.D. Pa. 1995).

Appellant has pled nonspecific broad conspiracy claims against numerous Defendants generally. Some of the Objecting Defendants in this case are private actors, and Appellant Nowicki has not alleged any facts from which the Court can infer that they were "acting under the color of state law" at the time that they committed the alleged constitutional deprivations. Objecting Defendants were, at most, private contractors hired to perform services for Tinicum Township, a relationship that does not convert them into state actors for the purposes of Section 1983 liability. *See* Bowman, 980 F.2d at 1108 (determining that a consulting engineer on a public works project was not a state actor); Kohn, 457 U.S. at 841 (holding that the "acts of private contractors do not become the acts of the government by reason of their significant or

even total engagement in performing public contracts").

In his Final Amended Complaint, Appellant argues, in a conclusory fashion, that a private actor can be held liable under Section 1983 if he meets the requirements of the so-called state compulsion, nexus, and/or the joint action tests. *See* Walker, 1191 F. Supp. at 1050 (discussing the requirements of each test). However, insofar that Appellant intends to argue that the relevant Objecting Defendants quality as state actors under the "state compulsion" test, he does not point to specific facts in his Final Amended Complaint or in his Concluding Memorandum from which the Court could infer that Tinicum Township "exercise[d] coercive power or provide[d] significant encouragement" to Objecting Defendants so that their actions could be attributed to that of the Township. Id.

Furthermore, the Court in its August 16, 2019 Order specifically directed Appellant to "identify, specifically, the allegations in the [Final Amended] Complaint that specifically define the Civil Right Action . . . as it relates to *each specific Defendant*." (Emphasis added). Appellant has not complied with this directive. His Concluding Memorandum makes certain allegations against Defendants as a whole, but it makes no effort to identify each defendant's action and the constitutional rights each defendant purportedly abridged. Therefore, it is impossible to infer, from the allegations made in the Final Amended Complaint, whether the actions of Objecting Defendants

can be fairly attributable to Tinicum Township, as Appellant suggests.

d. Appellant Failed to Plead that Defendants' Policies were Unconstitutional on their Face

In order to succeed against the Township with an equal protection claim, Appellant was also required to allege that a custom or policy of the Township is/was unconstitutional on its face or was the "driving force" of the alleged constitutional violation. Appellant failed to do so.

The Commonwealth Court's decision Cornell Narbeth is similar to the facts to this case and is instructive. In Cornell, the plaintiff began the construction of houses after receiving permits from the Borough, believing that he would not need to install sprinklers on the property. hi. at 232. The Borough then refused to issue the certificate of occupancy because the plaintiff had not installed sprinklers on the property as required by the Borough's ordinance. Id. The plaintiff in Cornell sued the Borough and the building inspector for, *inter alia*, breach of contract, negligent misrepresentation, and violation of the Equal Protection Clause. Id. at 233. In raising the equal protection claim, the plaintiff showed that the Borough had refused to require other properties within the Borough to have fire sprinklers. Id. at 234-235.

The Commonwealth Court in Cornell affirmed the dismissal of all claims against the defendants via,

summary judgment. In disposing the equal protection claim, the Cornell court noted that "a municipality cannot, however, be held liable under Section 1983 on a *respondent superior* theory." Id. at 244. (citations omitted). Instead, the Cornell court explained, a municipality may only be held liable if a policy or custom perpetrated by the municipality is the "moving force" behind the constitutional tort of one of its employees. Id. The Court held that the municipality in Cornell could not be held liable under Section 1983 under the facts of the case because the plaintiff had not identified a custom or policy of the Borough that was unconstitutional on its face or was the "driving force" for not requiring other residents to install fire sprinklers. Id. Instead, the Cornell court reasoned, the building code allowed discretion in granting or revoking the permits. Id.

Like in Cornell, Appellant Nowicki complains that Tinicum Township, through its employees, denied him a permit but gave the same permit to another resident of the Township Like in Cornell. Appellant complains that the Township, through its employees, did not take action against other residents for their activities but did take action against Appellant for similar activities. However, fatal to Appellant's equal protection claim, like in Cornell, Appellant failed to plead a custom or policy of the Township that is unconstitutional on its face or was the "driving force" of the alleged constitutional violation, and Appellant could also not articulate same during oral arguments.

The pleadings and judicial admissions made by Appellant Nowicki do not support his claims Appellant alleges that the Township officials were arbitrary in issuing the permits and not pursuing legal action against other residents. However, Pennsylvania courts have held that "[e]ven if the municipality's actions are arbitrary or even conscience shocking, in a constitutional sense the municipality cannot be held liable under Section 1983." Cornell, 167 A.3d at 244 (quoting Ameba v. County of Lehigh, 922 Aid 1010, 1021 (Pa. Cmwlth. 2007)).

There are no facts in Appellant's Final Amended Complaint to support his legal conclusion that Defendants violated any of Appellant's constitutional rights. Thus, the Court is satisfied, based on Appellant's numerous failed attempts to plead an equal protection claim (even with the benefit of the Court's December 31, 2018 Opinion discussing the law and specifically directing Appellant how to amend his Complaint) that Appellant will never be able to amend his Complaint to properly plead a claim for Civil Rights violations.

Therefore, this Court acted properly in sustaining Defendants' Preliminary Objections to Appellant's causes of action for Civil Rights violations and dismissing same with prejudice.

E. Appellant Failed to Properly Plead a Breach of Contract Claim

Under Pennsylvania law, parties asserting claims for breach of contract must allege the following three elements:

(1) the existence of a contract, including its essential terms;

(2) breach of duty imposed by the contract; and

(3) resultant damages.

Corestates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999). In Pennsylvania, a contract is formed when the parties to it (1) reach a mutual understanding, (2) exchange consideration, and (3) delineate the terms of their bargain with sufficient clarity. Geisinger Clinic v. DiCuccio, 606 A.2d 509, 512 (Pa. Super. 1992). Consideration is defined as "a benefit to the party promising, or a loss or detriment to the party to whom the promise is made." Hillcrest Foundation. Inc. v. McFeasters. 2 A.2d 775, 778 (Pa. 1938). It is not enough that the promise has suffered a legal detriment at the request of the promisor. The detriment incurred must be the "quid pm quo" or the "price" of the promise, and the inducement for which it was made. "Consideration must actually be bargained for as the exchange for the promise." *See* Union Trust Company v. Long, 164 A. 346 (Pa. 1932). Additionally, clarity is particularly important in pleadings where an oral contract is alleged. Pennsy Supply, Inc. v. Am. Ash

Recycling Corp. of Pennsylvania, 895 A.2d 595 (Pa. Super. 2006).

Appellant's Final Amended Complaint fails to state a proper breach of contract claim for which relief can be granted, and Defendants' Preliminary Objections with regard to this claim were properly sustained by this Court. In addition, Appellant failed to comply with the Court's Order of August 16, 2019 because he did not identify the specific language in his Final Amended Complaint which alleges sufficient facts to support a claim that there was a breach of an oral contract This Court has reminded Appellant multiple times, in its Supplemental Opinion and at multiple oral arguments, that Appellant must identify each element of a contract claim, the facts that support it, and the parties involved in the contract "In averring said facts, the specific terms of the contract should be spelled out, including the alleged consideration for contract."[22]

Appellant asserts on page 18 of his Concluding Memorandum that "Plaintiff's Final Amended Complaint specifically and accurately plead that there is . . . consideration for the contract . . . " However, nothing is set forth in Appellant's Concluding Memorandum or the Final Amended Complaint from which this Court or the Defendants could possibly determine what the alleged correlation is. Such consideration is an essential element of an enforceable

[22] *See* December 31, 2018 Supplemental Opinion, p. 20.

contract. Stelmack v. Glen Alden Coal Company, 14 A.2d 127, 128 (Pa. 1940).

Furthermore, while Appellant argues that Exhibit 7 to the Final Amended Complaint demonstrates that there was a violation of the alleged oral contract; a simple reading of that email from Appellant's counsel to him actually demonstrates that there was no oral contract.[23] There is no reference to any mutual understanding, agreement, or oral contract in that email. Having attached Exhibit 7, Appellant must suffer the consequences of [linking averments in a complaint which conflict with attached exhibits. Where there are inconsistencies between a complaint's general allegations and a written document attached, the latter will prevail. In this context, a demurrer does not admit the truth of averments in a complaint that conflicts with the exhibits. Framlau Corp. v. Delaware County. 299 A.2d 335, 338 (Pa. Super. 1973) (citing Elliott-Rowland Corporation v. Arcway Realty Company, Inc., 117 A.2d 808 (Pa. Super. 1955)). This is particularly true where the averments in the Complaint are so manifestly inadequate, and the Court has no basis for taking them or any inference to be drawn from them in a light most favorable to Appellant Lerman v. Rudolph, 198 Aid 532 (Pa. 1964).

There are no facts in Appellant's Final Amended Complaint that support Appellant's legal conclusion that Defendants breached a contract. Thus, this Court is satisfied, based on Appellant's numerous failed

---

[23] *See* Plaintiff's Eighth Amended Complaint, Exhibit "7."

attempts to plead a Breach of Contract claim (even with the benefit of the Court's December 31,2018 Opinion discussing the law and specifically directing Appellant how to amend his Complaint) that Appellant will never be able to amend his Complaint to properly plead a claim for Breach of Contract.

Therefore, this Court acted properly in sustaining Defendants' Preliminary Objections to Appellant's cause of action for Breach of Contract and dismissing same with prejudice.

F. The Court Properly Declined to Reconsider its Decision to Sustain the Defendants' Preliminary Objections and Therefore Deny Appellant's Motion for Reconsideration Filed October 31. 2019

The Trial Judge spent an inordinate amount of time allowing, the parties to present oral argument The Trial Court's Orders both sustaining in part and denying in part Preliminary Objections were accompanied with Decisions to explain the Court's reasoning. After the last oral argument, the parties were permitted to submit final metrics of law on issues discussed during oral argument. Appellant's Motion for Reconsideration was properly denied, in that Appellant was given eight opportunities to amend his Complaint, two of which followed extensive oral argument during which time the Court pointed out various weaknesses to the Appellant with respect to the causes of action. The issues were thoroughly briefed and argued. It would have been inappropriate

and unfair to allow the Appellant to force the Defendants to spend more money restating what had already been stated to the Court in the various memorandums of law and during oral argument

Therefore, the Court properly denied Appellant's Motion to Reconsider.

VI. CONCLUSION

Appellant Nowicki believes that he and his family are the victims of persecution by reason of prior litigation which was unfavorable to him. This litigation is an attempt to assert that the prior litigation was unfairly and improperly brought against him; however, the prior litigation was fully litigated with decisions that affirmed the propriety of the Defendants prior conduct which is the subject matter of this lit: ;on. Appellant Nowicki has been given many opportunities to replead his case. The Court has personally listened to hours of oral argument during which times Appellant Nowicki has been polite and respectful to the Court. Nonetheless, the Court is satisfied that the claims as described by Appellant which have been pled and repled do not represent valid causes of action and/or meritorious causes of action. The Defendants have spent much energy and money defending these ailing. The Defendants should not *be* required to continue to defend these claims.

For all the foregoing reasons set forth herein, including the Court's prior Opinion of December 31, 2018, incorporated herein, it is respectfully submitted

that the issues raised by Appellant Nowicki on appeal are without merit. Accordingly, his appeal should be denied, and the Order entered on October 22, 2019 should be affirmed.

BY THE COURT:

1/1/20 /s/ Robert O. Baldi
DATE ROBERT O. BALDI, J.

Copies of this Opinion were sent to the following:

Allan Novicki
PO Box 238
Erwinna, PA 18920-0238
Plaintiff – prose

Harry G. Mahoney, Esquire
1601 Market St, Suite 3400
Philadelphia, PA 19103
Counsel for Defendants. Tinicum Township, Nicholas Forte, Lind McNeill, Boyce Budd, Gary Pearson, James Sabath, Richard Rosamilia, Vincent Dotti & Chief of Police

Paul C. Troy, Esquire
Kane, Pugh, Knoell, Troy & Kramer, LLP
510 Swede Street
Norristown, PA 19401
Counsellor Defendants, Stephen B. Harris, Esquire & Harris and Harris LLP

John Patrick Gonzales, Esquire
Marshall Dennehey Warner Coleman & Goggin
2000 Market St Ste 2300
Philadelphia, PA 19103-3231
Counsel far Defendants, Keystone Municipal Engineering Inc. & Torn Fountain, PE

Michael E. Peters, Esquire
60 E. Court Street
PO Box 1389
Doylestown, PA 18901
Counsellor Defendants, Delaware Valley Landscape Stone, Inc., Joseph Bunk, Kevan Busik, Keith Keeping & Bonnie Keeping

William T. Dudeok, Esquire
60 East Court Street
PO Box 1389
Doylestown, PA 18901
Counsel for Defendants. Eastburn and Gray, P.C., Michael Savona, Esquire, Michael T. Pidgeon, Esquire & Michael Peters, Esquire

David Shatkowitz, Esquire
16 Sunset Ave
Chalfont, PA 18914
Counsel for Defendants, Keystone Municipal Services, LLC & Shawn McGlynn

Kevin Cornish, Esquire
High Swartz LLP
40 E Airy St
Norristown, PA 19401-4803
Counsel for Defendants. Estate of Sylvester H. Cook, Herbert A. Cook & Stewart H. Cook

---

IN THE COURT OF COMMON PLEAS OF BUCKS COUNTY, PENNSYLVANIA CIVIL ACTION – LAW

ALLAN J. NOWICKI	:	
Plaintiff,	:	
vs.	:	**No. 2015-01776**
TINICUM TOWNSHIP, et al.	:	
Defendants.	:	

ORDER

AND NOW, this 22nd day of Oct., 2019, upon consideration of Defendants' Preliminary Objections to Plaintiff's Eighth Amended Complaint and Briefs in Support thereof, Plaintiff's Response and Brief in Support thereof, oral argument that was held on August 16, 2019, and subsequent concluding briefs from both Plaintiff and Defendants, it is hereby **ORDERED** and **DECREED** that Defendants' Preliminary Objections are **SUSTAINED**.

Plaintiff's Eighth Amended Complaint is **DISMISSED** in its entirety, as all claims have been stricken.

BY THE COURT:

/s/ Robert O. Baldi
ROBERT O. BALDI, J.

N.B. it is your responsibility
to notify all interested parties
of the above action.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ALLAN J. NOWICKI, v. TINICUM TOWNSHIP, BUCKS COUNTY, PA., NICHOLAS FORTE, TINICUM TOWNSHIP SUPERVISOR, NICHOLAS FORTE, LINDA M. MCNEILL, TINICUM TOWNSHIP MANAGER, LINDA M. MCNEILL, STEPHEN B. HARRIS, ESQUIRE, HARRIS AND HARRIS, TOWNSHIP SOLICITOR TOM FOUNTAIN, P.E.,KEYSTONE MUNICIPAL ENGINEERING, INC., TOWNSHIP ENGINEER SHAWN MCGLYNN, KEYSTONE MUNICIPAL SERVICES, LLC, BOYCE BUDD, GARY V. PEARSON, DELAWARE VALLEY LANDSCAPE STONE, INC., JOSEPH BUSIK, J. KEVAN BUSIK, KEITH KEEPING, BUNNIE KEEPING v.	:	No. 125 MAL 2021 Petition for Allowance of Appeal from the Order of the Commonwealth Court

EASTBURN AND GRAY, :
P.C., MICHAEL J. SAVONA, :
MICHAEL E. PETERS, :
ESQUIRE, MICHAEL T. :
PIDGEON, ESQUIRE, :
JAMES J. SABATH, :
JAMES J. SABATH, :
CHIEF OF POLICE :
:
PETITION OF: :
ALLAN J. NOWICKI :

ORDER

PER CURIAM

AND NOW, this 14th day of June, 2021, the Petition for Allowance of Appeal is **DENIED**.

A True Copy Elizabeth E. Zisk
As Of 06/14/2021

Attest: Elizabeth E. Zisk
Chief Clerk
Supreme Court of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ALLAN J. NOWICKI, v. TINICUM TOWNSHIP, BUCKS COUNTY, PA., NICHOLAS FORTE, TINICUM TOWNSHIP SUPERVISOR, NICHOLAS FORTE, LINDA M. MCNEILL, TINICUM TOWNSHIP MANAGER, LINDA M. MCNEILL, STEPHEN B. HARRIS, ESQUIRE, HARRIS AND HARRIS, TOWNSHIP SOLICITOR TOM FOUNTAIN, P.E.,KEYSTONE MUNICIPAL ENGINEERING, INC., TOWNSHIP ENGINEER SHAWN MCGLYNN, KEYSTONE MUNICIPAL SERVICES, LLC, BOYCE BUDD, GARY V. PEARSON, DELAWARE VALLEY LANDSCAPE STONE, INC., JOSEPH BUSIK, J. KEVAN BUSIK, KEITH KEEPING, BUNNIE KEEPING v.	:	No. 125 MAL 2021 Petition for Allowance of Appeal from the Order of the Commonwealth Court

EASTBURN AND GRAY, :
P.C., MICHAEL J. SAVONA, :
MICHAEL E. PETERS, :
ESQUIRE, MICHAEL T. :
PIDGEON, ESQUIRE, :
JAMES J. SABATH, :
JAMES J. SABATH, :
CHIEF OF POLICE :
:
PETITION OF: :
ALLAN J. NOWICKI :

ORDER

PER CURIAM

AND NOW, this 7th day of September, 2021, the Allowance for Reconsideration is **DENIED**.

A True Copy Elizabeth E. Zisk
As Of 09/07/2021

Attest: Elizabeth E. Zisk
Chief Clerk
Supreme Court of Pennsylvania

IN THE COMMONWEALTH
COURT OF PENNSYLVANIA

Tinicum Township	:	
v.	:	
Allan J. Nowicki and River Road Quarry, LLC	:	
v.	:	
River Road Quarry, LLC and Pennswood Hauling, LLC	:	No. 2176 C.D. 2012 Argued: May 14, 2014
v.	:	
Tinicum Township Zoning Hearing Board	:	
Appeal of River Road Quarry, LLC and Pennswood Hauling, LLC	:	

BEFORE:

HONORABLE DAN PELLEGRINI, President Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE RENEE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

DISSENTING OPINION
BY JUDGE LEAVITT FILED: September 9, 2014

Respectfully, I dissent. The trial court held that the mulching operation of Landowners[1] was manufacturing and, as such, belonged only in the Township's Manufacturing District. Because Landowners' mulching operation was being conducted on property located on the site of a quarry in the Extraction District of Tinicum Township, the trial court upheld the Township's zoning violation. I would reverse. Landowners are not engaged in manufacturing. Our Supreme Court has held, definitively, that the production of mulch is an agricultural operation and not manufacturing. As such, it cannot be banned from the Township's Extraction District unless necessary to prevent a "direct adverse effect on the public health and safety." Section 603(h) of the Pennsylvania Municipalities Planning Code.[2] 53 P.S. §10603(h). No such harm was claimed or shown to exist by the Township.

Landowners' mulching operation uses tree roots and branches collected from off-site locations, including farms; grinds them into chips; and places the chips into piles where they decompose into mulch. Occasionally, water is applied to the chips, and the piles are turned by a rake. This is the limit of human contribution to the process. The remaining contribution is made by Mother Nature. Concluding that Landowners' mulching operation was the functional

---

[1] River Road Quarry, LLC is co-owned by Allan J. Nowicki and his son, Jonathan Nowicki; Allan Nowicki has been, and continues to be, a farmer and forester for many years.

[2] Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §10603(h).

equivalent of a sweater factory belonging in the Manufacturing District, Tinicum Township fined Landowners.

Landowners contend that creating mulch is nothing like a sweater factory, which is manufacturing, but a "normal agricultural operation," as was specifically determined by our Supreme Court in *Gaspari v. Board of Adjustment of Muhlenberg Township*, 139 A.2d 544 (Pa. 1958). In rejecting this contention of Landowners, the majority explains that the *Gaspari* holding must be understood in its factual context, an analytical principle to which I subscribe. However, the factual context of the *Gaspari* appeal cannot be distinguished from that present in this appeal. Accordingly, it is dispositive.

Arthur Gaspari and his two brothers developed synthetic compost for growing mushrooms when horse manure, the traditional "food" for mushrooms, became scarce. The Supreme Court described the process by, which the Gasparis produced their synthetic compost as follows:

> The ingredients are simply hay and crushed corn cobs which are mixed and aerated, and treated with cyanamid, potash and gypsum. The completed operation usually takes 15 days, during which time the accumulations are moved approximately every three days. The lower Court says in its opinion:
>
> > If the component parts of the synthetic compost were mixed and then used as a medium for the growing of mushrooms,

> the growing medium would be ineffective. The ingredients must be thoroughly mixed, water must be applied together with a prescribed chemical, and the resulting mass periodically turned mechanically so that a bacteriological change may take place. After the change has taken place, the end product is a synthetic manure of compost which is an effective growing medium.
>
> After this exposition [the trial court] arrives at the conclusion that synthetic manure is achieved via a manufacturing process.

Gaspari, 139 A.2d at 546. The Supreme Court soundly rejected this conclusion of the trial court.

The Supreme Court dismissed the trial court's logic that the Gaspari brothers were "manufacturing" because they were producing a "new article." It explained that the dispositive question was not "newness" but whether the "new" item was the result of human "skill and labor, entirely or mostly apart from what is done by Nature [herself]." *Id.* The Supreme Court found the human element in the Gaspari process to be nominal, explaining that, "hay and corn cobs participate in the chemical and biological changes when water is poured over them and they are mixed, turned, and moved in the open air." *Id.* at 548. The Supreme Court's description of the Gasparis' production of synthetic compost fits, almost perfectly, the production methods employed by Landowners to produce their mulch: water, mixing and open air. The

only difference is that Landowners do not add chemicals to their chips as did the Gasparis. Neither process constitutes manufacturing because each relies principally upon nature to do the job of turning the organic ingredients into a "new" article, *i.e.*, a type of compost.

Tinicum Township argues that *Gaspari* is not binding. It claims that the Gasparis used their compost exclusively to grow mushrooms on their own land. By contrast, it argues, Landowners will gal or use, their compost, but not at the quarry. The Township argues from two false premises.

First, the Gasparis did more than grow and sell mushrooms. They operated a full service mushroom business, selling a wide range of "mushroom *supplies* [such] as mushroom paper, mushroom wire, baskets, manure baskets, wash tubs of all sizes, ground tubs, electric cords, insecticides and fungicides, thermometers and different types of hoses and spraying nozzles." *Id.* at 545 (emphasis added). Their synthetic compost was another mushroom supply, and nothing in *Gaspari* suggests that the brothers did not include synthetic compost in their inventory of mushroom-related supplies. Indeed, the township inspector ordered the Gasparis to dispose of "all stock of manure *not required for [their] own immediate use*." *Id.* (emphasis added). This order would not have been necessary unless the Gasparis sold some of their synthetic compost to their customers.

Second, the *Gaspari* holding does not turn on where the synthetic compost produced by the Gasparis would be used. The sole question in *Gaspari* was whether the production of synthetic mushroom compost constituted a normal agricultural operation or a manufacturing operation. The Supreme Court focused solely on the production method, not the use of the synthetic compost, place of use or the source of the raw materials.[3] In no way does *Gaspari* stand for the proposition that synthetic compost (also called synthetic manure) must, be generated from materials that come from the property where produced and then be used there in order to qualify as an agricultural, as opposed to a manufacturing, operation.

The above study of *Gaspari* shows how far Landowners' mulching operation deviates from the operation of a knitting factory. Board Decision at 6; Conclusion of Law No. 4 (noting the obvious, *i.e.*, that "a factory which knits that wool into sweaters . . . is not an agricultural use but is a manufacturing use."). Making sweaters out of wool involves significant human intervention and labor; indeed, Mother Nature does not play a role at all. *See Gaspari*, 139 A.2d at 547 (the key ingredient to manufacturing is a "mechanical process under the domination and control of man").

The Supreme Court held that the production of synthetic compost was not manufacturing but, rather,

---

[3] It appears that the hay and corn cobs used by the Gasparis came from elsewhere, as did the horse manure they previously used. Likewise, here, Landowners acquire their tree by-products from other locations.

"well within the ambit of farming in all its branches." *Gaspari*, 139 A.2d at 548 (internal quotation omitted). Likewise, the production of mulch from tree roots and branches, to use as fertilizer, falls "well within the ambit of farming" and, as such, is protected.

Tinicum Township's strained effort to find Landowners' mulch operation "manufacturing" was undertaken because it knew it could not prohibit either an agricultural operation or forestry activity from taking place in the Extraction District. Section 2 of the act commonly referred to as the Right-to-Farm Act[4] limits the ability of municipalities to enact ordinances that restrict a "normal agricultural operation," which includes the sale of "agricultural commodities" and "forestry products." 3 P.S. §952." Mulch is surely such a commodity, and the Right-to-Farm Act does not say that, the commodity has to originate from or be used only on the landowner's property to be protected.[5]

---

[4] Act of June 10, 1982, P.L. 454, *as amended*, 3 P.S. §§951-957.

[5] Landowners argue that this Court has narrowed the scope of *Gaspari*. For example, in *Wellington Farms, Inc. v. Township of Silver Spring*, 679 A.2d 267 (Pa. Cmwlth. 1996), this Court held that a landowner violated his occupancy permit to raise, slaughter and market chickens because some of the chickens slaughtered were raised on other farms. Similarly, in *Clout, Inc. v. Clinton County Zoning Hearing Board*, 657 A.2d 111 (Pa. Cmwlth. 1995), this Court held that a compost facility, importing 120 tons of materials daily and operating inside a factory-sized building, was not a permitted "natural resource use." Since *Clout* and *Wellington Farms* were decided, the legislature has amended the Right-to-Farm Act to expand the definition of a normal agricultural operation. 3 P.S. §952. Also, in 2005, the legislature

Further, Section 603(h) of the Municipalities Planning Code mandates that "[z]oning ordinances shall encourage agricultural operations." 53 P.S. §10603(h). More specifically, zoning ordinances "may not restrict agricultural operations," defined as "the production, harvesting and *preparation for market or use of agricultural*, agronomic, horticultural, *silvicultural* and aquacultural crops and *commodities*." 53 P.S. §§10603(h), 10107(a) (emphasis added). A municipality may not "restrict" agricultural operations unless directly adverse to the public health and safety. 53 P.S. §10603(h).

The protection of forestry activities is somewhat different. Section 6030) of the Municipalities Planning Code provides that "forestry activities . . . shall be a permitted use by right in all zoning districts in every municipality." 53 P.S. §10603(f).[6] However, it

---

enacted limits on local ordinances in the Agricultural Code Act, which incorporates the definition of a normal agricultural operation as defined within the Right-to-Farm Act. *See* 3 Pa C.S. §312, 315.

Tinicum Township acknowledges that a "normal agricultural operation" includes forestry and even the use of a tub grinder. Township Brief at 15. However, it contends, without citation to language in any statute, that a normal agricultural operation uses only materials that come from the property where the agricultural operation takes place and can only occur on that same property.

[6] "Forestry" is defined as "the management of forests and timberlands when practiced in accordance with accepted silvicultural principles, through developing, cultivating, harvesting, transporting and selling trees for commercial purposes, which does not involve any land development." 53 P.S. §10107(a). Notably, Landowners "harvest" tree by-products from the

authorizes a municipality to regulate, reasonably, forestry activities.

In *Stoltzfus v. Zoning Hearing Board of Eden Township*, 937 A.2d 548 (Pa. Cmwlth. 2007), this Court considered an operation by which two people, the landowner and his brother, used one piece of equipment to cut tree trunks into logs, which they sold to sawmills. There was no question in *Stoltzfus* that the operation was mechanical and, thus, was not an agricultural operation under the principles established in *Gaspari*. The question was whether the process, albeit mechanical, was a "forestry activity," permitted in every zoning district because it involved the management of forests. 53 P.S. §10603(f). This Court held that because the tree trunks came from other property, the operation was not a "forestry activity." *Stoltzfus*, 937 A.2d at 550.

The majority draws on *Stoltzfus* to hold that Landowners' mulching operation does not qualify as a normal agricultural operation because the mulch is not used by Landowners at the quarry, but elsewhere. I disagree with this extension of *Stoltzfus*.

First, nothing in the text of the Municipalities Planning Code or Right-to-Farm Act specifically requires that a forestry activity use trees *from* the property or use the product of that activity *on* the property. In this respect, I believe *Stoltzfus* was wrongly decided. Second, *Stoltzfus* concerned a

---

surrounding area, "transport" them to their property and then "sell" their mulch at "market." 53 P.S. §10107(a).

mechanical operation, not the production of mulch. *Gaspari* was irrelevant to the question in *Stoltzfus*.

To restrict an agricultural operation or a forestry activity to the use of materials grown on the landowner's land, and for use thereon, adds words to the relevant statutes. Such a zoning ordinance does not "encourage" farming, but the opposite. 53 P.S. §10603(h). If mulch must be produced only on the farm where it is used, then there is less land available for farming. A narrow reading of the protections set forth in the Municipalities Planning Code and Right-to-Farm Act renders them meaningless surplusage. It is already the case that municipalities may not use zoning laws to forbid lawful activities, and this applies to any use, including agriculture and forestry. Finally, all doubts must be resolved in favor of the landowner. *Header v. Schuylkill County Zoning Hearing Board*, 841 A.2d 641, 645 (Pa. Cmwlth. 2004).

Municipalities may regulate forestry, even though it must be allowed in every district. 53 P.S. §10603(f) (stating that "[z]oning ordinances may not unreasonably restrict forestry activities"). The municipality may, for example, use dimensional requirements to regulate where a forestry activity is done. Municipalities may restrict agricultural operations that have a "direct adverse effect" on the public. 53 P.S. §10603(h). However, the elimination of the production of mulch from the Extraction District was not necessary to protect the public, and Tinicum Township did not contend that it was so necessary.

Gaspari is dispositive. The Supreme Court has defined mulch production to be an agricultural operation, whether its raw materials consist of corn cobs and hay or tree roots and branches. Landowners use trek by-products and, thus, are engaged in the silvicultural "branch of farming." *Gaspari*, 139 A.2d at 548.[7] Because Landowners' mulching operation does not *directly* harm the public, it cannot be restricted from the Extraction District. Because it is a forestry activity, it may be regulated, but not excluded, from the Extraction District.

I would reverse the trial court.

/s/ _____
MARY HANNAH LEAVITT, Judge

Judge Simpson and Judge McCullough join in this dissenting opinion.

---

[7] An "agricultural operation" is "an enterprise that is actively engaged in the commercial production and preparation for market of silvicultural . . . crops and commodities." 53 P.S. § 10107(a).