NO. 326P19 FIFTEEN-B DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

CHERYL LLOYD HUMPHREY LAND INVESTMENT COMPANY, LLC, Plaintiff-Appellant, v. RESCO PRODUCTS, INC. AND PIEDMONT MINERALS COMPANY, INC., Defendants-Appellees.	)	From Orange County 17 CVS 1399 No. COA 19-76

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RESPONSE TO DEFENDANTS-APPELLEES NOTICE OF APPEAL AND PETITION FOR DISCRETIONARY REVIEW

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STATEMENT OF THE CASE

Plaintiff-Appellant Cheryl Lloyd Humphrey Land Investment Company, LLC ("Plaintiff") commenced this action by filing a Complaint on 27 October 2017 against Defendant-Appellees Resco Products, Inc. ("Resco") and Piedmont Minerals Company, Inc. ("Piedmont"). Defendant-Appellees filed a Motion to Dismiss pursuant to Rule 12(b)(6) on 10 August 2018. Following a hearing, the Order granting Defendant-Appellees' Motion to Dismiss as to all of Plaintiff-Appellant's Claims was entered on 1 October 2018 Order by the Honorable Michael J. O'Foghludha, judge

presiding. Plaintiff filed and served Notice of Appeal on 29 October 2018. The proposed record was settled by stipulation on 7 January 2019, filed with the Court of Appeals on 22 January 2019 and docketed 23 January 2019. On 16 July 2019, the Court of Appeals reversed the decision of Judge O'Foghludha in a 25 page opinion, finding that Appellants had stated sufficient claims upon which relief could be granted. Specifically, the Court of Appeals found that the *Noerr-Pennington* doctrine (a First Amendment doctrine which protects businesses when they engage in certain petitioning activities, but recognizing a exception to this protection where the conduct at issue is a "mere sham" and is "nothing more than an attempt to interfere directly with the business relationship of a competitor") does not apply in this case. [COA Op. pp. 6-7].

It is from this decision that the Defendants-Appellees are now appealing and seeking discretionary review.

STATEMENT OF THE FACTS

In the summer of 2013, Plaintiff-Appellant began negotiations with Braddock Park Homes, Inc. (a third-party buyer) ["Braddock Park"] to sell approximately 45 acres of real property located on Orange Grove and Enoe Mountain Road in Hillsborough, NC [the "Property"]. [Compl. ¶17]. As part of the Purchase and Sale Agreement, Braddock Park planned to construct a 118 unit townhome subdivision on the Property. [Compl. ¶ 18]. Braddock Park's planned townhome subdivision required the Property to be annexed into the Town of Hillsborough and be rezoned as "Multi-Family Special Use" by the Town in order to complete the planned

development. [Compl. ¶19]. A particular parcel of the Property, consisting of 5.5 acres on the north side of Enoe Mountain Road was located adjacent to Defendant-Appellees' Pyrophyllite/Andalusite/Sericite mine located at 231 Piedmont Drive, Hillsborough, NC ["Hillsborough Mine"]. [Compl. ¶ 1, 20].

In the fall of 2013, the Town of Hillsborough, through its planning board, began conducting a series of meetings to consider whether the property to be purchased by Braddock Park could be rezoned and annexed into the Town. [Compl. ¶21]. During the approval process required by the Town of Hillsborough, Defendant-Appellees requested that the Town deny the approval of Braddock Park's proposed subdivision adjacent to their Hillsborough Mine due to the threat of damage to the health, safety, and welfare of future residents of the proposed subdivision due to fly rock and structural damage from the blasting operations at Defendant-Appellees' Hillsborough Mine. [Compl. ¶22].

However, during the ten year period of time following June 7, 2002 (the date that the Department of Environment and Natural Resources issued its initial permit to Defendant-Appellees to operate the Hillsborough Mine), Defendant-Appellees did not report to the Department of Environmental Quality any violations of the ground vibrations limits, did not report any violations of the air blast limits, and did not report any fly rock had occurred beyond the permitted and guarded areas, despite the June 7, 2002 permit requiring such disclosures. [Compl. ¶¶5, 9-11].

In December 2012, Defendant-Appellees submitted a Mining Permit Application for their Hillsborough Mine where they described the precautions they

would use to prevent physical hazard from their blasting to persons or neighboring properties from fly rock or excessive air blasts and/or ground vibrations. [Compl. ¶12]. On September 11, 2013, the Department of Environment and Natural Resources issued another permit for Defendant-Appellees' Hillsborough Mine. [Compl. ¶13]. The September 11, 2013 permit mandated strict blasting conditions to prevent fly rock, excessive air blasts, and/or ground vibrations as well as requiring that Defendant-Appellees monitor each blast with a seismograph and maintain records of peek particle velocity, air pressure, and vibration frequency levels. [Compl. ¶¶14-15]. Defendant-Appellees did not report any violations of the ground vibration limits, air blast limits, or fly rock permitted areas to the Department of Environment and Natural Resources. [Compl. ¶26].

Furthermore, during the course of the meetings with the Town of Hillsborough, Defendant-Appellees admitted that they could, in fact, conduct their mining excavations without endangering the residents of the proposed Braddock Park subdivision. [Compl. ¶27]. Also during the course of the meetings with the Town of Hillsborough, Defendant-Appellees "maliciously, intentionally and without justification" misrepresented that the residents of the Braddock Park subdivision would be endangered from fly rock, excessive air blasts, and/or excessive ground vibrations from the blasting operations at the Hillsborough Mine. [Compl. ¶23-25].

Despite Defendant-Appellees' objections, the Town of Hillsborough approved Braddock Park's request that the subdivision project be annexed by the Town and issued a "special use" permit. [Compl. ¶28]. However, on October 9, 2014, citing

dangers of foundation damage to homes, fly rock from blasting, and nitrogen dangers to future inhabitants of their project based on the misrepresentations Defendant-Appellees made to the Town during the meetings, Braddock Park exercised its right to modify the Purchase and Sale Agreement with Plaintiff and terminated its contract to purchase the 5.5 acres closest to Defendant-Appellees' Hillsborough Mine. [Compl. ¶33]. Defendant-Appellees' interference with Plaintiff's contract with Braddock Park was without justification as they had no evidence that the blasting operations from the Hillsborough Mine had endangered persons or neighboring properties from fly rock and/or excessive air blasts/ground vibrations. [Compl. ¶36]. Furthermore, Defendant-Appellees' interference with Plaintiff's pending contract with Braddock Park was without justification because Defendant-Appellees' motives were not reasonably related to the protection of a legitimate business interest. [Compl. ¶37-38]. Rather, Defendant-Appellees made the alleged malicious misrepresentations in an attempt to purchase the 5.5 acres from Plaintiffs at a discounted price. [Compl. ¶39-40].

RESPONSE

Petitioners are trying to make an end run around the high standards this Court requires for granting a Petition for Discretionary Review. Rather than address the decision of the Court of Appeals as part of their Petition for Discretionary Review, they attempt to raise a constitutional First Amendment issue. Rule 14(b)(2) of the Rules of Appellate Procedure requires a "substantial constitutional question" which is not yet present in this case. There has been no discovery, evidence presented, or

facts upon which Defendants can rely to raise any such question. Any determination by the Supreme Court based simply on the allegations of the Complaint without relying on facts, evidence, and surrounding circumstances would be merely advisory. Therefore, Defendants have failed to raise a "substantial constitutional question" with the proper facts, circumstances and context to allow the Supreme Court to make a determination. Plaintiffs believe that such an issue cannot yet exist without a trail and evidence for the court to consider. The complete lack of factual context removes the ability for this Court to competently rule on any constitutional issue presented by Plaintiff's Complaint.

The Court of Appeals, in a 25 page opinion, found that the *Noerr-Pennington* Doctrine does not apply and that Appellants had sufficiently pled facts to state a claim for relief. The Noerr-Pennington doctrine protects a private party that uses *proper* means in an attempt to influence a public official from antitrust liability, even if the private party has a selfish motive, purpose, or intent. *City of Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 398 (1991); *Eastern Railroad Presidents Conference v. Noerr Motor Freight,* 365 U.S. 127, 140 (1961); *United Mine Workers v. Pennington,* 381 U.S. 657, 670 (1965). The First Amendment provides the basis for immunity from antitrust laws, even if the request of the government or private entity is anticompetitive in nature.

However, the Noerr-Pennington doctrine does not grant immunity to individuals or entities for all statements made in an attempt to influence a public official. The Court in *State ex rel. Cooper v. McClure* discussed which behaviors by

private persons constitute petitioning and, specifically, dealt with whether protected petitioning, as defined under Noerr-Pennington, occurs when an entity submits false data to a public agency. 2004 NCBC 8, ¶¶22-25, 2004 NCBC LEXIS 7, *12-14 (03-CVS-005617, Wake Super. Ct. Dec. 14, 2004). The Court in *McClure* looked at whether the Noerr-Pennington doctrine classifies the allegedly falsified bids and rates surveys submitted by defendants as "protected petitioning" and therefore immune from antitrust liability, or constituted something other than "protected petitioning" and therefore would be subject to liability. Ultimately, the Court in *McClure* found that the petitioning activities did not qualify for immunity because the anticompetitive restraint flows from the private actions of the defendants, the submissions of inflated surveys and bids were not the action of a governmental agency, but that of a private group seeking an economic gain, and the context of the petitioning activity was undertaken only for financial gain. *Id.* at *21.

In the present case, Plaintiffs have alleged that the activities and information submitted to the Town of Hillsborough were false, and, per *McClure*, these activities fall outside of the protections afforded by the Noerr-Pennington Doctrine. While the simple act of petitioning the government and asking for restrictive results is not actionable, if improper means are used, then that can create a cause of action which is not subject to the Noerr-Pennington protections. The Court of Appeals agreed. Specifically, Plaintiff alleges that:

> 22. During the approval process required by the Town of Hillsborough to approve the Braddock Park project, The Defendants requested that the Town deny the approval of "Enoe Mountain Village,"

> which was proposed on the parcel of land adjacent to their Hillsborough Mine, *due to the potential threat of damage to the health safety and welfare of future residents* of Enoe Mountain Village due to fly rock and structural damages from the operations of the Defendants Mine.
>
> 23. During the course of the meetings before the Town of Hillsborough the Defendants maliciously, intentionally and without justification *misrepresented* that the Enoe Mountain Village residents would be endangered from fly rock from the blasting operations at the Defendants' Hillsborough Mine.
>
> 24. During the course of the meetings before the Town of Hillsborough, the Defendants maliciously, intentionally and without justification *misrepresented* that the Enoe Mountain Village residents would be endangered from excessive air blasts from the blasting operations at the Defendants' Hillsborough Mine.
>
> 25. During the course of the meetings before the Town of Hillsborough, the Defendants maliciously, intentionally and without justification *misrepresented* that the Enoe Mountain Village residents would be endangered from excessive ground vibrations from the blasting operations at the Defendants' Hillsborough Mine.

[Compl. ¶¶22-25]. Therefore, the Court of Appeals found that Plaintiff had stated a claim upon which relief can be granted.

For the reasons previously stated, there is no "substantial constitutional question" raised by Defendants and this issue is not ripe for consideration by the Supreme Court. For that reason, as well as others stated above and in the well-reasoned Court of Appeals' decision, the Supreme Court should not take up the purported constitutional question and should deny Defendants' Petition for Discretionary Review.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellee respectfully requests that Supreme Court refuse to hear Defendants' appeal and/or Petition for Discretionary Review and that the Court of Appeals decision reversing the trial court's Order granting Defendant-Appellees' Motion to Dismiss be upheld.

This the 3rd day of September, 2019.

/s/ J. Whitfield Gibson
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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Appellant's Brief conforms to the limitations as set forth in the North Carolina Rules of Appellate Procedure, Rule 28(j).

This the 3rd day of September, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Response to Petition for Discretionary Review** was duly served upon the following by first class mail, postage prepaid, addressed as follows:

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This the 3rd day of September, 2019.

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