IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ACCU-FIRE FABRICATION, INC.,	)	
	)	
Claimant,	)	
	)	C.A. No. 08L-09-048 PLA
v.	)	
	)	
CORROZI-FOUNTAINVIEW, LLC, and CORROZI BUILDERS, LLC,	)	
	)	
	)	
Defendants.	)	

ON CLAIMANT'S MOTION FOR REARGUMENT
DENIED

Submitted: March 19, 2009
Decided: March 26, 2009

Robert K. Beste, Esquire, SMITH, KATZENSTEIN & FURLOW LLP, Wilmington, Delaware, Attorney for Plaintiff.

Scott G. Wilcox, Esquire, THE BAYARD FIRM, P.A., Wilmington, Delaware, Attorney for Defendants.

ABLEMAN, JUDGE

I. Background

This mechanic's lien action arises from a materials supply contract between Accu-Fire Fabrication, Inc. ("Accu-Fire") and Pyro-Tech, LLC ("Pyro-Tech"). Pyro-Tech was hired to alter and repair fire suppression systems in a complex of condominium buildings owned by Corrozi-Fountainview, LLC. Corrozi Builders, LLC acted as the general contractor for the project. Accu-Fire agreed to furnish materials to Pyro-Tech, and it supplied pipes, fittings, and other materials for the project from November 2007 to March 5, 2008. Pyro-Tech failed to make payments on the contract and petitioned for bankruptcy prior to the institution of this action.

Accu-Fire filed a mechanic's lien statement of claim against Corrozi-Fountainview and Corrozi Builders (collectively, "Defendants") on September 5, 2008. Defendants moved to dismiss Accu-Fire's claim. Defendants contended that dismissal was required because Accu-Fire failed to adequately apportion the amounts owed between the three condominium buildings against which liens were sought and because Accu-Fire failed to name Pyro-Tech as a defendant in its Statement of Claim or praecipe.

By opinion dated March 2, 2009, this Court granted Defendants' Motion to Dismiss based upon Accu-Fire's failure to name Pyro-Tech as a party defendant. The Court held that Pyro-Tech was a necessary party under

a long-standing rule first articulated in *Iannotti v. Kalmbacher*, which held that "in a proceeding by a sub-contractor claiming under a contract with the main contractor . . . such main contractor is a necessary party" and must be named in the petition for a writ of scire facias.[1] Although Pyro-Tech's bankruptcy petition prevented Accu-Fire from enforcing a mechanic's lien against it, Accu-Fire could have protected its rights and avoided prejudicing the Defendants by timely perfecting its lien claim against Pyro-Tech. Perfection of Accu-Fire's claim against Pyro-Tech was permissible under 11 U.S.C. § 362(b)(3), which provides an exception to the automatic bankruptcy stay permitting actions to perfect certain liens. Because the statutory time period for perfecting a statement of claim had passed, the Court dismissed Accu-Fire's claim based upon this defect. [2]

II. Parties' Contentions

Accu-Fire filed this Motion for Reargument on March 11, 2009, and simultaneously filed a Motion to Amend its Statement of Claim to add Pyro-Tech as a named defendant.[3] In its Motion for Reargument, Accu-Fire

[1] 156 A. 366 (Del. Super. 1931).

[2] *See Accu-Fire Fabrication, Inc. v. Corrozi-Fountainview, LLC*, 2009 WL 537152 (Del. Super. Mar. 3, 2009).

[3] Accu-Fire's Motion to Amend was originally presented in the alternative to its Motion for Reargument. Because a denial of the Motion for Reargument would necessarily moot the Motion to Amend, the two motions are now being presented separately.

raises the following contentions: (1) it satisfied the requirements of Delaware law by identifying Pyro-Tech in its statement of claim, and was not obligated to name Pyro-Tech as a party defendant until the writ of scire facias was issued; (2) naming Pyro-Tech in the writ of scire facias would have violated the automatic bankruptcy stay and risked severe sanctions; (3) the bankruptcy court should determine whether actions taken outside of bankruptcy court violate the automatic stay; (4) sections 362(b)(3) and 546(b) of the Bankruptcy Code "do not necessitate that a Delaware mechanics' lien claimant forfeit its claim if, for whatever reason . . . the claimant does not . . . take actions that would have otherwise been required"; (5) Pyro-Tech need not have been named in this action because there was no advantage to doing so, and no prejudice arises as a result of Accu-Fire's failure to make Pyro-Tech a defendant.[4]

In response, Defendants urge that reargument is inappropriate because Accu-Fire has misinterpreted both the controlling authorities and the Court's opinion. Defendants also contend that Accu-Fire has improperly raised new arguments on its Motion for Reargument.[5]

[4] Docket 8 (Claimant's Mot. for Reargument).

[5] Docket 11 (Defs'. Resp. in Opposition to Claimant's Mot. for Reargument).

III. Analysis

A motion for reargument pursuant to Superior Court Civil Rule 59(e) will be granted only if "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."[6] A motion for reargument is not an opportunity for a party to rehash arguments already decided by the Court or to present new arguments not previously raised.[7]

Before reaching Accu-Fire's various arguments, the Court finds it necessary to address counsel's overall handling of the automatic stay issue. Upon the original Motion to Dismiss, both sides conclusorily stated their positions on the applicability of the automatic stay, without offering any developed arguments. In fact, neither the Defendants' motion nor Accu-Fire's response contained even a single citation to the Bankruptcy Code, let alone to cases or other authorities applying or interpreting the automatic stay provision. The question of how the automatic stay would affect this action was a complicated one, involving the interaction of the Bankruptcy Code, Delaware's mechanics' lien statute, precedent cases, and the Superior Court

[6] *Kennedy v. Invacare, Inc.*, 2006 WL 488590, at *1 (Del. Super. Jan. 31, 2006) (citation omitted).

[7] *Id.*; *Hennegan v. Cardiology Consultants, P.A.*, 2008 WL 4152678, at *1 (Del. Super. Sept. 9, 2008) (citing *Denison v. Redefer*, 2006 WL 1679580, at *2 (Del. Super. Mar. 31, 2006)).

Civil Rules. This complexity would have been apparent from the outset of any attempt to research the matter, and counsel's failure to provide any support for their contentions was disappointing.

As this Court has repeatedly explained, the proper role of a court in the litigation process does not include doing counsel's work for him or her.[8] When counsel has failed to develop arguments in the first instance, a motion for reargument is not a means to obtain a "second bite at the apple." In this case, Accu-Fire has employed a motion for reargument to present its interpretation of case law and the Bankruptcy Code after failing to develop any meaningful argument in its original response. Although the Court will address Accu-Fire's contentions, counsel is cautioned that this approach is unacceptable, and risks running afoul of the prohibition against presenting new arguments in a Rule 59(e) motion.

Furthermore, now that Accu-Fire belatedly has "done its homework" and elaborated on its position with relevant citations, the Court remains unconvinced of the merits of its arguments. Several of Accu-Fire's contentions rehash points already decided by this Court in its opinion, and none of Accu-Fire's claimed points of error demonstrate that the Court has

[8] *Novkovic v. Paxon*, 2009 WL 659075, at *3 (Del. Super. Mar. 16, 2009); *Gonzalez v. Caraballo*, 2008 WL 4902686, at *3 (Del. Super. Nov. 12, 2008) (citing *Pinto v. Universidad de Puerto Rico*, 895 F.2d 18, 19 (1st Cir. 1990)).

overlooked controlling authority or misapprehended either the law or the facts.

First, Accu-Fire argues that it did not need to name Pyro-Tech as a party defendant because "the subpoena power and other procedural tools readily available . . . to litigants would have served to provide named defendants the same protection contemplated by Delaware courts."[9] This argument defies well-settled law to the contrary.[10]

Accu-Fire relies upon *Finnegan Construction Co. v. Robino-Ladd Co.*[11] for the proposition that "issuing a subpoena to a general contractor to appear as a witness would be sufficient to provide information about the underlying debt."[12] Accu-Fire's summary of *Finnegan* is far too cursory, as it omits key facts distinguishing it from the case at bar. In *Finnegan,* a mechanic's lien claimant failed to name a general contractor that had *not* been a party to the contract forming the basis of the lien and only came to the project after the claimant had completed work for the original general

[9] Docket 8, ¶ 7.

[10] *See, e.g.*, *Iannotti*, 156 A. at 367; *Westinghouse Elec. Supply Co. v. Franklin Inst. of Pa. for Promotion of Mech. Arts*, 21 A.2d 204, 206 (Del. Super. 1941).

[11] 354 A.2d 142 (Del. Super. 1976).

[12] Docket 8, ¶ 7.

contractor.[13] Under these particular circumstances, the *new* general contractor was not an indispensable party.

The *Finnegan* Court makes clear that its holding is limited to the narrow range of cases in which the current general contractor was not a party to any agreement with the subcontractor. As the *Finnegan* opinion carefully explains, "The purpose of requiring a general contractor's presence as a defendant in the mechanic's lien action is that he was the party with whom the subcontractor had his contract. This is the meaning of *Iannotti v. Kalmbacher*."[14]

In this case, Pyro-Tech was the only other party to the contract with Accu-Fire. For the reasons this Court addressed in its opinion, the potential for prejudice from Accu-Fire's failure to join Pyro-Tech is clear:

> Often, the contractor will be "the only one who knows of the services or materials furnished by the subcontractor and the prices at which they were agreed to be furnished," and is in a better position than the owner to challenge or offer defenses to the subcontractor's claim. Furthermore, the principal contractor is necessary because the lien claim may affect its rights as against the owner.[15]

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[13] *Finnegan Constr. Co.*, 354 A.2d at 146.

[14] *Id.*

[15] *Accu-Fire Fabrication, Inc.*, 2009 WL 537152, at *5 (quoting *Iannotti*, 156 A. at 367).

Under the principles set forth in *Iannotti*, Pyro-Tech is a necessary party, and issuance of a subpoena will not substitute for its presence in this suit.

Accu-Fire also urges that a general contractor only becomes a necessary party upon issuance of the writ of scire facias, and that issuance of a writ against Pyro-Tech would have been precluded by the automatic stay in this case. However, Accu-Fire ignores that it *did* file a praecipe, and thus failed to join Pyro-Tech at the stage when it had become a necessary party. Furthermore, although Accu-Fire properly notes the general rule that "the creation of essential parties does not originate until the praecipe is filed, upon which the writ of scire facias is duly issued,"[16] this principle did not *prevent* Accu-Fire from naming Pyro-Tech as a defendant in the Statement of Claim. Because Accu-Fire could not have sought a writ of scire facias against Pyro-Tech without violating the automatic stay, naming Pyro-Tech in the Statement of Claim would have preserved its rights and prevented prejudice to Defendants.

In essence, Accu-Fire adopts the position that it was forced to choose between complying with Delaware mechanics' lien law or complying with the automatic stay provision of the Bankruptcy Code, and that it should not

[16] *See Accu-Fire Fabrication, Inc.*, 2009 WL 537152, at *5 (quoting *Westinghouse*, 21 A.2d at 206).

be penalized for excessive caution in avoiding a violation of the automatic stay.[17] Accu-Fire's position is premised on a false choice. Section 362(b)(3) of the Bankruptcy Code is intended to avert this potential dilemma by permitting post-petition perfection of a mechanic's lien claim. In addition, if Accu-Fire was concerned about whether the § 362(b)(3) exception to the automatic stay applied, it could have sought relief for cause from the automatic stay in bankruptcy court.[18] The Court cannot save Accu-Fire's claim after Accu-Fire neglected to avail itself of either of these solutions within the time periods set by Delaware law for filing a mechanic's lien and repeatedly evinced an intent *not* to comply with Delaware's requirements for maintaining a valid lien.

Accu-Fire next argues that "[t]he determination of whether actions taken outside of bankruptcy court violate the Automatic Stay should be made by a bankruptcy court."[19] Plaintiff's sole support for this contention is

[17] The Court notes that Accu-Fire now appears to contradict its protestations that naming Pyro-Tech as a party defendant was impossible by seeking leave to name Pyro-Tech as a party defendant in its Statement of Claim. *See* Docket 10 (Claimant's Mot. for Leave to Amend).

[18] *See* 11 U.S.C. § 362(d) ("On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . . (1) for cause, including the lack of adequate protection of an interest in property of such party in interest . . . .").

[19] Docket 8, ¶ 5.

In re Crown Vantage, Inc., in which the Ninth Circuit Court of Appeals noted (but did not fully explain) a district court ruling that the bankruptcy court should decide whether an action for declaratory judgment and damages against a trustee violated the automatic stay.[20]

The Court considers *Crown Vantage* inapposite. Although the *Crown Vantage* opinion does not provide details of the district court's holding, it appears that the challenged actions in that case did not fall within one of the statutory exceptions to the automatic stay. Here, by contrast, the Court had only to apply the clear language of § 362(b)(3) in order to determine whether Accu-Fire was able to satisfy the requirements of Delaware's mechanics' lien statute despite Pyro-Tech's bankruptcy petition.

The central questions before the Court upon Defendants' motion were (1) whether Accu-Fire had complied with the requirements of Delaware law to obtain a valid mechanic's lien, and (2) if not, whether compliance was possible. Resolving these questions necessarily entailed determining that the filing of a statement of claim for a Delaware mechanic's lien falls within § 362(b)(3) of the Bankruptcy Code. Accu-Fire offers no reasons why this Court should not have determined these questions. Indeed, Accu-Fire's Response, which emphasized its view that "Accu-Fire *could not have named*

[20] 421 F.3d 963, 969-70 (9th Cir. 2005).

Pyro-Tech" because of the automatic stay,[21] implicitly sought the Court's determination. In addition, by virtue of Accu-Fire's own procedural choices, there is no apparent basis for a bankruptcy court to assume jurisdiction: Pyro-Tech was never named as a party defendant, and the property against which Accu-Fire sought a lien is not part of the bankruptcy estate. As previously discussed, if Accu-Fire desired a bankruptcy court's determination, it had the ability to involve the bankruptcy court before filing its claim or praecipe by petitioning for relief from the automatic stay.

Accu-Fire's final contention is that §§ 362(b)(3) and 546(b) of the Bankruptcy Code only affect the trustee's avoiding power and do not require that a mechanic's lien claimant forfeit its claim for failing to take actions otherwise required by the Delaware mechanics' lien statute, whatever the reasons for those omissions. As Defendants observe, this argument is based on a misreading of the Bankruptcy Code and the Court's opinion. Although Accu-Fire is correct that § 546(b) only limits a trustee's avoiding power, its construction of § 362 is incorrect. Under § 362(b)(3), "[t]he filing of a petition . . . *does not operate as a stay*" under the § 362(a) automatic stay provision with regard to "any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and

[21] Docket 6 (Claimant's Resp. to Defs'. Mot. to Dismiss), ¶ 3 (emphasis in original).

powers are subject to such perfection under section 546(b)."[22] Thus, § 362(b)(3) does exempt post-petition perfection of a qualifying mechanic's lien from the automatic stay.

Contrary to Accu-Fire's assertions, the Court did not hold that Accu-Fire's claim was forfeited by operation of the Bankruptcy Code. Rather, the expiration of the statutory time period under § 2711 of the Delaware mechanics' lien statute barred Accu-Fire's claim.[23] As was more fully discussed in the Court's previous opinion, Accu-Fire would have been able to remedy its failure to join Pyro-Tech had the statutory period for filing a statement of claim not expired.[24] The Bankruptcy Code was relevant to Defendants' Motion to Dismiss only inasmuch as it established that Accu-Fire could have followed the requirements of the Delaware mechanics' lien law without violating the automatic bankruptcy stay.

[22] 11 U.S.C. § 362(b) (emphasis added).

[23] *See* 25 *Del. C.* § 2711(b) ("All other persons embraced within this chapter and entitled to avail themselves of the liens herein provided shall file a statement of their respective claims within 120 days from the date from the completion of the labor performed or from the last delivery of materials furnished by them respectively.").

[24] As the Court's opinion also details, amendment of the praecipe would have prejudiced both the named Defendants and Pyro-Tech.

IV. Conclusion

For the foregoing reasons, Accu-Fire's Motion for Reargument is hereby **DENIED.**

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Robert K. Beste, Esq.
Scott G. Wilcox, Esq.