[J-70-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

HENRY MCNEIL, JR.,	:	No. 268 MAP 2003
	:	
Appellant	:	Appeal from the Order of the Superior Court entered December 20, 2002 at No. 399 EDA 2002, affirming the Order of the
v.	:	Montgomery County Court of Common Pleas entered January 23, 2002 at No. 99-04287
BARBARA MCNEIL JORDAN AND HENRY A. JORDAN,	:	814 A.2d 234 (Pa. Super. Ct. 2002)
	:	
Appellees	:	ARGUED: April 15, 2004

DISSENTING OPINION

MR. CHIEF JUSTICE CAPPY **DECIDED: March 21, 2006**

In essence, the Majority Opinion holds that under Pa.R.C.P. No. 4007(c) and Pa.R.C.P. No. 4007.1(c), a plaintiff who believes that he has a cause of action to assert is entitled to subject a defendant or a non-party to the tools of discovery, as long as he has probable cause to believe that he will obtain information that will reveal to him that the essential elements of his claim exist. I do not agree with this holding. I would conclude that the Rules allow pre-complaint discovery only to a plaintiff who knows he has reason to sue, but needs additional information in order to plead his claim. Moreover, I do not agree with the Majority's approach for determining the meaning of this Court's procedural rules or

with the Majority's importation of a statutory standard in construing them. Therefore, I respectfully dissent.

The resolution of the issue presented in this appeal requires that certain of the Pennsylvania Rules of Civil Procedure be construed. This Court has articulated the principles by which we are to construe the Rules. Pa.R.C.P. No. 127(a) provides that "[t]he object of all interpretation and construction of the rules is to ascertain and effectuate the intention of the Supreme Court." Pa.R.C.P. No. 127(a). To meet this objective, Rule 127 offers more specific guidance; it first points to the words that are used in a Rule, and then to other considerations, if the words are not explicit. Rule 127 states

> Construction of the Rules. Intent of the Supreme Court Controls
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> …
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> (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.
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> (c) When the words of a rule are not explicit, the intention of the Supreme Court may be ascertained by considering, among other matters (1) the occasion and necessity for the rule; (2) the circumstances under which it was promulgated; (3) the mischief to be remedied; (4) the object to be attained; (5) the prior practice, if any, including other rules and Acts of Assembly upon the same or similar subjects; (6) the consequences of a particular interpretation; (7) the contemporaneous history of the rule; and (8) the practice followed under the rule.

Pa.R.C.P. No. 127.

In light of these principles, it is evident that under Pa.R.C.P. No. 4001(c) and Pa.R.C.P. No. 4007.1(c), this Court intends for a plaintiff to use the mechanics of discovery, even before his complaint is filed. In this regard, the words in the Rules are clear, stating

respectively, that "any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories *for…preparation of pleadings*…," and that a plaintiff who has filed a writ of summons and who "desires to take the deposition of any person… *for the purpose of preparing a complaint"* shall provide a written notice as to the nature of his cause of action and the areas into which he will inquire. Pa.R.C.P. No. 4001(c), Pa.R.C.P. No. 4007.1(c) respectively, (emphasis added).

What is not clear in Pa.R.C.P. No. 4001(c) and Pa.R.C.P. No. 4007.1(c), however, is this Court's intent as to the scope of such use. More specifically, the words of the Rules are not explicit as to whether a plaintiff may engage in discovery in order to uncover the material facts that reflect the essential elements of his cause of action, and which must be alleged in a well-pleaded complaint. See Pa.R.C.P. No. 1019(a). On this point, therefore, this Court's intent is to be ascertained through Pa.R.C.P. No. 127(c)'s other considerations.

I believe that two of these considerations are dispositive. The first consideration is the consequences that will flow from the majority's interpretation of the Rules. See Pa.R.C.P. No. 127(c)(6). In the majority's view, an interpretation of Pa.R.C.P. No. 4001(c) and Pa.R.C.P. No. 4007.1(c) that will expose litigants and non-parties to the burden and expense that discovery inevitably imposes so as to enable a plaintiff to determine whether or not he has a claim to pursue is acceptable. In my view, it is not. Moreover, I prefer the effects that would result from the narrow interpretation of Pa.R.C.P. No. 4001(c) and Pa.R.C.P. No. 4007.1(c) that the trial court articulated in Potts v. Consolidated Rail Corporation, 37 Pa.D.&C.4th 196 (Allegheny County 1998). I conclude that an interpretation of the Rules that encourages the filing of complaints and motions for a more specific pleading or answers, as opposed to requests for pre-complaint discovery, would best serve to resolve the disputes that frequently arise in this area efficiently and justly. See 37 Pa.D.&C.4th at 199-201.

The second consideration is the practice that has been followed under the Rules. Pa.R.C.P. No. 127(c)(8). Many trial courts have not allowed pre-complaint discovery to a plaintiff who desires to determine whether he has reason to sue, but have allowed it to a plaintiff who has shown that he has a cause of action, but needs additional information in order to plead his claim. See, e.g., French v. ITT Industries, 66 Pa.D.&C.4th 196 (Lawrence County 2004) (ordering pre-complaint discovery for a plaintiff who alleged that an equipment failure was a contributing factor in the industrial accident that resulted in plaintiff's decedent's death as to the specifics of the accident and the servicing and chain of distribution of the specific equipment and its components); Wable v. Watkins, 47 Pa.D.&.C.3d 485 (Somerset County 1986) (denying pre-complaint discovery to a defendant who sought to ascertain whether the additional defendant had breached any duty to plaintiff that may have caused or contributed to plaintiff's fall and ensuing injuries); Lutsko v. Sawka, 27 Pa.D.&.C. 246 (Lehigh County 1962) (denying pre-complaint discovery to a plaintiff who sought it in order to make up her mind as to whether she might have a claim for tortious interference of business); Purcell v. Westinghouse Broadcasting Co., 10 Pa.D.&C. 729 (Philadelphia County 1957) (ordering pre-complaint discovery for a plaintiff suing in libel and slander in order to secure the language used in the broadcast).[1] I am of the opinion that the approach taken by these trial courts leads to consistent, predictable results and properly balances the competing concerns that are presented by the litigants and non-parties in such cases.

[1] Until 1979, Pa.R.C.P. No. 4007 read that depositions that would "substantially aid" in the preparation of pleadings could be taken. This and other relevant Rules were amended in 1978, effective 1979. The allowance for pre-complaint is now set forth in Pa.R.C.P. No. 4001(c). See supra. pp. 2-3. According to the 1978 Explanatory Note to Pa.R.C.P. No. 4001, the amendments were not intended to change the purposes of pre-complaint discovery.

Therefore, I would conclude that this Court intends that the trial courts have the discretion under Pa.R.C.P. No. 4001(c) to make discovery available to a plaintiff who has a cause of action to assert; who demonstrates that he cannot prepare his complaint without the specific information he seeks; and who demonstrates that he reasonably believes that the party from whom he seeks discovery has the information he needs.

Accordingly, I would affirm the Order of the Superior Court, holding that Appellant is not entitled to discovery under Pa.R.C.P. No. 4001(c) inasmuch as he requested it for purposes of determining the existence of an essential element of his cause of action. For the reasons stated herein, I respectfully dissent.

Mr. Justice Eakin joins this dissenting opinion.