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

COMMONWEALTH CONSTRUCTION COMPANY,	)	
Plaintiff – Counterclaim-Defendant,	)	
v.	)	C.A. No. 04L-10-101 RRC
CORNERSTONE FELLOWSHIP BAPTIST CHURCH, INC.,	)	
Defendant – Counterclaimant.	)	

Submitted: November 1, 2005
Decided: November 14, 2005

On Defendant-Counterclaimant Cornerstone Fellowship Baptist Church, Inc.'s Motion for a Trial by Jury.
DENIED.

MEMORANDUM OPINION

Donald L. Logan, Esquire, Tighe, Cottrell & Logan, P.A., Wilmington, Delaware, Attorney for Plaintiff – Counterclaim-Defendant.

Lydia C. F. Anderson, Esquire, Law Office of Lydia C. F. Anderson, Newark, Delaware, Attorney for Defendant – Counterclaimant.

COOCH, J.

I. INTRODUCTION

Before this Court is the issue of whether Moving Defendant – Counterclaimant Cornerstone Fellowship Baptist Church ("Church") is entitled to a jury trial in this mechanic's lien action despite the fact that no timely demand for a jury trial was made in accordance with Superior Court Civil Rule 38. Church contends that "[p]ursuant to Superior Court Civil Rule 39(b), the Court in its discretion, upon motion, may order a trial by jury of any or all issues … notwithstanding the failure of a party to demand a jury as of right."[1] In opposition, Plaintiff – Counterclaim-Defendant Commonwealth Construction Company ("Commonwealth") relies on the plain language of Superior Court Civil Rule 38, which results in the waiver of the right to a jury trial if no jury trial is demanded within the time prescribed.

The Court finds that Church waived its right to trial by jury by not demanding it pursuant to Rule 38. Rule 39 provides that such a waiver is not always irreversible, but, in this case, because of (1) this Court's finding that Church's Rule 39 motion was not made in a reasonable amount of time after Church waived the right to trial by jury, (2) the lack of an adequate record concerning the failure to demand a jury trial (asserted by Church as "inadvertent"), (3) the fact that the issues in this case are complex and are equally, if not more, suitable to determination by the Court rather than by a jury, and (4) the lack of an

[1] Letter from Lydia C. F. Anderson, Esquire to the Court (November 1, 2005).

adequate record concerning whether or not conversion to a jury trial will prejudice Commonwealth, delay the trial of this case or interfere with the efficiency of the Court, the motion is **DENIED.**

II. FACTS

This case is primarily a mechanic's lien action with breach of contract elements and a quantum meruit claim. Plaintiff – Counterclaim-Defendant Commonwealth originally filed a Complaint on October 27, 2004.[2] Moving Defendant – Counterclaimant Church filed its initial answer, which included a counterclaim against Commonwealth that alleged that Commonwealth failed to complete performance under the parties' agreement, on November 29, 2004.[3] Neither of those pleadings, nor any of the subsequent pleadings, contains a demand for a jury trial on the face of the document. Commonwealth's ultimate claim is for $338,835.00, plus interest and costs; Church's counterclaim demanded $973,491.91, plus interest and costs.[4] A 3 day trial is scheduled for December 12, 2005.

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[2] The Amended Complaint was filed on November 23, 2004. The Second Amended Complaint, which is the operative complaint in this action, was filed on June 16, 2005.

[3] The Amended Answer was filed on December 22, 2004 and an Amended Affidavit of Defense was filed on December 29, 2004. The Third Amended Answer was filed on June 30, 2005. The Fourth Amended Answer was filed on July 25, 2005. It appears that no pleading styled as a Second Amended Answer was ever filed.

[4] Second Amended Compl. at 5; Fourth Amended Ans. at 7.

In a scheduling conference, which was requested by the parties, held on October 3, 2005, the purpose of which was to discuss possible extensions of discovery deadlines, the Court discussed the case with counsel and raised the issue of the right of either party to a trial by jury. When Church indicated that it thought it was entitled to a trial by jury, the Court asked for post-conference submissions on this point. Church asserted in such subsequent briefing that "any failure … to demand a jury trial as of right was inadvertent and not intended as a waiver."[5] Moreover, Church added that "[c]ounsel [for Church] is unable to see where the opposing party will be prejudiced or where delay will occur as a result of changing to a jury trial."[6] However, Commonwealth countered that because Church did not comply with Superior Court Civil Rule 38, which sets forth the proper procedure to demand a jury trial, and because the application was made a few weeks before trial, the motion should be denied.

III. DISCUSSION

The issue is whether Church, having waived its right to trial by jury under Rule 38 when it failed to properly demand a jury trial in any responsive pleading, is nevertheless entitled to relief from that waiver under Rule 39 and the particular facts of this case.

[5] Letter from Lydia C. F. Anderson, Esquire to the Court (November 1, 2005).

[6] *Id.*

Rule of Civil Procedure 38 provides that any party may demand a jury trial by setting forth such a demand on the face of a pleading at any time after the start of the action, but no later than 10 days after the last pleading directed to such issue.[7] The Delaware Supreme Court has stated that "the right to a jury trial must be preserved by demanding it on the face of a pleading at the time the action is commenced."(emphasis added)[8] Under Rule 38, the failure of a party to properly demand a jury trial constitutes a waiver of that party's right to a trial by jury.[9]

However, Rule 39(b) provides that "notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the Court in its discretion upon motion may order a trial by a jury of any or all issues."[10] Church waived its right to trial by jury by failing to make a demand under Rule 38 and the question now is whether this is such a situation in which this Court may grant that which was not properly requested.

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[7] Super. Ct. Civ. R. 38(b),(c).

[8] *McCool v. Gehret*, 657 A.2d 269, 284 n.20 (Del. 1995) (holding that where a party properly demanded a jury trial to hear two issues, but only one of the issues was able to be heard before the jury was discharged, that party was still entitled to a jury trial even though that party had waived the right to a jury trial based on the erroneous belief that the original trial judge would hear the bench trial on the second issue).

[9] Super. Ct. Civ. R. 38(e).

[10] Super. Ct. Civ. R. 39(b) (requiring that when a trial by jury is not demanded any issues "shall" be tried by the Court).

It is widely recognized that under Rule 39(b), courts have broad discretion in deciding whether to grant relief from the waiver of a jury trial.[11] However, in the exercise of that discretion, courts have applied conflicting standards and, as a result, have sometimes created presumptions regarding the burden of persuasion.[12] One line of cases places the burden on the adverse party in that "a Rule 39(b) motion for a jury trial should always be granted unless there is a strong and compelling reason for denying it."[13] Other courts take an opposite view that "a motion for a jury trial under Rule 39(b) should be granted only when the moving party shows adequate and persuasive grounds for granting the motion."[14] The United States District Court for the District of Delaware, it appears, has followed the latter approach.[15]

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[11] 8 James Wm. Moore et al., Moore's Federal Practice § 39.31(3) (1997) (stating that appellate courts are loathe to reverse the trial court's exercise of discretion in granting relief from the waiver of the right to a trial by jury and will do so only in extreme cases).

[12] *Id.*; *see also* 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2334 (2d ed. 1995).

[13] Moore's Federal Practice § 39.31(4)(a) (citing prejudice to opposing party and delay of proceedings as compelling reasons for denying a Rule 39(b) motion).

[14] Moore's Federal Practice § 39.31(4)(b) (adding that mere "inadvertence" is not such a persuasive ground).

[15] *See Diamond v. Reynolds*, 1986 WL 31580, *85 (D. Del.) (applying Federal Rule of Civil Procedure 39(b), which employs the same language as Superior Court Civil Rule 39(b), and stating that "[i]n this district, 'a jury trial should not be granted under the discretionary power of the court under Rule 39(b) unless some adequate or proper reason be assigned to invoke such discretionary power.'" (quoting *Reeves v. Pennsylvania R.R.*, F.R.D. 487, 488-89 (D. Del. 1949))).

The former, more permissive approach, which places the burden of persuasion on the non-moving party, does not seem desirable because it could potentially render the requirements of Rule 38 meaningless.[16] The latter presumption, which places the burden of persuasion on the party who waived the right to trial by jury, has somewhat more appeal because it gives teeth to the mandatory "shall" in the opening phrase of Rule 39(b);[17] however, this Court holds that the better and more logical approach is to avoid creating any presumption and, instead, to proceed directly to a fact-based analysis, described below.

Thus, this Court agrees with those courts that have avoided using such presumptions because the considerations in support of each presumption are "in equipoise."[18] The *Khalil* court, citing to Wright & Miller, states that "[n]o predisposition toward granting or denying a Rule 39(b) motion is required, and each such motion should stand or fall on its own merits in light of the above-stated

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[16] *See BCCI Holdings (Luxembourg), Societe Anonyme v. Khalil*, 182 F.R.D. 335, 337 (D. D.C. 1998) (applying Federal Rule 39(b) but instead of using one of the above approaches, the Court, upon finding that the considerations underlying each approach cancel each other out, proceeded directly to a factor-based analysis), *aff'd* 214 F.3d 168 (C.A.D.C. 2000).

[17] *See Id.* (suggesting that relief from a waiver under Rule 39 is the exception rather than the rule); *see also McCool v. Gehret*, 657 A.2d, at 284 n.20 ("Under Super. Ct. Civ. R. 38(b), the right to a jury trial must be preserved by demanding it on the face of a pleading at the time the action is commenced.") (emphasis added).

[18] *Khalil,* 182 F.R.D., at 337.

factors and in the context of the unique circumstances of a given case."[19] *Khalil* stated that a court should consider each Rule 39(b) motion "with an open mind and an eye to the factual situation in that particular case, rather than with a fixed policy against granting the application or even a preconceived notion that applications of this kind are usually to be denied."[20] The American Bar Association has promulgated *Principles for Juries & Jury Trials*, which states that "waiver [of the right to trial by jury] should neither be presumed nor required where the interests of justice demand otherwise."[21]

The most persuasive reason underlying this Court's decision to decline to adopt either of the presumptions is that, regardless of whether a presumption is used or not, all courts generally engage in a fact-sensitive, factor-based analysis when exercising the discretion to grant relief. A secondary authority has summarized these factors well:

> (1) whether the motion was made within a reasonable time after the expiration of the time allowed by statute or rule, or at a proper stage in the proceeding;
> (2) whether the failure to make a demand for a jury trial within the time prescribed by statute or rule appeared to be just a matter of trial tactics or was the result of such inadvertence, mistake, or excusable neglect as would justify an allowance of the motion;

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[19] *Id.*, at 338 (referencing factors listed previously in *Khalil* such as length of delay in making a jury demand, reasons for delay, prejudice to the adverse party if the Rule 39 motion is granted, complexity of the issues, and effect on the Court's docket of granting a jury trial).

[20] Wright & Miller, Federal Practice and Procedure § 2334.

[21] American Bar Association, Principles for Juries & Jury Trials, Principle 1.C (2005), *available at* http://www.abanet.org/juryprojectstandards/principles.pdf.

> (3) whether the action was one particularly suited for trial by jury or was one better suited for trial by the court without a jury; and
> (4) whether allowing a jury trial would prejudice the rights of the adverse party, would substantially delay the trial of the case, or would interfere with the orderly disposition of the business of the court or disrupt the docket.[22]

Each factor should be considered and, in doing so, no one factor will carry the day; a court should be "concerned with the cumulative effect of the various facts and circumstances shown by the parties in making and opposing Rule 39(b) motions for jury trials."[23]

Turning to this case: first, this Court finds that the motion was not made in a reasonable time after the expiration of the time allowed by Rule 38. This motion was filed almost one year after the initial pleadings were filed. Further, as pointed out by Plaintiff Commonwealth, this motion comes a few weeks before the start of trial. Church had more than enough time in which to realize that the claimed "inadvertent" mistake had been made. Further, it was the Court itself, rather than Church, that raised the issue of whether this case was a jury trial at the October 3, 2005 conference.

Second, this Court declines to find, on the present record, whether the failure to demand a trial by jury in a timely fashion was in fact the product of inadvertence. Church devotes but one line in its "reply" letter of November 1,

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[22] Romualdo P. Ecleavea, Annotation, *Authority of State Court to Order Jury Trial in Civil Case Where Jury Has Been Waived or Not Demanded by Parties*, 9 A.L.R. 4th 1041, 1047 (1981).

[23] Moore's Federal Practice, § 39.31(5)(a).

2005 to its assertion that the failure to demand a jury trial was "inadvertent": "In the instant case, any failure by [Church] to demand a jury trial as of right was inadvertent and not intended as a waiver." That sole unsupported statement fails to create an adequate basis upon which this Court may reasonably exercise its discretion and grant relief from Church's waiver.

Third, this Court finds that the issues involved in this case – i.e. a mechanic's lien and breach of contract claims – are equally, if not better, suited to be heard by the Court without a jury. In the context of complex breach of contract suits, courts frequently deny a Rule 39 motion to grant relief from the waiver of a trial by jury because the issues in the case are highly complex or otherwise less suited for consideration by a jury.[24]

The complaint and counterclaim in this case primarily involve a mechanic's lien and breach of contract and quantum meruit claims. This Court is aware of the complexity of both the contract claims and the mechanic's lien action.

[24] *See Nanticoke Homes v. Hamilton*, 2001 WL 985121, *1 (Del. Super.) (denying defendant's motion to have the case heard by a jury after failing to properly demand a jury trial on the grounds that "[i]n the Court's experience civil actions related to contracts are far more suited to a bench trial than a jury trial since most of the issues relate to matters of law rather than of fact."). *See also* Moore's Federal Practice § 39.31(5)(c)(i) (citing *New Creation Contact Lenses of Par, Inc., v. Continuous Curve Contact Lens, Inc.*, 100 F.R.D. 75 (W.D. Ark. 1983) (denying an untimely request for jury trial where the issues such as breach of contract and promissory estoppel, among others, were too technical and complex to make them easily understandable for lay jurors)); *see also* Wright & Miller, Federal Practice and Procedure § 2334 ("Courts often deny motions under [Rule 39], even if there would have been a right to a jury trial on timely demand, if the issues are technical or complicated or other wise ill-adapted for jury trial and therefore are better left for determination by the Court.").

The issues that appear to arise from those claims seem relatively less suited for deliberation by the jury and militate in favor of this Court's denial of relief from the waiver of the right to a jury trial.[25]

Fourth, this Court declines to find, based on the present record, whether or not the granting of relief from the waiver of a trial by jury would "prejudice" Commonwealth, delay or prolong the trial of this case, or otherwise interfere with the efficiency of the Court. The Court will, however, note that trials by jury usually take longer to complete than trials before the Court. Any shortening of the time required to try this case will, albeit in a small way, nevertheless ease the pressure of this Court's crowded docket. In its November 1 letter to the Court, Church provides only a conclusory statement as to its perception of the lack of potential prejudice to Commonwealth and the lack of delay that would be caused by the conversion of this case to a trial by jury: "Counsel [for Church] is unable to see where the opposing party will be prejudiced or where delay will occur as a result of changing to a jury trial." Further, because this statement was in Church's reply, Commonwealth did not have fair opportunity to respond to this claim of absence of prejudice. Insofar as "prejudice" is concerned, this Court may not reasonably exercise its discretion to allow a jury trial based on the scant record in this case.

[25] In fact, the Court advised counsel at the October 3 conference that if this case is tried non-jury, the Court would require closing arguments to be made post-trial in a writing upon a transcribed record.

IV. CONCLUSION

For the foregoing reasons, Moving Defendant – Counterclaimant Church's Motion for a Trial by Jury is **DENIED.**

IT IS SO ORDERED.

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oc: Prothonotary