IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

AHMED N. ABDI and ZAHRA MOHAMED,	)	
Plaintiffs,	)	
	)	C.A. No. 04C-08-028-PLA
v.	)	
NVR, INC., t/a RYAN HOMES,	)	
Defendant.	)	

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
GRANTED

Submitted: August 3, 2007
Decided: August 17, 2007

This 17th day of August, 2007, upon consideration of the Motion for Summary Judgment filed by NVR, Inc. t/a Ryan Homes ("Defendant"), it appears to the Court that:

1. On January 29, 1999, Ahmed N. Abdi and Zahra Mohamed ("Plaintiffs") executed an agreement with Defendant to purchase a new home located at 474 Preakness Run, Newark, Delaware 19702, otherwise

known as Lot 67 of the Old Post Farm ("Property"). On August 11, 1999, Plaintiffs settled on the Property and subsequently moved in.[1]

2. In February 2000, Plaintiffs began to experience problems with their basement bathroom. On one occasion, during a rain storm, sewage backed up in the sewer line and entered Plaintiffs' basement bathroom through the toilet, shower, and sink. Following this incident, both New Castle County ("County") and Defendant were informed of the problems Plaintiffs were experiencing with their basement bathroom. From then on, Plaintiffs continued to have problems with sewage backup in their basement bathroom until the County installed a backwater valve in January 2003.[2]

3. On August 5, 2004, Plaintiffs filed a Complaint against Defendant asserting negligence and breach of warranty claims. On September 29, 2004, Defendant filed an Answer to the Complaint asserting only one affirmative defense - failure to state a claim. On December 1, 2005, Defendant filed a Motion for Leave to Amend its Answer with "the only proposed changes [being] the addition of the affirmative defenses of estoppel, waiver, statute of limitations and contributory negligence." As an exhibit to its motion, Defendant attached a copy of the proposed Amended

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[1] Docket 40, p. 2; Docket 45, ¶ 1. "Docket [#]" refers to the number assigned by LexisNexis File & Serve.

[2] Docket 40, p. 2-3; Docket 45, ¶ 4.

Answer. On January 9, 2006, the Court granted Defendant's Motion for Leave to Amend its Answer.[3]

4. Now before the Court is Defendant's Motion for Summary Judgment. Defendant claims it is entitled to summary judgment because Plaintiffs' claims are barred by the statute of limitations provided for under DEL. CODE ANN. tit. 10, § 8106 ("Section 8106"). Specifically, according to Defendant, because Plaintiffs first became aware of the problem with their basement bathroom in February 2000 and did not file this action until August 2004, they are barred by the three year statute of limitation period pursuant to Section 8106. Defendant further argues that Plaintiffs' breach of warranty claims should also be dismissed because Plaintiffs expressly waived all claims of breach of warranty when they signed the purchase agreement to purchase the Property. That is, the purchase agreement specifically provided that Plaintiffs were waiving any claims that they may have regarding implied warranties. Similarly, Defendant maintains that Plaintiffs also agreed to limit any other warranty claims they may have by agreeing to limit their recourse for all defective components of the house to either repair or replacement, thereby prohibiting the recovery of monetary damages which Plaintiffs now seek. In all, Defendant contends that it is

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[3] Docket 40, p. 2-3; Docket 45, ¶¶ 4-7.

entitled to summary judgment because of “Plaintiffs’ failure to assert their claims within the statute of limitation, waiver of their breach of warranty claims, and waiver of their requests for money damages[.]”[4]

5. Plaintiffs respond by contending that Defendant waived its right to assert statute of limitations and waiver defenses because, even though the Court granted Defendant’s Motion for Leave to Amend its Answer, Defendant never actually filed an Amended Answer asserting a statute of limitation and waiver defense. Therefore, Plaintiffs claim that Defendant’s failure to file an Amended Answer requires the Court to deny the motion as it is simply too late to assert these defenses in a motion for summary judgment that is to be argued on the eve of trial.[5]

6. In considering a motion for summary judgment, the Court's function is to examine the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law. The court will view the record in the light most favorable to the non-moving party and will draw all rational inferences in favor of the non-movant based upon the undisputed facts and the non-

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[4] Docket 40, p. 3-5.

[5] Docket 45, ¶¶ 9-11. Plaintiffs’ response does not address the merits of Defendant’s statute of limitations and waiver defenses. Plaintiffs rely solely upon their contention that Defendant has waived its right to assert those defenses because of its failure to file an amended answer.

movant's version of any disputed facts. If the Court finds that material facts are in dispute or that judgment as a matter of law is not appropriate, summary judgment will be denied. However, if no material facts are in dispute and the moving party is entitled to judgment as a matter of law, summary judgment will be granted.[6]

7. Before turning to the merits of Defendant's motion, the Court must first decide whether, as alleged by Plaintiffs, Defendant has waived its right to assert a statute of limitations defense.

8. Technically, the Superior Court Rules of Civil Procedure require that a statute of limitations defense be pleaded in the answer.[7] The rules further provide that the failure to plead a limitations defense in the answer constitutes a waiver of the right to assert it.[8] The purpose of requiring the defendant to plead a limitations defense in the answer "is to avoid surprise and undue prejudice by providing the plaintiff with notice and

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[6] *See* SUPER. CT. CIV. R. 56; *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992); *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962); *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 879 (Del. Super. Ct. 2005); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. Ct. 1973).

[7] *See* SUPER. CT. CIV. R. 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively … statute of limitations[.]"); SUPER. CT. CIV. R. 12(b) ("Every defense … shall be asserted in the responsive pleading thereto if one is required[.]"); *Kaplan v. Jackson*, 1994 WL 45429, at *2 (Del. Super. Ct. Jan. 20, 1994) ("Superior Court Rule 12(b) requires a defendant to plead a statute of limitations affirmative defense in his or her Answer. Generally, if a defendant does not plead an affirmative defense, he or she waives that defense.").

[8] *Id.*

the opportunity" to rebut the defense.[9] However, because the rules "'reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits,'"[10] rigid adherence to the requirement of pleading a limitations defense in the answer is not always necessary. That is, "a limitations defense does not necessarily have to be raised in the answer."[11] Rather, "[c]onsistent with the purpose of Rule 8(c), courts require that defendants assert a limitations defense as early

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[9] *Robinson v. Johnson*, 313 F.3d 128, 134-135 (3d Cir. 2002). *See also id.* at 135 citing the following cases: "*Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.,* 402 U.S. 313, 350 (1971); *Williams v. Ashland Eng'g Co.,* 45 F.3d 588, 593 (1st Cir. 1995) ("The purpose of Rule 8(c) is to give the court and the other parties fair warning that a particular line of defense will be pursued."); *Grant v. Preferred Research, Inc.,* 885 F.2d 795, 797 (11th Cir. 1989) ("The Supreme Court has held that the purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and a chance to rebut it."); *Marino v. Otis Eng'g Corp.,* 839 F.2d 1404, 1408 (10th Cir. 1988) ("The purpose behind rule 8(c) ... [is to] put[ ] 'plaintiff on notice well in advance of trial that defendant intends to present a defense in the nature of an avoidance.' ") (citations omitted); *Perez v. United States,* 830 F.2d 54, 57 (5th Cir.1987) ("The central purpose of the Rule 8(c) requirement that affirmative defenses be pled is to prevent unfair surprise. 'A defendant should not be permitted to 'lie behind a log' and ambush a plaintiff with an unexpected defense.'") (citations omitted)."

[10] *Heyl & Patterson Intern, Inc. v. F.D. Rich Hous. of Virgin Islands, Inc.*, 663 F.2d 419, 426 (3d Cir. 1981) (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)).

[11] *Robinson*, 313 F.3d at 135.

as reasonably possible."[12] That does not imply "that a limitations defense can be raised at any time[]" but, instead, suggests that the defendant assert the defense in a timely manner so as "to promote judicial economy" and "avoid surprise and undue prejudice" to the plaintiff.[13]

9. In this case, Defendant asserted its statute of limitations defense "as early as reasonably possible." Although Defendant did not technically comply with the rules by asserting a limitations defense in its answer, Defendant did file a Motion for Leave to Amend its Answer by the deadline contained in the trial scheduling order (December 1, 2005) and, within that motion, sought to amend its answer to include a statue of limitations defense.[14] Defendant also attached as an exhibit to the motion to amend its proposed amended answer in which it asserted a statute of limitations

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[12] *Id.* at 135-136. *See also Gadow v. Parker*, 865 A.2d 515, 518-519 (Del. 2005) (In explaining the *Robinson* holding, the Court noted: "The Court of Appeals held that a limitations defense that is not raised in the manner prescribed by the Federal Rules of Civil Procedure must be raised 'as early as reasonably possible,' or it will be deemed to have been waived."); *Long v. Wilson*, 393 F.3d 390, 401 (3d Cir. 2004) ("Thus, although an affirmative defense need not be raised in the answer, it must be raised 'as early as practicable' thereafter.")

[13] *Id.* at 134-135; *Long*, 393 F.3d at 401. *See also Cannelongo v. Fid. Am. Small Bus. Inv. Co.*, 540 A.2d 435, 440 (Del. 1988) ("The failure to *timely* assert an affirmative defense constitutes waiver of the right to do so.") (emphasis supplied); *Ratcliffe v. Fletcher*, 1996 WL 773003, at *3 (Del. Dec. 24, 1996) ("This Court has ruled that failure to raise an affirmative defense may constitute a waiver, if that defense is not raised in a *timely* fashion.") (emphasis supplied).

[14] *See* Docket 8, 16.

defense.[15] This alone is sufficient in that, although Defendant did not rigidly adhere to the formalities by filing an amended answer after its motion to amend was granted, the mere filing and granting of Defendant's motion to amend constituted a timely and proper amendment of its answer.[16] Plaintiffs cannot now claim that they are surprised and prejudiced by Defendant's assertion of a limitations defense as Plaintiffs have been on notice of Defendant's reliance on that defense since December 2005.[17] What is more, Plaintiffs impliedly consented to the statute of limitations amendment by

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[15] *See* Docket 16, ex. A.

[16] *See Long*, 393 F.3d at 401 ("Consistent with *Heyl*, [663 F.2d at 425,] we agree that, although the Commonwealth did not rigidly adhere to the formalities of seeking leave to amend, it in effect made a timely and proper amendment of its answer."). As further explained by the court in *Long*: "In *Heyl,* the plaintiff filed a breach of contract action and the government, in an amended answer, pleaded one specific type of illegality as an affirmative defense. The government's pretrial statement contained an assertion of the same specific illegality defense. In its opening statement at trial, however, the government asserted three additional specific illegality defenses. Judgment was entered in its favor. On appeal the plaintiff argued that the government had waived the three additional illegality defenses, and that the district court improperly treated the government's opening statement at trial as an implied amendment to the answer. We disagreed, holding first that, although 'procedure[s] for obtaining leave to amend pleadings set forth in Rule 8 of the Fed. R. Civ. P. should generally be heeded, ... rigid adherence to formalities and technicalities must give way before the policies underlying Rule 15.' Moreover, we did not believe that the government had to supply a compelling reason for its delay in asserting the three additional defenses in view of the absence of prejudice to the plaintiff." *Id.* at 400-401.

[17] *See id.* at 400 ("In determining what constitutes prejudice, the [Court] considers 'whether the assertion of the new claim would: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction.'") (citation omitted).

failing to object to Defendant's motion to amend.[18] Therefore, Defendant has not waived its right to assert a limitations defense and, as such, the Court will address the merits of Defendant's contention that Plaintiffs' claims are barred by the statute of limitations.

10. The statute of limitations for breach of warranty and negligence claims is found in Section 8106.[19] Section 8106 provides:

> No action to recover damages for trespass, no action to regain possession of personal chattels, no action to recover damages for the detention of personal chattels, no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations, no action based on a promise, no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such

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[18] *See Filliben v. Jackson*, 247 A.2d 913, 914 (Del. 1968) (Failure to object to an amendment of a pleading is implied consent to it.); *Kaplan*, 1994 WL 45429, at *2 ("Superior Court Rule 12(b) requires a defendant to plead a statute of limitations affirmative defense in his or her Answer. Generally, if a defendant does not plead an affirmative defense, he or she waives that defense. However, Delaware courts have recognized an exception to this general rule where evidence of an unpled affirmative defense is admitted without objection. The procedural result of this 'admission without objection' is the same as if the affirmative defense had been added as an amendment to the pleadings under Superior Court Civil Rule 15(b).").

[19] *See Christiana Marine Serv. Corp. v. Texaco Fuel and Marine Mktg.*, 2002 WL 1335360, at *3 (Del. Super. Ct. June 13, 2002) ("Delaware's statute of limitations for contract and negligence actions is found in [Section] 8106."); *Elmer v. Tenneco Resins, Inc.*, 698 F. Supp. 535, 538-539 (D. Del. 1988) ("Delaware courts treat a breach of warranty claim as a contract[.]"); *Estall v. John E. Campanelli & Sons, Inc.*, 1993 WL 189500, at *2 (Del. Super. Ct. Apr. 30, 1993); *Marcucilli v. Boardwalk Builders, Inc.*, 2002 WL 1038818, at *4 (Del. Super. Ct. May 16, 2002) (Section 8106 is the applicable statute of limitations for breach of warranty claims).

> action; subject, however, to the provisions of §§ 8108-8110, 8119 and 8127 of this title.

Therefore, pursuant to Section 8106, a plaintiff must bring an action for breach of warranty and negligence within three years of "the accruing of the cause of such action."[20]

11. A cause of action for breach of warranty "accrues" on the sale date of the "product."[21] In the context of a real estate purchase, the sale date refers to the date of settlement. As a result, a plaintiff must bring an action

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[20] *See Commercial Union Ins. Co. v. S&L Contractors*, *Inc.*, 2002 WL 31999352, at *1, 3 (Del. Com. Pl. Nov. 8, 2002) ("As to plaintiff's negligence claim, the three year statute of limitations found in [Section] 8106 is applicable to that claim rather than the two year statute of limitations set forth in [Section] 8107."); *S&R Assocs., L.P. v. Shell Oil Co.*, 725 A.2d 431, 439 (Del. Super. Ct. 1998) ("Generally, a three-year statute of limitation under [Section] 8106 governs claims of negligence."); *Elmer*, 698 F. Supp. at 539 (Under Section 8106, "a litigant must bring a cause of action for breach of warranty within three years after the time the cause of action accrued."); *Estall*, 1993 WL 189500, at *2 ("There is an implied builder's warranty of good quality and workmanship in Delaware. The three year period provided by [Section] 8106 applies to claims under this implied warranty.") (citations omitted); *Council of Unit Owners of Sea Colony East, Phase III Condo. v. Carl M. Freeman, Assocs. Inc.*, 1988 WL 90569, at *6 (Del. Super. Ct. Aug. 16, 1988) ("Both parties agree that the three-year limitation found in [Section] 8106 applies to the breach of expressed and implied warranties."); *Plumb v. Cottle*, 492 F. Supp. 1330, 1336 (D. Del. 1980) ("Count I also alleges a cause of action based on breach of expressed and implied warranties[.] … In Delaware such warranties come under the three-year statute of limitations[.]").

[21] *See Plumb*, 492 F. Supp. at 1336 (In Delaware, a "cause of action based on breach of expressed and implied warranties … come[s] under the three-year statute of limitation, … which begins to run at the time of sale."); *Elmer*, 698 F. Supp. at 539 ("A cause of action for breach of implied warranty accrues on the date of the sale of the allegedly faulty product, not from the time a defect is discovered. While Delaware courts have recognized a 'discovery rule' in other contexts [i.e. negligence], … the courts have not extended the rule to claims of breach of implied warranty.") (citations omitted); *Harvey v. Sears, Roebuck & Co.*, 315 A.2d 599, 600 (Del. Super. Ct. 1973) ("[I]t is well established in Delaware that the breach of the implied warranty is deemed to occur at the time of the sale of a faulty product.").

for breach of warranty within three years of the date of settlement.[22] Here, settlement on Plaintiffs' Property occurred on August 11, 1999. Plaintiffs did not file this action until August 5, 2004, almost five years later. Therefore, Plaintiffs' breach of warranty claims are barred by the three year statute of limitations period under Section 8106.

12. Plaintiffs' negligence claim is also barred by Section 8106. A "cause of action in negligence accrues at the time of the injury to the plaintiff."[23] The "time of the injury" occurs, and therefore the limitation period begins to run, when "the plaintiff has reason to know that a wrong has been committed[.]"[24] That is, "[i]t is not the actual discovery of the reason for the injury that starts the clock, but the discovery of facts sufficient to put

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[22] *See Marcucilli*, 2002 WL 1038818, at *4 ("Any breach of this warranty is deemed to occur on the date of settlement and the applicable statute of limitations is [Section] 8106, which requires suit to be filed within three years of when a cause of action arises."); *Di Biase v. A & D, Inc.*, 351 A.2d 865, 867 (Del. Super. Ct. 1976) ("The breach of an implied warranty is deemed to occur at the time of sale … Thus, the three-year statute of limitations, activated at the time of the breach, began to run on March 4, 1970, the date of the settlement. Since this complaint was not filed until August 19, 1974, it would be barred by [Section] 8106[.]"); *Estall*, 1993 WL 189500, at *2 ("Breaches of … warranty are deemed to occur on the date of settlement. Settlement on this house took place on March 31, 1988. Plaintiffs filed suit on March 28, 1991, less than three years later. This claim is not barred by the statute of limitations.").

[23] *Plumb*, 492 F. Supp. at 1336-1337. *See also Christiana Marine Serv. Corp. v. Texaco Fuel and Marine Mktg.*, 2002 WL 1335360, at *3 (Del. Super. Ct. June 13, 2002) ("The 3 year limitation on cause of actions for … a tort claim accrues at the time of the injury."); *Nardo v. Guido DeAscanis & Sons, Inc.*, 254 A.2d 254, 256 (Del. Super. Ct. 1969) ("[A] cause of action in tort accrues at the time of the injury.").

[24] *S&R*, 725 A.2d at 439.

a person of ordinary intelligence on inquiry which, if pursued, would lead to discovery."[25]

13. In *Nardo v. Guido DeAscanis & Sons, Inc.*,[26] a case which is factually similar to this dispute, the plaintiff purchased a newly constructed home from the defendant in 1957. In 1959, the plaintiff noticed the basement walls of the home became damp after rainstorms. In 1960 or 1961, the plaintiff also discovered that the roof began to sag, but it was not until 1965 or 1966 that the plaintiff was made aware that the roof problems were the result of improper placement of the roof rafters. In 1967, the plaintiff eventually filed an action in this Court against the defendant/builder asserting both breach of contract and negligence claims with respect to the basement dampness and roof problems. The Court determined that the negligence cause of action for the basement dampness accrued in 1959, and the negligence cause of action for the sagging roof accrued in 1960 or 1961. Because the case was not filed until 1967, the Court held that the plaintiff's claims were barred by the three year statute of limitations under Section 8106.[27]

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[25] *Id.*

[26] 254 A.2d 254.

[27] *Id.* at 255-257.

14. Similarly, in this case, Plaintiffs first sustained damage in February 2000 when sewage backed up in the sewer line and entered the basement bathroom through the toilet, shower, and sink. This one event provided sufficient facts "to put a person of ordinary intelligence on inquiry" which, if pursued, would have led to the actual discovery of the reason for Plaintiffs' loss. Therefore, consistent with the holding in *Nardo*, Plaintiffs' cause of action for negligence accrued in February 2000 and, because Plaintiffs did not file this action until August 2004, their negligence claim is barred by the three year statute of limitations period under Section 8106.

15. Based on all the foregoing, the Court finds that Defendant adequately amended its answer with a statute of limitations defense and, therefore, did not waive its right to assert that defense. The Court is also satisfied that Plaintiffs' breach of warranty and negligence claims are barred by the three year statute of limitations provided for under Section 8106.[28] Accordingly, Defendant's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

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Peggy L. Ableman, Judge

Original to Prothonotary

[28] The Court is aware that it did not consider Defendant's waiver defense. However, because the Court has determined that Plaintiffs' claims are barred by the statute of limitations, the Court need not decide whether Defendant has waived its right to assert a waiver defense and, assuming Defendant may assert a waiver defense, whether Plaintiffs have waived their right to assert breach of warranty claims.