SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY
COURTHOUSE
GEORGETOWN, DE 19947

September 15, 2005

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Re: ***Legatski v. BethanyForest Assoc, Inc. v. Harris et al.***
C.A. No. 03C-07-033-RFS

Dear Counsel:

This is my decision regarding Plaintiffs Richard and Mary Legatski's Motion to Amend the Complaint.[1] For the reasons set forth herein, the motion is granted.

BACKGROUND

On October 12, 1993, the Plaintiffs, Richard and Mary Legatski ("the Legatskis") entered into a contract with Bethany Forest Associates, Inc. ("Bethany Forest") to buy a lot in the Bethany Forest Subdivision and to have a custom home built on it. The contract obligated Bethany Forest to design and construct a septic system for the home. Bethany Forest applied for and got a permit from DNREC to install a septic system. The permit required the system to be

[1] The motion was scheduled for presentation on September 16, 2005. The parties agreed that the question could be decided on the submitted papers.

inspected by DNREC's Division of Water Resources once installed and prior to it being covered with fill dirt. The septic system was designed by J. Ross Harris, a Professional Engineer of Environmental Consultants International Corp. (both are third party defendants in this case) ("Harris" and "ECI"). Bethany Forest hired Ormil Savage, a subcontractor to install it.

The Plaintiffs allege that once the system was installed, DNREC was never notified and the Division of Water Resources never inspected it. It was covered with fill dirt, and Plaintiffs began to reside in the house part-time shortly thereafter.[2] A further addition was built onto the home in 1996, also by Bethany Forest.

In September of 2002, when the Legatskis had begun residing in the house full-time, the septic system alarm activated, indicating problems. Soon after, it was discovered that the drain field lines were blocked and the pump was not in the proper location. In addition, there was dirt in the tank and water standing on the drain field. A subsequent DNREC inspection determined that the system had failed prematurely, most likely because of poor site preparation and improper construction practices. A replacement system had to be installed.

The Plaintiffs filed a Complaint on July 29, 2003, alleging negligence, breach of fiduciary duty and fraud. A scheduling conference was held on May 23, 2005, at which a briefing schedule was established. All briefs are to be filed by August 15, 2005. In addition, any Motions to Amend were to be filed by July, 5, 2005. Discovery is to be completed by January 31, 2006. Plaintiffs filed this Motion to Amend on June 27, 2005. They seek to amend the complaint to include claims of breach of contract and breach of warranty.

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[2] The Plaintiffs also allege that the Certificate of Occupancy was obtained upon the false representations of Bethany Forest that the septic system had been properly installed and inspected.

Third Party Defendants Harris and ECI respond that it is unfair to allow the Plaintiffs to amend the complaint now given the briefing schedule. Defendant Bethany Forest argues that the Motion should be denied because the statute of limitations has expired. Third Party Defendant Ormil Savage takes no position on the Motion.

DISCUSSION

Superior Court Civil Rule 15(a) provides that a pleading may be amended once at any time before a responsive pleading is served, or if there is no responsive pleading permitted and the case is not yet on the trial calendar, then a pleading may be amended within 20 days from when the party was served. Otherwise, a party must get leave of the court (or consent of the adverse party) to amend. "[L]eave shall be freely given when justice so requires." Super. Ct. Civ. R. 15(a). Leave of court should be freely given unless there is evidence of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, prejudice, futility, or the like. *Parker v. State of Delaware, et al.,* Del. Super., C.A. No. 99C-07-323-JRJ, Jurden, J. (Oct. 14, 2003). The decision to allow or deny an amendment to the complaint is within the discretion of the Court. *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 72 (Del. 1993).

The Plaintiffs filed their motion before the due date in the scheduling order for amending the pleadings. Bethany Forest filed a Motion for Summary Judgment on April 11, 2005, to which all the parties have already responded. The Plaintiffs also filed a Motion for Summary Judgment on June 21, 2005. It was not until after that motion was filed that they filed this motion on June 27th. Although there has been some delay, there is no evidence of bad faith or dilatory motive on the part of the Plaintiffs.

Bethany Forest seems to suggest that the Plaintiffs' additional contract actions might be

futile because the statute of limitations has expired pursuant to the rule in 10 *Del. C.* § 8106. It argues that the time of discovery rule[3] should not apply in this case. However, in a case with facts similar to this one, *Rudginski v. Pullella*, 378 A.2d 646, 649 (Del. Super. Ct. 1977), the Court found that it would be harsh to find that the cause of action accrued at the time of the negligent installation of a septic tank when there was no way to know that the negligence had taken place. At the very least, there is a dispute of fact as to whether or not the time of discovery rule should apply to the breach of contract claim and to the express warranty claim. *See Marcucilli v. Boardwalk Builders, Inc.*, 2002 WL 1038818, at *4 (Del. Super. Ct.) (noting that because there were factual issues as to what was discovered and when, the question of the application of the rule was one for the factfinder). This dispute negates a finding of futility. The time of discovery issue can be revisited with a more fully developed record.

The principal question then, is how prejudicial would it be to the Defendant and to the Third Party Defendants to allow the Plaintiffs to amend their complaint? In this regard, the Court will allow the parties to supplement their briefs on the summary judgment motions within the next thirty days. As the Plaintiffs point out, the time for discovery does not end until January 2006. Any prejudice brought about by the delay in filing the Motion to Amend can be ameliorated by allowing the parties time to supplement their briefs. Given the fact that the rule is

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[3] The time of discovery rule applies to breach of contract claims and to claims for breach of an express warranty not covered by the UCC. *Marcucilli v. Boardwalk Builders, Inc.*, 2002 WL 1038818, at *4 (Del. Super. Ct.). It applies when the injury or conditions are "inherently unknowable" and the plaintiff is "blamelessly ignorant." *Ruger v. Funk*, 1996 WL 110072, at * 2 (Del. Super. Ct.). *See also Dalton v. Ford Motor Co.*, 2002 WL 338081, at *3 (Del. Super. Ct.). For a history of the evolution of the rule's application in Delaware see *Descano v. Walters*, 1992 WL 9078, at *2 (Del. Super. Ct.) and *Rudginski v. Pullella*, 378 A.2d 646, 648-49 (Del. Super. Ct.).

to be given liberal construction and that its purpose is to "encourage the disposition of litigation on its merits," the Plaintiffs will be permitted to amend their complaint. *See E.K. Geyser Co. V. Blue Rock Shopping Ctr., Inc.*, 229 A.2d 499 (Del. Super. Ct. 1967) (noting that rule is given liberal construction); *Grand Venture, Inc.*, 632 A.2d at 72 (discussing the purpose of rule).

CONCLUSION

Considering the foregoing, Plaintiffs' Motion to Amend the Complaint is granted.

IT IS SO ORDERED.

Richard F. Stokes, Judge

Original to Prothonotary