

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

MICHAEL V. BILIUNAS d/b/a )  
PRESTIGE BUILDERS, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
JOHN W. MEDEK and )  
COLLEEN MEDEK, )  
 )  
Defendant )  
Third-Party Plaintiffs,)  
 )  
v. )  
 )  
MICHAEL V. BILIUNAS, )  
 )  
Third-Party )  
Defendant. )

C.A. No. 2002-02-204

Submitted: March 9, 2005  
Decided: March 18, 2005

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**ON DEFENDANT/THIRD-PARTY PLAINTIFF'S**  
**MOTION FOR REARGUMENT**

Defendant/third-party plaintiff's John W. Medek and Colleen Medek (hereinafter referred to as "Medek") moves the Court to reconsider its order of February 18, 2005 where it denied in part, movant's motion to amend its third-party complaint and awarded

attorney fees to third-party defendant's counsel. The essence of movant's arguments challenge the award of attorney fees.

### **FACTS**

This is a contractual dispute regarding the installation of a roof and other construction at the residence of the Medeks. After it was determined that the roof required temporary support, a beam was installed in the middle of the room. After the structural repairs were completed in December 2004 and the temporary beam was removed, portions of the sub-floor deflected up and the carpet under the area where the beam was located had stretched. On December 28, 2004, Medek moved to continue the trial in order to amend his counterclaim and add claims relating to the beam problems. At this time, the case had been pending in this Court for approximately three (3) years.

On January 4, 2005, the Court granted Medek's request for a continuance and leave to amend its third-party complaint. The order, however, limited any additional claim to damages resulting from the depression in the floor caused by the temporary beam. The Court provided in its order that no additional claims were permitted because those specifically associated with the beam could not have been discovered before it was removed. The order also provided that no other claim could be included since other matters could have been reasonably discovered by Medek previously.

Notwithstanding the Court's order, Medek filed his amended counterclaim on January 11, 2005 which included a claim of consumer fraud, punitive damage, and a demand for trial by jury. On January 12, 2005, counsel for Biliunas contacted third-party plaintiff's counsel and advised that the proposed amended complaint went well beyond

the order of the Court and failure to comply with the Court's order would force it to seek attorney fees to respond to the motion. On January 18, 2005, counsel for Medek responded by stating that his amended counterclaim was proper and that he had no intention of withdrawing or correcting it, since he believed it complied with the Court's order of January 4, 2005.

After docketing the amended complaint and the demand for a jury trial in this Court, Medek demanded the Clerk transfer the case to the Superior court for trial. This Court scheduled a hearing on the motion and Medek filed a Writ of Mandamus in the Superior Court, which was denied February 6, 2005.

On February 18, 2005, this Court denied Medek's demand for a jury trial, its claim based upon consumer fraud and its claim for punitive damages on the basis that such allegations were beyond the Court's order of January 4, 2005. Biliunas sought sanctions against Medek for failure to comply with the Court's January 4, 2005 Order, and the Court awarded sanctions to Biliunas pursuant to Rule 11(c). Medek filed this Motion for Reargument on February 22, 2005. This is the Court's response.

### **DISCUSSION**

While movant does not cite a rule for the motion, such motions are made pursuant to Court of Common Pleas Civil Rule 59(e). A party making application to the Court under such rule must show that the Court has misapprehended the law or the facts in a manner that would change the outcome of its decision were it correctly and fully informed. *Hessler v. Farrell*, Del. Supr., 260 A.2d 701 (1969). Medek argues that Rule 11(c)(1)(A) required Biliunas to serve its motion for sanctions, and he should have been

provided 21 days to withdraw or correct his Motion. Furthermore, Medek argues that motion for sanctions under Rule 11(c) is required to be brought separately from other motions, whereas here Biliunas made its motion as a part of its application to strike.

Biliunas argues Rule 11 (c) provides that sanctions may be ordered by the Court after notice is given and the opposing party afforded a reasonable opportunity to respond. Biliunas maintains that Medek was given notice of the sanctions motion by correspondence on January 12, 2005 advising them that if the amended counterclaim was not altered to comply with the Court's January 4, 2005 Order, then Biliunas would file a Motion to Strike and seek sanctions. On January 18, 2005, Medek responded by stating their amended counterclaim was proper and they had no intention of withdrawing or correcting it, since it believe it complied with the Court's January 4, 2005 Order.

The provisions of Court of Common Pleas Civil Rule 11 (c)(1)(A) provide: "A motion for sanctions under this rule shall be made separate from other motions or requested and shall describe the specific conduct alleged to violate subdivision (b)." In these proceedings, the motion for sanctions was not made separately, but was made as a part of the relief clause in the motion opposing the amendment; therefore, it did not comply with the rule and not properly before the Court.

Accordingly, the order granting sanctions is vacated with leave of third-party plaintiff to refile.

SO ORDERED this 18<sup>th</sup> day of March 2005

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Alex J. Smalls  
Chief Judge

Medek-OP Mar 05  
cc: Gary Aber, Esquire