IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ALEXANDER RONALD CAPOSSERE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 07C-08-133 JRS
	)	
DAVID J. LEVINE and GINA LEVINE	)	
	)	
Defendant,	)	

Date Submitted: March 4, 2008
Date Decided: June 12, 2008

Upon Consideration of Defendant's Motion for Reargument.
DENIED.

O R D E R

This 12th day of June 2008, Defendant, Gina Levine ("Ms. Levine"), having moved for reargument of this Court's order denying her motion to dismiss a mechanic's lein complaint filed by Plaintiff, Alexander Ronald Capossere, ("Mr. Capossere"), it appears to the Court that:

1. On November 15, 2007, Ms. Levine filed a motion to dismiss Mr. Capossere's mechanics lien complaint aruguing that Mr. Capossere failed to comply with the pleading requirements set forth in 25 *Del. C.* § 2712(b)(1-11). Specifically,

Ms. Levine challenged Mr. Capossere's compliance with Section 2712(b)(11), which requires a mechanics lien complaint to indicate "the time of recording of a first mortgage, or a conveyance in the nature of a first mortgage, upon [the] structure" that is the subject of the putative lien. Additionally, Ms. Levine alleged that Mr. Capossere had failed to comply with Section 2712(b)(1) because he failed to name the proper party plaintiff in his complaint. Specifically, she argued that the invoices attached as exhibits to Mr. Capossere's complaint were in the name of "A.R.C. Painting and Remodeling" and "A.R.C. & Associates," and not Mr. Capossere individually.[1]

2. A hearing was held on the motion on December 10, 2007, and an order denying the motion was issued on February 20, 2008. In that order, the Court concluded that Mr. Capossere had complied with the pleading requirements set forth in Sections 2712(b)(1) and (11). As stated, Section 2712(b)(11) mandates that the complaint state "[t]he time of recording of a first mortgage, or a conveyance in the nature of a first mortgage, upon such structure which is granted to secure an existing indebtedness." In his complaint, Mr. Capossere indicated that the Levine home was subject to a mortgage recorded at the New Castle County Recorder of Deeds held by Washington Mutual Bank. Additionally, Mr. Capossere attached a copy of the

[1]Ms. Levine presented other challenges to Mr. Capossere's complaint that were addressed in the Court's initial order. Only Section 2712(b)(1) and (11) are relevant to the motion for reargument.

mortgage to his complaint and incorporated it by reference. The Court determined that this was sufficient to meet the pleading requirement imposed by Section 2712(b)(11).

3. The Court also concluded that Mr. Capossere met the pleading requirement set forth in Section 2712(b)(1). This section requires the plaintiff to set forth "[t]he name of the plaintiff or claimant" in the complaint. While the invoices attached to the complaint had a different company name in the heading, Mr. Capossere had signed the bottom of each invoice as the contractor. The Court concluded that Mr. Capossere's signature on each invoice was sufficient to survive a motion to dismiss because all Mr. Capossere was required to do under the statute was to identify the plaintiff or claimant. Whether or not Mr. Capossere was the proper plaintiff was a matter for trial.[2]

4. Ms. Levine asks for reargument on two grounds. First, she argues that this Court improperly concluded that Mr. Capossere's complaint complied with Section 2712(b)(11) and failed to recognize that the decision in *Builder's Choice, Inc. v. Venzon*[3] controls the outcome of this litigation. Additionally, Ms. Levine asks this Court to reconsider her argument that the complaint fails to state the proper plaintiff.

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[2]Mr. Capossere claimed that the entities listed on the invoices are controlled exclusively by him and that there is a factual basis to allow the Court to consider those entities as his alter egos. The Court will not make that determination now; it will await trial.

[3]672 A.2d 1 (Del. 1995).

5. "A motion for reargument is the proper device for seeking reconsideration by the Trial Court of its findings of fact, conclusions of law, or judgment.... The manifest purpose of all Rule 59 motions is to afford the Trial Court an opportunity to correct errors prior to appeal...."[4] "It will be denied unless the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[5]

6. After revisiting the *Builder's Choice* decision, the Court remains satisfied that plaintiff has met his statutory pleading obligations. In *Builder's Choice*, the Supreme Court of Delaware affirmed the trial court's ruling, stating that "[T]he Superior Court correctly held that the failure of *Builder's Choice* to even attempt to comply with Section 2712(b)(11) in the statement of claim or complaint was a dispositive defect."[6] In order to comply with Section 2712(b)(11), the Supreme Court recommended that "[i]f the claimant cannot conclusively determine whether the first mortgage is a statutorily defined construction mortgage, that encumbrance can be referred to with equivocal terms, e.g. 'which may be,' in the statement of claim or

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[4] *Hessler Inc. v. Farrell*, 269 A.2d 701, 702 (Del. 1969).

[5] *Bd. of Managers of the Del. Crim. Justice Info. Sys. v. Gannett, Co.*, 2003 WL 1579170, at *1 (Del. Super. Ct. Jan. 17, 2003).

[6] *Builder's Choice, Inc. v. Venzon*, 672 A.2d at 4.

complaint."[7] Moreover, unlike Mr. Capossere, it does not not appear that Builder's Choice attached a copy of the potentially applicable mortgage to its complaint.[8]

7. The Supreme Court encouraged creative pleading in those instances where the plaintiff was not able to determine the nature of the mortgage that encumbered the subject property. The Court did not, however, prescribe any magic language.[9] While Mr. Capossere did not include the language discussed in *Builder's Choice*, he did make reference to the mortgage in a meaningful way. In paragraph 25 of his complaint, Mr. Capossere states that the "property is subject to a mortgage held by Washington Mutual Bank" and that this mortgage was recorded with the New Castle County Recorder of Deeds.[10] Additionally, Mr. Capossere attached a copy of the mortgage to the complaint and incorporated it by reference into the complaint. While this is not the exact type of artful pleading described in *Builder's Choice*, it is enough to fulfill the pleading requirement imposed by Section 2712(b)(11).

8. The Court also sees no reason to alter its conclusion regarding Mr.

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[7] *Id*.

[8] *Id*. at 3 ("The record reflects that a certified copy of a mortgage encumbering the Venzon property was attached as an exhibit *to the affidavit in support of the defendants' motion to dismiss*.")(emphasis added).

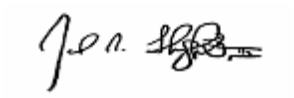
[9] *Id.* at 4.

[10] Docket Item ("D.I.") 1.

Capossere's compliance with Section 2712(b)(1).[11] As stated in the first order, "Mr. Capossere's complaint will not be dismissed at this state of the litigation for naming a plaintiff who eventually proves to be the incorrect party."[12] Mr. Capossere has fulfilled the procedural requirements of Section 2712(b)(1) by identifying "the name of the plaintiff or claimant." Whether he will fulfill his substantive burden to prove that he is the proper plaintiff is a matter to be determined after the presentation of his evidence at trial.

9. Based on the foregoing, the Defendant's Motion for Reargument is **DENIED.**

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary

[11] *See McElroy v. Shell Petroleum*, 1992 WL 397468, at *1 (Del.Supr. Nov. 24, 1992)("A motion for reargument is not intended to rehash the arguments already decided by the court.")

[12] D.I. 11 at 6.