IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert B. Sklaroff, M.D.,	:	
	:	
Appellant	:	
	:	
v.	:	
	:	
Abington Township, Les Benzak,	:	No. 23 C.D. 2013
John Carlin, Carol T. DiJoseph,	:	Submitted: August 30, 2013
Carol Gillespie, R. Rex Herder, Jr.,	:	
Steven N. Kline, Wayne C. Luker,	:	
William J. Lynott, Peggy Myers,	:	
John J. O'Connor, Michael O'Connor,	:	
Ernie Peacock, James H. Ring,	:	
Lori A. Schreiber, Robert A. Wachter,	:	
Dennis C. Zappone	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE COLINS **FILED: December 30, 2013**

Robert B. Sklaroff, M.D., (Appellant) appeals from the December 5, 2012 order of the Court of Common Pleas of Montgomery County (Trial Court) sustaining the preliminary objections of Abington Township (Township), members of the Township's Board of Commissioners (Board) and the Township solicitor (collectively, Appellees)[1] and dismissing with prejudice the December 6, 2010 Amended Complaint filed by Appellant. We affirm.

[1] The following Commissioners were named as defendants in this action: Les Benzak, John Carlin, Carol T. DiJoseph, Carol Gillespie, Steven N. Kline, Wayne C. Luker, William J. Lynott,
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This action commenced on December 28, 2009, when Appellant filed a Complaint against Appellees (Initial Complaint). (Reproduced Record Vol. 2 (R.R.) at 1a-21a.)[2] In the Initial Complaint, Appellant alleged that Appellees violated the Sunshine Act, 65 Pa. C.S. §§ 701-716, by not allowing Appellant to speak on a matter of public concern at a December 17, 2009 Board meeting. (*Id*.)

On January 15, 2010, Appellees filed preliminary objections seeking dismissal of the Initial Complaint. (Jan. 15, 2010 Preliminary Objections (First POs), R.R. at 22a-32a.) Appellees objected on the basis that the Initial Complaint violated Rule 1028(a)(2) because it contained scandalous and impertinent allegations and because it failed to conform to various other Pennsylvania Rules of Civil Procedure, including Rule 1019(a), Rule 1022 and Rule 1024(a). (First POs ¶¶1-26, R.R. at 22a-27a.)

Appellees also made two objections in the nature of a demurrer under Pennsylvania Rule of Civil Procedure 1028(a)(4). First, Appellees argued that the claims in the Initial Complaint based on alleged violations of Appellant's "Free Speech Rights" and the Robert's Rules of Order were legally insufficient and should be dismissed. (First POs ¶¶50-54, R.R. at 31a-32a.) Second, Appellees objected to the Sunshine Act allegations made against one of the Appellees, R. Rex Herder, Jr., who as Township solicitor, Appellees argued, was not a "member of

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Peggy Myers, John J. O'Connor, Michael O'Connor, Ernie Peacock, James H. Ring, Lori A. Schreiber, Robert A. Wachter and Dennis C. Zappone. R. Rex Herder, Jr., who is counsel of record for the Appellees in this appeal, was named as a defendant in his capacity as Township solicitor.

[2] Appellant filed two reproduced records in this appeal, denominated as Volume 1 and Volume 2. As the complete contents of Volume 1 were reproduced in Volume 2, this Opinion cites only to Volume 2.

any agency," 65 Pa. C.S. § 714, such that he could be liable for a Sunshine Act violation.[3] (First POs ¶¶42-49, R.R. at 29a-31a.)

Appellant responded to the preliminary objections on January 19, 2010. (Jan. 19, 2010 Response to First POs, R.R. at 33a-37a.) As to the Rule 1028(a)(2) objections that the Initial Complaint failed to conform to the Pennsylvania Rules of Civil Procedure and included scandalous and impertinent matters, Appellant stated that he would be amenable to replacing any objectionable material with language preferable to Appellees. (*Id*. ¶¶5-10, R.R. at 34a-35a.)

On November 16, 2010, Judge Kent H. Albright of the Trial Court issued an order sustaining Appellees' preliminary objections in the nature of a demurrer. (Nov. 16, 2010 Order.) Though Appellees had not objected in the nature of a demurrer as to all of the claims against all parties, the Trial Court dismissed the Initial Complaint in its entirety and overruled the remainder of the objections as moot. (*Id*.) The order provided, however, that Appellant would be granted leave to file an amended pleading "to allege and identify therein, in accordance with the applicable Pennsylvania Rules of Civil Procedure, the facts and legal bases necessary to state a viable cause or causes of action against [Appellees]." (*Id*.)

Appellant filed the Amended Complaint on December 6, 2010.[4] (R.R. at 38a-62a.) Appellees filed preliminary objections to the Amended Complaint on

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[3] Appellees also objected on the grounds that the Trial Court lacked subject matter jurisdiction over the Sunshine Act action, Pa. R.C.P. No. 1028(a)(1), and that a prior action was pending before the Trial Court with identical subject matter, Pa. R.C.P. No. 1028(a)(6). (First POs ¶¶27-41, R.R. at 27a-29a.)

[4] Appellant filed two additional amended complaints on January 12, 2011 and January 14, 2011 without leave of the Trial Court. By a May 5, 2011 order, the Trial Court struck these complaints and precluded Appellant from filing any additional amended complaints until the

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December 10, 2010, in which Appellees incorporated all of the preliminary objections to the Initial Complaint because, in Appellees' view, the Amended Complaint did not materially differ from or cure any of the defects of the Initial Complaint. (Dec. 10, 2010 Preliminary Objections (Second POs), R.R. 63a-66a.) In his response to the preliminary objections to the Amended Complaint, Appellant stated that he had made the necessary edits to address Appellee's preliminary objections to the Initial Complaint and he would not object to replacing any additional objectionable statements with preferred language supplied by Appellees. (Dec. 13, 2010 Response to Second POs,¶¶5-6, R.R. at 70a-71a.)

On December 5, 2012, Judge Bernard A. Moore of the Trial Court issued an order sustaining Appellees' preliminary objections and dismissing the Amended Complaint with prejudice. Appellant filed a timely notice of appeal, and Judge Moore issued an opinion on March 1, 2013 explaining the reasons for dismissal. The Trial Court identified numerous violations of the Rules of Civil Procedure, including: (i) lengthy quoting of the Sunshine Act and Township rules; (ii) numerous paragraphs that included multiple material allegations; (iii) immaterial and inappropriate allegations for this type of action; and (iv) the lack of a verification of the factual averments. (Opinion at 2-5.) Accordingly, the Trial Court held that the Amended Complaint failed to comply with Rules 1019(a), 1022 and 1024(a) of the Pennsylvania Rules of Civil Procedure. (Opinion at 2-5.) The Trial Court also concluded that the Amended Complaint was properly dismissed with prejudice as the determination to allow successive amendments is within the Trial Court's discretion. (Opinion at 5-6.) Though Appellant represented himself

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preliminary objections to the December 6, 2010 Amended Complaint were resolved. The May 5, 2011 order striking the additional amended complaints is not before the Court in this appeal.

in this matter, he did so at his own risk and he was not entitled to any special consideration because of his *pro se* status. (Opinion at 5-6.)

On appeal, Appellant argues that the Amended Complaint conforms to the Rules of Civil Procedure and that it therefore should not have been dismissed by the Trial Court.[5] We do not agree.

A complaint may be dismissed on preliminary objections under Rule 1028(a)(2) for failure to conform to the Rules of Civil Procedure. Pa. R.C.P. No. 1028(a)(2). Rule 1019(a) requires that the "material facts on which a cause of action or defense is based shall be stated in concise and summary form." Pa. R.C.P. No. 1019(a). "The purpose of Rule 1019(a) is to require the pleader to disclose the 'material facts' sufficient to enable the adverse party to prepare his case." *Landau v. Western Pennsylvania National Bank,* 445 Pa. 217, 225, 282 A.2d 335, 339 (1971); *see also Commonwealth ex rel. Corbett v. Peoples Benefit Services, Inc.*, 895 A.2d 683, 689 n.10 (Pa. Cmwlth. 2006). In order to comply with Rule 1019(a), a complaint must be clear and legible to allow the defendant to understand the material facts of the complaint and be able to prepare a defense. *Bennett v. Beard*, 919 A.2d 365, 367 (Pa. Cmwlth. 2007). Rule 1022 provides that "[e]very pleading shall be divided into paragraphs numbered consecutively," and "[e]ach paragraph shall contain as far as practicable only one material allegation." Pa. R.C.P. No. 1022. The test of compliance with Rule 1022 is the difficulty or impossibility in preparing an answer to the complaint. *General State Authority v. Sutter Corp.*, 356 A.2d 377, 380 (Pa. Cmwlth. 1976).

[5] When reviewing the decision of a trial court to sustain preliminary objections, our scope of review is limited to determining whether the trial court committed legal error or abused its discretion. *Bell v. Township of Spring Brook*, 30 A.3d 554, 557 n.7 (Pa. Cmwlth. 2011).

The gravamen of Appellant's claims against Appellees appears to be that he was denied his right to speak on a proposed bond issuance at a December 17, 2009 Board meeting in violation of Section 710.1(a) of the Sunshine Act. 65 Pa. C.S. § 710.1(a). Notwithstanding the discrete factual predicate for Appellant's suit, the Amended Complaint is "a rambling and disjointed narrative of [Appellant]'s opinions, theories and surmises, as opposed to material allegations." (Opinion at 2.) The Amended Complaint includes various instances of immaterial allegations (*e.g.*, Am. Compl. ¶¶27, 39, 51, 53, 57, R.R. at 53a, 55a, 57a, 58a, 59a.), multiple allegations within one paragraph (*e.g.*, *id.* ¶¶11, 14, 23, R.R. at 49a, 50a, 52a.), and opinion and conjecture instead of factual allegations. (*E.g.*, *id.* ¶¶14, 28, 29, 34, R.R. at 50a, 53a, 54a.) For example, Paragraph 33 of the Amended Complaint alleges:

> Prior to [the December 17, 2009] meeting, [Appellant] had discussed flood-related concerns dating back to 1996 (as they might affect public health) with numerous individuals, had reviewed the Township's prioritization process as part of its execution of due-diligence responsibilities (noting use of ratings of "1"-"5"), and had thereby noted the existence of more "15-point" projects than would be covered by as little as $3 million of immediate appropriation (due to the risk of flooding, rather than merely a localized, transient, accumulation of water); he had also been told that numerous other projects had been identified by the citizenry but had not been added to this official listing (for unspecified reasons) and that it had been averred by staff that certain high-point projects were life-threatening.

(Am. Compl. ¶33.) These allegations are entirely unrelated to the December 17, 2009 meeting, but instead concern Appellant's own actions and state of mind in the thirteen years prior to the meeting.

Furthermore, many of the allegations in the Amended Complaint do not relate to the December 17, 2009 meeting at all. In particular, the Amended Complaint goes into great detail concerning a Board meeting that took place on July 9, 2009; at this meeting, Appellant alleges, the Board discussed a project to build a new library and Appellant was refused the opportunity to speak on the condemnation of property within the Township for the purpose of building the new library because the Township was involved in pending litigation concerning the condemnation. (Am. Compl. ¶¶13-14, 18-31, 59, 63, R.R. at 50a-54a, 59a-60a.) While Appellant may feel aggrieved by the Board's refusal to allow him to speak about the library project, Appellant does not assert claims based on the Board's conduct at the July 9, 2009 meetings in the Amended Complaint. As Appellant concedes, he previously brought a claim related to the conduct at the July 9, 2009 meeting, but he terminated the lawsuit after he was allowed to speak about the library project at a later meeting. (*Id*. ¶72, R.R. at 62a.) Thus, the allegations relating to the July 9, 2010 meeting are entirely immaterial to Appellant's cause of action. The Amended Complaint also includes allegations related to two additional meetings on January 4 and 15, 2010 at which the library project was discussed. (*Id*. ¶¶55-56, 58, 61, 65, R.R. at 58a-60a.) However, Appellant also does not bring claims relating to those meetings and thus the allegations relating to those meetings are also immaterial to the causes of action asserted by Appellant in the Amended Complaint.[6]

[6] Appellant alleges that the events at the July 9, 2009, January 4, 2010 and January 15, 2010 meetings constituted a "pattern of violations" that allow for the recovery of punitive damages. (Am. Compl. ¶¶17, 71-75, R.R. at 51a, 61a-62a.) The Sunshine Act does not, however, allow for punitive damages, but rather only for the recovery of attorney's fees and costs of litigation where a "court determines that an agency willfully or with wanton disregard violated a provision" of the Sunshine Act. 65 Pa. C.S. § 714.1. At most, the allegations relating to the July 9, 2009, January 4, 2010 and January 15, 2010 meetings would establish multiple violations and not the

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The Amended Complaint also includes lengthy block quotes of the Sunshine Act, the Township's Rules of Procedure for Meetings of the Board of the Commissioners (Township Rules) and the Robert's Rules of Order, which are incorporated into the Township Rules. (*Id*. ¶¶5-7, R.R. at 41a-48a.) The Township Rules and Robert's Rules of Order are irrelevant to the cause of action because Appellant did not allege in the Amended Complaint that these provisions violate the Sunshine Act, *see* 65 Pa. C.S. § 710, and the Sunshine Act does not authorize a separate cause of action premised upon a violation of a local agency's procedural rules. Furthermore, Pennsylvania is a fact pleading jurisdiction, and therefore a complaint need only set forth the claims asserted and the essential facts that support each claim. *McShea v. City of Philadelphia*, 606 Pa. 88, 96, 995 A.2d 334, 339 (2010); *Steiner v. Markel*, 600 Pa. 515, 524-25 n.11, 968 A.2d 1253, 1258-59 n.11 (2009). "[C]ourts are presumed to know the law, and plaintiffs need only plead facts constituting the cause of action, and the courts will take judicial notice of the statute involved." *Heinly v. Commonwealth*, 621 A.2d 1212, 1215 n.5 (Pa. Cmwlth. 1993); *see also Pennsylvania State Troopers Association v. Pennsylvania State Police*, 667 A.2d 38, 41 n.6 (Pa. Cmwlth. 1995). Accordingly, we conclude that the Amended Complaint violates Rule 1019(a) and Rule 1022.

The Trial Court also held that the Amended Complaint was not properly verified as required by Rule 1024. Under Rule 1024, "[e]very pleading containing an averment of fact not appearing of record in the action or containing a denial of fact shall state that the averment or denial is true upon the signer's

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type of bad faith that is required for an award of attorney's fees and costs of litigation. As Appellant did not assert claims related to the events at these meetings in the Amended Complaint, they are therefore not relevant to the alleged Sunshine Act violation at the December 17, 2009 meeting.

personal knowledge or information and belief and shall be verified." Pa. R.C.P. No. 1024(a). To be verified, a pleading must be "supported by oath or affirmation or made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities." Pa. R.C.P. No. 76; *see also* Pa. R.C.P. No. 1024 (explanatory comment). An oath or affirmation in a writing is understood to mean that "the signer of the writing has either sworn or pledged to the truth of the statements in the writing before an official authorized to administer oaths or hear affirmations." *In re 2003 General Election for Office of Prothonotary*, 578 Pa. 3, 16, 849 A.2d 230, 238 (2004). The Amended Complaint includes statements that the Appellant "certif[ies] that the following statements are true and accurate" and "officially avers to the accuracy of all assertions contained in this filing." (Am. Compl. ¶8, R.R. at 40a, 48a.) Such statements, however, do not constitute an "oath" or "affirmation" and the Amended Complaint does not include a statement that the allegations contained therein were made subject to the penalties prescribed in 18 Pa. C.S. § 4904. Thus, we conclude that the Amended Complaint also violates Rule 1024(a).

Accordingly, because the Amended Complaint violates the pleading rules contained in Rules 1019(a) and 1022 and because the Amended Complaint was not properly verified as required under Rule 1024(a), we conclude that the Trial Court did not err in dismissing the Amended Complaint.

Appellant argues that, even if the Trial Court did not err in dismissing the Amended Complaint, it should not have been dismissed with prejudice and Appellant should have been given the opportunity to amend his complaint a second time. The determination of whether to allow the amendment of a pleading is within the discretion of the trial court and the trial court's determination will not be disturbed absent an abuse of that discretion. *Ash v. Continental Insurance Co.*, 593

Pa. 523, 525, 932 A.2d 877, 879 (2007); *Weaver v. Franklin County*, 918 A.2d 194, 203 (Pa. Cmwlth. 2007). Denying the opportunity to amend a pleading is proper where there appears a reasonable probability that allowing the amendment would be futile. *Weaver*, 918 A.2d at 203.

Appellant was provided an opportunity to amend the Initial Complaint after it was dismissed, and the Amended Complaint failed to remedy the pleading deficiencies contained in the first pleading. While the Trial Court dismissed the Initial Complaint in the nature of a demurrer, Appellees objected on the same grounds to both the Initial Complaint and the Amended Complaint (First POs, R.R. at 22a-32a; Second POs, R.R. at 63a-66a), and in the order dismissing the Initial Complaint, the Trial Court directed Appellant that the amended pleading would have to conform to the Rules of Civil Procedure. Furthermore, in his response to the preliminary objections to the Initial Complaint, Appellant acknowledged each of the defects in that pleading and stated that he would fix them if allowed to replead. (Response to First POs ¶¶5-10, R.R. at 34a-35a.) Appellant reiterated in his response to the preliminary objections to the Amended Complaint that he "would not object to supplanting any potentially-objectionable explanatory-terminology with whatever [Appellees] would prefer." (Response to Second POs ¶6, R.R. at 70a-71a.) When Appellant filed an Amended Complaint with the same pleading defects as in the Initial Complaint and failed to include a verification, the Trial Court thus reasonably determined that permitting any further amendments would be futile.[7]

[7] Furthermore, though properly verified in accordance with Rule 1024(a), the two additional amended complaints filed on January 11, 2010 and January 14, 2010 without leave of the Trial Court contain the same pleading deficiencies as the Amended Complaint.

Appellant argues on appeal that if allowed to replead, he would be able to delete the portions of the Amended Complaint determined to be "objectionable." (Appellant Br. at 9; Appellant Reply Br. at 9, 13). However, the critical flaw in the Amended Complaint is not a few superfluous allegations, but rather the wholesale failure by Appellant to set forth a comprehensible factual and legal basis for his claims. "The judicial role must be to adjudicate coherent claims, not to assume the burdens of the advocate or litigant." *Hohensee v. Luger*, 412 A.2d 1111, 1112 (Pa. Cmwlth. 1980). Moreover, though Appellant brought this action *pro se*, he is not excused from complying with the pleading requirements set forth in the Rules of Civil Procedure. *Id.*

Therefore, we conclude that the Trial Court did not commit an abuse of discretion by dismissing the Amended Complaint with prejudice. Accordingly, we affirm the order of the Trial Court sustaining Appellees' preliminary objections and dismissing the Amended Complaint with prejudice.

JAMES GARDNER COLINS, Senior Judge

Judge Covey did not participate in this decision.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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Abington Township, Les Benzak, John Carlin, Carol T. DiJoseph, Carol Gillespie, R. Rex Herder, Jr., Steven N. Kline, Wayne C. Luker, William J. Lynott, Peggy Myers, John J. O'Connor, Michael O'Connor, Ernie Peacock, James H. Ring, Lori A. Schreiber, Robert A. Wachter, Dennis C. Zappone	:	No. 23 C.D. 2013

O R D E R

AND NOW, this 30th day of December, 2013, the December 5, 2012 order of the Montgomery County Court of Common Pleas in the above-captioned case is AFFIRMED.

JAMES GARDNER COLINS, Senior Judge