

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL REIS, SR. and)	
LAWRENCE J. KATZ, on Their Own)	Civil Action
Behalf and as Assignees of)	No. 05-CV-01651
Weaver Nut Company, Inc.,)	
)	
Plaintiffs)	
)	
vs.)	
)	
BARLEY, SNYDER, SENFT)	
& COHEN LLC.,)	
)	
Defendant)	

O R D E R

NOW, this 27th day of March, 2008, upon consideration of the Motion of Defendant, Barley Snyder, LLC, to Strike Plaintiffs' Demand for a Jury Trial, which motion was filed July 13, 2007; upon consideration of Plaintiffs' Opposition to Defendant's Motion to Strike Plaintiffs' Jury Demand and Countermotion Pursuant to Federal Rule of Civil Procedure 39, which opposition and countermotion were filed July 30, 2007; upon consideration of the Memorandum of Law of Defendant in Opposition to Plaintiffs' Motion Pursuant to Fed.R.Civ.P. 39, and in Further Support of its Motion to Strike Plaintiffs' Jury Demand, which memorandum was filed August 9, 2007; and for the reasons expressed in the accompanying Memorandum,

IT IS ORDERED that the Motion of Defendant, Barley Snyder, LLC, to Strike Plaintiffs' Demand for a Jury Trial is granted.

IT IS FURTHER ORDERED that plaintiffs' Countermotion Pursuant to Federal Rule of Civil Procedure 39 is denied.

IT IS FURTHER ORDERED that the plaintiffs' Demand for Jury Trial filed June 29, 2007 is stricken.

BY THE COURT:

/s/ JAMES KNOLL GARDNER
James Knoll Gardner
United States District Judge

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* * *

APPEARANCES:

LYNANNE B. WESCOTT, ESQUIRE
On behalf of Plaintiffs

ARTHUR W. LEFCO, ESQUIRE
On behalf of Defendant

* * *

M E M O R A N D U M

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on the Motion of Defendant, Barley Snyder, LLC, to Strike Plaintiffs' Demand for a Jury Trial, which motion was filed July 13, 2007 and Plaintiffs' Opposition to Defendant's Motion to Strike Plaintiffs' Jury Demand and Countermotion Pursuant to Federal Rule of Civil Procedure 39, which opposition and countermotion were filed

July 30, 2007.

For the reasons expressed below, I grant defendant's motion to strike plaintiff's jury demand, deny plaintiff's motion pursuant to Rule 39 of the Federal Rules of Civil Procedure to file a late jury demand and strike plaintiffs' Demand for Trial by Jury, which demand was filed June 29, 2007.

JURISDICTION

This action is before the court on diversity jurisdiction. Plaintiff Michael Reis, Sr. is a resident of the State of Illinois and plaintiff Lawrence J. Katz is a resident of the State of New Jersey. Defendant Barley, Snyder, Senft & Cohen, LLC is a Pennsylvania limited liability company. The amount in controversy is in excess of \$75,000. See 28 U.S.C. § 1332.

VENUE

Venue is proper because plaintiffs allege that the facts and circumstances giving rise to the cause of action occurred in Lancaster County, Pennsylvania, which is in this judicial district. 28 U.S.C. §§ 118, 1391.

PROCEDURAL HISTORY

Examining the Third Circuit's five factor balancing test for district courts to utilize in determining whether to permit an untimely demand for jury, discussed below, requires a somewhat detailed recitation of the procedural history of this

case.

On April 10, 2005 plaintiffs Reis and Katz, on their own behalf and as assignees of Weaver Nut Company, Inc., filed their initial Complaint in this matter. The original Complaint alleged the five following causes of action: breach of fiduciary duty (Count I); professional negligence (Count II); abuse of process (Count III); interference with a contractual relationship (Count IV); and conversion (Count V).

On June 23, 2005 defendant filed its initial motion to dismiss. On July 7, 2005 plaintiffs responded, which included a request to amend the Complaint. My Order dated March 17, 2006 and filed March 20, 2006 granted plaintiffs' request.

On April 12, 2006 plaintiffs filed their Amended Complaint. The Amended Complaint contains the original five causes of action and an additional cause of action for breach of contract (Count VI). On May 2, 2006 defendants filed their second motion to dismiss. On May 19, 2006 plaintiffs responded. Oral argument was conducted before me on November 28, 2006. The matter was taken under advisement at the conclusion of oral argument on November 28, 2006.

By my Order and Opinion dated March 30, 2007 I granted in part and denied in part defendant's motion to dismiss plaintiffs' Amended Complaint.

Specifically, I granted defendant's motion to dismiss

that portion of Count I of plaintiffs' Amended Complaint brought by plaintiffs Michael Reis, Sr. and Lawrence J. Katz, in their individual capacities, alleging a breach of fiduciary duty by defendant law firm, Barley, Snyder, Senft & Cohen, LLC ("Barley Snyder"). I denied defendant's motion to dismiss the remaining portions of Count I: (1) breach of fiduciary duty brought by plaintiffs Reis and Katz as assignees of the rights of Weaver Nut Company, Inc. ("Company"); (2) aiding and abetting breach of a fiduciary duty brought by Reis and Katz individually; and (3) aiding and abetting breach of a fiduciary duty brought by Reis and Katz as assignees of the Company.

Also, I granted defendant's motion to dismiss that portion of Count II alleging a claim of professional negligence against defendant Barley Snyder, brought by plaintiffs Reis and Katz, individually. I denied defendant's motion to dismiss the remaining portion of Count II alleging professional negligence against Barley Snyder, brought by Reis and Katz as assignees of the Company.

I granted defendant's motion to dismiss Count III of plaintiffs' Amended Complaint alleging a cause of action against defendant for abuse of process brought by plaintiffs Reis and Katz in their individual capacities.

Moreover, I granted defendant's motion and dismissed from Count IV of the Amended Complaint the claims of Reis and

Katz, individually, alleging tortious interference with contractual relations by defendant. I denied defendant's motion to dismiss the remaining portion of Count IV alleging tortious interference with contractual relations against Barley Snyder, brought by Reis and Katz as assignees of the Company.

Finally, I granted defendant's motion to dismiss Count V of plaintiffs' Amended Complaint alleging a cause of action against Barley Snyder for conversion brought by plaintiffs Reis and Katz in their individual capacities. There are no other claims in Count V.

Count VI of plaintiffs' Amended Complaint alleges breach of contract. It was brought against defendant Barley Snyder by plaintiffs Reis and Katz in their capacity as assignees of the rights of the Company. Defendant did not include Count VI in its motion to dismiss. Accordingly, that count remains in this lawsuit.

As a result of these rulings, the following six claims against defendant Barley Snyder remain in this lawsuit: Count I: (1) breach of fiduciary duty brought by plaintiffs as assignees of the Company; (2) aiding and abetting breach of a fiduciary duty brought by plaintiffs individually; (3) aiding and abetting breach of a fiduciary duty brought by plaintiffs as assignees of the Company. Count II: (4) professional negligence brought by plaintiffs as assignees of the Company. Count IV: (5) tortious

interference with contractual relations brought by plaintiffs as assignees of the Company. Count VI: (6) breach of contract brought by plaintiffs as assignees of the Company.

On April 30, 2007 the Answer with Affirmative Defenses of Defendant, Barley Snyder, LLC (Erroneously Identified as Barley, Snyder, Senft & Cohen, LLC), to Plaintiffs' Amended Complaint was filed. On June 29, 2007 I conducted a telephone scheduling conference pursuant to Rule 16 of the Federal Rules of Civil Procedure with counsel for the parties. During the telephone conference the issue of trial was discussed. At that time, I mentioned to counsel that the case would be scheduled for a non-jury trial because there was no indication that either party had requested a jury.

In response, counsel for plaintiff, Lynanne B. Wescott, Esquire, indicated that she believed that a jury demand had been filed. A review of the original case file revealed that plaintiff had marked the box requesting a jury on the Civil Cover Sheet submitted to the Clerk of Court with the original Complaint, however, a jury demand did not appear on either the original Complaint filed on April 10, 2005 or the Amended Complaint filed on April 12, 2006.

During the conference, plaintiffs' counsel argued that marking the Civil Cover Sheet with a jury demand was sufficient to evince plaintiffs' intent to request a jury trial in this

matter. Defense counsel disagreed. Without specifically ruling on the propriety of the apparent request for a jury trial, I scheduled this case for jury trial, without prejudice for defendant to argue that the plaintiff's request for a jury, by way of the Civil Cover Sheet, was legally insufficient to effectuate the request.

On June 29, 2007, after completion of the telephone conference, plaintiffs' counsel filed a formal Demand for Jury Trial. On July 13, 2007 defendant filed the within motion to strike plaintiffs' jury demand. On July 30, 2007, in response to defendant's motion to strike the jury demand, plaintiffs filed their countermotion to file a late jury demand pursuant to Rule 39 of the Federal Rules of Civil Procedure.

Therefore, the issue before the court is whether I will permit plaintiffs to file a late jury demand as they request, or to strike the Demand for Jury Trial filed June 29, 2007 as untimely.

DISCUSSION

The long-standing right to a jury trial in civil cases arises from the common law, the United States Constitution and the Federal Rules of Civil Procedure. See Hare v. H & R Industries, Inc., 2001 U.S. Dist. LEXIS 8661 (E.D.Pa. June 26, 2001)(J.M. Kelly, J.); U.S. Const. Amend.VII; Fed.R.Civ.P. 38(b).

However, any party seeking a jury trial is required to

make a timely demand for jury, by filing such demand with the Clerk of Court, within 10 days of the last pleading that addresses the issue. Fed.R.Civ.P. 38(b). Failure to make a timely demand for a jury trial results in waiver of the right to have the matter heard by a jury. Fed.R.Civ.P. 38(d). Nevertheless, a party may, upon motion to the court, and in the court's discretion, seek leave to file a late demand for jury. Fed.R.Civ.P. 39(b).

Initially, plaintiffs assert that they requested a jury in this matter by marking the box on the Civil Cover Sheet which accompanied their original Complaint. However, it is well-settled by courts in this judicial district, and elsewhere, that marking a request for jury on the Civil Cover Sheet submitted with a Complaint does not substitute for formal written notice of a jury demand as required by the Federal Rules of Civil Procedure. Wall v. National Railroad Passenger Corporation, 718 F.2d 906, 909 (9th Cir. 1983); Omawale v. WBZ, 610 F.2d 20, 22 (1st Cir. 1979); Katzenmoyer v. City of Reading, 2001 U.S. Dist. LEXIS 15930 (E.D.Pa. Aug. 6, 2001)(Padova, J.); The Personal Touch, Inc. v. Lenox, Inc., 122 F.R.D. 470, 471 (E.D.Pa. 1988)(Reed, J.).

"The civil cover sheet is merely an administrative instrument utilized by the court to assist it in the management of its cases. This document is not served upon the defendant and

therefore cannot properly substitute for service in accordance with Rule 38(b)." Lenox, Inc., 122 F.R.D. at 471. Thus, based upon the above authority, all of which I find persuasive, I conclude that plaintiffs' marking the Civil Cover Sheet with a jury demand did not satisfy the requirements of Rule 38(b) and did not operate as a lawful jury demand in this matter. However, this does not end my analysis of this issue.

Rule 39 of the Federal Rules of Civil Procedure permits plaintiffs to seek leave to file a late jury demand, and the court may grant it in its discretion. Fed.R.Civ.P. 39(b). The United States Court of Appeals for the Third Circuit has established a five factor balancing test for district courts to utilize in determining whether in its discretion to permit an untimely demand for jury.

Specifically, I must examine and weigh the following factors: (1) whether the issues are suitable for a jury; (2) whether granting the motion would disrupt the schedule of the court or the adverse party; (3) whether any prejudice will result to the adverse party; (4) how long the party delayed in bringing the motion; and (5) the reasons for the failure to file a timely jury demand. United States Securities and Exchange Commission v. The Infinity Group Company, 212 F.3d 180, 195-196 (3d Cir. 2000). I address each of these factors and the parties' contentions below.

Suitability for Jury Trial

The first factor is whether the issues are suitable for a jury. For the following reasons, I conclude that this case is more suitable for a non-jury trial.

Plaintiffs contend that this case is suitable for jury trial because the central issues in the case (i.e., whether defendant was negligent in representing Paul Weaver, III, the President of Weaver Nut Company, to the detriment of its other client, plaintiff Weaver Nut Company, and in representing other companies in competition with Weaver Nut Company to Weaver Nut Company's detriment) are factual issues and are no more complex than other cases juries routinely hear.

Defendant asserts that this case presents complex factual and legal issues relating to alleged conflicts of interest and the breach of fiduciary duties owed to plaintiffs who were alleged shareholders in a small corporation. Thus, defendants contend that this case is one that is better addressed by a judge than by a jury. For the following reasons, I agree with defendants.

Contrary to plaintiffs' contentions, this case is not a simple or "garden variety" negligence or breach-of-contract case. Rather, it involves complex factual and legal issues regarding the conduct of defendant law firm in its representation of

multiple clients.

In addition, there are potentially complex issues regarding damages. Plaintiffs contend that they are owed hundreds of thousands, if not millions, of dollars for their lost business opportunities in this case. When the issue of damages involves intricate evidentiary facts and will require auditing or an accounting, the court will face substantial difficulties, though not insurmountable obstacles, in framing a proper jury charge that would properly submit the issue of damages to a jury. See SEC v. The Infinity Group Company, 212 F.3d at 196, citing William Goldman Theatres, Inc. v. Kirkpatrick, 154 F.2d 66, 69 (3d Cir. 1946).

Because this case involves complex issues of fact and law on the issues of both liability and damages, it is more suitable for trial by the court than by a jury. Accordingly, I conclude that this factor weighs against permitting plaintiffs to file a late jury demand.

Disruption of Schedules

The second factor is whether granting the motion would disrupt the schedule of the court or the adverse party. For the following reasons, I conclude that there would be only minimal, if any, disruption.

Plaintiffs contend that the court's schedule will not be disrupted because the jury demand filed by plaintiffs was

filed the same day that the court set the case management deadlines in this case. Moreover, plaintiffs assert that defendant's schedule is not disrupted because the court scheduled this case for a jury trial and all the deadlines for a jury trial were set well in advance of the trial.

Defendant avers that this case has been pending since April 10, 2005, and it has been preparing its defense since that time, more than two years prior to plaintiffs' untimely jury demand. As part of this argument, defendants imply that they have made certain, unspecified strategic decisions based upon the assumption of a bench trial.

I conclude that there would be only minimal effect, if any at all, of a jury trial on the schedule of the court or of defendants in this case. Defendant has not specifically articulated what prejudice it will suffer based upon its strategic decisions. However, I concede that believing that this was a non-jury case for over two years may have affected certain decisionmaking made by defendant and its counsel. Thus, I weigh this as a neutral factor in my analysis.

Prejudice

The third factor is whether any prejudice will result to the adverse party. For the following reasons, I conclude that there is some chance of prejudice to defendant.

Plaintiffs contend that defendants will not suffer any

prejudice by the late filing of their jury demand. Defendant contends that it will suffer increased costs, including possible additional expert fees, by having to prepare this matter for trial by jury.

There is a possibility of increased defense costs associated with the presentation of its case to a jury, rather than to the court. Because of the complex issues involved in this case, defendants could reasonably determine that it did not have to present certain issues to the court by way of electronic media, blowups or additional testimony, including additional expert testimony, because the court will be much more familiar than a jury would be with the factual and legal issues involved in the case.

While it is somewhat unclear the exact level of additional cost to be borne by defendants, any additional cost would certainly prejudice defendant to some degree, even if only slight or minimal. Thus, I conclude that because there is some chance of prejudice to defendant, this factor weighs in favor of not permitting plaintiffs' late jury demand.

Delay

The fourth factor is how long the party delayed in bringing the motion. For the following reasons, I conclude that plaintiffs delayed 74 days in filing their motion seeking leave to file an untimely jury demand.

Plaintiff's original Complaint was filed on April 10, 2005 and did not include a jury demand. The Amended Complaint was filed on April 12, 2006 and again did not contain a jury demand. On April 30, 2007 the Answer with Affirmative Defenses of Defendant, Barley Snyder, LLC (Erroneously Identified as Barley, Snyder, Senft & Cohen, LLC), to Plaintiffs' Amended Complaint was filed. Thus, plaintiffs had until May 17, 2007 to timely file a jury demand pursuant to Rule 38(b).¹ Plaintiffs' Demand for Jury Trial was not filed until 43 days later on June 29, 2007.

The Motion of Defendant, Barley Snyder, LLC, to Strike Plaintiffs' Demand for a Jury Trial was filed on July 13, 2007.

¹ Rule 38(b) of the Federal Rules of Civil Procedure provides:

Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

Fed.R.Civ.P. 38(b).

Rule 6(a) of the Federal Rules of Civil Procedure provides in pertinent part: "when the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Fed.R.Civ.P. 6(a). Moreover, Rule 6(e) adds three additional days when service is made by mail pursuant to Rule 5(b)(2)(B) as it was in this case. (See Certificate of Service regarding the Answer with Affirmative Defenses of Defendant, Barley Snyder, LLC (Erroneously Identified as Barley, Snyder, Senft & Cohen, LLC), to Plaintiffs' Amended Complaint filed April 30, 2007.)

Thus, based upon the application of Rules 5, 6 and 38, plaintiffs had until May 17, 2007 to file a timely jury demand.

Plaintiffs' Opposition to Defendant's Motion to Strike
Plaintiffs' Jury Demand and Countermotion Pursuant to Federal
Rule of Civil Procedure 39 was filed on July 30, 2007. Thus,
plaintiffs did not seek leave to file an untimely jury demand
until 74 days after expiration of their deadline to file their
jury demand.

Plaintiffs contend that there was no delay in bringing
the within countermotion for leave to file a late jury demand.
Defendants contend that plaintiffs' "countermotion" is untimely
because the countermotion should have been brought as a motion
for leave to file a late jury demand pursuant to Rule 39(b) prior
to filing their untimely Demand for Jury Trial. For the
following reasons, I agree with defendant and conclude that
plaintiffs' "countermotion" for leave of court under Rule 39(b)
was untimely.

"A party may not insert an untimely jury demand into a
case by stealth; rather, the proper procedure is a motion under
Rule 39(b)." Hare, 2001 U.S. Dist. LEXIS 8661 at *2, citing
Walton v. Eaton Corporation, 563 F.2d 66, 71 (3d Cir. 1977).
Plaintiffs' counsel filed a Demand for Jury Trial on the same
date as the Rule 16 telephone conference in this matter after it
was clear that defendants were asserting that plaintiffs had not
filed a legally viable jury demand prior to that date. Moreover,
rather than file an appropriate motion pursuant to Rule 39,

plaintiffs chose to file its untimely jury demand without seeking leave of court to do so.

Plaintiffs attempted to slide under the radar of both defendants and the court by not seeking leave to file the late jury demand. Furthermore, prior to responding to defendant's motion to strike, plaintiffs made no attempt to present information which might satisfy the five factors for filing a late jury demand.

Accordingly, because plaintiffs did nothing for over two years to properly request a jury, did not file a jury demand within 10 days of defendants filing an answer to plaintiffs' Amended Complaint and because plaintiffs, when specifically notified about the lack of a proper jury demand, simply filed a jury demand without filing a proper motion pursuant to Rule 39, I conclude that plaintiffs did delay in bringing their Rule 39 motion.

Reasons for Delay

The fifth factor is the reasons for the failure to file a timely jury demand. For the following reasons, I conclude that plaintiffs' stated reason for failure to file a timely jury demand is insufficient.

Plaintiffs contend that the jury demand in this matter was "inadvertently omitted" when filing both the original and Amended Complaint. Defendant contends that plaintiffs'

inadvertence is not a legally sufficient reason to permit a late jury demand. I agree with defendant.

It is well-settled that mere inadvertence, oversight or lack of diligence on the part of counsel will not justify the omission of a jury demand or abrogate the waiver of a jury trial. The Personal Touch, Inc. v. Lenox, Inc., 122 F.R.D. at 472.

(Citations omitted.) Moreover, as noted above, plaintiffs' attempt to request a jury by marking the Civil Cover Sheet is of no legal import. 122 F.R.D. at 471.

As noted by former, and now deceased, Judge E. Mac Troutman, of the United States District Court for the Eastern District of Pennsylvania, in a case involving a late jury demand;

To sanction [plaintiffs'] omission would invite disregard of procedural requirements in all of the Rules, cause delay in disposition of disputes by creating confusion on trial dockets and prejudice the opposing party by injecting an unnecessary element of uncertainty into trial strategy and preparation. Worse, the Rules' articulated purpose of securing the "just, speedy and inexpensive determination of every action" would be reduced to an empyrean principle with no practical meaning.

Bank Building & Equipment Corporation of America v. Mack Local 677 Federal Credit Union, 87 F.R.D. 553, 555 (E.D.Pa.1980)

(Troutman, J.).

Avoiding this result, and encouraging familiarity with the Federal Rules of Civil Procedure so that all litigants before the court receive even-handed, full, fair and prompt

consideration of their cases impel the conclusion that plaintiffs' stated reason for failure to file a timely jury demand is insufficient.

CONCLUSION

For all the forgoing reasons, and after weighing all the factors set forth by the United States Court of Appeals for the Third Circuit in SEC v. Infinity Group, supra, I grant the Motion of Defendant, Barley Snyder, LLC, to Strike Plaintiffs' Demand for a Jury Trial, deny plaintiffs' Countermotion Pursuant to Federal Rule of Civil Procedure 39 and strike plaintiffs' Demand for Jury Trial filed June 29, 2007. Accordingly, this matter will be tried without a jury by the court.