

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

FILA CONSTRUCTION CO., INC.,	:	NO. 02-02,046
Plaintiff	:	
	:	
vs.	:	
	:	CIVIL ACTION - LAW
GARY KENDALL,	:	
Defendant	:	Motions to Strike

**OPINION AND ORDER**

Before the Court are Defendant’s Motion to Strike Plaintiff’s Answer to Defendant’s New Matter and Counterclaim, filed December 13, 2004, and Plaintiff’s motion to strike that motion, filed January 24, 2005. Argument on both motions was heard March 16, 2005. Defendant claims Plaintiff’s Answer to his New Matter and Counterclaim was untimely, and Plaintiff claims Defendant’s motion to strike that answer is likewise untimely.

Plaintiff obtained a District Justice Judgment on October 30, 2002, in connection with its construction of a building for Defendant. Defendant appealed from that judgment and on December 3, 2002, Plaintiff filed a Complaint. That Complaint was reinstated on December 30, 2002, and served on Defendant on January 24, 2003. Defendant filed preliminary objections on February 5, 2003, but such were overruled by Order dated April 4, 2003, and Defendant filed his Answer with New Matter and Counterclaim on July 7, 2003. Thereafter, a significant period of time passed with no apparent movement in the case.

On October 7, 2004, Defendant praeciped for an arbitration hearing and such was scheduled for December 16, 2004. On November 16, 2004, Plaintiff filed its Answer to Defendant’s New Matter and Counterclaim (the pleading at issue here). The instant Motion to Strike that Answer was filed by Defendant on December 13, 2004, the arbitration hearing was held on December 16, and on December 17, 2004, the Motion to Strike was dismissed as moot, without prejudice to Defendant to renew the motion in the event of an appeal. Such an appeal was filed on December 29, 2004, and the Motion to Strike was indeed renewed by a request filed January 6, 2005. Plaintiff then filed its Motion to Strike Defendant’s Untimely Motion to Strike, on January 24, 2005.

Defendant contends Plaintiff's Answer to his New Matter and Counterclaim must be stricken as untimely, having been filed more than sixteen months after the New Matter and Counterclaim.<sup>1</sup> Defendant argues Plaintiff can show no just cause for the delay and that, even though the prejudice which might have been inherent in the late filing in relation to the arbitration hearing has now been eliminated with the filing of the appeal, such cause must be shown before the issue of prejudice is even addressed, citing Peters Creek Sanitary Authority v. Welch, 681 A.2d 167 (Pa. 1996). The Court does not believe Peters Creek requires the striking of the Answer in the instant case, however.

Peters Creek does indicate that when a party moves to strike a pleading, the other party must demonstrate just cause for the delay and only then will the moving party be required to show it has been prejudiced by the late filing. Id. The actual holding of the case, however, is that a trial court does not abuse its discretion in granting a motion to strike an answer even though the moving party has not sought a default judgment.<sup>2</sup> In support of that holding, the Court relies on Pa.R.C.P. Rule 126, which requires that the rules "be liberally construed to secure the just, speedy and inexpensive determination of every action" and that the court at any time "may disregard any error or defect of procedure which does not affect the substantial rights of the parties." The Court goes on to point out that the twenty-day rule is not mandatory but permissive, and late pleadings may be filed if the opposite party is not prejudiced and justice requires. Id. The Court declares "[m]uch must be left to the discretion of the lower court." Id. at 170. In light of this analysis, it appears the Court's holding would not prevent a trial court from denying a motion to strike a pleading, where it is the trial court's opinion that justice would be best served by proceeding on all matters sought to be raised by the parties and neither party is prejudiced.

In the instant case, trial has been scheduled for the October 2005 term. Defendant is thus not left without time to respond to Plaintiff's Answer to its New Matter and Counterclaim, unlike the plaintiff in Peters Creek. Further, the Answer comprises simply denials of the

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<sup>1</sup> Pa.R.C.P. Rule 1026(a) requires "every pleading subsequent to the complaint shall be filed within twenty days after service of the preceding pleading".

<sup>2</sup> The trial court in Peters Creek had granted a motion to strike Defendant's Answer and New Matter, which was filed nearly twenty-three months after service of the Complaint, and only one day prior to trial.

allegations contained in the Answer and Counterclaim, and does not present new issues: Defendant thus seeks to have its allegations deemed admitted for want of an Answer, thereby obtaining a tactical advantage, rather than ward off any prejudice created by “surprise issues” contained in a last-minute filing. The Court believes that to endorse such a strategy would not be in keeping with the goal of securing the “just” determination of every action. Defendant’s motion will, therefore, be denied.

**ORDER**

AND NOW, this 18<sup>th</sup> day of March 2005, for the foregoing reasons, Defendant’s Motion to Strike Plaintiff’s Untimely Answer to Defendant’s New Matter and Counterclaim is hereby DENIED. Plaintiff’s Motion to Strike Defendant’s Untimely Motion to Strike Plaintiff’s Answer to Defendant’s New Matter and Counterclaim is DISMISSED as moot.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Lori Hackenberg, Esquire, 41 South Main Street, Middleburg, PA 17842  
Bradley Hillman, Esquire  
Gary Weber, Esq.  
Hon. Dudley Anderson