

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CIVIL ACTION

BRUCE L. BREINER MASONRY LLC.,
Plaintiff

vs.

BRUCE C. FRITZ, and
LINDA A. FRITZ
Defendants

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:
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:
:

No. 12-2355

Robert J. Magee, Esquire
Bruce C. Fritz
Linda A. Fritz

Counsel for Plaintiff
Pro Se
Pro Se

MEMORANDUM OPINION

Matika, J. - August , 2013

Before the Court are two motions: one filed by Bruce C. Fritz and Linda A. Fritz, (hereinafter "Fritzes"), in the form of a "Motion to Remove Non Pros," and the second motion filed by Bruce L. Breiner Masonry, LLC., (hereinafter "Breiner"), in the nature of a "Motion to Strike Complaint."¹ After argument presented and a review of the short yet tortured procedural history of this case, and the documents filed in this matter, the Court denies Breiner's Motion to Strike Complaint and consequently determines that Fritzes' Motion to Remove Non Pros is rendered moot for the reasons stated below.

¹ The Motion to Strike Complaint deals with the document filed by the Fritzes on December 20, 2012 and titled "Ammendment (sic), Countercomplaint and Response to Complaint."

FACTUAL AND PROCEDURAL HISTORY

On August 7, 2012, Breiner filed a complaint against the Fritzes, in the office of Magisterial District Judge William J. Kissner alleging a balance due on a breach of contract claim. On September 5, 2012, the Fritzes filed a separate action against Breiner, presumably based upon Breiner's failure to provide the services contracted for between the parties. On October 5, 2012, Magisterial District Judge Kissner entered judgment in favor of Breiner and against the Fritzes on the initial complaint in the amount of One Thousand Five Hundred Dollars (\$1,500.00) plus costs of suit. Further, the Magisterial District Judge found in Breiner's favor on the other action brought forth by the Fritzes.

Since each action had a separate "CV" (civil action) number, the Magisterial District Judge issued two "Notice of Judgment" decisions, one for each case. The case indexed CV-226-2012 that listed Breiner as the plaintiff and Fritzes as the defendants, showed the disposition and judgment summary in favor of Breiner and against the Fritzes. However, the Notice of Judgment also reflected the disposition and judgment summary of the other case indexed CV-264-2012 in which the Fritzes were the plaintiffs and Breiner the defendant. Due to the fact there were two separate actions with different CV numbers, albeit

involving the same parties, the Magisterial District Judge issued another Notice of Judgment for the case indexed CV-264-2012 with the caption showing the Fritzes as the plaintiffs. Similarly, this Notice of Judgment reflected the disposition and summary judgment of both cases as well.

On November 5, 2012, the Fritzes prepared a handwritten notice of appeal to the case indexed CV-226-2012, and filed such document with the Carbon County Prothonotary's Office. In that notice of appeal, in the block designated for the caption of the case being appealed, Fritzes wrote: "Bruce C. Fritz, Linda A. Fritz vs. Bruce L. Breiner Massonry (sic) LLC.," which did not correspond with that CV docket number, but rather was the caption for the other docket number, CV-264-2012. Additionally, the Fritzes not only erroneously referenced these parties as plaintiff and defendant, respectively in accordance with the manner in which the pre-printed form was created, but also hand wrote "Defendant" above the Fritzes' names and "Plaintiff" above Breiner's name signifying reference to the other case indexed CV-264-2012.

Thereafter, on November 19, 2012, pursuant to a rule issued upon Breiner, Breiner filed a complaint; however in doing so it transposed the parties following the error in the notice of

appeal created by the Fritzes.² The complaint was served upon the Fritzes by first-class mail on November 19, 2012. Thereafter, on November 27, 2012, Breiner sent to the Fritzes a ten (10) day default judgment notice claiming that the Fritzes had not filed a complaint in the matter in which the Fritzes were the plaintiffs.³

On December 10, 2012 at approximately 12:50 P.M., Attorney Robert J. Magee, counsel for Breiner, faxed a letter to Attorney Jason Rapa, then counsel for the Fritzes,⁴ indicating that because of the manner in which the *pro se* appeal was filed, he, Attorney Magee, believed the "Defendant's Complaint was filed first on behalf of Breiner." Consequently, Attorney Magee indicated to Attorney Rapa that he had no problem if the Fritzes simply filed an answer to the complaint and a counterclaim rather than a separate complaint.

Later on December 10, 2012, at 3:52 P.M., the Fritzes filed

² The notice of appeal form filed by the Fritzes references the CV-226-12 docket number but transposes the parties. While not made an issue by Breiner, such error has created a logistical nightmare, one which the Court will correct with its order in this case.

³ When the rule was issued upon Breiner, the appellee in both cases, to file a complaint in the case indexed CV-226-2012 and captioned in the Magisterial District Court as Breiner vs. Fritz, it did so. However, no complaint was, as of November 27, 2012, filed by the Fritzes in the case captioned Fritz vs. Breiner and indexed as CV-264-2012.

⁴ Although Attorney Rapa never entered an appearance on behalf of the Fritzes or file any documents with the Court as Fritzes' counsel, it was represented to the Court that Attorney Rapa was Fritzes' counsel at the time he received this letter from Attorney Magee.

a *pro se* "Countercomplaint (sic) and Response to the Complaint."⁵ This document, devoid of a notice to plead, contains eight numbered paragraphs, which is the same number of paragraphs the complaint filed by Breiner has in it. Nevertheless, this pleading filed by the Fritzes does not differentiate between what averments are in response to the averments in the complaint and those averments necessary to set forth the counterclaim they assert against Breiner.

On December 13, 2012, Breiner filed a Praecipe for Judgment Non Pros against the Fritzes on the basis that the Fritzes did not file a complaint within twenty (20) days following the service of the rule.⁶

On December 20, 2012, the Fritzes filed a document titled "Amendment (sic), Countercomplaint and Response to Complaint" that included twenty-one (21) numbered paragraphs. Of these, the first eight (8) contains admissions, denials, or a combination of both to the eight (8) numbered paragraphs in

⁵ It is unclear if this filing was in response to Attorney Magee's letter or not, but for purposes of these motions the Fritzes contend the pleading filed was an answer with a counterclaim as prescribed by Attorney Magee's letter to Attorney Rapa.

⁶ It should be noted that no rule can be issued upon an appellant to file a complaint as a party cannot issue a rule upon itself; however Rules 1001(6) and 1004(A) of Pennsylvania Rule of Civil Procedure governing actions and proceedings before Magisterial District Judges requires an appellant who was the claimant before the Magisterial District Judge, which includes the Fritzes with respect to their cross-complaint, to file a complaint within twenty (20) days after filing the notice of appeal. Pa.R.C.P.M.D.J. 1001(6) & 1004(A).

Breiner's complaint. The remaining paragraphs appear to present additional facts and conclusions of law which seem grounded in either new matter defenses or a counterclaim.

Thereafter, the Fritzes filed, on January 17, 2013, the within motion to remove non pros. In this motion, the Fritzes claim that the document filed on December 10, 2012, titled "CCountercomplaint (sic) and Response to the Complaint" was a properly plead answer to the complaint along with a counterclaim stated therein. Accordingly, the Fritzes argue that the non pros should be removed. Further, upon removing the non pros, the Fritzes claim that the document filed on December 20, 2012 labeled "Ammendment (sic), Countercomplaint and Response to Complaint" should not only serve as an amendment to the original document filed on December 10, 2012, but should also survive the "Motion to Strike Complaint" filed by Breiner on January 21, 2013. In the motion filed by Breiner, it is argued by Breiner that this second pleading of the Fritzes, the pleading filed on December 20, 2012, should be stricken on the basis that judgment non pros was already entered against the Fritzes and thus there is nothing to amend.

Argument was held on these motions on May 30, 2013; disposition by the Court is now ripe.

LEGAL DISCUSSION

To commence a civil action before a magisterial district judge, a litigant must file a complaint. Pa.R.C.P.M.D.J. 303. A defendant may thereafter file a cross-complaint, otherwise termed as a counterclaim, against the plaintiff. Pa.R.C.P.M.D.J. 315. However, there is nothing in the rules that precludes the defendant from filing a new complaint and paying a greater filing fee, as the Fritzes did here.

Notwithstanding not consolidating the cases under one docket number, Magisterial District Judge Kissner held a single hearing on both complaints as it appeared the complaints revolved around the same facts, transactions, and occurrences. Shortly thereafter, the Magisterial District Judge entered judgment on both cases in favor of Breiner, with the notice of judgments issued to all parties. The computerized system utilized by the Magisterial District Judge's office generated two notices of judgment, one for each case respectively; however, the two notices of judgment reflect the disposition and judgment of the other case as well.

Pursuant to Pennsylvania's Magisterial District Judge Rule of Civil Procedure 1002,

a party aggrieved by a judgment for money . . . may appeal therefrom within thirty (30) days after the date of the entry of the judgment by filing with the

prothonotary of the court of common pleas a notice of appeal on a form which shall be prescribed by the State Court Administrator together with a copy of the Notice of Judgment issued by the magisterial district judge.

Pa.R.C.P.M.D.J. 1002A. This the Fritzes did. While ordinarily two notices of appeal should have been filed, the Court finds it understandable why the Fritzes filed a single notice of appeal document: the notice of judgment, while indexing one docket number, referenced both judgments rendered by the Magisterial District Judge on both cases. Accordingly, the Fritzes used both captions, "Bruce L. Breiner Masonry LLC v. Bruce Fritz, Linda Fritz" and "Bruce Fritz, Linda Fritz v. Bruce L. Breiner Masonry LLC," on the notice of appeal they filed with the Prothonotary to cover both cases heard by Magisterial District Judge Kissner.

Breiner, in compliance with the rule issued to file a complaint in the case indexed CV-226-2012, filed such complaint on November 19, 2012. In spite of such, due to the manner in which the Fritzes prepared the notice of appeal, and through no apparent fault of Breiner, the complaint filed by Breiner reversed the names on the caption.⁷

Once this complaint was filed, the Fritzes, pursuant to the rules of Pennsylvania Civil Procedure had twenty (20) days to

⁷ As part of the Court's order in this case, the Court will direct the Prothonotary to correct the caption and transpose the names accordingly.

file a responsive pleading, which they did on December 10, 2012, a pleading titled: "CCountercomplaint (sic) and Response to the Complaint." Prior thereto, on November 27, 2012, believing that the Fritzes, as plaintiffs in the case indexed CV-264-2012, were also required to file a complaint pursuant to the rule issued, Breiner sent a ten (10) day default judgment notice to them. On December 13, 2012, Breiner filed a "Praecipe for Judgment of Non Pros" asking the Prothonotary to enter judgment against the Fritzes as a consequence of the Fritzes' failure to file a complaint following the issuances of the rule in the case indexed CV-264-2012.

Pursuant to Pennsylvania Rule of Civil Procedure for Magisterial District Judges 1004A, "[i]f the appellant [Fritzes] was the claimant in the action before the magisterial district judge, he shall file a complaint within twenty (20) days after filing his notice of appeal." Subsection (b) of rule 1004 states that:

If the appellant was the defendant in the action before the magisterial district judge, he shall file with his notice of appeal a praecipe requesting the prothonotary to enter a rule as of course upon the appellee to file a complaint within twenty (20) days after service of the rule or suffer entry of a judgment of non pros.

Pa.R.C.P.M.D.J. 1004B. Since the Fritzes, as the appellants, were both defendants and plaintiffs in the underlying actions

before Magisterial District Judge Kissner, and Breiner, as the appellee, was both plaintiff and defendant, the Court must look at the notice of appeal to ascertain the priority of the actions with respect to who must file what first.

It is evident from the manner in which the notice of appeal was filed that the Fritzes intended to appeal both decisions of the Magisterial District Judge.⁸ Such conclusion can be gleaned from an examination of the notice of appeal that identified both parties as plaintiff and defendant. Fritzes, however, on the notice of appeal, only identified one docket number from the Magisterial District Court, that being CV-226-2012 with the caption of "Bruce L. Breiner Masonry LLC v. Bruce Fritz, Linda Fritz." Breiner recognizing that fact, acknowledged its obligation to file a complaint by doing so. Contrary to what Breiner wants the Court to believe, the Court does not find that the Fritzes had the same obligation since it is not practical to have two complaints filed by opposing parties to the same action under the same docket number. The appropriate procedural step would be for the Fritzes to file a counterclaim. The Court finds that Breiner's action in sending the ten (10) day default judgment notice was misplaced and the praecipe indicating that the Fritzes were deficient in not complying with a rule to file

⁸ Even though each case should have been appealed separately and consolidated thereafter, this issue was not raised by Breiner and therefore deemed waived.

a complaint erroneous.

Even assuming, *arguendo*, that Breiner is correct in its assertion that the Fritzes were obligated to file a complaint and had not done so before Breiner filed the praecipe for judgment non pros, the Court detects flaws in the process followed by Breiner in attempting to obtain default.

Black's Law Dictionary defines "Praecipe" as a "motion or request seeking some court action." PRAECIPE, Black's Law Dictionary (9th ed. 2009). In the case at bar, Breiner's filing of the praecipe was a request asking the Prothonotary to enter judgment non pros for the Fritzes' failure to file a complaint. This request was premised upon Breiner's belief that the December 10, 2012 pleading of the Fritzes was only an answer and not a counterclaim. This Court agrees with Breiner's assessment and characterization of Fritzes' pleading, however the Court cannot conclude that judgment non pros has been obtained. While Breiner made a request for the entry of judgment non pros, no such judgment was ever entered. Thus, Breiner's praecipe for judgment non pros did not prevent the Fritzes from asserting their counterclaim.

Customarily, a praecipe seeking judgment non pros is accompanied by certain language, usually on the praecipe, informing the party that judgment non pros was entered. In

addition to this information, the praecipe is signed and dated by the Prothonotary. In this case, no such verbiage was on the praecipe for the prothonotary to sign, nor was a separate document filed stating that judgment was entered against the Fritzes thus putting the Fritzes on notice of such entry of judgment. Consequently, the request for judgment non pros has technically gone unanswered and therefore never entered against the Fritzes. Despite the defects in the Fritzes' motion to remove the judgment non pros, said motion is denied as moot since no judgment was ever entered against them.⁹

The Court next addresses the issue of Breiner's "Motion to Strike Complaint" filed by the Fritzes on December 20, 2012. Since the Court is allowing the Fritzes' initial pleading to stand, the requisite inquiry the Court must now consider is whether or not the amended complaint is proper.

Initially, the Court would note that Breiner's argument is grounded in the proper entry of a judgment non pros against the Fritzes. Had judgment non pros been proper, the Court would find in favor of Breiner's motion and strike the complaint as requested. However, since the Court has found that no such judgment non pros exists, Breiner's motion, as stated, must be

⁹ The proper mechanism to challenge a judgment non pros is set forth in Pennsylvania Rule of Civil Procedure 237.3. While it would have been appropriate to dismiss Fritz's challenge to the judgment non pros for failing to comply with the rule, the Court is unwilling to do so since it cannot be considered a challenge to something that does not exist.

denied as the Fritzes properly filed the amended pleading. See, Pa.R.C.P. 1033.

CONCLUSION

Based on the foregoing, the Court enters the following order:

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CIVIL ACTION

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Plaintiff	:	
	:	
vs.	:	No. 12-2355
	:	
BRUCE C. FRITZ, and	:	
LINDA A. FRITZ	:	
Defendants	:	

Robert J. Magee, Esquire	Counsel for Plaintiff
Bruce C. Fritz	Pro Se
Linda A. Fritz	Pro Se

ORDER OF COURT

AND NOW, this day of August, 2013, upon consideration of the "Motion to Remove Non Pros" filed by Bruce C. Fritz and Linda A. Fritz and the "Motion to Strike Complaint" filed by Bruce L. Breiner Masonry, LLC., and after hearing and argument thereon, it is hereby **ORDERED and DECREED** as follows:

- 1) The motion to remove non pros is **DENIED** as **MOOT**;
- 2) The motion to strike complaint is **DENIED** and **DISMISSED**;
and
- 3) The Prothonotary is directed to correct the caption in this case to read as follows:

Bruce L. Breiner Masonry, LLC vs. Bruce C. Fritz
and Linda A. Fritz.

It is **FURTHER ORDERED and DECREED** that Bruce L. Breiner

Masonry, LLC. shall have twenty (20) days from the date of this order to file any responsive pleading deemed necessary and appropriate.

BY THE COURT:

Joseph J. Matika, Judge