NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

SHELLEY M. KETNER Appellant v. ALEX R. SZELES, INC. Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1482 MDA 2013

Appeal from the Order July 17, 2013
In the Court of Common Pleas of Dauphin County
Civil Division at No(s): 2007 CV 10704CV

BEFORE: GANTMAN, P.J., ALLEN, J., and LAZARUS, J.

MEMORANDUM BY LAZARUS, J.: **FILED MAY 06, 2014**

Shelley M. Ketner ("Ketner") appeals from the order, entered in the Court of Common Pleas of Dauphin County, granting Alex R. Szeles, Inc.'s ("Szeles") motion for summary judgment due to Ketner's untimely response. We affirm.

The trial court summarized the facts of this matter as follows:

> This case stems from the following undisputed facts: In September, 2002, Ketner's residence was damaged by a leak of water from a water heater. Szeles, a preferred vendor of Ketner's insurance carrier, State Farm, was hired to perform restoration services of the residence, including water extraction, carpet removal and disposal, application of an antimicrobial agent, and related services. Szeles completed its work on or about September 29, 2002, after which Ketner alleges she discovered mold growth beneath wall paneling located on the ground floor of the residence.
>
> By way of procedural background, on October 12, 2007, Ketner initiated the instant action by filing a civil complaint in which she alleged a single common law negligence claim. On January 7,

> 2010, Szeles filed a Motion for Summary Judgment to which Ketner responded by filing an Amended Complaint seeking to raise two additional causes of action in the nature of violations of Pennsylvania's Unfair Trade Practices and Consumer Protection law ("UTPCPL"). Because the Amended Complaint was improperly filed without first obtaining court approval, Ketner filed a separate "Motion for Leave *nunc pro tunc* to File an Amended Complaint." By Order dated June 10, 2010, the Honorable Andrew H. Dowling granted summary judgment in favor of Szeles and granted Ketner leave to file an Amended Complaint. Szeles now seeks summary judgment relating to the UTPCPL claims raised therein.

Trial Court Opinion, 7/17/13, at 1-2. The trial court ultimately granted Szeles' motion for summary judgment. The court reasoned:

> Preliminarily, we note that Ketner filed her Response to Szeles Motion for Summary Judgment on May 31, 2013, nearly two months after such response was required to be filed by local rule, namely Dauphin County Local Rule (Civil) 1035.2(a). As such, we deem Szeles' Motion for Summary Judgment to be uncontested as permitted by Pa.R.C.P. 1035.3(d); and therefore, we will enter judgment in favor of Szeles and against Ketner in this matter.
>
> However, even if we had deemed Ketner's response to the instant Motion to have been timely filed, we note that she has admitted, in her answers to Szeles' Requests for Admissions dated October 5, 2010, that she had expressed concerns to Szeles and/or her insurance carrier regarding potential mold growth prior to March 4, 2003. Judge Dowling did not have the benefit of these admissions when he issued his June 10, 2010 ruling. See, ***Commonwealth of Pennsylvania, Dept. of Environmental Resources v. PBS Coals, Inc.***, et al., 677 A.2d 868 (Pa. Cmwith. 1996). Accordingly, the six-year statute of limitations period on Ketner's UTPCPL claims began to run at some time prior to March 4, 2003, and, therefore, the UTPCPL claims, which were not raised until June 30, 2010, are time-barred.

Id. at 2. This timely appeal followed, in which Ketner presents the following issues for our review.

1. Whether the lower court erred in deeming a motion unopposed where [Ketner's] counsel demonstrated good cause for the delay in filing an opposition to the motion and where there was no prejudice to [Szeles] from the late filing.

2. Whether the lower court erred in granting summary judgment based upon a purported admission where there were triable issues of fact concerning the nature and scope of the statement.

Brief of Appellant, at 3.

When reviewing an order granting summary judgment, we examine the record in the light most favorable to the non-moving party and reverse only if there has been an error of law or clear abuse of discretion. ***Toth v. Donegal Companies***, 964 A.2d 413 (Pa. Super. 2009). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. ***Payne v. Commonwealth Department of Corrections***, 871 A.2d 795, (Pa. 2005); ***Fine v. Checcio***, 870 A.2d 850, 857 (Pa. 2005). If a question of material fact is apparent, this court must defer the question for consideration by a jury. ***Cassell v. Lancaster Mennonite Conference***, 834 A.2d 1185 (Pa. Super. 2003). A court may grant summary judgment only where the right to such judgment is clear and free from doubt. ***Marks v. Tasman***, 589 A.2d 205 (Pa. 1991). However, as the Supreme Court of Pennsylvania recognized in ***Ario v. Ingram Micro, Inc.***, 965 A.2d 1194 (Pa. 2009):

> [I]t is worth noting that a non-moving plaintiff bears some evidentiary burden to survive a defense summary judgment motion, as this Court has explained:
>
> > [a] non-moving party must adduce sufficient evidence on an issue essential to his case and on which he bears the

> burden of proof such that a jury could return a verdict in his favor. Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Id. at 1207, n.15, (quoting ***Ertel v. Patriot-News***, 674 A.2d 1038, 1042 (Pa. 1996)).

Pennsylvania Rule of Civil Procedure 1035.3 permits the court to enter summary judgment against a party who does not respond within 30 days. Pa.R.C.P. 1035.3(d). The note to Rule 1035.3(d) explains: "Procedural requirements with respect to argument and briefs are governed by local rule. In certain counties, the failure to respond to a motion may result in the motion being deemed uncontested and the entry of the judgment sought." Furthermore,

> Nothing in this rule is intended to prohibit a court, at any time prior to trial, from ruling upon a motion for summary judgment without written responses or briefs if no party is prejudiced. A party is prejudiced if he not given a full and fair opportunity to supplement the record and to oppose the motion.

Pa.R.C.P. 1035.3(e)(1). Finally, Dauphin County Local Rule (Civil) 1035.2(a) grants the responding party thirty days to file a response. "A party may file a certificate of readiness if the timelines contained in this rule have expired . . . . The assigned judge will address the failure to comply with the deadlines." Dauphin County Local Rule (Civil) 1035.2(a), comment.

In her first issue, Ketner argues that since she demonstrated a compelling reason for filing her response late and Szeles suffered no prejudice, the court should have overlooked the procedural errors. Ketner maintains she did not file a timely response due to a change in counsel in

the middle of this action. We find this argument misleading as Ketner retained her current counsel on or about October 13, 2009, as reflected by Attorney Stuski's entry of appearance. Given that Szeles did not file its motion for summary judgment until three years later, we cannot accept that Ketner's failure to file a timely response was due to a change in counsel.

Moreover, Szeles filed a certificate of readiness on April 15, 2013, which the court stated it would not entertain by order on April 17, 2013, because Ketner had yet to file her response and both parties had not complied with the briefing requirement. On April 22, 2013, Szeles filed its brief in support of defendant's motion for summary judgment. Ketner would have received notice from the court on each of these occasions, thus bringing attention to the mounting untimeliness of her response.

Ketner further argues that the lower court abused its discretion in its strict application of Rule 1035.3(d). Ketner relies on Rule 1035.3(e), arguing that it limits a court's discretion in granting summary judgment where the motion is unopposed. However, Ketner misapplies Rule 1035.3(e), which instructs that, "nothing in [Pa.R.C.P. 1035.3] is intended to prohibit a court, at any time prior to trial, from ruling upon a motion for summary judgment without written response or briefs if no party is prejudiced." Subsection (e) permits the court to rule upon a motion for summary judgment prior to thirty days after it is filed, and it is disingenuous for Ketner to attempt to rely on this provision for the proposition that is "places limits on [a trial court's] discretion in granting summary judgment

where the motion is unopposed." Pa.R.C.P. 1035.3(e). Moreover, local rule governs the procedural requirements with respect to motions for summary judgment. Here, Dauphin County Local Rule (Civil) 1035.2(a) requires a responding party to file its response within 30 days, and provides that the assigned judge will address the failure to comply with the procedural deadlines. Accordingly, the trial court's determination that Szeles' motion for summary judgment was uncontested due to Ketner's untimely response was within its purview, and its decision to enter judgment in favor of Szeles pursuant to Pa.R.C.P. 1035.3(d) was proper.

Ketner also alleges, "it is the policy of the courts in Pennsylvania to overlook procedural errors when a party has complied with the requirements of the rule and the adverse party suffers no prejudice." Brief of Appellant at 15. Ketner cites two cases, which we find inapplicable because in both cases the non-moving party timely filed its response to a motion for summary judgment. ***See Pomerantz v. Goldstein***, 387 A.2d 1280 (Pa. 1978) and ***Griffin v. Tedesco***, 486 A.2d 419 (Pa. Super. 1984). Even if Ketner were to demonstrate that Szeles suffered no prejudice, Ketner blatantly failed to comply with the requirements of Dauphin County Local Rule (Civil) 1035.2(a) and Pa.R.C.P. 1035.3.

For these reasons, the trial court properly determined that Szeles' motion for summary judgment was unopposed. We discern no abuse of discretion in this determination. Accordingly, Ketner's argument is meritless and we cannot grant her relief on this claim.

In her second issue, Ketner asserts that an issue of fact exists regarding the date she discovered, or had knowledge of, the mold growth on the property. The trial court, in its memorandum opinion granting Szeles' motion for summary judgment, noted that Ketner admitted in her answers to Szeles' requests for admissions dated October 5, 2010, that she had expressed concerns to Szeles and/or her insurance carrier regarding potential mold growth prior to March 4, 2003. Trial Court Opinion, 7/17/13, at 2. Ketner now alleges that she could not have possibly admitted to knowing about mold growth on the property prior to March 4, 2003 because she first learned of the mold growth in 2005 after her children's physician confirmed that their illnesses were the result of mold.

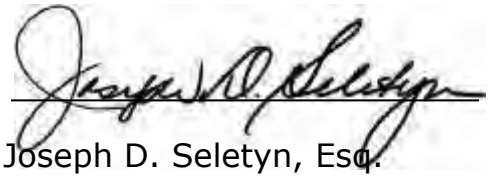
Preliminarily, we note a court may enter summary judgment in favor of a defendant where the statute of limitations bars plaintiff's cause of action. ***Moyer v. Rubright***, 651 A.2d 1139, 1141 (Pa. Super. 1994). Further, an answer made in response to a request for admissions serves as a proper base for entry of summary judgment, even if it was contrary to deposition testimony. ***See Innovate, Inc. v. United Parcel Service, Inc.,*** 418 A.2d 720,723 (Pa. Super. 1980).

Here, despite Ketner's assertions to the contrary, her admission served as a proper basis for the trial court's entry of summary judgment in favor of Szeles. ***Id.*** Ketner contends that her admission does not, in and of itself, entitle Szeles to summary judgment; however, our review of the record reveals that Ketner's response to Szeles' motion for summary judgment is

devoid of any relevant information or credible evidence in support of her position. ***Ario***, ***supra***. Thus, the trial court properly concluded that no genuine issues of material fact existed sufficient to prevent to entry of summary judgment.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 5/6/2014