

declaration by the actor himself, it can only be determined by looking to the conduct and the circumstances surrounding it. *Commonwealth v. O'Searo*, 466 Pa. 224, 352 A.2d 30 (1976) and it is the function of the jury, not the court, to draw inferences and conclusions from the facts in evidence. *DeGregoris v. Stockwell Rubber Co., Inc.*, 235 Pa. Super. 71, 340 A.2d 570 (1975). Inferences of fact are derived wholly and directly from the circumstances of the particular case, by means of the common experiences of mankind and without the aid or the control of any rules of Court; thus, such inferences are to be drawn by the jury, not by the Court. *Philadelphia Trust Safe-Deposit and Ins. Co. v. Philadelphia & E.R. Co.*, 160 Pa. 590, 28 A. 960 (1894).

By his motion to quash the information, the defendant has asked the Court to intervene in a matter that is strictly for the jury; that is to determine from the defendant's actions whether he intended to take and took the child from her mother without the privilege to do so. We believe that if a jury finds the defendant took the child from Pennsylvania for a period in excess of the time allowed, if the intent to take the child was formed at the time the child was picked up, it could be a violation of this statute.³

We hold that we are a Court of competent jurisdiction and that the case should not be dismissed because where different but reasonable conclusions can be drawn from the evidence the issue must be submitted to the jury.

ORDER OF COURT

January 14, 1983, the motion to quash the information is denied.

SMURO V. GSELL, C.P., Franklin County Branch, No. A.D. 1982 - 359

³If the father's visitation period had been long enough so that he could have taken the child to Colorado and then decided not to return her is another matter which we do not address.

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Assumpsit - Realtors Commission - Definition of Negotiate - Time for Payment of Commission

1. Where an exclusive listing contract does not define the word "negotiations" which are pending at the time of the contract's expiration, this lack of definition does not provide grounds for a demurrer.
2. When a written instrument fails to provide a time for performance, the law will imply that it shall be done within a reasonable time.
3. The question of what is a reasonable time is for the jury.

John F. Nelson, Esq., Counsel for Plaintiff

William C. Cramer, Esq., Counsel for Defendant

OPINION AND ORDER

KELLER, J., March 1, 1983:

This action was commenced on November 19, 1982, with the filing of a complaint by plaintiff, Dean M. Smuro, trading and doing business as Realty World-Dean Realty. Proper service was made on defendant, Dorothy A. Gsell, on November 29, 1982. Defendant filed preliminary objections in the nature of a demurrer and motions for a more specific pleading on December 13, 1982. Briefs were exchanged by counsel for the parties and argument was held before this Court on February 3, 1983. Defendants' preliminary objections are now ripe for disposition.

Counsel for the defendant informed this Court at argument that part A of his demurrer is withdrawn as is part B of the motion for a more specific pleading. The issues raised by these two parts of the preliminary objections are deemed abandoned and will not be hereafter considered.

Part B of defendant's demurrer alleges that plaintiff's complaint does not contain "material facts tending to prove that plaintiff negotiated with Mr. and Mrs. Clifford Harry to sell the property owned by Defendant." Plaintiff's claim for a commission is apparently based on the provision of the agreement signed by both parties which provides:

"After the 'EXPIRATION DATE OF AGENCY' or any extension thereof, the Agent's authority shall continue as to negotiations pending at time of such expiration. If subsequent to such expiration and providing the property is not listed exclusively with another Broker at the time it is sold or

exchanged in whole or in part to any legal person with whom the Agent, Owner or any other Broker shall have negotiated during the term of this agency, I agree that the said commission will be paid to you as Agent."

The law is clear that a demurrer may be sustained only when we are convinced that a claim cannot be upheld after viewing all facts and inferences reasonably deducible therefrom as admitted. If there is any doubt, the demurrer must be dismissed. *Diekman v. Wrightstown Township*, Pa. Cmwlth. 453 A. 2d 366 (1982). In this case, we cannot sustain defendant's demurrer, for plaintiff has presented a claim which at this stage of the proceeding appears to have merit. Therefore, Part B of defendant's demurrer is dismissed.

Defendant also raised the issue of plaintiff's failure to plead material facts regarding the negotiations in Part A of her motion for a more specific pleading. Defendant contends that plaintiff has not pled facts sufficient to advise the defendant of what transpired between plaintiff and the ultimate buyers. It is plaintiff's responsibility to plead facts sufficient to show that liability attaches to the defendant and to enable defendant to adequately prepare a defense. *General State Authority v. Lawrie & Green*, 24 Cmwlth. Ct. 407, 356 A. 2d 851 (1976). In this case, plaintiff has failed to allege specifics in his complaint regarding the negotiations that occurred with the Harrys. Such specific facts are material to plaintiff's theory of recovery and are essential to the preparation of a defense. Therefore, Part A of defendant's motion for a more specific pleading is granted.

We note plaintiff's argument that more specific and detailed facts concerning the negotiations can be obtained by defendant through the use of discovery procedures. However, once again, we are compelled to point out that one of the essential functions of pleadings is to make the Court aware of the issues before it. The discovery process is of no avail in fulfilling this purpose. As this Court observed in *College v. Gothie*, 4 Frank. Co. Leg. J. 58 at 61 (1980), and at pp. 4-5 of *Caleco v. Wilson College and Squires Appliances*, filed by this Court on January 10, 1983:

"1. The purpose of fact pleading as it is mandated in Pennsylvania not only is intended to inform the contesting parties of the issues which they will be required to meet at the ultimate trial of the matter, but it is also intended to provide the Court with a trial format establishing the parameters of the issues. The discovery procedures do not serve this second purpose.

"2. The Rules of Civil Procedure are based on the fact

pleading system. It is therefore necessary that the pleadings set forth the facts specifically even though the facts could also be determined by discovery. Thus the fact that discovery procedures are available does not excuse the plaintiff from specifically pleading the material facts on which its cause of action is based.

“Procedure should not be made unnecessarily complicated by requiring the defendant to resort to discovery proceeding to obtain information which the plaintiff could properly plead in his complaint when such information constitutes the basis on which his cause of action is based.” 2 Anderson Pa. Civil Practice Rule 1017.11, page 490.

Defendant alleges in Parts C and D of her demurrer that the contract between the parties is unenforceable since it fails to (1) define the term “negotiable,” (2) set the price to be paid, and (3) define a time period during which plaintiff would be entitled to receive a commission. While the contract does not contain a definition of the term “negotiate,” this alone does not provide grounds for sustaining a demurrer. As pointed out by counsel for plaintiff at argument, there is no indication in the contract that the word is to be given any other connotation than its common, everyday meaning. A standard dictionary definition will suffice in determining the meaning of “negotiate” as used in the complaint. However, as noted above, more specifics are needed to adequately inform the defendant of what took place between plaintiff and the Harrys.

The commission to be paid plaintiff pursuant to sale to any party with whom he negotiated is specified in the agreement as “Minimum Commission” calculated upon agreed sale price six percent (6%). We find nothing vague or complicated in the language of the exhibit. The demurrer is without merit and will be dismissed.

Part D of the demurrer relates to the agreement’s failure to set forth a time period during which a commission would potentially be owing plaintiff. Pennsylvania courts have consistently held that when a written instrument fails to provide a time for performance, the law will imply that it shall be done within a reasonable time. *Field v. Golden Triangle Broadcasting, Inc.*, 451 Pa. 410, 305 A. 2d 689 (1973). In a similar case also involving a claim for a broker’s commission, Judge Wissler of Lancaster County held that since the contract was silent as to the time within which it was to be performed, a reasonable time would be implied. Furthermore, what is a reasonable time is a question for the jury to determine. *Twitmire v. Glick*, 58 Lanc. L. Rev. 279 (1962). At

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page 282, Judge Wissler held:

“ . . . whether it was done within a reasonable time and what constitutes a reasonable time is a question of fact to be determined from the evidence. Details of evidence are not required to be pleaded; material facts are sufficient.”

Part D of defendant's demurrer is dismissed.

The defendant's last demurrer is in the form of a general demurrer. Pa. R.C.P. 1028(a) requires a party to specifically state the grounds relied upon in preliminary objections. In *Shannon v. Shearer*, 2 Frank. Co. L.J. 211 at 212 (1979), the defendant demurred to plaintiff's complaint on the ground that plaintiff had failed “to state a claim upon which relief can be granted.” We found such an objection to be a general demurrer prohibited by Pa. R.C.P. 1028(1) and it was dismissed. Accordingly, Part E of defendant's demurrer is dismissed.

We note that defendant's counsel addressed two issues in his exhaustive brief which were not raised in the preliminary objections. The merits of these contentions will not be considered since the matters are not properly before us by way of preliminary objections. *Commonwealth of Pennsylvania to Use of Morefield Communications, Inc. v. American Casualty Co.*, 26 Cumb. L.J. 261 (1976).

ORDER OF COURT

NOW, this 1st day of March, 1983, defendant's preliminary objection in the nature of Demurrer B and motion for a more specific pleading A are sustained. All other preliminary objections are denied.

The plaintiff is granted twenty (20) days from date hereof to file an amended complaint.

Exceptions are granted plaintiff and defendant.

BEAVER V. JONES, C.P. Franklin County Branch, A.D. 1982 - 185

Ejectment - Defendants Mistake - Reasonable Attorney's Fees - Boundary Dispute

1. 42 Pa. C.S.A. Sec. 2503 (9) permits the awarding of counsel fees for any participant who, because of the conduct of another party in commencing a matter or otherwise was arbitrary, vexatious or acted in bad faith.

2. Counsel fees maybe awarded against a defendant who meets the criteria of the act, as well as a plaintiff.

3. Regardless of where a deed places a boundary, it is the intention of the parties that must govern when the issue is where the boundary line should be.

Philip S. Cosentino, Esquire, Attorney for Plaintiffs

Robert P. Shoemaker, Esquire, Attorney for Defendants

OPINION AND ORDER

EPPINGER, P.J., January 4, 1983:

In this ejectment action, John and Susan Beaver, plaintiffs, are suing to require O. C. and Julia Jones, the defendant, to vacate a section of land which the Beavers say they erroneously deeded to the defendants. Plaintiffs attribute the erroneous conveyance to a mistake made by the surveyor who inadvertently inverted a distance. The draft prepared June 27, 1972 reflected the error and by a deed dated September 26, 1972 plaintiffs conveyed the parcel to defendants.

In 1974 the surveyor caught the mistake and informed Mr. and Mrs. Jones, but not the Beavers. On November 5, 1981, according to the complaint, while both parties treated the correct line as the boundary, the defendants erected a fence along the incorrect one. Knowing that the deed line is wrong, the Jones continue to possess the disputed strip and refuse to vacate it.

In a second count of the complaint, the Beavers ask that Mr. and Mrs. Jones be required to pay their reasonable attorney's fees and expenses, claiming that their possession of the land is the result of a mistake and their refusal to surrender it is vexatious, arbitrary and capricious.

Mr. and Mrs. Jones filed preliminary objections, including motions to strike and for a more specific pleading. As to these two, the plaintiffs agree to file an amended complaint complying with Pa. R.C.P. 1054(b) and Pa. R.C.P. 1019(a). The only matter