IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ELAINE M. CONCKLIN, Plaintiff, v. WKA FAIRFAX, LLC., WEINER, KRISTOL, AERENSON JV, LLC, B & L LIMITED PARTNERSHIP, WILLIARD S. WILSON, LLC, and E. EARLE DOWNING, INC., Defendants, and WKA FAIRFAX, LLC., WEINER, KRISTOL, AERENSON JV, LLC, B & L LIMITED PARTNERSHIP, Third-Party Plaintiffs v. E. EARL DOWNING, INC., Third-Party Defendant.	)	C.A. No. N15C-12-118 RRC

Submitted: August 26, 2016
Decided: November 16, 2016

On Defendant E. Earl Downing, Inc.'s Motion to Dismiss Plaintiff's Amended Complaint. **DENIED.**

MEMORANDUM OPINION

Brian S. Legum, Esquire, Kimmel, Carter, Roman, Peltz, & O'Neill, P.A., Newark, Delaware, Attorney for Plaintiff.

Christopher T. Logullo, Esquire, Chrissinger & Baumberger, Wilmington, Delaware, Attorney for Defendant E. Earle Downing, Inc.

Sarah B. Cole, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, P.C., Wilmington, Delaware, Attorney for Defendants WKA Fairfax, LLC. and Weiner, Kristol, Aerenson JV, LLC.

COOCH, R.J.

Defendant E. Earle Downing, Inc. ("E. Earle Downing") has moved to dismiss Plaintiff's Amended Complaint against it on grounds that the Amended Complaint is barred by the statute of limitations, and that the Amended Complaint does not otherwise relate back to the date the original complaint was filed under Super. Ct. Civ. R. 15(c).

This Court is called upon to determine whether the service of a third-party complaint with the original complaint attached against E. Earle Downing, within the time period prescribed by Rule 15(c), is sufficient notice of the action, as is required under Rule 15(c)(3)(A). This is an issue of apparent first impression in Delaware. Having considered the legal landscape of Rule 15(c) jurisprudence, this Court finds that timely service of a third-party complaint with the original complaint attached as an exhibit is sufficient notice under Rule 15(c) and **DENIES** Defendant E. Earl Downing, Inc.'s Motion to Dismiss.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff alleges that on or about December 18, 2013, she slipped and fell while in the parking lot of a shopping center owned by defendants WKA Fairfax, LLC. ("WKA Fairfax"), Weiner, Kristol, Aerenson JV, LLC ("Weiner, Kristol, Aerenson"), B & L Limited Partnership ("B & L"), and Williard S. Wilson LLC ("Williard S. Wilson").[1] Plaintiff alleges that her fall was caused by the

[1] Although originally also named as a direct defendant, Plaintiff's counsel advised at oral argument on August 26, 2016 that Plaintiff had as of that time been unable to locate and serve Williard S. Wilson, LLC.

defendants' failure to remove snow and ice in the parking lot of the shopping center. On December 14, 2015, Plaintiff filed suit against all defendants except E. Earle Downing, Inc.

On February 4, 2016, defendants WKA Fairfax and Weiner, Kristol, Aerenson answered Plaintiff's complaint and filed a third-party complaint against E. Earle Downing, alleging a breach of contract on grounds that E. Earle Downing was the company with which they contracted for snow removal, and that E. Earle Downing failed to perform its contractual obligation. On February 24, Defendant B & L answered Plaintiff's complaint and also filed a third-party complaint against E. Earle Downing on the same grounds as the other defendants. It is undisputed that E. Earle Downing was served with the third-party complaint with Plaintiff's original complaint attached as an exhibit on March 28.[2] E. Earle Downing answered the third-party complaints on May 9.

On May 10, the Court granted a stipulation filed by Plaintiff and the originally named direct defendants in which they agreed that Plaintiff could file an Amended Complaint to add E. Earle Downing as a direct defendant. On May 12, Plaintiff filed its Amended Complaint adding E. Earle Downing as an additional direct defendant. E. Earle Downing subsequently filed this Motion to Dismiss on May 23.

II. PARTIES' CONTENTIONS[3]

Both parties and the Court agree that Rule 15(c)(3) is the only subsection of Rule 15 applicable in this case.

A. *E. Earle Downing's Contentions*

Defendant E. Earle Downing contends that Plaintiff's claim against it was not timely filed within the two-year statute of limitations applicable in personal injury actions.[4] Moreover, E. Earle Downing contends that Plaintiff's Amended Complaint does not meet the standard set forth in Rule 15(c), because the only "such notice" that E. Earle Downing had of the proceedings was a third-party complaint for contribution and indemnification from the originally named direct

[2] Pl.'s Resp. to Def.'s Mot. to Dismiss Pl.'s Am. Compl., at 2.
[3] Defendants WKA Fairfax; Weiner, Kristol, Aerenson; and B & L took no position in connection with this motion.
[4] 10 *Del. C.* § 8119.

defendants, which was served on it on March 28, 2016. E. Earle Downing also asserts that "no amendment to the Complaint, and notice of same, was filed by Plaintiff against Defendant [E. Earle Downing] within 120 days of the original complaint being filed."[5] Accordingly, E. Earle Downing contends that Plaintiff's claim against it cannot relate back because it had insufficient notice that a claim may be brought against it. Therefore, E. Earle Downing contends that Plaintiff's claim against it must be dismissed.

B. *Plaintiff's Contentions*

Plaintiff claims that her Amended Complaint does relate back under Rule 15(c). Plaintiff contends that E. Earle Downing was put on notice of the possibility of proceedings against them when the originally named direct defendants served E. Earle Downing with a third-party complaint for indemnification and contribution with Plaintiff's original complaint attached as an exhibit. Plaintiff asserts that service was made on March 28, 105 days after the filing of the original complaint, thus within the 120 day period after the original complaint was filed. Plaintiff contends that Rule 15 only requires notice of the institution of the action within the statute of limitations or within 120 days of the filing of the original complaint. Accordingly, Plaintiff argues that although her Amended Complaint was filed outside the time period set forth by the statute of limitations, her claim against E. Earle Downing set forth in the Amended Complaint will relate back to the date the original complaint was filed under Rule 15(c) since E. Earle Downing had notice of the institution of the action on March 28, 105 days after the filing date of the original complaint.

III. DISCUSSION

A. *Standard of Review*

"A party raising a statute of limitations defense may do so in a motion to dismiss when the pleading itself shows that the action was not brought within the statutory period. The Court accepts the allegations contained in the opposing party's pleading as true for purposes of such a motion."[6] However, when considering a motion to dismiss in the context of a Rule 15(c)(3) amendment, the Court must remember that "subsection (c)(3) includes no discretionary powers for the Superior Court to exercise. Accordingly, unless [the plaintiff's] amended

[5] Reply to Pl.'s Resp. to Def.'s Mot. to Dismiss, at 2.
[6] *Verrastro v. Bayhealth Medical Center, Inc.*, 119 A.3d 676, 678 (Del. Super. 2015).

complaint completely comported with the dictates of Rule 15(c)(3), [the plaintiff's] amended complaint would not relate back to the date of the original filing."[7] In such a case, the plaintiff bears the burden of proving that the conditions of Rule 15(c)(3) are satisfied.[8]

B. *Overview of Rule 15(c)*

Delaware Superior Court Civil Rule 15 is substantially similar to its federal counterpart.[9] Accordingly, this Court frequently looks to the interpretation of the Federal Rules for guidance.[10] Delaware's Rule 15 provides that it is within the Court's discretion to grant or deny an amendment to a complaint; however, "the Rule directs the liberal granting of amendments 'when justice so requires.'"[11] "In the absence of prejudice to another party, the trial court is required to exercise its discretion in favor of granting leave to amend."[12]

Rule 15(c)(3) provides:

> **(c) Relation Back of Amendments.** An amendment of a pleading relates back to the date of the original pleading when . . . (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by statute or these Rules for service of the summons and complaint, the party to be brought in by amendment (A) has received ***such notice*** of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.[13]

Under Rule 15(c)(3), an amendment can only relate back if it satisfies the three conditions set forth therein. "First, the claim asserted by the amendment

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[7] *Taylor v. Champion*, 693 A.2d 1072, 1074 (Del. 1997).
[8] *Id.* at 1076.
[9] Fed. R. Civ. P. 15.
[10] *Dobson v. McKinley*, 2009 WL 891056, at *3 (Del. Super. Mar. 31, 2009).
[11] *Id.*
[12] *Id.*
[13] Super. Ct. Civ. R. 15(c)(3) (emphasis added).

must arise out of the same conduct, transaction, or occurrence asserted in the original pleading."[14] "Second, within the time provided by the rules, the party to be added must have received notice of the institution of the action, so that the party will not be prejudiced."[15] "Third, within the time provided by the rules, the party to be added must have known or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party to be added by the amendment."[16] The only condition at issue in the case at bar is the second requirement of notice. The "such notice" requirement is not notice of the incident giving rise to the cause of action, but is rather notice of the pending lawsuit itself.[17] This notice can be either formal or informal; "service of process is not mandated, and ['such notice'] may not even have to be in writing."[18]

However, the party against whom the claim is filed must have received "such notice of the institution of the action" within the time period set forth by either the statute of limitations or Superior Court Civil Rule 4(j).[19] Rule 4(j) provides the time period in which a party must be served with process after the filing of a complaint.[20] Interpreting the two rules in conjunction, Rules 15(c)(3) and 4(j) provide that a new party named in the amended complaint must receive notice of the institution of the lawsuit within either the period set forth in the statute of limitations or, if the statute of limitations has since expired, within 120 days of the institution of the action.[21]

C. *E. Earle Downing Had Sufficient Notice of the Institution of the Proceedings Within the Time Period Set Forth in Rule 15(c)(3)*

Delaware courts have held that "such notice" under Rule 15(c)(3) is notice of the pending litigation rather than the incident giving rise to the cause of action. In *Mergenthaler, Inc. v. Jefferson*, the Delaware Supreme Court found that

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[14] *Taylor v. Champion*, 693 A.2d 1072, 1074 (Del. 1997).
[15] *Id.*
[16] *Id.*
[17] *Mergenthaler, Inc. v. Jefferson*, 332 A.2d 396, 397 (Del. 1975).
[18] *Id. See also Williams v. Ward*, 553 F.Supp. 1024, 1026 (W.D.N.Y. 1983) (providing an interpretation of the Federal Rules: "The notice to the defendant does not have to be formal. It is sufficient if it puts defendant on actual or constructive knowledge that there may be a claim against him, and this knowledge is sufficient to encourage the defendant to prepare a defense.").
[19] Super. Ct. Civ. R. 15(c)(3).
[20] Super. Ct. Civ. R. 4(j).
[21] Super. Ct. Civ. R. 4(j).

sufficient notice did not exist where the party the plaintiff sought to bring into the litigation with an amended complaint had no knowledge or other notice, formal or informal, of the pending litigation within the appropriate time period.[22]

In *Dobson v. McKinley*, a case procedurally similar to the case at bar, this Court found sufficient notice existed.[23] In *Dobson*, the plaintiff filed a complaint against original direct defendant McKinley on June 6, 2007.[24] McKinley then filed a third party complaint against third-party defendants Ryan (a police officer in the town of Newport), the Town of Newport, and the Town of Newport Police (collectively, "Newport"). Following the filing of the third-party complaint, Dobson and the third-party defendants engaged in discussions in which Dobson requested Newport's applicable insurance policies. Dobson also made a written demand for settlement. Upon learning that there were two applicable insurance policies, the plaintiff filed a motion on August 21, 2008 to amend her complaint to include the third-party defendants as direct defendants in her lawsuit. The Court noted that the applicable statute of limitations had expired on April 7, 2008. Finding that the third-party defendants had notice of the lawsuit before the statute of limitations expired, the Court granted the plaintiff's motion to amend her complaint to include the third-party defendants as direct defendants, even though the amended complaint would be filed more than four months after the statute of limitations expired.[25] Accordingly, *Dobson* instructs that a party may be added to the litigation by an amended complaint even after the applicable time periods set forth in Rule 15(c) have expired, so long as the notice requirement was satisfied within the applicable time periods.

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[22] 332 A.2d at 398. In *Mergenthaler, Inc.*, the Court found that sufficient notice was not given within the time period provided for in the statute of limitations. At the time the *Mergenthaler, Inc.* decision was written, the language of Rule 15(c) provided that the new party must have notice within the time period prescribed by the statute of limitations. In 1993, Rule 15 was amended to provide that the time period in which the parties had notice was within 120 days after the institution of the proceedings. *See Difebo v. Board of Adjustment of New Castle County*, 132 A.3d 1154, 1157 n.8 (Del. 2016).

[23] 2009 WL 891056, at *1 (Del. Super. Mar. 31, 2009).

[24] *Id.*

[25] *Id. See also Stoppel v. State Dept. of Health and Soc. Servs.*, 2011 WL 3558120, at *9, (Del. Super. Aug. 9, 2011) (providing: "Rule 15(c) impliedly but clearly contemplates that claims may relate back even against a party added *after* the Rule 4(j) service period applicable to the original complaint has passed.").

Other courts have also discussed the "such notice" requirement,[26] and found that the service of a third-party complaint can constitute sufficient notice, thereby permitting an amendment to relate back to the filing date of the original complaint. In *Williams v. Avis Transport of Canada, Ltd.*, the United States District Court for the District of Nevada found that the "such notice" requirement was satisfied by the filing and service of a third-party complaint on a third-party defendant tire manufacturer.[27] In *Williams*, a case involving a car accident, defective tires were specifically addressed in the original complaint; however, the tire manufacturer was not named as an original defendant. The original defendant then filed a third-party complaint against the tire manufacturer. The plaintiff subsequently amended his complaint to include a claim against the tire manufacturer. The tire manufacturer then filed a motion to dismiss the plaintiff's claim against it on grounds that it was barred by the statute of limitations, and it did not receive notice before the statute of limitations expired (the then applicable timing standard under Rule 15(c)). Finding the notice requirement "obviously satisfied" by the filing of a third-party complaint, the District Court moved on to its analysis of the third condition requiring a mistake as to the identity of the proper party.[28] The District Court ultimately denied the tire manufacturer's motion to dismiss.[29]

In the case at bar, E. Earle Downing had sufficient notice under Rule 15(c)(3). Although the two-year statute of limitations for the underlying cause of action expired on December 18, 2015, E. Earle Downing was given notice of the pending litigation when the originally named defendants served E. Earle Downing with a third-party complaint against it with Plaintiff's original complaint attached as an exhibit. Plaintiff was not required to give E. Earle Downing formal notice of her complaint against E. Earle Downing within the time period set forth in Rule

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[26] *See* Jerald J. Director, Annotation, *Sufficiency of Notice or Knowledge Required under Rule 15(c)(1)(2) of Federal Rules of Civil Procedure Dealing with Relation Back of Amendments Changing Parties Against Whom Claim is Asserted*, 11 A.L.R. Fed. 269, § 8[a] (1972, Cum. Supp.). Although this annotation discusses relation back of amendments "changing" parties against whom a claim is asserted, Delaware Courts have held that the term "changes" in Delaware's Rule 15 pertains to both changing and adding parties to the litigation. *See, e.g., Stoppel v. State Dept. of Health and Soc. Servs.*, 2011 WL 3558120, at *9 (Del. Super. Aug. 9, 2011). Accordingly, the annotation provides guidance on the notice requirement for both changing and adding a party.

[27] 57 F.R.D. 53, 55 (D. Nev. 1972).

[28] *Id.*

[29] *Id.* In *Francis v. Pan Am. Trinidad Oil Co.*, 392 F.Supp. 1252 (D. Del. 1975), the United States District Court for the District of Delaware rejected the *Williams* decision as it pertained to the definition of "mistake," but did not discuss the *Williams* court's finding that a third party complaint constitutes "such notice" under Rule 15(c).

15(c)(3) and Rule 4(j); rather, informal notice—such as the service of a third-party complaint with the original complaint attached as an exhibit arising out of the plaintiff's injury—was sufficient, so long as such notice is within the prescribed time period. Contrary to the facts of *Mergenthaler*, in which there was no formal or informal notice to the potential defendant, E. Earle Downing had notice that a lawsuit was filed regarding a slip and fall at a parking lot for which they were responsible for snow and ice removal.

Moreover, and as this Court held in *Dobson*, notice within the time period prescribed by Rule 15(c) is sufficient to satisfy the requirements of the Rule, rather than the filing of a complaint within the time period. In *Dobson*, the third-party defendant had knowledge of the lawsuit before the statute of limitations expired, but the plaintiff's complaint was not amended to include a direct claim against the third-party defendant until well after the statute of limitations had expired. In fact, the amended complaint was not filed until after the 120-day period prescribed by Rule 15 for notice had also expired. In the case at bar, E. Earle Downing was given notice of the institution of the proceedings at the latest on March 28, the date service of process was made. These dates fall within the 120-day period following the institution of the action. Accordingly, E. Earle Downing was on notice at that point that Plaintiff might file a lawsuit against it as well. As stated in *Williams v. Ward*, "this knowledge is sufficient to encourage the defendant to prepare a defense."[30]

In support of its position that Plaintiff's claim against it is barred, E. Earle Downing cites three Delaware cases that have discussed the application of Rule 15(c)(3). However, E. Earle Downing's reliance on each of the three cases is inapposite. E. Earle Downing relies on *Taylor v. Champion*[31] and *Rodriguez v. Farm Family Cas. Ins. Co.*[32] to support its contention that Plaintiff's claim against E. Earle Downing cannot relate back to the date the original complaint was filed. In citing these two cases for support, E. Earle Downing states, but without any substantive discussion of either case:

> In these cases, the Court has ruled that relating the Amended Complaint back to the date of the original filing of the underlying Complaint was not permissible and it dismissed the action against the party that plaintiffs

[30] *Williams*, 553 F.Supp. 1024, 1026 (W.D.N.Y. 1983).
[31] 693 A.2d 1072 (1997).
[32] 2005 WL 1654019 (Del. Super. Apr. 19, 2005).

> were attempting to add. The underlying matter is similar to the *Rodriguez* and *Taylor* cases. Consequently, the Court should dismiss Plaintiff's Amended against Defendant E. Earle Downing, Inc.[33]

However, E. Earle Downing misinterprets the legal principles analyzed in these cases. In *Taylor*, the Delaware Supreme Court held that although a secretary who had drafted the complaint—and would later be a party added by an amended complaint—had knowledge of the institution of the action, the amended complaint did not relate back to the time the original complaint was filed because the "mistake concerning the identity of the proper party" condition of Rule 15(c)(3) was not met.[34]

In *Rodriguez*, this Court found that although the potential defendant fled the scene of the car accident, the potential defendant was not aware or on notice of the

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[33] Mot. to Dismiss Pl.'s Am. Compl., at 2.

[34] *Taylor*, 693 A.2d at 1075 (providing: "the proper focus of this Court's inquiry must be on whether [the defendant brought into the litigation by the amended complaint] 'knew or should have known that, but for a mistake concerning the identity of the proper party' she would have been named as a defendant in [the plaintiff's] original complaint."). In *Taylor v. Champion*, the plaintiff was involved in a car accident with the defendant in July 1991. The plaintiff sued the defendant, a Florida resident, but was unable to serve him with process. The defendant's Florida neighbors informed the process server that the defendant had died. In July 1993, the Plaintiff filed a suggestion of death with the Court. In July 1994, the plaintiff's counsel opened an "Ancillary Estate of Champion" in Delaware, naming his own secretary as the Ancillary Administratrix. Subsequently, in November 1994, the plaintiff filed a motion to amend her complaint to name the secretary as the Ancillary Administratrix. The motion was granted *ex parte* and the amended complaint was filed, naming the secretary as a direct defendant in her capacity as the original defendant's Ancillary Administratrix. In February 1996, the original defendant's personal representative was found in Florida and was substituted for the secretary as the "Successor Ancillary Administratrix." The Successor Ancillary Administratrix then filed a motion to dismiss on grounds that the amended complaint did not relate back to the date the original complaint was filed and was therefore barred by the statute of limitations.

In reaching its decision that the amended complaint did not relate back to the file date of the original complaint, the Court stated that the secretary most likely had notice of the record, as she likely drafted the complaint. It held, however, that while the secretary had notice of the institution of the proceedings, Rule 15(c) requires that the "party to be brought in by amendment . . . *knew or should have known that*, but for a mistake concerning the identity of the proper party, the action would have been brought against the party." *Taylor*, 693 A.2d at 1075 (quoting Super. Ct. Civ. R. 15(c)) (emphasis in original). The Court held that although the secretary had notice of the action, she could not have been aware of the plaintiff's mistake concerning the identity of the proper party. Accordingly, the Court held that the amended complaint did not relate back.

pending litigation during the 120-day period after the complaint was filed. Therefore, the Court found that the amended complaint did not relate back to the date the complaint was originally filed.[35] Accordingly, as *Taylor* does not discuss the portion of Rule 15(c)(3) applicable here and *Rodriguez* is factually distinguishable from the facts of the case at bar, E. Earle Downing's reliance on them is inapposite.

In its Reply in support of the Motion to Dismiss, E. Earle Downing contended for the first time that *Dobson v. McKinley* is factually distinguishable from the case at bar. E. Earle Downing contends that *Dobson* is distinguishable because (1) "the third-party defendant received notice and was added to the lawsuit before the original statute of limitations expired[;]" (2) the third-party defendant took action in anticipation of a direct claim by the plaintiff; and (3) the plaintiff and third-party defendant engaged in settlement negotiations, which were "deemed as sufficient evidence of [the third-party defendant's] knowledge of Plaintiff's claim before the statute of limitations expired."[36] However, it appears that E. Earle Downing here is contending that the "notice" requirement of Rule 15(c)(3) is stricter than it is. Although the third-party defendant in *Dobson* had notice of the litigation and was added to the lawsuit before the statute of limitations expired, Rule 15(c) does not make such a mandate. To the contrary, Rule 15(c) provides that the potential defendant must have notice within either "the period provided by statute *or* these Rules for service of the summons and complaint."[37] Additionally, although the third-party defendant in *Dobson* was able to prepare a defense while negotiating settlement with the plaintiff, this is not the requirement set forth in the rule. Rule 15(c) only requires notice of the institution of proceedings such that the defendant would not be prejudiced in maintaining a on the merits, not active preparation of a defense to a potential claim. Accordingly, E. Earle Downing's reliance on *Dobson* is inapposite.

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[35] *Rodriguez*, 2005 WL 1654019, at *4-5. In *Rodriguez*, the plaintiff was in a car accident with the driver of another vehicle who fled the scene of the accident. The plaintiff was only able to discover the identity of the driver of the car after suing the owner of the vehicle, who was able to provide the plaintiff with such information. The plaintiff then sought to file an amended complaint against the driver of the vehicle, which the driver opposed as the statute of limitations and the 120-day period following the original filing of the complaint had expired. Basing its discussion largely on whether the driver's conduct constituted fraudulent concealment of identity, thereby tolling the statute of limitations, this Court found that the statute of limitations was not tolled and the amended complaint would not relate back, as the driver had no notice of the lawsuit until after the applicable time periods had expired.

[36] Reply to Pl.'s Resp. to Def.'s Mot. to Dismiss, at 4.

[37] Super. Ct. Civ. R. 15(c) (emphasis added).

IV. CONCLUSION

Therefore, E. Earle Downing's Motion to Dismiss Plaintiff's Amended Complaint is **DENIED.**

/s/ *Richard R. Cooch*
Richard R. Cooch, R.J.