

IN THE COURT OF COMMON PLEAS, LYCOMING COUNTY, PENNSYLVANIA

ANTHONY and VIN SALVATORE, Individually and t/d/b/a 33TWOONECO, LLC, Plaintiffs	: NO. 18-0182 : : : :
vs.	: CIVIL ACTION – Law : In Equity : :
DANKO HOLDINGS, LP, 3 rd ST. PLCB VENTURES, LLC d/b/a FAT CAT GRILLE and NIGHT VENUE, Defendants	: Preliminary Objections/ : Motion to Strike

OPINION AND ORDER

On February 8, 2018, Plaintiffs filed their Complaint against Defendants with an attached Notice to Plead. On March 5, 2018, Defendants filed Preliminary Objections with an attached Notice to Plead. On March 21, 2018, Plaintiffs filed a Response to Defendant’s Preliminary Objections.

On May 30, 2019, Plaintiffs filed an Amended Complaint with an attached Notice to Plead. On July 5, 2019, Defendants filed an Answer with New Matter and a Counterclaim along with an attached Notice to Plead.

By Order entered January 21, 2020, the court set forth deadlines for discovery and dispositive motions as well as other trial related dates. Among other things, the court noted that the case was scheduled as a non-jury trial.

Due to scheduling matters, the court set a scheduling conference for December 14, 2020 to discuss, among other things, a new Scheduling Order. At said conference, the parties disputed whether the case would be heard by a jury or non-jury.

On December 30, 2020, Plaintiffs filed a Reply to Defendants’ New Matter as well as an Answer and New Matter to Defendants’ Counterclaim. Attached to Plaintiffs’

pleading was a Notice to Plead which demanded a jury trial. On January 19, 2021, Defendants filed Preliminary Objections to Plaintiffs' New Matter asserting that the New Matter failed to conform to law by being vague, boilerplate and non-specific. Furthermore, Defendants claimed that the New Matter contained no factual averments whatsoever to support its affirmative offenses.

On January 19, 2021, Defendants also filed a Motion to Strike Plaintiffs' demand for a jury trial. Plaintiffs filed a Response to the Motion to Strike. Argument was held before the court on March 31, 2021.

Defendants argue that Plaintiffs waived their right to a jury trial by not demanding such within twenty (20) days after service of the last permissible pleading in violation of Pennsylvania Rule of Civil Procedure 1007.1. Defendants further argue that there are equitable claims and counterclaims for which there is no right to a jury trial.

Plaintiffs counter that: they had no input into the scheduling order dated January 21, 2020; there is no provision in the Rules of Civil Procedure to strike a demand for a jury trial; the court has the inherent discretion to grant a jury trial beyond the twenty (20) days from the filing of a permitted pleading; the pleadings are not closed because defendant filed preliminary objections; and the demand for a jury trial was affixed to their Reply to New Matter, which was a permissible pleading.

Plaintiffs first requested a jury trial informally during the September 14, 2020 status conference in this matter. Previously, Plaintiffs did not demand such in their pleadings or through any motions in response to the court's January 21, 2020 scheduling order directing that the trial be non-jury.

Pursuant to Pennsylvania Rule of Civil Procedure 1007.1(a), in any action in which the right to a jury trial exists, that right shall be deemed waived unless the party

files and serves a written demand for a jury trial not later than twenty (20) days after service of the last permissible pleading.

Pursuant to Rule 1017, permissible pleadings include, among others, a reply to new matter and preliminary objections. Rule 1017(a)(2), (4).

Technically, Plaintiffs have complied with Rule 1007.1(a) by filing their demand for a jury trial within twenty (20) days of service of their reply to Defendants' New Matter and Answer and New Matter to Defendants' Counterclaim. As well, the demand for the jury trial was filed before Defendant's Preliminary Objections.

However, Rule 1026 requires that responsive pleadings to a pleading containing a Notice to Plead be filed within twenty (20) days after service of the preceding pleading. Further, pursuant to Rule 1029(b), averments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implication.

In addressing Defendants' Motion to Strike, the court must first address the effect of Plaintiffs' dilatory filing of its Reply to Defendants' New Matter as well as its Answer and New Matter to Defendants' Counterclaim. Said pleading was filed approximately 18 months after it was due pursuant to the rules.

Rule 1026 is not mandatory but permissive. *Peters Creek Sanitary Authority v. Welch*, 681 A.2d 167, 170 (Pa. 1996). However, the court cannot sanction such conduct. No excuse was offered for a delay of such extraordinary duration. The parties have engaged in extensive pretrial litigation as well as discovery for well over a year. While Defendants have not shown prejudice, the interest of expeditious and efficient administration of justice by reasonable adherence to the rules of court must prevail.

On the other hand, however, Rule 1007.1 does not explicitly bar a trial court from allowing an untimely jury demand. Moreover, the rules must be liberally

construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. Pa. R. Civ. P. 1026. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties. Pa. R. Civ. P. 126

Defendants argue that the decision in *Dauphin Deposit Bank and Trust v. Pifer*, 556 A.2d 904 (Pa. Super. 1989) controls. However, the request for a jury trial in said case was untimely from the face of the rule. Further, the request was never made by way of written demand. In this case, the demand is timely on the face of the rule and was made in writing.

In *Dauphin*, among other things, the court noted that there was no inherent prejudice in proceeding to trial by jury as opposed to trial before a judge. Moreover, the lack of prejudice to either side is not a factor in determining a waiver where the provisions of Rule 1007.1 (a) have not been met.

Nonetheless, the court cannot advance form over substance. As the Superior Court in *Dauphin* cautioned, its decision was not meant to “imply that full compliance with the rules of procedure is not required or that failure to do so is without peril.” *Id.* at 906. The court cannot guess as to why either party acted as they did in enforcing or not enforcing the Rules of Civil Procedure. Certainly, options were available to each party in connection with the pleadings.

The court is compelled to deny Defendants’ Motion to Strike. Plaintiffs have complied with Rule 1007.1.

With respect to Defendants’ Preliminary Objection, said Preliminary Objections are granted. Plaintiffs have thirty (30) days from the date of this Order to file an

Amended New Matter to Defendants' Counterclaims to specifically allege facts in support of those affirmative defenses.

ORDER

AND NOW, this ____ day of July 2021, Defendants' Preliminary Objections to Plaintiffs New Matter are **GRANTED** as set forth above. Plaintiffs must file an Amended New Matter within thirty (30) days of the date of this Order. Defendants Motion to Strike Plaintiffs' demand for a jury trial is **DENIED**.

BY THE COURT

Marc F. Lovecchio, Judge

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