IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Gary R. Dieffenbach and Ed Collins, Appellants	:	
v.	:	No. 308 C.D. 2014
	:	Submitted: October 3, 2014
Earl Crago, Thomas Scott, Mike Garman, Joe Craigwell, Paul Sload, Kim Glaser, Carrie Ferree, Allen Jones, Donald Patterson, Colleen Alviani, Brian Williams, Greg Fajt, Julia Sheridan, Molly Leach, Wilbur Hetrick, Sarah Yerger, et al., Commonwealth of Pennsylvania Department of Revenue and Office of Inspector General (OIG) and PA Office of Attorney General (OAG), James Honchar, Sandra Muma, Nancy Moskel, Mary Graham, Susan Price, Benita Martinez, Bill Olsen, Somchai Sae-Tong, Christine Fritto Easton	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE ANNE E. COVEY, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON **FILED: December 5, 2014**

In this appeal, Gary R. Dieffenbach and Ed Collins (collectively, Plaintiffs), two former Pennsylvania Department of Revenue (Department) employees, representing themselves, ask whether the Court of Common Pleas of Dauphin County (trial court) erred in sustaining the preliminary objections of the

Department and its former Secretary Gregory Fajt[1] as well as the separately filed preliminary objections of numerous purported additional defendants.[2] The trial court sustained the preliminary objections on the ground that Plaintiffs' suit was barred by the applicable statute of limitations. Plaintiffs argue the trial court erred in dismissing their suit as time-barred where they timely filed and promptly served a writ of summons so as to toll the applicable statutes of limitations periods for the causes of action alleged. Upon review, we reverse and remand for further proceedings.

On March 15, 2005, Plaintiffs filed a writ of summons in the trial court naming the Department and Fajt as defendants. On March 23, 2005, the sheriff's office served the writ of summons on Fajt and the Office of the Attorney General. Shortly thereafter, counsel from the Attorney General's Office entered his appearance on behalf of Fajt and the Department.

In 2006, Plaintiffs' counsel filed a petition to withdraw, in which counsel averred Plaintiffs filed no complaint and there was no docket activity since the filing of the writ. After issuance of a rule to show cause, counsel was permitted to withdraw.

[1] Fajt served as Secretary of the Commonwealth's Department of Revenue from 2003 through 2007.

[2] The purported additional defendants who separately filed preliminary objections are Earl Crago, Thomas Scott, Mike Garman, Joe Craigwell, Paul Sload, Kim Glaser, Carrie Ferree, Colleen Alviani, Brian Williams, Julia Sheridan, Molly Leach, Wilbur Hetrick, Sarah Yerger, Allen Jones, Donald Patterson and the Office of Attorney General.

In November 2008, former Judge Joseph Kleinfelter entered a Notice of Proposed Termination of Court Case in this matter. See Pa. R.C.P. No. 230.2.[3] In January 2009, Plaintiff Collins filed a Reply to Notice of Proposed Termination of Court Case, in which he indicated his intent to proceed with the case.

In March 2012, Judge Lawrence Clark entered a second Notice of Proposed Termination of Court Case. On May 25, 2012, Plaintiffs filed a complaint against Fajt, the Department and 17 additional defendants. Very briefly, Plaintiffs alleged that, during their employment with the Department, they were subjected to racial discrimination, harassment and retaliation.

In July 2012, Plaintiffs filed an amended complaint, which attempted to incorporate their entire original complaint by reference. Through their amended complaint, Plaintiffs sought to add an additional 13 defendants and include several additional allegations. In the complaint and the amended complaint, Plaintiffs purportedly raise claims pursuant to Title VII of the Civil Rights Act of 1964,[4] 42 U.S.C. §§1981, 1983, 1985(3) and/or 1986, the Pennsylvania Human Relations

[3] Pa. R.C.P. No. 230.2 was suspended effective April 23, 2014, effective immediately, but the Rule was in effect at all relevant times here.

[4] 42 U.S.C. §§2000e–2000e–17.

Act,[5] the Pennsylvania Whistleblower Law,[6] and the First, Fifth and Fourteenth Amendments to the United States Constitution.[7]

Defendants Fajt and the Department filed preliminary objections to the complaint in which they raised the statute of limitations and *res judicata* as grounds for dismissing the complaint. Numerous other defendants separately filed preliminary objections in which they raised the statute of limitations as a basis for dismissing the complaint.

After submission of briefs and oral argument, the trial court issued an opinion and order in which it sustained the preliminary objections of the Department and Fajt as well as the preliminary objections of the other defendants. The trial court determined Plaintiffs' claims were barred by the statute of limitations. The trial court based its decision on the fact that Plaintiffs filed and served writs of summons on Defendants Fajt and the Department in 2005, but did not file their complaint until approximately seven years later, a period which exceeded the limitations periods for any of the alleged causes of action. The trial court noted that in that seven-year period, Plaintiffs did not reissue their writs. As such, the trial court did not reach the issue of whether Plaintiffs' claims were barred by *res judicata*. In its opinion, the trial court did not separately address the

[5] Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951–963.

[6] Act of December 12, 1986, P.L. 1559, as amended, 43 P.S. §§1421–1428.

[7] In their preliminary objections, Defendants Fajt and the Department averred that both Plaintiffs filed prior federal suits relating to alleged discrimination and retaliation while they were employed by the Department, all of which were unsuccessful. See Defendant Fajt and Department of Revenue's Prelim. Obj. at ¶¶ 13-19; Reproduced Record at 64a-65a.

preliminary objections of the Defendants other than Fajt and the Department. Plaintiffs now appeal to this Court.

On appeal,[8] Plaintiffs argue the trial court erred as a matter of law or abused its discretion in dismissing their complaint in its entirety with prejudice. Plaintiffs assert the filing and service of the writ of summons was sufficient to toll the applicable statute of limitations periods for the causes of action pled.

Defendants respond that Plaintiffs filed a writ of summons which they served on the Department and Fajt on March 23, 2005. In the following seven years, Plaintiffs did not file a complaint, reissue the original writ or take any further action to pursue their rights. Finally, on May 25, 2012, Plaintiffs filed a complaint against the Department, Fajt and 17 previously unnamed defendants. Shortly thereafter, Plaintiffs filed a purported "amended complaint" that primarily served to add an additional 13 individuals as defendants. Even overlooking the procedural deficiencies in service, Defendants maintain, all of the claims relate to events that occurred before 2008. Defendants argue that, as the statute of limitations for any of these claims was at most four years, the trial court correctly determined Plaintiffs' claims were time barred. Thus, they contend this Court

[8] In ruling on preliminary objections, courts must accept as true all well-pled allegations of material facts as well as all inferences reasonably deducible from the facts. Stilp v. Commonwealth, 910 A.2d 775 (Pa. Cmwlth. 2006), aff'd, 974 A.2d 491 (Pa. 2009). For preliminary objections to be sustained, it must appear with certainty that the law will permit no recovery, and any doubt must be resolved in favor of the non-moving party. Id.

Although the statute of limitations is to be pled as new matter, it may be raised in preliminary objections where the defense is clear on the face of the pleadings and the responding party does not file preliminary objections to the preliminary objections. Petsinger v. Dep't of Labor & Indus., Office of Vocational Rehab., 988 A.2d 748 (Pa. Cmwlth. 2010).

should affirm the trial court's decision sustaining their preliminary objections and dismissing the complaint.

The tolling date for the statute of limitations occurs when there is proper, prompt service of a timely filed writ of summons. Sheets v. Liberty Homes, Inc., 823 A.2d 1016 (Pa. Super. 2003). For those actions initiated by filing a praecipe for a writ of summons and timely served within the limitations period, our Supreme Court has held there is no time limit within which a plaintiff must file a complaint. See Galbraith v. Gahagen, 204 A.2d 251 (Pa. 1964). Thus, timely service of the writ of summons satisfies the statute of limitations. Galbraith; Sheets.

Our Supreme Court's decision in Galbraith is helpful. There, the plaintiffs commenced a civil suit by filing and serving upon the defendant a praeceipe for summons in trespass within the applicable statute of limitations period. More than two years later, the plaintiffs filed their complaint. The complaint was subsequently reinstated and served on the defendant. The defendant filed preliminary objections, asserting the complaint was filed more than two years after the praecipe for summons was filed and more than two years after the summons was served on the defendant and was thus barred by the statute of limitations. The common pleas court overruled the preliminary objection. Our Supreme Court affirmed, stating (with emphasis added):

> [W]e agree with the Court below that the defendant, having been served with the summons, was required to take the next step of ruling plaintiffs to file their [c]omplaint.

The defendant did not avail herself of [Pa. R.C.P. No. 1037(a)], which provides:

> 'If an action is not commenced by a complaint, the prothonotary, upon praecipe of the defendant, shall enter a rule upon the plaintiff to file a complaint. If a complaint is not filed within twenty (20) days after service of the rule, the prothonotary, upon praecipe of the defendant, shall enter a judgment of non pros.'

The defendant argues that she was not obliged to ask for the rule above indicated in the circumstances, citing in this respect Rees v. Clark, 213 Pa. 617, 63 A. 364 [(1906)], Zarlinsky v. Laudenslager, 402 Pa. 290, 167 A.2d 317 [(1961)] and Marucci v. Lippman, 406 Pa. 283, 177 A.2d 616 [(1962)]. In the last case, we stated:

> 'When the writ of summons was originally issued in the present action, the statute of limitations was tolled for a period of two years from the date of issuance, but not a day longer. See Zarlinsky v. Laudenslager, 402 Pa. 290, 167 A.2d 317 (1961). The action was barred when this period expired and the lower court correctly so ruled.'

However, in the Marucci case, as in the other two cited, a Summons had issued, but it was never served upon the defendant. The defendant here argues that that fact is of no moment in this case because we had stated, as quoted above, that the statute of limitations was tolled for a period of two years from the date of issuance of the summons, 'but not a day longer.' Thus, the defendant seeks to interpret the legal conclusion there stated as something separate and apart from the facts on which the conclusion was based.

If a plaintiff does not bother to obtain service of the summons on the defendant, he, then, must become the moving party. The defendant, who has not been served with the summons and thus has no knowledge thereof cannot be required to be the moving party. In

> such a situation the defendant is in no position to invoke Rule 1037(a). But where the plaintiff has had the summons served upon the defendant, and the defendant is thus brought onto the record by proper service and he is thus made aware of the lawsuit pending against him, he cannot complain if the plaintiff takes his time and files the Complaint more than two years after service. If any harm is incurred by defendant as a result of such delay, it results from his own failure to employ the weapon given him under Rule 1037 to force the plaintiff to file the Complaint.
>
> We therefore hold that the defendant having been served with the Summons should have required plaintiffs to file their Complaint earlier. Having failed to do so she cannot now complain that the statute of limitations has barred further action.

Galbraith, 204 A.2d at 251-52.

Also instructive is Sheets. There, the plaintiffs filed a praecipe for writ of summons shortly before expiration of the statute of limitations. Within 30 days, the sheriff served the writ. About a year later, the plaintiffs filed, but did not serve, their complaint. Shortly thereafter, the plaintiffs filed and served an amended complaint. The defendants claimed, and the common pleas court agreed, that the statute of limitations expired. On appeal to the Superior Court, the defendants conceded that the filing and prompt service of the writ tolled the statute of limitations. However, they asserted the plaintiffs' suit was barred by the statute of limitations because the complaint replaced the writ as the key date for the statute of limitations. The defendants further argued that, because the original complaint was never served it was a nullity, and the amended complaint was improper as the plaintiffs never obtained the consent of the parties or approval of the court to amend the complaint, so the amended complaint was also ineffective.

Ultimately, the Superior Court disagreed, explaining (with underlined emphasis added):

> While creative, the [d]efendants' arguments are illogical and circular.
>
> The tolling date for the statute of limitations occurs when there is proper, prompt service of a timely filed writ of summons. That happened in this case. The subsequent complaint does not erase this tolling of the statute of limitations. The only time a subsequent complaint will replace a writ of summons is when the writ of summons was never properly served or is a nullity for some other reason, such as being filed by a non-existent party (e.g., an administrator of an estate that has not yet been raised). Even if the writ is not served, if the plaintiff does nothing to delay matters and makes a good faith effort to find the defendant to make service, the plaintiff has another two years in a trespass case to make service. As this Court stated in Katz v. Greig, 234 Pa.Super. 126, 339 A.2d 115, 117 (1975):
>
> > The law is clear that a writ of summons properly issued within the applicable statute of limitations validly commences an action. The law is also clear, however, that a party who has caused a writ to issue but not be served must act to protect the efficacy of the writ. If this be done by reissuance of the writ, it must be done within a period of time which, measured from the issuance of the original writ, is not longer than the time required by the applicable statute of limitations for the bringing of the action. Yefko v. Ochs, 437 Pa. 233, 263 A.2d 416 (1970), Zarlinsky v. Laudenslager, 402 Pa. 290, 167 A.2d 317 (1961).
>
> Although not cited in the opinion, the trial judge may have made a relatively common mistake in following the lead opinion in Witherspoon v. City of Philadelphia, 564 Pa. 388, 768 A.2d 1079 (2001), in which only two justices said that a writ must be renewed

> before it expired to be able to ever reinstate it. However, both the three concurring justices and the two dissenting justices make it clear that reissuance before expiration is not necessary. The law set forth originally in Lamp v. Heyman, 469 Pa. 465, 366 A.2d 882 (1976) is still good law, which provides that a plaintiff cannot just file a writ and have another period of the statute of limitations to make service, but must make a good faith effort to find and serve the [d]efendant. As the Lamp court said, 'a writ of summons shall remain effective to commence an action only if the plaintiff then refrains from a course of conduct which serves to stall in its tracks the legal machinery he has just set in motion.' [Lamp, 469 Pa. at 478, 366 A.2d at 889].
>
> However, neither of these cases is applicable to this situation, where timely service of the writ has been made and the statute of limitation satisfied. Somehow, the defendants are trying to say that the later filing of a complaint , and then adding a clause *before the complaint was ever served on them* undoes the successful tolling of the statute. We note that the defendants could have filed a rule on the plaintiffs to file a complaint. If they failed to respond, the case could be dismissed, but for failing to respond to the rule, not because of a statute of limitations violation. …
>
> The statute of limitations was tolled by the filing and prompt service of the writ. Nothing that happened thereafter undid that tolling of the statute. The case is still live.

Sheets, 823 A.2d at 1018-19 (footnote omitted).

Here, in their preliminary objections, Defendants Fajt and the Department alleged, in pertinent part (with emphasis added):

> 23. As stated above, all of the allegations in the Complaint allegedly occurred within the time frame of 2004 to 2007. Given the fact that all of the causes of action have a two-year statute of limitations, Plaintiffs

> would have to have effected service of process upon Defendants Fajt and Department by 2009, at the latest, for any of the causes of action to be viable.
>
> 24. Defendants Fajt and Department were not properly served with process within the applicable two-year statute of limitations. While Defendants Fajt and Department were served with the Writ on March 23, 2005, they did not receive a copy of the Complaint outlining Plaintiffs' claims and allegations until May of 2012, several years after the statute of limitations had expired on all of Plaintiffs' claims.
>
> 25. Plaintiffs' failure to comply with the Rules of Civil Procedure has prejudiced Defendants Fajt and the Department.
>
> 26. Because Plaintiffs failed to properly effect service of process upon Defendants Fajt and Department before the running of the two-year statute of limitations, the Complaint should be dismissed with prejudice.
>
> **WHEREFORE**, Defendants Fajt and Department respectfully request this Honorable Court enter an Order sustaining their preliminary objections and dismissing the matter as to them with prejudice.

R.R. at 65a-66a.

In sustaining this preliminary objection and dismissing Plaintiffs' complaint, the trial court deemed Plaintiffs' claims barred by the applicable statutes of limitations because Plaintiffs filed their complaint in May 2012, about seven years after they issued and served the writ of summons, but Plaintiffs never reissued the writ. This analysis was erroneous.

Specifically, it is undisputed that Plaintiffs commenced their suit by filing and serving a writ of summons on Defendants Fajt and the Department in

March 2005. See Reproduced Record at 1-4; Certified Record at Item Nos. 1-3. This was sufficient to toll the statutes of limitations. Galbraith; Sheets. Contrary to the trial court's statement, Plaintiffs were not required to reissue the timely filed writ where they effectuated proper, prompt service of the writ on Defendants Fajt and the Department. Sheets.

Further, the fact that Plaintiffs did not file their initial complaint until May 2012 did not render their claims against Defendants Fajt and the Department barred by the applicable limitations periods. Defendants Fajt and the Department were served with the writ of summons in 2005; they could have required Plaintiffs to file their complaint earlier by ruling Plaintiffs to file a complaint under Pa. R.C.P. No. 1037. Galbraith; Sheets. If Plaintiffs failed to respond to the rule, the case could be dismissed for failing to respond to the rule, not based on a violation of the applicable statutes of limitations periods. Id. The trial court erred to the extent it concluded otherwise.

However, as to Defendants other than Fajt and the Department, despite the fact that these other Defendants filed separate preliminary objections also raising the statute of limitations, the trial court's opinion offers no distinct analysis of those preliminary objections. Thus, a remand is proper to allow the trial court to evaluate the preliminary objections filed by Defendants other than Fajt and the Department.

Based on the foregoing, we reverse the trial court to the extent it held Plaintiffs' claims against Defendants Fajt and the Department are barred by statute

of limitations, and we remand for the trial court to consider the remaining preliminary objection of Defendants Fajt and the Department. Additionally, on remand, the trial court is directed to consider whether Plaintiffs' claims against objecting Defendants other than Fajt and the Department, who filed separate preliminary objections, are barred by the applicable statutes of limitations.

ROBERT SIMPSON, Judge

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O R D E R

AND NOW, this 5th day of December, 2014, the order of the Court of Common Pleas of Dauphin County is **REVERSED** and this matter is **REMANDED** for proceedings consistent with the foregoing opinion.

Jurisdiction is relinquished.

ROBERT SIMPSON, Judge