ment was written or oral, the inference is that it is oral, *Havery Probber, Inc. v. Kauffman*, 181 Pa. Super, 281, 124 A.2d 699 (1956); Goodrich-Amram 2d 1019 (h):1, we think nevertheless that the plaintiffs should attach any written contracts or material upon which they rely, if they rely on anything in writing.

ORDER OF COURT

May 19, 1981, it is ordered:

(1) that the defendants' motions to dismiss the complaint in equity on the ground that there is an adequate remedy at law are denied;

(2) that the motions to certify the case to the law side of the court are denied;

(3) that the demurrers to the complaint on the grounds that the relief sought would be unduly burdensome on the court are denied;

(4) that the township's demurrer to the complaint on the grounds that the act of requiring a bond is discretionary is denied.

(5) that the defendant Mills' motion for a more specific complaint as to paragraphs 7, 8, 9, 10, 12 and 13 is granted;

(6) that the demurrers of the Planning Commissions on the grounds that they are not governing bodies under the Municipal Planning Code are granted and as to each of them the case is dismissed.

It is further ordered that the plaintiffs are given twenty (20) days from this date to file an amended complaint.

FLOHR POOLS, INC. v. MILLER AND WIFE, C.P. Franklin County Branch, No. D.S.B. 1980 - 1098

Mechanics Lien - Counterclaim - Pa. R.C.P. 1658 - Claim for Counsel Fees

1. Pa. R.C.P. 1658 clearly bars a counterclaim in a mechanics lien action, but does provide for a setoff.

2. A claim for counsel fees based on 42 Pa. C.S.A. 2503(9) due to an

alleged wrongful filing of a mechanics lien action did not arise out of the construction of a swimming pool and does not meet the test of a setoff.

3. Notice of a claim for counsel fees under 42 Pa. C.S.A. 2053(9) may be included in the ad damnum clause.

4. The inclusion or exclusion of counsel fees must be determined by the procedure for taxing costs and is not a subject for determination by the trier of fact.

George S. Glen, Esq., Counsel for Plaintiff

Kenneth F. Lee, Esq., Counsel for Defendant, Peggy D. Miller

OPINION AND ORDER

KELLER, J., May 22, 1981:

The plaintiff entered a mechanic's lien in the amount of $6,006.26 against the defendants on August 26, 1980 by filing its claim in the Office of the Prothonotary of Franklin County, Pennsylvania. The defendant, Peggy E. Miller, accepted service of the claim on September 25, 1980. On petition of the defendants under Section 1510 of the Mechanic's Lien Law to discharge the said lien from the real estate upon the payment of $7,000.00 into court to secure said claim, the Court on October 15, 1980 entered an order directing the Prothonotary to discharge the lien pursuant to the prayer of the petition. On November 6, 1980 the plaintiff filed its complaint in the action upon mechanic's lien and true copies were served upon the defendants. Preliminary objections to the plaintiff's complaint filed November 25, 1980 on behalf of the defendant, Peggy D. Miller, were dismissed on the request of the said defendant and with the consent of the plaintiff on February 6, 1981.

On February 25, 1981 the defendant, Peggy D. Miller, filed an answer containing new matter and a counterclaim "against defendant, Paul E. Miller." On March 6, 1981 defendant, Peggy D. Miller, filed an answer containing new matter and an amended counterclaim "against plaintiff." On March 20, 1981 the plaintiff filed preliminary objections to the answer containing new matter and amended counterclaim of the defendant, Peggy D. Miller, in the nature of a motion to strike and a demurrer.

Argument on the preliminary objections of the plaintiff was heard on May 7, 1981, and the matter is ripe for disposition.

The preliminary objections of the plaintiff are addressed solely to the amended counterclaim of the defendant. The counterclaim alleges various facts relating to the ultimate conclusion of the defendant that the plaintiff wrongfully filed its mechanic's lien claim and the defendant, Peggy D. Miller, has been damaged in the amount of $1,650.00 by reason of having incurred attorney's fees in the amount of $150.00 to secure the release of the lien to permit sale of the defendants' real estate, and will incur additional counsel fees estimated at $1,500.00 to defend against the mechanic's lien action.

The plaintiff's preliminary objection in the nature of a motion to strike is predicated on the grounds that Pa. R.C.P. 1658 bars the assertion of counterclaims in actions upon mechanic's liens.

Pa. R.C.P. 1658 provides:

> A set-off arising from the same transaction or occurrence upon which the claim is based may be pleaded as new matter. No counterclaim may be asserted.

Section 1658 clearly bars the defendant's claim for counsel fees, if, in fact, the claim is a "counterclaim" and not a "set-off," for if the claimed counsel fee were, in fact, merely misidentified, we could treat it as corrected without more. *Capital Industries, Inc. v. Trevaskis*, 22 Chest. Co. L.R. 53 (1973). However, it seems obvious to us that the claim for counsel fees could not reasonably be said to have arisen out of the construction of the swimming pool on the defendants' real estate (the same transaction or occurrence upon which the claim is based), so it does not fit the test of the set-off permissible under Pa. R.C.P. 1658. We, therefore, conclude the plaintiff's motion to strike must be granted.

The plaintiff has demurred to the amended counterclaim contending that the defendant has not alleged facts that would establish any right to recover counsel fees as a taxable cost in the proceeding.

The Act of 1976, July 9 P.L. 586, No. 142, Sec. 2; 42 Pa. C.S.A. 2503 provides:

> The following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter:
>
> (9) Any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in

bad faith.

In the case at bar, the defendant has alleged in her Answer, New Matter and Counterlcaim facts which would, if proved, assert the defenses of failure to file the mechanic's lien claim within the statutorily allowed time period, or that the right to file such a claim had not accrued; and that the plaintiff knew or had reason to know those facts. From the factual allegations of the pleading the defendant proceeds to the ultimate conclusion that if the plaintiff did so act with knowledge, then it must necessarily follow that it acted in a vexatious manner and/or in bad faith. Therefore, the defendant is entitled to counsel fees under Section 2503. To the contrary the plaintiff contends that the averments of the complaint, answer and new matter disclose that the parties have a serious difference of opinion as to what the true facts in the case actually are. Consequently, the mere initiation of litigation by the plaintiff, which is opposed by the defendants, does not justify the defendants' determination that the action is arbitrary, vexatious or in bad faith. Therefore, the demurrer should be sustained.

In our judgment the sustaining of plaintiff's motion to strike defendant's counterclaim moots plaintiff's demurrer and requires it be dismissed for that reason.

Opposing counsel have raised various troublesome issue concerning the appropriate procedure for asserting a claim for counsel fees under 42 Pa. C.S.A. 2503(9), supra. There appears to be no statutory or case law to provide guidance in this area of the law. No doubt this is because there was no commonlaw right in the successful party litigant to recover attorneys' fees from his opponent as part of the costs, and generally there was nothing in the law of Pennsylvania to warrant the payment, as costs, of the fees of counsel for professional services. *15 Standard Penna. Practice* 611 (Costs Sec. 59)

Counsel for defendant, Peggy D. Miller, asserts in his brief that the Legislature by its adoption of subsection 9 of Section 2503 of the Judicial Code has created a "new right to benefit a defendant who has been forced to defend unwarranted litigation." Defense counsel, while conceding it may have been error to identify the claim for counsel fees as a counterclaim, argues that "due process" requires a litigant who expects to assert a claim for counsel fees under Section 2503(9) to give some early notice of that anticipated claim to the opposing party.

It is neither necessary nor proper for us to construe Section 2503(9) nor its application in the case at bar at this stage of the proceeding. We do not believe "due process" con-

siderations have any application in civil matters. However, we do agree litigants who realistically expect to assert a claim that counsel fees shall be taxed as costs under Section 2503(9) should give notice of that fact to the opposing party.

Pending appellate court or legislative guidance on the procedure to be followed in asserting a claim for counsel fees under Section 2503(9) of the Judicial Code, notice of such claim may appropriately be made by inclusion in the ad damnum clause. In our judgment the inclusion or exclusion of counsel fees as well as the amount to be included must be determined by the well-established procedure for taxing costs, and is not a proper subject for determination at trial by the trier of fact. Section 15 Standard Penna. Practice 624 et seq. (Costs Sec. 71, et seq. and 39th Jud. Dist. R. Jud. Adm. 86-88.

ORDER OF COURT

NOW, this 22nd day of May, 1981, Plaintiff's preliminary objection in the nature of a motion to strike is granted. Plaintiff's demurrer is denied.

The Defendant is granted leave to amend within twenty (20) days of date hereof.

Exceptions are granted Plaintiff and Defendant, Peggy D. Miller.

COLLEGE v. GOTHIE, No. 2, C.P. Fulton County Branch, No. 291 of 1978-C

Assumpsit - Pa. R.C.P. 1033 - Amendment of Pleadings - Diligence in Preparing Case

1. Pa. R.C.P. 1033 allowing the amendment of pleadings has been liberally construed except in cases where the statute of limitations has run.

2. Absent the pleading of facts or agreement by counsel, the Court may not assume the ultimate fact that the statue of limitations ran prior to a request for leave to amend.

3. An amendment to a pleading that would be directly contradictory to a party's prior pleading should be denied absent a satisfactory explanation for the inconsistencies.