

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

BENHAMIN FRAZIER, JR. and
YVETTE OUSLEY FRAZIER

v.

DARRYL K. MILLER

: JULY TERM, 2004

: No. 1276

: Commerce Program

: Control No. 010965

ORDER

AND NOW, this 17th day of March 2005, upon consideration of the plaintiffs' Preliminary Objections to the Counterclaim and defendant's opposition, the respective submissions, all matters of record, and in accord with the contemporaneous Opinion being filed of record, it is **ORDERED** that:

1. The Objection to the claim of harassment is **Sustained** and that claim is stricken and dismissed;
2. All claims for punitive damages and attorney fees are **Stricken** and dismissed;
and,
3. The Objection to the claim for ejectment is **Sustained**; however, defendant may file an amended counterclaim within twenty-two (22) days embodying the requisite survey.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

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OPINION

Albert W. Sheppard, Jr., J. March 17, 2005

Background

This action arises out of a property dispute between plaintiffs, Benjamin and Yvette Ousley, Frazier and defendant, Darryl Miller. Plaintiffs and defendant are adjoining neighbors in Philadelphia residing at 844 W. Mt. Airy Avenue and 852 W. Mt. Airy Avenue respectively. Plaintiffs brought this action to quiet title concerning the boundary between the two pieces of property.¹ Plaintiffs also alleged a Count in trespass.

¹ It is not clear the extent of the property that is in dispute. Plaintiffs claim that a fence separating the two pieces of land is the recognized boundary and has been for at least thirty years. Plaintiffs' Complaint ¶ 6. While Defendant claims that the fence encroaches on his property, the actual metes and bounds of which have been surveyed and staked by the City of Philadelphia Survey Bureau. Defendant Answer ¶ 6; Motion to Determine Preliminary Objections, Exhibit B. However, neither party has submitted any evidence as to what the actual metes and bounds are. Exhibit "B" to Defendant's memorandum dated February 2, 2005 indicates that the width of the section of property in dispute is approximately five or six feet. Motion to Determine Preliminary Objections, Defendant Amended Counterclaims, Exhibit B.

Defendant, acting *pro se*, filed an Answer and Counterclaim to plaintiffs' Complaint and subsequently filed an Amended Counterclaim asserting actions of Ejectment and Harassment.²

Plaintiffs have filed Preliminary Objections on a number of grounds. Plaintiffs contend that: (a) the Amended Counterclaim fails to comply with *Pa.R.Civ.P. 1019(a)* and *Pa.R.Civ.P. 1022*; (b) the Amended Counterclaim fails to allege facts with sufficient specificity; and (c) the Amended Counterclaim fails to state any cause of action upon which relief may be granted (demurrer).

Discussion

The determination of preliminary objections is governed by Rule 1028, Pennsylvania Rules of Civil Procedure. That Rule 1028 essentially provides that Preliminary Objections may be filed by any party to any pleading for: "failure of a pleading to conform to ... a rule of the court; insufficient specificity in a pleading; [and] lack of capacity to sue." *Pa.R.Civ.P. 1028(a)*. Because the first and third arguments of the plaintiffs are similar, those analyses have been combined.

Ejectment

Plaintiffs' first argument raises an objection under *Pa.R.Civ.P. 1019(a)*. Plaintiffs allege that the defendant has failed to state the material facts on which any of his causes of action are based in a concise and summary form and therefore, they are unable to prepare an appropriate responsive pleading. Additionally, plaintiffs argue that the Amended Counterclaim fails to allege the facts upon which it is based with sufficient specificity.

² The harassment claim arises out of alleged threats made by plaintiff, Yvette Ousley Frazer, towards the Defendant. Motion to Determine Preliminary Objections, Part D, Criminal Complaint attached to Defendant's Amended Counterclaim.

Rule 1051 of the Pennsylvania Rules of Civil Procedure states; “Except as otherwise provided in this chapter, the procedure in the action of Ejectment shall be in accordance with the rules relating to a civil action.” *Pa.R.Civ.P. 1051*. Further, Rule 1054(b) states: “a party shall set forth in the complaint or answer an abstract of the title³ upon which the party relies at least from the common source of the adverse titles of the parties.” *Pa.R.Civ.P. 1054(b)*. The defendant has described the property, but has failed to set forth an abstract of title, and is therefore in violation of Rule 1054(b). It is set out in the record that a survey was performed but the results of the survey are neither alleged nor attached to the Counterclaim.

Admittedly, the plaintiffs have also failed to submit an abstract of title. However, when a claim is based on adverse possession, it has been recognized that there is no need for the abstract. “Although the requirement that the complaint set forth an abstract of title is mandatory and a complaint lacking the same is insufficient, several courts of common pleas have held that no abstract of title is required where the plaintiff bases his action on a claim of adverse possession.” *Wolfe v. Porter*, 405 Pa. Super. 385, 388, 592 A.2d 716, 718 (1991).

Under the rule governing amendments in civil actions, *Pa.R.Civ.P.1033*, and made applicable to actions of Ejectment by *Pa.R.Civ.P. 1051*, either party may amend his or her pleadings by filed consent of the adverse party or by leave of court.

³ Ballentine’s Law Dictionary defines an “Abstract of Title” as: “A short account of the state of the title to real estate, or a synopsis of the instruments which show title,” and further states that “it should contain a full summary of all grants, conveyances, wills and all records and judicial proceedings whereby the title is in any way affected, and all encumbrances and liens of record, showing whether they have been released or not.”

In at least one case the court has allowed a short period for the defendant to correctly file an abstract of title. *Porter v. Hayes*, 142 A. 282, 282 (Pa. 1928). (“Now, rule to show cause why judgment should not be entered to be made absolute within ten days from this date, unless the defendants within said ten days file a proper answer as required by rules of court and the Act of Assembly. Failure to file said answer, upon presentation of proper order setting forth the premises, etc., judgment will be entered on the same.”)

Thus, the first Preliminary Objection raising the sufficiency of the pleading (Rule 1019(a)) should be sustained. However, the defendant should be afforded the opportunity to file an amended counterclaim embodying the pertinent survey and the particulars of the chain of title.

Plaintiffs next contend that the counterclaim should be dismissed because it does not conform to *Pa.R.Civ.P. 1022*. This rule states that “every pleading shall be divided into paragraphs numbered consecutively. Each paragraph shall contain as far as practicable only one material allegation.” *Pa.R.Civ.P. 1022*. Plaintiffs base this argument on two paragraphs, paragraphs 29 and 36, of Defendant’s Counterclaim, which they allege each contain more than one material allegation.⁴

⁴ Paragraph 29 states: “The defendant had the property surveyed and staked two times in February 2004, by a surveyor from the City of Philadelphia; the survey conclusively shows that the plaintiffs’ fence is on the defendant’s property.” Motion to Determine Preliminary Objections, Defendant Amended Counterclaims, Paragraph 29. Paragraph 36 states: “In July 2004, Ms. Frazier threatened to kill the defendant’s dog and prompted the defendant to file a complaint with the SPCA and Philadelphia Animal Care and Control Association for the protection of the animals.” *Id* at Paragraph 36.

Rule 1022 is intended to allow a pleader substantial flexibility⁵, and will not require dismissal unless the pleadings prejudice the adverse party or impede the ability to answer the complaint. See *Gary Lorenzon Contrs. v. Allstates Mech.*, 52 Pa. D. & C.4th 567, 576 (Phila. Co. 2001). “This standard must be applied with great flexibility, not only because of the express direction of the rule that, ‘the standard be followed as far as practicable,’ but also because there is no set standard as to what constitutes a material allegation. Mere length, complexity, and verbosity do not in themselves violate Rule 1022 if the subsidiary facts averred fit together into a single allegation.” *Id* at 575 (quoting *General State Authority v. Sutter Corp.*, 24 Pa. Commw. 391, 394, 356 A.2d 377, 380 (1976)). Allowing the paragraphs to stand and not requiring the Counterclaim to be dismissed will not prejudice the plaintiffs and will not preclude their ability to answer it. Therefore, this Preliminary Objection should be overruled.

Harassment

The second Counterclaim includes a claim of harassment. Plaintiffs’ fourth Preliminary Objection argument addresses this allegation, contending that the defendant has failed to state a claim upon which relief may be granted. They argue that Pennsylvania does not recognize a cause of action for harassment. This court agrees.

⁵ “Section 5 of the suspended Practice Act of 1915 provided that each paragraph shall contain but one material allegation. Strict adherence to this command created practical difficulties. For example, an averment that a defendant ‘executed and delivered’ a promissory note would give rise to a question whether one material allegation had been pleaded or two. Rule 1022 rewrites this so that the requirement that each paragraph of a pleading contain one material allegation is followed only as far as practicable. Perhaps this qualification results in the section having no real meaning whatever, but in any event, the emphasis on form is removed, and the matter is left to the courts with *ample room for intelligent and flexible treatment*. If a clear statement and the requirements of good style necessitate the inclusion of two material allegations in one paragraph, this may be done without fear that there will be a formal violation of the rules and that a plaintiff will be put to the burden of arguing a formal objection to his or her pleading.” *Gary Lorenzon Contrs.*, 52 Pa. D. & C.4th at 574-5.

Most courts that have addressed this issue have declined to recognize claims for harassment in Pennsylvania. See *Sobel v. Wingard*, 366 Pa. Super. 482, 487, 531 A.2d 520, 523 (1987) (declining to create a new cause of action for harassment); *DeAngelo v. Fortney*, 357 Pa. Super. 127, 132, 515 A.2d 594, 596 (1986) (same). Additionally, only the Pennsylvania Supreme Court or the Pennsylvania legislature can create new causes of action. See *D'Errico v. DeFazio*, 763 A.2d 424, 433 (Pa. Super. 2000). Thus, in that Pennsylvania has declined to recognize a cause of action for harassment, this Preliminary Objection should be sustained. The claim of harassment is dismissed.

Finally, this court finds that there is no basis set forth in the amended Counterclaim to sustain the claims for punitive damages or attorneys' fees. All references to punitive damages and attorney fees are stricken and dismissed.

In summary, the defendant will be granted leave to file an amended Counterclaim as to the claim for ejectment in accordance with this Opinion within twenty-two (22) days. An Order consistent with this Opinion will be filed of record.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.