

The borough is concerned about the appearance of things as the case goes to trial. In the other case all of the parties are before the court. In this one, as the borough contends, those charged with the active conduct causing Barnhart's injury are not. The borough would like the court to intervene under Pa. R.C.P. 2232(c) which permits the court, at any stage in the action, to order joined any additional person who could have been joined in the action. The borough seems to say that this can be done despite the fact that the statute of limitations has run in this case and that at this point the borough could not join the Hensons by their own action.

We quote from Goodrich-Amram, 2d. Sect. 2232(c):3: ". . . if a person who could have been joined as a defendant can not be sued because of the statute of limitations he can not be joined by the court." See also *Buranowsky v. Himes (No. 2)*, 34 D & C 509, 510 (C.P. Elk County, 1964).

We are of the firm opinion, however, that the two cases must be tried at the same time. At the argument we suggested that the attorneys for all parties be circularized to determine whether they would agree that this case would be discontinued with Barnhart preserving all his rights as though the case had not been discontinued. Barnhart's attorney did this, but apparently the attorneys for the other parties failed to respond. At any rate, we received no word that an agreement could be reached.

Under the court's inherent power to control the way these cases will proceed, *First Nat. Bank v. Baird*, 300 Pa. 92, at 101, 150 A. 165 at 169 (1930); Goodrich-Amram 2d Sections 213(a): 10, 223:1, 224:1, we will make an order, concurrent with our order overruling the preliminary objections, that the cases will be joined for trial, that the trial will proceed with Barnhart presenting his case, to be followed by the presentations of the Hensons in the order they are named in the caption to No. 96 November Term, 1976, followed by the presentation of the case of the Borough of Greencastle and the individual police officers in the order they are named in the caption to No. 97 November Term, 1976. Thus the trial will proceed as though one suit has been filed and during the course of the proceedings there will be no necessity to make reference to the fact that there are two separate suits.

At the time of the pretrial conference, the details with regard to challenges and other matters can be worked out.

#### ORDER OF COURT

NOW, November 30, 1978, the defendants' preliminary objections are overruled. Exceptions granted to the defendants.

ROMALA INVESTMENT CORPORATION v. JOINER, ET AL., C.P. Franklin County Branch, Equity Doc. Vol. 7. Page 157

*Preliminary Objections - Pa. R.C.P. 1019(h) - Impertinent Matter - 1019(f)*

1. Pa. R.C.P. 1019(h) does not require letters between litigants, which are not the basis of the legal claim, to be attached to the pleadings.
2. An averment that a party acted in an unreasonable manner is an evidentiary conclusion, not a material fact, and consequently impertinent.
3. Preliminary objections to the absence of averments of time and place should be in the nature of a motion for a specific pleading not demurrer.

*H. Anthony Adams, Esq.*, Counsel for Plaintiff

*Harvey C. Bridgers, Jr., Esq.*, Counsel for Defendants

#### OPINION AND ORDER

KELLER, J., November 17, 1978:

This action was commenced by filing of a complaint in equity on April 19, 1978, and service of the same upon both defendants on April 22, 1978. On May 12, 1978, the defendants filed preliminary objections to the complaint and in response thereto the plaintiff filed an amended complaint on May 22, 1978. Preliminary objections to the amended complaint in the nature of a motion for more specific complaint, a motion to strike, and a demurrer were filed by defendant on June 9, 1978.

First, it should be noted that plaintiff has conceded the need for greater specificity except as to paragraph 1(c) of the defendants' motion for a more specific complaint which pertains to paragraph 17 of the amended complaint. Paragraph 17 alleges: "The defendant was informed of the surface water damage being done to the land of the plaintiff by numerous letters from the plaintiff's president and by letters from the township supervisor." In their motion for more specific complaint, the defendants contend that copies of the alleged letters or their dates must be attached to the complaint.

Pa. R.C.P. 1019(h) requires that a copy of a writing be attached to the complaint if ". . . any claim or defense set forth therein is based on a writing."

"Pa. R.C.P. 1019(h) imposes a duty on a party to attach a writing to a pleading only when the writing is the basis of the cause of action or defense. Papers that are collateral to the cause of action, or that may become evidence, do not fall in this category and would, it seems to us, clutter up the pleadings unnecessarily."

*Bostetter v. Hull*, 3 Adams 46, 49 (1961). A careful examination of the amended complaint clearly indicates that the plaintiff's cause of action is not based upon a writing, but is based on the alleged conduct of the defendants. Whether the defendants were informed of the water damage being done to the plaintiff is a matter of proof, if relevant. "Rule 1019(h) does not apply to evidence, it applies to agreements and writings between litigants." *Robinson v. Burrell*, 32 West. 259, 260 (1959). Therefore, the letters, not being the basis of the claim, need not be attached to the pleadings. As to the defendants' contention that the dates of the letters should be pled, it appears to this court that if the letters need not be pled, then it is equally unnecessary that the dates be alleged in the pleadings. The defendants have available discovery procedures whereby they can attain this information, if they feel it is needed in preparation for trial. The defendants are able to file a responsive pleading to the allegation of paragraph 17 as pleaded. Therefore, we dismiss motion for a more specific complaint 1(c).

The defendants' motion to strike alleges that paragraphs 15, 16, and 17 of plaintiff's amended answer should be stricken because the allegations therein are not material to the issue and are scandalous and impertinent matter under Pa. R.C.P. 1017(B)(2). Impertinent matters are those matters which are irrelevant to the material issues of the case. *Beasley v. Freedman*, 70 D & C 2d 751 (1974). Paragraph 15 of the amended complaint incorporates by reference paragraph 15 of the original complaint and that allegation is clearly pertinent to the plaintiff's claim. The removal of the stone fence according to the allegations of the complaint is one of the causes for the excess surface water which the plaintiff claims has caused its damage. Paragraph 17 is relevant in that it alleges defendants had knowledge of the alleged situation. Paragraph 16 claiming that defendants were unreasonable is an evidentiary conclusion and not a material fact. Consequently, it is impertinent. However, such an allegation may be treated as harmless surplusage if its presence results in no confusion as to the issues to be tried due to this allegation.

We do not agree with defendants' contention that these allegations are reproachful and scandalous.

"Scandal consists of any unnecessary allegation which bears cruelly on the moral character of an individual or states anything which is contrary to good manners, or anything which is unbecoming to the dignity of the court to hear, or which charges some person with a crime, not necessary to be shown in the cause."

*Schwigen v. Pierkarski*, 13 D & C 2d 617, 618 (1958). Neither paragraph 16, which alleges the defendants were unreasonable, nor paragraph 17, which alleges that defendants had knowledge of the harm occurring to the plaintiff, are, in the eyes of this court, within the definition of scandalous. As to paragraph 15 being scandalous by implying that defendant interfered with actions of the Commonwealth, we cannot find any basis for this contention. All the allegation states is that the stone fence diverted water from plaintiff's land to a culvert along the highway constructed by the Commonwealth and that the culvert could not hold the excess water produced when defendants' removed the fence. We fail to see how this bears on the moral character of the defendants or implies that the defendant intentionally interfered with the actions of the Commonwealth.

The motion to strike paragraphs 15, 16, and 17, is dismissed.

We note that paragraph 15 of plaintiff's complaint referring to a "stone fence" alleges "being in the nature of an easement." This is an averment which is meaningless to the Court. Since plaintiff has conceded that an amended complaint must be filed, we will *sua sponte* direct plaintiff to replead paragraph 15 to clarify the reference to an "easement."

Defendants' final preliminary objection is in the nature of a demurrer and alleges:

"The complaint is devoid of any facts showing or alleging that plaintiff is not guilty of laches, or that plaintiff has a legal claim for which relief may be granted, in that the complaint fails to state any dates which will allow defendants to file a responsive pleading to any of the other allegations set forth in plaintiff's complaint."

The defendants' brief in this issue consisting of nine lines, no citations of authority other than to Goodrich-Amram, and an ad damnum clause, may well be a model of conciseness; but

it neither amplifies nor clarified the language of the demurrer itself.

If we understand the defendants' demurrer, and we are not at all certain we do; apparently defendants are contending: (a) that plaintiff has a duty to plead dates and facts of relevant events with such specificity that the complaint of its face demonstrates an absence of the availability of the defense of laches or any applicable statute of limitation, and (b) that the complaint fails to state a cause of action because it does not allege time and place with specificity sufficient to permit them to file a responsive pleading.

We find no merit in the demurrer as presented for:

1. "A pleader is not required to and should not set forth in his pleading matter to avoid defenses which the pleader anticipates will be raised by the adverse party." *2A Anderson Pa. Civil Practice Sect. 1019.15(a)*.

2. The defenses of laches and statute of limitations are affirmative defenses to be pleaded as a responsive pleading under "New Matter." Pa. R.C.P. 1030.

3. "Averments of time, place . . . shall be specifically stated." Pa. R.C.P. 1019(f). Therefore, if defendants believed the averments of plaintiff's complaint lacked necessary specificity in these areas, their remedy was by motion for a more specific pleading; not by demurrer.

4. "The demurrer cannot be used to raise an objection as to form?" *2A Anderson Pa. Civil Practice Sect. 1017.1555*.

#### ORDER OF COURT

NOW, this 17th day of November, 1978, the defendants' preliminary objections in the nature of a motion for more specific pleading is sustained as to (a) (b) (d) and (e) by agreement of counsel for the parties. All other preliminary objections are dismissed.

The plaintiff is granted twenty (20) days from date of this Order to file a second amended complaint.

Exceptions are granted the defendants.

CULLINGS V. FARMERS & MERCHANTS TRUST  
COMPANY OF CHAMBERSBURG, C.P. Franklin County  
Branch, No. A.D. 1978-129

*Trespass and Assumpsit - Preliminary Objections - Pennsylvania Securities Act of 1972, P.L. 1280, No. 284, 70 P.S. 1-101 et seq. - Securities Act of 1933, 15 U.S.C.A. Sect. 77(a) et seq. - "Sale" of Securities - Pa. R.C.P. 1020 - "Affiliate" - Securities Exchange Act of 1934, 15 U.S.C.A. Sect. 78(a) et seq. - Registration of Brokers and Dealers - Fraud - Pa. R.C.P. 1019.*

1. In state court, allegations that defendant lent money to plaintiff, that defendant required security for the loan and that defendant deposited the money to the account of a corporation are insufficient allegations of the sale of securities under both the Pennsylvania Securities Act of 1972, P.L. 1280, No. 284, 70 P.S. 1-101 et seq. and the Securities Act of 1933, 15 U.S.C.A. 77(a) et seq.

2. Because Pa. R.C.P. 1020(d)(1) requires that each count of a complaint specify whether the cause of action is in trespass or in assumpsit, a complaint captioned in its entirety as in trespass and assumpsit will be stricken.

3. In state court, an allegation of "affiliation" under the securities regulations does not plead all material facts as required by Pa. R.C.P. 1019(a), and defendant's motion for specificity will therefore be granted.

4. A bank is neither a broker nor a dealer under the Securities Exchange Act of 1934, 15 U.S.C.A. Sect. 78(a) et seq., and is, therefore, not required to register as either with the Securities Exchange Commission.

5. While the concept of fraud under the securities regulations is broader than that of common law fraud, it must be pleaded with particularity under Pa. R.C.P. 1019(b)(1).

6. Where plaintiff in securities case alleges a bank's involvement in the sale of securities, the identity of the officers or employees of the bank involved in the sale must be pleaded.

7. An allegation of "deep financial difficulty" fails to allege all material facts as required by Pa. R.C.P. 1019(a), and more specific pleading will therefore be required.

*Donald L. Kornfield, Esq., Attorney for Plaintiff*

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