NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JOHN MOORE,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
v.	:	
	:	
D.E. & S. PROPERTIES, INC. T/A CLASSIC QUALITY HOMES	:	
	:	
Appellant	:	No. 1767 EDA 2013

Appeal from the Judgment Entered July 22, 2013
In the Court of Common Pleas of Monroe County
Civil Division No(s).: 11573 Civil 2010

BEFORE: ALLEN, JENKINS, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: **FILED JULY 22, 2014**

Appellant, D.E. & S. Properties, Inc., trading as Classic Quality Homes, appeals from the judgment entered in the Monroe County Court of Common Pleas in favor of Appellee, John Moore. Appellant contends the court erred in not considering the defense of the Real Estate Licensing and Registration Act ("RELRA"), 63 P.S. § 455.101, and in not permitting Appellant to amend its complaint to raise the defense of the RELRA. We affirm.

The trial court summarized the facts and procedural posture of this case as follows:[1]

* Former Justice specially assigned to the Superior Court.

> [Appellee] commenced this action to recover commissions he alleged that he earned pursuant to an Independent Contractor's Agreement whereby [he] acted as a salesman for [Appellant], a company that builds homes . . . .
>
> [Appellee] in the Complaint pled breach and anticipatory breach of the agreement as well as alternative theories of recovery sounding in unjust enrichment and a separate count for contract implied in fact.[2]
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> [Appellant] filed an Answer with New Matter and a Counterclaim. Significantly, in Paragraphs 5 through 8 of the answer [Appellant] admitted that it solicited the services of [Appellee] as an independent contractor, that [Appellee] agreed to act as a salesperson, that [Appellee] performed services for [Appellant], and that the terms of compensation were as listed in the copy—albeit unsigned—of the Independent Contractor Agreement that was attached to [Appellee's] original Complaint.
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> * * *
>
> [T]he Counterclaim was based on and referenced the Agreement. Significantly, in the Answer, New Matter and Counterclaim, [Appellant] did not plead any defense—affirmative, statutory or otherwise—based uon the [RELRA]. That forms the basis of the only substantive issues [Appellant] has preserved or has attempted to preserve through its post trial motion or decision . . . .
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[1] At the May 20, 2013 hearing, the court ruled on the post-trial motion, summarizing its rationale. In its Pa.R.A.P. 1925(a) opinion, the trial court relies upon its decision at the May 20th hearing.

[2] We note that in the complaint, Appellee averred he agreed to perform services for Appellant as an independent contractor. Compl., 12/2/10, at 2. Appellee did not plead that he was a licensed real estate broker. ***See id.***

> [T]he parties . . . file[d] cross motions for summary judgment.[3] In [Appellant's] motion, [Appellant] sought dismissal of all of [Appellee's] claims; and in [Appellee's] motion, [Appellee] sought dismissal of [Appellant's] Counterclaim.
>
> Significantly, in [Appellant's] summary judgment motion . . . [Appellant] did not raise or seek dismissal of the action based on the [RELRA].[4]
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> After hearing argument . . . this Court granted [Appellee's] motion and dismissed [Appellant's] counterclaim.
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> * * *
>
> The Court also denied [Appellant's summary judgment] motion.
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> * * *
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> Shortly after the motions were denied, a non-jury trial was in fact scheduled. At the pre-trial conference [Appellant] once again raised the issue of the [RELRA] and a possible defense under [it]. [Appellee] through counsel objected and then nothing was done or filed with respect to the [RELRA] until the day of trial and at trial [Appellant] made an oral motion that was also supported with a written motion that was filed.
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[3] Prior to the completion of discovery, Appellant filed a motion for summary judgment. N.T., 5/20/13, at 8; ***see also*** Appellant's Mot. for Summ. J., 7/14/11, at 1-2. This motion was based in part on RELRA. ***Id.*** The trial court dismissed the motion "without prejudice to the right of either party to file dispositive motions after completion of discovery." Order, 9/12/11.

[4] ***See*** Appellant's Mot. for Summ. J., 2/2/12, at 1-2. Appellant concedes this fact. ***See*** Appellant's Brief at 7.

> [The trial court] ultimately indicated that [it] would deny the request to amend the pleading there at time of trial to assert the affirmative defense or statutory defense—those two terms were used interchangeably— that were or may have been available to [Appellant] under the [RELRA].[5]

N.T., 5/20/13, at 6-7, 8-9, 10, 11.

On January 15, 2013, the court entered an order in favor of Appellee in the amount of $52,275.00 plus interest. The trial court denied Appellant's post-trial motion on May 20, 2013. This appeal followed on June 19, 2013.[6] A praecipe to enter judgment on the verdict was filed and the court entered judgment in favor of Appellee on July 22, 2013. Appellant filed a court-odered Pa.R.A.P. 1925(b) statement of errors complained of on appeal. The trial court filed a Pa.R.A.P. 1925(a) opinion incorporating its reasoning announced at the hearing held on May 20, 2013. ***See id.*** at 2.

Appellant raises the following issues for our review:

> I. Whether the lower court committed an error of law in not considering the defense of the Real Estate Licensing

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[5] Counsel for Appellant conceded that the affirmative defense would be waived if the court did not permit the amendment. N.T., 10/24/12,at 9. The court did not permit the amendment. ***Id.*** at 61.

[6] Appellant purported to appeal from the order denying his post-trial motion. ***See*** Notice of Appeal, 6/19/13. An appeal properly lies from the entry of judgment because it "is a prerequisite to our exercise of jurisdiction." ***Johnston the Florist, Inc. v. TEDCO Const. Corp***., 657 A.2d 511, 515 (Pa. Super. 1995) (*en banc*). However, it is well-settled that "even though the appeal was filed prior to the entry of judgment, it is clear that jurisdiction in appellate courts may be perfected after an appeal notice has been filed upon the docketing of a final judgment." ***Id.*** at 513. Accordingly, we have amended the caption.

> and Registration Act (RELRA), as codified at 63 P.S. §§ 455.101 et seq., nor permitting [Appellant] to raise the RELRA as a defense?
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> II. In the alternative, whether the lower court committed an error of law and abuse of discretion in not permitting [Appellant] to amend its pleadings to raise the defense of the Real Estate Licensing and Registration Act (RELRA), as codified at 63 P.S. §§ 455.101 *et seq*.?

Appellant's Brief at 4.

We address Appellant's issues together because they are interrelated. Appellant argues that the court erred in not considering the RELRA as a defense. Appellant contends that Appellee was not entitled to a 5% commission on certain real estate sales on behalf of Appellant in 2010 because the independent contractors agreement between the parties expired on November 16, 2009. ***Id.*** at 8. Appellant contends that the RELRA[7]

[7] The statute provides, *inter alia*, that

> [n]o action or suit shall be instituted, nor recovery be had, in any court of this Commonwealth by any person for compensation for any act done or service rendered, the doing or rendering of which is prohibited under the provisions of this act by a person other than a licensed broker, salesperson, cemetery broker, cemetery salesperson, campground membership salesperson, time-share salesperson, builder-owner salesperson or rental listing referral agent, unless such person was duly licensed and registered hereunder as broker or salesperson at the time of offering to perform any such act or service or procuring any promise or contract for the payment of compensation for any such contemplated act or service.

63 P.S. § 455.302.

should apply in the instant case. ***Id.*** at 12. Because broker agreements have to be in writing, the court should find RELRA applicable. Id. at 13, 14.

Appellant contends the court erred in not permitting Appellant to amend its pleadings to raise the defense of the RELRA. ***Id.*** at 17. Appellant argues that amendment of pleadings should be liberally granted. ***Id.*** Appellant avers there was no surprise to Appellee based upon the fact that the RELRA defense was raised in its first motion for summary judgment, which was dismissed by the trial court. ***Id***. at 20.

Instantly, the court did not permit Appellant to amend the pleadings to assert the affirmative defense.

> Pennsylvania Rule of Civil Procedure 1033 provides in pertinent part that "[a] party . . . by leave of court, may at any time . . . 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 . . . defense. Pleadings may be amended at the discretion of the trial court after pleadings are closed, while a motion for judgment on the pleadings is pending, at trial, after judgment, or after an award has been made and an appeal taken therefrom. Our courts have established as parameter a policy that amendments to pleadings will be liberally allowed to secure a determination of cases on their merits. A trial court enjoys broad discretion in evaluating amendment petitions.
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> Despite this liberal amendment policy, Pennsylvania appellate courts have repeatedly ruled that an amendment will not be permitted where it is against a positive rule of law, or where the amendment will surprise or prejudice the opposing party. The prejudice, however, must be more than a mere detriment to the other party because any amendment requested certainly will be designed to strengthen the legal position of the amending party and

> correspondingly weaken the 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 [by asserting] an affirmative defense which has a substantial likelihood of success.
>
> All amendments have this in common: they are offered later in time than the pleading which they seek to amend. If the amendment contains allegations which would have been allowed inclusion in the original pleading (the usual case), then the question of prejudice is presented by the time at which it is offered rather than by the substance of what is offered. The possible prejudice, in other words, must stem from the fact that the new allegations are offered late rather than in the original pleading, and not from the fact that the opponent may lose his case on the merits if the pleading is allowed. . . .
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> [D]enial of a petition to amend, based on nothing more than unreasonable delay, is an abuse of discretion. The timeliness of the request to amend is a factor to be considered, but it is to be considered only insofar as it presents a question of prejudice to the opposing party, as by loss of witnesses or eleventh hour surprise.

Capobianchi v. BIC Corp., 666 A.2d 344, 346-47 (Pa. Super. 1995) (quotation marks and citations omitted).

The trial court opined:

> [I] did not allow the amendment because this really was a last minute mid-trial amendment that was raising a claim that [Appellant] identified was going to require expert testimony without any disclosure of experts, without any reports being filed, etc.
>
> There was also a surprise to [Appellee] . . . [Appellant] did raise the issue in its first motion for summary judgment; however, for whatever reason, it didn't raise the issue in the second motion for summary judgment, and I believe that until we had the pre-hearing conference and then until the motion followed I certainly did not think that

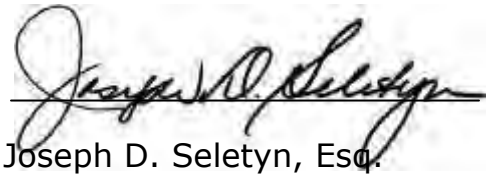
> that was an issue in the case anymore when it was raised at one point in a motion that was dismissed—not denied, but just dismissed with leave to file after discovery was closed and the motion was essentially re-filed and the issue was not raised.
>
> So I think there was an element of surprise there as well.

N.T. at 25-26.

We find no abuse of discretion by the trial court in denying Appellant's motion to amend the pleading. ***See Capobianchi***, 666 A.2d at 346-47.

Judgment affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/22/2014