

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

CHRIS FALCONE, INC.,	:	June Term 2004
Plaintiff,	:	
v.	:	No. 3157
THE INSURANCE COMPANY OF	:	
THE STATE OF PENNSYLVANIA	:	COMMERCE PROGRAM
Defendant.	:	
	:	Control Number 121567

ORDER and MEMORANDUM OPINION

AND NOW, this 23rd day of May, 2005, upon consideration of the Motion for Summary Judgment of Defendant The Insurance Company of the State of Pennsylvania, Plaintiff Chris Falcone, Inc.'s response in opposition, Memoranda, all matters of record, after oral argument and in accord with the Contemporaneous Memorandum Opinion filed of record, it hereby is **ORDERED** and **DECREED** that Defendant's Motion for Summary Judgment is Granted and Plaintiff's complaint is dismissed.

BY THE COURT:

C. DARNELL JONES, II, J.

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MEMORANDUM OPINION

JONES, II, J.

The question presently pending before the court is whether Plaintiff Chris Falcone Inc.'s ("Falcone") claim is barred by the applicable statute of limitations found within the surety bond issued by Defendant The Insurance Company of the State of Pennsylvania ("Defendant"). For the reasons set forth below, Defendant's Motion for Summary Judgment is Granted.

BACKGROUND

On or about January 18, 2001, Defendant, a surety, issued Payment Bond No. Pa 4517351 ("Bond") naming JMS Construction, Inc. as Principal and Clarion Group, Inc. as Owner in connection with a certain project known as "Bullets Texaco Mini-mart" ("Project") located on Lancaster Avenue, Phila. On or about August 2, 2001, Falcone entered into a subcontract with the general contractor JMS to complete certain concrete, masonry and landscape work for the Project.

On or about April 12, 2002, Falcone commenced an action ("initial action") in federal court before the Honorable Bruce W. Kauffman against JMS to recover

outstanding contract balances it claimed due and owing under the subcontract. JMS never responded or appeared in opposition to the initial action and Falcone moved forward to obtain default judgment.

During the assessment of damages hearing, Chris Falcone testified that work on the Project was last performed in December 2001. Mr. Falcone later testified at a deposition that Arthur Morton, a principal of both JMS and the land owner where the project was built, told Falcone that he would not receive any payment for his work unless he returned to the Project to do additional work. This work was completed in April 2002.

On March 12, 2003, Falcone contacted Defendant for purposes of claiming outstanding amounts due from JMS under the Bond and enclosed copies of invoices which Falcone was claiming due. Plaintiff claims that it had not received any previous notice that a bond existed despite his explicit request regarding any bonding information from Arthur Morton. On March 24, 2003, Falcone requested a copy of the bond. On March 31, 2003, Defendant responded to Falcone's requests and forwarded proof of claim forms to be completed and returned for Defendant's consideration of Falcone's claim.

On or about April 23, 2003, Falcone commenced an action in the United States District Court for the Eastern District of Pennsylvania against Defendant. The complaint alleged that Defendant's principal place of business was in Cherry Hill, New Jersey and Falcone performed his last work on April 25, 2002. In its answer to Falcone's complaint, Defendant admitted that the principal place of business was Cherry Hill, New Jersey and denied that the court had jurisdiction as a legal conclusion. Thereafter in a "Joint Rule 16

Memorandum” submitted to the Judge, Defendant affirmatively represented to the court that diversity jurisdiction existed.

In June 2004, prior the case being placed in the trial pool, Defendant informed Falcone that it was a Pennsylvania Company. On June 11, 2004, the Federal District Court action against Defendant was dismissed for lack of subject matter jurisdiction without prejudice. On June 25, 2004, Falcone commenced the instant action.

DISCUSSION

In determining whether to grant summary judgment, the trial court must view the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Potter v. Herman, 762 A.2d 1116, 1117-18 (Pa. Super. 2000). Summary judgment is proper only when the uncontraverted allegations in the pleadings, depositions, answers to interrogatories, admissions of record, and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. Id. In sum, only when the facts are so clear that reasonable minds cannot differ, may a trial court properly enter summary judgment. Basile v. H & R Block, Inc., 761 A.2d 1115, 1118 (Pa. 2000).

It is well established in Pennsylvania that a contractual modification of the ordinary statute of limitations is valid and enforceable. Lyons v. Nationwide Ins. Co., 567 A.2d 1100, 1102 (Pa. Super. 1989) (citing Lardas v. Underwriters Ins. Co., 231 A.2d 740 (Pa. 1967)); see also Toledo v. State Farm Fire & Casualty Co., 810 F. Supp. 156, 157 (E.D. Pa. 1992) (applying Pennsylvania law). By statute, Pennsylvania law provides that contractual limitations of suit provisions, which are shorter than the applicable statute of

limitations, are valid provided they are not manifestly unreasonable. 42 Pa. Cons. Stat. Ann. § 5501(a). Here, the Bond in issue provides in pertinent part as follows:

No suit or action shall be commenced by a claimant under this Bond other than in a court of competent jurisdiction...or after the expiration of one year from the date (1) on which the claimant gave notice required by Subparagraph 4.1 or Clause 4.2.3 or (2) on which the last labor or service was performed by anyone under the Construction Contract, whichever of (1) or (2) occurs.

Thus, in order to bring an action pursuant to the bond, Falcone was required to file suit one year from the date on which the last labor or service was performed under the construction contract.

Defendant argues that Falcone's action is time barred since the lawsuit was not filed in a court of competent jurisdiction within one year after completing its work on the project. In support thereof, Defendant maintains that the last day of work performed on the project was performed in December 2001. If the last day of work was in December 2001, the statute of limitations bars Falcone's claim.

Falcone, on the other hand, maintains that the last day of work was April 25, 2002. At this stage in the proceedings, viewing the record in a light most favorable to plaintiff, the court will assume for purposes of this motion that the last day of work is April 25, 2002. Falcone argues that since the last day of work is April 25, 2002 the statute of limitations does not bar its cause of action since the federal cause of action satisfied its obligation to initiate an action within the statutory period. In support thereof Falcone relies upon 42 Pa. C.S. A. § 5103, "Transfer of Erroneously Filed Matters" which tolls the limitations period as of the date the action was filed in federal district court.

Title 42 Pa. C.S. A. § 5103 provides in part:

§ 5103. Transfer of erroneously filed matters

(a) General rule.--If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or district justice shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court or magisterial district of this Commonwealth.

...

(b) Federal Cases.

(1) Subsection (a) shall also apply to any matter transferred or remanded by any United States court for a district embracing any part of this Commonwealth. . . . Where a matter is filed in any United States court for a district embracing any part of this Commonwealth and the matter is dismissed by the United States court for lack of jurisdiction, any litigant in the matter filed may transfer the matter to a court or magisterial district of this Commonwealth by complying with the transfer provisions set forth in paragraph (2).

(2) . . . Such transfer may be effected by filing a certified transcript of the final judgment of the United States court and the related pleadings in a court or magisterial district of this Commonwealth. The pleadings shall have the same effect as under the practice in the United States court, but the transferee court or district justice may require that they be amended to conform to the practice in this Commonwealth. . . .

42 Pa.C.S. § 5103.

Section 5103 allows a party to transfer a case dismissed by a federal court on jurisdictional grounds to an appropriate state court, bringing with the case its federal filing date for purposes of the statute of limitations. Defendant argues that the Transfer Statute is inapplicable as Falcone has yet to invoke its protections. According to Defendant, the statute provides a specific method by which a matter may be transferred under the statute. Defendant argues that Falcone filed a new action by filing a new complaint rather than effectuating the transfer by filing a certified transcript of the final

judgment and the related pleadings. Thus, Defendant argues that since Falcone failed to comply with the statute's provisions it can not now seek its protections.

The clear and unambiguous language of 42 Pa. C.S.A. § 5103(a) and (b) provides that if a matter is originally filed within the statute of limitations in the federal court, but is dismissed for lack of jurisdiction by the federal court, the litigant may then effect a transfer of the action to state court by complying with the provisions set forth in 42 Pa. C.S.A. § 5103(b) (2). See Williams v. F.L. Smithe Machine Co., 577 A.2d 907, 909 (Pa. Super. 1990). The state court will treat the matter as if originally filed in the state court if the litigant complies with the dictates of 42 Pa. C.S.A. § 5103(b)(2). Thus, in the present case, if Falcone complied with 42 Pa. C.S.A. § 5103(b)(2), the court must deem their action as filed on the date it was first filed in the federal court, April 23, 2003 and thus within the applicable limitations period. Id.

It is also clear from a reading of 42 Pa. C.S.A. § 5103 that, in order for the statute to apply to prevent a litigant from losing the opportunity to litigate his case on the merits simply because he is in error regarding federal jurisdiction, all that is required is an order entered by the federal court dismissing the matter for lack of jurisdiction. Id. It is then incumbent upon the litigant to take further action under the statute to move the case to state court.

In Williams v. F.L. Smithe Machine Co., 577 A.2d 907 (Pa. Super. 1990), the Superior Court discussed the time period when such a transfer can be effected and created a general promptness requirement. In Williams, the plaintiff filed a federal action which was dismissed. The plaintiff filed a certified transcript of the final judgment of the United States Court but mistakenly filed a new, although identical, complaint in state

court. Plaintiffs later filed true and correct copies of the District Court pleadings but failed to have the copies certified. Approximately six months later plaintiffs filed certified copies of the original pleadings.

Given the absence of case law interpreting 42 Pa. C.S.A. §5103, plaintiffs initial partial compliance with the statute's requirements and eventual complete compliance, the Superior Court found that plaintiffs' complaint did not merit the harsh result of dismissal of their cause of action. Id. at 909. However, the Superior Court cautioned future litigants that in order to protect the timeliness of an action filed under 42 Pa. C.S.A. § 5103, a litigant, upon having his case dismissed in federal court for lack of jurisdiction, must promptly file a certified transcript of the final judgment of the federal court and, at the same time, a certified transcript of the pleadings from the federal action. The litigant shall not file new pleadings in state court and reversed the order dismissing plaintiffs' action and remanded it for further proceedings. Id. at 909. This qualifying language suggests that based on the lack of clear precedent interpreting Section 5103, the court would not hold the Williams plaintiffs to such a high standard but cautioned that future plaintiffs would be held to a higher standard. *See Kelly v. Hazelton General Hospital*, 837 A.2d 490,494 (Pa. Super. 2003)(By implication Willaims was *sui generis*, and plaintiffs would be held to a higher standard in the future.).

In Collins v. Greene County Memorial Hospital, 615 A.2d 760(1992), affirmed, 536 Pa. 475, 640 A.2d 379 (1994), cert. denied, 513 U.S. 943, 130 L. Ed. 2d 306, 115 S. Ct. 350 (1994), the Superior Court once again was given the opportunity to apply section 5103. On this occasion the Superior Court found untimely a nearly seven-month delay between dismissal of the federal court action and the Collins' praecipe to transfer the case

to state court. The Superior Court noted that after Williams the plaintiffs could not claim they did not know what was expected of them. Id. 762. Likewise, in Agostino Ferrari SPA v. Antonacci, 689 A.2d 320 (Pa. Super. 1997), the Superior Court found untimely a delay of almost one year between the federal court dismissal and the state court filing. Id. at 323.

In Kelly v. Hazleton General Hospital, 837 A.2d 490 (Pa. Super. 2003), the Superior Court again addressed 42 Pa. C. S. A. § 5103. In Kelly, the Superior Court affirmed dismissal of a complaint for failing to comply with the requirements of 42 Pa. C.S.A. § 5103 (b). Kelly filed suit in federal court in the Middle District of Pennsylvania. On February 4, 2002 the case was dismissed for want of jurisdiction. On February 20, 2002, Kelly filed a new complaint with the Court of Common Pleas of Luzerne County. On October 15, 2002, defendants filed a motion for judgment on the pleadings asserting that Kelly failed to comply with the requirements of 5103 and therefore the statute of limitations had run because she failed to preserve her right to relate back her state filing date to the date on which she filed her initial federal complaint. On October 30, 2002, Kelly filed a praecipe to transmit the federal court order and opinion as well as Kelly's amended complaint filed in federal court to belatedly comply with the requirements of section 5103.

On appeal the Superior Court noted that it empathized with the spirit that “confidence [in the legal profession] will not be bolstered by dismissing a case on procedural grounds rather than on the merits where the statute provides no time limit...”, however, the Superior Court found that the Williams case carved out a one time exception to the plain requirement of section 5103, which was warranted due to the lack

of precedent governing the amount of time given plaintiffs to satisfy the requirements. The Court found that after Williams, Collins and Ferrari no procedural void remains, and counsel has no excuse for failing to satisfy the promptness requirement read into the statute by this court. Id. at 495. The Court went on to note that it would prefer not to deny Kelly an opportunity to pursue her claim on the merits due to attorney error, but shifting the burden to the adverse party is an even less appealing alternative. Id. at 496.

Here, Falcone commenced the federal court action on April 23, 2003. Since the last day of work was April 25, 2002, Falcone's complaint was timely filed in the District Court. On June 11, 2004, the District Court action was dismissed without prejudice for lack of subject matter jurisdiction. Falcone refiled its action here on June 25, 2004. Although Falcone promptly refiled the action in state court, he failed to follow the requirements of section 5103, which required the filing of a certified copy of the judgment and a certified copy of the pleadings. Certified copies of the record were recently filed by Falcone on April 11, 2005, approximately ten months after the case was dismissed by the District Court for lack of jurisdiction. Based on Williams and its progeny, it is clear that plaintiff's complaint is time barred. The complaint filed on June 25, 2004 does not relate back to the federal court filing since the requirements of section 5103 were not fulfilled promptly as required by the existing case law.

In an attempt to avoid the strict application of 42 Pa. C. S. A. § 5103 (b), Falcone argues that Defendant should be equitably estopped from asserting the statute of limitations defense since Defendant hid the jurisdictional defect and intentionally mischaracterized its corporate status in order to create a controversy.¹ Essentially,

¹ If through fraud or concealment the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry, the defendant is estopped from invoking the bar of limitation of action. The burden of

Falcone wants this court to balance the equities i.e. Defendant's alleged affirmation to the federal court that jurisdiction existed, Defendant's alleged lack of prejudice from any delay and Defendant's alleged consent to the timing and method of filing of the current action against the existing case law interpreting section 5103. Although troubled by the alleged obstructionist conduct, this court must follow the precedent established by the Superior Court and grant Defendant's Motion for Summary Judgment.

CONCLUSION

Based on the foregoing, Defendant's Motion for Summary Judgment is Granted and Plaintiff's complaint is dismissed. An Order consistent with this Opinion will follow.

BY THE COURT,

C. DARNELL JONES, II, J.

proving the existence of such fraud or concealment is upon the asserting party by evidence that is clear, precise and convincing. It is also well established that mistakes, misunderstandings or lack of knowledge in themselves afford no basis for an estoppel. Davis v. Commonwealth of Pa., 660 A.2d 157, 161 (Pa. Commw. 1995). This standard is inapplicable to the facts at hand.