

# Lebanon County Legal Journal

The official legal periodical for Lebanon County  
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## *Public Notices*

**DECEDENTS' ESTATES  
FICTITIOUS NAME REGISTRATION**

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## *Table of Contents*

### **OPINION**

**KEYSTONE SMART START LLC V. MICHAEL MOWERS NO. 2016-01777**

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**Paul W. Kilgore, Esq., Chair  
Stephanie Axarlis, Esq., Editor  
Jennifer Wentzel, Esq., Editor**

**DECEDENTS' ESTATES**

**NOTICE IS HEREBY GIVEN** that Letters Testamentary or of Administration have been granted in the following estates. All persons indebted to the said estate are required to make payment, and those having claims or demands to present the same without delay to the administrators or executors named.

**FIRST PUBLICATION**

**ESTATE OF BERNICE A. BEDLEYOUNG**, late of Lebanon County, Pennsylvania, deceased. Letters of Administration have been granted to the undersigned Administrator.

Kenneth L. Bedleyoung, Administrator

George E. Christianson, Attorney  
Lebanon, PA

**ESTATE OF DENNIS R. HOKE**, late of the Borough of Cleona, Lebanon County, Pennsylvania, deceased. Letters of Administration have been granted to the undersigned Administrator.

David R. Hoke, Co-Administrator  
Gary L. Hoke, Co-Administrator  
KEVIN M. RICHARDS, ESQUIRE  
P. O. Box 1140  
Lebanon, PA 17042-1140

**SECOND PUBLICATION**

**ESTATE OF GEARY S. BUTSKO**, late of North Londonderry Township, Lebanon County, Pennsylvania, deceased. Letters of Administration have been granted to the undersigned Administratrix.

Beth Butsko  
c/o Charles B. Hadad, Esq.  
The Lynch Law Group, LLC  
375 Southpointe Blvd, Suite 100  
Canonsburg, PA 15317

**ESTATE OF JOHN B. KING**, late of the City of Lebanon, Lebanon County, Pennsylvania, deceased. Letters of Administration have been granted to the undersigned Administratrix.

Sadie Mae Riehl  
c/o Blakinger Thomas, PC  
28 Penn Square  
Lancaster, PA 17603

Attorneys: Blakinger Thomas, PC

**ESTATE OF MARY J. KUGLER**, late of Lebanon County, Pennsylvania, deceased. Letters Testamentary have been granted to the undersigned Executrix.

Sarah J. Kugler

Anthony J. Fitzgibbons, Esquire  
279 North Zinn's Mill Road  
Lebanon, PA 17042  
717-279-8313

**THIRD PUBLICATION**

**ESTATE OF DANIEL R. BLOUCH**, late of the City of Lebanon, Lebanon County, Pennsylvania, deceased. Letters Testamentary have been granted to the undersigned Executrix.

Linda A. Blouch – Executrix  
c/o Keith D. Wagner  
P. O. Box 323  
Palmyra, PA 17078  
ATTORNEY

**The ROBERT L. BROCKLEHURST** Revocable Trust u/a/d October 20, 2014, plus amendments thereto. Robert L. Brocklehurst, late of Jackson Township, Lebanon County, Pennsylvania, deceased. This trust is in existence and all persons having claims or demands against said Trust or decedent are requested to make known the same and all persons indebted to the decedent to make payment without delay to the undersigned Trustee.

Daivid Brocklehurst, Trustee  
c/o Sean D. Curran, Esq.  
222 N. Kenhorst Blvd.  
Reading, PA 19607

Sean D. Curran  
Curran Estate Law  
222 N. Kenhorst Blvd.  
Reading, PA 19607

**ESTATE OF JOSEPH G. DEENEY**, late of the Borough of Palmyra, Lebanon County, Pennsylvania, deceased. Letters Testamentary have been granted to the undersigned Personal Representative.

Ann D. Messner, Personal Representative  
c/o Megan C. Huff, Esquire  
Nestico Druby, P. C.  
1135 East Chocolate Avenue  
Suite 300  
Hershey, PA 17033

**FICTITIOUS NAME REGISTRATION**

**NOTICE IS HEREBY GIVEN** that an application for registration of the assumed name MOTORHEAD for the conduct of business in Lebanon County, Pennsylvania, with the principal place of business being 749 Guilford Street, Lebanon, PA 17046 was made to the Department of State of Pennsylvania at Harrisburg, Pennsylvania, on the 20th day of May 2019, pursuant to 54 Pa.C.S. 311. The name of the entity owning or interested in the said business is Applied Products Resources, LLC.

**KEYSTONE SMART START LLC V. MICHAEL MOWERS NO. 2016-01777**

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*Civil Action-Law-Limited Liability Company-Dissolution-Breach of Contract-Counterclaim-Negligence-Statute of Limitations-Discovery Rule-Joinder-Additional Defendant-Timeliness-Reasonable Justification for Delay*

In this action involving the dissolution of limited liability company Plaintiff Keystone Smart Start LLC (“Keystone”) by its members Defendant Michael Mowers and Michael F. Wahmann (“Wahmann”), Keystone alleges that Mowers breached a provision of the Operating Agreement requiring equal payment of debts of Keystone by carrying a negative balance in his capital account. After Preliminary Objections were sustained and an Amended Complaint was filed, Defendant filed an Answer, New Matter and Counterclaim asserting a cause of action in Negligence against Keystone on the basis that Keystone’s business practices enabled Wahmann to receive payments from contractors without depositing payments into Keystone’s operating account. Keystone filed Preliminary Objections to the Counterclaim on the basis that it was lodged after the expiration of the two (2) year statute of limitations for Negligence actions. Further, Mowers filed a Motion to Join Additional Defendant Wahmann that ultimately was untimely to which Keystone has objected.

1. The statute of limitations for actions in Negligence is two (2) years.
2. The discovery rule provides that where the existence of an injury is not known to the complaining party and such knowledge reasonably cannot be ascertained within the prescribed statutory period, the limitations period does not begin to run until the discovery of the injury reasonably is possible.
3. The point at which the complaining party reasonably should be aware that he or she has suffered an injury generally is an issue of fact to be determined by the jury. However, where the facts are so clear that reasonable minds cannot differ, the commencement of the limitations period can be determined as a matter of law.
4. While it generally is not appropriate to raise the defense of statute of limitations by preliminary objections, Defendant waived this procedural error by failing to file preliminary objections to the improper raising of statute of limitations in Preliminary Objections.
5. Since the factual averments and inferences relied upon by Keystone in its Preliminary Objections have not been admitted and are subject to further development during discovery and the facts are not so clear that the Court is able to determine whether the Counterclaim is barred by the applicable statute of limitations, the Preliminary Objection must be overruled at this juncture of the proceedings with Defendant being directed to file a more specific

**KEYSTONE SMART START LLC V. MICHAEL MOWERS NO. 2016-01777**

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Counterclaim to give Keystone an idea of the specific time period during which negligent activities were alleged to have occurred.

6. Pa.R.C.P. Rule 2252 provides that any party may join as an additional defendant any person not a party to the action who may be solely liable on the underlying cause of action against the joining party or liable to or with the joining party on any cause of action arising out of the transaction or occurrence or series of transactions or occurrences upon which the underlying cause of action against the joining party is based.

7. A praecipe for a writ to join an additional defendant or complaint to join an additional defendant shall be filed no later than sixty (60) days after the service upon the original defendant of the initial pleading of the plaintiff or any amendment thereof or the time for filing the joining party's answer.

8. Pa.R.C.P. Rule 2253 requires that leave of court must be sought to secure joinder of an additional defendant after the expiration of time set forth by law.

9. A motion seeking extension of time to join an additional defendant must set forth (a) some reasonable justification or excuse for the delay; (b) a statement of facts alleged to render the proposed additional defendant alone liable or liable with or over to the defendant or liable to the defendant on a proper cross claim; and (c) allegations that the late joinder will not be prejudicial to the proposed additional defendant.

10. Defendant failed to show reasonable justification for the belated effort to join Wahmann as an additional defendant where the allegations in the Counterclaim of improper activities on the part of Wahmann are similar to the conduct alleged in the Joinder Complaint such that the Joinder Complaint could have been filed at the same time as the Counterclaim and Defendant failed to identify any additional investigation was conducted and why any information ascertained during that additional investigation led to the decision to join Wahmann as an additional defendant.

L.C.C.C.P. No. 2016-01777, Opinion by John C. Tylwalk, President Judge, November 16, 2018.

**KEYSTONE SMART START LLC V. MICHAEL MOWERS NO. 2016-01777**

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**IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY  
PENNSYLVANIA**

**CIVIL DIVISION**

**KEYSTONE SMART START LLC** : **NO. 2016-01777**  
**Plaintiff** :  
**v.** :  
: :  
**MICHAEL MOWERS** :  
**Defendant** :

**APPEARANCES:**

**KEVIN M. RICHARDS, ESQUIRE** **FOR KEYSTONE SMART START LLC**  
**HEATHER A. EGGERT, ESQUIRE**  
**HENRY & BEAVER LLP**

**VERONICA L. BOYER, ESQUIRE** **FOR MICHAEL MOWERS**  
**METTE, EVANS & WOODSIDE, P.C.**

**OPINION, TYLWALK, P.J., NOVEMBER 16, 2018.**

This action involves the dissolution of Plaintiff Keystone Smart Start LLC (“Keystone”), a Pennsylvania limited liability company, by its two members, Defendant Michael Mowers (“Mowers”) and Michael F. Wahmann (“Wahmann”). On May 10, 2010, Mowers and Wahmann had executed an Operating Agreement for Keystone, with Wahmann, being a sixty percent owner, and Mowers a forty percent owner. Paragraph 23 of the Operating Agreement provides:

If the Company is dissolved, the remaining members shall wind-up its affairs. On winding-up of the Company, all existing contracts of the Company shall be fulfilled as soon as possible, using all of available resources of the Company; all Company

**KEYSTONE SMART START LLC V. MICHAEL MOWERS NO. 2016-01777**

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debts shall be paid equally from the capital accounts of the Members; and the remaining balance in said capital accounts shall be paid to the Members, and the Company shall formally be dissolved in accordance with Pennsylvania Law.

(Complaint, Exhibit “A,” Para. 23).

On December 1, 2014, Wahmann and Mowers, on behalf of Keystone, executed an Agreement for Purchase and Sale of Assets and Cancellation of Franchise Agreements and Distribution Agreements to cancel Keystone’s franchise with 1A Smart Start, Inc.<sup>1</sup> (“Smart Start”), to sell back certain assets of Keystone, and to commence the winding-up and dissolution of Keystone. (Complaint, Exhibit “B”) Pursuant to that agreement, the purchase price would be paid by Smart Start via check payable to Henry & Beaver, LLP, as escrow agent, less any outstanding invoices owed by Keystone to Smart Start. (Complaint, Exhibit “B,” Para. 2:01).

On September 14, 2017, Keystone and Wahmann instituted this action against Mowers alleging breach of contract of the Operating Agreement. The Complaint alleges that during the period of winding-up, an IRS Form 1065 was prepared for Keystone on or about March 14, 2016 and that Schedule K-1 of the return revealed that Mowers’ capital account balance had a negative \$31,197.00 balance, while Wahmann’s capital account had a positive balance of \$17,242.00. When Keystone and Wahmann made demand that Mowers pay his negative balance, Mowers assured them that he would complete a review of the relevant records no later than the end of the first quarter of 2016. It is alleged that Mowers failed to follow through with any review or response. In the Complaint, Keystone and Wahmann sought to have Mowers satisfy the negative balance of his capital account.

Mowers filed Preliminary Objections to the Complaint objecting to venue in Lebanon County, seeking dismissal of Wahmann as a party plaintiff, and seeking dismissal for failure to state a cause of action for Breach of Contract. By Order of Court dated February 12, 2018, The Honorable Charles T. Jones, to whom the case had been assigned, ruled that venue was proper in Lebanon County, directed that Wahmann was removed as a plaintiff, and held that Keystone had set forth sufficient facts to plead a cause of action for Breach of Contract.

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<sup>1</sup> Keystone had been granted franchise rights and licenses to lease and service Smart Start ignition interlock devices and other Smart Start products in Pennsylvania and West Virginia through two franchise agreements entered on March 1, 2009.

**KEYSTONE SMART START LLC V. MICHAEL MOWERS NO. 2016-01777**

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Thereafter, Mowers filed an Answer, New Matter and Counterclaim on March 23, 2018. In his Answer, Mowers denied that he owes Keystone any outstanding amounts and denied that the members were required to maintain a zero or positive capital account balance by the terms of the Operating Agreement. He also alleges various improprieties on the part of Wahmann which adversely affected Keystone's financial condition. Mower's Counterclaim sets forth a cause of action in negligence against Keystone, charging that Keystone engaged in business practices, including the failure to invoice contractors for products and services, which enabled Wahmann to receive payments from those contractors without depositing the payments into Keystone's operating account.

On April 12, 2018, Keystone filed Preliminary Objections seeking dismissal of the Counterclaim on the basis that Mowers' claims were barred by the expiration of the applicable statute of limitations. In the alternative, Keystone seeks a more specific pleading, arguing that Mowers' pleading fails to set forth specific dates and specific amounts of money which he alleges to be due and owing to Keystone.

On April 23, 2018, Mowers filed a Motion to Join Additional Defendant Michael F. Wahmann. In the Motion, Mowers explains that on March 12, 2018, he was granted an extension to March 23, 2018 to file his Answer to the Complaint and that his Answer with New Matter and Counterclaims was filed on that date. The Motion further avers that "[t]he complexity of the issues involved in this case is evidenced in Mowers' New Matter and Counterclaim" and that "[a]s a result, Mowers required additional investigation in order to file a proper joinder complaint against Wahmann." (Motion to Join Additional Defendant, Paras. 7-8) In the Answer to the Motion to Join Wahmann as an Additional Defendant, Keystone counters that Mowers had ample time for investigation of this matter, having had all of Keystone's business records since December 2015, and noting that Mowers sought to have Wahmann excluded from the suit in his own Preliminary Objections to the Complaint.

The Preliminary Objections were scheduled for Argument before Judge Jones; however, at the time of a hearing scheduled for Mowers' Joinder Motion, and before ruling on the Preliminary Objections, Judge Jones realized the existence of a potential conflict of interest and issued an Order directing that the matter be transferred to another jurist of this Court. At that time, the parties agreed that both the Preliminary Objections and the Joinder Motion should be decided on Briefs and that there would be no further oral arguments or hearings on these matters. The action was ultimately transferred to this jurist after the other two members of this Court were also unable to preside due to conflicts of interest. The Joinder Motion was then listed for argument and the Preliminary Objections were deferred pending



**KEYSTONE SMART START LLC V. MICHAEL MOWERS NO. 2016-01777**

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Argument on that Motion.

**Preliminary Objections**

Keystone argues that its Preliminary Objections should be sustained and the Counterclaim should be dismissed because it was filed after the expiration of the two year period statutory limitation period applicable to actions in negligence as set forth at 42 Pa.C.S.A. §5524. In the alternative, Keystone asks us to direct Mowers to file a more specific pleading setting forth the dates of the alleged negligent conduct and the amount of money owed due to the alleged negligent business practices. Mowers argues that the Preliminary Objections should be overruled because the issue of the statute of limitations should have properly been raised as an affirmative defense in new matter. He further argues that he should be permitted the opportunity to obtain and develop the evidence necessary to support his negligence claim through discovery.

As a general rule, the statute of limitations for negligence actions is two years. 42 Pa.C.S.A. §5524(7). The discovery rule normally applies to negligence actions. *Donison v. HCR Manor Care*, 2008 WL 5010531 (C.C.P. Cumberland Cnty. 2008).

The discovery rule is an exception to the requirement that a complaining party must file suit within the statutory period. The discovery rule provides that where the existence of the injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the prescribed statutory period, the limitations period does not begin to run until the discovery of the injury is reasonably possible.... The statute begins to run in such instances when the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress.... The party seeking to invoke the discovery rule bears the burden of establishing the inability to know that he or she has been injured by the act of another despite the exercise of reasonable diligence.

*Baselice v. Franciscan Friars Assumption BVM Province, Inc.*, 879 A.2d 270, 276 (Pa. Super. 2005). With regard to the discovery rule, the point at which the complaining party should reasonably be aware that he has suffered an injury is generally an issue of fact to be determined by the jury. *E. J.M. Archdiocese of Philadelphia*, 622 A.2d 1388 (Pa. Super.

**KEYSTONE SMART START LLC V. MICHAEL MOWERS NO. 2016-01777**

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1993). However, where the facts are so clear that reasonable minds cannot differ ... the commencement of the limitations period can be determined as a matter of law. ... Additionally, if a party has the means of discovery within his power but neglects to use them, his claim will still be barred. *Baselica v. Franciscan Friars Assumption BVM Province, Inc.*, 879 A.2d at 277.

It is not generally appropriate to raise the defense of the statute of limitations by preliminary objection. *Devine v. Hutt*, 863 A.2d 1160 (Pa. Super. 2004). An affirmative defense of the statute of limitations is properly raised in new matter. Pa.R.C.P. No. 1030. When a defendant raises a waivable statute of limitations via preliminary objections, the proper challenge is to file preliminary objections to strike the defendant's preliminary objections for failure of a pleading to conform to law or rule of court. *Devine v. Hutt*, 863 A.2d 1160 (Pa. Super. 2004). Pennsylvania law provides that where a plaintiff fails to file preliminary objections to preliminary objections, the plaintiff waives the objection that the issue was raised in an improper manner. *Duquesne Slag Products Co. v. Lench*, 490 Pa. 102, 415 A.2d 53 (1980).

[W]here a party erroneously asserts substantive defenses in preliminary objections rather than to raise these defenses by answer or in new matter, the failure of the opposing party to file preliminary objections to the defective preliminary objections, raising the erroneous defenses, waives the procedural defect and allows the trial court to rule on whether the affirmative defense defeats the claim against which the defense has been invoked.

*DeMary v. Latrobe Printing & Publishing Co.*, 762 A.2d 758, 762 (Pa. Super. 2000) (emphasis added).

Mowers failed to file preliminary objections to the improper raising of the statutes of limitations in Keystone's Preliminary Objections, which waives this procedural error. See, *Richmond v. McHale*, 35 A.3d 779, 782–83 (Pa. Super. 2012). Therefore, we are therefore at liberty to address this issue.

In support of its Preliminary Objections, Keystone claims that it ceased doing business when the Agreement with Smart Start was executed on December 1, 2014 and that it did not earn any income after March 2015. It further argues that any transactions which oc-

## KEYSTONE SMART START LLC V. MICHAEL MOWERS NO. 2016-01777

curred after March 2015 were strictly part of the winding-up and dissolution of Keystone and liquidation of assets, and did not involve any business practices, including sending invoices to contractors and/or customers. Keystone argues that, based on this scenario, it must be assumed that the negligent business practices alleged in the Counterclaim occurred before or on December 1, 2014 or, at the latest, in March 2015 and that the Counterclaim should have been filed within two years of that date. Keystone further argues that Mowers was not a silent partner, but was actively involved in Keystone's management and business activities. Keystone argues that Mowers should have known of the occurrence of any inappropriate practices and that any discrepancies would have been evident in Keystone's 2015 tax return. Keystone argues that, therefore, the claim was already time-barred when it was filed on March 23, 2018.

Keystone did not endorse its Preliminary Objections with a Notice to Plead. An answer to a preliminary objection is required only where the preliminary objection contains a notice to plead. See *Van Mastrigt v. Delta Tau Delta*, 573 A.2d 1128 (Pa. Super. 1990). When an answer is required, but not filed, properly pleaded facts set forth in the preliminary objections must be taken as true. *Cooper v. Church of St. Benedict*, 954 A.2d 1216 (Pa. Super. 2008).

Mowers did not file any response to Keystone's Preliminary Objections; however, a response was not necessary since the Preliminary Objections were not endorsed with a Notice to Plead. Therefore, Mowers cannot be deemed to have admitted the factual averments set forth in Keystone's Preliminary Objections.

Regardless, we are permitted to rule on Keystone's Preliminary Objections, but we find that such a determination cannot be made at this juncture. In ruling on preliminary objections, the court must accept as true all material facts set forth in the complaint as well as all inferences reasonably deducible therefrom. *Santiago v. Pennsylvania National Mutual Casualty Insurance Company*, 613 A.2d 1235 (Pa. Super. 1992). Preliminary objections will be sustained only if they are clear and free from doubt. *Milliner v. Enck*, 709 A.2d 417, 418 (Pa. Super. 1998). The resolution of preliminary objections must be made solely on the basis of the pleadings; no other testimony or other evidence outside of the complaint may be considered. *Mellon Bank, N.A. v. Fabinyi*, 650 A.2d 895, 899 (Pa. Super. 1994).

[A]ll material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purposes of review. The question presented by the demurrer is whether, on the facts averred, the law says with certainty

**KEYSTONE SMART START LLC V. MICHAEL MOWERS NO. 2016-01777**

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that no recovery is possible. Where any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the demurrer.

*Fewell v. Besner*, 664 A.2d 577, 579 (Pa. Super 1995).

Considering the facts set forth in the Counterclaim and the inferences deducible from those facts, we are unable to say for certain that no recovery is possible. However, we agree with Keystone that it is entitled to a more specific pleading.

Keystone complains that Mowers has failed to produce any evidence to support his averments. However, a litigant is not required to produce evidence during the pleading stage of the litigation. A complaint (or counterclaim) need not cite evidence, but only state those facts necessary for defendant to prepare a defense. *Com., Dept. of Transp. (PennDOT) v. Bethlehem Steel Corp.*, 380 A.2d 1308 (Pa. Commw. 1977).

Keystone argues that Mowers should have known of the conduct alleged more than two years prior to the filing of his Counterclaim based on factual averments which have not been admitted and which must be developed in discovery. For instance, Keystone avers that it ceased doing business as of the signing of the Agreement with Smart Start and that it received no profits after March 2015. It also avers that Mowers was an active participant in Keystone and, thus, should have been aware of any inappropriate activities. In its Brief, Keystone asserts that Mowers has had copies of all of Keystone's business records since at least December 2015, and had assured that he would review the records by the end of the first quarter of 2016.

The factual averments and the inferences relied on by Keystone have not been admitted, and are therefore subject to further development during the discovery process. Moreover, the facts are not so clear that we are able to determine the time of commencement of the limitations period as a matter of law and/or whether Mowers had the means to discover his cause of action more than two years prior to the filing of his Counterclaim and neglected to utilize those means.

We will, therefore, overrule this Preliminary Objection, but direct Mowers to file a more specific pleading. Pa.R.C.P. No. 1019(f) provides that “[a]verments of time, place and items of special damage shall be specifically stated.” As noted by Keystone, Mowers' Counterclaim is completely without any dates, names of contractors, or amounts which were allegedly owed to Keystone due to Keystone's failure to invoice and Wahmann's al-

**KEYSTONE SMART START LLC V. MICHAEL MOWERS NO. 2016-01777**

leged failure to deposit payments into Keystone's operating account. Although Mowers may not be able to provide specific dates when this conduct occurred, we believe that he should be required to give Keystone an idea of the specific time period during which these alleged activities were taking place. We further believe that, as a member of Keystone for a number of years, Mowers would have some idea of Keystone's customers and the amounts of money which were routinely charged or billed to them. Thus, he should at least be able to provide a more specific estimate of the amounts which he alleges should have been invoiced and received by Keystone, but which were retained by Wahmann instead of being deposited into Keystone's account.

We will direct Mowers to file a pleading setting forth these items with more specificity within thirty days of service of this Order. If after a more specific Counterclaim is filed and discovery is conducted, it is apparent that the claim asserted by Mowers arose and was discoverable more than two years prior to the filing of the Counterclaim, Keystone is free to file a dispositive motion to again seek dismissal based on the expiration of the statutory limitation period.

**Mowers' Motion to Join Wahmann as an Additional Defendant**

Mowers' Joinder Complaint alleges that Wahmann used his superior position as majority member-owner to use funds payable to Keystone for his own personal use and paid himself distributions, which should have been classified as loans, and which should have resulted in a negative balance in Wahmann's own capital account. Mowers asserts causes of action for Conversion, Breach of Fiduciary Duty, and Fraud and seeks punitive damages.

Keystone objects to the timeliness of Mowers' Joinder Motion, noting that it was filed beyond the time limit permitted by the Rules of Civil Procedure. Keystone claims that, although Mowers was granted an extension due to illness of his counsel, that an extension was granted only to allow Mowers to file an Answer to the Complaint, and that the extension would not have been granted had Keystone's counsel been aware that Mowers planned to seek to join Wahmann as an additional defendant. Keystone argues that Mowers has failed to show any reasonable justification for his delay in filing his Joinder Complaint.

Pursuant to Pa.R.C.P. No. 2252, "any party may join as an additional defendant any person not a party to the action who may be ... solely liable on the underlying cause of action against the joining party, or ... liable to or with the joining party on any cause of action arising out of the transaction or occurrence or series of transactions or occurrences upon which the underlying cause of action against the joining party is based." Pa.R.C.P. No. 2252(1),

(4). Pa.R.C.P. 2253 provides as follows:

Rule 2253. Time for Filing Praecipe or Complaint

(a) Except as provided by Rule 1041.1(e), neither a praecipe for a writ to join an additional defendant nor a complaint if the joinder is commenced by complaint, shall be filed later than

(1) sixty days after the service upon the original defendant of the initial pleading of the plaintiff or any amendment thereof, or

(2) the time for filing the joining party's answer as established by Rule 1026, Rule 1028 or order of court, whichever is later, unless such filing is allowed by order of the court or by the written consent of all parties approved by and filed with the court. The praecipe for a writ to join an additional defendant or the complaint joining the additional defendant shall be filed within twenty days after notice of the court order or the court approval of the written consent or within such other time as the court shall fix.

(b) Any party may object to a motion to join an additional defendant after the period prescribed by subdivision (a) on the ground that the party will be prejudiced by the late joinder. The plaintiff may also object to the late joinder on the ground that the joining party has not shown a reasonable justification for its delay in commencing joinder proceedings.

(c) A person not previously a party who is joined as an additional defendant may object to the joinder by filing preliminary objections asserting prejudice or any other ground set forth in Rule 1028.

Pa.R.C.P. No. 2253.

Keystone argues that Mowers' pleading in response to the Complaint was due on March 12, 2018 and that the Joinder Complaint should have also been filed by that date. Due to the illness, Mowers' attorney requested an extension to March 23, 2018 which she confirmed with the following email to Keystone's counsel:

This email is to confirm our conversation in which you agreed to grant my client an extension until next Friday, March 23, to file an answer to the complaint due to my illness last week. Please email me with any concerns regarding this request.

## KEYSTONE SMART START LLC V. MICHAEL MOWERS NO. 2016-01777

(Exhibit “B” to Motion to Join Additional Defendant) On March 23, 2018, Mowers filed his Answer with New Matter and Counterclaim. On April 12, 2018, Keystone filed a Reply to New Matter and Preliminary Objections to Mowers’ Counterclaim. On April 23, 2018, Mowers filed the Motion to Join Addition Defendant. A Rule was issued and Keystone filed its Answer to the Motion on April 30, 2018.

Mowers appears to agree that the Joinder Complaint was originally due on March 12, 2018. However, the sixty-day time period within which an additional defendant may be joined is tolled by the filing of preliminary objections by an original defendant against the plaintiff’s initial pleading if the preliminary objections, if successful, would result in the action being dismissed. 3 *Standard Pennsylvania Practice 2d* §14:280. Under such circumstances, once the objections are overruled and the initial pleading is determined to be valid, the praecipe for a writ of joinder or if joinder is commenced by complaint, the complaint against the additional defendant may be filed within sixty days after the objections have been overruled. *Id.* Mowers’ Preliminary Objections sought dismissal on the basis that Plaintiffs had failed to set forth a cause of action for Breach of Contract. If successful, that argument would have resulted in the action being dismissed. Therefore, we believe the Joinder Complaint would have been timely filed within sixty days of Judge Jones’ Order of February 12, 2018, which would have been April 13, 2018. However, regardless of which date is used, it is clear that Mowers did not proceed in a timely manner to join Wahmann as an additional defendant.

Mowers argues that his Motion was filed “within a month after the applicable due date.” (Defendant’s Brief in Support of Motion to Join Additional Defendant) Rule 2253 requires that leave of court must be sought to secure joinder of an additional defendant after the expiration of the times set forth in that Rule. Pa.R.C.P. No. 2253. The defendant’s motion seeking an extension of time to join an additional defendant must set forth (a) some reasonable justification or excuse for the delay; (2) a statement of the facts alleged to render the proposed additional defendant alone liable, or liable with, or liable over to defendant, or liable to the defendant on a proper cross claim; and (3) allegations that the late joinder will not be prejudicial to the proposed additional defendant. *DiLauro v. One Bala Avenue Associates, DiLauro v. One Bala Avenue Associates*, 515 A.2d 939 (Pa. Super. 1986). The rule does not specify what is sufficient cause for an extension nor does it delineate the factors that the court should take into consideration when deliberating upon such a petition for extension. The court, therefore,

should be guided by the objectives sought to be achieved by use of the additional

## KEYSTONE SMART START LLC V. MICHAEL MOWERS NO. 2016-01777

defendant procedure in conjunction with the purpose for which a 60-day limitation was placed on its unrestricted use. In a capsule, these rules are an attempt to provide a means to simplify and expedite the disposition of matters involving numerous parties without subjecting the original plaintiff to unreasonable delay in the prosecution of his portion of the litigation.

*Id.*, at 942, citing *Zakian v. Liljestrand*, 264 A.2d 638, 641 (Pa. Super. 1970) (citations omitted).

The burden of demonstrating sufficient cause to allow an unseasonable joinder of an additional defendant rests with the moving party. *Welch Foods, Inc. v Bishopric Products Company v. PPG Industries, Inc.*, 385 A.2d 1007 (Pa. Super. 1978). The question of whether there is cause shown to justify an extension of time to permit the joinder of an additional defendant is a matter committed solely to the discretion of the trial judge. *Id.*

Keystone argues that Mowers has failed to show reasonable justification for the belated effort to join Wahmann as an additional defendant. After careful consideration of the record, we agree with Keystone.

In his Counterclaim filed on March 23, 2018, Mowers alleges that Keystone failed to engage in appropriate business practices which permitted Wahmann to engage in conduct which deprived the business of funds to which it was entitled. These allegations of improper activities on the part of Wahmann are similar, if not the same conduct, as those set forth in the Joinder Complaint. We conclude, therefore, that Mowers would have been aware of any improper activities on the part of Wahmann with regard to Keystone at the time his Answer was filed and, within the sixty-day period after the Order disposing of the Preliminary Objections on February 12, 2018. In explaining his failure to effectuate joinder of Wahmann in a timely fashion, Mowers simply states that “[t]he complexity of the issues involved in this case is evident in Mowers’ New Matter and Counterclaims” and that “[a]s a result, Mowers required additional investigation in order to file a joinder complaint against Wahmann.” (Defendant’s Motion to Join Additional Defendant, Paras. 7-8) Mowers fails to elaborate on what additional investigation was conducted and why the information which resulted from that investigation led to his decision to join Wahmann as an additional defendant. The explanation provided by Mowers does not constitute sufficient justification for his failure to proceed within the procedural time constraints and we will, therefore, issue an Order denying the Motion to Join Wahmann as an additional defendant.



IN THE COURT OF COMMON PLEAS OF LEBANON COUNTY  
PENNSYLVANIA

CIVIL DIVISION

KEYSTONE SMART START LLC : NO. 2016-01777  
Plaintiff :  
v. :  
MICHAEL MOWERS :  
Defendant :

ORDER OF COURT

AND NOW, this 16th day of November, 2018, it is hereby Ordered as follows:

1. Plaintiff's Preliminary Objections to Defendant's Counterclaim are OVERRULED, in part, and SUSTAINED, in part, as follows:
  - (a.) Plaintiff's Preliminary Objection in the Nature of a Demurrer/Motion to Strike Defendant's Counterclaim for Expiration of the Statute of Limitations is DENIED;
  - (b.) Plaintiff's Preliminary Objection in the Nature of a Motion for a More Specific Complaint (in the Alternative) is GRANTED. Defendant Michael Mowers is directed to file an Amended Counterclaim setting forth with more specificity the dates of the conduct complained of and the amounts at issue within twenty (20) days of notice of this Order.
2. Defendant's Motion to Join Additional Defendant Michael F. Wahmann is DENIED.

BY THE COURT:

\_\_\_\_\_, P.J.  
JOHN C. TYLWALK