IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

KENNETH D. RUTLEDGE, Toni Rutledge, Michael J. McGee, and Donna L. McGee,	:	C.A. No. 05-12-0032
Plaintiffs,	:	
v.	:	
S & L CONTRACTORS, INC., a Delaware Corporation, and Brent Rogers, an individual,	:	
Defendants and Third-Party Plaintiffs,	:	
v.	:	
Alton Beach, Country Custom Siding, Inc. Stelljes Excavating and Paving,	:	
Third-Party Defendants.	:	

Upon Defendant's Motion for Summary Judgment

Submitted: September 12, 2007

Decided: September 24, 2007

Defendant's Motion is granted.

Sean M. Lynn, Esquire, Hudson, Jones, Jaywork & Fisher, LLC, 225 South State Street, Dover, Delaware 19901, Attorney for Plaintiffs.

Matthew E. O'Byrne, Esquire, Casarino, Christman & Shalk, P.A., Post Office Box 1276, Wilmington, Delaware 19899-1276, Attorney for Defendants, S & L Contractors, Inc. and Brent Rogers.

Kimberly A. Meany, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, Post Office Box 8888, Wilmington, Delaware 19899-8888, Attorney for Third-Party Defendant, Country Custom Siding, Inc.

Trader, J.

The defendant, S & L Contractors, Inc. (S & L), has filed a motion for summary judgment against the plaintiffs, Kenneth D. Rutledge, et al. (Rutledge), on the grounds that the three-year statute of limitations contained in 10 *Del. C*. § 8106 bars the plaintiffs' contract claims and tort claims. Rutledge contends, *inter alia,* that (1) S & L has waived its right to assert the statute of limitations by taking a default judgment against a third-party defendant; (2) S & L provided materials and labor within the period of the statute of limitations; and therefore, the statutory period should not begin to run until the date of the last attempted repair; and (3) that the contract between the parties is a contract under seal and the three-year statute of limitations does not apply. I reject Rutledge's contentions and I enter judgment for S & L because Section 8106 applies and there is no genuine issue of any material fact.

The procedural posture of the case is as follows: on December 7, 2005, Rutledge filed a cause of action against the defendants, S & L and Brent Rogers (Rogers), setting forth claims for breach of contract and negligence. Counts 1 and 2 allege a negligence claim and a claim for breach of contract based on the installation of a driveway. Count 3 alleges a claim for negligence based on the installation of a waterproof barrier on the roof, and Count 4 alleges the negligent installation of tile flooring in the Rutledge home. S & L and Rogers filed an answer denying the allegations of the complaint and asserting a statute of limitations defense. Thereafter, S & L and Brent Rogers filed a third-party complaint against the defendants, Alton Beach, Country Custom Siding, and Stelljes Excavating and Paving. On November 1, 2006, the third-party plaintiffs (S & L and Brent Rogers) obtained a default judgment against Stelljes Excavating and Paving. Subsequent thereto, the third-party claim against Alton Beach was settled out of court.

By agreement of the parties, the various claims were sent to arbitration, but on August 20, 2007, the arbitrator declared that he had a conflict of interest and the defendants thereafter filed a motion for summary judgment. The third-party defendant, Country Custom Siding, joined S & L and Rogers in the motion for summary judgment and the plaintiffs have filed a response to the motion for summary judgment.

The defendants in this case have moved for summary judgment on the grounds that there is no genuine issue as to any material fact and, therefore, the defendants are entitled to judgment as a matter of law. *See Court of Common Pleas Civil Rule* 56. The defendants, as the moving parties, bear the burden of demonstrating with reasonable certitude that there was no genuine issue as to any material fact. *Matas v. Green*, 171 A.2d 916, 918 (Del. Super. Ct. 1961). When a motion for summary judgment is supported by such a showing under the Rule, the burden shifts to a non-moving party to demonstrate that there are material issues of fact. *Moore v. Sizemore*, 405 A.2d 679, 681 (Del. 1979). If the non-moving party does not meet this burden, judgment shall be entered against the non-moving party. *Court of Common Pleas Civil Rule* 56(e). Pursuant to Civil Rule 56(c) of this Court, the adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought to be rendered will be based on the pleadings, depositions, together with the affidavits on file. *Id.*

The plaintiffs first contend that the statute of limitations defense is waived because the defendants obtained a Civil Rule 55(b)(2) default judgment against the third-party defendant, Stelljes Excavating and Paving. The plaintiffs' contention is incorrect. The defense of the statute of limitations is an affirmative defense under Rule 8(c) of the Civil Rules of the Court of Common Pleas. The fact that the defendants asserted a statute

of limitations defense does not preclude the defendants from filing a third-party complaint and obtaining a default judgment against one of the third-party defendants. "A judgment against a third-party defendant is only in favor of the third party plaintiff and not the original plaintiff." *Brandywine Constr. Co. v. Koppers Co.*, 1970 WL 115764, at *2 (Del. Super. Ct. 1970).

> It is the law of Delaware that, for purposes of calculating the statute of limitations, a claim for contribution or indemnification accrues at the time the party seeking contribution or indemnification 'suffers loss or damage through payment of a claim after judgment or settlement.' It is also the law of Delaware, however, that if contribution or indemnification claims are brought as derivative cross or third-party claims, i.e., the claimant's right to indemnification or contribution is contingent upon the success of the plaintiff's direct claim against him, then the court may adjudicate all claims together in the interest of judicial economy.

Daystar Constr. Mgmt., Inc. v. Mitchell, 2006 WL 2053649, at *11 (Del. Super. Ct. 2006). Neither the rules of this Court nor the law of the State precludes the defendants from proceeding in such a manner.

The plaintiff next contends that the defendants are estopped from asserting a statute of limitation defense because the defendants promised to repair defects to the driveway and roof, and repairs to the driveway continued until 2005. I disagree. Under Delaware law, "[n]o action to recover damages for trespass . . . and no action to recover damages . . . . based on a promise . . . . and no action to recover a debt based on an instrument not under seal . . . . shall be brought after the expiration of 3 years from the accruing of the case of such action . . . ." 10 *Del. C.* § 8106. The general and well-settled law of Delaware is that tort actions and breach of contract actions accrue under 10 *Del. C.* § 8106 at the time of the occurrence of the wrongful act or injury. *Nardo v. Guido DeAscanis & Sons*, 254 A.2d 254, 256 (Del. Super. Ct. 1969).

The plaintiffs, in their complaint, allege the shared driveway was substantially completed by August 2001 and settlement was held and deeds were conveyed to the plaintiffs on September 4, 2001. Pursuant to the deposition testimony of Plaintiff Rutledge, the plaintiffs were aware that the driveway was allegedly installed improperly in their home in September 2001, and they became aware of the alleged issue in connection with the roof a few months later. Thus, the plaintiffs' claim in regard to the driveway would have accrued sometime prior to September 2001, and a few months later Rutledge's claim for the roof would have accrued. Applying 10 *Del. C.* § 8106, the 3 year statute of limitations would subsequently have run for the driveway around September 2004, and would have run a few months later for the roof claim. The plaintiffs did not file suit until December 6, 2005. Therefore, the plaintiffs' claim is barred by the statute of limitations pursuant to 10 *Del. C*. § 8106, unless for some reason the defendants are estopped from asserting the defense of the statute of limitations.

It is generally held that mere attempts to repair or promise to repair do not preclude the running of the statute. *Ontario Hydro v. Zallea Systems, Inc.*, 569 F. Supp. 1261, 1272 (D. Del. 1983). "As the repair rule is based on the principle of estoppel, there must be strong elements of the reliance and inducement to justify a defense to the statute of limitations. Defendant's assurances must be relied on by plaintiff as an inducement to delay filing suit." *Burrows v. Master Lumber Company*, 1986 WL 13111, at *2 (Del. Super. Ct. 1986)(internal citations omitted).

In the present case, although the plaintiffs allege in their complaint that materials and labor were supplied until October 2005, Rutledge testified, in his deposition, that he was aware the driveway was installed improperly prior to September 2001. The supply

of materials and labor after September 2001 was an attempt to repair the driveway. However, there are no elements of reliance or inducements to justify a defense to the statute of limitations. The complaint contains no factual allegation that Defendant S & L acted to mislead or induce Rutledge from filing suit and there is no affidavit to that effect. Therefore, there is no evidence in the record of assurances from Defendant S & L that were relied on by the plaintiffs as an inducement to delay filing suit.

The plaintiffs finally contend that the contract between the parties is under seal and the 10 *Del. C*. § 8106 three-year statute of limitations has no application. "The existence of a seal . . . exempts the contract from the applicable statute of limitations." *Peninsula Methodist Homes and Hospitals v. Architects Studio*, 1985 WL 634931, at *2 (Del. Super. Ct. 1985)(citing *Monroe Park v. Metro. Life Ins. Co.*, 457 A.2d 734, 737 (Del. 1983)). The plaintiffs' contention is incorrect. In Delaware, for an instrument other than a mortgage to be under seal: the contract must contain language in the body of the contract that the contract is under seal, a recital affixing the seal, and extrinsic evidence showing the parties' intent to include a seal. *Aronow Roofing Co. v. Gilbane Building Co.,* 902 F.2d 1127, 1129 (3d. Cir. 1990); *See Smith v. Hwang*, 2005 WL 2266958 (Del. Com. Pl. Ct. 2005). For mortgages, because of their inherent nature, the presence of the word "seal" next to and on the same line as the signature of an individual debtor is legally sufficient, without more (e.g. a testimonium clause), to establish that the note is signed under seal. *Milford Fertilizer Co. v. Hopkins*, 807 A.2d 580, 582 (Del. Super. Ct. 2002); *Cf. Aronow Roofing Co*., 902 F.2d at 1129 (holding that the mere use of the word "seal" and the affixing of the corporate seal thereto, was only enough to find that the contract

was signed as an act of the corporation and not as evidence of an intent to make the contract one under seal).

In *Milford Fertilizer Co.*, President Judge Vaughn decided that the recital in the testimonium clause that the promissory note was being signed under seal and the presence of the word "seal" to the right of the defendant's signature were clearly sufficient to have indicated that the contract was under seal. *Id.* at 583. See *Peninsula Methodist Homes and Hospitals*, at *1-2 (similarly holding that the word "seal" printed below the signatures on the contract for improvement of real estate, along with a testimonium clause, were ample evidence that the parties adopted the printed word as their seal); *See also Alropa Corp. v. Myers*, 55 F. Supp. 936, 939 (D. Del. 1944).

In the case before me, the only evidence on the document's face that the contract is under seal is the recital in the testimonium clause; the word "seal" is not printed next to any of the signature lines of the contract. The testimonium clause reads: "[I]n Witness Whereof, the parties have hereunto set their hands and seals the day and year aforesaid." The present case differs from all of the above cited cases in that (1) the contract is neither a mortgage nor a promissory note, therefore, it lacks the benefit of the historical significance of, and preference for, affixing a seal to it, and (2) the contract does not contain the word "seal" by or near any of the signatures. Therefore, the issue before me is whether a testimonium clause, in and of itself, absent the word "seal" next to the signatures or any other extrinsic evidence, is enough to justify an intent to make the contract one under seal. The case before me is one of first impression.

Based on my interpretation of the above cases and the historically elevated significance of a contract under seal, I hold the contract before me was not under seal

and, therefore, the statute of limitations contained in 10 *Del. C.* § 8106 applies. Accordingly, the defendants' motion for summary judgment is granted because the plaintiffs' claims are barred by the applicable statute of limitations found in 10 *Del. C.* Sec. 8106.

IT IS SO ORDERED.

Merrill C. Trader
Judge