

January 5, 2012

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**Re: *Anemone Carpentry, LLC v. Roberts v. Zando*, CPU6-10-002635  
*Defendant Roberts' Motion to Amend Pleadings***

Gentlemen:

Please accept this letter as the Court's decision on Defendant Michael D. Roberts' motion to amend his complaint. As you know, this matter originated with the filing of this action in Kent County Court of Common Pleas on April 16, 2010. Defendant Roberts, through his original counsel, filed an answer, counterclaim, and third-party claim on June 15, 2010. Defendant made no demand for a trial by jury in these pleadings.

Throughout the balance of 2010, the parties litigated this matter in Kent County. Answers to the counter- and cross-claims were filed, Roberts' current attorney substituted in as counsel in June, 2010, and the parties participated in a pre-trial conference with the assigned Judge in Kent County. On November 10, 2010, the Judge in Kent County granted a joint motion for change of venue to Sussex County, and the matter was transferred to this Court. Throughout the entire pendency of this matter in Kent County, neither the Defendant nor any other party requested a trial by jury.

The docket reflects no activity in this matter until ten months later, when the Defendant filed this present motion to amend his answer, counter-claim, and third-party

complaint. The proposed amendments make various changes to the pleadings. However, the proposed amendments also make a further addition: A demand for a trial by jury. At the September 19, 2011 hearing on the motion, the Court ordered the parties to inform the Court of their positions on Defendant's request for a jury trial, and to brief the matter.

The Court received no notice of position or brief from Plaintiff Anemone Carpentry, LLC. Third-Party Defendant Zando objected to permitting the amendment to request a trial by jury, but does not object to the other proposed amendments.

Court of Common Pleas Civil Rule 15 states that "a party may amend the party's pleading only by leave of court...and leave shall be freely given when justice so requires." The Delaware Supreme Court has held that, unless there is "prejudice to another party, the trial court is required to exercise its discretion in favor of granting leave to amend." *Mullen v. Alarmguard of Delmarva, Inc.*, 625 A.2d 258, 263 (Del. 1993). Rule 15 "affords the parties the right, *inter alia*, to state additional claims, to increase the amount of damages sought, to establish additional defenses and to change the capacity in which the action was commenced." *Id.*

A demand for a trial by jury in an action commenced in this Court, however, is governed by a statute that defines and limits the jurisdiction and power of this Court.

Title 10, section 1328 of the Delaware Code provides:

(a) Every person who commences a civil action in this Court shall, by virtue of such commencement, be deemed to have waived any right to trial by jury of the issues to which such person's original pleading is directed.

(b) Except as otherwise provided in this chapter any party other than the party commencing the action may demand a trial by jury of an issue triable of right by a jury by serving upon the other parties a demand therefor in writing and depositing with the Clerk of the Court the amount necessary for the commencement of an action in Superior Court. Such demand shall be served and filed and the necessary amount deposited with the Clerk, not later than 5 days after the service of the last pleading directed to such issue. The demand for jury trial may be endorsed upon a pleading of the party, provided it is typed or written on the first page of the pleading immediately following the caption of the case.

(c) The failure of a party to serve and file a demand for trial by jury or to deposit the necessary amount in accordance with the requirements of this section constitutes a waiver of trial by jury.

Therefore, to make a timely demand for a trial by jury, and thereby remove the action to Superior Court, a non-commencing litigant must both serve his jury trial demand in writing, and deposit the Superior Court filing fee within 5 days of service of “the last pleading directed to such issue.” Defendant Roberts did not timely perfect his jury trial demand. The Court views the “last pleading directed to such issue” as the original answer, counterclaim and third-party complaint filed on June 15, 2010. Roberts made no jury trial request within those pleadings, or within 5 days of their service. The “last pleading” as intended by the statute does not include pre-trial stipulations or motions to amend a pleading. Clearly, the statutory limitation of § 1328 overrides the discretion granted the Court by its own Rule, and Roberts is not entitled to now demand a trial by jury by amending his pleadings.

Even if the Court were to interpret § 1328 otherwise, under the facts of this matter, “prejudice to another party” clearly would result if, after more than 20 months of litigation in this forum, without the prospect of a trial by jury, the non-moving parties were forced to re-commence this action in Superior Court.

For the foregoing reasons, Defendant Roberts’ motion to amend his pleadings to demand a trial by jury is DENIED. Without objection from the other parties, Defendant Roberts otherwise is granted leave to amend his pleadings as set forth in the Exhibit to his motion.

Sincerely,

Kenneth S. Clark, Jr.  
Judge

