IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

NANCY J. DIGGS and JAMISON DIGGS, her husband, Plaintiffs	:	
v.	:	NO. 99-01,582
CROWN AMERICAN PROPERTIES, L.P. and ASSOCIATED CLEANING CONSULTANTS & SERVICES, Defendants	:	

OPINION and ORDER

If this were not such a serious matter, it would be tempting to label the procedural history of this case a Comedy of Errors, for like Shakespeare's play, it is a case of mistaken identity that has resulted in a confused muddle. As a result of the plaintiffs' failure to properly identify the company responsible for cleaning the Lycoming Mall floors at the time of this slip-and-fall accident, along with the defendants' repetition and affirmation of that error in their answers, the plaintiffs have sued the wrong cleaning company and cannot now sue the correct one because the statute of limitations has run.

Having learned that the mall terminated its contract with Associated Cleaning Consultants and Services shortly before the time of the accident, both defendants now wish to amend their pleadings to reflect that fact. The plaintiffs oppose these motions, struggling to keep the wrong cleaning company on the hook and prevent Crown American from bringing in the correct company as a third party defendant liable to Crown American.

Unfortunately, unlike Shakespeare's play, this muddled scenario cannot have a happy ending. Either the plaintiffs or the defendants will suffer severely as a result of the court's decision on the motions to amend. After a thorough consideration of the actions and responsibilities of all parties, we believe the plaintiffs must suffer the brunt of the error, for although both defendants are certainly at fault for not accurately ascertaining the facts before filing their answers, it is the plaintiffs' responsibility to identify the correct defendant before the statute of limitations has run.

Factual Background

On 28 November 1997, plaintiff Nancy Diggs slipped and fell onto the floor of the Lycoming Mall, and suffered injuries because of the accident. On 16 April 1999, plaintiffs' counsel notified Crown American that it was representing the plaintiffs. No mention was made of Associated Cleaning or any other cleaning service at that time.

On 1 October 1999, the plaintiffs filed a complaint against Crown American and Associated Cleaning. The complaint was served on 18 October 1999. On 16 November 1999, counsel for Crown American phoned plaintiffs' counsel and requested a thirty day extension in which to file an answer. Plaintiffs' counsel extended the deadline until 16 December 1999. On 30 November 1999 Crown American filed an answer admitting there was a contract between Associated Cleaning and itself at the time the accident took place.

Some time in November 1999, counsel for Associated Cleaning received a phone call from plaintiffs' counsel, asking whether he represented Associated

Cleaning in this matter. At that time, counsel for Associated Cleaning knew nothing about this case, although he had previously represented Associated Cleaning in a similar slip-and-fall case that occurred at the mall. Counsel for Associated Cleaning told plaintiffs' counsel that he had not yet been contacted by Associated Cleaning about the case, and therefore he did not represent Associated Cleaning on the matter. However, he added that it was likely the carrier would retain his firm, since his firm had handled the previous case. When plaintiffs' counsel mentioned something about an extension of time in which to file an answer, he replied that he could not do anything until he was assigned the case, and told her to "do what you have to do," meaning she should institute default judgment proceedings, if necessary.

On 10 December 1999 the case was assigned to Associated Cleaning's current counsel. On 13 December 1999, Associated Cleaning's counsel notified plaintiffs' counsel of his involvement in the case and asked for an extension in which to file an answer. Plaintiffs' counsel granted him an extension until 28 December 1999. On 28 December 1999, Associated Cleaning's counsel filed an answer admitting a contractual relationship existed between Associated Cleaning and Crown American on the date of the accident. On 10 January 2000, Associated Cleaning's counsel learned from his client that the contract had been terminated approximately two months before the accident. Counsel for Associated Cleaning notified counsel for Crown American of that fact. Associated Cleaning filed a Motion for Leave to Amend its Answer and New Matter, to deny the contract. Crown American filed a Motion for Leave to File an Amended Answer, to deny the contract, along with a Motion for Leave to Join Additional Defendant, Store Systems/Wade Services, the cleaning service under contract at the time of the

accident.[1]

DISCUSSION

One of the underlying themes of the Pennsylvania Rules of Civil Procedure is that technical irregularities and infractions should be overlooked when necessary to allow cases to be decided on their merits, rather than determined by technicalities. In accordance with this policy, Rule 1033 advises courts to liberally permit amendments to the pleadings:

> A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, correct the name of a party or 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 cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted.

Pennsylvania case law interprets this rule to mean that requests to amend pleadings should be liberally evaluated in an effort to secure a determination on the merits. Horowitz v. Universal Underwriters Ins., 397 Pa. Super. 473, 580 A.2d 395 (1990). Although the right to amend a pleading is a matter of judicial discretion, it should be liberally granted at any stage unless it constitutes surprise which results in prejudice to an adverse party, or constitutes an error of law. Robinson Protective Alarm v. Bolger & Picker, 516 A.2d 299, 302 fn. 6 (Pa. 1986). Since there is clearly no error of law involved here, the question is whether allowing the amendments would cause

[1] The contract between Crown American and Wade contained a clause allowing Crown American to sue Wade for indemnity and contribution. Therefore, while Wade cannot be directly liable to the plaintiffs due to the running of the statute of limitations, Wade can be liable to Crown American, if Crown American is found liable to the plaintiffs, since the statute of limitations for contracts is six years.

the plaintiffs to suffer the type of prejudice envisioned by the appellate courts.

Prejudice has been defined as "something more than a detriment to the other party, since any amendment almost certainly will be designed to strengthen the legal position of the amending party and correspondingly to weaken the position of the adverse party." Winterhalter v. West Penn Power Co., 512 A.2d 1187 (Pa. Super. 1986), *citing* Sands v. Forrest, 290 Pa. Super. 48, 53, 434 A.2d 122, 125 (1981). In Bata v. Central-Penn National Bank of Philadelphia, 448 Pa. 355, 380, 293 A.2d 343 (1092), the benchmark case in which amendments to pleadings was discussed, the Pennsylvania Supreme Court provided the following framework within which to determine whether prejudice exists:

> 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.

The plaintiffs in this case contend they would be prejudiced by granting the defendants leave to amend their answers. Certainly the denial of a contractual relationship between Crown American and Associated Cleaning would harm the plaintiffs' ability to prosecute their case–especially against Associated Cleaning, since it is likely such an amendment would ultimately lead to the dismissal of the complaint against that company. Such harm, however, does not in itself constitute the sort of prejudice envisioned in the appellate cases cited above. The plaintiffs are only prejudiced by the proposed amendments if they suffer that harm as a result of allowing the amendments *at this date*. As the defendants have pointed out, both of

their answers admitting the contract were filed after the statute of limitations had already run.[2] Therefore, the harm plaintiffs suffer will not result from the court's allowing the amendments at this time.

The plaintiffs respond to this argument by pointing out they graciously granted to both defense attorneys extensions in which to file their answers, and that it would be unfair to punish them for their generosity. The court disagrees. While it is generally admirable for attorneys to be gracious to opposing counsel, that is not the case when such graciousness endangers the rights of their clients. An attorney's primary duty is to protect those rights–not to sacrifice them in order to be a nice guy or gal to an opponent. In light of the swiftly approaching statute of limitations, the plaintiffs' attorney should not have granted an extension to either defense attorney unless she was certain she had identified the correct defendants. Instead, she should have initiated default judgment proceedings against both defendants as soon as the deadline for filing an answer had passed.[3]

Another way of stating this conclusion is that the plaintiffs have not suffered *undue prejudice.* This term is frequently used in discussing possible prejudice caused by amendments to the pleadings. *See* Winterhalter, supra, at 1189; Cucchi v. Rollins Protective Services Co., 377 Pa. Super. 9, 546 A.2d 1131 (1988); Bevans v. Hilltown Tp,, 72 Pa. Commw. 227, 457 A.2d 977 (1983); Junk v. East End Fire

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[2] In fact, the statute had run even before counsel for Associated Cleaning entered his appearance.

[3] The court also notes that the plaintiffs' firm had been involved in the case since April 1999–at least five months before filing the complaint. That certainly gave them plenty of time to identify the correct defendants. If they were uncertain, it would have been far better to have filed the complaint early, to leave time to correct potential mistakes of that sort.

Department, 262 Pa. Super. 473, 396 A.2d 1269 (1078). Here, plaintiffs suffer no undue prejudice, because they have brought it upon themselves.[4]

The plaintiffs attempt to escape the consequences of their mistake by arguing that both defendants should be estopped from amending their answers. The doctrine of equitable estoppel precludes a party from doing an act differently than the manner in which another was induced by word or deed to expect. Novelty Knitting Mills, Inc. v. Siskind, 500 Pa. 432, 457 A.2d 502 (1983). Plaintiffs cite Zitelli v. Dermatology Educ. and Research Foundation, 534 Pa. 360, 370, 633 A.2d 134, 139 (1993). for the proposition that estoppel arises when a person by his acts, representations, admissions, or silence when he ought to speak out, induces another to believe certain facts exist and that other person acts on such belief to his detriment. The inducement may be intentional or a result of negligence.

This argument must fail because Zitelli clearly states that two things must exist for estoppel to be found: inducement and reliance. There was clearly no inducement in this case–either intentional or negligently.[5] There is not one scrap of evidence that either of the defense attorneys, or any of the defendants' agents, induced the plaintiffs to believe Associated Cleaning company was under contract at the time of the accident. There were no acts, representations, admissions, or silences when under a duty to speak, regarding Associated Cleaning's

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[4] Of course, it is the plaintiffs' attorney, and not the plaintiffs themselves, who presumably made the error. Still, the plaintiffs must suffer for their counsel's error, at least in this case.

[5] We note that during the oral argument the plaintiffs' attorney stated the plaintiffs were not accusing the defendants' attorneys of deliberately misleading them.

appropriateness as a defendant, before the statute of limitations had run. The affidavits submitted by both defense attorneys indicate that neither attorney made any representation which would lead the plaintiffs to believe they had sued the correct cleaning company before the statute had run.[6]

Moreover, as pointed out in Associated Cleaning's brief, even if such an inducement occurred, estoppel cannot be predicated upon errors of judgment, mistakes, or omissions by the actor himself. In Re: Estate of Tallarico, 228 A.2d 741 (Pa. 1967); Zitelli, supra, at 140. In this case, the plaintiffs' attorney relied not on anything the defendants said or did. Instead, she relied on a previous tort case her firm had filed against the same defendants. Although the facts of that earlier case were similar, the timing was different: the accident happened four months before the accident involved here. During that interval, the contract was terminated and Associated Cleaning ceased to clean the mall's floors–a possibility that the plaintiffs' attorney should have considered. Instead of conducting a thorough investigation of the matter, however, the plaintiffs' attorney simply assumed the same cleaning company was under contract at the time of this accident.

In fact, it appears that almost everyone involved made that assumption and relied upon it. Insofar as they did, all parties are negligent, to say the least. However, it the plaintiffs who must bear the brunt of the responsibility for the blunder because it is they who have the duty of identifying the correct defendants.

This conclusion is supported by the case of Winterhalter, supra. Although none of the parties cited or discussed this case, the court believes the principles

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[6] In fact, the attorney for Associated had not even entered his appearance before the statute of limitations had run.

enunciated in Winterhalter are very applicable here. In Winterhalter, the incident occurred on 17 June 1982; the plaintiffs filed an amended complaint joining a company on 17 April 1984. Various preliminary objections and other motions were filed, and eventually the company filed an answer on 7 November 1984. On 11 March 1985 the company filed leave to amend its answer to raise the defense that its employees were not acting within their scope of employment at the time of the incident. The trial court granted permission to amend, which eventually led to a grant of summary judgment in the company's favor.

The plaintiffs claimed the trial court erred in granting leave to amend, because the statute of limitations had run and therefore it was too late for them to join the individual employees. In support of their position, they constructed a very sophisticated argument: (1) Plaintiffs cannot amend a complaint after the statute of limitations has run if it introduces a new cause of action; (2) The scope of employment defense introduced the need for the plaintiffs to assert new causes of action against the individual employees; (3) Therefore, an untimely defense is just as prejudicial as an untimely cause of action, and should also be prohibited.

The Superior Court rightly rejected this argument, pointing out that the new defense simply resulted in the realization by the plaintiffs that their complaint was incomplete. The court stated:

> The assertion of a defense which may, if proven, deny recovery against the amending party is far different from the prohibition against asserting a new cause of action against a party after the statute of limitations has run. The reasoning is quite clear. "It is the duty of one asserting a cause of action against another to use all reasonable diligence to properly inform himself of the facts and circumstances upon which the right of recovery is based." *Shaffer v. Larzelere*, 410 Pa. 402, 405, 189 A.2d 267, 269 (1963). By suing an employer for the acts of its employees, appellants assumed the risk that appellee

would not deny agency.

Winterhalter, supra, at 1190. The court also pointed out that, as in this case, even if the company had raised the scope of employment defense in its original answer, the plaintiffs still would have been barred from suing the individual employees because the statute of limitations had already run. Id. at 1190-91. Therefore, there was no prejudice.

In the case before this court the defendants wish to plead a different fact, rather than a new defense. Nonetheless, the principle behind Winterhalter still applies: plaintiffs must use all reasonable diligence to properly inform themselves of the facts, circumstances, and individuals against whom they have a cause of action. When they do not fulfill this duty, and instead rely on a previous lawsuit to choose their defendants, they have no one but themselves to blame, and must suffer the consequences of their actions.

This court is not entirely happy about allowing the defendants to escape the consequences of their errors; however, we must strive to ensure that this case is tried on the merits and it would be preposterous and repugnant to our system of justice to prevent Associated Cleaning from defending on the basis that it was not the cleaning company at the time of the suit, or to prevent Crown American from bringing in the real cleaning company as a third party defendant. Whatever errors the defendants made, it appears that Associated Cleaning was not under contract at the time of the accident, and without any evidence that either defendant concealed or misrepresented that fact, any trial prohibiting that truth from being introduced would turn this comedy of errors into a farce.

O R D E R

AND NOW, this _____ day of April, 2000, for the reasons stated in the foregoing opinion, the Motion to Amend Answer With New Matter filed by Associated Cleaning is granted; the Motion for Leave to File Amended Answer filed by Crown American is granted; the Motion for Leave to Join Additional Defendant filed by Crown American is granted; and the Motion for Estoppel filed by the plaintiffs is denied.

BY THE COURT,

Clinton W. Smith, P.J.

cc: Dana Stuchell Jacques, Esq., Law Clerk
Hon. Clinton W. Smith
Rhonda Davis, Esq.
Joy McCoy, Esq.
Christopher Reeser, Esq.
Gary Weber, Esq., Lycoming Reporter