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

EDWARD F. LAZARSKI, JR.	:	**CIVIL TRIAL DIVISION**
Appellants,	:	**JANUARY TERM, 2006**
	:	**No. 1074**
v.	:	
	:	**Superior Court Docket No.**
ARCHDIOCESE OF PHILADELPHIA, CARDINAL JUSTIN RIGALI, AND CARDINAL ANTHONY BEVILACQUA	:	**1850 EDA 2006**
Appellees	:	

O P I N I O N

Tereshko, J.

PROCEDURAL HISTORY

Plaintiff Edward Lazarski, Jr. appeals from this Court's Order dated June 28, 2006, which granted summary judgement in favor of Defendants Archdiocese of Philadelphia ("Archdiocese"), Cardinal Justin Rigali ("Rigali"), Cardinal Anthony Bevilacqua ("Bevilacqua").

FACTUAL BACKGROUND

According to plaintiff, he was a parishioner of the Archdiocese at the parish of St. Agnes located in West Chester, Pennsylvania ("St. Agnes") where he served as an alter

boy, was an active member of the Catholic Youth Organization ("CYO") and attended grade school. (Complaint ¶7).

In 1975, while a minor parishioner at St. Agnes and its school, plaintiff became acquainted with Father Leneweaver while attending mass. (Complaint, ¶27). Plaintiff alleges that beginning in 1975 and lasting approximately five (5) years Father Leneweaver sexually abused plaintiff. (Complaint, ¶29-38). Plaintiff states that Father Leneweaver's sexual abuse continued until July 10, 1980 when his parents received an anonymous letter in the mail indicating that Father Leneweaver had left "a previous parish because of his relationship with young boys." (Complaint, ¶40).

When confronted by his parents about this letter, Plaintiff stated that Father Leneweaver had been abusing him since he was in seventh grade. (Complaint, ¶41). Thereafter, the Plaintiff's parents notified the St. Agnes pastor of this and prohibited Father Leneweaver from having any further contact with Plaintiff. (Complaint, ¶43). However, it was not until some twenty-five (25) years after the alleged abuse that Plaintiff would end up commencing an action.

According to a report of the County Investigating Grand Jury, that was made public on September 23, 2005, Father Anthony Massimini reported to the Archdiocese in 1968 that Father Leneweaver was sexually abusing a young boy. (Complaint, ¶45). Father Leneweaver admitted to doing so. (Complaint, ¶45).

After various other assignments, Father Leneweaver was transferred to St. Monica's parish in South Philadelphia in the early 1970's. (Complaint, ¶46). Father Leneweaver committed acts of sexual abuse while at St. Monica's parish. (Complaint, ¶47). According to the Grand Jury Report, in May 1975, Archdiocesan officials,

including Monsignor Statkus and Cardinal Krol became aware of Father Leneweaver's conduct. (Complaint, ¶48). Father Leneweaver admitted to committing such acts. In September 1975, Father Leneweaver was reassigned by the Archdiocese to St. Agnes, where Plaintiff alleges the aforementioned acts occurred. (Complaint, ¶51).

On January 10, 2006, Plaintiff commenced this action alleging negligence, misrepresentation, negligent supervision and fraud on the part of Archdiocese, Cardinal Rigali and Cardinal Bevilacqua. Plaintiff asserts that Father Leneweaver was committing abuse to minors and that the defendants did not disclose this information or failed to take any overt action to prevent further incidents.

However, Defendant's filed their Motion for Summary Judgement contending that Plaintiff's claims were barred by the applicable statute of limitations. On June, 28, 2006 the Trial Court granted Defendants' Motion for Summary Judgment. The Plaintiff subsequently filed his Notice of Appeal and timely submitted his 1925(b) Statement.

LEGAL ANALYSIS

The Pennsylvania Rules of Civil Procedure that govern Summary Judgment instruct in relevant part, that the Court shall enter Judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. *Pa.R.C.P.1035.2(1).* Under the Rules, a Motion for Summary Judgment is based on an evidentiary record that entitles the moving party to a Judgment as a matter of law. *Note to Pa.R.C.P.1035.2*. In considering the merits of a Motion for Summary Judgment, a Court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of

material fact must be resolved against the moving party. *Jones v. SEPTA*, 565 Pa. 211, 772 A.2d 435, 438 (2001).

Under Pennsylvania law, tort claims for intentional conduct, negligence, and conduct based in fraud are subject to a two-year statute of limitations. *Baselice v. Archdiocese of Philadelphia*, 879 A.2d 270, 277, 2005 PA Super 246 (2005). *42 Pa.C.S.A.§ 5524* states, in pertinent part, "the following actions and proceedings must be commenced within two years: an action for assault, battery, false imprisonment ...an action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another ... [and] any other 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." *42 Pa.C.S.A. § 5524(1), (2), (7).*

According to 42 Pa.C.S.A. 5502(a) limitations periods are computed from the time the cause of action accrued. *Fine v. Checcio*, 582 Pa. 253, 256 870 A.2d 850, 857-858 (2005). In Pennsylvania, a cause of action accrues when the plaintiff could have first maintained the action to a successful conclusion. *Id*. Thus, we have stated that the statute of limitations begins to run as soon as the right to institute and maintain a suit arises. Id. (citing *Pocono International Raceway, Inc. v. Pocono Produce, Inc.*, 503 Pa. 80, 468 A.2d 468, 471 (Pa. 1983)). Generally speaking, in a suit to recover damages for personal injuries, this right arises when the injury is inflicted. Id. Mistake, misunderstanding, or lack of knowledge does not toll the running of the statute. Id. (citing *Nesbitt v. Erie Coach Co.*, 416 Pa. 89, 204 A.2d 473, 475 (Pa. 1964)). *Pocono International*, 468 A.2d

at 471. Once a cause of action has accrued and the prescribed statutory period has run, an injured party is barred from bringing his cause of action. *Fine*, 870 A.2d at 857.

A person asserting a claim "is under a duty to use all reasonable diligence to be properly informed of the facts and circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period." *Pocono Int'l Raceway*, 468 A.2d at 468. If the court accepts as true the fact that Plaintiff's abuse continued until July 10, 1980, according to the two-year statute of limitations applicable in this case, Plaintiff's claim would have expired approximately twenty four (24) years before this action was commenced.

There are exceptions that act to toll the running of a statute of limitations. The discovery rule and the doctrine of fraudulent concealment are such exceptions. Plaintiff pleads these exceptions in his Complaint. However the discovery rule has been held in similar cases to be inapplicable.

In two recent decisions, the Superior Court has held that the discovery rule does not apply with respect to allegations such as these against the Archdiocese of Philadelphia. *Meehan v. Archdiocese of Philadelphia*, 870 A.2d 912, 921, 2005 PA Super 91 (2005), *Baselice v. Archdiocese of Philadelphia*, 879 A.2d 270, 277, 2005 PA Super 246 (2005). In both *Meehan* and *Baselice*, the Superior Court affirmed the trial courts' granting of judgment on the pleadings base on the statute of limitations. In both cases, the Court found no questions of fact for the jury regarding when the plaintiffs knew or should have known that they were injured or that the Archdiocese could have been responsible for their injuries. *Baselice*, 879 A.2d at 277.

In Meehan, the Court stated:

> Here, the plaintiffs knew they were injured, knew the identity of the primary cause of their injury, knew their abusers were employees of the Archdiocese of Philadelphia, and knew the abuses took place on church property, yet the plaintiffs conducted no investigation into any cause of action against their abusers or into any other aspect of the matter. It is undisputed that the plaintiffs were aware that the Archdiocese employed their abusers and that the abuses all occurred on church property. These facts alone were insufficient to put the plaintiffs on notice that there was a possibility that the Archdiocese had been negligent. *Meehan*, 870 A.2d at 921.

The Court in *Baselice,* stated that,

> "[n]either the appellant's lack of knowledge of the Archdiocese's conduct, nor appellant's reluctance, as a member of the Catholic Church, to investigate the possible negligence of the Archdiocese of Philadelphia after having been abused by one of its priests, tolls the statute of limitations when appellant had the means of discovery by neglected to use them." *Baselice,* 879 A.2d 278.

Courts have consistently held in these types of cases, that the discovery rule has no applicability in sexual abuse cases. *E.J.M. v. Archdiocese of Philadelphia*, 622 A.2d 1388, 1390-1391, 424 Pa. Super. 449, 450-456 (1993), *Seto v. Willits*, 638 A.2d 258, 432 Pa. Super. 346 (1994).

Plaintiff admitted in his Complaint that he knew he was injured, knew the identity of his abuser, and knew the abuser was a priest of the Archdiocese. However, the Complaint is void of any indication that the plaintiff ever attempted to conduct investigation or hired counsel to substantiate any allegation against the Archdiocese within the applicable limitations period. Had plaintiff sought legal advice, he more likely would have been advised of his rights under the law against Father Leneweaver's employer and supervisors on a theory of vicarious liability and/or negligent supervision. In light of plaintiff's admissions, and his failure to set forth any diligence, investigation

or legal consultation within the limitations period, the discovery rule cannot be appliced in this case.

Plaintiff's Complaint makes also alleges counts of fraudulent concealment against defendants in an attempt to circumvent the statute of limitations.

The doctrine of fraudulent concealment is an exception to the requirement that a complaining party must file suit within the statutory period. Where, "through fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry, the defendant is estopped from invoking the bar of the statute of limitations." *Kingston Coal Co. v. Felton Mining Co.*, 456 Pa. Super. 270, 690 A.2d 284, 290 (1997). The defendant's conduct "need not rise to fraud or concealment in the strictest sense, that is, with an intent to deceive; unintentional fraud or concealment is sufficient . . . mere mistake, misunderstanding or lack of knowledge is insufficient however, and the burden of proving such fraud or concealment, by evidence which is clear, precise and convincing, is upon the asserting party." *Id*. Moreover, "in order for fraudulent concealment to toll the statute of limitations, the defendant must have committed some affirmative independent act of concealment upon which the plaintiffs justifiably relied." *Id.*

Plaintiff's Complaint fraud count consists of unsupported general allegations concerning other alleged abuse by other members of the Archdiocese. This is an attempt by plaintiff to direct the Court attention to what is irrelevant evidence, rather than focus on the central issue of the conduct of the Archdiocese and Father Leneweaver as it relates to plaintiff. As the Complaint relates to this issue, plaintiff claims that defendants "systematically concealed [their knowledge of an offending cleric's misconduct], failed

to report the misconduct to authorities and prevailed upon others not to report said misconduct to law enforcement officials." (Complaint, ¶78). In *Aquilino v. Philadelphia Catholic Archdiocese*, 2005 PA Super 339; 884 A.2d 1269, 1279 (2005), the Superior Court found that the tolling of the statute of limitations based on the acts of the priest could not be imputed to the Archdiocese or the parish, who might be vicariously liable for the priest's actions. In addition, the doctrine of fraudulent concealment was inapplicable where the plaintiff alleged he recalled repressed memories of abuse many years later and asserted the applicability of the doctrine of fraudulent concealment to overcome the statute of limitations problem with regard to his claims of sexual abuse by a priest. *Id*.

Plaintiff in *Aquilino* also averred that the Archdiocese, consistent with its practice of transferring offending priests from parish to parish, transferred Father D'Onofrio to Peru. Id. Despite this more specific assertion with regard to the Archdiocese's handling of Father D'Onofrio, Aquilino still failed to aver that he "questioned the Archdiocese about his abuser" at any time. See also *Baselice*, 879 A.2d at 278. He did not, for example, assert that he questioned the Archdiocese/Parish about "his abuser's current location or history with the church." *Id.* As we concluded in *Baselice*, had Aquilino made these inquiries and "had the Archdiocese affirmatively and independently acted in response to [Aquilino's] inquiries so as to mislead [Aquilino] into forgoing his suit, the fraudulent concealment exception would later allow [Aquilino's] suit." *Id.* However, nowhere in the complaint did Aquilino aver that he made any inquiries to the Archdiocese/Parish whatsoever, or that the Archdiocese/Parish responded by misleading him into foregoing his suit against them. Thus, the Superior Court found that Aquilino

failed to establish that the doctrine of fraudulent concealment applies to toll the statute of limitations. *Id*.

In all these decisions, the Superior Court noted that it will toll the statute of limitations for fraudulent concealment only where "through fraud…the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry." *Baselice*, 879 A.2d at 278. Mistake, misunderstanding, lack of knowledge, silence or non-disclosure are not enough to trigger tolling of the statute; the defendant must commit some affirmative independent act of concealment upon which the plaintiff justifiably relies in order to toll the statute. *Id*.

The Court in Meehan clarify what constitutes fraudulent concealment:

> Had the plaintiffs (sometime after the abuse but before the running of the statute of limitations) questioned the Archdiocese about their abusers (for example, questions about their abusers' current location or history within the church), and had the Archdiocese affirmatively and independently acted in response to the plaintiffs' inquiries so as to mislead the plaintiffs into forgoing their suits, the fraudulent concealment exception would later allow the plaintiffs' suits. The general and systematic conduct alleged by the plaintiffs here, however, does not constitute an affirmative act for purposes of the fraudulent concealment exception and the plaintiffs have not shown that they relied on any affirmative act of concealment by the defendants which caused them to forgo pursuit of their causes of action. We agree that "to postpone the accrual of causes of action until [the plaintiffs] completed their investigation of all potential liability theories would destroy the effectiveness of the limitations period." *Id.* Therefore the fraudulent concealment exception is inapplicable and does not toll the statute of limitations in this matter. *Id*. At 922-923.

Plaintiff has not plead facts which would satisfy the elements of fraudulent concealment. In paralleling *Aquilino* and *Meehan*, plaintiff has failed to identify any specific

affirmative act of concealment by the Archdiocese. Plaintiff has also failed to take any overt action to speak to an official of the Archdiocese within the statute of limitations period, whereby Plaintiff or parents were misled into believing that the sexual abuse by Father Leneweaver did not occur or that plaintiff was not injured. Plaintiff does not assert that the Archdiocese concealed from Plaintiff that the injury occurred. Nor Plaintiff's claim that he was deceived by the Archdiocese with regard to the identity of the abuser or his affiliation within the Archdiocese so as to suspend his investigation or pursuit of litigation. Much like in *Baselice*, plaintiff is attempting to associate silence by defendant as concealment under the law. However *Baselice* stated, an argument for fraudulent concealment where plaintiff alleges general conduct and/or silence as liability, "…misses the mark…for a cause of action to accrue,…as soon as [appellant] became aware of the alleged abuse, [he] should also have been aware that [Appellees], as [priest's] employers, were potentially liable for that abuse." *Id*. 879 A.2d 279.

Taken into consideration the fact that Plaintiff was aware of all the facts at the time the battery occurred by Father Leneweaver and, despite this, failed to investigate, seek advice of counsel or confront his potential claims against the Archdiocese. According to the law, plaintiff cannot be said to have proven that the Archdiocese committed some overt act amounting to fraudulent concealment of facts giving rise to the cause of action to have tolled the statute of limitations.

Lastly we will address the contention that the Servicemembers Civil Relief Act (hereinafter SCRA) tolled the statute of limitations for plaintiff's case. Plaintiff states that he enlisted in the United States Navy on July 1, 1982, just a few days before the two-

year statute of limitations expired, and that he presently remains a member of the Navy. However this does not make absolute the SCRA's protection.

The SCRA allows service members, "the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of service members during their military service." 50 App. U.S.C.A. §502(1-2). The SCRA 50 App. U.S.C.A. §526(a) dealing with the statute of limitations tolling provision during military service, states:

> (a) *The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court*, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns. (emphasis added).

According to 50 App. U.S.C.A. Appx §511(2)(A)(i) under the SCRA defines "military service" as a servicemember who is on "active duty."

> The term "*active duty" means full-time duty in the active military service of the United States*. Such term includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. Such term does not include full-time National Guard duty. 10 U.S.C.A. §101(d)(1). (emphasis added).

Plaintiff claims that on July 1, 1982, he "enlisted in the military and continuously remained and still remains in the military services." (Complaint, ¶103). However, Plaintiff's allegation that he "enlisted" in the military on July 1, 1982 does not satisfy the SCRA's definition of "period of military service."

While plaintiff may have "enlisted" in the military on July 1, 1982, as he alleges in the Complaint, according to official military records, this date is his pay entry base "PEBD." (Motion for Summary Judgment, Exhibit A, B).

In fact, Plaintiff's military records demonstrate that he has not consistently been a servicemember on active duty since his enlistment date of July 1, 1982. There are gaps in Plaintiff's active duty status, in which he was classified as inactive. (Motion for Summary Judgment, Exhibit B). Specifically, Plaintiff has documented days of inactive service from 7/1/82 through 1/31/83, 8/7/83 through 2/1/86, and again from 2/15/86 through 11/27/86. These gaps of inactive service totaled twenty-two (22) months. The SCRA provision of the statute would therefore not apply to those dates. The tolling provision of the SCRA only applies during the period in which the servicemember was in "active service." 50 App. U.S.C.A §511(2)(A)(i), 10 U.S.C.A. §101(d)(1). Furthermore, Plaintiff has had periods of inactive duty in his service such that his "date first entered active duty" and "active duty base date" are calculated as occurring in 1986 and 1987, which is several years after the expiration of the applicable two-year statute of limitations on his claims. The military records show that Plaintiff's "date first entered active duty," or DGAD, is April 3, 1987. (Motion for Summary Judgment, Exhibit A, B). Plaintiff's "active duty base date" is May 10, 1986. Although it is unclear as to whether his active duty date began, whether it be April 3, 1987 or May 10, 1986, in either case, it was well after the statute of limitations expiration date under *42 Pa.C.S.A. § 5524(1), (2), (7).*

Because of the considerable gaps in Plaintiff's active duty, the protection of the SCRA's tolling may not serve to rescue Plaintiff's claim from being filed after the two-

year statute of limitations applicable under *42 Pa.C.S.A.§ 5524* and *42 Pa.C.S.A. § 5524(1), (2), (7).*

CONCLUSION

In light of the foregoing analysis, this Court believes that the Defendants' Archdiocese's, Cardinal Rigali's, Cardinal Bevilacqua's Motion for Summary Judgment was properly granted, and should be affirmed by the Court above.

BY THE COURT:

10-10-2006

Date **ALLAN L. TERESHKO, J.**

cc: Jay N. Abramowitch, Esq./Kenneth Milliman, Esq/Richard M. Serbin, Esq., for Appellant
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