

**COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE
KENT COUNTY COURTHOUSE
DOVER, DELAWARE 19901
PHONE: (302) 739-4618**

**CHARLES W. WELCH, III
JUDGE**

June 6, 2011

Ms. Doreatha Howell
132 Minner Street
Houston, DE 19954

Mr. Mark Kohout
Gateway Construction, Inc.
3527 Forrest Avenue
Dover, DE 19904

RE: Doreatha Howell v. Leslie H. Persans, Dale Jones & Mark Kohout
C.A. No.: CPU5-10-000737

Decision on Motion to Dismiss

Dear Ms. Howell and Mr. Kohout:

Plaintiff has filed this civil action against employees of Kent County, Delaware, and Defendant Mark Kohout ("Kohout"). In general, the plaintiff alleges that some or all Kent County employee defendants are liable for trespass on her property, the demolition of structures on her property, the failure to pay property taxes prior to demolition and the failure to obtain a permit prior to demolition. Although the plaintiff's Complaint makes similar allegations against Gateway Construction, Inc., of which Kohout is an officer, no allegations have been made against Kohout in his individual capacity. At a hearing for this matter, the Court heard argument as to whether Kohout should be dismissed from this matter pursuant to Court of Common Pleas Civil Rule 12(b)(6) for failure to state a claim upon which relief can be granted. At the conclusion of the hearing, the Court reserved decision. This correspondence constitutes the Court's decision. Kohout is

dismissed from this action as the plaintiff has failed to state a claim against him upon which relief can be granted.

BACKGROUND

Doreatha Howell (“Plaintiff”) and three other individuals own real property in Kent County, Delaware (“the property”).¹ On or about September 17, 2007, the Kent County Department of Planning Services, through its Division of Inspection and Enforcement, condemned two dwellings and numerous outbuildings on the property and ordered that the structures be demolished. The demolition was to be completed within 90 days of the property’s condemnation. Kent County solicited bids for the demolition work because the owners of the property did not timely complete the demolition. The bid was awarded to Gateway Construction, Inc. (“Gateway”), of which Kohout is an officer. Gateway completed the demolition work and forwarded an invoice to the owners of the property. Plaintiff signed a domestic return receipt for the invoice. A lien was placed against the property by recording a Certificate of Taxing Authority when the owners of the property failed to pay for the demolition.

On March 22, 2010, the plaintiff filed a Complaint against the defendants, generally alleging that the defendants who are employed by Kent County are liable for trespass on her property, the demolition of structures on her property, the failure to pay property taxes prior to demolition and the failure to obtain a permit prior to demolition.²

¹ After receiving permission from the parties, the Court contacted the Kent County Register of Wills and determined that the plaintiff and three other individuals own the property.

² W. Dale Hammond was formerly a defendant in this case. He is now deceased. Therefore, pursuant to the plaintiff’s request, the Court dismissed Mr. Hammond from this action during an April 4, 2011, hearing for this matter. Defendants Leslie H. Persans and Dale Jones are employed by the Kent County Department of Planning Services, Division of Inspection and Enforcement.

Although the plaintiff's Complaint also discusses the actions of Gateway, it does not contain any specific allegations against Kohout. Therefore, at a hearing for this matter, the Court raised the issue as to whether Kohout should be dismissed from the plaintiff's action for a failure by the plaintiff to state a claim against him upon which relief can be granted. The Court then heard argument on Kohout's motion to dismiss seeking such relief.³

STANDARD OF REVIEW

Court of Common Pleas Civil Rule 12(b)(6) allows a defendant to file a motion to dismiss for "failure to state a claim upon which relief can be granted." *Furman v. Delaware Dep't of Transp.*, 2011 WL 1205237, at *1 (Del. Super. Ct. Mar. 29, 2011). "All the facts pled in the complaint are accepted as true." *Id.* "The motion will be granted 'only where it appears with reasonable certainty that the plaintiff could not prove any set of facts that would entitle him to relief.'" *Id.* (quoting *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998)).

DISCUSSION

Plaintiff has failed to state a claim against Kohout upon which relief can be granted. In reviewing the plaintiff's Complaint, it is apparent to the Court that the plaintiff has not made any allegations against Kohout individually. While plaintiff alleges that "Gateway Construction [for whom Kohout is an officer of the company] did not pay our delinquent property taxes," she does not specifically make any allegations

³ Although the Court raised the issue as to whether Kohout should be dismissed from the plaintiff's action for a failure by the plaintiff to state a claim against him, the Court considered it Kohout's motion to dismiss once argument on the motion ensued.

against Kohout. Therefore, Kohout must be dismissed from the action pursuant to Court of Common Pleas Civil Rule 12(b)(6), as the plaintiff has failed to state a claim against him upon which relief can be granted.

CONCLUSION

As a result of the Court's findings of fact, which are based on the entire record, and the Court's above-referenced conclusions of law, Kohout is dismissed from this action pursuant to Court of Common Pleas Civil Rule 12(b)(6) as the plaintiff has failed to state a claim against him upon which relief can be granted.

IT IS SO ORDERED.

Sincerely,

A handwritten signature in black ink that reads "Charles W. Welch, III". The signature is written in a cursive style with a large initial "C" and "W".

Charles W. Welch, III

CWW:mek