

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

STEVE MCKEAN D/B/A MCKEAN CUSTOM
HOMES

IN THE SUPERIOR COURT OF
PENNSYLVANIA

Appellee

v.

KATHY YACKANIN

Appellant

No. 2733 EDA 2013

Appeal from the Judgment Entered August 30, 2013
In the Court of Common Pleas of Pike County
Civil Division at No(s): No. 1885-2008-CIVIL

BEFORE: ALLEN, J., MUNDY, J., and FITZGERALD, J.*

MEMORANDUM BY MUNDY, J.:

FILED JUNE 19, 2014

Appellant, Kathy Yackanin, appeals from the August 30, 2013 judgment of \$40,279.80 entered in favor of Appellee, Steven McKean d/b/a McKean Custom Homes (McKean), in this breach of contract action. After careful review, we affirm.

The trial court has set forth the relevant facts and procedural history as follows.

This matter arises from disputes involving construction of a residential home which [], Steven McKean d/b/a McKean Custom Homes, agreed to construct for [Appellant], for the contract price of \$429,625.00. The parties originally entered [into] a construction agreement dated February 7, 2002,

* Former Justice specially assigned to the Superior Court.

which was later signed by [Appellant] on March 7, 2002. Between July 2003 and October 2006, the parties entered various change orders of construction, which delayed the project and added to the overall cost. Disputes arose between [McKean] and [Appellant] near the end of construction as to allegedly unfinished or un-workmanlike items of construction.

[McKean] first filed an action for breach of contract and unjust enrichment against [Appellant] [o]n October [6,] 2008. The [c]omplaint was reinstated in 2009 and [McKean] filed an [a]mended [c]omplaint after [Appellant] objected to [McKean]'s failure to attach the original agreement. [McKean] filed the [a]mended complaint on July 15, 2009, alleging that [Appellant] failed to pay \$40,979.80, the agreed-upon cost of additional work [McKean] had performed on the house. [Appellant] responded [on October 13, 2009,] with an [a]nswer and [n]ew [m]atter arguing that [McKean]'s claims were barred by the statute of limitations. Additionally, [Appellant] brought a [c]ounterclaim alleging [McKean] failed to complete various items of construction and other items were not constructed in a workmanlike manner.

[The parties proceeded to a non-jury trial,] held on March 9, 2012 and March 15, 2013. After careful consideration of the parties' filings, testimony presented, and other evidence, th[e trial c]ourt issued an [o]rder on June 28, 2013 (Affirmed by [a]mended [o]rder on July 17th 2013) in favor of [McKean] and against [Appellant] in the amount of \$40,279.80 and denying [Appellant]'s [n]ew [m]atter and [c]ounterclaim.

Trial Court Opinion, 12/2/13, at 1-2.

On July 24, 2013, Appellant filed timely a post-trial motion. The trial court denied said motion on July 31, 2013. Thereafter, on August 30, 2013,

McKean filed a praecipe for entry of judgment, which was entered the same day. On September 30, 2013, Appellant filed a timely notice of appeal.¹

On appeal, Appellant raises the following issues for our review.

1. Did the [trial c]ourt err or abuse its discretion in finding that the identity of the contracting party was immaterial where [Appellee] identified the contracting party as McKean Custom Homes, a partnership, and where [Appellee] was Steven McKean d/b/a Custom Homes?
2. Did the [trial c]ourt err or [] abuse its discretion in determining that the statute of limitations did not start to run until October of 2006?

Appellant's Brief at 2.²

In her first issue, Appellant asserts that the trial court "erred in determining that Steven McKean d/b/a McKean Custom Homes was the party that entered the initial and all subsequent agreements with [Appellant]." ***Id.*** at 13. Specifically, Appellant asserts that "there is no assignment to or authorization for Steven McKean to sue on behalf of the

¹ We note that the 30th day from August 30, 2013, fell on Sunday. However, weekends are excluded from our computation of time. **See** 1 Pa.C.S.A. § 1908 (providing that when the last day of a calculated period of time falls on a Saturday or Sunday, such day shall be omitted from the computation). Therefore, Appellant's notice of appeal filed on Monday, September 30, 2013 was timely. Appellant and the trial court have complied with Pa.R.A.P. 1925.

² We note that Appellant sets forth her arguments in reverse order in her brief. However, for ease of our discussion we have elected to address them in the order stated in her questions presented.

partnership in his own name.” **Id.** at 14. Appellant argues that “[b]oth witnesses testified distinctly to the existence of the partnership, and the partnership is not named as the Plaintiff in the suit.” **Id.** It is Appellant’s position that “McKean Custom Homes, a partnership, would be the appropriate party[,]” to enforce the contract. **Id.** at 11. Therefore, Appellant argues the trial court “erroneously dismisses [Appellant]’s objection related to the identity of the Plaintiff.” **Id.**

Preliminarily, we note that Appellant’s brief fails to cite any case law or legal authority for her position that Appellee’s identity on the complaint and throughout the proceedings as “Steven McKean d/b/a McKean Custom Homes” impedes McKean’s ability to enforce the contract. **See** Appellant’s Brief at 11-14. Pennsylvania Rule of Appellate Procedure 2119(a) requires that the argument section of an appellate brief include “citation of authorities as are deemed pertinent.” Pa.R.A.P. 2119(a). This Court will not consider an argument where an appellant fails to cite to any legal authority or otherwise develop the issue. **Commonwealth v. Johnson**, 985 A.2d 915, 924 (Pa. 2009), *cert. denied*, **Johnson v. Pennsylvania**, 131 S. Ct. 250 (2010); **see also, e.g., In re Estate of Whitley**, 50 A.3d 203, 209 (Pa. Super. 2012) (stating, “[f]ailure to cite relevant legal authority constitutes waiver of the claim on appeal[.]”) (citation omitted), *appeal denied*, 69 A.3d 603 (Pa. 2013). Nevertheless, as we can discern the substance of Appellant’s argument, we will review her issue herein.

Appellant points to Pennsylvania Rule of Civil Procedure 2127 noting that said rule “has particular pleading requirements for a partnership.” Appellant’s Brief at 11. Specifically, Rule 2127 states the following.

Rule 2127. Actions by Partnerships and Liquidators

(a) A partnership having a right of action shall prosecute such right in the names of the then partners trading in the firm name, in the following manner: “A, B and C trading as X & Co.”

Pa.R.C.P. 2127(a). It is Appellant’s contention, therefore, that “McKean Custom Homes is a partnership made up of Steven and Rory McKean ... [i]t is not Steven McKean d/b/a McKean Custom Homes.” Appellant’s Brief at 12.

In response to Appellant’s claim, the trial court concluded as follows.

[Appellant] alleges that the proper party is a partnership and seeks to overturn the [trial court]’s judgment based on a technicality, that the pleadings violated Pa.R.C.P. 2127. However, review of the 2002 contract reveals that the contract was signed by [Appellant] and Stephen McKean, listed as Contractor, McKean Custom Homes. After hearing all of the evidence in this matter, the [trial court] found that Stephen McKean d/b/a McKean Custom Homes was indeed the party that entered the initial and all subsequent agreements with [Appellant].

Trial Court Opinion, 12/2/13, at 3.

A review of the record reveals the trial court’s assertion is supported by the record. **See** McKean’s Complaint, 10/6/08, Exhibit A. Further, as the trial court and McKean both argue, the time for Appellant to challenge

McKean's capacity to file the complaint as Steven McKean d/b/a McKean Custom Homes has passed. In its Rule 1925(a) opinion, the trial court asserted Appellant's argument is waived on the following basis.

[McKean] has been identified since the initiation of proceedings in 2008 as Steven McKean d/b/a McKean Custom Homes. [Appellant] possessed copies of the pleadings and the contracts executed between the parties, yet failed to object to [McKean]'s identity at any time before the trial held on March 1[5], 2013. [Appellant] could have filed a preliminary objection pursuant to Pa.R.C.P. 1028(a)(5) for lack of capacity to sue, but instead allowed the litigation to proceed for approximately three to four years without objecting to Plaintiff's identity. Rule 1032(a) states: "A party waives all defenses and objections which are not presented either by preliminary objection, answer or reply..." **See** Pa.R.C.P. 1028; Pa.R.C.P. 1032. [Appellant] failed to make a timely objection as to Plaintiff's identity and should not be permitted to do so at this time.

Trial Court Opinion, 12/2/13, at 3. We agree. **See Erie Indem. Co. v. Coal Operators Cas. Co.**, 272 A.2d 465, 467 (Pa. 1971) (holding "[t]he issue of incapacity to sue is waived unless it is specifically raised in the form of a preliminary objection or in the answer to the complaint[]").

Accordingly, because Appellant never raised a challenge in her preliminary objections or answer, new matter and counter claim, Appellant has waived her ability to now challenge McKean's capacity to proceed as Steven McKean d/b/a McKean Custom Homes. Therefore, Appellant's first issue fails.

In her second issue, Appellant argues the trial court abused its discretion in determining that the statute of limitations did not start to run until October 2006. Rather, Appellant argues that the “change orders/extras alleged by [McKean] occurred on July 16, 2003, and the latest on December 14, 2004.” Appellant’s Brief at 7. Asserting that pursuant to 42 Pa.C.S.A. 5525(a)(8), “[t]he applicable ... statute of limitations for a written construction agreement is” four years, Appellant argues “the last non-redundant demand for payment occurred on or about December 14, 2004[, but the law]suit was not commenced until March 6, 2009, more than four (4) years beyond the most recent original invoice payment, and nearly six (6) years from [the] July 2003 change orders and the time the homeowner took occupancy of the dwelling.” **Id.** Finally, Appellant argues that the “only thing to happen on October 17, 2006 was an attempt by the contractor to provide credits for work that he did not complete.” **Id.** at 8.

Our review is guided by the following. “The question of whether a statute of limitations has run on a claim is usually a question of law for the trial judge, but, at times, a factual determination by the jury may be required.” **Sch. Dist. of Borough of Aliquippa v. Md. Cas. Co.**, 587 A.2d 765, 768 (Pa. Super. 1991). “[E]xcept in circumstances where another limitations period explicitly applies, an action upon a written contract, including a contract for the construction of real estate such as is at issue here, is subject to the four-year period of limitations explicitly provided

under Section 5525(a)(8).” ***Gustine Uniontown Assocs., Ltd. v. Anthony Crane Rental, Inc.***, 842 A.2d 334, 349 (Pa. 2004); ***see also*** 42 Pa.C.S.A. § 5525(a)(8) (stating “the following actions and proceedings must be commenced within four years... (8) An action upon a contract, obligation or liability founded upon a writing[.]”). Both parties agree Section 5525(a)(8) is applicable. The parties, however, dispute the final date that triggered the statute of limitations to run.

The trial court concluded McKean’s October 6, 2008 complaint was filed within the statute of limitations for the following reasons.

The [trial c]ourt was presented with evidence that after the parties’ initial construction agreement in 2002, the parties continued to enter various agreements through October 2006 providing for changes or additions to construction project. Even if the statute of limitations period began to run immediately after the parties’ final change order of construction in October 2006, [McKean] was well within the four year period when filing the Complaint in October 2008.

Trial Court Opinion, 12/2/13, at 4.

On the contrary, Appellant argues as follows.

[Appellant] made a final payment in October 2003 upon occupying the dwelling and refused payment unless the contractor finished the house. Admittedly, he did not finish and [Appellant] made no further payments. The contractor provided no work on “extras,” as found in his own record, from 2004, and there is no evidence to support any work on the claimed extras beyond that date.

Appellant's Brief at 8. Therefore, it is Appellant's contention that the breach of contract occurred in October of 2003, not in October of 2006. **Id.**

"To successfully maintain a cause of action for breach of contract the plaintiff must establish: (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages." **Albert v. Erie Ins. Exch.**, 65 A.3d 923 (Pa. Super. 2013), *citing* **McShea v. City of Phila.**, 995 A.2d 334, 340 (Pa. 2010) (citation omitted). A review of the certified record supports the trial court's conclusion that the breach of contract occurred in 2006, and therefore, McKean's complaint was filed well within the statute of limitations.

Instantly, McKean attached to its complaint the original agreement entered into by the parties on February 7, 2002, and the subsequent invoices for payments, as well as an adjustment for credits to Appellant, ranging through October 2006. **See** Appellee's Amended Complaint, 7/15/09, at Exhibits A-B. Said invoices are dated, July 16, 2003, December 14, 2004, and October 17, 2006. McKean's Complaint, 10/6/08, Exhibit A. Further in its complaint, McKean noted that throughout construction of Appellant's home, "extras" were required and "memorialized in writing" as evidenced by the invoices. **Id.** at ¶¶ 5-6. A review of the trial testimony supports this contention.

At trial Steven McKean testified that the original contract included a specification sheet with a price for each aspect of the construction of the

home. N.T., 3/9/12, at 13. Throughout the construction of the home, changes were made based on Appellant's requests, and said changes were then charged to Appellant in change orders as an additional cost beyond the 2002 contract price. **Id.** at 18. Steven McKean further testified that they continued to work on Appellant's house after she occupied the house in October 2003, with the last work on the house being in April 2004. **Id.** at 30, 52.³ At trial, Rory McKean noted that at all times, he was willing to finish the work on Appellant's house, but they had not received answers on how to finish the projects that remained incomplete at the time they ceased working on the house, *i.e.*, the fireplace tile and outdoor handrails. N.T., 3/15/13, at 25. In October 2006, Steven McKean stated that he and Appellant communicated that she wanted credits for work that wasn't completed, and he informed her that they could no longer "keep coming back and fixing things and adding things without getting paid." N.T., 3/9/12, at 33; N.T., 3/15/13, at 165. On October 17, 2006, Steven McKean mailed Appellant the invoice with the credits that were going to be given to Appellant for work that had not been completed. **Id.** at 34. McKean

³ We note, however, that Steven McKean also testified that they returned to the house sometime in 2006 to repair Appellant's radiant heat after it sustained mice damage. N.T., 3/9/12, at 91. Further, Rory McKean, Steven McKean's brother and business partner, testified he last worked on the house in 2005. N.T., 3/15/13, at 24.

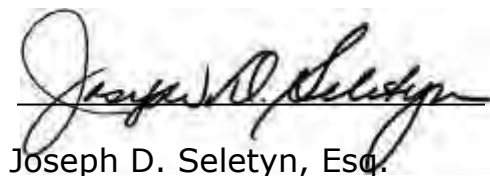
received no further payment from Appellant, accordingly, the instant breach of contract action was subsequently initiated.

The trial court, weighing the evidence in the record, concluded that Appellant's failure to pay McKean the amounts stated on the invoices constituted a breach of contract, and that Appellant owed McKean the outstanding balance of \$40,279.80 as evidenced by the invoices. Trial Court Order, 7/17/13, at 3. Based on our own independent review of the testimony of record, and the final invoice filed on October 17, 2006, said date is the earliest possible date that could have triggered the four-year statute of limitations period to run. As a result, McKean's complaint was filed within the four-year statute of limitations, and Appellant's second issue fails.

Based on the foregoing, we conclude that Appellant's claims are either waived or devoid of merit. Therefore, we affirm the trial court's August 30, 2013 judgment of \$40,279.80 entered in favor of McKean.

Judgment affirmed

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", is written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 6/19/2014