

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ELSMERE PARK CLUB, L.P.,)
)
 Plaintiff,)
)
 v.) C.A. No. 03C-07-034 CHT
) ARBITRATION CASE
 TOWN OF ELSMERE,)
)
 Defendant.)
)

Opinion and Order

On the Plaintiff's Motion for Summary Judgment

Submitted: October 26, 2004
Decided: January 31, 2005

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TOLIVER, JUDGE

Before the Court is the motion of the plaintiff, Elsmere Park Club, L.P. ("EPC"), summarily seeking the entry of judgment in its favor regarding the application of 31 *Del. C.* § 4133. The matter having been briefed and oral argument completed, that which follows is the Court's resolution of the issues so presented.

STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

At some undisclosed point in time in 2002, the Fenwick Apartments complex in Elsmere, Delaware became infested with an unspecified mold thought to be harmful to the health of the occupants of the complex. The defendant, the Town of Elsmere, claimed it was necessary to have the premises condemned in order to rid the apartments of the mold and did so. In connection with that effort, the Town incurred \$23,077.40 in expenses. These expenses consisted of employee overtime wages and legal fees stemming from litigation about the matter and small payments made to the American Red Cross for temporary shelter, along with miscellaneous costs such as copying and food.¹ EPC subsequently filed a claim against the Town,

¹ There is no dispute concerning how the expenses were accumulated with respect to the condemnation of the apartments or the amount thereof. They do not include any expenses directly related to the physical removal of the mold. Pl. Mot. Summ. J., D.I. 7, ¶ 4, at 2.

claiming the Town did not possess authority to condemn the apartment complex.² The Town responded with a counterclaim seeking repayment of the \$23,077.40 and imposed a tax lien against the property pursuant to 31 Del. C. § 4133. EPC generally contends that the condemnation was improper and unnecessary. Its primary argument, however, is that the Town did not meet the statutory requirements mandated by § 4133 to impose a tax lien. The instant motion focuses solely on that issue.

DISCUSSION

Summary judgment may be granted only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.³ The moving party bears the initial burden of showing there are no material facts in dispute.⁴ Once that initial burden is satisfied, through affidavits or otherwise, the nonmoving party must

² This case was originally filed in the Court of Chancery, but when the Chancery Court denied EPC's motion for a temporary restraining order EPC dismissed its complaint. At that time the case was properly transferred to this Court.

³ *Dale v. Town of Elsmere*, 702 A.2d 1219, 1221 (Del. 1997).

⁴ *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

establish the existence of disputed material issues of fact.⁵ The moving party is entitled to summary judgment if the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it will bear the burden of proof at trial.⁶

_____The Town and EPC have stipulated that no factual issue exists that would prevent the Court from ruling on this summary judgment motion. They both submit the only issue to be decided, again, is whether the requirements of § 4133 were met before the tax lien was imposed.

In this regard, Section 4133 provides:

There is hereby created a tax lien on real property for moneys expended by the State, or a community, for razing, demolition, removal or repairs of buildings or abatement of other unsafe conditions constituting a threat to the public health and safety where the responsible party refuses or fails to comply with the lawful order of the code official after due notice thereof, either actual or constructive. Upon certification of a tax lien to the appropriate state or community official by the code official, the amount of such lien shall be recorded and collected in the same manner as other county real estate taxes, and paid to the State or community when collected, by the appropriate county government. (Emphasis added).

⁵ *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

⁶ *Id.*

This language clearly allows a tax lien to be levied on property when the State has incurred expenses and/or costs demolishing, removing, or abating an unsafe condition on the property. However, the State can only act if the party responsible for the structure or condition fails to obey with lawful order from the proper authority of which it had notice.

EPC claims the Town's expenses of \$23,077.40 were not incurred as a result of an "abatement of other unsafe conditions . . ." as required under § 4133. Alternatively, EPC argues that it did not refuse any order to remove the mold, but was not allowed to do so. The Town insists its actions did in fact constitute an abatement of an unsafe condition and that EPC did not attempt to comply with directives from the Town. Consequently, the tax lien was properly imposed on the property via § 4133.

The arguments of both parties center around the scope of the definition of the word "abatement" and how placement of that word within the statute in question, affects how it is defined. The Town argues abatement means something "short of destruction and can include any act that results in the

suppression, alleviation, or mitigation of a nuisance.”⁷ EPC insists abatement requires some physical act leading toward or culminating in the elimination and reduction of the unsafe condition. This issue to be resolved, therefore, is one of statutory construction.

“When a statute is clear and unambiguous, the Court’s role is limited to an application of the literal meaning of the words’.”⁸ The Court finds no ambiguity in this statute, nor within the phrase, “abatement of other unsafe conditions.” As a result, the court must look to the ordinary definition of the term abatement⁹. Abatement is defined as “the act of eliminating or nullifying.”¹⁰ It does not appear to include expenses and/or costs ancillary or indirectly related to the elimination of a dangerous condition, i.e., securing a legal determination that such a problem exists.¹¹

⁷ Def. Reply Br., D.I. 8, ¶ 4, at 2.

⁸ *Capano v. Director of Revenue*, 2002 WL 1485352 (Del. Super.).

⁹ The term abatement is not otherwise defined within the statute.

¹⁰ Black’s Law Dictionary 2 (7th ed. 2000).

¹¹ The term abatement is used through out various other Delaware Code provisions and within those provisions the term regularly refers to a physical abatement of the condition. See e.g. 3 Del. C. § 1310 (“The **abatement** of this public nuisance [i.e, actual removal of infested plants] shall be at the expense of the aforementioned person(s).”); 16 Del. C. § 7803 (requiring the “physical ability to perform asbestos **abatement** work without endangering the health and safety of others.”); Wilmington City Code § 13-133 (ordering “the removal, **abatement** encapsulation, or other similarly approved method of abatement of the [lead-based] paint. . . .”).

However, when interpreting a statute the Court does not look at the meaning of the words as they stand alone. Words grouped together within a statute are to be given related meaning.¹² In the present context this dictates that the meaning of abatement must be decided in relation to the words "razing", "demolition" and "removal" in the relevant portion of § 4133.

The Town contends that under the above-mentioned rules of statutory construction, the term abatement is not linked to the verbs of "razing, demolition, [and] removal". It further suggests the second "or" used in the provision is a disjunctive used to express an alternate category.¹³ Under the Town's interpretation, "abatement" can therefore include "any act that results in [or leads to] the suppression, alleviation or mitigation of a nuisance" as used in § 4133. EPC insists the term abatement is linked for definitional purposes with the terms signifying the elimination of hazards and/or nuisances, and read together, limit the reach of § 4133 to costs and expenses directly associated with the elimination of any conditions so covered.

¹² See, *Butler v. Butler*, 222 A.2d 269, 271 (Del. 1966) (citing 2 Sutherland, *Statutory Construction* (3d ed.)).

¹³ 1A Sutherland at § 21:14, 2A Sutherland at § 47:16.

The Court finds the argument made by EPC more persuasive. The rules of statutory construction and common sense support such a finding. The language in question fixes the liability of the party responsible for the problem to that which it takes to physically eliminate or reduce the same. It does not provide for the recoupment of indirect costs. Nor do the other statutory provisions referred to by the defendant¹⁴ provide any assistance in this regard. They are similarly silent and the Town has not indicated that such costs were ever collected under the auspices of those authorities.

_____The costs and/or expenses which the Town is seeking to recover are legal fees and overtime wages of certain employees incurred in connection with activities and proceedings begun to impose a § 4133 lien. They do not arise from activities directly related to the elimination or reduction of a hazard or nuisance. To achieve the result that the Town desires would have required the insertion of language in § 4133 providing for the recovery of costs associated with securing or enforcing the lien. Since § 4133 is silent in that regard, the Town is not entitled to the relief sought via that statutory authority.

¹⁴ 31 Del. C. § 4102; 31 Del. C. § 4126(b).

In light of the foregoing conclusion relative to the definition of "abatement", the second requirement of § 4133, whether EPC refused or failed to comply with an order of the appropriate official to abate the nuisance in question, need not be addressed. Moreover, it appears to the Court that there are material facts necessary to resolve this issue in dispute and could not have been resolved short of trial in any event.¹⁵

¹⁵ EPC claims it promptly responded on October the 7, 2002 after having received notice of the mold condition in the Fenwick apartments. Pl. Mot. Summ. J., D.I. 7, ¶ 9. at 4. The Town alleges EPC failed to duly comply with the Town's order to condemn and vacate the buildings. Def. Reply Br., D.I. 8, ¶ 6, at 3. Both sides point to the record and affidavits to prove the truth of their statements notwithstanding their assertions that there were no material disputes of fact.

CONCLUSION

For the aforementioned reasons, the Plaintiff's Motion for Summary Judgment must be, and hereby is, **granted.**

IT IS SO ORDERED.

TOLIVER, JUDGE
