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

ASSUMPTION OF THE BLESSED VIRGIN MARY CHURCH OF THE ARCHDIOCESE OF PHILADELPHIA,	: FEBRUARY TERM, 2001
	: No. 1078
Plaintiff,	
v.	: Commerce Program
PFS CORPORATION, and	
NESHAMINY ELECTRICAL CONTRACTORS,	: Control Numbers:
Defendants.	040093 and 040153

O R D E R

AND NOW, this 18th day of June 2002, upon consideration of the Motions for Summary Judgment of defendants, PFS Corporation ("PFS") and Neshaminy Electrical Contractors ("Neshaminy"), responses in opposition of the plaintiff thereto and in accord with this court's contemporaneous Opinion, it is hereby **ORDERED and DECREED** as follows:

1) PFS's Motion for Summary Judgment is **Granted** because the plaintiff's negligence, assumpsit, and breach of warranty claims against PFS are barred by the applicable statute of limitations;

2) Neshaminy's Motion for Summary Judgment is **Granted** as to the plaintiff's negligence claim because it is barred by the two-year statute of limitations. But the Motion is **Denied** as to the plaintiff's breach of warranty claim because the plaintiff commenced this action against Neshaminy within the applicable six-year statute of limitations.

BY THE COURT:

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ALBERT W. SHEPPARD, JR., J.

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O P I N I O N

Albert W. Sheppard, Jr., J. ..... June 18, 2002

Defendants, PFS Corporation ("PFS") and Neshaminy Electrical Contractors ("Neshaminy"), filed separate Motions for Summary Judgment. For the reasons discussed PFS's Motion is granted in full, and Neshaminy's Motion is granted, in part.

BACKGROUND

In 1989, the plaintiff contracted with Building Concepts, Inc. ("BCI") for the construction of a classroom building and a health room building to be added on its grounds. BCI, in turn contracted with various subcontractors, including Coastal Manufacturing Company ("CMC") and Neshaminy. For this project, CMC manufactured and provided BCI with eleven prefabricated modular units. Defendant, PFS,

inspected and approved the plans and specifications during the manufacturing of the CMC modular units. Defendant, Neshaminy installed the conduits and performed other electrical services at the construction site.

The work was completed by the Fall of 1989. However, in November 1989, the plaintiff discovered a ponding problem involving the roof of the new modular units. Similarly, in 1995, the plaintiff discovered a water infiltration problem in the basement of the health room building. Eventually, by 1996, the plaintiff was faced with modular units and a health room building in a state of collapse due to alleged water damage and poor construction.

On August 27, 1998, the plaintiff instituted this action against BCI and several of its subcontractors, including PFS and Neshaminy. On May 23, 2000, that action was discontinued pursuant to a stipulation.[1] Then, in February 2001, the plaintiff commenced this action asserting, inter alia, claims of negligence, assumpsit, and breach of warranties against PFS and Neshaminy. In April 2002, the defendants each filed a motion for summary judgment.

DISCUSSION

I. Legal Standard

A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense. Basile v. H & R Block, Inc., 777 A.2d 95, 100 (Pa. Super Ct. 2001). Under Pa.R.C.P. 1035.2(2), if a defendant is the moving party, he may make the showing necessary to support the entry of summary judgment by pointing to evidence which demonstrates that the plaintiff is unable to

[1] The stipulation included that, for purposes of filing, any subsequent actions would be listed as filed in August, 1998.

satisfy an element of his cause of action. Id. The non-moving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. Id. When the plaintiff is the non-moving party, "summary judgment is improper if the evidence, viewed favorably to the plaintiff, would justify recovery under the theory [he] has pled." Id. However, "[s]ummary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Horne v. Haladay, 728 A.2d 954, 955 (Pa.Super.Ct. 1999) (citing Pa.R.C.P. 1035.2). Summary judgment may only be granted in cases where it is "clear and free from doubt that the moving party is entitled to judgment as a matter of law." Id. (citations omitted).

II. The Plaintiff's Negligence Claims Against PFS and Neshaminy are Barred by the Two-Year Statute of Limitations

The defendants argue that all of the plaintiff's claims are barred by the applicable statute of limitations. Pennsylvania has a two-year statute of limitations for actions arising in tort[2], a four-year statute of limitations for actions arising in contract[3] and a six-year "catchall" statute of limitations.[4] The purpose

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[2] Pennsylvania's two-year statute of limitations applies generally to torts and specifically to "[a]ny ... action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except an action or proceeding subject to another limitation specified in this subchapter." 42 Pa.C.S. §5524(7).

[3] Pennsylvania's four-year statute of limitations applies generally to contracts 42 Pa.C.S. §5525.

[4]Under Pennsylvania law, "[a]ny civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation) must be commenced within six years." 42 Pa.C.S. §5527.

of a statute of limitations is to expedite litigation and discourage delay and the presentation of stale claims which may result in considerable prejudice to the defendant. Harmer v. Hulsey, 321 Pa.Super.11, 467 A.2d 867 (1983). Because the events giving rise to the plaintiff's action took place more than six years prior to the initiation of this action, the defendants assert that the statute of limitations bars the plaintiff from proceeding and requires the dismissal of its negligence, assumpsit and warranty claims.

A. The Negligence Claim Against PFS is Barred Because Plaintiff Failed to Exercise Due Diligence Upon Discovery of the Ponding Problem in 1989

Plaintiff contends that its claim for negligence against PFS is not barred by the two-year statute of limitations, arguing that the "discovery rule" allows it to continue with its negligence claim against PFS since it was not until September 1996, that the plaintiff "knew or had reason to know that there existed hidden material defects in the modular units." Pl's Mem. of Law at 11-12. This court disagrees.

In Pennsylvania,

> [g]enerally, once the prescribed statutory period has expired, the complaining party is barred from bringing suit. The 'discovery rule,' however, is an exception to that rule, and its application tolls the running of the statute of limitations. The 'discovery rule' provides that where the existence of the injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the prescribed statutory period, the limitations period does not begin to run until the discovery of the injury is reasonably possible.... The 'discovery rule' arises from the inability of the injured party, despite the exercise of reasonable diligence, to know of the injury or its cause.... Its purpose is to exclude the period of time during which the injured party is reasonably unaware that an injury has been sustained so that people in that class have essentially the same rights as those who suffer an immediately ascertainable injury.

Hayward v. Medical Center of Beaver Cty., 530 Pa. 320, 325, 608 A.2d 1040, 1043 (1992). (citations omitted). Further, the plaintiff, who is arguing the applicability of the discovery rule, bears the burden of

proving that it falls within the rule. Cochran v. GAF Corp., 542 Pa. 210, 216, 666 A.2d 245, 249 (1995).

In determining whether the plaintiff here has met its burden, this court "must, before applying the exception of the rule, address the ability of the damaged party, exercising reasonable diligence, to ascertain the fact of a cause of action." Pocono International Raceway, Inc. v. Pocono Produce, Inc., 503 Pa. 80, 83, 468 A.2d 468, 471 (1983). "'The standard of reasonable diligence is an objective or external one that is the same for all individuals.'" Ingenito v. AC&S, Inc., 633 A.2d 1172, 1174 (Pa.Super.Ct. 1993) (citations omitted). Further, "the standard by which one's efforts to learn of a cause of action, so as to forestall the running of a statute of limitations, is measured by the inability, despite the exercise of diligence, to determine the injury or its cause, not upon a retrospective view of whether the facts were actually ascertained within the period." Today's Express, Inc. v. Barkan, 626 A.2d 187, 190 (Pa.Super.Ct. 1993) (emphasis in original) (citations omitted).

Here, consideration of the plaintiff's discovery rule argument gives rise to a conflict. On the one hand, application of the discovery rule generally raises questions of fact. Kramer v. Dunn, 749 A.2d 984, 988 (Pa. Super.Ct. 2000). Pennsylvania courts have expressed a clear preference that factual questions as to discovery be settled by a jury, when available and demanded. See, e.g., Crouse v. Cyclops Industries, Inc., 560 Pa. 394, 404, 745 A.2d 606, 611 (2000) ("[p]ursuant to application of the discovery rule the point at which the complaining party should reasonably be aware that he has suffered an injury is a factual issue best determined by the collective judgment, wisdom and experience of jurors"); Cochran v. GAF Corp., 542 Pa. 210, 215, 666 A.2d 245, 248 (1995) ("[w]here the issue involves a factual determination regarding what constitutes a reasonable time for the plaintiff to discover his injury and its cause, the issue is usually for the jury").

On the other hand, "only where the facts are so clear that reasonable minds cannot differ may the commencement of the limitation period be determined as a matter of law." Hayward, 530 Pa. at 325, 608 A.2d at 1043. In fact, the issue may be resolved as a matter of law when "there is plainly evidence of record that plaintiffs have failed to exercise due diligence, 'a smoking gun' so to speak." Ingenito, 633 A.2d at 1180. Judge Ford Elliott, in her dissenting opinion in Ingenito, discussed several cases of where this so-called "smoking-gun" appeared:

> For example, in Holmes v. Lado, 412 Pa.Super. 218, 602 A.2d 1389 (1992), allocatur denied, 530 Pa. 660, 609 A.2d 168 (1992), plaintiff's survivors brought suit November 15, 1988 for failure to diagnose decedent's breast cancer. However, appellants' deposition testimony revealed that the decedent had been aware of the cancer since September 1985 following a biopsy. In Cars v. Angling, 406 Pa.Super. 279, 594 A.2d 337 (1991), plaintiff brought suit November 4, 1988 for failure to diagnose abscessed pelvic fistula. However, plaintiff had been aware of the condition and its cause since August 1986, when a definitive diagnosis was made and it was decided that corrective surgery was necessary. In MacCain v. Montgomery Hospital, 396 Pa.Super. 415, 578 A.2d 970 (1990), plaintiff brought suit November 21, 1986 for failure to diagnose her breast cancer. However, in her deposition, plaintiff stated that when she consulted a new physician in October 1984, this doctor informed her that her cancer was visible in the mammograms performed by appellee. The cancer was confirmed during a mastectomy on October 5, 1984. In Ackler v. Raymark Industries, Inc., 380 Pa.Super. 183, 551 A.2d 291 (1988), plaintiff brought suit December 21, 1983 for work-related asbestosis. However, plaintiff had filed a workmen's compensation petition August 21, 1981 alleging work-related asbestosis. In Chandler v. Johns-Manville Corp., 352 Pa.Super. 326, 507 A.2d 1253 (1986), plaintiff brought suit in September 1978 for work-related asbestosis. However, in deposition testimony plaintiff admitted that he had filed a workmen's compensation claim for asbestosis on July 14, 1976. In Lucera v. Johns-Manville Corp., 354 Pa.Super. 520, 512 A.2d 661 (1986), plaintiff brought suit in 1976 claiming he did not learn that his asbestosis had been caused by the conduct of another until 1975. However, from trial testimony quoted by the court, it is clear that in 1972 plaintiff had filed a disability claim for work-related asbestosis.

Id. Thus, such "smoking gun" evidence of prior knowledge can have the effect of barring the plaintiff's claim.

Here, the plaintiff has failed to provide sufficient evidence to show it is entitled to the application of the discovery rule. The record reveals that the plaintiff possessed the requisite degree of knowledge in November 1989, to implicate the statute of limitations, but failed to exercise reasonable due diligence. Here, the "smoking gun" is the November 29, 1989-letter from Thomas Hecker, plaintiff's Parish Finance Committee member, to the general contractor, BCI ("Hecker Letter"). In the Hecker Letter, the plaintiff acknowledges that "[a]t the Finance Committee Meeting of November 28, 1989, we were also informed of a continuing problem with the roof. I understand that the roof will be inspected shortly, and some decision made as to how to handle the 'ponding' problem." Def's Mem. of Law, Exh. F. However, despite knowledge of the existence of this condition, it was not until 1996 that the plaintiff exercised reasonable due diligence in investigating the source of the ponding problem.[5] The facts are sufficiently clear that reasonable minds cannot differ that the Hecker Letter not only reveals that plaintiff had the means by which to discover the ponding problem, but that as early as November 1989, did nothing to ascertain the cause of the problem. Therefore, since the statute of limitations began to run upon the discovery of these problems in 1989, and not in 1996 as the plaintiff suggests, the plaintiff, as a matter of law, is barred from bringing its negligence claim over eight years later against PFS.

In addition to the Hecker Letter, there is deposition testimony from Edward Bobeck, an electrician employed by plaintiff, to support the argument that the plaintiff had knowledge of the water problems with the modular units as early as 1989. Bobeck stated that while working 18- hour days for the plaintiff's

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[5] Specifically, in 1996, plaintiff hired David J. Fielding, an engineer, and Gerard Clabbers, a construction consultant to conduct extensive investigations of the modular units and the health room building.

construction project, he remembers "there was a problem with the roof... [T]he one guy was saying when he was up there, the water was pouring through the one section of roof where the [trailers] met together... [H]e was talking about the water coming through and it wasn't sealed right." Def's Mem. of Law, Exh E, 58-59. This suggests it is reasonabe to conclude that these concerns of Bobeck regarding the water leaks were relayed to plaintiff-employer. Indeed, knowledge of the ponding problem was reflected in the Hecker Letter, yet nothing was done to investigate the problem until 1996.

Plaintiff counters that the statute of limitations did not begin until 1996 since the defects which plaintiff discovered "were not evident to the layperson but required inspection and probing by construction and engineering professionals." Pl's Reply Mem. of Law at 13. This court is not persuaded. Our Superior Court was faced with a similar argument in Today's Express, where plaintiffs filed suit five years after the discovery of asbestos in the apartment building they purchased from defendants. 626 A.2d 187. There, the plaintiffs argued that "despite the fact that the asbestos was not concealed but obvious and open to anyone using the garage facilities, the lack of 'some awareness that the condition [wa]s a problem or a potential problem' exonerated them from any duty to exercise due diligence in discovering the asbestos prior to the expiration of the statute of limitations." Today's Express, 626 A.2d at 189. The court disagreed and held that although "the Plaintiffs may [not] have had the expertise to detect visually the presence of asbestos or lacked the knowledge regarding the deleterious effects of the material in the sedentary state..., this does not insulate the Appellants from exercising due diligence to ascertain, if possible, what problems may have existed with the purchase... of the commercial realty." Id. at 190. In concluding that the plaintiffs failed to act in a timely manner and were thus barred by the statute of limitations, the court held that "the essential facts necessary to uncover asbestos were not 'impossible' to identify with the exercise of due diligence."

Id. at 191 (citations omitted) (emphasis in original).

Similarly, had this plaintiff exercised reasonable diligence in November 1989, as the Hecker Letter suggested, it would have been possible to uncover the alleged latent defects in the units and then instituted an action.[6] In that plaintiff commenced this suit over eight years after knowledge of the water problem, plaintiff is now barred by the two-year statute of limitations from pursuing its negligence claim against PFS. See Weik v. Estate of Brown, 794 A.2d 907, 908 (Pa.Super.Ct 2002) ("[i]t is the duty of the party asserting a cause of action to use all reasonable diligence to properly inform himself of the facts and circumstances upon which the right of recovery is based and to institute suit within the prescribed period.).

B. The Negligence Claim Against Neshaminy is Barred Because Plaintiff Failed to Exercise Due Diligence Upon Discovery of the Water Infiltration Problem in 1995

Neshaminy argues that the discovery rule does not apply here because the plaintiff became aware of the water infiltration problem in 1995 and did not exercise due diligence. As discussed, "[t]he 'discovery rule' provides that where the existence of the injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the prescribed statutory period, the limitations period does not begin to run until the discovery of the injury is reasonably possible." Hayward, 530 Pa. at 325, 608 A.2d at 1043.

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[6] Plaintiff urges that there is no evidence suggesting that the ponding problem discussed in the Hecker Letter "refers to the modular units, as opposed to the health room building which was not modular and was not inspected and approved by PFS." Pl's Response to PFS's Reply Mem. of Law at 1 (emphasis in original). However, for purposes of application of the discovery rule, it is irrelevant whether there was in fact actual ponding on the roof of the modular units or the health room building. Instead, the focus of the inquiry for this court pursuant to the discovery rule is plaintiff's knowledge of such a ponding problem, regardless of where it was discovered to have occurred after the fact.

Here again, the plaintiff failed to provide evidence sufficient to show it is entitled to application of the discovery rule. Although the plaintiff argues that the water infiltration problem was not discovered until 1997, Reverend Devine, the plaintiff's pastor, stated in sworn deposition testimony that he learned of a water infiltration problem in the basement of the health room building as early as 1995.[7] Specifically, deposition testimony reveals the following:

> Q: Now, with respect to Mr. Doerner, did he ever come to you and report any problems that he had found or been informed of that were occurring in the modular unit section of the school?
> A: Yes, over the years, he's reported a number of things to me.
> Q: And what has he reported to you?
> A: Well, he certainly reported the water problem in the basement of the health room...
> * * * *
> Q: When was the first time he approached you concerning any sort of problem with the modular units that he either found or –
> A: Well, the one I remember the best, and I think it's the earliest, would be with the water problem in the basement. Did you say when?
> Q: Yes.
> A: I think that would be in, sometime 1995, probably the latter part of 1995.
> * * * *
> Q: Okay. And the basement that you described is underneath the health room; is that right?
> A: Yes.

[7] Plaintiff suggests that there is a disputed issue of material fact as to the date the water infiltration problem was first discovered. Although Devine attributed 1995 as the year he first observed water problems in the basement, Doerner, the plaintiff's maintenance worker, "disagreed with Father's recollection of 1995 as the time when water in the health room basement manifested itself." Pl's Mem. of Law at 4. However, the plaintiff does not support, nor can this court find evidence to support the existence of this disagreement. While Doerner originally testified that he observed the water problems in 1996, then later submitted an Erratta Sheet correcting the date of his discovery to 1997, nowhere does Doerner expressly disagree with Devine's 1995 date. Id. In fact, Devine re-emphasizes in a April 25, 2002, Verification letter, that he observed the leaking in the health room in 1995. Pl's Mem. of Law, Exh J.

Def's Mem. of Law, Exh C at 59; 61; 62. In addition to his deposition testimony, Devine later verified that, not only did he know about the water problem in 1995, but that he actually "observed, in 1995, ... leaks in the ...health room basement..." Pl's Mem. of Law, Exh J. Thus, even though plaintiff was aware of the leaking in the basement as early as 1995, it was not until September 1996, nearly one year later, that plaintiff investigated the source of the leaking. Furthermore, it was not until August 1998, three years after the discovery of the water infiltration problem, and one year after the running of the two-year statute of limitations, that plaintiff commenced this negligence action against Neshaminy.

The plaintiff counters that Devine's testimony shows that any leaking he observed in the health room was "no more frequent, noticeable, or severe from any maintenance condition he observed on a regular basis in the other parish buildings." Pl's Mem. of Law at 8. However, it is irrelevant for purposes of the discovery rule that the problem observed was, as plaintiff suggests, not out-of-the-ordinary. Instead, the focus of the inquiry for this court pursuant to the discovery rule is plaintiff's knowledge of such a water problem, regardless of the precise quality of the problem. The facts are sufficiently clear that reasonable minds cannot differ that in 1995, once plaintiff had the knowledge of the water infiltration problem, it should have conducted reasonable due diligence, investigated the source of the problem and instituted the action. Having failed to act timely, plaintiff is now barred by the two-year statute of limitations from pursuing its negligence claim against Neshaminy. See Weik v. Estate of Brown, 794 A.2d 907, 908 (Pa.Super.Ct 2002) ("[i]t is the duty of the party asserting a cause of action to use all reasonable diligence to properly inform himself of the facts and circumstances upon which the right of recovery is based and to institute suit within the prescribed period.).

III. Plaintiff's Assumpsit and Breach of Warranty Claims Against PFS are Barred by the Statute of Limitations, but Plaintiff's Breach of Warranty Claim against Neshaminy Is Not Barred by the Statute of Limitations[8]

A. The Statute of Limitations Bars Plaintiff's Assumpsit and Breach of Warranty Claims against PFS

The plaintiff argues it is not barred from pursuing its assumpsit and breach of warranty claims because the statute of limitations applicable to these claims based upon alleged latent construction defects is "six years from the date it became aware or should have become aware of the existence of the construction defects." Pl's Mem. of Law at 12 (relying upon Gustine Uniontown Associates v. Anthony Crane Rental, Inc., 786 A.2d 246 (Pa. Super. 2002). PFS asserts that whether the six-year statute or the four-year statute applies the result is the same, and the plaintiff is barred from pursuing its claims. Def's Mem. of Law at 19. This court agrees.

As with its negligence claim, the plaintiff argues that the discovery rule should apply to this action since it did not discover the defect until 1996. Under the Uniform Commercial Code, the statute of limitations period applicable to an assumpsit and breach of warranty action is four years. 13 Pa.C.S. § 2725. See also 42 Pa.C.S. § 5525(2). Section 2725 provides in pertinent part:

> (a) General rule.--An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
> (b) Accrual of cause of action.--A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends

[8] Unlike PFS's Motion, Neshaminy's Motion discusses only plaintiff's negligence and breach of warranty claims and not plaintiff's remaining two assumpsist claims against Neshaminy. Def's Neshaminy Mem. of Law; See also Complaint at Counts 6 and 8. Thus, as to Neshaminy having already ruled on the negligence claim, the court need only address the remaining breach of warranty claim.

> to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Thus, except for explicit warranties of future performance, 13 Pa.C.S. § 2725 expressly rejects a discovery rule similar to the one that has developed in tort actions. Applying the statute to the facts of this case, the plaintiff's causes of action for assumpsit and breach of warranty accrued in 1989, when it originally contracted with BCI for the construction of the modular units and health room building. The four-year statute of limitations had run by August 1998, when the plaintiff filed the complaint against PFS. Therefore, the plaintiff is now barred from proceeding on its claims against PFS.

Even if the discovery rule did apply, as plaintiff avers, the plaintiff would still be barred from bringing its assumpsit and breach of warranty claims against PFS. As shown above, in Pennsylvania, the discovery rule generally does not apply to breach of warranty actions. Northampton County Community College v. Dow Chemical, USA, 566 A.2d 591 (Pa. Super. 1989). However, "contract actions alleging latent real estate construction defects are governed by the six-year statute of limitations." Gustine, 786 A.2d 246, 254. "The statute of limitations will not start to run until the injured party becomes aware, or by the exercise of reasonable diligence should have become aware, of the defect." A.J. Aberman, Inc. v. Funk Building Corp., 420 A.2d 594, 599 (Pa.Super.1980). Here, this court has already concluded that the plaintiff was aware of the ponding problems in 1989, but chose not to exercise due diligence. Since the plaintiff commenced this action more than six years later, both the assumpsit and breach of warranty claims against PFS are now barred by the statute of limitations.

B. Plaintiff's Breach of Warranty Claim Against Neshaminy is not Barred by the Statute of Limitations

As noted, the discovery rule generally does not apply to breach of warranty actions. Northampton County Community College v. Dow Chemical, USA, 566 A.2d 591 (Pa. Super. 1989). However, "contract actions alleging latent real estate construction defects are governed by the six-year statute of limitations." Gustine, 786 A.2d 246, 254. "The statute of limitations will not start to run until the injured party becomes aware, or by the exercise of reasonable diligence should have become aware, of the defect." A.J. Aberman, Inc. v. Funk Building Corp., 420 A.2d 594, 599 (Pa.Super.1980).

Here, since the plaintiff alleges latent construction defects in Neshaminy's improper installation of electrical service and electrical conduits during the 1989 construction of the modular units and health room building, the six-year statute of limitations applies to its breach of warranty claim against Neshaminy. Complaint ¶¶8, 35. Further, the court has already determined that, based on sworn deposition testimony and subsequent verification from Devine, the plaintiff became aware of the water infiltration problem in the basement as early as 1995. Therefore, the statute of limitations did not begin to run until 1995, and since the plaintiff commenced this action in August 1998, its breach of warranty claim against Neshaminy is not barred by the six-year statute of limitations.

Neshaminy counters that "[t]his case is plainly not a real estate construction contract dispute as in Gustine, but rather a simple negligence case which happens to involve alleged work at a construction site." Def's Reply Mem. of Law at 3. Such a contention ignores the fact that for the alleged improper electrical work done by Neshaminy, the plaintiff has filed separate and distinct claims against Neshaminy- a negligence action and breach of warranty action. Further, Neshaminy's attempt to distinguish Gustine from

the present matter is unavailing. In holding that contract actions alleging latent real estate construction defects are governed by the six-year statute of limitations, the Gustine court expressly highlighted some of the underlying policy concerns supporting application of a six-year statute of limitation to anyone involved in a construction contract:

> In the interest of fair play and in light of the expected long-term life span of a house or commercial structure and the builder's attendant ethical and legal responsibilities to its customer, we find the purchaser and his investment must be afforded the six years of protection provided by section 5527. To find otherwise would be grossly unfair to the buyer, who routinely expends large sums of money in the hope of securing a structurally and financially sound investment(citations omitted)... To the reasons given for a more generous limitations period we would add, the difficulty in ascertaining presumptive responsibility for construction defects or failures, as well as the inevitable delays involved in negotiations for, and performing attempts at remediation or repair.

Gustine, 786 A.2d at 253-54.

To hold, as Neshaminy suggests, that the six-year statute of limitations only applies to the contractor or builder of alleged latent defects at a construction site and not to the electrician who allegedly improperly installed conduits at the same construction site, would ignore the relevant and important policy concerns espoused above. Therefore, since the six-year statute of limitations applies to the breach of warranty claim against Neshaminy. The plaintiff is not barred from proceeding with this claim.

CONCLUSION

For the reasons stated, PFS's Motion is granted and the plaintiff is barred from bringing its negligence, assumpsit and breach of warranty claims against PFS. Neshaminy's Motion is granted, in part, and plaintiff is barred from bringing its negligence claims against Neshaminy. Plaintiff is not barred from bringing its breach of warranty claims against Neshaminy.

This court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.