

IN THE COURT OF COMMON PLEAS OF LUZERNE COUNTY

KIP MCCABE, SR., ET AL.,  
Plaintiffs  
vs.  
PAUL DAGOSTIN, ET AL.,  
Defendants

NO. 2014-06202  
CIVIL ACTION

JANE BURLINGAME, ET AL.,  
Plaintiffs  
vs.  
PAUL DAGOSTIN, ET AL.,  
Defendants

NO. 2015-02092  
CIVIL ACTION

JEFFREY BEACHELL, ET AL.,  
Plaintiffs  
vs.  
PAUL DAGOSTIN, ET AL.,  
Defendants

NO. 2015-04023  
CIVIL ACTION

FILED  
PROthonARY  
LUZERNE COUNTY  
2017 APR 13 AM 11:39

ORDER

AND NOW, this 13<sup>th</sup> day of April, 2017, upon consideration of Defendants' Motions for Summary Judgment, Plaintiffs' Responses thereto, Briefs submitted by the parties, and oral argument before this Court, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. For the reasons set forth in the attached OPINION, the Motions are GRANTED.

2. The Clerk of Judicial Services and Records (Prothonotary) is directed to enter this Order and Opinion of record and to mail a copy of the Order and Opinion to all counsel (as per attached list) of record pursuant to Pa. R.C.P. No. 236.

By the Court:

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J.

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OPINION

Presently before the Court are the Motions for Summary Judgment filed by each of the Defendants in the three above-captioned cases.

Following the filing of the three separate actions and multiple subsequent pre-trial filings, including preliminary objections, Plaintiffs' claims were narrowed down to causes of action sounding in private nuisance and, accordingly, the cases were consolidated for disposition. The parties have all filed copious

pleadings and briefs, oral argument was held before this Court, and the Summary Judgment Motions are now ripe for disposition.

By way of background, the Dagostin Defendants are the owners and operators of "Will-O-Bett Farm" located in Salem Township, Luzerne County. The farm houses a pig finishing barn and is considered a "Concentrated Animal Feeding Operation" (hereinafter a "CAFO"). Defendant Country View Family Farms, LLC, owns the pigs which are raised at the CAFO. Defendant Zehner is a farmer who "imports" liquid swine manure from the CAFO and uses it to provide nutrients for crops that he grows on the Will-O-Bett Farm and in the vicinity. Plaintiffs are landowners and/or residents of properties which abut and/or are located near the CAFO.

In their Complaints, the Plaintiffs, collectively, assert that the activity of the CAFO, and most particularly the spreading of its resultant liquid swine manure on the fields surrounding it, which are owned by the Dagostins and farmed in part by Zehner, create conditions which amount to an actionable private nuisance.

In their Summary Judgment Motions, Defendants assert that they are protected from this type of nuisance action under the provisions of 3 P.S. §§951-957, commonly known as the Pennsylvania Right to Farm Act (RTFA).

Upon consideration of the legislative policy of the RTFA, as set forth in §951, a review of the language of §954(a) of the RTFA, which operates as a statute of repose, and an analysis of the few appellate court cases which have interpreted the RTFA, the Court agrees with the Defendants.

Section 951 of the RTFA reads as follows:

§951. Legislative policy

It is the declared policy of the Commonwealth to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits and ordinances. As a result, agricultural operations are sometimes forced to cease operations. Many others are discouraged from making investments in farm improvements. It is the purpose of this act to reduce the loss to the Commonwealth of its agricultural resources by limiting the circumstances under which agricultural operations may be the subject of nuisance suits and ordinances.

It is clear to the Court that the plain language of this legislative policy is not only designed to protect existing agricultural operations from those situations where plaintiffs “come to the nuisance” but also to *encourage the development and improvement* of agricultural land within the Commonwealth for the production of food and other agricultural products. (emphasis added). See *Horne v. Haladay*, 728 A.2d 954 (Pa. Super. Ct. 1999).

Interestingly, the Court in *Horne*, in finding time-barred a nuisance suit by a neighboring landowner against a poultry operation that housed up to 122,000 laying hens, was interpreting the pre-1998 amendment version of §954(a) of the RTFA. That version of the RTFA read as follows:

§954. Limitation on public nuisances

(a) No nuisance action shall be brought against an agricultural operation which has lawfully been in operation for one year or more prior to the date of bringing such action, where the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation and are normal agricultural operations, or if the physical facilities of such agricultural operations

are substantially expanded or substantially altered and the expanded or substantially altered facility has been in operation for one year or more prior to the date of bringing such action: Provided, however, That nothing herein shall in any way restrict or impede the authority of this State from protecting the public health, safety and welfare or the authority of a municipality to enforce State law.

In the present case, this Court is dealing with the current version of §954(a) of the RTFA which includes the 1998 amendment and reads as follows (added language is italicized):

§954. Limitation on public nuisances

(a) No nuisance action shall be brought against an agricultural operation which has lawfully been in operation for one year or more prior to the date of bringing such action, where the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation and are normal agricultural operations, or if the physical facilities of such agricultural operations are substantially expanded or substantially altered and the expanded or substantially altered facility has *either: (1) been in operation for one year or more prior to the date of bringing such action, or (2) been addressed in a nutrient management plan approved prior to the commencement of such expanded or altered operation pursuant to [3 Pa.C.S.A. §506], and is otherwise in compliance therewith*: Provided, however, That nothing herein shall in any way restrict or impede the authority of this State from protecting the public health, safety and welfare or the authority of a municipality to enforce State law.

As the Pennsylvania Supreme Court has recently held, “§954(a) is a statute of repose; its applicability, as determined by statutory interpretation is a question of law for the courts to decide.” *Gilbert v. Synagro Central, LLC*, 131 A.3d 1, 2 (Pa. 2015). Accordingly, we must interpret §954(a) of the RTFA to determine if it applies so as to bar Plaintiffs from pursuing their nuisance action against Defendants based on the record before the Court. We hold that it does.

In the very recent case of *Branton v. Nicholas Meat, LLC*, 2017 WL 1246698 (Pa. Super. Ct. 2017), the Pennsylvania Superior Court has set forth the following analytical framework:

There are three key requirements for section 954(a) to bar a nuisance action: (1) the agricultural operation against which the action is brought must have lawfully operated for at least a year prior to the filing of the complaint; (2) (a) the conditions or circumstances that are the basis for the complaint must have existed substantially unchanged since the established date of operation, or (b) if the physical facilities have been substantially expanded or altered such facilities must have (i) operated for at least one year prior to the filing of the complaint or (ii) been addressed in a nutrient management plan approved prior to the commencement of such expanded or altered operation; and (3) the conditions or circumstances are normal agricultural operations. *Id.*

In keeping with the express legislative policy of §951 of the RTFA as set forth above, and in accord with the expansive protection provided to agricultural operations by the 1998 amendments to the RTFA, the Court concludes that the “operation” in question is the CAFO. Further, the Court holds that the operation of the CAFO, for purposes of time computation under §954(a), began on January 23, 2013, when the first delivery of pigs to the finishing barn occurred. The first of the Complaints in the three above-captioned cases was filed on May 16, 2014, more than one year from the date when the CAFO’s operations began.

The Court is mindful that Plaintiffs have taken the position that the Court should focus on the CAFO’s activity of spreading the liquid swine manure for purposes of determining the start date for the running of the one-year time period set forth in §954(a) because, as the Plaintiffs characterize it, that activity represents a “substantial change in conditions or circumstances” that form the basis for their Complaints. The Court, however, is of the opinion that to accept the Plaintiffs’ position would render the 1998 amendments to §954(a)



meaningless where, as it is undisputed here, the agricultural operation had, prior to commencement of the operation, an approved nutrient management plan in place that specifically addressed the spreading of the liquid swine manure. Accordingly, we decline to accept Plaintiffs' position and hold that because the CAFO had an approved nutrient management plan in place prior to the commencement of its operations on January 23, 2013, the date on which it began to spread the liquid swine manure is irrelevant for purposes of the time computation under §954(a).

In addition, the Court holds as a matter of law that the operation of the CAFO, and, more specifically, the spreading of the liquid swine manure, are "normal agricultural operations." 3 P.S. §952; *See Gilbert v. Synagro Central, LLC*, 131 A.3d 1 (Pa. 2015); *See also* Exhibit "G" to Defendant Dagostin's Motion for Summary Judgment (Report of Professor Herschel A. Elliot, Ph.D., P.E.).

Finally, all of the competent evidence before the Court indicates that the CAFO has "lawfully" been in operation since it began and that it has likewise been in full compliance with its approved nutrient management plan. *See generally Branton v. Nicholas Meat, LLC*, 2017 WL 1246698 (Pa. Super. Ct. 2017).

Accordingly, and for the reasons set forth above, the Court enters the attached Order.

End of Opinion

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