J-A32014-13

2014 PA Super 77

RALPH GILBERT, GLORIA GILBERT, MICHELLE TORGERSON, MELDA BITTORF, BEVERLY COX, WILLIAM COX, KIMBERLY MILES, CLEA FOCKLER, JOHN FOCKLER, LINDA ECKERT, WILLIAM STRINE, KENNY JASINSKI, DENNIS JASINSKI, KATHRYN JASINSKI, JOSEPH JASINSKI, PATRICIA UNVERZAGT, MEGAN JACOBS, BARBARA UNVERZAGT, DONNA PARR, JEFF FODEL, WENDY FODEL, JENNIFER JASINSKI, JOHN JASINSKI, JUDY QUEITZSCH, JEAN FRY, RICK McSHERRY, JOHN FREESE, DONNA LYNN FREESE, JEFF VAN VOORHIS, SUSAN LEE FOX, TERRENCE FANCHER AND DONNA FANCHER, Appellants v. SYNAGRO CENTRAL, LLC, SYNAGRO MID-ATLANTIC, GEORGE PHILLIPS, HILLTOP FARMS AND STEVE TROYER Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 119 MDA 2013

Appeal from the Order Entered December 28, 2012,
In the Court of Common Pleas of York County,
Civil Division, at No. 2008-SU-003249-01.

BEFORE: DONOHUE, OTT, and PLATT*, JJ.

DISSENTING OPINION BY PLATT, J.: **FILED APRIL 15, 2014**

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* Retired Senior Judge assigned to the Superior Court.

I respectfully dissent. In my view, Appellants' complaint was untimely filed, based on the one-year statute of repose at 3 P.S. § 954(a). Therefore, I would affirm the trial court's decision.

The leaned Majority concludes that "issues of material fact remain with respect to whether the use of biosolids in this case is a 'normal agricultural operation'" to determine that Appellees' conduct fell outside the statute of limitation set forth in the Right to Farm Act (RTFA) at 3 P.S. § 954(a). (Majority Opinion, at 2). I believe this conclusion is unwarranted.

It is well-settled that "the statute of limitations begins to run as soon as the right to institute and maintain a suit arises." ***Hopkins v. Erie Ins. Co.***, 65 A.3d 452, 460 (Pa. Super. 2013) (citation omitted).

The Majority correctly concludes that the circumstances constituting the basis of the nuisance action, the application of biosolids on Appellees' farm, began in March 2006, and Appellants filed their complaint in July 2008. (Majority Opinion, at 3-5, 13-14, 15-17).

The Majority contends, however, that the application of biosolids fails to qualify as a "normal agricultural operation," in order to apply the statute of repose. (***Id.*** at 18). It acknowledges that there are EPA and industrial guidelines on biosolid application, which strongly suggests that the use of biosolids is, contrary to its determination, a normal agricultural practice under 3 P.S. § 952. (***Id.*** at 19-20, 26). Instead, the Majority concludes that there remains a genuine issue of material fact as to whether the use of biosolids "was in any event not 'normal' as specifically employed by the Farm Parties in this case." (***Id.*** at 27). However, this exception is unwarranted, because it conflates our standard for grant of summary

judgment with the question of law raised by whether the statute of limitations has run. ***See Wilson v. Transp. Ins. Co.***, 889 A.2d 563, 570 (Pa. Super. 2005).

The cases relied on by the Majority do not stand for its assertion that "[w]ith respect to the ***applicability*** of statutes of repose, . . . issues of fact are often determinative, and a party may avoid summary judgment by identifying sufficient evidence in the record to establish that one or more issues of material fact remain for consideration by the eventual finder of fact." (Majority Opinion, at 23); ***see, e.g. McConnaughey v. Building Components***, 637 A.2d 1331 (Pa. 1994) (genuine issue of material fact regarding whether appellee was involved in allegedly tortious conduct).

Here, there is no genuine issue of material fact as to the identity of the parties, the date of commencement of the application of biosolids, or the date on which Appellants filed their complaint. ***See Hopkins***, ***supra*** at 460. We cannot reach the question of whether the application of biosolids "was in any event not 'normal' as specifically employed by the Farm Parties in this case" because Appellants' complaint was not timely filed. (***Id.*** at 27). Thus, I believe that the Majority erred in sidestepping the statute of limitations in order to reach the issues raised by Appellants' untimely nuisance claim.

Therefore, I would conclude that the trial court correctly determined that summary judgment was appropriate where Appellants' complaint was untimely under the one-year statute of limitation under the RTFA at 3 P.S. § 954(a). ***See Horne v. Haladay***, 728 A.2d 954, 954 (Pa. Super. 1999), *appeal denied*, 745 A.2d 1223 (Pa. 1999).

I would affirm the grant of summary judgment by the trial court. Accordingly, I respectfully dissent.