

LEVIN, ET VX. V. NITTERHOUSE, ET AL., C.P. Franklin County Branch, NO. A.D. 1988-349

*Judgment on the Pleadings - Statute of Limitations Latent Defects*

1. Judgment may be entered on the pleadings only in the clearest of cases, when trial would be a fruitless exercise.
2. In matters involving latent defects in construction, the statute of limitations will not start to run until the injured party becomes aware, or by the exercise of reasonable diligence should have become aware of the defect.
3. Whether the statute has run is usually a question of law but where the issue involves a factual determination, it is for the jury.

*John N. Keller, Esq., Counsel for Plaintiffs*

*George B. Faller, Jr., Esq., Counsel for Defendants, Nitterhouse*

*Kendra D. Feldman, Esq., Counsel for Defendants, Coldwell Banker, et al.*

*George E. Wenger, Jr., Esq., Counsel for Defendants, Bonded Applicators*

OPINION AND ORDER

WALKER, J., January 18, 1990

STATEMENT OF FACTS

Plaintiffs, Mr. and Mrs. Levin, "Levins", filed a complaint on February 2, 1989 alleging that the defendants provided them with false information concerning the condition of the roof, basement and swimming pool of a house they were looking at and subsequently purchased. An amended complaint was filed on May 26, 1989 after this court sustained preliminary objections which sought a more specific pleading.

On March 23, 1989, defendants, Mr. and Mrs. Nitterhouse, "Nitterhouses" filed a praecipe to join Bonded Applicators, Inc. as an additional defendant. A complaint was filed against Bonded Applicators, Inc. by the Nitterhouses on September 21, 1989. An answer and new matter has been filed, and the Nitterhouses have replied to the new matter. On November 27, 1989, Bonded Appli-

cators, Inc. filed a motion for judgment on the pleadings. This issue was briefed and was argued before the court on January 4, 1990. The matter is now ripe for determination.

DISCUSSION

Pursuant to Pennsylvania Rule of Civil Procedure 1034:

**Rule 1034. Motion for Judgment on the pleadings**

(a) after the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings.

(b) The court shall enter such judgment or order as shall be proper on the pleadings.

In considering a motion for judgment on the pleadings, the court is guided by the following standard:

Judgment may be entered on the pleadings only in the clearest of cases, when trial would be a fruitless exercise . . . . When considering a motion for judgment on the pleadings a court must limit its review of the facts to those appearing in the pleadings themselves.

*Puleo v. Broad Street Hospital*, 267 Pa. Super. 581, 584, 407 A.2d 394 (1979) (citations omitted).

Moreover, in passing on a motion for judgment on the pleadings, a court has the "obligation to consider the pleadings and the inferences therefrom in the light most favorable to the [nonmoving party]."

*Thomas Merton Center v. Rockwell International Corporation*, 280 Pa. Super. 213, 216, 421 A.2d 688 (1980) (citing *Karns v. Tony Vitale Fireworks Corp.*, 436 Pa. 181, 183, 259 A.2d 687 (1969)).

The pertinent facts in the case at bar regard a defective roof. The roof was constructed by additional defendant, Bonded Applicators, Inc., in 1978. Plaintiffs, the Levins, bought the house from the defendants, the Nitterhouses, on April 14, 1987. From late 1987 until the middle of 1988, plaintiffs experienced problems with the roof leaking. In July 1988, the plaintiffs contracted Kelly Roofing to replace the defective roof. After the shingles were removed, several

defects relating back to the original construction of the roof were discovered.

The plaintiffs filed suit against the Nitterhouses et al. alleging, *inter alia*, misrepresentation of the condition of the roof. The Nitterhouses filed a praecipe to join Bonded Applicators, Inc. on March 23, 1989. Bonded Applicators, Inc. raised the affirmative defense that the Nitterhouses' cause of action is barred by the applicable statute of limitations. Based upon this affirmative defense, Bonded Applicators, Inc. seeks judgment on the pleadings.

The Nitterhouses claim that the problems with the roof were a latent defect and that the statute didn't begin to run until the defects were discovered in July of 1988. The Nitterhouses contend that while a latent defect was not specifically pled, the additional defendants were put on notice by the averment in their complaint that the defects were not discovered until 1988. The Nitterhouses contend that the four (4) year statute of limitations contained in 42 Pa.C.S.A. §5525(i) controls, but is tolled by virtue of the fact that the latent defects were not discovered until 1988. In the alternative, the Nitterhouses seek leave to amend their complaint to specifically allege a latent defect.

Preliminarily, the court notes that the twelve (12) year statute of limitations contained in 42 Pa.C.S.A. §5536 controls for construction suits. As outlined in *A.J. Aberman, Inc. v. Funk Building Corporation*, 278 Pa. Super. 385, 420 A.2d 594 (1980), this twelve year statute is an outside limitation only; this section is not intended to extend any other applicable statute of limitations, but is intended as a maximum limit within which to commence an action based on a construction project. In the case at bar, the four (4) year statute of limitations pursuant to 42 Pa.C.S.A. §5525(i) controls the breach of contract cause of action.

Since suit was commenced within twelve (12) years of the construction of the roof, the Nitterhouses cause of action is not barred by 42 Pa.C.S.A. §5536. The issue for the court to decide is when did the applicable four (4) year statute of limitations begin to run. Bonded Applicators, Inc. contend that the statute began to run when the roof construction was finished in 1978, while the Nitterhouses contend that the statute began to run in July of 1988 when the defects were discovered.

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In matters involving latent defects in construction, the law in Pennsylvania states that:

the statute of limitations will not start to run until the injured party becomes aware, or by the exercise of reasonable diligence should have become aware of the defect.

*A.J. Aberman, Inc., supra.* at 396 (citing *Schaffer v. Larzelere*, 410 Pa. 402, 189 A.2d 267 (1963)). The court in *A.J. Aberman, Inc.*, further states that:

Whether the statute has run on a claim is usually a question of law for the judge, but where, as here, the issue involves a factual determination . . . the determination is for the jury.

*A.J. Aberman, Inc., supra.* at 397 (citations omitted).

In the case at bar, the issue of whether or not the Nitterhouses should have become aware of the defects in the roof by the exercise of reasonable diligence is an issue to be determined by the jury.

As stated in *Schaffer*:

Mere mistake, misunderstanding or lack of knowledge is not sufficient to toll the running of the statute . . . If, however, through fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry, the defendant is estopped from invoking the bar of the limitation of the action . . . Likewise, if the existence of the injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the prescribed statutory period, the limitation does not begin to run until discovery of the injury is reasonably possible.

*Schaffer, supra.* at 405-406 (citations omitted). The court finds that the jury should determine whether or not the Nitterhouses should have been aware of the defects in the roof prior to July of 1988.

While it is true that:

A party may be deemed to have waived all defenses which he does not raise in the pleadings.

*Pugh v. Bankers Mutual Insurance Comapny*, 206 Pa. Super. 136, 143, 211 A.2d 135 (1965) (citations omitted), it is also true that:

while the right to amend pleadings is ordinarily a matter resting in the sound discretion of the trial court, amendments should be allowed with great liberality at any stage of the case, unless, of course, they violate the law or prejudice the rights of the opposing party.

*Puleo, supra.* at 585 (citations omitted).

In the case at bar, the court finds that Bonded Applicators, Inc. will not be prejudiced by the court allowing the Nitterhouses to amend their complaint to specifically aver the existence of a latent defect. The amendment will not result in a new cause of action, but merely the correction of a defect in the pleadings.

Based on the above, the court finds that a four (4) year statute of limitations applies to his cause of action pursuant to 42 Pa.C.S.A. § 5525(i). The court further finds that the Nitterhouses shall be granted leave to amend their complaint to specifically allege the existence of a latent defect. The additional defendant's motion for judgment on the pleadings is hereby denied.

#### ORDER OF COURT

January 18, 1990, the court finds that a four (4) year statute of limitations applies to this cause of action pursuant to 42 Pa.C.S.A. §5525(i); the Nitterhouses are hereby granted leave to amend their complaint to specifically allege the existence of a latent defect; and the additional defendant's motion for judgment on the pleadings is denied.

ELHAJJ V. ELHAJJ, C.P. Franklin County Branch, No. F.R. 1986-716

#### *Divorce - Marital Property - Pension Valuation*

1. Even a non-vested or an unmaturred pension plan can be marital property and subject to division.
2. In calculating a pension plan's value, life expectancy must be calculated from the age at separation and not from when the beneficiary can retire without penalty.
3. When a pension plan allows for retirement at age 55 without penalty, an employee's normal retirement age may differ from the population at large.
4. Life insurance mortality tables are generally not appropriate in valuing pensions.
5. Tax ramifications must be considered when valuing a pension plan.

*Carol Van Horn, Esq.*, Attorney for Plaintiff  
*William C. Cramer, Esq.*, Attorney for Defendant

#### OPINION AND ORDER

KAYE, J., January 17, 1990:

#### OPINION

This action in divorce and equitable distribution is before the Court on exceptions and objections filed by both parties to the findings and division of the marital property by the master. We remand to the master for revaluation of the husband's pension.

#### PROCEDURAL BACKGROUND

On June 7, 1988, Lorraine A. Elhadj ("Wife"), plaintiff, filed an action in divorce against William J. Elhadj, Jr. ("Husband"), defendant. In the complaint, the wife requested equitable distribution of the couple's marital property.