IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

KING CONSTRUCTION, INC.,)	
Plaintiff and Claimant,)	
)	C.A. No.: N10L-07-080 PLA
V.)	
)	
PLAZA FOUR REALTY, LLC, et al.,)	
Defendants.)	

ON DEFENDANT PLAZA FOUR REALTY, LLC'S MOTION FOR LEAVE TO AMEND ANSWER

GRANTED IN PART AND **DENIED** IN PART

Submitted: May 4, 2012 Decided: August 7, 2012

I. Introduction

Defendant Plaza Four Realty, LLC ("Plaza Four") seeks to amend its Answer to include a counterclaim against Plaintiff King Construction, Inc. ("King"), cross claims against co-defendant Alpha Baptist Church, also known as Alpha Worship Center ("Alpha"), and an affirmative defense to King's claims. King opposes the amendments. In short, Plaza Four seeks to add claims and defenses arising out of the alleged demolition of its property that occurred while King was performing construction work pursuant to its contract with Alpha. King opposes the amendments. Given the complex and unusual factual circumstances of this case, the Court finds that Plaza Four should not be permitted to assert its counterclaim

but that it should be allowed to amend its Answer and its affidavit of defense to include an affirmative defense of setoff in the mechanic's lien action. Accordingly, Plaza Four's motion to amend is DENIED in part and GRANTED in part.

II. Factual and Procedural History

King is a general construction contractor based in Baltimore, Maryland. Plaza Four, a limited liability company, owns property located at 721 East Chestnut Hill Road in Newark, Delaware ("the property"). Plaza Four leased the property to Alpha Baptist Church, also known as Alpha Worship Center, Inc. ("Alpha"). Alpha's lease term began January 1, 2007. Alpha intended to renovate the building on the property to use as a church.

On December 8, 2006, before the lease term commenced, Plaza Four sent a notarized letter to the New Castle County Department of Land Use authorizing Alpha to obtain a demolition permit or a building permit for its renovation project. On December 20, 2006, Alpha entered into a construction contract with King to perform the renovations for a lump sum of \$1,185,000.

King began furnishing labor and materials for Alpha's renovations on January 22, 2007. During the initial phase of the project, King demolished the front

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¹ King Constr., Inc. v. Plaza Four Realty, LLC, 976 A.2d 145, 147 (Del. 2009). The Delaware Supreme Court noted in its opinion that the parties have since disputed whether Plaza Four consented to the renovation of its building.

interior portion of the building. On March 1, 2007, Alpha directed King to focus its construction efforts on the more critical parts of the project because Alpha was experiencing financial difficulties, and King moved its renovation efforts to the rear of the building. During the renovations, Alpha also issued various change orders directing King to add certain work to and delete other work from the contract. The changes reduced the sum of the contract by \$156,056.23 to a revised sum of \$1,028,943.77.

Since 2007, King, Plaza Four, and Alpha have been embroiled in litigation as part of King's efforts to recover payment under the contract. In 2007, King filed a mechanic's lien action, naming Alpha and Plaza Four as defendants, asserting that it was owed \$367,749.35 under the contract. King also sought to recover the same amount as a personal judgment against Alpha only. King and Alpha subsequently negotiated a settlement agreement on October 16, 2007, which included a payment plan for the remaining \$360,249.35 that the parties agreed was owed under the contract. King did not allege in its initial statement of claim that Plaza Four had consented to the construction project on its property. Plaza Four filed an answer to the 2007 statement of claim on May 29, 2008, in which it asserted that it had not given prior written consent to the renovations. This Court granted Plaza Four's subsequent motion to dismiss because King had failed to demonstrate that the owner of the property had given prior written consent to the alteration of the

property and because King had failed to show that it had completed labor or furnishing materials on the project.

King has not performed work or furnished materials in connection with the Alpha project since February 26, 2010. King's architect certified completion of the project on March 1, 2010. Final payment was to be due March 31, 2010. On July 8, 2010, King filed another mechanic's lien action that named Alpha and Plaza Four as defendants, seeking to recover the balance of the contract, which King alleged was \$200,416.15 at the time of the Complaint. King also seeks to recover the balance of the contract from Plaza Four and/or Alpha as personal judgments under the theories of unjust enrichment and *quantum meruit*.

III. Parties' Contentions

Plaza Four filed an Answer to the Complaint, including an Affidavit of Defense, on October 5, 2010. In its Answer and Affidavit of Defense, Plaza Four characterized King's Statement of Claim as procedurally deficient and untimely and again asserted that Plaza Four had not given its written consent to the renovation project on its property. Plaza Four also asserted that King does not have a license to be doing business in Delaware. Plaza Four made no reference to the demolition of the building or the quality of King's construction work in any other respect.

On May 3, 2012, one day before the deadline for amendments to pleadings established in the Trial Scheduling Order in this case, Plaza Four filed a Motion for Leave to Amend the Complaint, attempting to assert a counterclaim against King, cross-claims against Alpha, and an affirmative defense against King. Specifically, Plaza Four alleges that King demolished the front interior portion of its building and failed to perform any further construction, leaving the building in a demolished condition. Plaza Four estimates that it would cost \$150,000 to restore the demolished portion of the building and requests a judgment against King for the cost of restoring the front interior portion of the building to its previous condition. Plaza Four also asserts the partial demolition of the building as an affirmative defense that would bar King's claims.

In response, King argues that allowing the counterclaim to proceed would result in substantial prejudice to it because it has not had an opportunity to investigate the alleged demolition since it was performed in early 2007. Moreover, King contends that the statute of limitations bars Plaza Four's proposed counterclaim because the demolition of the front of the building was completed by March 1, 2007, when Alpha directed King to focus on the most essential portion of the project. As such, King submits, even assuming that the proposed amendments would relate back to the date the answer was filed, they would still be barred by the statute of limitations. As to Plaza Four's affirmative defense, King withdraws its *quantum*

meruit and unjust enrichment claims against Plaza Four and contends that the demolition cannot be asserted as a defense of recoupment to the mechanic's lien action because Plaza Four was not a party to the construction contract between King and Alpha.

IV. Discussion

a. Plaza Four's Proposed Counterclaim Against King

Plaza Four seeks to assert a counterclaim against King pursuant to Superior Court Civil Rule 13(f), which provides that "[w]hen a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, the pleader may by leave of court set up the counterclaim by amendment." In order to allege a counterclaim for the first time several years after the commencement of an action, as with any amendment to a pleading, Plaza Four must initially proceed under paragraph (a) under Superior Court Civil Rule 15. An order permitting or refusing an amendment to a pleading is committed to the sound discretion of the trial court. A trial judge in his or her discretion must permit or deny an amendment by weighing the desirability of ending the litigation on its merits against possible prejudice or surprise to the other side.

⁵ *Id*.

² Super. Ct. Civ. R. 13(f).

³ PNC Bank, Delaware v. Turner, 659 A.2d 222, 225 (Del. Super. 1995) (citing Annone v. Kawasaki Motor Corp., 316 A.2d 209, 210 (Del. 1974)).

⁴ Id. (citing Mergenthaler, Inc. v. Jefferson, 332 A.2d 396, 398 (Del. 1975)).

Under Superior Court Civil Rule 15, leave to amend a pleading "shall be freely given when justice so requires." Justice may not so require if the party seeking to amend has been inexcusably careless or if the amendment would unfairly prejudice an opposing party. A motion to amend must be denied, furthermore, if the amendment would be futile because it would not survive a motion to dismiss under Superior Court Civil Rule 12(b)(6). The standard for assessing the legal sufficiency of a proposed counterclaim is the same standard applicable to a motion to dismiss under Rule 12(b)(6). All allegations in the amended counterclaim must be accepted as true, and the proposed amendment will be dismissed if the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof. To

Upon review of the pleadings and the proposed amended counterclaim in this case, the Court has determined that Plaza Four's proposed counterclaim against King should be barred as legally insufficient. King's proposed counterclaim, in setting forth its account of the damage to its property and

⁶ Super. Ct. Civ. R. 15(a).

⁷ Petenbrink v. Superior Home Builders, Inc., 1999 WL 1223786, at *** (Del. Super. Nov. 1, 1999) (quoting Annone, 316 A.2d at 211).

⁸ E.g., Colbert v. Goodville Mut. Cas. Co., 2011 WL 441363, at *1 (Del. Super. Feb. 8, 2011); see also Shuman v. Santora, 1991 WL 18101, at *3 (Del. Super. Feb. 5, 1991); Am. Home Products Corp. v. Norden Laboratories, Inc., 1992 WL 368604, at *3 (Del. Ch. Dec. 11, 1992) ("A counterclaim is equivalent to an affirmative action brought by a litigant...").

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⁹*Id.*; *Parallel Fund L.P. v. Ergen*, 2004 WL 3048751, at *6 (Del. Ch.); *Fitzgerald v. Cantor*, 1998 WL 940824, at *2 (Del. Ch.)

¹⁰ *Colbert*, 2011 WL 441363, at *1.

requesting compensation for the cost of restoring the building to its original condition, presents no legal theory under which it would be entitled to such relief. In its brief supporting the motion to amend, Plaza Four suggests that King breached its contractual obligation to restore the demolition when it certified the completion of the construction project in March 2010. Unfortunately, however, the original contract between King and Alpha, to which Plaza Four was not a party, reveals no specific duty to restore the demolition in the front interior portion of Plaza Four's building. Moreover, as King correctly points out in its brief, Plaza Four was not a party to the construction contract between King and Alpha and has not claimed to be a third-party beneficiary of the contract. The record, therefore, does not support Plaza Four's attempt to characterize the demolition of its building as a breach of contract by King.

While Plaza Four might arguably have (or have had) a tort claim against King for the destruction of its building, the counterclaim fails to articulate any theory of liability in tort under which Plaza Four might recover from King. The amendment makes no effort to set forth any specific tort, the elements of such a tort, or to explain how King's conduct would satisfy the elements of the tort. Furthermore, any proposed counterclaim based in tort against King would likely present a statute of limitations problem because a common-sense evaluation of the facts indicates that Plaza Four's cause of action would have accrued on or before

March 1, 2007, when King discontinued work on the front portion of the building pursuant to directions from Alpha. Plaza Four has offered no convincing reason why a cause of action based in tort should have accrued at any later date than the completion of the demolition. Indeed, even if Plaza Four's amendment related back to its original answer, filed October 5, 2010, a tort claim based on the partial demolition of the interior of Plaza Four's building would still probably be untimely. Plaza Four's attempts to evade the statute of limitations by suggesting various ways that the counterclaim, with or without relation back, falls within the statutory period further suggests that Plaza Four itself is not sure what its cause of action is or when it accrued. As such, the Court finds that Plaza Four has failed to state a claim under which relief could be granted. Plaza Four's motion to amend its answer to assert a counterclaim is therefore denied because such a counterclaim would be futile.

b. Plaza Four's Proposed Affirmative Defense

Plaza Four also seeks to raise the damage to its building against King as an affirmative defense. Ordinarily a defendant may amend a pleading to assert an affirmative defense even where the statute of limitations or other considerations would bar the assertion of a substantially similar counterclaim. ¹¹ In a mechanic's

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¹¹ See PNC Bank, 659 A.2d at 225 (allowing an affirmative defense of recoupment where the defendant's proposed counterclaim would have been barred by the statute of limitations, noting that "the underlying policy of the statute of limitations is not promoted by suppressing a valid

lien action, a defendant is required to submit an affidavit of defense establishing that the defendant "verily believes there is a legal defense to the whole or part of such cause of action and setting forth the nature and character of the defense." The affidavit of defense does not, however, limit the available defenses in a mechanic's lien action. 13

Here, King argues unpersuasively that Plaza Four's affirmative defense should not be permitted because it does not arise from the same transaction as the mechanic's lien. King submits that by relying on its opposition to the construction contract between King and Alpha, Plaza Four has relinquished the right to bring claims related to the contract as a third-party beneficiary of the contract. King's argument is without merit. Assuming the truth of Plaza Four's allegations, King entered Plaza Four's building pursuant to a construction contract with Plaza Four's tenant, demolished an interior portion of the building, then completed work

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defense arising out of a transaction" and that the "purpose of statutes of limitation is to bar actions and not to deny matters of defense. As a general rule, such statutes are not applicable to defenses, but only where affirmative relief is sought. [...] It would therefore be appropriate for [defendant] to plead her claims [...] defensively whether or not they would be barred if pleaded affirmatively."

¹² 25 Del. C. §2716.

¹³ E.g., Miller v. Master Home Builders, Inc., 239 A.2d 696 (Del. Super. 1968) (allowing defendants to amend a procedurally defective affidavit of defense to avoid default judgment); Snow v. MAP Constr., 2008 WL 116205, at *7 (Del. Super. Jan. 11, 2008) (noting that even where the affidavit of defense is defective, courts liberally permit amendments to avoid default judgment where the defendant chooses to offer a meritorious defense); see also In re Cartee, Inc. v. Severin Builders, Inc., 1997 WL 529589, at *1 (Del. Super. Apr. 30, 1997) ("The purpose of requiring an affidavit of defense is to ensure speedy determination of litigation by permitting trials only in such cases where the defendant is willing to swear that he has a valid, just, and legal defense to the action.").

without restoring the demolished portion, leaving \$150,000 in damages.

Mechanic's lien actions are based on the theory that a contractor is entitled to a lien

on the property for unpaid work because the labor and materials that he provided

increased the value of the property. 14 Where, as here, the owner of the property is

effectively claiming that the contractor's work decreased the property's value, it

would create a manifest injustice to the owner of the property to deny the owner

the opportunity to claim a setoff based on any damage to the property.

Accordingly, the Court will grant leave to Plaza Four to assert an affirmative

defense against King's mechanic's lien action.

V. Conclusion

For the reasons set forth above, Defendant Plaza Four's Motion to Amend

Answer is DENIED with respect to its proposed counterclaim against Plaintiff

King and GRANTED with respect to its proposed affirmative defense against

King's mechanic's lien action.

IT IS SO ORDERED.

/s/ Peggy L. Ableman

PEGGY L. ABLEMAN, JUDGE

Original to Prothonotary

¹⁴ Snowe, 2008 WL 116205, at *5.

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