IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

ESTATE of JOSEPH PATERNO;

AL CLEMENS, member of the Board of Trustees of Pennsylvania State University;

and

WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO,
former football coaches at Pennsylvania State University

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION
("NCAA"),

MARK EMMERT, individually and as President of the NCAA, and

EDWARD RAY, individually and as former Chairman of
the Executive committee of the NCAA,

Defendants,

and

THE PENNSYLVANIA STATE UNIVERSITY,

Nominal Defendant.

Docket No.: 2013-2082

Type of Case:
Declaratory Judgment Injunction
Breach of Contract
Tortious Interference with Contract
Defamation
Commercial Disparagement
Conspiracy

Type of Pleading:
Addendum to Memorandum in Support of The NCAA Defendants' Preliminary Objections to Plaintiffs' Second Amended Complaint

Filed on Behalf of:
National Collegiate Athletic Association, Mark Emmert, Edward Ray

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PA I.D. Number: 15681

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

The ESTATE of JOSEPH PATERNO; AL CLEMENS, member of the Board of Trustees of Pennsylvania State University; and WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO, former football coaches at Pennsylvania State University, Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ("NCAA"); MARK EMMERT, individually and as President of the NCAA; and EDWARD RAY, individually and as former Chairman of the Executive Committee of the NCAA, Defendants, and PENNSYLVANIA STATE UNIVERSITY, Nominal Defendant.	Civil Division Docket No. 2013-2082

ADDENDUM TO MEMORANDUM IN SUPPORT OF THE NCAA DEFENDANTS' PRELIMINARY OBJECTIONS TO SECOND AMENDED COMPLAINT

MEMORANDUM IN SUPPORT OF THE NCAA DEFENDANTS' PRELIMINARY OBJECTIONS TO SECOND AMENDED COMPLAINT

ADDENDUM: UNPUBLISHED CASES

ACUMIX, INC., Plaintiff v. BULK CONVEYOR SPECIALISTS, INC., Defendant

NO. 2003 CV 424

COMMON PLEAS COURT OF DAUPHIN COUNTY, PENNSYLVANIA

2007 Pa. Dist. & Cnty. Dec. LEXIS 62

March 23, 2007, Decided

COUNSEL: [*1] Mark W. Witzig, Esquire, Harrisburg, PA.

Barry J. Palkovitz, Esquire, White Oak, PA.

Thomas J. Weber, Esquire, Harrisburg, PA.

Carolyn C. Thompson, Esquire, Court Administrator.

Deborah S. Freeman, Esquire, Deputy Court Administrator -- Civil Nativa P. Wood, Chief Court Reporter.

JUDGES: Lawrence F. Clark, Jr., Judge.

OPINION BY: Lawrence F. Clark, Jr.

OPINION

CIVIL ACTION

OPINION

FACTS:

Before the Court is the Plaintiff's Motion to Strike the Answer and New Matter filed by Mr. William Caputo on behalf of the Defendant, Bulk Conveyor Specialists, Inc. (Bulk Conveyor or Defendant). The pertinent facts of this case are as follows.

On January 27, 2003, Plaintiff, Acumix, Inc. (Acumix or Plaintiff) filed a Complaint against Bulk Conveyor. Said Complaint contained on its face a Notice to Defend. This Notice stated, *inter alia,*

> *You have been sued in Court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering an appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set* [*2] *forth against you. . . .*
>
> Complaint, January 27, 2003.

According to the Sheriff's Return, the Complaint was served on Bulk Conveyor on February 11, 2003. On March 6, 2003, an Answer to the Complaint and New Matter was filed with the Court. This Answer and New Matter was signed by, "William Caputo, President[,] Bulk Conveyer [sic] Specialists, Inc." Answer p. 6. Further, on the front page of the Answer and New Matter it states, *inter alia,*

Filed on behalf of:

BULK CONVEYER [sic] SPECIALISTS, INC.

Defendant

Counsel of Record for this Party:

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Answer filed by Mr. William Caputo, March 6, 2003, emphasis original.

No Answer was ever filed by the Plaintiff to the New Matter filed by Mr. Caputo.

On March 8, 2003, Barry J. Palkovitz, Esquire, entered his appearance on behalf of Bulk Conveyor. However, Attorney Palkovitz never filed an Answer or New Matter on behalf of Bulk Conveyor. In fact, no further motions were filed on this case by either party until January 26, 2007, when the Plaintiff filed a Motion to Strike. Said Motion seeks to have the Court strike the Answer and New Matter filed by Mr. Caputo **[*3]** on the grounds that Mr. Caputo, as a layperson, could not file such a pleading on behalf of a corporation such as the Defendant.

Said Motion also states that the Answer should be stricken based upon Pennsylvania Rule of Civil Procedure 1028(a)(2). Rule 1028 is the Rule for Preliminary Objections. 1028(a)(2) states,

(a) *Preliminary Objections may be filed by any party to any pleading and are limited to the following grounds:*

> *(2) Failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;*

Pa.R.C.P. 1028(a)(2).

Upon receipt of the Motion to Strike, this Court issued a Rule on the Defendant to show cause why the Plaintiff's Motion to Strike should not be granted. Thereafter, Attorney Palkovitz filed a Motion to Withdraw as Counsel. On February 22, 2007, Attorney Thomas J. Weber entered his appearance on behalf of the Defendant and filed a response to the Rule to Show Cause. On that same day, the Plaintiff filed a Motion to Make Rule Absolute. On March 5, 2007, Attorney Weber filed an Amended Answer to the Complaint and New Matter.

ISSUES:

[*4] 1. SHOULD THE DEFENDANT'S ORIGINAL ANSWER BE STRICKEN?

2. SHOULD THE "AMENDED ANSWER" BE TREATED AS AN ORIGINAL ANSWER?

DISCUSSION:

1. SHOULD THE DEFENDANT'S ORIGINAL ANSWER BE STRICKEN?

Under Pennsylvania Rule of Civil Procedure (Pa.R.C.P.) 1026, every pleading subsequent to the Complaint must be filed within **TWENTY (20)** days after service of the preceding pleading if the preceding pleading contains a Notice to Defend. Pa.R.C.P. 1026(a). Pursuant to Pa.R.C.P. 1018.1, every Complaint must contain a Notice to Defend. The Complaint in the instant matter did in fact contain a Notice to Defend. Pa.R.C.P. 1017 states, ". . . the pleadings in an action are limited to a complaint, an answer thereto, a reply if the answer contains new matter . . ." Pa.R.C.P. 1017(a). Therefore, there is no question that an Answer to a Complaint is considered a "pleading" and is governed by Rule 1026. As a result, as soon as the Complaint was served upon the Defendant, it (Defendant) had a duty to file an Answer in writing with the Court within **TWENTY (20) [*5]** days.

The Sheriff's Return states that the Complaint was served upon Bulk Conveyor on February 11, 2003 [Tuesday]. Therefore, Bulk Conveyor had to file its Answer on or before March 3, 2003. We note that March 3, 2003, did not fall on a weekend but was a Monday. No Answer was filed by anyone prior to March 6, 2003. Although this issue has not been raised by Plaintiff in its Motion to Strike, it would appear based upon these facts alone that the Defendant failed to file with the Court a timely Answer to the Complaint.

As mentioned above, on Thursday, March 6, 2003, an Answer to the Complaint and New Matter was filed by Mr. William Caputo. Bulk Conveyor, in its Response to the Motion to Strike is requesting this Court to find Mr. Caputo's Answer to be acceptable since the Plaintiff failed to object to it for almost **FOUR (4)** years. However, before we can analyze the Plaintiff's Motion to Strike, we must first identify what was filed by Mr.

Caputo.

Mr. Caputo is not a Defendant in this action; he is not even a party. Further, Mr. Caputo is not a licensed Attorney in Pennsylvania. Under Pennsylvania Law, ". . . a corporation must have counsel in order to proceed in any action [*6] as a corporation cannot represent itself." Smaha v. Landy, 162 Pa. Commw. 136, 146, 638 A.2d 392, 397 (1994). Mr. Caputo as a layperson, could perform no action on behalf of Bulk Conveyor. Therefore, Mr. Caputo simply did not have the power to discharge Bulk Conveyor's duty to file an Answer. Based upon this analysis, we are forced to conclude that no Answer was ever filed by Bulk Conveyor.

Attorney Weber is asking this Court to find that by not filing Preliminary Objections earlier, the Plaintiff in effect ratified the Answer filed by Mr. Caputo. However, we cannot conceive that the Defendant would have this Court impose a duty on a party to respond to a document filed by a non-party. Mr. Caputo's filing was a legal non-entity. The Plaintiff was under no duty to file either a Preliminary Objection to Mr. Caputo's Answer to the Complaint or an Answer to Mr. Caputo's New Matter.

The fact that now, **FOUR (4)** years later, the Plaintiff has filed a Motion that appears to be a Preliminary Objection is of no moment. The Plaintiff's Motion to Strike is moot because there is no Answer to strike in the first place.

2. SHOULD THE "AMENDED ANSWER" BE TREATED AS AN [*7] ORIGINAL ANSWER?

The Defendant filed an Amended Answer with New Matter on March 5, 2007. Pa.R.C.P. 1033 clearly states that a party can only file an amended pleading with the consent of the other party or by leave of Court. The Defendant has obtained neither.

We recognize that an exception to Rule 1033 is Rule 1028(c)(1). This Rule states that a party may file an amended pleading, as of course, within **TWENTY (20)** days after service of Preliminary Objections. Undoubtedly, the Defendant believes that when the Plaintiff filed its Motion to Strike based upon Rule 1028(a)(2), it (Plaintiff) "opened the door," and allowed the Defendant to file an Amended Answer.

However, it is axiomatic that a Preliminary Objection must have something to which it objects. In this case, the only Answer on record was filed by Mr. Caputo, a non-party. Therefore, whatever the Plaintiff filed could not possibly be a Preliminary Objection because it was not objecting to any pleading of record. If we were to follow the Defendant's logic, the absurd result would be that we would be forced to let Mr. Caputo file an Amended Answer, since he is the one who filed the original Answer.

[*8] Nevertheless, although the Defendant could not file an "Amended" Answer, we will now discuss whether we should treat the Amended Answer as an original Answer. As mentioned in our prior discussion, the Answer filed by Mr. Caputo was a legal non-entity and therefore, there exists no pleading of record to be "amended."

Under the Rules of Civil Procedure, the Defendant had **TWENTY (20)** days from service of the Complaint to file an Answer. After the **TWENTY (20)** day deadline elapsed, the Plaintiff could have filed a Motion for Judgment on the Pleadings.

In the instant case, we calculated the **TWENTY (20)** day deadline for filing an Answer to have expired at the close of business on March 3, 2003. **FOUR (4)** years have since elapsed and no Motion for Judgment on the Pleadings has ever been filed by the Plaintiff. The Plaintiff has, quite simply, failed to "slam the door."

We further note that unlike the rule governing amended pleadings, there is no requirement by the Rules of Civil Procedure for the Defendant to obtain leave of Court or consent of the opposing party to file an original Answer. Therefore, since no Motion for Judgment on the Pleadings has been filed by **[*9]** the Plaintiff, and since there is no original Answer to be amended, we will treat the Defendant's Amended Answer as the original Answer in this case.

WHEREFORE, pursuant to our Order of even date herewith, we find that the Plaintiff's Motion to Strike is rendered moot because the Answer filed by Mr. Caputo was never a pleading to begin with. We also find that the Defendant's Amended Answer is deemed to be the original Answer in this case. Finally, upon consideration of the Petition by Barry J. Palkovitz, Esquire, to withdraw his appearance as counsel for the Defendant, we find the issue has been rendered moot. On February 22, 2007, Thomas J. Weber, Esquire entered his appearance on behalf of Bulk Conveyor. As such Mr.

Palkovitz's appearance has been withdrawn.

ISSUED AT HARRISBURG, this 23<rd> Day of March, 2007.

BY THE COURT:

Lawrence F. Clark, Jr., Judge

ORDER

AND NOW, to wit, this, 23<rd> day of March, 2007, pursuant to our Opinion of even date herewith, **IT IS HEREBY ORDERED** that the Plaintiff's Motion to Strike is moot and is therefore **DISMISSED. IT IS FURTHER ORDERED** that the Defendant's Amended Answer **IS HEREBY DEEMED [*10]** to be the original Answer in this case. Finally, upon consideration of the Petition by Barry J. Palkovitz, Esquire, to withdraw his appearance as counsel for the Defendant, we find that the Motion is moot and is therefore **DISMISSED.** On February 22, 2007, Thomas J. Weber, Esquire entered his appearance on behalf of the Defendant. As such Mr. Palkovitz's appearance has been withdrawn.

BY THE COURT:

Lawrence F. Clark, Jr., Judge

PAUL APPENZELLER, an individual, Appellant/Plaintiff, v. PHILADELPHIA PROTESTANT HOME, and JOSEPH F. MAMBU, M.D., Appellees/Defendants.

No. 3592

COMMON PLEAS COURT OF PHILADELPHIA COUNTY, PENNSYLVANIA, CIVIL TRIAL DIVISION

2007 Phila. Ct. Com. Pl. LEXIS 263

March 12, 2007, Decided

SUBSEQUENT HISTORY: [*1]
Superior Court Docket No. 2810 EDA 2006
Affirmed without opinion by Appenzeller v. Phila. Protestant Home, 2007 Pa. Super. LEXIS 4419 (Pa. Super. Ct., Dec. 3, 2007)

JUDGES: ALLAN L. TERESHKO, J.

OPINION BY: ALLAN L. TERESHKO

OPINION

PROCEDURAL HISTORY

Plaintiff appeals from the Order dated October 12, 2006, wherein this Court granted Defendants' Preliminary Objections and dismissed Plaintiff's Complaint.

FACTUAL BACKGROUND

Plaintiff Paul Appenzeller (hereinafter Plaintiff) was the son of Abraham Appenzeller (hereinafter Abraham). (Complaint, P11). Abraham was a "care-dependant individual" residing at Philadelphia Protestant Home's (hereinafter PPH) Philadelphia facility. (Complaint, P13). PPH was in the business of providing skilled nursing, medical and/or long-term institutional care and related medical services available twenty-four hours a day. (Complaint, P13). In essence, PPH operated a nursing home facility, an assisted living facility (including dementia unit), and an independent living facility. (Complaint, P7). Joseph Mambu, M.D. (hereinafter Dr. Mambu) was a licensed physician, privately retained by Plaintiff to provide medical care for his father during the time that Abraham resided at PPH. (Complaint, P6).

Abraham first became a resident of PPH on January 21, 2003. (Complaint, P 15). Prior to his transfer to PPH, Abraham had resided [*2] at Willow Lake Assisted Living for approximately two (2) years and four (4) months. (Complaint, P16). Abraham was 87 years old when he was admitted to PPH. (Complaint, P17). It is contended that upon Abraham's admission to PPH it was noted that he suffered from a history of falling, +3 edema, bi-lateral feet and gait disorder, degenerative joint disease, dementia and osteoporosis among other diagnosis. (Complaint, P18).

Plaintiff alleges that Abraham suffered several falls over a period of approximately fourteen (14) months, while residing at PPH. (Complaint, pgs. 3-7). Since the time of these incidents, Abraham has passed away. It is alleged by Plaintiff that Abraham was admitted to Abington Memorial Hospital on May 5, 2004 with a diagnosis of subdural hematoma resulting from a fall at PPH; he then died on May 10, 2004 from blunt force trauma. (Complaint, P57-59).

This action for nursing home and medical negligence was commenced by Writ of Summons on April 27, 2006. (See Docket). On June 29, 2006, Plaintiff filed his Complaint naming "Paul Appenzeller, an individual" and not Abraham as the only Plaintiff in the action. (See Docket). In the Complaint, Plaintiff alleges that Defendant [*3] PPH and Dr. Mambu were negligent in the care, monitoring and treatment of Abraham. (Complaint, P64-65).

Dr. Mambu and PPH filed their Preliminary Objections to the original Complaint and Plaintiff filed an Amended Complaint on July 31, 2006. In addition to the Amended Complaint, Plaintiff also filed a Praecipe to Amend the Caption on the same day. (See Docket). On August 16, 2006, Dr. Mambu filed his Motion to Determine Preliminary Objections to Plaintiff's Amended Complaint and a Motion to Strike Plaintiff's Praecipe to Amend the Caption. (See Docket, Control # 59-06081059, 60-0608081060). PPH's Motion to Determine Preliminary Objections and Motion to Strike followed on August 18, 2006. (See Docket, Control # 10-06081410, 11-06081411). [1]

1 Both issues of Amending the Complaint and Caption were discussed in each of defendants' respective Motions to Amend and the Motions to Strike the Caption and therefore will be addressed collectively in one analysis below.

The docket does not reflect that a response was filed to either of these Motions, despite Plaintiff's contention that their responses were filed and returned to Plaintiff's counsel due to an error by the Court's motion clerk. (Plaintiff's [*4] Statement of Matters). On September 14, 2006, the Court granted Defendants' PPH and Dr. Mambu's Preliminary Objections to Plaintiff's Amended Complaint. (See Docket). On October 5, 2006, Plaintiff's filed their Notice of Appeal with the Superior Court. A request for Statement of Matters was sent to Plaintiff on October 12, 2006 and they issued their 1925(b) Statement of Matters on October 31, 2006.

The issues Plaintiff raises on appeal are as follows:

1. Whether the trial court committed an error of law or abused its discretion in granting defendants Preliminary Objections to Amended Complaint wherein the Amended Complaint and Caption failed to adhere to the Rules of Civil Procedure.

2. Whether the trial court committed an error of law or abused its discretion in not ruling on Plaintiff's Motion for Reconsideration, where the trial Court is given discretion in Pa.R.A.P. as to whether or not it wishes to address such motions when an appeal has been filed.

LEGAL ANALYSIS

Plaintiff raises the issue that the Court failed to consider Plaintiff's Responses to Preliminary Objections, which, according to Plaintiff, were returned to Plaintiff's counsel due to error by the Court's motion clerk. A [*5] review of the docket does not indicate that response to Defendants' Preliminary Objections were filed by Plaintiff either prior to or subsequent to their response period. However, Dr. Mambu did file a sur-reply to both of his Motions referencing responses by Plaintiff in his motions. Had a clerical error occurred in this case, Plaintiff should have attempted to re-file their response or contact the Court to advise it of the situation so that an accommodation could be made until the responses were filed. Despite Plaintiff's contention, this Court granted these motions on their merits and the responses of Plaintiff would not have altered the outcome because Plaintiff would be without recourse to rectify the error as the applicable statute of limitations had passed.

Plaintiff's Amended Complaint was dismissed because it was filed in violation of Pa.R.C.P. 1033 without obtaining permission of the Court or consent of the parties.

Pa.R.C.P. 1033 states, "A party, either by filed consent of the adverse party or by leave of court, may at any time change the form of action, correct the name of a party or amend his pleading." On July 31, 2006, Plaintiff filed a Praecipe to Amend the Caption and [*6] his Complaint from "Paul Appenzeller, an individual" to "Paul Appenzeller, Individually and as Personal Representative of the Estate of Abraham Appenzeller, deceased, Plaintiff." Neither PPH nor Dr. Mambu consented to the amendment to the caption, and Plaintiff failed to petition the Court for leave to amend the caption. As such, Plaintiff's praecipe to amend the caption fails to comply with the Pa.R.C.P. 1033.

Furthermore, Plaintiff's Praecipe to Amend the Caption seeks to add a new party after the expiration of the statute of limitations. Where the statute of limitations has expired, amendments which introduce a new cause of action or bring in a new party or change the capacity in which that party is being sued, will not be allowed. *Tork-Hiis v. Commonwealth of Pennsylvania,* 558 Pa. 170, 175, 735 A.2d 1256, 1258 (1999); see also *Lafferty v. The Alan Wexler Agency, Inc.,* 393 Pa.Super. 400, 574 A.2d 671 (1990). The cause of action for Abraham accrued on the date of his death, May 10, 2004, however Plaintiff's praecipe to amend the caption was filed on July 31, 2006, which is more than 2 years since the cause of action arose and outside the statute of limitations. Thus it is clear from **[*7]** the pleadings that Paul Appenzeller, in his capacity as personal representative of the estate of Abraham, was not a party in this action prior to the expiration of the statute of limitations. The fact that an amendment is not allowed, where it amounts to the addition of a new party to the matter, is undisputed in Pennsylvania case law. *Tork-Hiis,* 735 A.2d at 1258, *Saracina v. Cotoia,* 417 Pa. 80, 208 A.2d 764 (1965); *Anderson Equipment Company v. Shirley Huchber,* 456 Pa.Super. 535, 541, 690 A.2d 1239, 1241 (1997).

In *Saracina,* the Plaintiff filed an action against Mr. Cotoia, the owner of the vehicle, and not Robert Cotoia, the operator of the vehicle. The Supreme Court held that although it was likely that Plaintiff's intended to sue the operator of the vehicle, the amendment of the complaint was disallowed, since it would have brought in a new and distinct party to the action. Id. In both *Anderson* and *Tork-Hiis,* the Plaintiff's were prohibited from amending their pleadings, after the statute of limitations had run, to include a new and distinct party to the action. *Anderson,* 690 A.2d at 1241, *Tork-Hiis*, 735 A.2d at 1258.

In the case *sub judicie,* Plaintiff seeks to amend the caption **[*8]** to read "Paul Appenzeller, Individually and as Personal Representative of the Estate of Abraham Appenzeller, deceased, Plaintiff." Paul Appenzeller, as personal representative of the estate of Abraham Appenzeller, deceased, was not an original party to this action, and therefore does not amount to a mere substitution of names, but rather the addition of a new party. The original Writ and Complaint were filed in the name of Paul Appenzeller, an individual who had no standing to bring such actions. Paul Appenzeller, an individual, is not a proper plaintiff to bring a wrongful death action, which must be brought by the personal representative of the decedent's estate. See Pa.R.C.P. 2202. Likewise, a survival action is brought by the personal representative of the decedent, and is an action that the decedent himself could have brought had he survived. *In re Pozzuolo Estate,* 433 Pa. 185, 249 A.2d 540 (1969). Paul Appenzeller, an individual, is not a permissible party to bring either of these actions.

Plaintiff is now attempting to add a new plaintiff by way of an Amended Complaint and caption in an effort to preserve these claims. However, the statute of limitations has since expired and **[*9]** Plaintiff cannot now add a new party to correct the defect in the original Writ and Complaint pursuant to the caselaw and the applicable Rules of Civil Procedure. Accordingly, Plaintiff's amended Complaint and amended caption were properly dismissed for failure to have a proper party-plaintiff.

Plaintiff also raises the issue that the Court erred in not ruling on his Motion for Reconsideration. However, pursuant to Pa.R.A.P. 1701, the trial Court is given discretion as to whether or not it wishes to rule on Motions for Reconsideration. Pa.R.A.P. §1701 states in pertinent part that:

> (a) Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter.
>
> (b) Authority of a trial court or agency after appeal. After an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit *may:*
>
> (3) Grant reconsideration of the order which is the subject of the appeal or petition, if:
>
> (i) an application for reconsideration of the order is filed in the trial court or other government unit within the time provided or prescribed by **[*10]** law; and
>
> (ii) an order expressly granting reconsideration of such prior order is filed in the trial court or other government unit within the time prescribed by these rules

> for the filing of a notice of appeal petition for review of a quasijudicial order with respect to such order, or within any shorter time provided or prescribed by law for the granting of reconsideration, (emphasis added).

The comments to 1701(b)(3) also specifically state that:

> Subdivision (b)(3) is intended to handle the troublesome questions of the effect of application for reconsideration on the appeal process. The rule (1) permits the trial court or other government unit to grant reconsideration if action is taken during the applicable appeal period, which is not intended to include the appeal period for cross appeals, or, during any shorter applicable reconsideration period under the practice below, and (2) eliminates the possibility that the power to grant reconsideration could be foreclosed by the taking of a "snap" appeal. The better procedure under this rule will be for a party seeking reconsideration to file an application for reconsideration below and a notice of appeal, etc. *If the application lacks merit* **[*11]** *the trial court or other government unit may deny the application by the entry of an order to that effect or by inaction.* The prior appeal will remain in effect, and appeal will have been taken without the necessity to watch the calendar for the running of the appeal period. *If the trial court or other governmental unit fails to enter an order "expressly granting reconsideration"* (an order that "all proceedings shall stay" will not suffice) *within the time prescribed by these rules for seeking review, Subdivision (a) becomes applicable and the power of the trial court or other government unit to act on the application for reconsideration is lost.* (emphasis added).

According to this Rule and its comments, the trial Court was vested with full discretion whether or not it wishes to rule on Plaintiff's Motion for Reconsideration. The fact that the Court did not rule on Plaintiff's Motion in this case is fully permitted according to the rules and does not amount to an error under the circumstances.

CONCLUSION

In light of the foregoing analysis, this Court believes that the Complaint was properly dismissed, and should be affirmed by the Court above.

BY THE COURT:

ALLAN L. TERESHKO, J.

3-12-07

Date

EUGENE L. DUKE, Plaintiff, v. HERSHEY MEDICAL CENTER, Defendant

NO. 1195-CV-2000

COMMON PLEAS COURT OF DAUPHIN COUNTY, PENNSYLVANIA

2006 Pa. Dist. & Cnty. Dec. LEXIS 148

September 7, 2006, Decided

COUNSEL: [*1] Roger R. Laguna, Jr., Esquire, Laguna, Reyes, Maloney, LLP, Harrisburg, PA.

Paul Troy, Esquire, Kane, Pugh, Knoell, Troy & Kramer, LLP, Norristown, PA.

Deb Freeman, Esquire, Deputy Court Administrator.

JUDGES: JOSEPH H. KLEINFELTER, JUDGE.

OPINION BY: JOSEPH H. KLEINFELTER

OPINION

CIVIL ACTION -- LAW

OPINION

Before the court for disposition are preliminary objections to plaintiff's amended complaint filed by defendant Hershey Medical Center (hereinafter "HMC"). This is a medical negligence action arising out an eye surgery and related care provided to Eugene L. Duke (hereinafter "plaintiff") at the Veterans Administration Medical Center in Lebanon, Pennsylvania.

Plaintiff commenced this action by writ of summons filed March 27, 2000, naming Dr. Renee Jones, the ophthalmologic intern who performed plaintiff's surgery, and HMC as defendants. Plaintiff also filed an administrative tort remedy claim with the United States Department of Veterans Affairs on December 19, 2000. The administrative claim was denied on March 14, 2002. Plaintiff filed his complaint on July 21, 2003.

On August 19, 2003, all defendants filed preliminary objections. However, on October 2, 2003, the defendants [*2] sought to remove the case to the United States District Court for the Middle District of Pennsylvania on the basis that Dr. Jones was an employee of the United States of America as a resident in the surgical service of the Lebanon Veterans Administration Medical Center. The District Court dismissed the complaint as to the United States of America and Dr. Jones, denied HMC's motion to dismiss, and remanded the case to this court.

Thereafter, on July 8, 2004, HMC filed preliminary objections. On October 28, 2004, we issued a Memorandum Opinion and Order granting HMC's preliminary objection in the nature of a motion for a more specific pleading with respect to paragraphs 4 and 6(a)-(f) of plaintiff's complaint, while denying its motions to strike the complaint for factually deficient agency allegations and for failure to properly verify the complaint.

On March 3, 2006, plaintiff filed his amended complaint. On March 30, 2006, HMC filed the instant preliminary objections. Subsequent to the filing of briefs, the matter was certified as being ready for disposition and assigned to this court on July 17, 2006.

Although raised in two counts, we find that HMC raises three preliminary objections. [*3] The first is a

demurrer pursuant to Pa.R.Civ.P. 1028(a)(4); the second is a motion to strike pursuant to Pa.R.Civ.P. 1028(a)(2); and the third is a motion to strike general allegations with respect to paragraph 12, subsections (a), (b) and (c) of plaintiff's amended complaint pursuant to Pa.R.Civ.P. 1028(a)(3).

Demurrer/Motion to Strike Impertinent Matter

As plaintiff's first two preliminary objections are closely related, we will consider them together. A preliminary objection in the nature of a demurrer should be sustained only in cases that clearly and without a doubt fail to state a claim for which relief may be granted. Shick v. Shirey, 552 Pa. 590, 716 A.2d 1231 (Pa. 1998). "If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected." Id. at 1233.

HMC claims that plaintiff has failed to state a claim for which relief may be granted in that the amended complaint only alleges misconduct on the part of Dr. Jones, who, as stated **[*4]** above, was previously dismissed from the instant lawsuit. Plaintiff contends that HMC's demurrer is without merit because his amended complaint asserts negligence on the part of HMC itself.

We agree with HMC's assertion that, insofar as the claim of negligence on the part of Dr. Jones has been extinguished, it is precluded from vicarious liability based upon the conduct of Dr. Jones. *See,* Mamalis v. Atlas Van Lines, Inc., 364 Pa. Super. 360, 528 A.2d 198 (Pa.Super. 1987); Skalos v. Higgins, 303 Pa. Super. 107, 449 A.2d 601 (Pa.Super. 1982). As stated in Skalos:

> Where the master is joined with his servant in an action based wholly on the servant's negligence or misconduct, the master cannot be held liable unless there is a cause of action against the servant, but where the case is founded on the proposition that the master was independently negligent, and no attempt is made to restrict the alleged negligent acts to its servants alone, recovery can be had against the master, irrespective of the servant's liability.

449 A.2d at 603-04.

Thus, because plaintiff will not survive the instant demurrer by merely alleging that HMC is responsible for the misconduct **[*5]** of Dr. Jones alone, we must determine whether plaintiff's amended complaint states a valid, independent cause of action against HMC. Paragraph 12 of plaintiff's amended complaint -- the only paragraph to discuss the conduct of any person or entity other than Dr. Jones - reads as follows:

> At all times pertinent hereto, Defendant Medical Center was acting by and through its agents, servants and employees, including Defendant, Renee L. Jones, M.D., and therefore, is responsible, inter alia, for acts of omission and commission of Ms. Jones as set forth below:
>
> a. Failing to properly supervise the operating room personnel before and during the surgical procedure upon Mr. Duke;
>
> b. Failing to perform the intraocular lens implantation procedure in accordance with medically accepted standards;
>
> c. Failing to properly attend and supervise the intraocular lens implantation procedure upon Mr. Duke;
>
> d. Permitting Ms. Jones to implant the intraocular lens too high above the iris and close the surgery upon the broken lens;
>
> e. Failing to discover and disclose to Mr. Duke that the intraocular lens had been implanted too high above the iris and was broken;
>
> f. Failing **[*6]** to heed the warnings and complaints of Mr. Duke that he was experiencing post-operative problems with his vision.

Setting aside all drafting issues for the moment, and consistent with the principle that on demurrer a complaint must be read most favorably to the pleader, we find that plaintiff has not sought to restrict the alleged negligent acts to Dr. Jones' conduct alone, but has set forth allegations of vicarious liability on the part of HMC

based upon the conduct of agents other than Dr. Jones. Plaintiff alleges that HMC, "acting by and through its agents, servants and employees," is liable for the negligence of its staff members who supervised the performance of plaintiff's surgery and after-care. While not specifically named in his amended complaint, we note that paragraph 12 of plaintiff's original complaint, to which we overruled HMC's previous preliminary objection based upon factually deficient agency allegations, sufficiently identified those HMC employees who supervised Dr. Jones and participated in plaintiff's surgery. We also noted in our October 28, 2004 Memorandum Opinion that "each HMC staff person involved in the plaintiff's care [was] disclosed in the Joint [*7] Case Management Plan submitted to Judge Sylvia Rambo when the case was before the District Court."

Accordingly, we will grant HMC's demurrer to the extent that plaintiff's amended complaint alleges vicarious liability based upon the conduct of Dr. Jones and order that the following portions of plaintiff's amended complaint be stricken as containing impertinent matter: paragraph 3; paragraphs 5 through 10; the second, misnumbered, paragraph 10, beginning "At all times mentioned...;" and, the portions of paragraph 12 which read, "including Defendant, Renee L. Jones, M.D." and "of Ms. Jones."

Motion to Strike General Allegations

HMC's motion to strike general allegations regards paragraph 12, subsections (a), (b) and (c) of plaintiff's amended complaint, as set forth above. Rule 1019(a) requires a party to allege the material facts upon which a cause of action is based in concise and summary form. Furthermore, it has long been recognized by this court that "[t]he purpose of pleadings is to present, define, and narrow the issues and to form the foundation of and to limit the proof to be submitted at trial. They are designed to advise the Court and the adverse party of the issues. [*8] " Starr v. Myers, et al., 109 Dauph. 147, 155 (1988). To determine if a pleading meets Pennsylvania's specificity requirements, a court must ascertain whether the facts alleged are "sufficiently specific so as to enable [a] defendant to prepare [his] defense." Smith v. Wagner, 403 Pa. Super. 316, 588 A.2d 1308, 1310 (Pa.Super. 1991).

We sustain the instant objection as HMC cannot prepare an adequate defense to such broad and non-specific allegations. HMC's assertion that subparagraphs (a), (b) and (c) of paragraph 12 contain the same type of general allegations as previously stricken by this court in Reed v. University Hospital, et al., 112 Dauph. 395 (1992) is well-taken. There, we struck paragraphs containing such general allegations as "[f]ailure to adequately supervise," "[f]ailure to oversee" and "[failure to comply] with...standards of the American Medical Association." Id., at 396. Plaintiff makes similarly broad, non-specific allegations: "[f]ailing to properly supervise," "[f]ailing to perform...in accordance with medically accepted standards" and "[f]ailing to properly attend and supervise."

Further, we note [*9] that subparagraphs (a), (b) and (c) of paragraph 12 are defective in precisely the same manner as those paragraphs previously stricken from plaintiff's original complaint for lack of specificity. There, plaintiff alleged that defendants' negligence consisted of "[f]ailing to treat...in accordance with the standard medical care," "[n]egligently performing the medical care/surgery" and "[n]egligently diagnosing."

Although "the right to amend pleadings is to be construed liberally, it is not absolute." Halliday v. Beltz, 356 Pa. Super. 375, 514 A.2d 906, 909 (Pa.Super. 1986). "Seriatim amendments should not be allowed absent a showing of reasonable entitlement to repeated restatements of an alleged cause of action." Id. Here, after six years of litigation in both state and federal court and an amended complaint having already been filed in this matter, we will not, in fairness to HMC, permit plaintiff to further plead his case. Accordingly, subparagraphs (a), (b) and (c) of paragraph 12 of plaintiff's amended complaint are stricken with prejudice.

We enter the following;

ORDER

AND NOW, this 7<th> day of September 2006, upon consideration of the preliminary objections to [*10] the plaintiff's amended complaint filed by defendant Hershey Medical Center,

IT IS HEREBY ORDERED as follows:

1) HMC's demurrer is granted only to the extent that plaintiff's amended complaint alleges vicarious liability based upon the conduct of Dr. Renee Jones.

2) The following portions of plaintiff's amended complaint are stricken as containing impertinent matter: paragraph 3; paragraphs 5 through 10; the second, misnumbered, paragraph 10, beginning "At all times mentioned...;" and, the portions of paragraph 12 which read, "including Defendant, Renee L. Jones, M.D." and "of Ms. Jones."

3) HMC's Motion to Strike General Allegations is granted. Subsections (a), (b) and (c) of paragraph 12 of plaintiff's amended complaint are stricken with prejudice.

BY THE COURT:

JOSEPH H. KLEINFELTER, JUDGE

In Re: Foundation For Anglican Christian Tradition, a corporation. Appeal of: David W. Rawson

No. 2164 C.D. 2013

COMMONWEALTH COURT OF PENNSYLVANIA

2014 Pa. Commw. LEXIS 525

October 8, 2014, Argued
November 5, 2014, Decided
November 5, 2014, Filed

PRIOR HISTORY: [*1] Appealed from No. 2013-X0031. Common Pleas Court of the County of Montgomery. Judge Ott, J.

COUNSEL: Paul B. Bartle, Christopher M. Curci and Walter H. Flamm, Jr., Blue Bell, for appellant.

Obadiah G. English, King of Prussia, for appellee Foundation for Anglican Christian Tradition.

Dean R. Phillips, Blue Bell, for appellee The Church of the Good Shepherd.

Claudia M. Tesoro, Senior Deputy Attorney General, Philadelphia, for appellee Commonwealth of Pennsylvania.

JUDGES: BEFORE: HONORABLE DAN PELLEGRINI, President Judge, HONORABLE BERNARD L. McGINLEY, Judge, HONORABLE BONNIE BRIGANCE LEADBETTER, Judge, HONORABLE RENÉE COHN JUBELIRER, Judge, HONORABLE MARY HANNAH LEAVITT, Judge, HONORABLE P. KEVIN BROBSON, Judge, HONORABLE ANNE E. COVEY, Judge. OPINION BY PRESIDENT JUDGE PELLEGRINI.

OPINION BY: DAN PELLEGRINI

OPINION

OPINION BY PRESIDENT JUDGE PELLEGRINI

David W. Rawson (Rawson) appeals from an order of the Court of Common Pleas of Montgomery County's Orphans' Court Division (trial court) sustaining the preliminary objections filed by the Foundation for Anglican Christian Tradition (Foundation) and the Church of the Good Shepherd (Church) and dismissing Rawson's "*amended petition for citation to show cause why the Foundation ...* [*2] *and the Church ... should not be enjoined from using charitable gift*" (amended petition) seeking declaratory and injunctive relief. Finding no error, we affirm.

I.

Rawson's amended petition alleges that he personally donated funds to the Foundation, a Pennsylvania non-profit corporation, and assisted it in raising additional funds "for the purpose of supporting Biblical and traditional Anglican Christian principles at [the Church]." (Am. Pet. ¶6; Reproduced Record [R.R.] at 16a.) Foundation funds were used to purchase real property adjoining the Church in 2000 in exchange for a note and mortgage on the property.[1]

1 The note executed by the Church promises to repay the Foundation and states, "[I]f the Church

> shall fail to perform any other provision hereof on the part of the Church to be performed, then the balance of the debt evidenced by this Note...shall at the option of the holder hereof, become and be due and payable immediately without notice to the Church." (R.R. at 28a.)

According to the amended petition, Rawson subsequently demanded that the note be amended to "guarantee that [the Church] would continue to follow the precepts of [the Foundation] and the direction of [Rawson]," thereby effectuating the intent of his **[*3]** donation. (Am. Pet. ¶10; R.R. at 16a.) Specifically, Rawson alleged that the amendment sought to objectively measure whether the Church continued to follow the Foundation's principles without engaging in ecclesiastical debate, and stated: "The Church shall be in default under the Note and Mortgage if a majority of the members of the Church's vestry are removed and replaced with new members, except for removal and replacement as a result of the annual elections pursuant to the Church's bylaws." (Am. Pet. ¶10; Am. Pet. Ex. B; R.R. at 16a.17a, 27a.) In the event that the default provision was triggered, the Foundation had the option of demanding the unpaid balance and interest immediately.

The amended petition goes on to state that after the note was amended, a majority of the vestry's members were removed and replaced with new members outside of the annual elections. Rawson alleges that around the same time, the Church decided to put the subject property up for sale and that to avoid losing the property pursuant to the default provision, vestry and Foundation members entered into a conspiracy. Ultimately, the Foundation's Board of Directors (Board) met and voted unanimously to declare the mortgage **[*4]** null and void, and the Foundation filed a satisfaction of mortgage without receiving any payment of principal or interest.[2] The amended petition alleges that the Church subsequently entered an agreement to sell the subject property with regard to which Rawson sought declaratory and injunctive relief against the Foundation and Church.

> 2 The amended petition avers that the meeting at which the vote took place "was engineered and scheduled in a fashion as to exclude, as a practical matter, those directors who would have voted against the proposal." (Am. Pet. ¶17; R.R. at 18a.)

II.

The Foundation and the Church filed preliminary objections contending that Rawson failed to allege the creation of a charitable trust and that even if one was alleged, he lacked standing to enforce it.[3] The trial court sustained both sets of preliminary objections and dismissed Rawson's amended petition with prejudice, finding that Rawson lacked standing because he did not have the requisite special interest. Specifically, the trial court explained:

> [Rawson]'s donations to and fundraising for [the Foundation] did not empower him to challenge [the Foundation]'s corporate decisions. He did not allege that he was a board member **[*5]** or officer of [the Foundation] at the time of the actions about which he complains. His being a "proponent of Biblical and traditional Anglican Christian principles" did not provide him with the requisite special interest any more than being the author of a book about The Barnes Foundation gave an individual the right to participate in litigation involving that institution [in *In re Barnes Foundation*, 2013 PA Super 145, 74 A.3d 129 (Pa. Super. 2013), *appeal denied*, 80 A.3d 774 (Pa. 2013), *cert. denied*, 134 S. Ct. 2301, 189 L. Ed. 2d 175 (2014)].

(Trial Court Opinion at 5.6 (footnote omitted).) The trial court distinguished between the settlor of a charitable trust that has standing to enforce the trust and the donor of a charitable gift that lacks standing and determined that "there was no reference to a trust4 in this petition, and we perceive this allegedly debatable issue to be no more than a makeweight argument." (*Id.* at 6.) Footnote 4 further explained, "The amended petition speaks only the language of gifts with words and phrases, such as 'personally donated' (¶6), 'contribution' (¶7), 'donor' (¶10), and 'charitable gifts' (¶¶18, 24.)" (*Id.* at 6 & n.4.) This appeal followed.[4]

> 3 In its capacity as *parens patriae*, the Commonwealth of Pennsylvania, through its Attorney General, participated in oral argument at the trial court and participates **[*6]** in the instant appeal.
>
> 4 Rawson filed his appeal in the Superior Court, which transferred the appeal to this Court by order

dated November 1, 2013. We review a trial court's order sustaining preliminary objections and dismissing a complaint for lack of standing *de novo*, and our scope of review is plenary. *McConville v. City of Philadelphia*, 80 A.3d 836, 842 (Pa. Cmwlth. 2013). We must accept as true all well-pleaded facts set forth in the pleading and any reasonable inferences deducible therefrom. *Id.*

III.

On appeal, Rawson asserts that the trial court erred in finding that he lacked standing because, as either the settlor of a charitable trust or as the donor of a charitable gift, he may enforce the conditions placed on his donation. He further contends that the trial court erred in determining that his charitable funds constituted a gift rather than a trust, based solely on the pleadings.

A.

At the outset, we address the question of whether Rawson's amended petition has alleged the existence of a charitable trust. While conceding that his amended petition does not reference the word "trust" but instead refers to his donation as a "gift," Rawson argues that the absence of this "magic word" is not fatal, as the relevant analysis in determining whether a trust **[*7]** was established concerns the powers and duties conferred. *See Buchanan v. Brentwood Federal Savings & Loan Association*, 457 Pa. 135, 320 A.2d 117, 122.23 (Pa. 1974).

This Court has defined a "trust" as "a legal instrument created by one person or entity (the 'settlor') purporting to transfer property (the 'trust res' or 'trust property') to another person or entity (the 'trustee') to hold in trust for the benefit of another (the 'beneficiary')." *In re Milton Hershey School*, 867 A.2d 674, 681 (Pa. Cmwlth. 2005), *rev'd on other grounds*, 590 Pa. 35, 911 A.2d 1258 (Pa. 2006).

Pursuant to the Uniform Trust Act (Act):[5]

> A trust may be created by:
>
> (1) transfer of property under a written instrument to another person as trustee during the settlor's lifetime or by will or other written disposition taking effect upon the settlor's death;
>
> (2) written declaration, signed by or on behalf and at the direction of the owner of property as required by section 7732 (relating to requirements for creation -- [Act] 402), that the owner holds identifiable property as trustee; or
>
> (3) written exercise of a power of appointment in favor of a trustee.

Section 7731(1), (3) of the Act, 20 Pa. C.S. §7731(1), (3). Under the Act, a trust may be created only if "the settlor signs a writing that indicates an intention to create the trust and contains provisions of the trust." Section 7732(a)(2) of the Act, 20 Pa. C.S. §7732(a)(2). Indeed, "[o]ral trusts are unenforceable in this Commonwealth." Section 7737 of the Act, **[*8]** 20 Pa. C.S. §7737.

5 20 Pa. C.S. §§7701, 7799.3.

Although the Act was not in effect at the time Rawson made his donation to the Foundation and we are without knowledge whether it was in effect at the time the note was amended,[6] even the common law predating the Act required "clear and unambiguous language or conduct indicating that the settlor intended to create a trust." *See In re Church of St. James the Less*, 585 Pa. 428, 888 A.2d 795, 806 (Pa. 2005). In other words, a trust "cannot arise from loose statements admitting possible inferences consistent with other relationships." *Bair v. Snyder County State Bank*, 314 Pa. 85, 171 A. 274, 275 (Pa. 1934). Regardless of whether a written instrument was required, we find that Rawson has failed to allege "clear and unambiguous language or conduct" indicating that he intended to create a trust.

6 Rawson asserts for the first time in his reply brief that he created an oral trust in 2000. (Reply Br. for Appellant to Br. for Appellee Commonwealth of Pennsylvania at 7.) However, arguments in briefs do not constitute factual averments which we are required to deem true for the purposes of resolving preliminary objections. *See Erie Indemnity Co. v. Coal Operators Casualty Co.*, 441 Pa. 261, 272 A.2d 465, 466-67 (Pa. 1971).

As the trial court duly noted, the amended petition does not so much as mention a "trust," but rather, "speaks

only the language of gifts." (Trial Court Opinion at 6 & n.4.) Specifically, the amended petition alleges [*9] that Rawson "personally donated" and assisted in raising funds for the Foundation (Am. Pet. ¶5; R.R. at 3a), that the note was amended to ensure that the Church continued to follow the Foundation's precepts, that Rawson has a special interest in enforcing the conditions set forth in the amended note "as the donor of the charitable gift and proponent of Biblical and traditional Anglican Christian principles" (Am. Pet. ¶11; R.R. at 4a), and that the Foundation's Board's vote "frustrate[d] the purpose of [Rawson]'s charitable gift" and "negate[d] the control that [Rawson] had required as a condition of the gift." (Am. Pet. ¶14; R.R. at 4a.)

The only language or conduct which Rawson asserts evidences his intent to create a trust is his delivery of the funds themselves, his advocacy for "Biblical and traditional Anglican Christian principles," the language of the original note, his post-donation insistence that an amendment be executed, and the language of the amendment. Neither the note nor the amendment references Rawson or confers upon him any rights or duties. They do not mention his donation and certainly do not render his donation, *post hoc*, dependent upon the Foundation's election to declare the Church in default. Likewise, none [*10] of the conduct referenced by Rawson evidences his intent to create a trust as opposed to a charitable gift. *See Bair*, 171 A. at 275 ("[A trust] cannot arise from loose statements admitting possible inferences consistent with other relationships."). Therefore, Rawson has failed to allege the existence of a trust under both Section 7732(a)(2) of the Act, 20 Pa. C.S. §7732(a)(2), and the common law predating the Act. Further, because it was Rawson's duty to allege all of the elements of a charitable trust in his pleading, the trial court did not err in making this determination based upon the face of his amended petition without first ordering discovery.

B.

Nonetheless, Rawson contends that even if he is only the donor of a charitable gift, he still has standing to enforce the conditions placed on the gift.

1.

Although this is an issue of first impression in the Commonwealth, the common law regarding standing is well settled:

> The core concept of standing is that "a party who is not negatively affected by the matter he seeks to challenge is not aggrieved, and thus, has no right to obtain judicial resolution of his challenge." *City of Philadelphia v. Commonwealth*, 575 Pa. 542, 838 A.2d 566, 577 (Pa. 2003). A litigant is aggrieved when he can show a substantial, direct, and immediate interest in the outcome of the litigation. [*11] *William Penn Parking Garage, Inc. [v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269, 280 (Pa. 1975)]. A litigant possesses a substantial interest if there is a discernable adverse effect to an interest other than that of the general citizenry. *Id.* at 282. It is direct if there is harm to that interest. *Id.* It is immediate if it is not a remote consequence of a judgment. *Id.* at 283.

In re Milton Hershey School, 590 Pa. 35, 911 A.2d 1258, 1261-62 (Pa. 2006).

In the instant case, Rawson's status as a donor is insufficient to confer on him authority to enforce the Board's option to declare a default. As the trial court noted, Rawson is neither a Board member nor an officer of the Foundation. His belief in "Biblical and traditional Anglican Christian principles" does not provide him with a specialized interest different from other members of the citizenry.

Moreover, the terms of the amendment do not so much as mention Rawson but rather set forth an additional circumstance under which the Foundation may declare the Church in default. As made clear under the original note, the only parties to the note and mortgage are the Foundation and the Church; Rawson is not a party and the option to declare a default belongs to the Foundation as the holder of the note and mortgage.

Further, the fact that he made a gift to the Foundation is insufficient [*12] to confer standing upon him to enforce conditions on the gift where no conditions have been shown to exist. Generally, inter vivos gifts are irrevocable. *In re Sivak's Estate*, 409 Pa. 261, 185 A.2d 778, 781 (Pa. 1962). When asserting that an inter vivos gift was conditional, the donor bears the burden of

establishing the same. *In re Yeager's Estate*, 273 Pa. 359, 117 A. 67, 68 (Pa. 1922).

While Rawson has alleged that his donation to the Foundation was conditioned upon the terms of the amended note, this conclusion contradicts the amendment, itself and the other facts Rawson averred. *See Baravordeh v. Borough Council of Prospect Park*, 699 A.2d 789, 791 (Pa. Cmwlth. 1997) (explaining that when there is a contradiction between a pleading's averments and exhibits, the latter control, and the contradicted averments are not admitted for purposes of resolving preliminary objections), *appeal denied*, 555 Pa. 733, 725 A.2d 183 (Pa. 1998). Indeed, the amendment was executed on an unspecified date *after* Rawson's donation was made and *after* the note and mortgage were executed. Therefore, any conditions imposed by the amendment were not contemporaneous conditions of the gift.[7]

> 7 In support of Rawson's argument that we should adopt a rule enabling donors of gifts, like settlors of trusts, to enforce the terms of a gift, he cites cases from California, Louisiana, New York and Tennessee. Even if we deemed these cases persuasive, they are inapposite **[*13]** because each involves a donation accompanied by *contemporaneous*--not subsequent--conditions. *See L.B. Research & Education Foundation v. The UCLA Foundation*, 130 Cal. App. 4th 171, 29 Cal. Rptr. 3d 710 (Cal. Ct. App. 2005) (holding that a donor of a conditional gift had standing to enforce the conditions when they were evidenced in the agreement establishing the gift); *Howard v. Administrators of Tulane Educational Fund*, 986 So. 2d 47, 58 (La. 2008) (explaining that under Article 1758 of the Louisiana Civil Code, LSA-C.C. Art. 1758, which derives from the French Civil Code, a donor and its heirs may enforce the conditions of a gift set forth in the instrument creating the gift); *Smithers v. St. Luke's-Roosevelt Hospital Center*, 281 A.D. 2d 127, 723 N.Y.S.2d 426 (N.Y. App. Div. 2001) (finding that a donor's wife had standing to enforce the conditions of her late-husband's gift which were established in the document creating the gift); *Tennessee Division of the United Daughters of the Confederacy v. Vanderbilt University*, 174 S.W. 3d 98 (Tenn. Ct. App. 2005) (same).
>
> Similarly, Rawson's focus on our case law regarding engagement rings is misplaced. It is well established that an engagement ring is a gift impliedly conditioned upon the occurrence of a marriage. *See, e.g., Lindh v. Surman*, 560 Pa. 1, 742 A.2d 643, 644 (Pa. 1999). In such cases, the law recognizes the existence of the condition without the need for the donor to establish it. Such is not the case where a monetary gift is made to a non-profit corporation.

Because Rawson has failed to set forth any factual averments from which it can be inferred that his gift was conditioned at the time it was made upon the Foundation exercising its authority under the amendment, his gift **[*14]** is assumed to be irrevocable and, as such, he lacks standing to enforce any *post-hoc* conditions.[8]

> 8 We note that Section 5793(a) of the Nonprofit Corporation Act, which was amended in 2013, expands standing to "any person aggrieved by any corporate action" to file an application with the court for it to "hear and determine the validity of the corporate action." 15 Pa. C.S. §5793(a). However, Rawson states that "the standing requirements of that law are irrelevant to this case," and he does not argue that he has standing under this provision. (Reply Br. for Appellant to Br. for Appellee Commonwealth of Pennsylvania at 2; Reply Br. for Appellant to Br. for Appellee Church of Good Shepherd, Rosemont at 7.8.) He probably considered the provision irrelevant because it was amended in 2013 after the trial court's decision. In any event, because Rawson has failed to establish that he is "aggrieved," standing is not conferred under this provision. We leave for another day the issue of whether a donor who imposes contemporaneous conditions on a charitable gift has standing to enforce the conditions.

2.

Still, Rawson argues that our common-law standing doctrine has been superseded by the Act, which he urges us to follow in determining **[*15]** whether donors of charitable gifts have standing. The Act, however, applies only to charitable trusts and not to charitable gifts. *See* Section 7702 of the Act, 20 Pa. C.S. §7702 ("This chapter applies to express trusts, charitable and noncharitable, and trusts created pursuant to a statute, judgment or

decree that requires the trust to be administered in the manner of an express trust."). Moreover, because the common-law doctrine is the same without regard to whether a charitable gift or trust is at stake, Rawson's argument that the trial court erred in relying on *In re Milton Hershey School*, 590 Pa. 35, 911 A.2d 1258, which involved a trust, is without merit.[9]

> 9 We further note that *In re Milton Hershey School*, 590 Pa. 35, 911 A.2d 1258, decided on December 28, 2006, was not superseded by the Act, which was enacted on July 7, 2006, and became effective on November 6, 2006, before the decision was rendered. *See generally* Sections 7701, 7799.3 of the Act, 20 Pa. C.S. §§7701, 7799.3.

Accordingly, we affirm the trial court's order sustaining the Foundation's and the Church's preliminary objections and dismissing Rawson's amended petition with prejudice.

DAN PELLEGRINI, President Judge

Judge Leavitt concurs in the result only.

ORDER

AND NOW, this 5th day of November, 2014, the order of the Court of Common Pleas of Montgomery County's Orphans' Court Division dated August 27, **[*16]** 2013, in the above-captioned matter, is affirmed.

DAN PELLEGRINI, President Judge

MARY McLANE, Plaintiff, vs. STOREXPRESS, INC., A CORPORATION; STEVEN L. MITNICK, AS OWNER AND PRESIDENT, AND AS AN EMPLOYEE OF STOREEXPRESS, INC. AND INDIVIDUALLY AND PERSONALLY; SUSAN "SUE" FRANCIS, AS SUPERVISOR OF STOREEXPRESS, INC. AND AS AN EMPLOYEE OF STOREEXPRESS, INC. AND AS AN EMPLOYEE OF STOREEXPRESS, INC., LORI KADALES, AS MANAGER AND AS AN EMPLOYEE OF STOREEXPRESS, INC., AND INDIVIDUALLY AND PERSONALLY; ANTHONY "TONY" CURGES, ASAN EMPLOYEE OF STOREEXPRESS, INC. AND INDIVIDUALLY AND PERSONALLY AND RICK , AS AN EMPLOYEE OF STOREEXPRESS, INC., INDIVIDUALLY AND PERSONALLY, Defendants.

No. GD08-17605

COMMON PLEAS COURT OF ALLEGHENY COUNTY, PENNSYLVANIA, CIVIL DIVISION

2009 Pa. Dist. & Cnty. Dec. LEXIS 228

September 2, 2009, Filed

COUNSEL: [*1] Mary McLane, Plaintiff, Pro se, Pittsburgh, PA.

For Defendants: Mark Clement, Esquire, Pittsburgh, PA.

JUDGES: JUDGE RONALD W. FOLINO.

OPINION BY: RONALD W. FOLINO

OPINION

FOLINO, J.

For the third time, Plaintiff failed to draft a procedurally or substantively valid complaint; this Court was thus forced to dismiss Plaintiffs "Second Amended Complaint" with prejudice. Not only has Plaintiff violated two prior Court orders, but she is simply not able or not willing to comply with our procedural rules or to state a cause of action. I recommend affirmance.

On August 22, 2008, Plaintiff Mary McLane filed her initial complaint in this matter. The confused, 38-page complaint names, as Defendants, STORExpress, Inc. and a variety of identified and unidentified employees of the company. Basically, Ms. McLane alleges that she rented eight "self-storage" units from STORExpress; the complaint then recites a long list of problems with: the STORExpress facilities, the way STORExpress uses its resources, the manner in which STORExpress has treated her and the manner in which STORExpress treats its other customers.

According to this initial complaint, STORExpress violated Ms. McLane's constitutional rights, committed a breach of contract [*2] and acted negligently because, among other things, STORExpress: 1) gives to its "commercial" tenants more time to access property than the "residential" tenants; 2) at certain times in the day, does not have an on-duty employee available to handle possible emergencies; 3) has an elevator that will sometimes break down; 4) has cargo-doors that, at times,

will malfunction and not allow Ms. McLane access to her belongings; 5) only recently has installed a bathroom; 6) does not spray for "insects, roaches, flies[or] spiders"; 6) has "band rooms" (which do not belong in a self-storage facility); 7) does not have heating and air-conditioning on every floor; 8) rented her two units that were slightly smaller than what was contracted and 9) will, "many times," not have free coffee available for its tenants.

The crux of the complaint, however, appears to be the following: on July 27, 2008, STORExpress cut the locks off of Ms. McLane's eight storage rooms and transferred all of her belongings elsewhere; this was done, Ms. McLane averred, despite the fact that she was current on her rental payments. As with Plaintiffs other claims, Ms. McLane alleged that these actions violated her constitutional **[*3]** rights, constituted a breach of contract and caused her "great emotional distress." The complaint sought damages in excess of $ 1,000,000. [1]

> 1 The initial complaint also sought injunctive relief to prohibit STORExpress from destroying or otherwise disposing of her property. And, on August 28, 2008, this Court (speaking through the Honorable Robert P. Horgos) granted, in part, Ms. McLane's preliminary injunction request. According to Judge Horgos's Order, STORExpress was required to; "provide the keys to the storage unit forthwith", allow Plaintiff "access to the storage unit during normal business hours" and "not dispose or damage any of Plaintiff's property." Order of Court, dated August 28, 2008, Horgos, J.

A quick view of the complaint shows that its procedural and substantive problems are many. For example: the Complaint is not divided into separate counts; almost all of the paragraphs contain two or more material allegations of fact; the allegations contain a multitude of "impertinent matter"; the buried "*ad damnum*" clauses request haphazard monetary damages; the necessary contract is not attached to the complaint; almost all of the claims have no basis in law; as shown below, many **[*4]** of the claims, even according to Plaintiffs own averments, have no basis in fact, and the complaint is not verified. Hence, after Defendants filed preliminary objections to the complaint, this Court (speaking through the Honorable Paul F. Lutty) sustained the preliminary objections and struck the complaint in its entirety. Moreover, Judge Lutty's Order specified: "Plaintiff may file an amended complaint ***limited to a breach of contract action for damage to her personal property***." Order of Court, dated October 22, 2008, Lutty, J (emphasis added).

Ms. McLane responded to Judge Lutty's Order with an amended complaint that -- both legally and socially speaking -- was ***even more*** objectionable than the first. Although the Amended Complaint was verified and did attach the written contract between the parties, Ms. McLane refused to limit her complaint to a "breach of contract action for damage to her personal property." *Id.* Rather, from what this Court can see, Ms. McLane simply reprinted her original, unanswerable, 38-page Complaint, doubled the requested money damages and then ***added*** 21 unanswerable pages to the screed.

Further, located right in the middle of this Amended Complaint is an odd **[*5]** digression in which Ms. McLane explains how our nation has gone wrong. This social commentary first laments the decline of the gold standard and then blames every ill of the United States upon the "Jews; Negros; Italians; Chinese, etc." -- groups of people who, from Ms. McLane's understanding, "were not to [have been] allowed into the United States" in the first place. Amended Complaint, at 26. Plaintiff follows this discourse with a story of how the Pittsburgh Public Library removed its single typewriter from public use; this anecdote, Ms. McLane implies, is emblematic of our failing society. She writes:

> And on Thursday, November 2008, the manager at the said downtown Pittsburgh, Pa. library decided to remove the typewriter there because a black (negro) young man refused to relinquish the only (one) typewriter -- even though he had been typing on it for four (4) hours; he said it was because he was black.
>
> []which fits right in with what herein Plaintiff has been saying -- if the negroes do not get their way, they cause a fuss, yell racist, swear.
>
> This is what comes of giving to a group of people (who were never to have been in the United States of America) the status of being special.
>
> They **[*6]** are owed NOTHING. And

> just as with the typewriter, they have destroyed the public schools which they attend.
>
> So, shortly, the United States of America will cease to exist. It is a failed experiment.

Amended Complaint, at 29A-B (emphasis in original).

Next, Ms. McLane's writing jumps to the various "rackets" that exist in the United States (such as the "gambling racket", the "alcohol racket" and the "charities racket") and, finally, transitions to the issue of implanting "human genes in pigs and pig genes in humans." Amended Complaint, at 29B-C.

Understandably, Defendants again filed preliminary objections to Plaintiffs complaint and, this time, the Court placed an ultimatum upon Plaintiff. In the Order dated March 11, 2009, this Court (speaking through the Honorable Christine A. Ward) sustained Defendants' preliminary objections, struck Plaintiff's Amended Complaint and specifically ordered:

> Plaintiff is granted ***one last opportunity*** to amend her complaint within thirty (30) days of the date of this court's Order, consistent with Judge Lutty's Order of October 22, 2008. The amended complaint shall consist of a count for breach of contract for damage to her personal property. ***Failure to comply*** [*7] ***with this order shall result in dismissal with prejudice.***

Order of Court, dated March 11, 2009, Ward, J (emphasis added).

Unfortunately, Ms. McLane did not heed Judge Ward's Order. Rather, Ms. McLane's "Second Amended Complaint" contains repeated allegations that the Defendants violated her constitutional rights, committed various torts against her and caused her "great emotional pain and upset." *See, e.g.*, Plaintiffs "Second Amended Complaint," at 4 & 5. Moreover, and oddly, Ms. McLane's "Second Amended Complaint" avers, over and over again, that there ***never was a contract*** between herself and STORExpress. *See, e.g.*, Plaintiffs "Second Amended Complaint," at 6 ("There is NO contract by and between herein Plaintiff, Mary McLane and herein Defendant, Storexpress, Inc"); 8 ("The Agreement/contract was never completed...thus no contract exists..."); 9 (the contract is "NULL AND VOID and none of the terms and conditions of said contract apply to herein said MARY McLANE"); 9-10 ("All of the contracts by and between herein Plaintiff...[and] herein Defendant....[are] invalid, non-binding, null and void as a contract").

And, added to these substantive problems, the very same procedural errors that were [*8] present in Ms. McLane's "original" and "amended" complaints are present here. Simply put, this complaint is (again) unanswerable: every paragraph in the complaint contains a multitude of factual allegations; it is not clear which paragraphs attempt to state a claim for relief; in almost every instance, it is unclear what "relief Plaintiff actually does seek and the Complaint is replete with "impertinent matter."

Therefore, the Defendants once again filed preliminary objections to the pleading: the Defendants requested that Plaintiffs "Second Amended Complaint" be dismissed with prejudice. I agreed that the complaint should be dismissed with prejudice and, on June 4, 2009, this Court entered an Order to that effect; Plaintiff has now filed this meritless appeal. The ensuing discussion will explain first why I dismissed Plaintiffs "Second Amended Complaint," and second why I did not afford Plaintiff leave to amend.

I was forced to dismiss Plaintiffs "Second Amended Complaint" for a variety of independent reasons; First, I dismissed the pleading because the complaint violates two prior orders of Court. As was explained above, Plaintiff's initial complaint contained an assortment of outlandish [*9] claims. She alleged that the Defendants violated her constitutional rights, breached a contract with her and caused her "great emotional distress" because they did such things as: only recently installed a bathroom; failed to have heating and air-conditioning on every floor and "many times" failed to have free coffee available for their tenants. Further, the rambling complaint was just not answerable. Thus, after receiving Defendants' preliminary objections, Judge Lutty struck the unanswerable complaint and, in an attempt to help focus Plaintiff, ordered that she limit her amended complaint to "a breach of contract action for damage to her personal property." Order of Court, dated October 22, 2008, Lutty, J.

Plaintiff ignored Judge Lutty's order: she simply ***reprinted*** her initial complaint and then added 21 pages to her original pleading. Therefore, after the Defendants again filed preliminary objections, Judge Ward ordered:

> Plaintiff is granted ***one last opportunity*** to amend her complaint within thirty (30) days of the date of this court's Order, consistent with Judge Lutty's Order of October 22, 2008. The amended complaint shall consist of a count for breach of contract for damage to **[*10]** her personal property. ***Failure to comply with this order shall result in dismissal with prejudice.***

Order of Court, dated March 11, 2009, Ward, J (emphasis added).

Yet, for the second time, Plaintiff unmistakably ignored an order of Court: again, Plaintiff failed to limit her complaint "to a breach of contract action for damage to her personal property." Instead (and again), Plaintiffs "Second Amended Complaint" alleges that the Defendants violated her constitutional rights, committed various torts against her person and caused her "great emotional pain and upset." Not only do these claims have no basis in law, but their inclusion plainly violates the terms of both Judge Lutty's and Judge Ward's orders. And, as was made clear by Judge Ward's March 11, 2009 Order, "dismissal with prejudice" was required for such a violation.

Secondly (and independent of the above reason), I dismissed Plaintiff's "Second Amended Complaint" because it is just not answerable. As stated above: every paragraph in the complaint contains multiple factual allegations; it is not clear which paragraphs attempt to state a claim for relief; in almost every instance, it is unclear what "claim" or what "relief Plaintiff **[*11]** actually does seek and every paragraph in the complaint contains varying amounts of "impertinent matter."

Finally, I was forced to dismiss Plaintiffs complaint for another independent reason: none of the claims have any basis in law or in fact. To be sure, from reading Plaintiff's earlier attempts, Plaintiff's only conceivable claim could have been one for breach of contract. Yet, in Plaintiff's "Second Amended Complaint," Plaintiff repeatedly avers that ***there is no contract*** between herself and STORExpress. Therefore, as the "Second Amended Complaint" states no valid cause of action, I was required to dismiss the pleading.

And, with my dismissal, I did not afford Plaintiff leave to amend her complaint.

It is true that, although the amendment of pleadings is a matter placed within the trial court's discretion, as a general rule leave to amend should be liberally granted. *Kilian v. Allegheny. County Distribs., Inc.*, 409 Pa. 344, 185 A.2d 517, 519 (Pa. 1962). This "general rule" is currently embodied in Pennsylvania Rule of Civil Procedure 1033, which declares: "A party, either by filed consent of the adverse party or by leave of court, may at any time...amend his pleading." Pa.R.Civ.P. 1033. Yet, as our **[*12]** Supreme Court has held, neither Rule 1033 nor Pennsylvania case law ***requires*** "a court to *sua sponte* order...a party to amend his pleading." *Werner v. Zazyczny*, 545 Pa. 570, 681 A.2d 1331, 1338 (Pa. 1996). And, here, Plaintiff ***never asked*** this Court for leave to amend her complaint. *See* "Plaintiffs Answer to Defendants* Preliminary Objections to Plaintiffs Second Amended Complaint," filed June 4, 2009. Thus, under both *Werner* and Rule 1033, Plaintiff cannot now argue that she should have (yet again) been allowed to amend her complaint: the issue was never raised before this Court. *Id; see also Kalenevitch v. Finger*, 407 Pa. Super. 431, 595 A.2d 1224 (Pa.Super. 1991)(holding: issues not raised before the trial court are waived).

Moreover, even if Plaintiff did request leave to amend, that request would have been denied. This denial would have been based upon at least three independent reasons. First, pursuant to Judge Ward's March 11, 2009 Order, Plaintiff was given "one last opportunity" to amend her complaint; and, as Judge Ward made clear, a "[f]ailure to comply...***shall*** result in dismissal with prejudice." Order of Court, dated March 11, 2009, Ward, J. (emphasis added). Plaintiff failed to comply with Judge Ward's Order **[*13]** -- dismissal with prejudice was, therefore, mandatory.

Also, this was Plaintiffs third attempt at drafting a procedurally proper complaint and, in each attempt, Plaintiff failed miserably. Certainly, Plaintiff's "Second Amended Complaint" was not dismissed for mere "technical" procedural violations. Rather, just like Plaintiffs first two attempts, the current complaint is simply unanswerable. As our Superior Court has held, "[s]eriatim amendments [to a complaint] should not be

allowed absent a showing of reasonable entitlement to repeated restatements of an alleged cause of action." *Halliday v. Beltz*, 356 Pa. Super. 375, 514 A.2d 906, 909 (Pa.Super. 1986). Far from showing any "reasonable entitlement" to an amendment, Plaintiff has shown that she is either unable or unwilling to draft an "answerable" complaint. Further amendment should not be permitted.

Finally, Plaintiffs third attempt fails substantively: as explained above, the "Second Amended Complaint" has no basis in law or fact. According to our Superior Court, even where leave to amend is requested, that leave may be denied "[w]here the initial pleading reveals that the complaint's defects are so substantial that amendment is not likely to cure **[*14]** them, and that the *prima facie* elements of the claim or claims asserted will not be established." *Feingold v. Hill*, 360 Pa. Super. 539, 521 A.2d 33, 39 (Pa.Super. 1987). Here, Plaintiffs only conceivable cause of action is for "breach of contract," Yet, Plaintiff's "Second Amended Complaint" repeatedly avers that "no contract exists" between herself and STORExpress. And, by making these factual averments, it is clear that "amendment would serve no useful purpose even if granted": Plaintiff has shown that she has no substantive claim in this case. *Halliday*, 514 A.2d at 910.

Accordingly, this Court recommends that the Superior Court uphold the contested order and affirm the final judgment entered in this case.

DATE FILED: September 2, 2009

OSPREY PORTFOLIO, LLC, Plaintiff, vs. MAR-RON CATERERS, INC. and MARGO DAVIS, Defendants.

Case No.: 1388

COMMON PLEAS COURT OF PHILADELPHIA COUNTY, PENNSYLVANIA, CIVIL TRIAL DIVISION

2013 Phila. Ct. Com. Pl. LEXIS 403

November 13, 2013, Decided

JUDGES: [*1] MARK I. BERNSTEIN, J.

OPINION BY: MARK I. BERNSTEIN

OPINION

This breach of contract action proceeded to non-jury trial on May 24, 2013. On June 20, 2013, this Court returned a verdict in favor of Defendants and against Plaintiff. Plaintiff filed Motions for Post-Verdict Relief on July 8, 2013. On July 18, 2013, Defendants filed an Answer to Plaintiff's Post-Verdict Motions as well as their own Post-Verdict Motion. On October 9, 2013, this Court entered an Order granting Defendants' Motion for Post Verdict Relief and denying Plaintiff's Motions. Plaintiff timely appeals this decision.

On March 31, 1988, Defendants took out a $60,000 business loan with Meridian Bank at a 10.90% annual interest rate.[1] As part of the loan, a mortgage was secured on Defendant Margo Davis' home. In 2002, Meridian Bank sold the mortgage to Plaintiff.[2] Plaintiff filed this action on April 21, 2008, alleging that $8,844.82 was due, and sought foreclosure on Margo Davis' home.[3] Of this amount, $3,026.68 constituted principal and $5,818.14 overdue interest. In lieu of litigation, Plaintiff offered Defendants a forbearance agreement, which Margo Davis signed individually and on behalf of Mar-Ron. Therein, Plaintiff represented that [*2] Defendants owed $13,555.75.[4]

1 Mortgage and Security Agreement between Margo Davis and Meridian Bank dated March 31, 1988 (Ex. P-1); Mortgage Note between Mar-Ron Caterers, Inc. and Meridian Bank dated March 31, 1988 (Ex. D-2).

2 Assignment of Mortgage dated June 17, 2002 (Ex. P-2).

3 Complaint in Mortgage Foreclosure (Ex. D-1).

4 Forbearance Agreement Number 2, pg. 2 (Ex. P-3).

The forbearance agreement gave Plaintiff the ability to charge an 18% interest rate. This exorbitant interest rate was usurious,[5] and unconscionable.[6]

5 See Saunders v. Resnick, 142 Pa. Super. 457, 16 A.2d 676, 678 (Pa. Super. Ct. 1940) ("As usury is generally accompanied by subterfuge and circumvention of one kind or another to present the color of legality, it is the duty of the court to examine the substance of the transaction as well as its form.").

6 Salley v. Option One Mortgage Corp., 592 Pa. 323, 925 A.2d 115, 119 (Pa. 2007)("[A] contract or term is unconscionable, and therefore avoidable, where there was a lack of meaningful choice in the acceptance of the challenged provision and the provision unreasonably favors

the party asserting it.").

Plaintiff told unrepresented Defendant Margo Davis that should she decline to sign the forbearance agreement, [*3] Plaintiff would proceed with the lawsuit and foreclose on the collateral for the mortgage, her home. Prior to his death shortly before the forbearance agreement was offered, Defendant Margo Davis relied upon her husband to manage their finances. Plaintiff never discontinued its lawsuit, the present action.

Plaintiff kept the lawsuit active but did not further pursue the matter while receiving payments from Defendants. In 2010, Plaintiff informed Mrs. Davis that it believed she had defaulted on a payment.[7] Defendants disputed both the default, and the remaining balance claimed under the forbearance agreement. Defendants continued to make monthly payments as required.[8] Plaintiff nonetheless began active pursuit of the lawsuit, seeking $13,555.75 from the forbearance agreement plus interest.

7 Letter from Attorney Matthew P. Rosenberg to Margo H. Davis, dated February 2, 2010 (Ex. P-7).

8 In the letter informing Defendants of default, Plaintiff acknowledges that "Obligors have continued to make payments to OSPREY[.]" (Ex. P-7).

Plaintiff sued on the mortgage and security agreement. The complaint alleged default on the mortgage and security agreement.[9] Plaintiff verified in its complaint that [*4] as of March 2008 Defendants owed $3,026.68 in principal and $5,818.14 in interest for a total of $8,844.82.[10] Yet, in the forbearance agreement Plaintiff represented that Defendants owed $13,555.75 on the mortgage. The sum as set forth in the forbearance agreement as due was not accurate. This was a material misrepresentation of the sum due. A contract provision induced by fraudulent or innocent misrepresentation is voidable.[11] Even an innocent misrepresentation, where material misinformation is given without knowledge of its falsity, can void a contract.[12] The forbearance agreement was void, and the terms of the underlying mortgage controlled.[13]

9 Plaintiff did not sue on the forbearance agreement. Plaintiff never amended its complaint. The $13,555.75 Plaintiff sought at trial had no basis in either the complaint or the mortgage and security agreement.

10 Admissions in pleadings are binding on the party that makes them. John B. Conomos, Inc. v. Sun Co., Inc. (R&M), 2003 PA Super 310, 831 A.2d 696, 712 (Pa. Super. Ct. 2003). In its Post-Trial Motions, Plaintiff claims that this Court erred in limiting Plaintiff's demand for relief to the amount stated in the Complaint where this Court granted Plaintiff's [*5] oral motion to amend its Complaint to conform to the evidence. A verified complaint is a party admission. An amendment does not abolish such admissions. John B. Conomos. Inc., 831 A.2d at 712. A Court's Opinion is a finding of fact. The Court's grant of a right to amend the Complaint is irrelevant to the Court's finding of fact.

11 Bortz v. Noon, 556 Pa. 489, 729 A.2d 555, 560 (Pa. 1999); Lanci v. Metropolitan, Ins. Co., 388 Pa. Super. 1, 564 A.2d 972, 974 (Pa. Super. Ct. 1989).

12 Id. at 142.

13 In its Post-Trial Motions, Plaintiff claims that this Court admitted evidence of fraud in the inducement of the contract in violation of the Parole Evidence Rule. However, the Pennsylvania Supreme Court recognizes evidence of fraud in the inducement of a contract as an exception to the general rule prohibiting parole evidence. Blumenstock v. Gibson, 2002 PA Super 339, 811 A.2d 1029, 1036 (Pa. Super. 2002) ("If fraud induced the agreement, no valid agreement came into being, and parol evidence is admissible to show that the alleged agreement is void.") (citing LeDonne v. Kessler, 256 Pa. Super. 280, 389 A.2d 1123 (Pa. 1978)).

Five years and four months had passed since Plaintiff's Complaint had been filed. Using the original interest rate of 10.9%, Defendants owed an [*6] additional $1,649.40 on the $3,026.68 principal amount owed at the filing of the Complaint. Adding this interest ($1,649.40) to the interest due as claimed in the March 2008 complaint ($5,818.14) and the principal amount as claimed due ($3,026.68), the total owed by Defendants to Plaintiff was $10,494.22.[14] Based on the testimony presented at trial, Defendants have paid that amount in full and the loan is satisfied.

14 This represents the sum due including interest as of the date of this Court's ruling.

For the aforementioned reasons, the Court denied Plaintiff's Motions for Post-Trial Relief.

11/13/13
DATE

BY THE COURT,

/s/ Mark I. Bernstein

MARK I. BERNSTEIN, J.

CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving the foregoing Addendum to Memorandum in Support of the NCAA Defendants' Preliminary Objections to Second Amended Complaint by First Class Mail and email to:

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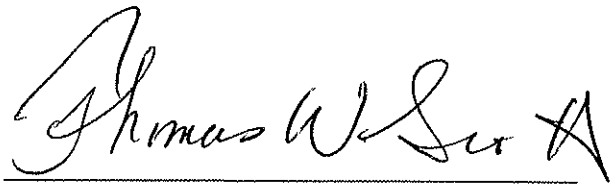

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