

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

MICHAEL WILSON, and)	
PATRICIA WILSON,)	C.A. No. N10C-09-175 JAP
)	
Plaintiffs,)	JURY TRIAL DEMANDED
)	
v.)	
)	
MACKENZIE KIRLIN, and)	
CITY OF WILMINGTON,)	
)	
Defendants.)	

Submitted: January 13, 2011

Decided: April 15, 2011

Upon Counterclaim Defendant Michael Wilson's Motion to Dismiss
MOTION GRANTED

MEMORANDUM OPINION

Dennis A. Mason, II, Esquire, Wilmington, Delaware
Attorney for Plaintiff/Counterclaim Defendant, Michael Wilson

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Attorney for Plaintiffs

Daniel F. McAllister, Esquire, Wilmington, Delaware
Attorney for Defendants, Mackenzie Kirlin and City of Wilmington

JUDGE JOHN A. PARKINS, JR.

FACTUAL AND PROCEDURAL BACKGROUND

On October 6, 2008, Plaintiff/Counterclaim Defendant, Michael Wilson, (“Wilson”), was operating a motor vehicle which was involved in a collision with a police vehicle operated by MacKenzie Kirlin, a City of Wilmington police officer. On September 22, 2010, Wilson filed an action for damages against Officer Kirlin and the City of Wilmington, (collectively, the “City”). The City was served with the complaint on October 14, 2008. Consequently, fourteen days later, on October 28, 2010, the City answered the complaint and filed a counterclaim against Wilson for property damage to the police vehicle. Wilson has now filed a motion to dismiss the counterclaim alleging that it is time-barred.

CONTENTIONS OF THE PARTIES

Wilson contends that the City’s counterclaim for property damages is barred by a two-year statute of limitations. The City counters that Delaware statute specifically permits a counterclaim, up to the amount of setoff for damages awarded to a plaintiff, even if the counterclaim is filed after the statute of limitations has run. The City further argues that the Superior Court should follow the law of other states in allowing affirmative

counterclaims filed after the statute of limitations has run when they are filed with a timely answer in response to a timely-filed complaint.

DISCUSSION

Motion to Dismiss

A motion to dismiss is the proper vehicle for a statute of limitations defense where the pleading itself demonstrates that the claim was brought after the statutory period has run.¹ Upon consideration of such a motion to dismiss, the Court will consider as true the allegations contained in the pleading of an opposing party.²

Statute of Limitations for a Counterclaim

Delaware statute provides that “[n]o action to recover damages for wrongful death or for injury to personal property shall be brought after the expiration of 2 years from the accruing of the cause of such action.”³

Counterclaims are affirmative actions and, consequently, are subject to the applicable statute of limitations.⁴

On the other hand, as to “any debt alleged by way of setoff or counterclaim on the part of a defendant” the time of limitation “shall be

¹ *Brooks v. Savitch*, 576 A.2d 1329, 1330 (Del. Super. 1989).

² *Brooks*, 576 A.2d at 1330.

³ 10 *Del.C.* § 8107.

⁴ *Shuman v. Santora*, 1991 WL 18101, *3, Babiarz, J. (Del. Super. Feb. 5, 1991); *Am. Home Products Corp. v. Norden Laboratories, Inc.*, 1992 WL 368604, *3, Hartnett, V.C. (Del. Ch. Dec. 11, 1992) (stating that “[a] counterclaim is equivalent to an affirmative action brought by a litigant . . .”).

computed in like manner as if an action therefor had been commenced at the time when the plaintiff's action commenced.”⁵ Therefore, in order to determine whether counterclaims for injury to personal property are time-barred if brought after the two-year limit, the Court must distinguish between counterclaims seeking affirmative relief and those proffering a defense for setoff or recoupment.⁶ Where the entire defense in an answer to a negligence claim amounts to denying the negligence and alleging contributory negligence, any counterclaim seeking affirmative relief in addition to the defenses stands separately.⁷ Those separate counterclaims seeking affirmative relief for injury to personal property after the two-year statute of limitations has run are time-barred pursuant to the statute.⁸

In *Delaware Chemicals, Inc. v. Reichhold Chemicals, Inc.*, the Delaware Chancery Court granted a plaintiff's motion to dismiss defendant's counterclaims because the counterclaims were presented in the answer after the statute of limitations had run.⁹ The Court, there, stated that the fact that an action first appears as a counterclaim seeking affirmative relief does not

⁵ 10 *Del.C.* § 8120.

⁶ *DiNorscia v. Tibbett*, 124 A.2d 715, 716-17 (Del. Super. 1956); *Delaware Chems., Inc. v. Reichhold Chems., Inc.*, 121 A.2d 913, 917-18 (Del. Ch. 1956); *Fort Howard Cup Corp. v. Quality Kitchen Corp.*, 1992 WL 91157, *2, Steele, J. (Del. Super. Apr. 22, 1992) (stating that the “Court recognizes it must evaluate defendant's counterclaim as an action within the meaning of the applicable statute of limitations . . . at least insofar as defendant seeks affirmative relief as opposed to merely asserting a defense”).

⁷ *DiNorscia*, 124 A.2d at 717.

⁸ *DiNorscia*, 124 A.2d at 717-18; *Sines v. Wyatt*, 281 A.2d 499, 501 (Del. Super. 1971) (stating that the fact that the plaintiff sued defendant “did not make [defendant] aware for the first time that he might have a cause of action . . .”); *Shuman*, 1991 WL 18101 at *3.

⁹ 121 A.2d at 918.

obscure the fact that it is, nonetheless, an action subject to the statute of limitations.¹⁰ That Court specifically rejected the defendant’s argument that the statute of limitations did not apply to a compulsory counterclaim for affirmative relief.¹¹ In addition, the Chancery Court further found that 10 *Del.C.* § 8119 applied solely to setoff, a “purely defensive” maneuver, and not to a counterclaim for affirmative relief.¹² The Chancery Court did, however, permit the defendant to seek leave to amend in order to assert the counterclaim as a defense.¹³

In this matter, the City has presented an affirmative counterclaim for property damage to the police vehicle on October 28, 2010, more than two years after date of the collision—October 6, 2008. The City’s affirmative counterclaim was filed concomitantly with its timely answer which included various defenses. Since the counterclaim for property damage to the police vehicle is an affirmative action, it is subject to the statute of limitations of two years pursuant to 10 *Del.C.* § 8107. And, since the defenses provided in the City’s answer amount to a denial of negligence rather than a defensive

¹⁰ *Delaware Chems., Inc.*, 121 A.2d at 918.

¹¹ *Delaware Chems., Inc.*, 121 A.2d at 918.

¹² *Delaware Chems., Inc.*, 121 A.2d at 918; *contra NVF Co. v. New Castle County*, 276 B.R. 340, 353-4 (D. Del. 2002) *aff’d*, 61 F. App’x. 778 (3d Cir. 2003) (stating that *Delaware Chems., Inc. v. Reichhold Chems., Inc.* actually does not involve setoff but recoupment in that the counterclaim “is related to the same transaction and is therefore truly defensive in nature” and that a “defensive recoupment claim . . . will not be time-barred [under the doctrine of latches] if the opponent’s claim is timely”).

¹³ *Delaware Chems., Inc.*, 121 A.2d at 918.

claim, the counterclaim stands as separate from those defenses and, as such, is time-barred.

As in *Delaware Chemicals, Inc. v. Reichhold Chemicals, Inc.*, here, the City's action for property damages is presented as a counterclaim. Nevertheless, since that designation does not remove the action from under the authority of the statute of limitations, the Court rejects the City's argument that its affirmative counterclaim is timely because it accompanies a timely-filed answer to the complaint. While other states may allow late-filed counterclaims under certain circumstances, Delaware jurisprudence has consistently held that affirmative counterclaims, whether compulsory or not, are subject to the statute of limitations.¹⁴

Accordingly, Wilson's motion to dismiss the City's counterclaim in its present form is hereby **GRANTED**. However, in lieu of the City seeking leave to amend so as to assert its claim as a defense, ***the Court will construe the City's counterclaim as presented as a defense for a setoff.***

IT IS SO ORDERED.

John A. Parkins, Jr.
Judge

¹⁴ *E.g. Shuman*, 1991 WL 18101 at *3; *Delaware Chems., Inc.*, 121 A.2d at 917-18; *B. Lewis Productions, Inc. v. Bean*, 2005 WL 273298, *2, Jordan, J. (D. Del. Jan. 28, 2005).