BYERS v. LAYE, C.P. Franklin County Branch, A.D. 1984 - 44

Sale of Real Estate - Downpayment - Request for Admissions - Timely Answer - Pa. R.C.P. 4014(b)

1. Service of all legal papers except writs and pleadings is effected by depositing a properly addressed postage prepaid envelop containing such papers in a receptacle provided by the U.S. Postal Service for the receipt of U.S. mail.

2. Where defendant files his answer to a request for admissions on the 31st day after plaintiff's mailing of the same, defendant is deemed to admit the plaintiff's request.

3. Where a buyer does not deposit all monies into escrow required by an agreement of sale, seller may seek liquidated damages of the full sum and not just the amount actually deposited.

Courtney J. Graham, Esquire, Counsel for Plaintiff

Forest N. Myers, Esquire, Counsel for Defendant

OPINION AND ORDER

KELLER, J., October 5, 1984:

This action in assumpsit was commenced by the filing of a complaint on February 23, 1984 and service upon the defendant by the Sheriff of Franklin County on February 24, 1984. The defendant filed an "Answer and New Matter Joinder of Additional Defendant" on April 6, 1984. The plaintiff's reply to the new matter was filed on May 24, 1984. In this case the plaintiff alleges that she and the defendant entered into a written agreement under the terms of which he would purchase her real estate in St. Thomas Township, Franklin County, Penna. for the sum of $105,000. A copy of the agreement is attached to the plaintiff's complaint and marked "Exhibit A" and provides inter alia that the defendant pay $1,000 on account of the contract price at the time of the execution of the agreement and under Special Clauses provides:

> "Condition #4: Upon settlement (partial) from insurance company, additional $10,000.00 will be deposited in escrow account with Coldwell Banker/Feldman, Inc., this money will be used toward settlement cost."

The agreement inter alia provided that settlement would be made on or before December 15, 1983.

The plaintiff alleged in her complaint that prior to December 15, 1983 the defendant received a partial settlement from an insurance company in excess of $10,000; did not pay the sum of $10,000 into escrow as provided for in the agreement; that the plaintiff was ready, willing and able to make settlement pursuant to the agreement; and on or about January 19, 1984, elected to seek liquidated damages for defendant's breach of the agreement. Plaintiff also alleged that the liquidated damages totalled $11,000 consisting of the $1,000 paid initially plus $10,000 required by the agreement to be paid into escrow.

The defendant's answer and new matter alleged inter alia:

(a) The admission that he had received a partial settlement from an insurance company in excess of $10,000.

(b) Admitted he had never paid $10,000 into escrow pursuant to the agreement.

(c) Neither admitted or denied that the plaintiff was ready, willing and able to settle and that on or about January 19, 1984, plaintiff elected to seek liquidated damages.

(d) Denied that the liquidated damages were in the total amount of $11,000 and to the contrary were limited to $1,000.

(e) That the defendant had sold her house to a third party for $105,000.

(f) That the plaintiff waived her right to the $10,000 as additional damages by failure to insist upon payment when the defendant received the partial payment from the insurance proceeds.

The plaintiff admitted in her reply to new matter that the house had been sold as alleged to a third party, and denied the waiver alleged by the defendant and to the contrary averred he had been requested on or before November 2, 1983, to deposit the sum of $10,000 as per the agreement.

On June 21, 1984, counsel for the plaintiff served a request for admissions under Pa. R.C.P. 4014 on the defendant by mailing the same to defendant's attorney of record, and filing a copy of the

request together with his certificate of service in the office of the Prothonotary of Franklin County on the same date. The answer to plaintiff's request for admissions dated July 24, 1984, was filed in the office of the Prothonotary on July 26, 1984. No certificate of service of the answer upon the plaintiff or plaintiff's counsel was filed of record. The plaintiff's request together with the answers of the defendant are:

REQUEST 1

By letter to your attorney from Courtney J. Graham, dated December 6, 1983, the plaintiff informed you that she was ready, willing and able to tender a good and sufficient warranty deed on or before December 15, 1983, for the sale of her property to you.

ANSWER 1

Admitted.

REQUEST 2

The $10,000.00 you were to pay into escrow with Coldwell Banker/Feldman Inc., pursuant to Paragraph 5, Condition 4, of the sales agreement dated August 5, 1983, between you and the plaintiff, was to be applied to the purchase price therein upon settlement thereon.

ANSWER 2

It is admitted that the purchaser, James L. Laye, was required to pay an additional $10,000.00 into escrow with Coldwell Banker/Feldman, Inc., upon parcel (sic) settlement from his insurance company. It is denied that the additional sum was to be applied to the purchase price pursuant to paragraph 5, condition 4. On the contrary, the additional sum was to be used toward settlement costs.

REQUEST 3

By letter to your attorney from Courtney J. Graham, dated January 19, 1984, the plaintiff informed you that she elected to pursue her remedy for liquidated damages as set forth in Paragraph 16(c)(3) of the aforesaid sales agreement.

ANSWER 3

Admitted.

REQUEST 4

You did not tender the purchase price on or before December 15, 1983, or any time thereafter, as required by the said sales agreement.

ANSWER 4

Admitted.

On July 31, 1984, counsel for the plaintiff filed her motion for summary judgment and in support of the motion averred:

1. Plaintiff states a valid cause of action in her complaint.

2. Defendant's answer to the complaint admits all the material facts alleged in the complaint either by direct admission or by failing to properly deny the same.

3. Additional facts in support of plaintiff's claim have been established by the defendant's failure to timely reply to plaintiff's request for admissions.

In our judgment the defendant's answer and new matter together with his specific admissions to plaintiff's Requests Nos. 1, 3 and 4 make out all of the relevant and material facts in plaintiff's case other than the issue whether the defendant was required to deposit the additional $10,000 in the escrow account of the realtor for application to "settlement costs" as specified in the agreement or to purchase price as contended for by the plaintiff. The plaintiff argues that the defendant's answer was dated July 24, 1984 or 31 days after the plaintiff's request for admissions was mailed to counsel for the defendant and that answer was not filed until July 26, 1984 or 33 days after said mailing. Consequently, the Court must treat Request 2 as being admitted because Pa. R.C.P. 4014(b) provides inter alia:

. . . the matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the

party requesting the admission a sworn answer or an objection addressed to the matter, signed by the party or by his attorney: . . .

The defendant contends that the 30-day period prescribed by Pa. R.C.P. 4014(b) does not commence to run until a request for admissions has been received by the addressee. Since counsel for the plaintiff's certificate of service only indicates the date that the request for admissions was mailed to counsel for the defendant, that is legally insufficient to establish the date of service. To the contrary, counsel for the plaintiff notes that Pa. R.C.P. 233 provides inter alia:

> (a) All legal papers except writs and pleadings to be served upon a party under any Rule of Civil Procedure including but not limited to motions, petitions, answers thereto, rules, orders, notices, interrogatories and answers thereto, shall be served by . . .mailing a copy to him at the address of the party or his attorney of record endorsed on an appearance or prior pleading of the party . . .

Counsel for the plaintiff concedes that he has found no case law directly on point on the issue but also observes:

1. Pa. R.C.P. 1027 provides that pleadings other than complaints shall forthwith be served on every other party "by . . . mailing a copy to him at the address endorsed on an appearance or prior pleading of the party . . ."

2. In *Barsky, Inc. v. Wolverton,* 18 Bucks Co. L.Rep. 187 (1968), that court held "The rule (1027) does not require proof of actual receipt of the notice."

3. Federal Rule of Civil Procedure No. 5(b) provides "Service by mail is complete upon mailing."

4. Pa. R.A.P. 121(c) provides inter alia "Service by mail is complete on mailing."

The defendant has cited *Franklin Interiors, Inc. v. Browns Lane, Inc.,* Pa. Super. , 323 A. 2d 226 (1974) as authority for his position that the thirty-day period commences with the receipt of the request for admissions and not the date of mailing. However, an examination of the case discloses that the plaintiff mailed an amended complaint to the office of defendant's attorney, and on

Clifford Arthur Smith, executors of the estate of Edna B. Smith, late of Montgomery Township, Franklin County, Pennsylvania, deceased.

SNYDER First and final account, statement of proposed distribution and notice to the creditors of Lucy Jane Snyder, executrix of the estate of J. Frank Snyder, late of Montgomery Township, Franklin County, Pennsylvania, deceased.

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Glenn E. Shadle
Clerk of Orphans' Court of
Franklin County, Pennsylvania

6-7, 6-14, 6-21, 6-28

FICTITIOUS NAME NOTICE

NOTICE IS HEREBY GIVEN, pursuant to the provisions of the Ficititous Name Act, Act No. 1982-295, of the filing, with the Department of State of the Commonwealth of Pennsylvania, on May 8, 1985, an application for a certificate for the conducting of a business under the assumed or fictitious name of Waltco, with its principal place of business at 1266 North Franklin Street, Chambersburg, Pennsylvania 17201. The names and addresses of the persons owning or interested in said business are: Carl D. Walter, Sr., 68 Grand Avenue, Chambersburg, PA 17201; Carl D. Walter, Jr., 2305 High Avenue, Chambersburg, PA 17201; David L. Walter, 1576 Lakeshore Drive, Chambersburg, PA 17201; and Gerald R. Walter, 2300 High Avenue, Chambersburg, PA 17201.

Law Offices of Welton J. Fischer
550 Cleveland Avenue
Chambersburg, Pennsylvania 17201

6-7-85

LEGAL NOTICES, cont.

NOTICE

Sealed bids will be received by the Waynesboro Area School District until 10:00 a.m. on June 24, 1985 for the property described below at which time all bids will be opened.

Pursuant to a determination by the Board of Directors of the Waynesboro Area School District that the hereinafter real estate, together with the improvements thereon, is unused and unnecessary pursuant to Section 707 of the Public School Code of 1949, as amended, the Waynesboro Area School District will offer for sale, as a single tract, real estate situate in Quincy Township, Franklin County, Pennsylvania, on which is erected the New Baltimore Elementary School.

Said real estate is subject to certain easements, rights, covenants, reservations and restrictions legally affecting the same and is presently zoned Development District.

For a complete description of the real estate and terms of sale, contact Wallace J. Jones, Business Administrator, Clayton Avenue Administration Building, P.O. Box 72, Waynesboro, Pennsylvania 17268, telephone 717-762-1191.

Waynesboro Area School District
Ullman, Painter and Misner
Solicitors

6-7, 6-14, 6-21

NOTICE OF RELOCATION OF BRANCH BANK APPLICATION

NOTICE IS HEREBY GIVEN that Orrstown Bank, Orrstown, Pennsylvania, has filed an application for approval of the relocation of a branch banking facility to be filed on June 10, 1985. The location of the current facility is 51 East King Street, Shippensburg, Cumberland County, Pennsylvania and the same is to be relocated at 77 East King Street, Shippensburg, Cumberland County, Pennsylvania 17257.

JOEL R. ZULLINGER
1 West King Street
Shippensburg, PA 17257
SOLICITOR

6-7-85

the twenty-first day after mailing obtained a judgment by default for defendant's failure to respond. The Superior Court held that a praecipe for judgment by default filed twenty-one days after the date of mailing the amended complaint is not strict compliance with the Rule of Civil Procedure because the effective date of service is the date on which the pleading is received in due course of mail service.

In Pa. R.C.P. 233 "writs and pleadings" are specifically excluded, and in Pa. R.C.P. 1027 "a complaint by which an action is commenced or a complaint used as an alternative process . . ." are excluded from the word "pleading". In our judgment this constitutes the controlling distinction between the case at bar and *Franklin Interiors, Inc.*, supra.

Pa. R.C.P. 127 provides inter alia:

(a) The object of all interpretation and construction of rules is to ascertain and effectuate the intention of the Supreme Court.

(b) Every rule shall be construed, if possible, to give effect to all its provisions. When the words of a rule are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

Pa. R.C.P. 126 provides:

The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

"When the rules were first adopted, the courts were generous in extending time when failure to act was due to the unfamiliarity of attorneys with recently adopted rules. However, after the rules have been promulgated for a reasonably long time, extensions on the ground of ignorance of counsel were refused. Similarly, inadvertence of counsel will not be blindly accepted as an excuse for non-compliance. Thus, inadvertence of counsel or negligence are not necessarily grounds for extensions of time fixed by the

rules. Were it otherwise, the time limits would be meaningless." 1 Goodrich-Amram 2d §126:2(p.48).

In the light of the language adopted by the Supreme Court in Pa. R.C.P. 233, we conclude that service of all legal papers except writs and pleadings is effected by depositing a properly addressed postage prepaid envelope containing such papers in a receptacle provided by the United States Postal Department for the receipt of United States mail.

The defendant did not seek an extension of time for the filing of the answers to plaintiff's request for admissions under Pa. R.C.P. 248. The defendant did not file an affidavit of service of the answers to the requests upon the plaintiff or counsel for the plaintiff. The defendant has provided no information as to the date of the receipt of plaintiff's request for admissions. The language of Pa. R.C.P. 4014 (b), supra, is clear and unambiguous. We can find no justification for disregarding the time limit established by the Supreme Court under the pretext of pursuing its spirit. Therefore, we must conclude the defendant's failure to timely respond to plaintiff's request for admissions effects an admission that the $10,000 defendant agreed to pay into escrow was to be used toward settlement costs.

Pa. R.C.P. 1035 provides inter alia:

> (a) After the pleadings are closed, but within such time as not to delay the trial, any party may move for summary judgment on the pleadings, depositions, answers to interrogatories, admissions on file and supporting affidavits, if any.
>
> (b) The adverse party, prior to the day of hearing, may serve opposing affidavits. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issues of liability alone although there is a genuine issue as to the amount of damages.

We find that all of the material facts alleged by the plaintiff have been admitted by the defendant, and there is no genuine issue as to any material fact.

Paragraph 16 of the agreement of sale executed by the parties provides inter alia:

> Default (1-79) The said time for settlement and all other times referred to for the performance of any of the obligations of this agreement are hereby agreed to be of the essence of this agreement. Should the Buyer:
>
> (a) Fail to make any additional payments as specified in paragraph #3,
>
> (c) Violate or fail to fulfill and perform any of the terms or conditions of this agreement,
>
> then in such case, all deposit money and other sums paid by the Buyer on account of the purchase price, whether required by this agreement or not, may be
> (1) Retained by the Seller on account of the purchase, or
> (2) As moneys to be applied to the Seller's damages, or
> (3) As liquidated damages for such breach,
>
> as the Seller may elect, and in the event that the Seller elects to retain the moneys as liquidated damages in accordance with paragraph #16(3), the Seller shall be released from all liability or obligations and this agreement shall be NULL AND VOID and all copies will be returned to the Seller's agent for cancellation.

In the case at bar, the plaintiff has elected to take the deposit money as liquidated damages for the breach, and claimed the $1,000 paid plus the $10,000 that should have been paid as those liquidated damages. The defendant contends the plaintiff is limited to the $1,000 actually paid and may not recover the $10,000 he should have deposited in escrow but didn't.

In *Tudesco et ux. v. Wilson,* 163 Pa. Super. 352 (1948), the plaintiff entered into an agreement to sell certain real estate for the sum of $16,000. Pursuant to the agreement of sale the defendant delivered two checks payable to the plaintiff in the total amount of $1,600 as hand money. The defendant stopped payment on the two checks. The agreement of sale provided:

> "If buyer defaults in any of the covenants and conditions hereof, the deposit herein mentioned and any other deposits made by buyer may, at the option of the seller, be retained by the seller as liquidated damages resulting from said default or in part payment

of the consideration for the said premises if seller elects to enforce this agreement according to law."

The plaintiff sued to recover the $1,600 as liquidated damages and the defendant contended that the word "retained" in the agreement could not be enlarged to mean to recover liquidated damages where the deposit was made not in cash as the agreement provided but by checks. Judgment was entered in favor of the plaintiff. The Superior Court affirmed holding inter alia:

> There is no merit to appellant's argument that the word retained as used in the agreement restricts the liquidated damages to the retention of the cash deposit of $1,600 contemplated in said agreement, and therefore precludes the present action for breach of contract. When the vendees stopped payment on the checks there was nothing for the vendors to retain. Of course, the vendors could have brought action on the checks had they chosen to do so. But they chose, as was their right, to base this action on vendees' breach of contract of sale and to seek recovery of the sum specified in the liquidated damage clause of the agreement. To bar this action, as vendee would have us do, by its narrow construction of the liquidated damage clause . . . would do violence to the clear intention of the parties to provide for an effective liquidated damage clause by the use of words which are plain, direct and understandable and would ignore the vital language of the said damage clause. Indeed, it comes with little grace for the vendee to now challenge the vendors' right to such damages especially where the inability to retain the deposit as damages was caused by the act of the vendee. A party cannot take advantage of his own wrongful act or set up his own default to nullify his contract or to work its forfeiture. . . . In these circumstances the method of collection of liquidated damages is the only distinction between the right of the vendors to retain their down money upon default by the vendee and the vendors' right to recover the liquidated damages, as provided for in the agreement, for the breach of contract. (*Tudesco* at page 356.)

See also *The Fidelity Bank et al. v. First Valley Forge Corp.*, 30 Chester 23 (1982).

The decision in *Tudesco* is clearly applicable to the facts in the case at bar, and, therefore, controlling upon this case. We, therefore, conclude there is no issue of law in the case at bar.

LEGAL NOTICES, cont.

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6-7, 6-14, 6-21, 6-28

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Solicitors

6-7, 6-14, 6-21

ORDER OF COURT

NOW, this 5th day of October, 1984, the plaintiff's motion for summary judgment is granted.

Exceptions are granted the defendant.

KEMMLER V. KEMMLER, C.P. Franklin County Branch, F.R. 1984 - 230-S

Non-Support - Forum Non Conveniens

1. In a non-support action, a Pennsylvania court may exercise in personam jurisdiction where there have been "minimum contacts" with Pennsylvania and such jurisdiction does not offend traditional notions of fair play.

2. Where defendant would have to travel 210 miles to Franklin County, the court does not offend traditional notions of fair play by not dismissing the case based on forum non conveniens considering the parties' children primarily reside in Franklin County.

3. Where there is no greater hardship on the defendant by requiring her to present her case in Franklin County than would be imposed on the plaintiff by requiring him to proceed in New Jersey, the doctrine of forum non conveniens does not apply.

William C. Cramer, Esquire, Counsel for Plaintiff

Michael B. Finucane, Esquire, Counsel for Defendant

OPINION AND ORDER

KELLER J., October 5, 1984:

This action in support was commenced by the filing and presentation of a complaint for support on April 3, 1984. An order was signed the same date setting May 2, 1984 at 10:00 a.m. as the date and time for hearing before Robert J. Woods, Domestic Relations Hearing Officer. An affidavit of service executed and acknowledged by the plaintiff indicated personal delivery by him to the defendant on April 19, 1984. On May 1, 1984 counsel for the defendant presented her petition raising the