

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

AVONDALE RENTALS, INC.	:	July Term 2001
	:	No. 02563
Plaintiff,	:	
v.	:	Commerce Program
	:	
ROSER & EINSTEIN, INC., et al.	:	
	:	Control No. 080607
Defendants.	:	

ORDER and MEMORANDUM

AND NOW, this 8TH day of January, 2004, upon consideration of the Motion for Summary Judgment of Defendant First Union National Bank (“First Union”), all responses in opposition, all other matters of record, and in accordance with the Opinion being filed contemporaneously with this Order, it hereby is **ORDERED** and **DECREED** that said Motion is **GRANTED** and that Counts III (negligence) and VI (promissory estoppel) of Plaintiff’s Amended Complaint are **DISMISSED**.

BY THE COURT:

GENE D. COHEN, J.

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MEMORANDUM OPINION

GENE D. COHEN, J.

Before the Court is the Motion for Summary Judgment of Defendant First Union National Bank (“First Union”). For the reasons fully set forth below, First Union’s Motion is **granted**.

DISCUSSION¹

First Union filed the instant motion seeking summary judgment as to Plaintiff’s negligence (Count III) and promissory estoppel (Count VI) claims. First Union argues that such claims are barred by the statute of limitations provision contained in the Appendix to the Rider to the Mortgage between Merrill Lynch and Plaintiff (the “Rider”),² which states:

Each of the Borrower and Indemnitor hereby agrees that any claim or cause of action by Borrower or Indemnitor against Lender, or any of the Lender’s directors, officers, employees, agents, based upon, arising from or relating to such instrument or the Loan or any other matter, cause or things whatsoever, whether or not relating thereto, occurred,

¹ For a more complete discussion of the facts involved in this case, this court references its earlier Opinion of December 18, 2002.

² The facts of record establish beyond cavil that First Union was the servicer of the mortgage between Plaintiff and Merrill Lynch and that First Union was performing all such duties in connection therewith on behalf of and for the benefit of Merrill Lynch. Def. Mtn., Exh. I, § 3.01 (a). Plaintiff has produced no facts which demonstrate anything to the contrary.

done, omitted or suffered to be done by the Lender or by the Lender's directors, officers, employees, agents...whether sounding in contract, tort or otherwise shall be barred unless asserted by the Borrower or Indemnitor, as the case may be, by the commencement of an action or proceeding in a court of competent jurisdiction by the filing of a complaint within one year after the Borrower or Indemnitor, as they case may be, first acquires or reasonably should have acquired knowledge of the first, act, occurrence or omissions upon which such claim or cause of action, or any part thereof, is based . . . Each of Borrower and Indemnitor agrees that such one year period of time is reasonable and sufficient time for a borrower or Indemnitor to investigate and act upon any such claim or cause of action.

Def. Mtn., Exh. G, Rider Agreement, Appendix, p. A-4.

This court finds that the foregoing limitations provision is valid and enforceable and serves as a bar to Plaintiff's negligence and promissory estoppel claims against First Union.³ Hurricane Floyd hit Pennsylvania on or about September 16, 1999. Compl. ¶¶ 31-32. Plaintiff made its insurance claim within a few days of Hurricane Floyd and at the same time learned that there was no coverage for the second building. *Id.* at ¶¶ 31-34. Thus, in order to be within the applicable statute of limitations, Plaintiff would have had to file the action against First Union by late September 2000. The Complaint in this case was not filed until July 20, 2001, almost two years later. Based on the foregoing, it is clear that Plaintiff's claims against First Union are time-barred under the Rider. Accordingly, First Union's Motion is **granted** and Counts III (negligence) and VI (promissory estoppel) of Plaintiff's Amended Complaint are **dismissed**.

BY THE COURT:

GENE D. COHEN, J. 1/8/04

³ It should be noted that First Union did not move for summary judgment as to the cross-claim filed against it by Roser & Einstein ("R&E"), nor did First Union respond to R&E's opposition to its Motion for Summary Judgment. Thus, it appears as if R&E's cross-claim against First Union for contribution and/or indemnity survives, at least through this stage of the litigation.
