

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P 65.37

ALEX H. PIERRE,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
POST COMMERCIAL REAL ESTATE,	:	
CORP., DAWN RODGERS, NANCY	:	
WASSER AND NANCY WASSER and	:	
ASSOCIATES	:	
	:	
Appellees	:	No. 2560 EDA 2011

Appeal from the Order entered August 26, 2011,
Court of Common Pleas, Philadelphia County,
Civil Division at No. 384 Dec. Term 2010

BEFORE: DONOHUE, OLSON and FITZGERALD*, JJ.

MEMORANDUM BY DONOHUE, J.:

Filed: January 30, 2013

Alex H. Pierre ("Pierre") appeals from the order entered in the Court of Common Pleas, Philadelphia County, granting the motion for judgment on the pleadings filed by Post Commercial Real Estate, Corp., Dawn Rodgers and Nancy Wasser (collectively, "Appellees"), dismissing with prejudice all counts raised in Pierre's complaint and awarding Appellees counsel fees and costs upon finding Pierre's conduct sanctionable pursuant to 42 Pa.C.S.A. § 2503. We vacate and remand for further proceedings.

Beginning in 1993, Pierre rented apartment C-1 in the Cloverly Building on West School House Lane in Philadelphia. In 2008, Pierre failed

*Former Justice specially assigned to the Superior Court.

to pay his monthly rent for July, August and September.¹ Consequently, his landlord, MP Cloverly Partners, L.P. ("Cloverly"), instituted an action against him in the Landlord-Tenant Division of Philadelphia's Municipal Court. On October 23, 2008, a judgment was rendered in Cloverly's favor, finding the lease terminated as of that date and awarding possession of the premises to the landlord, but prohibiting eviction proceedings to begin before November 30, 2008. Pierre did not appeal this ruling.

On November 6, 2008, Cloverly filed a writ of possession, which was served on Pierre on November 13, 2008. On November 14, 2008, Pierre submitted a money order for the November rent to Appellee Post Commercial Real Estate Corp. ("Post"). Approximately three days later, on November 17, 2008, Pierre tendered two additional money orders to Post, which were intended to be the December and January rental payments.

On December 8, 2008, Post initiated Pierre's eviction from the Cloverly building with the assistance of a sheriff. At that time, a representative of Post returned the money order Pierre had submitted for the January 2009 rent. Pierre removed some of his possessions, but did not return to retrieve the items left behind on that date.

¹ It appears from the record that Pierre remitted his rental payments to Appellee Post Commercial Real Estate Corp., which acts only as a property manager for the Cloverly Building. The record also reveals that the Cloverly Building is owned by MP Cloverly Partners, L.P.

On December 7, 2010, Pierre filed the complaint at issue in this appeal. Therein, Pierre raised the following claims: (1) breach of contract against Post;² (2) tortious interference with contract against Nancy Wasser ("Wasser") and Nancy Wasser and Associates; (3) violation of Philadelphia Code against all defendants; (4) wrongful use of civil proceedings against Post, Wasser, and Nancy Wasser and Associates; and (5) abuse of process against Post, Wasser and Nancy Wasser and Associates. **See** Complaint, 12/7/10, at 5-10.

In their answer and new matter, Appellees denied Pierre's claims. Appellees responded, in essence, that Pierre did not have a contractual relationship with any of the named defendants; that Pierre was evicted pursuant to a properly-obtained eviction order which he failed to appeal; and that there is no such entity as Nancy Wasser and Associates. Appellees also pointed out that Pierre is an attorney by training who has been suspended from practice in this Commonwealth; and that Pierre filed precisely the same complaint in December 2009, but that it was dismissed for lack of prosecution. **See** Answer and New Matter, 1/13/11.

On February 3, 2011, Pierre filed his response to Appellees' new matter. No further action occurred until March 14, 2011, when Pierre filed a

² Pierre based his breach of contract claim not on the original lease agreement, but on the theory that despite the termination of his lease by the October 2008 order of court, another lease agreement was created by virtue of his tendering rent for the months of December 2008 and January 2009, and the acceptance of these payments by Post.

motion seeking leave to amend his complaint and caption. The trial court denied this motion on April 8, 2011. Pierre sought reconsideration, which the trial court denied. Undeterred, Pierre sought reconsideration of the denial of his motion for reconsideration. The trial court denied this request, including in its order, "no further reconsiderations to be filed." Trial Court Order, 6/16/11.

On July 21, 2011, Appellees filed a motion for judgment on the pleadings, also requesting sanctions pursuant to 42 Pa.C.S.A. § 2503. The trial court granted this motion, dismissed Pierre's claims with prejudice, and granted Appellees' request for sanctions.³

This appeal followed. Pierre presents the following three issues for our review:

1. Did the trial court err or abuse its discretion in denying [Pierre] leave to amend where the proposed amendment was to add a defendant on counts which were not time-barred, the proposed amendment was to amplify the original complaint with legal theories supported by factual averments made before the applicable statutory period ran, and the proposed amendment was to streamline the issues at an early procedural juncture, to wit, but sixty days after service of the answer or ninety days after commencement of the action?

³ In its order, the trial court directed Appellees to file an affidavit detailing the counsel fees and costs incurred for the preparation and filing of the motion for judgment on the pleadings. It appears from our review of the record that no such affidavit has been filed. Thus, the unliquidated award is interlocutory and unappealable. **See Gray v. State Farm Ins. Co.**, 477 A.2d 868, 872 (Pa. Super. 1984).

2. Did the trial court err or abuse its discretion in granting [Appellees] judgment on the pleadings where, procedurally, service of the motion was effected two days before its response [sic] due date, the pleading of the [Appellees] and documents attached thereto were considered, [Pierre's] facts were not taken as true, evidence was weighed, multiple fact questions existed and, substantively, the motion did not meet its initial burden of establishing entitlement to judgment as a matter of law, the controlling law did not support entry of judgment for [Appellees], and the trial court *sua sponte* raised arguments for these [Appellees]?
3. Did the trial court err or abuse its discretion in awarding attorneys' fees to [Appellees] under 42 Pa.C.S.[A.] § 2503 where the motion for sanctions improperly was filed with the underlying motion for judgment on the pleadings, the 'motion' was predicated on purported 'dilatatory, vexatious, arbitrary, in bad faith and obdurate' conduct which the law of the case determined was not sanctionable, the trial court consequently of its own proffered grounds for the award, and the trial court in like vein discounted key evidence in opposition and misconstrued and/or misapplied the controlling law to justify the award?

Appellant's Brief at 2.

Pierre's first issue challenges the trial court's denial of his motion seeking leave to amend the complaint. "When reviewing a trial court's ruling on a petition to amend a complaint, we grant the trial court a broad discretion in evaluating the petition. We will not disturb the sound discretion of the trial court absent an abuse of discretion." ***Diaz v. Schultz***, 841 A.2d 546, 549 (Pa. Super. 2004) (citation omitted). "An abuse of discretion is not

merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence of record.” **Conroy v. Rosenwald**, 940 A.2d 409, 415-16 (Pa. Super. 2007).

Pierre sought leave to amend his complaint pursuant to Pennsylvania Rule of Civil Procedure 1033 in order to add Cloverly as a defendant and assert claims against it for breach of contract, unfair trade practices and a violation of the Landlord and Tenant Act. Motion for Leave to Amend Caption and Complaint, 3/14/11, at 2, Exhibit C ¶ 6. He also sought to add factual allegations designating Post as the agent of Cloverly, and designating Nancy Rodgers (“Rodgers”) and Wasser as agents of Post. **Id.** at Exhibit C, ¶¶ 55 -58. Pierre further sought to add a factual allegation to the effect that after his eviction, he contacted Rodgers and Wasser to inquire as to when he could retrieve the property that he left in the apartment on the day he was evicted. **Id.** at Exhibit C ¶ 8. Finally, Pierre sought to add the following claims against Appellees: fraud, conversion, fraudulent misrepresentation, negligent misrepresentation, negligence, and unfair trade practices. **Id.** at Exhibit C ¶¶ 83-124.

First, we consider Pierre’s attempt to add Cloverly as a defendant and to assert additional causes of action against it. Pennsylvania Rule of Civil Procedure 1033 provides as follows:

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. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted.

Pa.R.C.P. 1033 (emphasis added). The language emphasized above providing that a party may amend his pleading at any time is tempered by the case law interpreting this rule, which restricts the addition of a new party pursuant to Rule 1033 to situations in which the statute of limitations for the underlying action has not yet run:

Although Pa.R.C.P. 1033 permits amendments to the caption at any time, changes effected subsequent to the running of the statute of limitations are restricted to minor rectifications, not substitution of parties. As this Court explained in **Anderson Equip. Co. v. Huchber**, 456 Pa. Super. 535, 690 A.2d 1239, 1241 (1997), amendments correcting the name of a party, e.g., from corporation to partnership or vice-versa, will be allowed after the statute period has ended. **See Powell v. Sutliff**, 410 Pa. 436, 189 A.2d 864 (1963). Where the proposed change has the effect of adding a new party, it should be prohibited. We held that, '[i]f the proper party was sued but under the wrong designation, the correction will be allowed. However, where the wrong party was sued and the amendment is designed to substitute another, distinct party, it will be disallowed. Important in this determination is whether different assets will be subject to liability by allowing the amendment.' **Anderson, supra** at 1241 (citations omitted). The imposition of liability on a new and distinct party after the statute of limitations has run is the result to be avoided.

Fredericks v. Sophocles, 831 A.2d 147, 150 (Pa. Super. 2003).

Pierre sought to add Cloverly to this action and to assert claims for wrongful eviction under the Landlord and Tenant Act, breach of contract and unfair trade practices against it.⁴ Pierre bases all three of these claims on Cloverly's acceptance of three rental payments in November 2008 and its subsequent eviction of Pierre on December 8, 2008. **See** Motion for Leave to Amend Caption and Complaint, 3/14/11, at Exhibit C ¶¶ 36-39, 49-54, 123. The wrongful eviction claim under the Landlord and Tenant Act that Pierre sought to bring is subject to a four-year statute of limitations, 42 Pa.C.S.A. § 5525. Likewise, the statute of limitations for a claim of breach of contract is four years, *id.*, and the statute of limitations on a claim for unfair trade practices is six years. *Id.* at § 5527; **see also** *Gabriel v. O'Hara*, 534 A.2d 488, 495 (Pa. Super. 1987) ("Unfair Trade Practices and Consumer Protection Law is subject to the six-year 'catchall' statute of limitations."). These limitations periods gave Pierre until December 8, 2012 to file his breach of contract and wrongful eviction claims, and until December 8, 2014 to file an unfair trade practices claim. Thus, when Pierre

⁴ Similar to the allegations in his original complaint, Pierre bases his breach of contract and wrongful eviction claims on the theory that he entered into another lease agreement with Cloverly by virtue of his tendering rent for the months of December 2008 and January 2009, and the acceptance of these payments by Cloverly. Furthermore, we note that in his amended complaint, Pierre sought to substitute Cloverly for Post in the breach of contract claim, but he intended to name both Cloverly and Post in the Landlord and Tenant Act claim.

filed his motion seeking to amend his complaint to add Cloverly in March 2011, the claims he wished to assert against it were viable. The trial court therefore should have permitted him to make these amendments.

We do not reach the same conclusion with regard to the claims that Pierre sought to add against Appellees. The majority of these proposed amendments asserted claims sounding in fraud or negligence. Fraud and negligence claims are subject to a two-year statute of limitations. 42 Pa.C.S.A. § 5524. The facts upon which Pierre based his proposed fraud and negligence-related claims occurred either on October 28, 2008 (at the eviction hearing), or December 8, 2008 (at the time of Pierre's eviction). **See** Motion for Leave to Amend Caption and Complaint, 3/14/11, at Exhibit C ¶¶ 84-90, 99-106, 108-115, 117-121. Thus, the statute of limitations on these claims ran on or about October 28, 2009 and December 8, 2009. Pierre's attempt to add them via amendment in March 2011 was therefore time barred.

Pierre also intended to add a claim for conversion against Appellees. According to his proposed amended complaint, Pierre's conversion claim stems from the date upon which Appellees allegedly took possession of the items remaining in Pierre's former residence, which was January 8, 2009. **Id.** at 2, Exhibit C ¶ 94. The statute of limitations for conversion is also two years, 42 Pa.C.S.A. § 5524; **Kingston Coal Co. v. Felton Min. Co., Inc.**, 690 A.2d 284, 291 (Pa. Super. 1997), and so the limitations period for

Pierre's conversion claim ran on January 8, 2011, approximately two months before Pierre filed his motion seeking leave to amend. This claim is therefore also time barred.⁵

Finally, we consider Pierre's attempt to add factual allegations asserting that Post is an agent of Cloverly and that Wasser and Rodgers are agents of Post. Rule 1033 permits the amendment of a complaint to correct the designation of a named party at any time prior to the running of the statute of limitations on the cause of action asserted. Pa.R.C.P. 1033; *Fredericks*, 831 A.2d at 150. In his amended complaint, Pierre sought to name Post as an agent of Cloverly with regard to the Landlord and Tenant Act and unfair trade practices claims. Pierre also sought to name Wasser and Rodgers as agents of Post for purposes of the same claims. **See** Motion for Leave to Amend Caption and Complaint, 3/14/11, at 2, Exhibit C ¶¶ 8, 51. Because these claims were viable, the trial court should have permitted these amendments as well.

⁵ Pierre's proposed claim under the Landlord and Tenant Act also involves a claim that on December 8, 2008, Cloverly and Post wrongfully took possession of the personal property that Pierre did not remove at the time of his eviction. **See** Motion for Leave to Amend Caption and Complaint, 3/14/11, at 2, Exhibit C ¶¶ 55-59. Claims for the wrongful retention of personal property are subject to a two-year statute of limitations. 42 Pa.C.S.A. § 5524(3). Thus, the statute of limitations for this claim ran on or about December 8, 2010, and so this aspect of Pierre's Landlord and Tenant Act claim was also time barred at the time Pierre sought to amend his complaint.

In denying Pierre's motion, the trial court erroneously concluded that the "new claims" Pierre sought to raise were universally subject to a two-year limitations period, and that that period expired on December 8, 2010 (three months before Pierre filed his motion seeking leave to amend). Trial Court Opinion, 7/2/12, at 6.⁶ As we have discussed above, this conclusion was wrong with regard to Cloverly, and so the trial court abused its discretion in denying that aspect of Pierre's motion based on the statute of limitations. However, the trial court was correct in its application of the law relating to the fraud, negligence and conversion claims that Pierre sought to raise against Appellees, and so it did not abuse its discretion in denying Pierre's motion to amend for purposes of adding those causes of action. Accordingly, we vacate the order granting Appellees' motion for judgment on the pleadings and reverse the order denying Pierre's motion for leave to amend. On remand, Pierre may file the amended complaint as attached to his motion for leave to amend, but with all proposed claims sounding in fraud, negligence, conversion and wrongful retention of personal property

⁶ The trial court also rejected Pierre's attempt to add Cloverly as a defendant upon finding that Pierre failed to comply with the timeliness requirements for the joinder of an additional defendant contained in Pennsylvania Rule of Civil Procedure 2253(a)(1). Trial Court Opinion, 7/2/12, at 6-7. However, Rule 2253(a)(1) addresses the joinder of an additional defendant in the context of cross-claims. **See** Pa.R.C.P. 2253, Explanatory Comment, 2007. This rule has no applicability to the present situation.

under the Landlord and Tenant Act excised therefrom. Pierre may not add any additional factual allegations or claims to his amended complaint.

In arriving at this ruling, we pass no judgment on the merits of any of the claims that Pierre seeks to bring.⁷ We have applied our standard of review, which requires us to consider only whether the trial court erred in its application of the law when rendering its judgment. *Diaz*, 841 A.2d at 549. Having found that it did, we are constrained to correct the error.

In light of our disposition, we need not address Pierre's remaining issues.

Order vacated. Case remanded. Jurisdiction relinquished.

Fitzgerald, J. files a Concurring and Dissenting Statement.

⁷ Indeed, we question the viability of Pierre's abuse of process and wrongful use of civil proceedings claims, as he pleads nothing that would make out a case for either cause of action, and in fact, he recites precisely the same allegations for each one. However, this is a matter for resolution by the trial court on remand should the defendants decide to challenge the amended complaint by preliminary objections or otherwise.