

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

VERIZON DELAWARE, INC.)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 2003-09-402
)	
JOSEPH T. HARDY & SONS, INC.,)	Non-Arbitration
)	
Defendant.)	

Submitted: April 16, 2004
Decided: June 7, 2004

**DECISION ON DEFENDANT'S
MOTION TO AMEND ITS ANSWER**

COMES NOW, the Court finds as follows:

1. On September 22, 2003, plaintiff Verizon Delaware, Inc., brought these proceedings to recover damages which it alleges Joseph T. Hardy & Sons, defendants caused on its property while conducting excavation work at West Second Street and Cleveland Avenue in the city of Wilmington.
2. On November 3, 2003, defendant filed a responsive pleading which included general denials and four (4) affirmative defenses. The first affirmative defense asserted a supervening cause; the second indicated no attorney fees were recoverable; the third asserted plaintiff failed to set forth special

damages with specificity; the fourth (but listed as fifth) asserted that there was no utility wires in the area.

3. On March 10, 2004, defendant filed a motion moving the court for leave to amend its prior answer to assert an additional affirmative defense raising the statute of limitations. On March 26, 2004, this motion was granted by the Court. On March 26, 2004, defendant's attorney sent a letter to the Court indicating that he had agreed with plaintiff's counsel that the motion would be renoticed for April 9, 2004. Therefore, on March 26, 2004, this Court rescinded its original order granting defendant's motion to amend its answer to assert an affirmative defense.

4. This matter is now back before the Court on defendant's renoticed motion to amend its answer for leave to assert an affirmative defense raising the statute of limitations. In moving the Court for an order to amend its answer, the defendant set forth two bases. First, defendant argues that the motion should be granted because when he first reviewed the initial complaint, it understood the matter was subject to a three-year statute of limitations which apply to matters involving real property. Therefore, operating under such belief, it did not include the statute of limitations as an affirmative defense in its initial pleading. However, upon further research, it has now discovered that the items in question, for which plaintiff allegedly is seeking damages involve equipment such as power lines or utility cables, which are considered equipment or personal property and is subject to a two-year statute of limitations. Secondly, defendant

argues that Court of Common Pleas Civil Rule 15(b) provides, that leave to amend shall be freely given when justice so requires. Thus, he maintains justice clearly requires that the defendant be afforded the opportunity to raise the issue of affirmative defense.

5. Plaintiff responds to defendant's motion relying upon the language of Court of Common Pleas Civil Rule 8(c) which provides as follows: "In pleading to a proceeding pleading, a party shall set forth affirmatively, accord and satisfaction, . . . , statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." Therefore, plaintiff argues defendant's failure to raise the statute of limitation as an affirmative defense in its answer as required by the rule, constitutes waiver, and defendant is thereby barred from raising the issue at this stage of the proceedings. Plaintiff further argues that it is well recognized in Delaware that an affirmative defense is considered waived if not pled in the defendant's first responsive pleading.

6. Defendant, however, points to James v. Glazer, Del. Supr., 570 A.2d 1150 (1990) where the Court stated there were two exceptions to the general rule of waiver. The first exception occurs in factual situations where it is impossible to determine the issues of the defendant's negligence and proximate cause without considering the actions of the plaintiff. The second exception to the general rule involves those circumstances when evidence of an unpled affirmative defense is admitted without objection. The factors to consider whether an exception shall be granted was considered in Schwartzkopf v. Esham, Del.

Super. 203 WL 22853531 (2003), which include: (1) the timeliness of the amendment; (2) the reason for the delay; (3) the prejudice caused to the party opposing such amendment; and (4) whether the amendment would be futile in any event.

The motion to amend was originally filed by the defendant in this case February 20, 2004 approximately five months after the complaint was originally filed. The Court in Schwartzkopf found a motion filed nine months after the responsive pleading untimely. In this matter, while it is only five months after the responsive pleading, the issues are less complex and the potential amount in controversy is substantially less.

The second area of inquiry involves the reason for the delay. The defendant indicates the statute of limitation was not raised in its answer because of the belief that the issues involved real property as opposed to personal property. The allegation of the complaint clearly indicated it involved lines and cables installed in the ground; therefore, defendant was on notice of the nature of the property involved in these proceedings.

The third area of the analysis involves prejudice to the party opposing the amendment. In these proceedings, whether the property is classified as personal or real property, if the motion is granted, would dispose of whether plaintiff can continue with its claim in the present form. If it is determined that the property is personal, plaintiff's claim is time barred. As plaintiff argued, they

would then have to proceed under a trespass theory on a three-year statute of limitations.

The fourth area of the analysis requires the Court to consider whether the amendment would be futile if it was permitted by the Court. Clearly, it would not be futile because it would bar the plaintiff from further proceeding on its present claim for damages.

Based upon my review of the facts in these pleadings, defendant was aware of the nature of the property. The failure to recognize lines and cables constituted personal property as opposed to real property, which is settled in this jurisdiction, is not sufficient for the Court to grant an exception to the well recognized rule that unpled affirmative defenses are waived. Further, plaintiff raised several affirmative defenses in its initial pleading and it is reasonable that defendant should have considered this defense. Therefore, to bring the issue at this time and to request the Court leave to grant an amendment to the pleading does not constitute an exceptional circumstance.

Accordingly, the motion to amend the pleading is hereby Denied.

SO ORDERED this 7th day of June, 2004

Alex J. Smalls
Chief Judge