

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

JOSEPH A. ROBINSON,	:	NOVEMBER TERM, 2002
MOTORWORKS, INC., and AR22, INC.,	:	
	:	No. 00220
Plaintiffs,	:	
	:	Control Nos. 040106, 090973
v.	:	
	:	
BERWIND FINANCIAL, L.P., and	:	
BERWIND SECURITIES CORP.,	:	
	:	
Defendants.	:	

**ORDER**

**AND NOW**, this 29<sup>th</sup> of December, 2005, upon reconsideration of this court's Order and Opinion dated August 31, 2005, in which the court granted defendants' Motion for Summary Judgment, and upon consideration of plaintiffs' Motion for Reconsideration, defendants' response thereto, the memoranda in support and in opposition, and all other matters of record, and after holding a hearing on the issue of timely service on December 15, 2005, and in accord with the contemporaneous Opinion being filed of record, it is hereby **ORDERED** that defendants' Motion for Summary Judgment is **GRANTED**, and plaintiffs' claims against defendants are **DISMISSED**.

**BY THE COURT,**

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**C. DARNELL JONES, II, J.**

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**OPINION**

Plaintiffs, Motorworks, Inc. and AR22, Inc. (collectively “Motorworks”), moved to have the court reconsider its Order and Opinion granting the Motion for Summary Judgment of defendants, Berwind Financial, L.P. and Berwind Securities Corp. (collectively “Berwind”). The court granted the Motion for Reconsideration solely because precedent required the court to hold a hearing on the issue of whether Motorworks made a good faith effort to serve Berwind within the four year limitations period applicable to this action. Now that the hearing has been completed, the court reconsiders its ruling on Berwind’s Motion for Summary Judgment.

Motorworks claims to be “the operator of the only national chain of automotive centers that produce, sell and install remanufactured engines.” Second Amended Complaint (“SAC”), ¶ 27. Motorworks retained Berwind, pursuant to a contract (the “Contract”), to serve as exclusive financial advisor to Motorworks “on a best efforts basis in two steps” to obtain the following financing for Motorworks:

- I. Senior Debt Financing
  - A. Revolving Credit Facility of \$2-3 million;
  - B. Mortgage of approximately \$ 625,000 - \$1,237,500; and
  - C. Equipment Loan of \$1,750,000 plus.
- II. Subordinated Debt or Equity Financing of \$5 million to fund additional franchises or other retail locations.

*See* SAC, Ex. A, p.1. The Contract further provides that it

shall remain in force for a period of six months from the date [of] this agreement, May 29, 1998 [i.e. until November 29, 1998] (the “Term”). The Term will automatically renew for an additional nine (9) month period [i.e. until August 29, 1999] (the “Renewal Period”), unless either [Motorworks] or Berwind serve the other party written notice 30 days prior to the end of the Term.<sup>1</sup>

*Id.*, Ex. A, p.7. Neither party served the requisite notice of termination, so the Contract continued in effect through the Renewal Period.

Berwind obtained Senior Debt Financing of \$5 million for Motorworks from Sovereign Bank as follows:

- A. Mortgage loan in the amount of \$1,875,000;
- B. Revolving Credit Line in the amount of \$3,125,000 secured by equipment.

*See* SAC, ¶ 77; Response to Motion for Summary Judgment (“Response”), Ex. I. However, at the December 31, 1998, closing of the Sovereign Bank loan, or shortly thereafter,<sup>2</sup> Motorworks received only \$3,065,000 from Sovereign. *See* SAC, ¶ 78. Apparently, Sovereign refused to

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<sup>1</sup> Motorworks claims that since the Contract is dated June 5, 1998, not May 29, 1998, as contemplated in the termination provision, the Term does not end until December 5, 1998, and the Renewal Period does not end until September 5, 1999. *See* Response, p. 17. However, for the purpose of applying the statute of limitations in this case, this difference of 6 days is not determinative.

<sup>2</sup> Motorworks claims that Sovereign made the limited money from the closing available to Motorworks on January 5, 1999, not immediately at the closing. *See* Response, p. 2. Once again, this difference of 5 days is not determinative.

release the additional \$1,935,000 in credit line funds until Motorworks altered its accounting and reporting systems. *See id.* ¶ 127; Response, Ex. I, Summary of Terms and Conditions, p. 2.

In the present action, Motorworks claims that Berwind breached the Contract by failing to use its best efforts to obtain \$5 million in Senior Debt Financing. *See SAC*, ¶ 1. Motorworks does not set forth a claim in the Complaint for breach of the Contract based on Berwind's failure also to obtain the second level Subordinated Debt or Equity Financing for a total of \$10 million.<sup>3</sup> Instead, Motorworks asserts that Berwind breached the Contract as follows:

- 1) by disregarding the input and professional opinions of [Motorworks' accountant] and by inflating [Motorworks'] financial projections when communicating same to Sovereign Bank in connection with the financing, all without [Motorworks'] knowledge or consent. *SAC*, ¶ 122.
- 2) [by pressuring Motorworks] to settle on the loan on December 31, 1998, full well knowing of the dangers the lack of a proper accounting system would cause [Motorworks], both with regards to amounts of financing available and the failure of [Motorworks] to be able to abide by the terms of the loan in the future. *Id.* ¶ 125.
- 3) in advising [Motorworks] to engage in the financing transaction and proceed with the settlement on December 31, 1998 . . . [particularly since] there was a substantial short fall in the borrowing base with respect to the short term capital requirements of [Motorworks]. *Id.* ¶ 126-127.
- 4) [by failing] to use its best efforts to ensure [Motorworks] obtained a loan which gave them the required financing totaling at least Five Million (\$5,000,000) Dollars and under terms and conditions which they could meet. *Id.* ¶ 128.

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<sup>3</sup> At the hearing, Motorworks' counsel insisted that the Second Amended Complaint sets forth claims based upon the Subordinated Debt or Equity Financing, but the most that it states is that "Berwind agreed to assist [Motorworks] in raising approximately \$5 Million Subordinated Debt and/or Equity Financing in order to facilitate the roll out of additional company owned locations and/or facilitate the selling of additional franchise locations." *SAC*, ¶ 110. The rest of the allegations against Berwind are focused on Berwind's failure to obtain the entire \$5 Million in Senior Debt Financing from Sovereign Bank. "Pennsylvania is a fact pleading state, which requires that the pleader define the issues, apprise the defendant of an asserted claim, and set forth all material and essential facts to support that claim." *San Lucas Constr. Co. v. St. Paul Mercury Ins. Co.*, 2001 Phila. Ct. Com. Pl. LEXIS 59 \* 26 (Mar. 14, 2001). If the nature of Motorworks' claim against Berwind changed during the course of these proceedings, then Motorworks should have filed a Motion to Amend its already amended Complaint to add a new claim. *See Pa. R. Civ. P. 1033.*

5) by not finding another financing source which would give [Motorworks] the required financing on appropriate terms and/or advising [Motorworks] not to proceed with the transaction with Sovereign because of its shortcomings. *Id.* ¶ 132.

[In summary,] Berwind breached its duties to [Motorworks] by presenting false financial projections, failing to duly advise [Motorworks] regarding the financing and obtaining financing under terms and conditions with which [Motorworks] could [not] comply and its breach was the direct and proximate cause of damages to [Motorworks]. *Id.* ¶ 139.

In other words, Motorworks complains solely about the loan that Berwind did obtain (the Senior Debt) and not the one that Berwind failed to obtain (the Subordinate Debt or Equity).

The statute of limitations for a breach of contract action is four years. *See* 42 Pa. C. S. § 5525. The statute “begins to run from the time of the breach” unless that breach is somehow concealed from the plaintiff. Romeo & Sons v. P.C. Yezbak & Son, 539 Pa. 390, 393, 652 A.2d 830, 832 (1995). Since the allegedly inadequate Sovereign Bank loan closed on December 31, 1998, Berwind’s alleged breach of the Contract in connection with that loan occurred on or before that date. Furthermore, since Sovereign refused to release all the loan funds to Motorworks on January 5, 1999, Motorworks was put on notice of the alleged inadequacy of the loan, and thereby of Berwind’s alleged breach of the Contract, at that point, if not before.<sup>4</sup> Therefore, Motorworks had until January 5, 2003, at the very latest, to bring this action against Berwind.

The docket reflects that this action was commenced on November 5, 2002, by Praecipe to Issue Writ of Summons, but nothing else happened until March 19, 2003, when the court issued a Rule to Show Cause why Motorworks should not suffer a non-pros for failure to effect service

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<sup>4</sup> As Motorworks takes pains to point out, the revised loan proposal between Sovereign Bank and Motorworks “did not provide [Motorworks] with the funding [it] needed. Essentially, the revised proposal represented a line of credit of \$3,125,000 of which only \$1,190,000 was available to [Motorworks] post closing. The remaining \$1,935,000 of credit would not be available to [Motorworks] until [its] accounting and reporting systems met Sovereign Bank’s standards.” Response, p. 10. The revised loan proposal was dated November 30, 1998, so the statute of limitations on some of Motorworks’ claims may have begun to run on that earlier date.

and to file a Complaint. New counsel entered his appearance for Motorworks on March 24, 2003, and he filed a Complaint and a Praecipe to Reissue the Writ of Summons on April 8, 2003. Service was made on Berwind on April 10, 2003, more than three months after the statute of limitations ran on Motorworks' claims arising out of the Sovereign Bank loan.

“A writ of summons shall remain effective to commence an action only if the plaintiff then refrains from a course of conduct which serves to stall in its tracks the legal machinery he has just set in motion.” Lamp v. Heyman, 469 Pa. 465, 478, 366 A.2d 882, 889 (1976). In order to satisfy the Lamp rule, a plaintiff must

make a good faith attempt to effect service of process in a timely manner where an action is commenced prior to the running of the statute of limitations but service does not occur until after the expiration of the statutory period. What constitutes a good faith effort is assessed on a case-by-case basis. . . . It is not necessary that the plaintiff's conduct be such that it constitutes some bad faith act or overt attempt to delay before the rule of Lamp will apply. Simple neglect and mistake to fulfill the responsibility to see that the requirements for service are carried out may be sufficient to bring the rule in Lamp to bear. Thus, conduct that is unintentional that works to delay the defendant's notice of the action may constitute a lack of good faith on the part of the plaintiff.

Devine v. Hutt, 863 A.2d 1160, 1168 (Pa. Super. 2004) (citations omitted). In this case, Motorworks' counsel conceded at the hearing that Motorworks and its prior counsel did not take “affirmative action to effect service in accordance with the applicable rules of procedure” prior to April 8, 2003.<sup>5</sup> Ramsay v. Pierre, 822 A.2d 85, 91 (Pa. Super. 2003). Since the Complaint was filed and served after the statute of limitations had run, and no evidence of a good faith attempt at service was presented by Motorworks, Motorworks' claims are untimely and must be dismissed.

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<sup>5</sup> Instead, counsel argued that the service issue was irrelevant because the statute of limitations did not run on the Contract claims until well after service of the original Complaint.

**CONCLUSION**

For all the foregoing reasons, defendants' Motion for Summary Judgment is granted and plaintiffs' claims are dismissed.

**BY THE COURT,**

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**C. DARNELL JONES, II, J.**