

: CIVIL ACTION

:
: No.

R U L E

....., 19 .., pursuant to the Order of the Supreme Court of Pennsylvania dated November 19, 1979 which has been implemented by rules of this court dated July 15, 1980 (Rule Nos. 1800 through 1809), a rule is hereby issued as of course upon all parties and their counsel to show cause why the above captioned case should not be dismissed for want of prosecution. Rule returnable 30 days from this date. Unless an answer setting forth good cause for an extension of time is filed on or before the return date by one or more of the parties, the rule shall be made absolute and the case shall be dismissed by the court as of course, with costs to be paid as directed by the court.

.....
Prothonotary

Rule 1808. All notices, applications for extension and responses, rules to show cause, objections and court orders to be served upon a party or counsel of record under these rules shall be served upon the parties or counsel by personal service or by leaving a copy at or mailing a copy by first class mail to the address of the party or counsel. Proof of service shall be readily available and shall be filed if ordered by the court in the event the issue of proper service is raised.

Rule 1809. These rules on prompt certification of trial of civil actions shall become effective immediately.

By the Court,

GEORGE C. EPPINGER
P.J.

Ejectment - Motion to Strike - Conclusions of Law - Confidential Relationship

1. The pleading of conclusions of law is a violation of Pa. R.C.P. 1019(a); however, where the complaining party cannot demonstrate any prejudice flowing from such improper pleadings, the court may decline to grant a motion to strike.

2. A confidential relationship does not automatically flow from the existence of a marital relationship.

3. The facts leading to the conclusion that a "confidential relationship" exists are material facts and must be pleaded.

William H. Kaye, Esq., Counsel for Plaintiff

John McCrea, III, Esq., Counsel for Defendant

OPINION AND ORDER

KELLER, J., May 6, 1980:

This action in ejectment was commenced by the filing of a Complaint in Ejectment on September 21, 1979, and service of a true copy upon the defendant on September 24, 1979. The complaint alleges that the plaintiff owns a certain tract of real estate in Southampton Township, Franklin County, Penna. in fee simple as a result of a deed executed by plaintiff and defendant as grantors to the plaintiff as grantee on July 5, 1977 recorded in Franklin County Deed Book Vol. 744, Page 899. Plaintiff further alleges that he has been entitled to possession of the real estate as a result of said conveyance and the defendant has continued to occupy it since July 1977, despite his demands for possession. The defendant's Answer Containing New Matter was filed on October 15, 1979. In the answer, while admitting the execution and delivery of the deed, she denied all material allegations of the complaint other than the identity of the parties, and alleged ownership of an equitable title to one-half interest as a tenant in common in the real estate, and has a right as a co-tenant to possession of the same. Under new matter the defendant alleged impaired health by reason of marital strife; a nervous, unstrung and severely depressed mental condition due to ill treatment rendering her unable to judge wisely and prudently her affairs or oppose the plaintiff. She also alleged a confidential relationship between

herself and the plaintiff, and that she was compelled to execute and deliver the deed by false and fraudulent representations and that she received no consideration for the conveyance.

The plaintiff filed preliminary objections in the nature of a motion to strike and for a more specific pleading. This matter is now ripe for disposition.

The plaintiff contends in his motion to strike that paragraphs 3 and 4 only state conclusions of law, and the first sentence of paragraph 5 is similarly defective; all in violation of Pa. R.C.P. 1019(a), which provides, "The material facts on which a cause of action or defense is based shall be stated in a concise and summary form."

In commenting on Pa. R.C.P. 1019(a) Goodrich Amram 2d Sec.1019(a)(12) states:

"Conclusions of law have no place in the pleading, and like evidence, may be ignored. It has been pointed out that the inclusion of conclusions of law may be an asset to a defendant since it may mark out the theory of the plaintiff's case.

"Striking off the pleading which contains conclusions of law would not be justified in the absence of some showing of real prejudice from such conclusion. If, however, only conclusions of law are pleaded, the pleading would, of course be defective for not stating a cause of action and could be stricken on that ground.

"The rules do not expressly prohibit pleading conclusions of law. They are impliedly excluded by the general limitation of Rule 1019(a) restricting the pleadings to the material facts. The court has wide discretion in determining whether a particular averment is a conclusion of law or an averment of fact in a particular pleading. And the court has wide discretion in interpreting the averments of the pleading. . ."

We are satisfied that the defendant has pleaded conclusions of law in paragraphs 3 and 4, and the first sentence of paragraph 5. However, the plaintiff has failed to demonstrate any prejudice flowing from such improper pleadings. Therefore, although we do not condone this violation of Pa. R.C.P. 1019(a), we decline to grant the plaintiff's motion to strike. The plaintiff may ignore the legal conclusions pleaded as mere surplusage.

Plaintiff's motion for a more specific pleading attacks paragraphs 9, 10 and 11, but the challenge to paragraph 9 has

been withdrawn and we will consider it abandoned.

Defendant's paragraph 10 alleges:

"On or about July 5, 1977, plaintiff, intending to deceive and defraud the defendant, falsely and fraudulently represented to the defendant that it was mandatory for her to sign the deed of their jointly-owned property over to plaintiff in order to resolve their marital difficulties."

Pa. R.C.P. 1019(b) provides inter alia: "Averments of fraud or mistake shall be averred with particularity." In paragraph 10 it is not clear whether the defendant intended to allege that the false and fraudulent representations made by plaintiff compelled her to execute the deed, or whether the plaintiff falsely and fraudulently represented that the execution of the deed would resolve their marital difficulties. In addition, it is unclear whether the defendant intended the use of the word fraudulently to refer only to a false representation or to encompass some other conduct on the part of the plaintiff.

The party required to file a responsive pleading should not also be required to speculate as to the intention of the pleader. Therefore, the motion for a more specific pleading as to paragraph 10 will be granted.

Paragraph 11 of the defendant's new matter alleges:

"Plaintiff, on or about July 5, 1977, occupied a confidential relationship as the dominant marital partner in the marriage between defendant and plaintiff, and taking advantage of said confidential relationship with defendant, procured her execution of the deed to him and by fraud as averred in paragraph 10 of the NEW MATTER and by duress, threatening to take away the minor children of the parties from defendant and not permit her any custody, visitation or support if she did not sign the deed."

The use of the words "confidential relationship" creates the problem in paragraph 11, for those words are well-recognized in the law as words of art having a specific legal connotation and carrying with them particular legal effects and ramifications. Here, an analysis of the defendant's new matter, coupled with the legal conclusions in the answer, establishes that the defendant is defending against plaintiff's action in ejectment on the theory that she is entitled to have a constructive trust imposed upon an undivided one-half interest in the real estate here in question. It is well-established that a

confidential relationship does not automatically flow from the existence of a marital relationship, but rather is a legal status dependent upon specific facts. *Butler v. Butler*, 464 Pa. 522, 528, 529; 347 A. 2d 477 (1975).

We consider the facts leading to the conclusion that a "confidential relationship" exists are material facts and must, therefore, be pleaded. Therefore, the defendant's motion for more specific pleading as to paragraph 11 will be granted.

ORDER OF COURT

NOW, this 6th day of May, 1980, the Plaintiff's Preliminary Objections in the nature of a Motion to Strike are dismissed, and the Plaintiff's Preliminary Objections Nos. 5 and 6 in the nature of a Motion for More Specific Pleading are granted.

Exceptions are granted both parties.

REED v. TRESLER, C.P. Franklin County Branch, F. R. 1980 - 154 - S

Paternity - Burden of Proof - Sexual Relationship With Others

1. The burden of proof in a paternity case is the preponderance of the evidence.
2. Sexual intercourse with another around the time the child was conceived is a matter to be weighed in the balance along with other evidence.
3. The fact that plaintiff had sexual relations with two men other than the alleged father during the 220 and 330 day gestation period does not exclude a finding that the alleged father is in fact the father.

District Attorney's Office

William C. Cramer, Esq., Attorney for Defendant

OPINION AND VERDICT

EPPINGER, P.J., June 12, 1980,

Tina M. Reed is the mother of a child she called Delilah Tresler because, she says, the father is James H. Tresler, Jr. While James acknowledges that he was living with Tina and had sexual relations with her, he says it cannot be established

that he is the father because others were having sexual relations with her during the 220 to 330 day gestation period mentioned in *Commonwealth v. Watts*, 179 Pa. Super. 398, 116 A.2d 844 (1955). We referred to *Watts* in a footnote in *Rosenberry v. Swan*, 3 Franklin Co. L.J. 190 (1979), where we noted the general proposition that sexual intercourse with another around the time the child was conceived is a matter to be weighed in the balance along with other evidence. *Commonwealth ex rel. Lonesome v. Johnson*, 231 Pa. Super. 335, 331 A.2d 702 (1974). In *Rosenberry v. Swan*, we held it was impossible to determine whether the child was born of a union with the defendant Swan or with the plaintiff's husband. There it was stated that the plaintiff had sexual relations with her husband before she knew the child was conceived. Her contention was that it was only once and that at the time he was using a contraceptive. We did not accept this contraceptive statement as being true.

The testimony in this case is quite different. Tina lived with James from December, 1978 through March, 1979 and the child was conceived early in March. That is when she suspected she was pregnant. Her last menstrual period began February 8th and her pregnancy was confirmed, in James' presence, at a clinic on April 17th. The child was born December 7, 1979. Talks between Tina and Jim about her pregnancy and his statement that he didn't want to have a child and that she should have an abortion caused her to move out the last part of March.

Tina acknowledged having sexual relations with two other, with one at the end of April, 1979 and with another in June or July of the same year. She said she told both of them that she was pregnant and that neither cared. One of these, Dennis Sheffler, testified that he had relations with her one time about April, 1979. Another person, not mentioned by Tina, Mike Boswell, said he had relations with her in the Spring of 1979, about the first, second, maybe third week of April.

The only evidence bearing on who was the father of the child was the recounting of a conversation, denied by Tina, which went about like this:

Kelly Monn: "You know this is not Jim's."

Tina: "I know, but what if it is?"

Kelly added that in the conversation Tina talked about getting James for nonsupport because she wanted him and that's the way she figured she'd get him. Tina responded that