

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

**WILLIAM T. WHITENACK, JR. AND )  
MICHELE S. CARINO, )  
Plaintiffs, )**

v. )

C.A. No.: N11C-12-095 ALR

**THOMAS G. LACKEY, LUCREZIA )  
LACKEY, COGENT BUILDING )  
DIAGNOSTICS, J. FRANK PETER, )  
DOORDEN BUILDING & REMODELING, )  
INC., and STUCCO CODE, INC. )  
Defendants )**

**COGENT BUILDING DIAGNOSTICS and )  
J. FRANK PETER, )  
Third-Party Plaintiffs, )**

v. )

**THOMAS G. LACKEY, and )  
LUCREZIA LACKEY )  
Third-Party Defendants. )**

Submitted: September 25, 2013

Decided: September 30, 2013

**Upon Motion to Dismiss Third-Party Complaint  
DENIED in part and GRANTED in part**

Scott Wilcox, Esquire, Wilmington, DE, *Attorney for the Plaintiffs*

Herbert W. Mondros, Esquire, Gerald Hager, Esquire, Wilmington, DE, *Attorneys for the Cogent Defendants/Third- Party Plaintiffs*

John H. Newcomer, Esquire, Wilmington, DE, *Attorney for the Third-Party Defendants*

**Rocanelli, J.**

This matter arises from the alleged defective conditions and related damage to a house located at 16 Equestrian Circle, Hockessin, Delaware 19707. In September 2008, the Third-Party Plaintiffs, Cogent Building Diagnostics and J. Frank Peter (collectively “Cogent”) were retained by Third-Party Defendants, Thomas G. Lackey and Lucrezia Lackey, to perform a stucco evaluation to determine whether there were any indications of possible water damage, to prepare a repair plan, and to oversee any needed repairs to the house.

Cogent presented the Lackeys with a document titled “Authorization to Perform Invasive Testing” which contained an indemnification clause, limitations period, and waiver clause which stated:

Any legal action arising from this Agreement or from the Evaluation and Report, including (but not limited to) the arbitration proceeding more specifically described above, must be commenced within one (1) year from the date of the Evaluation. Failure to bring such an action within this time period shall be a complete bar to any such action and a full and complete waiver of any rights or claims based thereon. This time limitation period may be shorter by state law.

Additionally, before repairs started, Cogent sent a letter to the Lackeys, with an attachment titled “General Contract Conditions” which contained an indemnification clause and a limitations period clause identical to the clause in the “Authorization to Perform Invasive Testing.” This limitations clause also stated that the one year period to bring a lawsuit would run from the date of the Evaluation. (Collectively, the “Authorization to Perform Invasive Testing” and “General Contract Conditions” are referenced as “Cogent Agreements”). The evaluation took place in September 2008.

After the evaluation and repair work contemplated by the Cogent Agreements was completed, the property was sold to William T. Whitenack and Michele Carino (“Plaintiffs”) in

December 2008. In August 2009, Plaintiffs saw water stains on the exterior of the stucco. After retaining an expert to evaluate the house, Plaintiffs filed suit against Cogent, the Lackeys, and several other parties in the Court of Chancery in January 2010 (“Chancery Court Action”).

In the Chancery Court Action, Cogent and the Lackeys asserted cross-claims against each other for indemnification and contribution. The cross-claims asserted in the Chancery Court Action were not specified as contractual or common law claims. In November 2011, the Lackeys settled with Plaintiffs and a Stipulation of Partial Dismissal was entered by the Chancery Court whereby Plaintiffs’ claims against the Lackeys were dismissed.

In August 27, 2012, Plaintiffs transferred the Chancery Court Action to the Superior Court. Plaintiffs first filed a complaint that mirrored the complaint in the Chancery Court Action in order to preserve any limitations periods. Shortly thereafter, Plaintiffs filed an amended complaint which did not name the Lackeys as defendants.

On September 25, 2012, Cogent filed a Third-Party Complaint against the Lackeys. Count I and Count III allege common law indemnification and contribution, respectively. Count II alleges contractual indemnification. Count IV alleges breach of contract.

On March 5, 2013, the Lackeys filed this Motion to Dismiss Third-Party Complaint. The Lackeys state that Count I (common law indemnification) and Count III (common law contribution) should be dismissed because Cogent has already asserted these claims against the Lackeys. As to Count II (contractual indemnification) and Count IV (breach of contract), the Lackeys contend that these claims are barred by the one-year limitations period set forth in the limitations clauses in the Cogent Agreements.

As to the common law claims set forth in Count I and Count III, the Lackeys contend that the cross-claims asserted by Cogent against the Lackeys in the Chancery Court Action survive,

and that a third-party complaint is not required for Cogent to assert these claims. However, the Lackeys have not cited statutory or decisional law or referenced any procedural vehicle by which the cross-claims asserted in the Chancery Court Action would survive in this case absent a third-party complaint. Except as third-party defendants, the Lackeys are not parties to this lawsuit.

The Lackeys have stated that they are willing to stipulate that Cogent's cross-claims from the Chancery Court Action remain part of this case, but have not explained how this court could exercise jurisdiction over the Lackeys unless they are one of the parties to the lawsuit. Delaware law is clear that when a released tortfeasor is dismissed from a case "no judicial finding as to whether he is a joint tortfeasor can be made."<sup>1</sup> The court finds that the common law claims set forth in Count I and Count III are properly asserted in the third-party complaint.

As to the contractual claims set forth in Count II and Count IV, the Lackeys contend that these claims must be dismissed because they were asserted after the one-year limitations period allowed by the Cogent Agreements. Here, the court is faced with a limitations period, in agreements drafted by Cogent, to which the Lackeys were required to agree to in order to work with Cogent, and the burden of which Cogent now seeks to escape. The Lackeys contend that Cogent should be bound by the one-year limitations period of the Cogent Agreements. The evaluation occurred in September 2008. Therefore, according to the terms of the Cogent Agreements, the time period for either the Lackeys or Cogent to file a lawsuit against the other party expired in September 2009, several months before the Chancery Court Action was filed.

Cogent contends that, despite being the party which drafted the Cogent Agreements setting forth the one-year limitations period, it should not be construed against Cogent here. According to Cogent, a contractual limitation period that expires before the statutory limitations

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<sup>1</sup> *Roca v. Riley*, 2008 WL 1724259 at \*3 (Del. Super. Apr. 10, 2008).

period is unreasonable under any circumstances. In support of this contention, Cogent cites *Flanagan v. Nationwide Inc. Co.*<sup>2</sup> *Flanagan* involves a personal injury matter, wherein the insured filed suit against the insurer, and the insurer moved for summary judgment on the grounds that the action was barred by the limitations period in the policy.<sup>3</sup> The policy, drafted by the insurer, imposed a two-year time period, from the date of injury, wherein an action could be commenced against an insurer.<sup>4</sup> However, the Delaware statute provided a three-year time period to file a lawsuit from the date that a matter accrued, which under Delaware law was not the date of injury but the date the insurer denied the claim.<sup>5</sup> By the time the insurer denied the claim, the two-year limitations period set forth in the insurance contract had expired.<sup>6</sup> The court deemed that, under these circumstances, the time limit in the contract was unenforceable, because the time limit expired before Delaware's statute began running.<sup>7</sup>

*Flanagan* is distinguishable from the present case, as the insured who filed the lawsuit was not the party who drafted the contractual limitations period. In this case, it is Cogent who drafted the limitations period and who now seeks to have its own limitations period declared unenforceable. The court finds that the contractual claims are barred by the contractual limitations period set forth in the Cogent Agreements. Accordingly, Count II and Count IV must be dismissed.

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<sup>2</sup> *Flanagan v. Nationwide Inc. Co.*, 1989 WL 89537 (Del. Super. July 7, 1989).

<sup>3</sup> *Id.* at \*1.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at \*2.

**NOW, THEREFORE, IT IS HEREBY ORDERED this 30<sup>th</sup> day of September, 2013, that the Motion to Dismiss the Third-Party Complaint is granted in part and denied in part. As to the common law claims set forth in Count I and Count III, the Motion to Dismiss the Third Party Complaint is hereby DENIED. As to the contract claims asserted in Count II and Count IV, the Motion to Dismiss the Third Party Complaint is hereby GRANTED.**

*Andrea L. Rocanelli*

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**Honorable Andrea L. Rocanelli**