



**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

M. Diane Koken,  
Insurance Commissioner of the  
Commonwealth of Pennsylvania,  
Plaintiff

No. 269 M.D. 2001.

vs.

Reliance Insurance Company,  
Defendant

In re: Proof of Claim #1914944  
Claimant—Nancy Rackmyer

**REFEREE'S REPORT AND FINDINGS**

William J. Chapas (herein, "Referee") having been appointed Referee for the within matter by Order of the Honorable James Gardner Colins, President Judge of the Commonwealth Court of Pennsylvania, dated May 22, 2006, hereby makes the following findings, conclusions of law, and recommendation that the Motion for Summary Judgment on Behalf of the Statutory Liquidator of Reliance Insurance Company (the "Motion for Summary Judgment") be granted and that Notice of Determination be affirmed and the Objection be denied and in support thereof states as follows:

**FINDINGS**

**Procedural History**

1. By Court Order dated May 22, 2006, the Referee was assigned to hear the objection to notice of determination issued by the Statutory Liquidator (the "Liquidator") for Reliance Insurance Company (In Liquidation), to submit findings of fact where appropriate and

necessary, and to issue recommended decisions regarding said objection relating to the claim filed by Nancy Rackmyer (the "Claimant").

2. On February 1, 2002, Claimant filed a timely Proof of Claim ("POC") seeking payment for property damages to her home due to flooding occurring on or about July 4, 1999, under commercial general liability policy #SI 3024679 issued by Reliance Insurance Company ("Reliance") to the Town of Roseboom, New York (the "Insured") for the policy period January 1, 1999 to January 1, 2000. Claimant contends that a culvert overflowed during a heavy rain causing damage to her home in the amount of \$48,000. It is further alleged that the culvert overflowed because that Insured failed to properly maintain the culvert. On August 5, 2003, the Statutory Liquidator issued its Notice of Determination to Claimant assigning a Priority Level (b) to the POC in accordance with Section 544 (40 P.S. Section 221.44) of the Insurance Department Act (the "Act"). The POC was valued at \$0.00.
3. On or about August 26, 2005, Claimant filed her Objection to the NOD (the "Objection"), which was received by the Statutory Liquidator on September 12, 2005.
4. On September 23, 2005, the Statutory Liquidator filed the Response of the Liquidator to Objection of Nancy Rackmyer to Notice of Determination on Proof of Claim Number 1914944.
5. In conjunction therewith, the Referee and Counsel for the Statutory Liquidator and the Claimant, acting *pro se*, held telephone conference calls on September 1, September 28, and November 29, 2006. In each conference call and in Referee's Orders, dated September 1 and September 28, 2006, Claimant was advised by the Referee that it would be in Claimant's best interest if she were represented by legal counsel to present her case.

Claimant advised that due to financial constraints, she would continue without the benefit of an attorney.

6. During the November 29, 2006 conference call and in the subsequent Referee's Order, dated December 1, 2006, Claimant was given the opportunity to submit whatever additional information and documents she desired. On December 4 and December 18, 2006, the Referee received Claimant's submissions in support of her position. These were in addition to a large poster board display with a map and pictures of Claimant's home and surrounding area that had been previously submitted.
7. By Referee's Order dated December 12, 2006, a schedule for filing of motions, including dispositive motions was set. In conjunction therewith, on December 22, 2006, Counsel for the Statutory Liquidator, timely filed the Motion for Summary Judgment, along with a Memorandum of Law in support thereof. Claimant did not file a response to the motion, but as stated in the Referee's Order, dated December 12, 2006, no adverse inference is being made by the Referee for her failure to file a response.

#### History of Underlying Case

8. On or about July 4, 1999, Claimant's home was damaged after exceptionally heavy rains cause a culvert to overflow. The culvert, which was located within the right of way of State Highway 165, was, according to Claimant, maintained by the Insured. (During the claims process Claimant submitted to the Referee estimates for repair of the damages to her real property in the amount of \$47,004.) Shortly after the incident Claimant avers that she reported the claim against the Insured to the Insured's Superintendent, and in conjunction therewith signed whatever written notice of claim that was required by the Insured.

9. On or about September 2, 1999, Reliance acknowledged receipt of “word” that Claimant had sustained damages to her home, but advised Claimant that the culvert was the responsibility of the State of New York and that Reliance was only liable for those claims for which the Insured was held legally liable, and it appeared that the Insured would not be liable for the incident. Further Reliance’s correspondence went on to say “If you wish to pursue a claim against the Town (Insured), you must complete a written Notice of Claim and file it with the Town Clerk within 90 days of the date of loss.” (added by Referee for clarification). In effect, Reliance didn’t believe the Insured was legally liable, but if Claimant wanted to pursue the matter she should file written notice as required by statute and that prior “notice”, if any, was not adequate.
10. Claimant contends that the written notice was given at the initial meeting with the Insured’s Superintendent, while Reliance in its acknowledgment requested a written Notice of Claim.

#### Summary of Claimant’s Position

11. Claimant asserts that the Insured is liable for negligently maintaining a culvert (the Insured’s workers failed to clean it out, causing it to plug and overflow, which flooded her home), even if it is located within the right of way of a state highway. Further, she gave the Insured timely written notice of the claim for which she seeks damages in the amount of \$47,004.

#### Statutory Liquidator’s Position

12. The Statutory Liquidator contends that Claimant’s claim is barred by the applicable statute of limitations.
  - a. The Claimant failed to give timely written notice of the claim to the Insured. i.e. within 90 days of the claimed loss as required by 50-i of Article 4 of New York

Municipal Law, which requires the written notice comply with section 50-e and be in writing and include the name and address of claimant and attorney, if any, the nature of claim, the time when, place where and manner in which claim arose, and the items of damage claimed to have been sustained). Reliance's letter of September 2, 1999, stated that written notice was not received and advised Claimant to file the appropriate Notice of Claim if she wished to pursue the claim. At no time did Reliance accept responsibility for the damages.

b. Claimant failed to file suit against the Insured within one year and ninety days of the claimed loss as required by 50-i of Article 4 of New York Municipal Law, which states in part that "No action can be prosecuted against a ...town... for damage to real or personal property...for negligence of such ...town... unless (c) the action ... shall be commenced within one year and 90 days after the happening of the event upon which the claim is based." Since no law suit was filed by October 2, 2000, the claim is barred. Reliance was placed in liquidation about a year later. Filing of the POC in the within proceeding in February 2002, does not revive an already barred claim.

13. The Statutory Liquidator further contends that the Insured is not liable for the damage to Claimant's real property. The Insured's policy provides coverage only for sums that the Insured is legally obligated to pay. If any party could be held liable it would be the State of New York, in whose right of way the culvert was situate and not the Insured, which had no responsibility for the culvert or the highway. As the Insured had a liability policy, Reliance's obligation to pay arose only when there were damages which the Insured was "legally obligated" to pay. The policy states "We (Reliance) will pay those sums the insured (Town of Roseboom) becomes legally obligated to pay as damages because of

bodily injury or property damage to which the insurance applies.” (added by Referee for clarification).

14. The Statutory Liquidator also contends that the Claimant’s Objection was not timely filed. The Objection was received by the Statutory Liquidator on or about August 26, 2005. The mailing date of the NOD was August 5, 2003. Under the Commonwealth Court’s Order of September 9, 2002, a claimant shall within sixty (60) days file an Objection to the determination with the Commonwealth Court and serve a copy of the Objection on the Liquidator. Therefore since no Objection was received by October 3, 2003, the Objection was not timely filed and the Claimant may not object to the Statutory Liquidator’s determination.

#### Discussion

15. The Motion for Summary Judgment asserts that the Claimant’s claim against Reliance and its Insured is barred by the applicable statute of limitations and that judgment (in this case a Referee’s recommendation to the Commonwealth Court in the Statutory Liquidator’s favor) is required as a matter of law.

16. Pennsylvania law and procedure apply to the Motion for Summary Judgment, but New York law applies to the underlying claim.

17. A motion for summary judgment is governed by Pennsylvania Rule of Civil Procedure 1035.2, which provides in part that:

“After the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law

(1) whenever there is not genuine issue of any material fact as to a necessary element of

the cause of action or defense which could be established by additional discovery or expert report, ...”

18. The basis for granting a summary judgment motion is set forth in Chepkevich v. Hidden Valley Resort, L.P., 2006 Pa. Super 323, where the Superior Court said:

“Pennsylvania law provides that summary judgment may be granted only in those cases in which the record clearly shows that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. The moving party has the burden of proving that no genuine issues of material fact exist. In determining whether to grant summary judgment, the trial court must review the record in the light most favorable to the non-moving party and must resolve all doubts as to the existence of a genuine issue of material fact against the moving party. Thus summary judgment is proper only when the uncontroversial allegations in the pleadings, depositions, answers to interrogatories, admissions of record and submitted affidavits demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. In sum, only when the facts are so clear that reasonable minds cannot differ, may a trial court properly enter summary judgment...

Weber v. Lancaster Newspapers, Inc., 878 A.2d 63, 71 (Pa. Super. 2005), citing Gutteridge v. A.P. Green Servs., 804 A.2d 643, 651 (Pa. Super. 2002) (citations omitted), appeal denied, 574 Pa. 748, 829 A.2d 1158 (2003).”

See also Pagnotti v. Lancaster Township, 751 A.2d 1226, 1128, n.6 (Pa. Cmwlth. 2000, appeal dismissed, 565 Pa. 467, 776 A.2d 266 (2001).

19. While Claimant did not respond to the Motion for Summary Judgment by affidavit or additional submission, no adverse inference will be made for failure to do so. Instead, for the limited purposes of the Motion for Summary Judgment only, the Referee will

consider all prior submissions by the Claimant in a manner most favorable to the Claimant, notwithstanding any assertions, pleadings or affidavits by the Statutory Liquidator to the contrary.

20. For the purposes of the Motion for Summary Judgment only, the facts in a light most favorable to Claimant are as follows:

(a) torrential rains occurred on July 3 and July 4, 1999 in the Cherry Valley, New York area where Claimant's home was situate;

(b) a culvert within the right of way of State Route 165 became plugged up, causing overflow therefrom to flood Claimant's home and other real property;

(c) the Insured's workers negligently failed to maintain the culvert;

(d) the Claimant's home and other real property sustained damages in the amount of \$47,004;

(e) the Claimant timely reported the loss to the Insured and gave written notice of the claim;

(f) Reliance acknowledged the damage to Claimant's home by letter dated September 2, 1999, but denied liability therefor;

(g) the Claimant did not file suit against the Insured, and no judgment has ever been rendered against the Insured or Reliance on Claimant's claims for damages;

(f) the POC in the within proceeding was filed in February 2002; and

(g) the Statutory Liquidator denied the claim in its NOD.

21. This Referee was impressed with the Statutory Liquidator's Motion for Summary Judgment and memorandum of law and affidavit in support thereof. They fairly covered the facts of the case and underlying history in detail. The memorandum was well reasoned and persuasive and provided more than sufficient statutes and case law to

persuade me to make a recommendation in the Statutory Liquidator's favor. The Referee comes to this conclusion even after giving the Claimant the benefit of the doubt on all disputed facts, which he is required to do in judging the merits of the Motion for Summary Judgment.

22. It is most unfortunate that Claimant has suffered the damages to her real property, and if this recommendation is approved, she will not have her day in court on the merits. However, the law is clear that when a claim or action is barred by the statute of limitations, it can not be prosecuted or proceed any further, no matter what the inequities or the facts of the case may be. The Referee can only suggest that Claimant obtain counsel to determine whether a cause of action against the State of New York is still viable.
23. In Referee's Order, dated December 12, 2006, the Referee advised the parties that he would determine whether a hearing would be required if the matter was not resolved by dispositive motion by either of the parties. Claimant advised the Referee that she would not add any more to her case by testimony beyond that which was submitted or which be submitted. Her final submissions were on December 4 and December 18, 2006. The Referee has determined to issue this Report and Findings based the pleadings, the submissions of the parties and the Motion for Summary Judgment and the memorandum of law and affidavit in support thereof. It is apparent from the applicable law that a recommendation is appropriate without the need for additional discovery or further proceedings (including a hearing).

## CONCLUSIONS OF LAW

24. There is no material issue of fact which would prevent a recommendation granting the Motion of Summary Judgment. Any facts in dispute have been viewed in the light most favorable to the Claimant as required by the standards for granting a summary judgment. See cases cited in paragraph 18 hereof and incorporated herein. These same standards have been set forth over and over in other cases too numerous to cite.
25. Under New York law, specifically Section 5-i of McKinney's General Municipal law, "1. No action or special proceeding can be prosecuted or maintained against a ...town,... for damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such ...town,... or any officer, agent, or employee thereof...unless...(c) the proceeding shall be commenced within one year and 90 days after the happening of the event upon which the claim is based." Claimant has never filed suit against the Insured. The deadline for such an action against the Insured was October 2, 2000. Therefore the claim is barred by the applicable statute of limitations. See Klein v. Yonkers, 53 N.Y. 2d 1011, 425 N. E. 2d 865, 442 N.Y.S. 2d 477 (1981); Nebbia v. Monroe County, 92 A.D. 2d 724, 461 N.Y.S. 2d 127 (N.Y.A.D. 4 Dept. 1983); and Millard v. Lewis, 17 Misc. 2d 698, 185 N.Y.S. 2d 708 (1959). (All cited in the Statutory Liquidator's memorandum of law).
26. The order placing Reliance in liquidation was dated October 3, 2001. Filing of the POC in February 2002 in the Reliance liquidation does not revive the failure to file suit against the Insured within the applicable time frame as required by statute. Under New York law, an insured must first obtain a judgment against the insured before the insured can proceed with an action against the insurer. See N.Y. Ins. Law §3420 (McKinney 2000). Since suit

was not filed against the Insured by Claimant, no judgment was ever obtained, and therefore no direct action can be taken against Reliance, and the Statutory Liquidator is entitled to raise the statute of limitations on the underlying claim as a defense to the POC. See 40 P.S. § 221.23(18).

27. The Claimant's claim is barred by the applicable statute of limitations and therefore the Statutory Liquidator is entitled to summary judgment as a matter of law.
28. The Statutory Liquidator properly assigned the POC a Priority Level (b) with a value of \$0.00.
29. Since the recommendation, if approved, disposes of the POC, the other reasons asserted by the Statutory Liquidator for denying the POC are mute and need not be ruled upon in this Report and Findings.

#### CONCLUSION

WHEREFORE, for the reasons set forth above, it is recommended that the Statutory Liquidator's Motion for Summary Judgment be granted, that the Notice of Determination and the assignment of Priority Level (b) and \$0.00 value to the POC be affirmed, and that Claimant's Objection be denied, without hearing or other further proceeding.

Respectfully submitted,

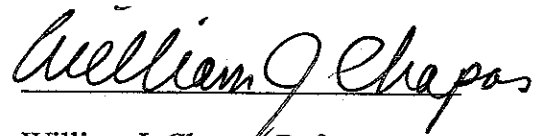


William J. Chapas, Referee

Dated: January 22, 2007

Certification of Mailing

I hereby certify that on January 22, 2007, copies of the foregoing Referee's Report and Findings, dated January, were sent by Priority Mail, with Delivery Confirmation, to Nancy Rackmyer, Claimant, at 433 State Highway 165, Cherry Valley, NY 13320-3318 and by First Class Mail to Gail M. Burgess, Counsel for the Statutory Liquidator, at Reliance Insurance Company (In Liquidation), Three Parkway, 5<sup>th</sup> Fl., Philadelphia, PA 19102.

A handwritten signature in cursive script that reads "William J. Chapas". The signature is written in black ink and is positioned above a horizontal line.

William J. Chapas, Referee