JONES v. SMITH, C.P. Franklin County Branch, No. 121 November Term, 1975

Trespass - assumpsit - laches - Pa. R.C.P. 1030.

1. Where an action at law involving no equitable rights is instituted within the statutory period of limitations, the equitable defense of laches is unavailable.

Kenneth E. Hankins, Jr., Esq., Attorney for Plaintiffs

Robert E. Graham, Jr., Esq., Attorney for Defendants

OPINION AND ORDER

KELLER, J., June 3, 1976:

This action in trespass and assumpsit was commenced by the filing of a complaint on October 27, 1975, and the complaint was served upon the defendants on the same date. On November 21, 1975, the defendants filed preliminary objections to the complaint. On January 19, 1975, counsel for the parties, by stipulation, disposed of the majority of the defendants' preliminary objections. On February 9, 1976, an order was entered disposing of the remaining objections and granting the plaintiffs twenty (20) days in which to file an amended complaint. On February 12, 1976, the plaintiffs' amended complaint was filed and served upon the defendant and the defendants' answer containing new matter was filed and served on the plaintiffs on March 5, 1976. On March 9, 1976, the plaintiffs filed and served upon the defendants preliminary objections in the nature of a demurrer to the new matter and a motion to strike. The matter came on for argument before the Court en banc on May 6, 1976, for disposition.

The defendants' demurrer is predicated upon the contention that the defendants have asserted in paragraphs 46 and 47 of their new matter the defense of laches which is an equitable defense unavailable in actions at law.

The offending paragraphs allege:

> "46. Any inability of plaintiffs to acquire governmental approval for a new septic system as alleged in paragraphs 15 and 44 of plaintiffs' amended complaint is the result of plaintiffs' undue delay in attempting to remedy such problem as may exist, if any, by self help, through the judicial process or otherwise."

> "47. Plaintiffs are guilty of laches in that they failed to prosecute such claim as they may have or have had within a reasonable time after its alleged discovery in April, 1971, a period of almost five years."

In support of their position the defendants cite *Northeast Borough Appeal*, 191 Pa. Super. 532, 539 (1960), wherein the Superior Court held:

> "Laches is a purely equitable doctrine which cannot be maintained in a court of law, unless redress for a violation of an equitable right is sought under common law forms in a court of law."

Similar language appears in *Pennsylvania Company for Banking and Trusts*, 167 Pa. Super. 637 (1950), *Transbel Investment Co., Inc. vs Scott*, 344 Pa. 544 (1942), *Commonwealth vs City of Philadelphia*, 5 Pa. Commonwealth Ct. 358 (1972), and *Camaron Apartments, Inc. vs Zoning Board of Adjustment of the City of Philadelphia*, 14 Pa. Commonwealth Ct. 571 (1974).

To the contrary, the defendants argue that laches can be asserted as a defense in legal actions as well as equitable ones, and point to Pa. R.C.P. 1030, which provides inter alia: "All affirmative defenses, including but not limited to the defense of . . . laches . . . shall be pleaded in a responsive pleading under the heading 'New Matter.' " We have reviewed the cases cited by the defendants in support of their position and find the decisions either turned on the right of an appellant to raise a defense on appeal after having failed to raise it in the trial court or the impropriety of attempting to raise a defense by preliminary objection where the action involved equitable rights or principle. Therefore, the authorities cited do not support the defendants' position.

In the case at bar the pleadings clearly demonstrate that the plaintiffs initiated their action within the period allowed by the Statute of Limitations. We can find no equitable principles or rights involved in the causes of action alleged. We, therefore, conclude the defense of laches is not available to the defendants and the plaintiffs' demurrer will be sustained.

It is not clear to the Court that paragraph 46, supra, necessarily pleads the defense of laches, but rather might be considered as pleading the failure of the plaintiffs to mitigate damages. Therefore, our sustaining of the demurrer is limited to paragraph 47 and to the asserted defense of laches.

Rather than require the defendants to replead their new matter, eliminating paragraph 47, and to further delay the ultimate resolution of this litigation, paragraph 47 will be ignored by the plaintiffs and no contention under it will be made by the defendants.

Under the motion to strike the plaintiffs contend that paragraphs 45 and 46 constitute a mere traverse not properly pleadable under new matter. Paragraph 45 alleges:

> "45. Plaintiffs have themselves substantially caused any problems that presently exist by connecting the kitchen plumbing facilities, including garbage disposal to the septic system at the rear of plaintiffs' dwelling, thus adding an additional burden to that system, which at the time of conveyance, served only the downstairs bathroom, consisting of a bathtub, toilet and sink."

Pa. R.C.P. 1030 provides inter alia:

> ". . . a party may set forth as new matter any other material facts which are not merely denials of the averments of the preceding pleading."

It is our opinion that paragraph 45 undoubtedly alleges additional facts that could be highly relevant to the issues in the case at bar and are, therefore, properly pleaded.

As previously indicated paragraph 46 may be an effort on the part of the defendants to plead the failure of the plaintiffs to mitigate damages which would be relevant at the trial of the matter, but would not properly constitute new matter. Therefore, the motion to strike paragraph 46 is granted.

In the interest of avoiding further delay, the plaintiffs shall consider paragraph 46 as harmless surplusage and will not be required to answer the same.

ORDER

NOW, this 3rd day of June, 1976, the plaintiffs' demurrer to the defense of laches is sustained, and their motion to strike paragraph 46 is granted. The motion to strike paragraph 45 is denied.

The plaintiffs are granted twenty (20) days from date hereof to file a reply.

Exceptions are granted the parties.

COMMONWEALTH v. FOGAL, C.P. Cr. D. Franklin County Branch, No. 117 of 1976

Appeal from decision of Justice of the Peace in summary case - municipal tax ordinance - civil rules applicable.

1. An action brought for the violation of a municipal tax ordinance is a suit for the recovery of a penalty due the municipality and is civil in nature.

2. Rules of civil procedure are applicable to an action brought for the violation of a municipal tax ordinance.

Rudolf M. Wertime, Esq., Attorney for the Commonwealth

John R. Walker, Esq., District Attorney, also for the Commonwealth, nominally

Roy S. F. Angle, Esq., Attorney for the Defendants

OPINION

LEHMAN, J., Specially Presiding, January 12, 1977:

A two count criminal complaint was lodged before Justice of the Peace Robert E. Eberly on October 30, 1975, by I. Eugene Martin, Income Tax Officer of Greencastle-Antrim School District, against the defendants, Ronald R. Fogal and Margaret Fogal, setting forth in count 1. the failure of the defendants on or before April 16, 1974 to make and file with said Income Tax Officer a final return of earned income tax due said School District for the calendar year 1973 on the form prescribed or approved for said purpose and failing to pay the balance of earned income tax due for the calendar year 1973 and in count 2. the failure of the defendants on or before April 15, 1975 to perform similar acts for the calendar year 1974, all of which were against the peace and dignity of the Commonwealth of Pennsylvania and contrary to the Act of Assembly, or in violation of Section 4 of the Earned Income Tax Resolution of Greencastle-Antrim School District, Franklin County, Pennsylvania enacted May 14, 1969, and requesting that a warrant of arrest or a summons be issued and that the accused be required to answer the charges made by said Income Tax Officer.

A summons was sent to the defendants by certified mail by said Justice of the Peace commanding them to appear for arraignment upon the charges on November 11, 1975.