IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| The Allenview Home Owners Association, Duane E. Herman and Susan M. Herman | : | |
| v. | : | |
| David A. Hawkins and Marcia R. Hammersley, Appellants | : | No. 451 C.D. 2009 |
| | : | Submitted: August 14, 2009 |

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: October 23, 2009

David A. Hawkins and Marcia R. Hammersley (Owners) appeal the February 6, 2009 orders of the Court of Common Pleas of Cumberland County (trial court) denying their motion for post-trial relief seeking a judgment notwithstanding the verdict and a new trial, and denying their motion to amend the answer to the complaint filed by the Allenview Home Owners Association (Association). The issues before this Court are: (1) whether the Association's breach of its contractual obligation to approve Owners' application within 30 days resulted in a deemed approval of the application; (2) whether the Association's deemed approval of the application deprived it of standing to challenge the approval; (3) whether the Association's lack of standing deprived the trial court of subject matter jurisdiction; (4) whether the trial court erred by denying Owners' motion to amend its answer to the complaint, since the Association was aware of the proffered defenses in advance

of the trial; and (5) whether the trial court erred by failing to find that Owners proved their right to relief at the bench trial, and by ignoring evidence that was not refuted or contradicted. For the reasons that follow, we affirm the orders of the trial court.

The Association is a Pennsylvania non-profit corporation formed to operate on behalf of the residential development known as Allenview, located in Mechanicsburg, Upper Allen Township, Cumberland County, Pennsylvania. The property in the Allenview development is subject to the terms and conditions in the Declaration of Covenants and Restrictions (Initial Declaration), dated December 27, 1976, and the Declaration of Supplementary Covenants and Restrictions, dated April 10, 1980, both of which have been recorded in the Recorder of Deeds' office.

On July 1, 2005, Owners purchased a 3.2 acre lot with improvements in Allenview, located at 1302 Foxfire Circle (property). On August 15, 2006, Owners resubmitted a previously-denied request to the Association for permission to construct a detached, steel pole building at the left rear of their property which would measure 40 feet by 60 feet.[1] At a meeting of the Association's Board of Directors (Board) on August 22, 2006, attended by Mr. Hawkins, the Board approved a request to build a detached building measuring 32 feet by 56 feet. By letter dated August 29, 2006, the Board gave written notification approving the request, stating that the building should measure only 32 feet by 56 feet, but added that it should be constructed in the same appearance as the previously-requested larger building, without garage doors, but with a large "barn-type" sliding or pull-out door. Owners ordered the materials for construction of the building that day. Site preparation for the project began in early October of 2006.

[1] In all, Owners submitted five previous requests to the Association for architectural approval and/or modification of their property. Three were approved and two were denied.

At the Board's October 24, 2006 meeting, 32 Allenview residents appeared and expressed concerns about the Board's approval of the Owner's detached building. It was discovered that there was confusion between what the Board thought was approved, and what the Owners' thought was approved on August 22, 2006. With the exception of one member, the Board believed that, on August 22, 2006, it re-approved Owners' March 2006 request to construct a workshop measuring 32 feet by 56 feet, only detached from the home, and with siding and shingles to match the existing building. Owners' believed that the Association approved its request to construct a steel pole building, submitted in June, July and August of 2006, only measuring 32 feet by 56 feet, instead of the 40 feet by 60 feet requested.

As a result of the confusion identified at that October 24, 2006 meeting, the Board passed a motion that Owners immediately stop construction of their structure, and rescinded any and all approvals by the Board related to the property of the Owners. The Association verbally advised Owners of its actions that day. Owners notified its contractor of the situation and were able to put the work crew on hold, but the materials were nevertheless delivered to their property on or about October 25, 2006. The Board notified the Owners of the rescissions, dated October 24, 2006, and asked that Owners submit one proposal specifically describing all of the changes they desired to make to their property in time for the Architectural Control Committee to consider at its November 20, 2006 meeting.

On October 28, 2006, Owners met with the Board to resolve its objections to the rescission notice. At that meeting, Owners proposed to cancel the construction, so long as the Association agreed to reimburse them $16,979.00 for the costs incurred with the project to date (i.e., for the contractor's deposit, for excavation and for materials that had been cut and could not be returned), and for returning the

property to its original condition. Owners gave the Association until November 3, 2006 to respond to its demand.

After receiving no response from the Association to the proposed resolution of the situation, on November 21, 2006, Owners commenced erection of a steel-sided pole barn on their property. On November 30, 2006, the Association filed a complaint and petition for preliminary and permanent injunction with the trial court to enjoin Owners from constructing the building.[2] By that time, the building had been substantially completed, and the siding and roof had been installed.

On February 5, 2007, Owners responded to the Association's petition for preliminary and permanent injunction, and filed an answer to the complaint and a counterclaim, which did not include new matter. On February 26, 2007, Duane E. Herman and Susan M. Herman (Intervenors), owners of the property adjacent to Owners' property, were granted leave to intervene in the action before the trial court. On October 23, 2007, the Association and Intervenors filed their answer to Owners' counterclaim. A bench trial was held before the trial court on October 16, 2008, at which evidence was taken. On October 24, 2008, the trial court issued an opinion and order requiring Owners to remove the detached structure, unless it was modified with appropriate siding.

On November 5, 2008, the Association and Intervenors moved to amend the trial court's October 24, 2008 order, seeking to impose the additional requirement that the shingles on the structure match Owners' existing residence and garage as closely as possible, which motion was denied by the trial court. On November 17, 2008, Owners filed a motion for post-trial relief seeking a judgment notwithstanding

[2] On March 5, 2007, the Association withdrew its request for preliminary injunction without prejudice to its request for permanent injunction.

the verdict and a new trial. On January 16, 2009, Owners sought leave to amend their answer to the Association and Intervenors' complaint. By opinion and order issued February 6, 2009, incorporating its earlier decision, the trial court denied Owners' post-trial motion, stating Owners' arguments were waived because they were not previously pled as new matter, and that the Board did not act inequitably. Also, by order issued February 6, 2009, the trial court denied Owners' motion to amend their answer to the Association and Intervenors' complaint. On March 2, 2009, Owners appealed the trial court's decisions to this Court.[3]

Owners argue on appeal, as they did in their motion for post-trial relief, that the Board was mandated to approve or deny their August 15, 2006 request to construct a detached steel pole building within 30 days after it was submitted, and the Board's failure to do so resulted in a "deemed approval" of the application by the Association. We disagree. It would appear from the record that the Board approved a request by Owners at its August 22, 2006 meeting, but it is unclear exactly what was approved by the Board. In any event, the Association rescinded all of its prior approvals on October 24, 2006. To the extent that what the Board approved was something other than Owner's August 15, 2006 submission, we will address the issue of deemed approval.

The crux of Owners' argument comes from the deed restrictions set forth in Article VII, Section 1 of the Association's Initial Declaration which provides:

[3] "This Court's scope of review of the trial court's final decree entered in an action in equity is limited to determining whether the trial court committed an error of law or abused its discretion." *Earl Twp. v. Reading Broad., Inc.*, 770 A.2d 794, 798 (Pa. Cmwlth. 2001).

> Review by Committee. No building, fence, wall or other structure shall be commenced, erected or maintained upon The Properties . . . until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Board of Directors of the Association, or by an architectural committee composed of three (3) or more representatives appointed by the Board. In the event said board, or its designated committee, fails to approve or disapprove such design and location within thirty (30) days after said plans and specifications have been submitted to it, or in any event, if no suit to enjoin the addition, alteration or change has been commenced prior to the completion thereof, approval will not be required and this Article will be deemed to have been fully complied with.

Reproduced Record (R.R.) at 43a, 259a. It is clear from the cases cited by Owners that the basis for their deemed approval defense lies in the Pennsylvania Municipalities Planning Code (MPC).[4] Specifically, the Association refers to Section 908(9) of the MPC, which requires a board or hearing officer to render a written decision or written findings within 45 days after the last hearing on an application and, if that does not occur, "the decision shall be deemed to have been rendered in favor of the applicant unless the applicant has agreed in writing or on the record to an extension of time." 53 P.S. § 10908(9); *see Bd. of Supervisors of Rockhill Twp. v. Mager*, 855 A.2d 917 (Pa. Cmwlth. 2004). This Court has recognized that the "deemed approval" language in Section 908(9) of the MPC means the application will be deemed approved by operation of law when a municipality fails to timely act on a land use application. *In re Deemed Approved Conditional Use*, 975 A.2d 1193 (Pa. Cmwlth. 2009).

[4] Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101 - 11202.

Owners' reliance on Section 908(9) of the MPC as the basis for this appeal is misplaced. This case does not involve a municipality that failed to timely approve a land use application. Rather, it involved an Association, which is a non-profit corporation whose guidelines are set forth in deed covenants and restrictions. Even within the context of the MPC, deemed approval is not applied to all application approval processes. *See Gemini Equip. Co. v. Bd. of Comm'rs of Susquehanna Twp.*, 604 A.2d 1233 (Pa. Cmwlth. 1992) (Section 708 of the MPC, 53 P.S. § 10708, does not provide for deemed approval); *Beekhuis v. Zoning Hearing Bd. of Middletown Twp.*, 429 A.2d 1231 (Pa. Cmwlth. 1981) (Section 1004 of the MPC, 53 P.S. § 11004, does not provide for deemed approval). Moreover, it is clear that, in order for a deemed approval to apply in the context of the MPC, "there must be an express legislative declaration of deemed approval in a statutory or ordinance provision to have such a substantive result produced by procedural tardiness." *LVGC Partners, LP v. Jackson Twp. Bd. of Supervisors*, 948 A.2d 235, 237 (Pa. Cmwlth. 2008). Thus, we do not find that, under the "deemed approval" provisions set forth in Section 908(9) of the MPC, the Association's alleged failure to act on Owners' application within 30 days resulted in an approval of the application.[5]

Owners next argue that the trial court erred by denying Owners' motion to amend their answer to the complaint. We disagree. Owners did not assert new matter in their answer to the Association's complaint. R.R. at 66a-76a. Following the bench trial of this matter, Owners' requested leave to amend their answer to the Association's complaint to add the following new matter:

[5] By reaching this result, we need not address Owners' allegations that the Association's deemed approval of the application deprived it of standing to challenge the approval, nor that the Association's lack of standing deprived the trial court of subject matter jurisdiction.

27. Paragraphs 1 through 26 are hereby incorporated by reference.

28. [The Association's] claims are barred by the principles of deemed approval, equitable estoppel and unclean hands as follows.

29. [Owners] have incurred expenses for the construction of the detached building in the total amount of $28,479.00.

30. [Owners] have incurred these expenses based on the August 29 2006 approval letter received from the Board and the fact that the materials were delivered and construction began prior to receipt of the rescission letter. Additionally the majority of the materials were specifically manufactured for the specific size of the detached building.

31. [The Association] has demanded that the building be removed and the property returned to its prior condition. [Owners] have obviously incurred significant expenses based on the approval received in August 2006.

32. The October 25 2006 rescission letter was not received in a timely manner. Construction of the detached building had already begun in that the location of the building had been prepared and specifically manufactured materials had been manufactured and delivered to the premises. [Owners] strongly argue that the rescission was improper, however, in the event the Court agrees that the building be removed, [Owners] demand reimbursement of the $28,47[]9.00 due to the fact that materials had been manufactured and purchased and construction had begun prior to the receipt of the October 25 2006, rescission letter and the construction expenses were incurred by [Owners] through no fault of their own.

33. [The Association] has also indicated that the materials used for the siding and the roof are improper and should be replaced rather than having the entire building removed. Again, [Owners] argue that the construction of the building and materials used were

> proper based on the August 29 2006 letter and the October 25 2006 rescission letter has no legal basis. However in the event the court would order that the materials used for the siding and the roof be changed [Owners] demand that the replacement costs of $12,248.00 be paid by [The Association]. The replacement costs are shown on the attached Exhibit D.
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> WHEREFORE, [Owners] submit that [The Association's] Complaint should be dismissed and Judgment entered in [Owners'] favor.

R.R. at 393a, 397a-398a. Rule 1030 of the Pennsylvania Rules of Civil Procedure (Pa.R.C.P.) states:

> Except [affirmative defenses of assumption of the risk, comparative negligence and contributory negligence], all affirmative defenses including but not limited to . . . estoppel . . . shall be pleaded in a responsive pleading under the heading "New Matter". A party may set forth as new matter any other material facts which are not merely denials of the averments of the preceding pleading.

Pa.R.C.P. No. 1032(a) provides that "[a] party waives all defenses . . . which are not presented . . . by . . . answer . . . except a defense which is . . . nonwaivable . . . ." *See Coldren v. Peterman*, 763 A.2d 905 (Pa. Super. 2000).

The defenses presented here by Owners, such as deemed approval, equitable estoppel and unclean hands are waivable and, therefore, should have been pled as new matter in response to the Association's complaint. Estoppel is an equitable doctrine that Pa.R.C.P. No. 1030 specifically requires shall be pleaded as new matter in a responsive pleading and, since it was not pled as new matter to the Association's complaint, it was waived. Additionally, the Pennsylvania Supreme

Court has specifically held that the defense of unclean hands is waived unless it is raised as an affirmative defense in new matter. *Commonwealth v. Coward*, 489 Pa. 327, 414 A.2d 91 (1980). Finally, this Court has held that the failure to plead deemed approval as an affirmative defense renders it waived pursuant to Pa.R.C.P. No. 1032. *Paxton Hollow Estates, Ltd. v. Lower Paxton Twp.*, 501 A.2d 1175 (Pa. Cmwlth. 1985).

Pa.R.C.P. No. 1033 provides that "[a] party . . . by leave of court, may at any time . . . amend his pleading. . . . An amendment may be made to conform the pleading to the evidence offered or admitted." Under this Rule, the Pennsylvania courts have permitted amendments to pleadings even after trial. *Horowitz v. Universal Underwriters Ins. Co.*, 580 A.2d 395 (Pa. Super. 1990). The decision to permit an amendment to a pleading is within the trial court's discretion. *Mistick, Inc. v. City of Pittsburgh*, 646 A.2d 642 (Pa. Cmwlth. 1994). Such discretion is not limitless. "Amendments are to be liberally permitted except where surprise or prejudice to the other party will result, or where the amendment is against a positive rule of law." *Id.* at 644. "Prejudice must be . . . something more than a detriment to the other party, since any amendment almost certainly will be designed to strengthen the legal position of the amending party and correspondingly to weaken the position of the adverse party." *Standard Pipeline Coating Co., Inc. v. Solomon & Teslovich, Inc.*, 496 A.2d 840, 844 (Pa. Super. 1985) (quotations marks omitted).

The trial court in the instant case stated that the Association would be prejudiced if Owners were permitted to amend their answer to raise affirmative defenses that were waived, and which the Association did not have to meet at the bench trial. The trial court pointed out that Owners cite no cases where a post-verdict amendment was granted to afford a defendant the opportunity to raise affirmative

defenses that were waived for failure to plead them pursuant to Pa.R.C.P. No. 1030. We agree. Moreover, Owners cited only *Standard Pipeline* in support of its conclusion that the trial court erred by not allowing them to amend their answer. In *Standard Pipeline*, however, the Pennsylvania Superior Court permitted the amendment of a complaint post-verdict to conform the complaint to the verdict where, unlike here, the defendants raised and presented the new evidence at trial, and therefore there was no prejudice to the defendants. Under the circumstances now before the Court, however, we hold that the trial court did not err in denying Owners' motion to amend their answer to the Association's complaint to add new matter.

Owners' final argument on appeal is that the trial court erred by failing to find that they proved their right to relief at the bench trial, and by ignoring evidence that was not refuted or contradicted. Specifically, Owners claim that they are entitled to judgment notwithstanding the verdict since they complied with the restrictive covenants and properly filed plans that were approved by the Board. They also claim that they are entitled to a new trial, since the trial court's decision was against the weight of the evidence. We disagree.

This Court has held that:

> [t]he decree in an equity action may not be disturbed unless it is not supported by the evidence or is demonstrably capricious. Further, this Court will not reverse the trial court's final decree in equity, 'if apparently reasonable grounds exist for the relief ordered and no errors or inapplicable rules of law were relied on.'

*Earl Twp. v. Reading Broad., Inc.*, 770 A.2d 794, 798 (Pa. Cmwlth. 2001) (citation omitted). When reviewing a party's entitlement to a judgment notwithstanding the verdict, this Court "must determine 'whether, reading the record in the light most favorable to the verdict winner and granting him the benefit of every favorable

inference, there is sufficient competent evidence to support the verdict.'" *Mannick v. Dep't of Labor and Indus.*, 732 A.2d 26, 28 (Pa. Cmwlth. 1999). Moreover, an appellate court's "standard of review [of a denial of] a motion for a new trial is to decide whether the trial court committed an error of law which controlled the outcome of the case or committed an abuse of discretion." *Kruczkowska v. Winter*, 764 A.2d 627, 629 (Pa. Super. 2000).

In the case before us, it is undisputed that, on August 15, 2006, Owners submitted a request to the Association for permission to construct a detached, steel pole building at the left rear of their property which would measure 40 feet by 60 feet. R.R. at 195a-196a, 199a-200a, 304a, 335a. It is also uncontroverted that, on August 22, 2006, the Board approved a request to construct a detached building, but measuring only 32 feet by 56 feet, with the proviso that "[t]he building should be constructed in the same appearance as the previously requested larger building, with no garage doors but a large "barn-type" sliding or pull-out door." R.R. at 116a, 145a, 159a-160a, 170a-173a, 200a-201a, 229a-231a, 340a-342a, 345a. Thereafter, on October 24, 2006 the Board, having discovered that there was confusion about whether the Board approved construction of a steel pole building or one that matched the Owners' home, it rescinded any and all approvals related to Owners' property and asked that they submit one proposal specifically describing all of the changes they proposed to make to their property by November 20, 2006. R.R. at 116a, 147a, 161a-162a, 214a-215a, 343a-344a, 346a-347a. There is no question that Owners did not submit that proposal but, instead, proceeded to construct the building without express approval from the Association. R.R. at 116a, 128a, 148a, 206a-207a, 215a-216a, 218a, 225a-226a. Following the bench trial, the trial court entered an order stating that Owners had to remove the structure and return the property to its original

condition, unless they modified the building with siding to match their home and the attached garage as closely as possible. R.R. at 87a-97a.

Reading the record in the light most favorable to the Association, and giving it the benefit of every favorable inference, we hold that there is sufficient competent evidence to support the trial court's orders. We also hold that the trial court did not commit an abuse of discretion or an error of law. We, therefore, hold that the trial court properly denied Owners' motion for post-trial relief seeking a judgment notwithstanding the verdict and their motion for a new trial.

For the foregoing reasons, we affirm the orders of the trial court.

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JOHNNY J. BUTLER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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O R D E R

AND NOW, this 23rd day of October, 2009, the February 6, 2009 orders of the Court of Common Pleas of Cumberland are affirmed.

JOHNNY J. BUTLER, Judge

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

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| The Allenview Home Owners Association, Duane E. Herman and Susan M. Herman | : | |
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BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**DISSENTING OPINION BY JUDGE COHN JUBELIRER** **FILED: October 23, 2009**

I respectfully disagree with the majority opinion in this case.

I believe the trial court abused its discretion in denying Owners' motion to amend their Answer to Complaint and Counterclaim (Answer) to include the affirmative defense of equitable estoppel. Rule 1033 of the Rules of Civil Procedure states that "[a] party, either by filed consent of the adverse party or by leave of court, may *at any time* change the form of action, correct the name of a party *or amend his pleading*." Pa. R.C.P. No. 1033 (emphasis added). This Court has held that, pursuant

to Rule 1033, "[a]mendments should be allowed at *any* stage of the case." E.O.J., Inc. v. Tax Claim Bureau of Schuylkill County, 780 A.2d 814, 818 (Pa. Cmwlth. 2001) (emphasis added). "Amendments are to be liberally permitted except where surprise or prejudice to the other party will result . . . ." Miller v. Stroud Township, 804 A.2d 749, 754 (Pa. Cmwlth. 2002). This court has described in detail the sort of prejudice required to defeat a motion to amend:

> The probability that an offered affirmative defense will be successful is not sufficient prejudice to deny a party leave to amend in that a showing of a reasonable possibility of success is a ground for granting leave to amend. The prejudice to the adverse party must be more than a mere detriment to that party's position in that any amendment would almost certainly be designed to strengthen the legal position of the amending party to the detriment of the adverse party. The prejudice to the adverse party, to be sufficient to warrant a court denying a party leave to amend a pleading, must stem from the delay in raising the defense and prejudice to the substantive position of the adverse party. The mere fact that the adverse party has expended time and effort in preparing to try a case against the amending party is not such prejudice as to justify denying the amending party leave to amend to raise an affirmative defense which has a substantial likelihood of success.

James A. Mann, Inc. v. Upper Darby School District, 513 A.2d 528, 531 (Pa. Cmwlth. 1986) (citations omitted). Here, even though Owners did not seek to amend their Answer until after the trial court's verdict, there was still no prejudice or undue surprise to the Association. The Owners only sought to amend their Answer to explicitly include the theory of equitable estoppel; they did not attempt to plead new facts. While the Answer did not originally assert the affirmative defense of equitable estoppel as new matter, it did include a counterclaim that pleaded facts that would support a claim of equitable estoppel. The factual assertions in Owners' proposed new matter are identical to the assertions made in Owners' Answer. (Compare

Defendants' Motion to file Amended Answer, Ex. 1, Defendants' New Matter ¶¶ 29-33 with Answer ¶¶ 28-32.)[1] The counterclaim pleaded that the Owners incurred construction expenses in reliance upon the Association's August 29, 2006 approval letter and sought damages based on these facts. (Answer ¶ 28-29.) These facts were addressed at the hearing, and are the same facts that would be relevant to a decision on equitable estoppel as an affirmative defense. See, e.g., Boyd v. Rockwood Area

[1] Specifically, both the Answer to Complaint and Counterclaim and the proposed new matter assert that:

> 28. Defendants have incurred expenses for the construction of the detached building in the total amount of $28,479.00.
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> 29. The Defendants incurred these expenses based on the August 29, 2006, approval letter received from the Board and the fact that the materials were delivered and construction began prior to receipt of the rescission letter. Additionally, the majority of the materials were specifically manufactured for the specific size of the detached building.
>
> 30. Plaintiff has demanded that the building be removed and the property returned to its prior condition. Defendants have obviously incurred significant expense based on the approval received in August 2006.
>
> 31. The October 25, 2006, rescission letter was not received in a timely manner. Construction of the detached building had already begun in that the location of the building had been prepared and specifically manufactured materials had been manufactured and delivered to the premises. Defendants strongly argue that the rescission was improper, however, in the event the Court agrees that the building be removed, the Defendants demand reimbursement of the $28,479.00 due to the fact that materials had been manufactured and purchased and construction had begun prior to the receipt of the October 25, 2006, rescission letter and the construction expenses were incurred by Defendants through no fault of their own.
>
> 32. Plaintiff has also indicated that the materials used for the siding and the roof are improper and should be replaced rather than having the entire building removed. Again, Defendants argue that the construction of the building and the materials used were proper based on the August 29, 2006 letter and that the October 25, 2006 rescission letter has no legal basis. However, in the event the court would order that the materials used for the siding and the roof be changed, the Defendants demand that the replacement costs of $12,478.00 be paid by the Plaintiff. The replacement costs are shown on the attached Exhibit D.

(Answer ¶¶ 28-32; see also Defendants' Motion to file Amended Answer, Ex. 1, Defendants' New Matter ¶¶ 29-33.)

School District, 907 A.2d 1157, 1168 (Pa. Cmwlth. 2006) (setting forth the elements of equitable estoppel as "(1) intentional or negligent misrepresentation of some material fact; (2) made with knowledge or reason to know that the other party would rely upon it; and (3) inducement of the other party to act to its detriment because of its justifiable reliance on the misrepresentation"). Because these facts were raised in the original Answer, and because the trial court failed to address Owners' estoppel argument in its opinion, I believe the trial court abused its discretion by not allowing Owners to amend their Answer.[2]

**RENÉE COHN JUBELIRER, Judge**

[2] I would also note that I believe Owners base their argument regarding deemed approval on the language of the deed restriction, not on the MPC. While Owners do cite cases which discuss the deemed approval provisions of the MPC, they do this to analogize the language of the deed restriction to the deemed approval provisions of the MPC, and not in reliance upon those provisions of the MPC.