Perkins v. Maroni et al.

Purchase and sale agreement — Alleged breach — Settlement date — Failure to close

The plaintiff buyer failed to establish that the defendant sellers breached a written agreement for the sale of real property where the agreement and any extensions expired before plaintiff claimed he was ready to proceed to settlement. The court entered judgment in favor of defendants.t

Defendants owned property on Freedom Road in Eat Stroudsburg. They entered into an agreement of sale dated Sept. 8, 2016, with plaintiff. The agreement set forth a purchase price of $40,000, with $5,000 due at signing and the balance to be paid by a purchase money mortgage to be signed at closing. The agreement stated that closing would occur on or before Sept. 30, 2016, but did not contain language that time was of the essence. At plaintiff's request, the closing was delayed. The parties did not sign any written extension, but scheduled the closing for Oct. 8, 2016, and then for Oct. 22, 2016, at plaintiff's request. The closing scheduled for Oct. 22 contemplated that plaintiff's sister, Eunice Glushefski, would be substituted as buyer. However, the closing did not take place on Oct. 22, 2016. Rather, plaintiff proposed another substitution of buyer, his mother-in-law, and a new closing date of Nov. 15, 2016. Defendants would not agree to the assignment. Rather, defendants indicated that they were willing to extend the original agreement of sale for 30 days provided plaintiff was the buyer. Plaintiff did not proceed to closing in that time period. Ultimately, defendants listed the property with a realtor for $50,000, but the property did not sell. Defendants still owned the property as of the date of the court's opinion. Plaintiff then filed this suit against defendants seeking specific performance of the agreement of sale. After a non-jury trial, the court issued this opinion finding that plaintiff failed to demonstrate any breach of contract by defendants. The parties' agreement called for settlement to occur on or before Sept. 30, 2016. While there was no time of the essence clause, dates agreed to in contracts are generally to be adhered to by the parties and failure to do so may constitute a breach, the court explained. There was a meeting of the minds that plaintiff would be afforded additional time to close the transaction in October 2016. While this agreement was not put in writing, there was no dispute that plaintiff had until Oct. 8, 2016, to close and that assignee Glushefski had until Oct. 22, 2016, to close. There was no meeting of the minds to extend or substitute an additional purchaser after Oct. 22, 2016, the court observed. While defendants testified that

they expressed a willingness to extend settlement to Nov. 30, 2016, with plaintiff as purchaser, there was no evidence that plaintiff made any effort to close on the purchase any time after Oct.22, 2016. Defendants could not be expected to hold open indefinitely an agreement of sale with a settlement date that had long since expired, the court reasoned in its opinion finding no breach of the written agreement of sale.

C.P. of Monroe County, No. 1129 CIVIL 2017

WILLIAMSON, *J.*, November 30, 2018—This matter is before the Court on the claim of Les Perkins ("Plaintiff") for specific performance regarding the sale of real property located at 6148 Freedom Road., East Stroudsburg, PA 18302, a/k/a Lot 49 Section D Plotting 1 of Leisure Lands, Inc., Tax Code # 9/13A/1/34 ("real property"). The owners of the real property are Charles Maroni and Douglas Behrens ("Defendants"). A non-jury trial was held on November 1, 2018. The parties were granted seven (7) days to file any post-trial briefs, and Plaintiff chose to do so.

FINDINGS OF FACT

1. Charles Maroni and Douglas Behrens own the real property located at 6148 Freedom Rd., East Stroudsburg, PA 18302, a/k/a Lot 49 Section D Plotting 1 of Leisure Lands, Inc., Tax Code #9/13A/1/34.

2. The Defendants are cousins. Charles Maroni appeared at time of trial and testified. Douglas Behrens did not appear for the trial.

3. Plaintiff and Defendants signed an Agreement of Sale dated September 8, 2016 for the sale of the real property to Plaintiff. (Plaintiff's Exhibit 1).

4. The Agreement of Sale was prepared by Attorney Richard James, the attorney for the Defendants. Plaintiff chose not to retain an attorney.

5. The Agreement of Sale set forth a purchase price of $40,000, with $5,000 due at the signing of the Agreement and the balance by a purchase money mortgage to be signed at time of closing. (Pl. Exh. 1).

6. The Agreement of Sale further provided that closing shall occur on or before September 30, 2016 at the office of the Buyer's attorney or such other place as the parties mutually agree. (Pl. Exh. 1).

7. The Plaintiff, as Buyer, was responsible for the preparation of a mortgage and note by Seller's (Defendants') attorney at a cost not to exceed $250. (Pl. Exh. 1).

8. The parties agreed the closing would be at the office of the Sellers' (Defendants') attorney, Richard James.

9. Buyers also elected to have Attorney James obtain title insurance and examine the title to the subject real property for him.

10. The Agreement of Sale did not contain language that time was of the essence with regard to the closing date or other timeframes.

11. The Agreement of Sale, at paragraph 17, contained language that "[i]t is understood that this Agreement contains the terms of purchase between the Seller and the Buyer and there are no other terms or representations

concerning this sale." (Pl. Exh. 1).

12. The Defendants have done several prior real estate transactions with the assistance of Attorney James.

13. Attorney James believed the parties were in a hurry to close on the sale and it would occur by the next weekend after execution of the Agreement of Sale.

14. Defendant Maroni later advised Attorney James the closing would be delayed until after September 30, 2016 at the request of the Plaintiff.

15. No written extension of the Agreement of Sale was ever signed by the parties.

16. The sale was then set to close on October 8, 2016, and extended again to October 22, 2016 at the request of the Plaintiff. (Defendants' Exh. 4).

17. The closing that was to occur on October 22, 2016 contemplated Plaintiff's sister, Eunice Glushefski being substituted as Buyer.

18. An assignment of the original Agreement of Sale from Plaintiff to his sister, Eunice Glushefski, was prepared, but never signed. (Defendants' Exh. 13).

19. Attorney James had prepared a Deed, Mortgage and Note for the earlier closing dates with Plaintiff, and then re-did the documents for the proposed closing with Plaintiff's sister, Eunice Glushefski.

20. The closing did not take place on October 22, 2016. Attorney James was advised that another proposed substitution of buyer and new closing date of November

15, 2016 was being sought by Plaintiff. (Defendants' Exh. 5).

21. Plaintiff proposed that his mother-in-law, Linda Braunsberg, purchase the real property on assignment of the original Agreement of Sale.

22. Defendant Maroni would not agree to that assignment, and no written assignment of the Agreement of Sale was signed as to Plaintiff's mother-in-law as purchaser.

23. Plaintiff's mother-in-law is an attorney in another state, and Plaintiff had previously asked her to review the initial closing documents.

24. A new proposed Agreement of Sale was prepared by Attorney James as between Defendants and Plaintiff's mother-in-law, Linda Braunsberg. (Defendants' Exh. 11). That Agreement of Sale was never signed.

25. On October 30, 2016, Defendant Maroni advised Attorney James he was willing to extend the original Agreement of Sale with Plaintiff for thirty (30) days provided the Plaintiff was the buyer. (Defendants' Exh. 7).

26. No written extension was signed, nor did Plaintiff proceed to closing in that timeframe.

27. Attorney James continued to receive contact from Plaintiff's mother-in-law, Ms. Braunsberg, regarding new terms she allegedly discussed with Defendants, to the point where he grew frustrated and withdrew from representing Defendants.

28. Defendant Maroni sent a certified letter to Plaintiff on October 30, 2016 advising he had to close within thirty (30) days.

29. The notice was mailed to an address next door to the real property where Defendant Maroni believed Plaintiff was residing at the time, and not to Plaintiff's address shown in the Agreement of Sale.

30. Defendant Maroni believes he got a message at some point from Plaintiff that he was cancelling and wanted his deposit toward the purchase price returned. Defendant Maroni could not recall when he received that message.

31. Plaintiff believes he only advised he was cancelling due to the inability to get information and documents and that he never requested the return of his money.

32. The real property was then listed for sale with ReMAX for $50,000, but it did not sell. It is no longer listed with a real estate professional.

33. Defendants are still the owners of the real property.

34. Plaintiff still wants to purchase the real property for the terms of the original Agreement of Sale which is Plaintiff's Exh. 1.

DISCUSSION

The Statute of Frauds bars specific performance of a contract to convey real estate where the agreement is not in writing. *See Stafford v. Reed*, 363 Pa. 405 (1950); *Anderson Estate*, 348 Pa. 294, 35 A.2d 301 (1943).

Specific performance is an appeal to the equitable powers of a court. *Lackner v. Glosser*, 892 A.2d 21 (Pa. Super. 2006). To enforce specifically an agreement of sale for real estate, the terms of the agreement must be definite. *Agnew v. Southern Ave. Land Co.*, 53 A. 752 (Pa. 1902). Real estate is by its very nature unique. There rarely is an adequate remedy at law for a buyer who wants to purchase a property under an agreement of sale when the Seller later refuses to convey the property. *See Oliver v. Ball*, 2016 Pa. Super. 45 (2016). A court should not order specific performance where a hardship or injustice would result to either of the parties. *Id.* In interpreting deadlines in an agreement of sale for real estate, time is not ordinarily regarded of the essence unless it is so stipulated in the agreement, or it is implied. *Carsek Corp. v. Stephen Shiffer, Inc.*, 431 Pa. 550, 246 A.2d 365 (1968); *See also*, *Rusiski v. Pribonic*, 511 Pa. 383, 515 A.2d 507 (1986).

The initial issue is whether or not specific performance is the appropriate remedy sought in this case. Plaintiff seeks specific performance of real property, subject to an agreement of sale. There was no testimony that an adequate remedy at law exists and we find based upon the testimony presented, that there is no adequate remedy at law for the Plaintiff. There was no testimony of any hardship or injustice if specific performance were granted. In fact, Defendants listed the property for sale after the proposed sale to Plaintiff for $50,000, instead of $40,000 as agreed between the parties. There have been no offers and no sale at the higher price, and the property is still owned by the Defendants. There was no testimony that

it is worth anything more than the price agreed between the parties. Therefore, we find specific performance is the available remedy for any breach in this case by the Defendants.

The next issue is whether or not Defendants breached a duty owed under contract with the Plaintiff. There was only one written contract between Plaintiff and Defendants. The signed Agreement between the parties is dated September 8, 2016. The Agreement sets forth that settlement shall occur on or before September 30, 2016. There is no "time of the essence" clause in the Agreement. There are no other written agreements between the parties.

Plaintiff ultimately chose not to appear for settlement on or before September 30, 2016. There is some disagreement over why Plaintiff was not prepared to close on the purchase of the real property; however, both parties orally agreed to extend the closing date. No written extension was signed. Defendant Maroni provided credible evidence that the settlement with Plaintiff was to take place by October 8, 2016, and then by further agreement to take place by October 22, 2016. Plaintiff did not proceed to settlement by either of those two dates. Despite no written extension and no written assignments to the Agreement of Sale, the parties were planning to proceed to settlement by October 22, 2016 with Plaintiff's sister, Eunice Glushefski as the purchaser. Attorney James testified convincingly that he then prepared documents for closing to take place by October 22, 2016 with Ms. Glushefski as purchaser. No closing took place on October 22, 2016. Thereafter, Plaintiff wanted an extension of time and

wanted to substitute his mother-in-law, Linda Braunsberg, as purchaser.

Defendant Maroni provided convincing testimony that he did not agree to the substitution of Ms. Braunsberg as purchaser under the original written Agreement of Sale. No assignment to Ms. Braunsberg was signed by the parties. No New Agreement of Sale was signed by Defendants and Ms. Braunsberg. On October 31, 2016, Defendant Maroni mailed a notice to Plaintiff advising that Plaintiff had thirty (30) days to close on the purchase pursuant to the original Agreement of Sale. That thirty (30) days would have expired on November 30, 2016. Plaintiff did not close on the purchase by November 30, 2016.

Plaintiff contends he never received the notice sent by the Defendant Maroni and that at some point he was ready to proceed to settlement. First, the issue of whether or not Plaintiff received the notice is immaterial. The Agreement of Sale between the parties called for settlement to occur on or before September 30, 2016. Although there was no "time of the essence" clause in the Agreement of Sale, dates agreed to in contracts are generally to be adhered to by the parties. Failure to do so may constitute a breach of contract. Here, there was a meeting of the minds that additional time would be afforded to the Plaintiff to close the transaction in the month of October 2016. The agreement was not contained in writing, but there was no dispute by either party that Plaintiff had until October 8, 2016 to close; then he, and eventually his assignee, Ms. Glushefski, had until October 22, 2016 to close. Unfortunately, there was no meeting of the minds of all parties to extend or substitute

additional purchasers after October 22, 2016. At most, the testimony showed that Defendants were willing to extend settlement to November 30, 2016 with Plaintiff as the purchaser, as contemplated in the original Agreement of Sale. There was no testimony that Plaintiff made any attempt to close on the purchase of the real property at any time after October 22, 2016.

In fact, Plaintiff's only testimony about his actions thereafter was to advise a real estate agent in May 2017 that he "had a lien" on the real property for failing to have it sold to him, and consulting with legal counsel. There was no written correspondence to Defendants or counsel that he remained ready, willing and able to close until months later when he contacted legal counsel. There also was no convincing testimony from Plaintiff as to when, or even if, he verbally advised Defendants he was ready, willing and able to close. Clearly, no notice was given within a reasonable time after October 22, 2016 that Plaintiff would purchase the real property. The Defendants cannot be expected to hold open indefinitely an Agreement of Sale with a settlement date that had long since expired.

Furthermore, by the parties' conduct of verbally agreeing to extend the time to close to October 8, 2016 and then October 22, 2016, and substitution of Ms. Glushefski, Plaintiff should have known that any further agreements thereafter had to be agreed to by all parties. There clearly was no meeting of the minds after October 22, 2016 as to terms of an extension and/or substitution of parties. Most glaringly, there was no written agreement of any kind between the parties. Therefore, there were no

further agreements between the parties after October 22, 2016. Defendants were still prepared and willing to sell the property to the Plaintiff directly, on or before November 30, 2016, but Plaintiff never took any steps to close on the transaction. After November 30, 2016, Defendants were no longer in agreement to extend the original Agreement of Sale any longer. Plaintiff provided no evidence of any attempts to contact or communicate with Defendants, or to demand a closing for himself at any time after October 22, 2016. Even if some communication occurred with Defendants' new counsel, Kathleen Walters, Esq., it appears to have taken place in February 2017, which was long after the date to close set forth in the written Agreement of Sale between the parties. By then, the Agreement of Sale had been breached by Plaintiff's inability to close as set forth, and within the timeframes extended by the parties. Plaintiff has provided no authority for the proposition that a lack of a "time of the essence" clause will indefinitely extend terms of a written agreement, when a specific time to act has not been adhered to by a party. As such, there is no breach by the Defendants of the written Agreement of Sale of real property, and any breach was done by the Plaintiff.

Plaintiff's claims that he could not close due to no fault of his own, and that he should be permitted to do so now, are unfounded. Plaintiff stated that he was a novice purchaser of real estate and that he tried to ascertain closing costs from Defendants' attorney, but was unable to do so. Being a novice purchaser is no excuse. Plaintiff could have obtained his own legal advice and representation in the

matter. On such an important and expensive undertaking, with admitted inexperience, Plaintiff took his own risk by not retaining a Pennsylvania licensed attorney. It is astounding how many people choose to do so in real estate transactions. The Plaintiff also could have selected his own title insurance/abstract company to conduct the closing for him, but he failed to do so. Plaintiff's mother-in-law was an attorney in another state, and may have reviewed documents for him. However, that attorney does not appear to be licensed in Pennsylvania, nor did that relationship encourage Plaintiff to consider retaining his own attorney in Pennsylvania for this transaction.

The testimony was also unconvincing that Plaintiff could not receive information necessary to close. By his own testimony, he was advised to bring about $3,000 to closing for costs.[1] Plaintiff stated he needed an exact amount. However, there was no testimony that $3,000 would not have covered the closing costs. Attorney James was also credible in his testimony that he gave an amount necessary to close to Plaintiff prior to the October 8, 2016 closing date and that he also gave it to Defendant Marino, who then gave it to the Plaintiff. This figure would not have substantially changed through the later date of October 22, 2016. There was no convincing testimony that Plaintiff was hindered in any way by Defendants or their attorney in closing within the agreed upon dates.

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1. Judicial notice is taken that a real estate sales transaction usually includes costs to a Buyer for balance of the purchase price, a portion of the realty transfer tax, pro-rated taxes and dues (if any), title insurance, (if requested) and any agreed document preparation fees.

For all of these reasons, we find that the Defendants have not breached a written agreement with Plaintiff for sale of the real property. The Agreement of sale, and any extensions, expired before Plaintiff claimed he was ready to proceed to settlement.

ORDER

AND NOW, this 30th day of November, 2018, following a non-jury trial in this matter, the Court finds in favor of the Defendants and against the Plaintiff on the claim for specific performance. The Complaint in this matter is dismissed, and the lis pendens entered of record is hereby STRICKEN.

Karten v. Shoprite, Inc.

Insufficient evidence — Dangerous condition — Transitory spill — Constructive notice

Plaintiff failed to establish that a grocery store had constructive notice of a dangerous substance in its parking lot, so the court granted defendants' motion for summary judgment.

Plaintiff slipped and fell as she was leaving a Shoprite grocery store. The accident occurred on the main walkway of the store's parking lot. Plaintiff claimed she slipped on some debris that was dark, slippery and smelled of rotten banana. She was not aware of how the substance got onto the ground or how long it had been there before her fall. Plaintiff sustained injuries to her knee, ankle and lower back.

Plaintiff filed suit for negligence and premises liability. One defendant, Mark Four Realty, filed a crossclaim against Martin's Power Sweeping. All defendants moved for summary judgment as to plaintiff's complaint.

According to plaintiff, the dark gooey substance in the grocery store parking lot constituted a dangerous condition of lasting duration. The court disagreed, concluding instead that the substance amounted

to a transitory spill. Plaintiff argued that Shoprite had actual notice of a dangerous condition because it had received general complaints regarding debris near the parking lot garbage cans. However, general knowledge of a frequent occurrence was not sufficient to show actual notice of a current transitory spill. The court found no evidence of actual notice to the store of the banana's presence, so a jury would have needed to resort to improper speculation.

In her argument for constructive notice, plaintiff complained that Shoprite failed to produce information regarding a store employee and the surveillance film of the incidence. The court found that plaintiff manufactured these issues solely for the purpose of defeating summary judgment. Both of these issues could have been pursued in discovery, but plaintiff did not do so, despite extensions of the discovery period. The court also found that material in plaintiff's affidavit contradicted her prior pleadings and/or deposition testimony, so it disregarded that affidavit as self-serving and speculative.

State law did not support the presumption that damaged debris served as sufficient circumstantial proof for the duration of a transitory spill. The court concluded plaintiff failed to meet her burden of establishing constructive notice, so it granted summary judgment in favor of defendants.

Next, the court considered Mark Four's motion for summary judgment against Martin's Power Sweeping. Mark Four's pleading did not allege the cause of action for which it sought summary judgment. The summary judgment motion relied on a contract, but Mark Four neither alleged the terms of this contract nor attached a copy of the agreement to the pleading. To the extent Mark Four sought to recover on an indemnity claim, its motion was premature. Also, its pleading was not signed in accordance with procedural rules. Due to the number of deficiencies, the court held Mark Four was not entitled to summary judgment against its co-defendant.

C.P. of Monroe County, No. 4416 CV 2016

HARLACHER-SIBUM, *J.*, December 3, 2018—This case comes before us on Defendants Shoprite, Inc. d/b/a Shoprite of Stroudsburg ("Shoprite"), Martin's Power Sweeping, Inc. (Martin's Power Sweeping), and Mark Four Realty, L.P. d/b/a The Lightstone Group, LLC.'s ("Mark Four") Motions for Summary Judgment against

Plaintiff Beverly Karten ("Karten"), as well as, Co-Defendant Mark Four's Motion for Summary Judgment against Co-Defendant Martin's Power Sweeping. Karten filed a Complaint with this Court on August 11, 2016, sounding in negligence and premises liability against all named Defendants, both individually and jointly. Mark Four filed a Crossclaim to Karten's Complaint, against Martin's Power Sweeping on September 9, 2016, sounding in contribution, indemnity, and breach of contract. After reviewing all Defendants' Motions for Summary Judgment against Karten, as well as, Mark Four's Motion for Summary Judgment against Martin's Power Sweeping, and all parties' respective briefs, we are now prepared to render our decision.

FACTS AND PROCEDURAL HISTORY

On June 30, 2014, in the hour of 10:30 — 11:30 a.m., Karten was leaving the Shoprite grocery store after grocery shopping with her late husband. (Pl.['s] Compl. ¶ 6-9). She slipped and fell on the main walkway of the parking lot after exiting the store. (Id. at ¶ 12). At first, Karten was not aware of the specific kind of debris upon which she slipped. (Pl. Dep. 52) She described the substance as "gooey, dark grey and almost black and again somewhat liquid and slippery." (Pl. Compl. ¶ 11, 13). She further describes the debris as approximately eight inches long, two inches wide, and smelling of rotten banana. (Pl. Dep. 52) Karten is unaware how the substance got onto the ground and how long it remained on the ground before it was the cause of her fall. (Id. at 53)

Following her accident, another customer who witnessed her fall, went inside to get help. (Pl. Dep. 51). The manager came out to assist Karten and inspect the situation, while Virginia Rubino, a Shoprite parking lot attendant employee, brought Karten a chair. (Id. at 58). As a result of her fall, Karten sustained injuries to her right knee, left ankle, and lower back. (Pl. Compl. ¶ 14).

A Complaint was filed by Karten on July 5, 2016. Shoprite was the first of the Defendants to file a Motion for Summary Judgment on March 5, 2018. Mark Four next filed their Motions for Summary Judgment against Karten and against Martin's Power Sweeping on March 20, 2018. Lastly, Martin's Power Sweeping filed a Motion for Summary Judgment against Karten on March 22, 2018.

DISCUSSION

We are mindful that "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay trial," a party may request summary judgment. Pa.R.C.P. No. 1035.2. Pursuant to Pa.R.C.P. No. 1035.2, movants may proceed with such a motion following one of two methods:

> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial

has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Although both subdivisions necessarily require the court to find that the evidentiary record allows for judgment as a matter of law, the court's analysis varies depending on the method asserted by the moving party.

Subdivision (1) requires that after examining all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... there exists no genuine issue as to any material fact." Community Medical Services of Clearfield Inc. v. Local 2665, AFSCME, 437 A.2d 23, 25 (1981) (emphasis added). "A 'material fact' ... is one that directly affects the outcome of the case." Bartlett v. Bradford Publishing, Inc., 885 A.2d 562, Super.2005. This analysis results in the court comparing the allegations, pleadings, and statements made by each party to determine whether a material factual discrepancy exists. "It is not the court's function upon summary judgment to decide issues of fact, but only to decide whether there is an issue of fact to be tried." Krepps v. Snyder, 112 A.3d 1246, Super.2015, appeal denied 125 A.3d 778, 633 Pa. 757.

Similar to subdivision (1), subdivision (2) requires that there be no question to be decided by the trier of fact. However, subdivision (2) necessitates the court make a finding as to "whether a plaintiff has alleged facts sufficient to establish a prima facie case." Ack v. Carroll Twp. Auth., 661 A.2d 514, 516-17 (Pa. Commw. Ct. 1995). Instead

of comparing the allegations, pleadings, and statements made by each party to one another, the court examines the allegations, pleadings, and statements made by each party to adjudge whether the adverse party, who must bear the burden of proof, has made sufficient allegations on the record to meet said burden. See Pa.R.C.P. No. 1035.2.

We are further mindful that summary judgment may only be granted "in cases where it is clear and free from doubt that movant is entitled to judgment as a matter of law." Ney v. Axelrod, 723 A.2d 719, Super.1999. It is the court's duty to "examine the record in the light most favorable to the non-moving party," and to "resolve any doubt against the moving party." Pocono International Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 470 (1983); Zimmerman v. Zimmerman, 469 A.2d 212, 213 (1983); Chorba v. Davlisa Enterprises, Inc., 450 A.2d 36, 38 (1982). With all of these standards in mind, we are now prepared to render our decision.

I. Defendants Shoprite, Martin's Power Sweeping, And Mark Four's, Motions For Summary Judgment Against Karten Are Granted Pursuant To Pa.R.C.P. No. 1035.2, Subdivision (2), Insufficient Evidence Essential To The Cause Of Action.

To succeed in presenting a prima facie negligence action, a plaintiff must properly allege against a defendant or defendants the existence of (1) a duty or obligation recognized by law; (2) a breach of that duty; (3) a causal connection between the breach and resulting injury; and (4) actual damages. Pittsburgh National Bank v. Perr, 637

A.2d 334 (Pa. Super. 1994). The case before the Court today involves negligence under the theory of premises liability, and more specifically, one alleging the existence of a dangerous condition on the land, which in this case, was the cause of injury following a "slip and fall."

Duty in a "slip and fall" case where a dangerous condition is alleged to have harmed an invitee is governed by The Restatement (Second) of Torts § 343.[1] Pursuant to case law interpreting The Restatement (Second) of Torts § 343, the plaintiff must present in their prima facie case some showing of either actual or constructive notice, differing dependent upon whether the dangerous condition is of an inherently sustained duration or of a transitory nature. See Neve v. Insalaco's, 771 A.2d 786, 791 (2001).

As a preliminary matter, the distinction between the two is explored in detail by the court in Neve, with the court ultimately holding that while a "spill or piece of fruit on the floor" is a common transitory danger, a defective grate is distinguishable as a defect in the building itself, and therefore, a dangerous condition of an inherently sustained duration. 771 A.2d 786, 791 (2001). The Neve court defines transitory dangers as "(1) those in which a patron slipped on debris; and (2) those in which a patron was struck by falling goods that had been stacked properly for display." Id. at 789 (citing Dougherty v. Great Atlantic & Pacific Tea Co., 221 Pa.Super. 221, 289 A.2d 747,

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1. Section 343 has been cited with approval in this jurisdiction. *Neve v. Insalaco's*, 2001 PA Super 71, 771 A.2d 786, 792 (2001) (citing *Lonsdale v. Joseph Home Co.*, 403 Pa.Super. 12, 587 A.2d 810, 811 (1991); also citing *Winkler v. Seven Springs Farm*, 240 Pa.Super. 641, 359 A.2d 440, 442 (1976)).

748 (1972) (falling jar of olives struck plaintiff); Cohen v. Penn Fruit Co., 192 Pa.Super. 244, 159 A.2d 558, 560 (1960) (falling can of fruit struck plaintiff); Jones v. Sanitary Market Co., 185 Pa.Super. 163, 137 A.2d 859, 860 (1958) (plaintiff slipped on banana peel); and DeClerico v. Gimbel Bros., 160 Pa.Super. 197, 50 A.2d 716, 717 (1947) (plaintiff slipped on soft substance). In doing so, the Neve court cites to multiple Pennsylvania cases which have similarly held that a piece of dropped fruit or other debris have traditionally been considered a transitory spill. Id.

Karten's argument that a gooey, brown/black, odorous banana and banana remains should be considered a dangerous condition of a lasting duration, misunderstands well-documented case law to the contrary. See (Pl. Compl. ¶ 11, 13). We hold that the banana and banana remains are a transitory spill under Pennsylvania law. As such, the prima facie requirements laid out by the court in Neve for a dangerous condition of lasting duration are inappropriate. Instead, this Court looks, in the light most favorable to Karten, to see whether her prima facie case complies with Pennsylvania law regarding a dangerous condition on the land — transitory spill. For the following reasons, we hold that Karten has not met her burden.

The Restatement (Second) of Torts § 343, defines the duty of the land possessor in relation to a dangerous condition on the land, as follows:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land,

if but only if, he:

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

This duty does not make a land possessor the "insurer of its patrons." Zito v. Merit Outlet Stores, 436 Pa.Super. 213, 647 A.2d 573, 574-75 (1994). Rather, The Restatement (Second) of Torts § 343(a) places liability only on a land possessor for a dangerous condition, if the possessor, "knows or by the exercise of reasonable care would discover the condition." Pennsylvania courts have historically interpreted the Restatement (Second) of Torts § 343(a) to require a plaintiff invitee to show that the land possessor had either actual or constructive notice of the offending transitory spill. See Moultrey v. Great A & P Tea Co., 281 Pa. Super. 525, 527, 422 A.2d 593, 594 (1980); See also Restatement (Second) of Torts § 343 (1965).

A. Actual Notice

Karten argues Shoprite had actual notice of the dangerous condition because Shoprite had, in the past, received general complaints regarding debris near parking lot garbage cans. Furthermore, Shoprite instructed employees to empty garbage cans when necessary and

to clean any visible debris on the ground throughout the day. Since Karten in fact slipped on a type of debris in the location generally complained about, Karten concludes Shoprite had actual notice of the dangerous condition and negligently maintained the parking area. However, general knowledge of a frequent occurrence alone is not enough to show actual notice of a current transitory spill. See Martino, 213 A.2d at 610.

In Martino, employee testimony revealed that fruit frequently fell on the floor, specifically grapes, which were then stepped on by customers and squished by cart wheels, leaving black stains on the floor. 213 A.2d at 609. It was further revealed that it was the duty of an employee to remove any and all debris when it was noticed. Id. Nevertheless, the court in Martino concluded that general knowledge that grapes and other refuse frequently fell onto the floor did not impute the store with actual knowledge and refusal to correct a current unsafe condition. Id. at 610. The court held that the lack of evidence as to the cause of the grape being on the floor, the store's awareness as to the presence of the grape, and the store's lack of response, required a non-suit. Id.

We conclude that Martino is factual indistinguishable from the present case, and we reject Karten's attempt to impute actual notice to Shoprite or any of the Defendants. In examining the record as a whole, there is no evidence the Defendants had actual notice as to the banana's presence, nor is there any evidence as to the cause of the banana's presence, nor any evidence that the store lacked sufficient response to the presence of the banana debris. Pursuant

to the precedent in Martino, we must hold that under this theory, there is no question for the jury that would not improperly require the jury to reach a conclusion based on speculation.

B. Constructive Notice

Before properly addressing constructive notice in this case, it is necessary to discuss the following two issues: 1) Karten's March 29, 2018 Affidavit, and 2) Karten's argument that Shoprite failed to produce witness Virginia Rubino, and failed to produce surveillance film of the incident. The Court finds that these issues were manufactured by Karten for the sole purpose of defeating summary judgment. Therefore, we hold that the Affidavit is not wholly credible, and the arguments regarding the alleged discovery failures are untimely. Nevertheless, we discuss our reasoning for rejecting each issue raised in turn.

First, we turn to Karten's March 29, 2018 Affidavit. According to Jiminez v. All American Rathskeller, Inc., "if it is clear that an affidavit is offered solely for the purpose of defeating summary judgment, it is proper for the trial judge to conclude that no reasonable jury could accord that affidavit evidentiary weight and that summary judgment is appropriate." C.A.3 (Pa.) 2007, 503 F.3d 247. In this case, Shoprite's Motion for Summary Judgment was filed on March 5, 2018. Karten filed her Affidavit soon after, on March 29, 2018. The Court finds that Karten's Affidavit pointedly addresses the concerns Shoprite raises in a manner that is directly contradictory to prior

pleadings and/or deposition testimony, and is not purely supplemental. Therefore, the Court holds the Affidavit is not wholly credible, and should not defeat summary judgment.

According to Pa.R.C.P. No. 1035.3(b), when encountering a Motion for Summary Judgment, "[a] n adverse party may supplement the record." While supplementation may include the use of an affidavit, a trial court may disregard such affidavit when it is not "wholly credible" — the trial court must determine whether the information contained in the affidavit is inherently credible, i.e. not directly contradictory. Compare Burger v. Owens Illinois, Inc., 2009 PA Super 26, ¶ 22, 966 A.2d 611, 620 (2009) (holding that because Defense counsel never asked Plaintiff in deposition if he could specifically identify trade names of the products he used, Plaintiff was properly allowed to supplement the record with an affidavit defeating a Motion for Summary Judgment, whereby he indicated using a specific product known to contain asbestos), with Stephens v. Paris Cleaners, Inc., 2005 PA Super 315, ¶ 13, 885 A.2d 59, 64 (2005) (holding that Plaintiff's affidavit in opposition to a Motion for Summary Judgment was not "wholly credible," when during earlier deposition testimony he indicated he could not remember the uniform he was wearing, then subsequently named the uniform manufacturer in his affidavit after refreshing his recollection by browsing through the manufacturer's catalogs).

The Court finds that this case factually similar to Stephens. See 885 A.2d 59, 64 (2005). In Karten's

Affidavit, she states, "this banana or banana remains were located on the surface area of the parking lot and in the area where I fell at least 24 hours or 1 day prior to my fall." However, her deposition testimony clearly states that she never learned how long the debris had been present. (Pl. Dep. 53). In regards to the actions and location of Ms. Virginia Rubino, Karten's Affidavit states, that an employee later identified as Virginia Rubino, was "working with the shopping carts in the parking lot," and "[Karten] believe[s] she saw [her] fall." However, her earlier deposition testimony states she believed only one person saw her fall, a lady who she assumed was a customer, who went in to get her help then left. (Pl. Dep. 58). Karten further indicates in her deposition testimony that she is unsure of where Ms. Rubino was at the time of her fall and only became aware of her presence when Ms. Rubino brought her a chair. (Id. at 58). These notable discrepancies between Karten's Affidavit and her earlier deposition testimony are not mere supplementations or details added to an otherwise ambiguous record, but rather, they are direct contradictions to finite facts provided in earlier deposition testimony.

Additionally, and again similar to the affidavit in Stephens, the Court holds Karten's Affidavit is not made on personal knowledge, but rather on information gleaned from outside sources and contains statements of opinion, not fact, inappropriate for an affidavit. Karten's Affidavit speculates that because the banana was dark, slick, and odorous, it must have been present in the parking lot for at least 24 hours. Her conclusion as to the duration of the

existence of the transitory spill is based on her personal observations of the condition of the banana itself. However, Karten's speculation does not actually reveal any personal knowledge of the duration of the banana/banana remains in that specific area, but rather reveals general personal knowledge of the decay timeline of a fruit. A rotten fruit on the ground is not evidence (circumstantial or otherwise) alone that said fruit rotted where it now lies. Such a leap in logic is pure speculation and not a fact based on personal knowledge as admissible in evidence pursuant to Pa.R.C.P. 1035.4.

For these reasons, the Court finds that Karten's March 29, 2018 Affidavit is self-serving and not "wholly credible." Plaintiff directly contradicts her earlier deposition testimony and does so by including information in her affidavit based on speculation, not personal knowledge pursuant to Pa.R.C.P. 1035.4. As such, the information in the Affidavit is disregarded for the purposes of deciding all Defendants' Motions for Summary Judgment against Karten.

Next, we turn to Karten's argument that Shoprite acted in bad faith during discovery by failing to provide employee Virginia Rubino as a witness for deposition and by failing to provide Karten with the surveillance footage. For the following reasons, the Court holds that these arguments are untimely and should have properly been raised during discovery through a motion to compel. Due to Karten's failure to timely raise the issue through the proper procedural means, and subsequent decision to raise only such arguments when facing the prospect of

summary judgment, we hold the arguments are dismissed as untimely.

According to this Court's Order dated January 9, 2017, final discovery was originally to be completed by the parties by June 21, 2017 — including the filing of all motions to compel. Prior to the final discovery deadline, the deadlines were extended by this Court twice upon Defendants' requests, with the new final date for discovery to be completed by all parties by January 21, 2018. Having over a year to complete discovery, Karten at no point requested the Court to extend deadlines for discovery or filed a motion to compel the testimony of Virginia Rubino and/or to compel the production of the surveillance footage. It is not until her brief in opposition to Shoprite's Motion for Summary Judgment, three months following the final discovery deadline extension, that Karten even mentions that Defendants obstructed discovery.

However, in her argument, Karten does not provide the Court with any evidence to show Defendants stonewalled her discovery or deposition requests. Furthermore, Karten does not present evidence that her discovery or depositions requests are coming in light of new evidence that was previously unavailable during the period allotted for discovery. Therefore, the Court finds that Karten failed to raise timely discovery and deposition requests. The Court further finds that these arguments are now being raised in the eleventh hour for the sole purpose of defeating summary judgment. For these reasons, the Court holds that Karten's arguments regarding discovery are untimely and made in bad faith to solely to defeat summary judgment.

The Court disregards such claims when determining the Defendants' Motions for Summary Judgment.

The Court now turns to the primary issue of this case, whether or not Karten has presented sufficient evidence to show a prima facie case of constructive notice pursuant to The Restatement (Second) of Torts § 343(a). Constructive notice is determined on a case-by-case basis. Neve, 771 A.2d 786, 791. When proving constructive notice, "one of the most important factors to be taken into consideration is the time elapsing between the origin of the defect or hazardous condition and the accident." Rogers v. Horn & Hardart Baking Co., 183 Pa. Super. 83, 86, 127 A.2d 762, 764 (1956). For the following reasons, we hold Karten has not met her burden, and has presented insufficient evidence on the record to support a prima facie case for constructive notice, specifically due to the lack of evidence regarding the origin or duration of the banana and banana remains in the parking lot.

Karten presents her observations of the banana and banana remains (dark color, gooey consistency, and rotten odor) as circumstantial evidence that the banana and banana remains were present on the ground for a long duration. "Negligence need not be proved by direct evidence, but may be inferred from attendant circumstances if the facts and circumstances are sufficient to reasonably and legitimately impute negligence." Lanni v. Pennsylvania R. Co., 371 Pa. 106, 110, 88 A.2d 887, 888 (1952) (citing Rockey v. Ernest, [367] Pa. [538], 80 A.2d 783; Bills v. Zitterbart, 363 Pa. 207, 69 A.2d 78; Turek v. Pennsylvania R. R. Co., 361 Pa. 512, 64 A.2d 779; Randolph v. Campbell,

360 Pa. 453, 62 A.2d 60; Wright v. Straessley, 321 Pa. 1, 182 A. 682).

However, Pennsylvania case law does not support the presumption that soft, squished, or otherwise damaged debris serves as sufficient circumstantial proof for duration of a transitory spill. See Moultrey, 422 A.2d at 535 (affirming entry of nonsuit in favor of defendant market where plaintiff failed to present any evidence as to the length of time the squashed cherry upon which she slipped was on the floor); See also Jones v. Sanitary Mkt. Co., 185 Pa.Super. 163, 137 A.2d 859, 861 (Pa.Super.1958) (en banc) (affirming directed verdict for the defendant market in negligence action for slip and fall on a piece of a banana peel because "[t]here is nothing whatsoever in her testimony when viewed in its most favorable light nor in the testimony of any other witness as to how long the offending substance had been in the aisle nor where it had come from"). While a question of duration may typically be considered a jury question, "[a] jury is not permitted to speculate, or guess; conjecture, guess or suspicion do not amount to proof. Lanni, 371 Pa. 106, 110, 88 A.2d 887, 889 (1952) (citing De Reeder v. Travelers Insurance Co., 329 Pa. 328, 198 A. 45; Sharble v. Kuehnle-Wilson, Inc., 359 Pa. 494, 59 A.2d 58).

In this case, the dark colored, gooey, and odorous banana and banana remains were located in an outdoor parking lot, near a .garbage can. Because Karten has presented no evidence as to the origin of the banana and banana remains, the limited circumstantial evidence of the banana's decaying nature cannot allow a jury to reach

a conclusion that would not require them to resort to conjecture, guess, or speculate. Without further evidence of duration, the jury could not know whether the banana was dropped from passing vehicle mere minutes before Karten slipped, or whether the banana had been decaying in that location for hours or even days.

Therefore, we necessarily hold that all Defendants' Motions for Summary Judgment are GRANTED against Karten, pursuant to Pa.R.C.P. No. 1035.2(2). Karten failed her burden of presenting a prima facie case for constructive notice, necessary for negligence under The Restatement (Second) of Torts § 343(a).

II. Co-Defendant Mark Four's Motion For Summary Judgment Against Co-Defendant Martin's Power Sweeping Pursuant To Pa.R.C.P. No. 1035.2 Is Denied.

Co-Defendant Mark Four filed an Answer and New Matter to Plaintiff's Complaint on September 2, 2016, seeking contractual damages for contribution and indemnity claims against Co-Defendant Martin's Power Sweeping. Subsequently Mark Four filed this Motion for Summary Judgment on March 20, 2018. After reviewing the Motion for Summary Judgment, and the parties' respective briefs, the Court finds that summary judgment in favor of Mark Four is inappropriate.

Mark Four's Answer and New Matter, and subsequent Summary Judgment Motion against Martin's Power Sweeping are replete with issues, some of which are beyond mere curable procedural defects. However, the primary issue inhibiting the Court from considering

Mark Four's pending Summary Judgment Motion is that the original pleading, in the form of an Answer and New Matter, does not allege the cause of action for which Mark Four now seeks summary judgment.

Mark Four's Answer and New Matter alleges two alternative theories of liability against Martin's Power Sweeping: 1) common law contribution and/or indemnification; and 2) contractual contribution and/or indemnification. Def. New Matter ¶ 3-4. However, Mark Four's Motion for Summary Judgment exclusively argues breach of contract against Martin's Power Sweeping for violation of the indemnification and duty to defend provision. Def. Mot. Summary Judgment ¶ 71-78. Violation of the alleged contractual duty to defend was never alleged or cited to in the original pleading. "The purpose of the pleadings is to place a defendant on notice of the claims upon which he will have to defend." City of New Castle v. Uzamere, 829 A.2d 763, Cmwlth.2003. Accordingly Pa.R.C.P. No. 1019(a) requires, "[t]he material facts on which a cause of action or defense is based shall be stated in a concise and summary form." In this case, since the contractual duty to defend was never alleged in the pleadings, and no facts were provided, we hold that the Defendant Martin's Power Sweeping was not properly put on notice to defend against such claim. As such, we cannot and will not consider it.

The second issue which precludes summary judgment in this matter is Mark Four's failure to properly alert the Court whether the agreement underlying the breach of contract action was oral or in writing, and to attach said

contract to their pleading. See Pa.R.C.P. 1019(h-i). In this case, Mark Four alleges breach of contract, but never specifies whether the contract was written or oral, nor provides a copy of the contract or the material portions thereof to the Court in its original pleadings. To sustain a claim 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. CoreStates Bank, Nat'l Assn. v. Cutillo, 723 A.2d 1053 (Pa.Super.1999). We hold that by failing to comply with Pa.R.C.P. 1019(h-i), Mark Four has failed their prima facie burden showing the existence of the contract, and therefore, failed to properly state a breach of contract claim.

The third issue precluding summary judgment in this matter goes to the unviability of Mark Four's indemnity claim. "Where the indemnity is against the consequences of negligence or carelessness on the part of the indemnitor, the indemnitee must, in order to recover, show that the damage for which he seeks to be indemnified was caused by some negligent act of the indemnitor." Perry v. Payne, 217 Pa. 252, 66 A. 553 (1907). In this case, the Court never addressed the merits of the underlying negligence claim against Defendants; this in turn, never triggered the indemnity obligation between the Co-Defendants. Therefore, we hold the indemnity claim is premature.

The fourth and final issue inhibiting summary judgment in favor of the movant, Mark Four, in this matter is a procedural defect. According to Pa.R.C.P. 1023.1(b), "every pleading ... shall be signed by at least one attorney

of record..." Typically, such a small procedural defect is corrected. See Howard v. Bentley, 48 Wash.Co. 19, 43 Pa. D. & C.2d 144 (1967). However, in this case Mark Four's unsigned pleading is just one of too many errors that prevent this Court from granting their Motion for Summary Judgment.

Therefore, and for the reasons detailed above, Mark Four's Motion for Summary Judgment against Martin's Power Sweeping is DENIED.

Accordingly, we enter the following ORDER.

ORDER

AND NOW, this 3rd day of December, 2018, upon consideration of all Defendants' Motions for Summary Judgment against Plaintiff Beverly Karten, as well as, Co-Defendant Mark Four's Motion for Summary Judgment against Co-Defendant Martin's Power Sweeping, and all parties' respective briefs, IT IS ORDERED as follows:

1. Defendants Shoprite, Martin's Power Sweeping, And Mark Four's Motions for Summary Judgment against Beverly Karten are GRANTED pursuant to Pa.R.C.P. No. 1035.2(2). Judgment on Plaintiff's claims is entered in favor of Defendants and against Plaintiff.

2. Co-Defendant Mark Four's Motion for Summary Judgment against Co-Defendant Martin's Power Sweeping pursuant to Pa.R.C.P. No. 1035.2 is DENIED.