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

SUSAN HENDERSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 09C-12-110 PLA
	)	
BEST BUY, CAPANO MANAGEMENT COMPANY, CENTER POINTE ASSOCIATES, L.P., a Delaware limited partnership, and APEX CURB, INC., a Delaware corporation,	)	
	)	
Defendants.	)	

ON DEFENDANT APEX CURB, INC.'S MOTION TO DISMISS
GRANTED

Submitted: January 14, 2011
Decided: February 3, 2011

This 3rd day of February, 2011, it appears to the Court that:

1. Plaintiff Susan Henderson ("Henderson") alleges that she fractured her right ankle after falling on ice in the parking lot of a Best Buy store in Newark, Delaware, on December 18, 2007. The Best Buy was located in the Center Pointe Plaza II shopping center, and the property was managed by Capano Management Company. According to Henderson, her counsel contacted Travelers Insurance ("Travelers") to advise it of her personal injury claim in February 2008. Travelers

insured Defendants Best Buy, Capano Management Company, and Center Pointe Associates, L.P.

2. On October 22, 2009, Travelers sent a letter to Apex Curb, Inc. ("Apex"), which had a contract with Capano Management Company to provide ice and snow removal services for Center Pointe Plaza II at the time of Henderson's accident. By its letter, Travelers notified Apex of Henderson's accident, and explained that Travelers considered Apex subject to a duty to defend or indemnify its insureds. The letter stated that "[Henderson] is pursuing a claim for her injuries and in that regard is represented by [an attorney]."[1]

3. Plaintiff filed the instant lawsuit against Best Buy, Capano Management Company, and Center Pointe Associates, L.P., on December 9, 2009. At some point, the three original defendants informed Henderson's counsel of the contract between Capano Management Company and Apex. On December 22, 2009, prior to the filing of responsive pleadings by any of the original defendants, Henderson filed an Amended Complaint to assert a claim against Apex.

4. Apex filed the instant Motion to Dismiss on the basis that Henderson's claim against it is barred by the two-year statute of limitations for

[1] Pl.'s Resp. to Def. Apex's Mot. to Dismiss, Ex. A.

personal injury actions.[2] In response, Henderson contends that the Amended Complaint relates back to the date her initial Complaint was filed under Superior Court Civil Rule 15(c). Henderson asserts that Apex "was placed on notice of plaintiff's claim upon receipt of the letter from Travelers Insurance on October 22, 2009," prior to the expiration of the two-year limitations period.[3] Moreover, Henderson urges that relation-back would cause no prejudice to Apex, as discovery has not been completed and no scheduling order has yet been issued by the Court. The original defendants have joined in Plaintiff's response.

5. Pursuant to Rule 15(a), a party may amend its pleadings "once as a matter of course at any time before a responsive pleading is filed." An amendment as a matter of right under Rule 15(a) "may extend to bring[ing] in separate entities, not originally named as defendants."[4] Rule 15(c) sets forth the circumstances under which an amended filing will relate back to the date of the original pleading. Where a party seeks to change or add a party by amendment and the applicable statute of limitations has expired, the movant must satisfy three criteria to establish relation-back:

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[2] 10 *Del. C.* § 8119 ("No action for the recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that such alleged injuries were sustained[.]").

[3] Pl.'s Resp. to Def. Apex's Mot. to Dismiss ¶ 9.

[4] *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993).

(1) The claim asserted in the amended pleading must arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading;

(2) Within the period provided by statute or the Superior Court Civil Rules for service of the summons and complaint, the party to be brought in by amendment received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits; and

(3) Within the period provided by statute or the rules for service of the summons and complaint, the party to be brought in by amendment knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.[5]

[5] *See* Super. Ct. Civ. R. 15(c):

> An amendment of a pleading relates back to the date of the original pleading when
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by statute or these Rules for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The party seeking relation-back of an amendment bears the burden of establishing that Rule 15(c) has been satisfied.[6] Although Rule 15 imparts a liberal approach to amendment, the Court cannot "bend" the language of Rule 15(c), and therefore must refuse to relate an amendment back to the date of the original filing if the necessary showing is not made.[7]

6. Although Henderson acted diligently in amending her Complaint after learning of the contract between Capano Management Company and Apex, the Court concludes that she has not shown that relation-back is appropriate under Rule 15(c). The parties do not dispute that Henderson's claim against Apex arises out of the same occurrence set forth in her original Complaint; however, Henderson has not demonstrated that Apex received notice of the institution of the action within the time period for service of the original Complaint, nor that Apex knew or should have known within that time period that but for a mistake of identity, it would have been named in the original Complaint.

7. Contrary to Henderson's argument, the October 22, 2009 letter from Travelers to Apex does not constitute "notice of the institution of the action" within the meaning of Rule 15(c). Although the letter informed Apex that Henderson was "pursuing a claim for her injuries" and was represented by counsel,

[6] *Smith v. Hawkins*, 2008 WL 555915, at *1 (Del. Super. Jan. 31, 2008).

[7] *Mullen*, 625 A.2d at 263-64.

it did not notify Apex that Henderson had initiated a lawsuit—an event which would not occur until December 9, 2009, more than six weeks *after* the letter from Travelers. In *Mergenthaler, Inc. v. Jefferson*, the Delaware Supreme Court examined the phrase "notice of the institution of the action" and concluded that "'action,' as used in Rule 15(c), means a lawsuit, and not the incident giving rise to a lawsuit."[8] Thus, notice "merely of a claim or allegation"—neither of which can be sensibly described as "instituted"—is insufficient to satisfy Rule 15(c).[9]

8. Accordingly, the letter from Travelers does not demonstrate that Apex received notice of the action as required by Rule 15(c). While service of the Amended Complaint upon Apex would certainly constitute notice of the institution of the action, Apex was not served until July 14, 2010, well after the 120-day period for service of the original Complaint. Service was returned *non est* as to Apex on several occasions within that period, but the Court cannot conclude from those returns that Apex received notice of Henderson's suit, and Henderson has not offered any argument that notice was accomplished by any means other than the letter from Travelers. Henderson therefore cannot establish that Apex received "notice of the institution of the action" within "the period provided . . . for service

[8] 332 A.2d 396, 397-98 (Del. 1975) (quoting *Craig v. United States*, 413 F.2d 854, 858 (9th Cir. 1969)). Although *Mergenthaler* addressed a previous version of Rule 15, the subsequent amendments have not altered the notification language at issue.

[9] *Id.*

of the summons and complaint."[10] Moreover, because Henderson has not established that Apex was notified of her suit within the 120-day service period, she necessarily has not shown that Apex knew or should have known within that time that it would have been named in her suit but for a mistake of identity.

9. For the foregoing reasons, the allegations and claims in Henderson's Amended Complaint will not relate back to the December 9, 2009 filing date of her original Complaint. As Henderson's claim against Apex was therefore asserted after the statute of limitations under 10 *Del. C.* § 8119 had run, Apex's Motion to Dismiss must be **GRANTED**.

IT IS SO ORDERED.

/s/
Peggy L. Ableman, Judge

Original to Prothonotary
cc: James P. Hall, Esq.
Kenneth Doss, Esq.
Nancy Chrissinger Cobb, Esq.

[10] Super. Ct. Civ. R. 15(c).