

01-1273-CD
ROBERT K. KITCHEN et al -vs- FRANK M. SHEESLEY CO.

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a :
ROBERT KITCHEN CONTRACTING, :
PLAINTIFF, : CIVIL ACTION NO.
v. : 01- 1273 -CD
FRANK M. SHEESLEY CO., :
DEFENDANT. : TYPE OF PLEADING:
 : CIVIL COMPLAINT
 : FILED BY:
 : PLAINTIFF
 : COUNSEL FOR THIS PARTY:
 : Theron G. Noble, Esquire
 : Ferraraccio & Noble
 : 301 East Pine Street
 : Clearfield, PA 16830
 : 814-375-2221
 : PA I.D.#: 55942

FILED

AUG 07 2001

William A. Shaw
Prothonotary

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a)
Robert Kitchen Contracting,)
)
 PLAINTIFF,)
)
 v.)
)
 FRANK M. SHEESLEY, CO.,)
)
 DEFENDANT.)
)

No. 01- 1273 -CD

©NOTICE TO DEFEND

You have been sued in Court. If you wish to defend against the claim set forth in the following pages, you must take action within twenty (20) days after this Complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgement may be entered against you by the Court without further notice for any claim in the Complaint or for any other claim or relief requested by the Plaintiffs. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE AN ATTORNEY, OR CANNOT FIND ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Court Administrator
Clearfield County Courthouse
2nd and Market Streets
Clearfield, PA 16830
(814)-765-2641

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

CIVIL COMPLAINT

NOW COMES, the Plaintiff, Robert K. Kitchen, t/d/b/a Robert Kitchen Contracting, by and through his counsel of record, Theron G. Noble, Esquire, of Ferraraccio & Noble, who avers as follows in support of his CIVIL COMPLAINT:

The Parties

1. Plaintiff is Robert K. Kitchen, doing business as Robert Kitchen Contracting, who does, and at all material times, did reside at 7 Marshall Road, Mahaffey, Clearfield County, Pennsylvania 15757, hereinafter sometimes referred to as "Kitchen".

2. That Defendant is Frank M. Sheesley Co., upon information and belief, a duly formed and existing Pennsylvania corporation, with principal address of 1464 Frankstown Road, Johnstown, Cambria County, Pennsylvania 15907, sometimes hereinafter referred to as "Sheesley".

Background

3. Commencing sometime in May, 1999, Defendant hired Robert K. Kitchen as a golf course construction specialist.

4. That said employment relationship was maintained through late fall of 2000.

5. That during said employment relationship between Kitchen and Defendant, Kitchen agreed to rent to Defendant, and Defendant agreed to rent from Kitchen, one 416C Caterpillar Backhoe.

6. That Defendant agreed to pay \$2,200 per month as such rent for said machine and was responsible for damages and repairs other than reasonable wear and tear.

7. That Kitchen did bill and Defendant did pay such rent as in conformity to the attached invoice, a true and correct copy of which is attached as Exhibit "A", for a period of time, up to and including September 2000.

8. That while Defendant had possession, use and control of said machine, being used in Defendant's construction of a golf course in New Jersey, said machine was damaged and in need of repairs.

9. The machine was taken to an official Caterpillar dealer, Foley, Inc., hereinafter Foley, to perform such necessary and needed repairs, in September 2000.

10. That Foley, Inc., performed such repairs, in a reasonable and workmanlike manner, for which approximately \$11,000 was billed, together with interest on past due amounts.

11. Around the time said equipment was being repaired, the employment relationship between Kitchen and Defendant spoiled and Defendant has refused to pay for said repairs.

12. Kitchen is without the means to make said payment to Foley and Foley has refused to release said equipment to Kitchen.

13. That, upon information and belief, Foley still has said piece of equipment in its possession.

14. That Defendant has not tendered any additional rental payment since September 2000.

Count I: Breach of Contract

15. The averments of paragraphs 1 - 14, inclusive, are hereby incorporated as if again fully set forth at length.

16. That Defendant owes to Kitchen the sum of \$2,200 as rent for each month that Foley has maintained and does maintain possession of the Caterpillar 416C Backhoe, currently (as of July 23, 2001) being \$2,200, to be more fully determined at time of trial.

17. That Defendant owes the amount of the Foley invoice, together with its appropriate interest, in the approximate amount of \$11,000, to be more fully determined at time of trial.

WHEREFORE, Plaintiff requests that judgment be entered in his favor and against Defendant, in an amount in excess of \$25,000, together with interest and costs, to be more fully determined at time of trial.

Count II: Conversion

18. That averments of paragraphs 1 - 17, inclusive, are hereby incorporated as if again fully set forth at length.

19. That Defendant has exercised dominion and control over the 416C Caterpillar Backhoe, by failing to pay said Foley invoice, and intentionally depriving Kitchen of the use and benefit of the same.

20. That Kitchen has had to maintain his payments owed for his purchase of the 416C Caterpillar Backhoe.

21. That under the facts and circumstances, Kitchen has not been able to make his required payments for the 416C Backhoe and also acquire replacement equipment.

22. That as a result of said his inability to use and benefit from the 416C Caterpillar Backhoe, Kitchen has lost revenue and income in the approximate amount of \$4,500 per month since his separation of employment from the Defendant, commencing in January 2001, in an amount to be more fully determined at time of trial.

23. That, upon information and belief, the 416C Caterpillar Backhoe, has value of approximately \$50,000, which Defendant has converted from Kitchen.

24. That under the facts and circumstances, Defendant is liable for punitive damages, in an amount to be determined at time of trial, for its intentional conversion of the 416C Caterpillar Backhoe.

WHEREFORE, Plaintiff request judgment in his favor and against Defendant, in an amount in excess of \$25,000, to be more fully determined at time of trial, together with punitive damages, attorney's fees, interest and costs.

Miscelaneous

25. That venue is appropriate.

26. That jurisdiction is appropriate.

WHEREOFRE, Plaintiff requests JUDGMENT, in his favor and against Defendant, in an amount in excess of \$25,000, together with interest, costs, reasonable attorney's fees and punitive damages.

Respectfully Submitted,



Theron G. Noble, Esquire
Ferraraccio & Noble
301 East Pine Street
Clearfield, PA 16830
(814)-375-2221
PA I.D.#: 55942

**FRANK M. SHEESLEY CO.
1464 FRANKSTOWN RD.
JOHNSTOWN, PA 15907**

ATTN: STUART WHINNIE

**AUGUST 23 THROUGH SEPTEMBER 23
416C CAT BACKHOE @ \$2200.00/MOS.**

DUE ON OR BEFORE SEPT. 23rd

Please Remit payment to :

**Robert Kitchen Contracting
R.D. # 2 Box 234 Mahaffey, PA 15757**

Thank you for your business!

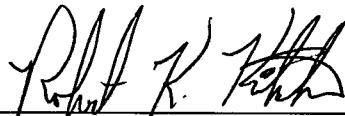
Exhibit "A"

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a)
Robert Kitchen Contracting,)
PLAINTIFF,)
v.) No. 01-1273 -CD
FRANK M. SHEESLEY, CO.,)
DEFENDANT.)

©VERIFICATION

I, Robert K. Kitchen, an adult individual, Plaintiff in the foregoing and attached CIVIL COMPLAINT, state that I have read the same and the information therein contained is true and accurate to the best of my knowledge, information and belief. I further understand that the same is made pursuant to 18 Pa.C.S.A. 4904 relating to unsworn falsification to authorities.



Robert K. Kitchen

Made this 23 day of July, 2001.

FILED
3 CC Atty
Noble
AUG 6 2001
2:10 PM
Atty pd.
William A. Shaw
Prothonotary
80.00

In The Court of Common Pleas of Clearfield County, Pennsylvania

Sheriff Docket # 11341

KITCHEN, ROBERT t/d/b/a ROBERT KITCHEN CONTRACTING
VS.
FRANK M. SHEESLEY CO.

01-1273-CD

COMPLAINT

SHERIFF RETURNS

NOW AUGUST 7, 2001, BOB KOLAR, SHERIFF OF CAMBRIA COUNTY WAS DEPUTIZED BY CHESTER A. HAWKINS, SHERIFF OF CLEARFIELD COUNTY TO SERVE THE WITHIN COMPLAINT ON FRANK M. SHEESLEY CO., DEFENDANT.

NOW AUGUST 16, 2001 SERVED THE WITHIN COMPLAINT ON FRANK M. SHEESLEY CO., DEFENDANT BY DEPUTIZING THE SHERIFF OF CAMBRIA COUNTY. THE RETURN OF SHERIFF KOLAR IS HERETO ATTACHED AND MADE A PART OF THIS RETURN STATING THAT HE SERVED DAVE GABLE, ASST. MGR.

Return Costs

Cost	Description
27.89	SHFF. HAWKINS PAID BY: ATTY.
36.87	SHFF. HAWKINS PAID BY: ATTY.
10.00	SURCHARGE PAID BY: ATTY.

Sworn to Before Me This

28th Day Of August 2001

WILLIAM A. SHAW
Prothonotary
My Commission Expires
1st Monday in Jan. 2002
Clearfield Co. Clearfield, PA.

So Answers,

*Chester Hawkins
by Marilynn Hause*
Chester A. Hawkins
Sheriff

CASE # PLAINTIFF
90229-01 KITCHEN, ROBERT
DATE 8/16/01

DEFENDANT
SHEESLEY, FRANK CO. 2001-1273

AT 13:35 HRS. SERVED THE COMPLAINT WITH NOTICE TO DEFEND UPON FRANK M. SHEESLEY BY HANDING A TRUE AND ATTESTED COPY THEREOF TO DAVE GABLE ASSISTANT MANAGER AT 1464 FRANKSTOWN RD. JOHNSTOWN, CAMBRIA CO. PA. AND MAKING CONTENTS THEREOF KNOWN TO HIM. MY COSTS PAID BY ATTORNEY FOR PLAINTIFF.

SHERIFF COSTS 33.87
SURCHARGE 3.00
TOTAL COSTS 36.87

SO ANSWERS,

Bob Kolar

BOB KOLAR, SHERIFF

SWORN AND SUBSCRIBED TO BEFORE ME THIS 23RD DAY OF AUG. 01.

PROTHONATARY

Patty Buhbile



Sheriff's Office Clearfield County

OFFICE (814) 765-2641
AFTER 4:00 P.M. (814) 765-1533
CLEARFIELD COUNTY FAX
(814) 765-5915

2001-90229

CHESTER A. HAWKINS
SHERIFF

COURTHOUSE
1 NORTH SECOND STREET, SUITE 116
CLEARFIELD, PENNSYLVANIA 16830

DARLENE SHULTZ
CHIEF DEPUTY

MARILYN HAMM
DEPT. CLERK

MARGARET PUTT
OFFICE MANAGER

PETER F. SMITH
SOLICITOR

DEPUTATION

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

ROBERT K. KITCHEN t/d/b/a
ROBERT KITCHEN CONTRACTING
VS:

FRANK M. SHEESLEY CO.

SERVE BY: 9/6/01
or
HEARING DATE:

TERM & NO.: 01-1273-CD

DOCUMENT TO BE SERVED:
COMPLAINT

SERVE: FRANK M. SHEESLEY CO.

ADDRESS: 1464 Frankstown Road, Johnstown, Pa. 15907

Know all men by these presents, that I, CHESTER A. HAWKINS, HIGH SHERIFF of CLEARFIELD COUNTY, State of Pennsylvania, do hereby depelize the SHERIFF of CAMBRIA County Pennsylvania to execute this writ.

This Deputation being made at the request and risk of the Plaintiff this 7th day of AUGUST 2001.

MAKE REFUND PAYABLE TO: THERON G. NOBLE, Attorney

Respectfully,

CHESTER A. HAWKINS,
SHERIFF OF CLEARFIELD COUNTY

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a :
ROBERT KITCHEN CONTRACTING,
:
PLAINTIFF, : CIVIL ACTION NO.
: 01-1273-CD
:
v. :
FRANK M. SHEESLEY CO., :
:
DEFENDANT. : TYPE OF PLEADING:
: PRELIMINARY OBJECTIONS
:
: FILED BY:
: DEFENDANT
:
: COUNSEL FOR THIS PARTY:
:
: Craig E. Kuyat, Esquire
: Supreme Court ID# 39590
: Kuyat & Kuyat
: 150 Central Park Law Building
: Gazebo Park At Locust Street
: Johnstown, PA 15901
: 814-539-8783
:
:
:

FILED

AUG 31 2001

William A. Shaw
Prothonotary

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN,t/d/b/a)
ROBERT KITCHEN CONTRACTING,)
)
)
)
PLAINTIFF,)
v.) No. 01-1273-CD
)
)
)
FRANK M. SHEESLEY, CO.,)
)
)
)
DEFENDANT.)
)

NOTICE TO PLEAD

TO: ROBERT K. KITCHEN, t/d/b/a
ROBERT KITCHEN CONTRACTING,
Plaintiff

You are hereby notified to plead to the enclosed Preliminary
Objections within twenty (20) days from service hereof or a default
judgment may be entered against you.



Craig E. Kuyat, Esquire
Attorney for Defendant

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a)
ROBERT KITCHEN CONTRACTING,))
PLAINTIFF,))
v.)) No. 01-1273-CD
FRANK M. SHEESLEY, CO.,))
DEFENDANT.))

PRELIMINARY OBJECTIONS

To the Honorable Judges of said Court; And now, this 30th day of August, 2001, comes the Defendant, by and through, its Attorneys, Kuyat and Kuyat, and files the following PRELIMINARY OBJECTIONS to the Civil Complaint which was filed in the above matter, for the reasons hereinafter setforth:

I. Preliminary Objection Raising Lack of Subject Matter Jurisdiction

1. The complaint, in paragraph 8, correctly recites that the piece of heavy equipment in question was used exclusively at a golf course construction site in New Jersey. This Court does not have jurisdiction over the subject matter of this action, and jurisdiction is reposed solely in the state of New Jersey, for the reason that any alleged damage to the equipment, or repairs thereafter, took place outside of the Commonwealth of Pennsylvania and within the state of New Jersey.
2. Therefore, the subject matter of this lawsuit involves alleged damage to personal property and consequential or collateral damages for an incident which occurred outside of the Commonwealth of Pennsylvania, and within the state of New Jersey, where the Plaintiff had delivered the equipment.

WHEREFORE, Defendant requests this Court to enter judgment in favor of the Defendant and against the Plaintiff because this Court lacks jurisdiction over the subject matter of this lawsuit.

II. Preliminary Objection Raising Lack of Personal Jurisdiction

3. The Defendant is a corporation with its registered office and principle place of business at 1464 Frankstown Road, Johnstown, Cambria County, Pennsylvania 15907.
4. The Defendant has no other place of business or registered office in the Commonwealth of Pennsylvania.
5. Service of the complaint was made on the Defendant by the Sheriff of Cambria County on August 17, 2001, at the Defendant's registered office in Cambria County, PA.
6. The Defendant does not regularly conduct business within Clearfield County.
7. Count I of the Complaint alleges breach of contract, when the contract was entered outside of Clearfield County, Pennsylvania.
8. Count II of the Complaint alleges conversion of property, resulting from damage, all of which also occurred outside of Clearfield County, Pennsylvania.

WHEREFORE, Defendant requests this Court to enter judgment in favor of the Defendant and against the Plaintiff because this Court lacks jurisdiction over the Defendant under Counts I and II of the Complaint.

III. Preliminary Objection Raising Question of Improper Venue

9. The Defendant is a corporation existing under the laws of the Commonwealth of Pennsylvania, but registered to do business in the state of New Jersey.
10. This action has brought in the County of Clearfield, Commonwealth of Pennsylvania, on causes of action which allegedly arose in the state of New Jersey, and outside of Clearfield County, Pennsylvania.

WHEREFORE, Defendant requests this Court to enter judgment in favor of the Defendant and against the Plaintiff because the venue is improper.

IV. Preliminary Objection Raising Question of Improper Venue

11. The Defendant is a corporation with a registered office located at 1464 Frankstown Road, Johnstown, Cambria County, Pennsylvania 15907.
12. This action has been brought in the County of Clearfield on causes of action which allegedly arose in either the state of New Jersey, or the County of Cambria, Pennsylvania.

13. The Defendant has no place of business or registered office in Clearfield County and does not regularly conduct any business within the County of Clearfield, Commonwealth of Pennsylvania.

WHEREFORE, Defendant requests that judgment be entered in favor of the Defendant and against the Plaintiff because the venue is improper in Clearfield County (and the matter should be transferred to the County of Cambria, Commonwealth of Pennsylvania).

V. Preliminary Objection Raising Lack of Conformity to Rules of Court and/or Insufficient Specificity

14. In paragraph 6 of the Complaint, Plaintiff makes assertions concerning the terms of a rental agreement, including allegations of responsibility for damages and repairs, but no documents are attached to support the supposed terms of such an agreement.

15. In paragraphs 9,10 and 17 of the Complaint, it is alleged that the equipment was delivered to Foley, Inc. in September, 2000, that repairs were performed, and approximately \$11,000 was billed, but Plaintiff failed to attach a copy of such a bill or an itemization of the alleged repairs.

16. In paragraphs 20 and 23 of the Complaint, the value of the 416C Caterpillar Backhoe is asserted, as well as allegations of continued payments, without any documentation or proof thereof.

WHEREFORE, it is asserted that paragraphs 6,9,10,17,20, and 23 be stricken for lack of specificity or conformity to law, or, alternatively that Plaintiff be ordered to amend the Complaint and attach such documentation within 30 days, or the Complaint will be dismissed.

VI. Preliminary Objection on Ground of Legal Insufficiency of the Pleading (Demurrer)

17. The Plaintiff's Complaint sets forth facts concerning alleged damage to equipment owned by the Plaintiff, but fails to state facts asserting who caused such damage or whether the Defendant and/or its agents or employees caused any of the claimed damage to said property.

WHEREFORE, Defendant respectfully requests that the Complaint be dismissed, with prejudice.

Respectfully Submitted,



Craig E. Kuyat, Esquire
Attorney for Defendant

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a)
Robert Kitchen Contracting,).
PLAINTIFF,)
v.) No. 01-1273-CD
FRANK M. SHEESLEY, CO.,)
DEFENDANT)

VERIFICATION

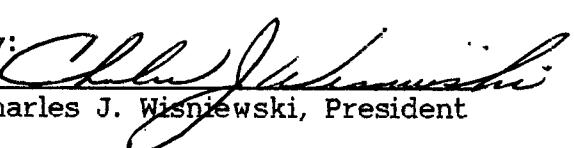
I, Charles J. Wisniewski, president of Frank M. Sheesley Co., state that I have read the information contained in the attached preliminary objections and that the information therein is true and accurate to the best of my knowledge, information and belief. I further understand that the same is made pursuant to 18 Pa.C.S.A. Section 4904 relating to unsworm falsification to authorities.

Dated:

08/28/01

Frank M. Sheesley Co.

By:


Charles J. Wisniewski, President

KUYAT & KUYAT
ATTORNEYS AT LAW
150 CENTRAL PARK LAW BUILDING
PARK PLACE AT LOCUST STREET
JOHNSTOWN, PENNSYLVANIA 15901

ROBERT K. KITCHEN, t/d/b/a
ROBERT KITCHEN CONTRACTING,

: IN THE COURT OF COMMON PLEAS OF
: CLEARFIELD COUNTY, PENNSYLVANIA

: Plaintiff

: NO. 01-1273 C.D.

: vs.

FRANK M. SHEESLEY CO.,

: Defendant

:
:
:
:
:
:
:

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Defendant's Preliminary Objections was forwarded by First Class Mail, postage prepaid, upon the following counsel on August 30, 2001:

Theron G. Noble, Esquire
FERRARACCIO & NOBLE
301 East Pine Street
Clearfield, PA 16830

Respectfully submitted,

KUYAT & KUYAT

By


Craig E. Kuyat, Attorney for
Frank M. Sheesley Co.

FILED

AUG 31 2001

William A. Shaw
Notary Public

KUYAT & KUYAT
ATTORNEYS AT LAW

150 CENTRAL PARK LAW BUILDING
PARK PLACE AT LOCUST STREET

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a :
ROBERT KITCHEN CONTRACTING, :
PLAINTIFF, :
: CIVIL ACTION NO.
v. : 01-1273-CD
FRANK M. SHEESLEY CO., :
DEFENDANT. :
: TYPE OF PLEADING:
: AMENDED CIVIL COMPLAINT
:
: FILED BY:
: PLAINTIFF
:
: COUNSEL FOR THIS PARTY:
: Theron G. Noble, Esquire
: Ferraraccio & Noble
: 301 East Pine Street
: Clearfield, PA 16830
: 814-375-2221
: PA I.D.#: 55942

FILED

SEP 1 2001

mjl:thcc

William A. Shaw

Prothonotary

9/8/01

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

)
ROBERT K. KITCHEN, t/d/b/a)
Robert Kitchen Contracting,)
)
PLAINTIFF,)
)
v.)
)
FRANK M. SHEESLEY, CO.,)
)
DEFENDANT.)
)

No. 01-1273-CD

NOTICE TO DEFEND

You have been sued in Court. If you wish to defend against the claim set forth in the following pages, you must take action within twenty (20) days after this Complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the Court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgement may be entered against you by the Court without further notice for any claim in the Complaint or for any other claim or relief requested by the Plaintiffs. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE AN ATTORNEY, OR CANNOT FIND ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Court Administrator
Clearfield County Courthouse
2nd and Market Streets
Clearfield, PA 16830
(814)-765-2641

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a)
Robert Kitchen Contracting,)
)
 PLAINTIFF,)
)
 v.) No. 01-_____ -CD
)
)
 FRANK M. SHEESLEY, CO.,)
)
 DEFENDANT.)
)

AMENDED CIVIL COMPLAINT

NOW COMES, the Plaintiff, Robert K. Kitchen, t/d/b/a Robert Kitchen Contracting, by and through his counsel of record, Theron G. Noble, Esquire, of Ferraraccio & Noble, who avers as follows in support of his CIVIL COMPLAINT:

The Parties

1. Plaintiff is Robert K. Kitchen, doing business as Robert Kitchen Contracting, who does, and at all material times, did reside at 7 Marshall Road, Mahaffey, Clearfield County, Pennsylvania 15757, hereinafter sometimes referred to as "Kitchen".

2. That Defendant is Frank M. Sheesley Co., upon information and belief, a duly formed and existing Pennsylvania corporation, with principal address of 1464 Frankstown Road, Johnstown, Cambria County, Pennsylvania 15907, sometimes hereinafter referred to as "Sheesley". Furthermore, upon information and belief, Sheesley has done, does do, and/or will do business in Clearfield County, Pennsylvania.

Background

3. Commencing sometime in May, 1999, Defendant hired Robert K. Kitchen as a golf course construction specialist.

4. That said employment relationship was maintained through late fall of 2000.

5. That during said employment relationship between Kitchen and Defendant, Kitchen agreed to rent to Defendant, and Defendant agreed to rent from Kitchen, one 416C Caterpillar Backhoe.

6. That Defendant agreed to pay \$2,200 per month as such rent, which was to be paid to Plaintiff at his Clearfield address, for said machine and was responsible for damages and repairs other than reasonable wear and tear.

7. That Kitchen did bill and Defendant did pay such rent as in conformity to the attached invoice, a true and correct copy of which is attached as Exhibit "A", for a period of time, up to and including September 2000.

8. That while Defendant had possession, use and control of said machine, being used in Defendant's construction of a golf course in New Jersey, said machine was damaged and in need of repairs.

9. The machine was taken to an official Caterpillar dealer, Foley, Inc., hereinafter Foley, to perform such necessary and needed repairs, in September 2000.

10. That Foley, Inc., performed such repairs, in a reasonable and workmanlike manner, for which approximately \$11,000 was billed, together with interest on past due amounts.

11. Around the time said equipment was being repaired, the employment relationship between Kitchen and Defendant spoiled and Defendant has refused to pay for said repairs.

12. Kitchen is without the means to make said payment to Foley and Foley has refused to release said equipment to Kitchen.

13. That, upon information and belief, Foley still has said piece of equipment in its possession.

14. That Defendant has not tendered any additional rental payment since September 2000.

Count I: Breach of Contract

15. The averments of paragraphs 1 - 14, inclusive, are hereby incorporated as if again fully set forth at length.

16. That Defendant owes to Kitchen the sum of \$2,200 as rent for each month that Foley has maintained and does maintain possession of the Caterpillar 416C Backhoe, currently (as of July 23, 2001) being \$2,200, to be more fully determined at time of trial.

17. That Defendant owes the amount of the Foley invoice, together with its appropriate interest, in the approximate amount of \$11,000, to be more fully determined at time of trial.

WHEREFORE, Plaintiff requests that judgment be entered in his favor and against Defendant, in an amount in excess of \$25,000, together with interest and costs, to be more fully determined at time of trial.

Count II: Conversion

18. That averments of paragraphs 1 - 17, inclusive, are hereby incorporated as if again fully set forth at length.

19. That Defendant has exercised dominion and control over the 416C Caterpillar Backhoe, by failing to pay said Foley invoice, and intentionally depriving Kitchen of the use and benefit of the same.

20. That Kitchen has had to maintain his payments owed for his purchase of the 416C Caterpillar Backhoe.

21. That under the facts and circumstances, Kitchen has not been able to make his required payments for the 416C Backhoe and also acquire replacement equipment.

22. That as a result of said his inability to use and benefit from the 416C Caterpillar Backhoe, Kitchen has lost revenue and income in the approximate amount of \$4,500 per month since his separation of employment from the Defendant, commencing in January 2001, in an amount to be more fully determined at time of trial.

23. That, upon information and belief, the 416C Caterpillar Backhoe, has value of approximately \$50,000, which Defendant has converted from Kitchen.

24. That under the facts and circumstances, Defendant is liable for punitive damages, in an amount to be determined at time of trial, for its intentional conversion of the 416C Caterpillar Backhoe.

WHEREFORE, Plaintiff request judgment in his favor and against Defendant, in an amount in excess of \$25,000, to be more fully determined at time of trial, together with punitive damages, attorney's fees, interest and costs.

Miscelaneous

25. That venue is appropriate.

26. That jurisdiction is appropriate.

WHEREOFRE, Plaintiff requests JUDGMENT, in his favor and against Defendant, in an amount in excess of \$25,000, together with interest, costs, reasonable attorney's fees and punitive damages.

Respectfully Submitted,



Theron G. Noble, Esquire
Ferraraccio & Noble
301 East Pine Street
Clearfield, PA 16830
(814)-375-2221
PA I.D.#: 55942

**FRANK M. SHEESLEY CO.
1464 FRANKSTOWN RD.
JOHNSTOWN, PA 15907**

ATTN: STUART WHINNIE

**AUGUST 23 THROUGH SEPTEMBER 23
416C CAT BACKHOE @ \$2200.00/MOS.**

DUE ON OR BEFORE SEPT. 23rd

Please Remit payment to :

**Robert Kitchen Contracting
R.D. # 2 Box 234 Mahaffey, PA 15757**

Thank you for your business!

Exhibit "A"

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a)
Robert Kitchen Contracting,)
PLAINTIFF,)
v.) No. 01- 1273 -CD
FRANK M. SHEESLEY, CO.,)
DEFENDANT.)

CERTIFICATE OF SERVICE

I, Theron G. Noble, Esquire, attorney for Plaintiff, does hereby certify that I did this 7th day of September, 2001, mail a true and correct copy of Plaintiff's AMENDED CIVIL COMPLAINT to the below listed individual, being counsel of record for the Defendant, by depositing the same in the United States Mail, first class, postage pre-paid, addressed as follows:

Kuyat and Kuyat
150 Central Park Law Building
Gazebo Park at Locust Street
Johnstown, PA 15901

Respectfully Submitted,



Theron G. Noble, Esquire
Attorney for Plaintiff

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a)
Robert Kitchen Contracting,)
)
 PLAINTIFF,)
)
 v.) No. 01- 1273 -CD
)
)
 FRANK M. SHEESLEY, CO.,)
)
 DEFENDANT.)
)

VERIFICATION

I, Robert K. Kitchen, an adult individual, Plaintiff in the foregoing and attached **AMENDED CIVIL COMPLAINT**, state that I have read the same and the information therein contained is true and accurate to the best of my knowledge, information and belief. I further understand that the same is made pursuant to 18 Pa.C.S.A. 4904 relating to unsworn falsification to authorities.



Robert K. Kitchen, Plaintiff

Made this 13th day of September, 2001.

FILED
SEP 18 2001

William A. Shaw
Prothonotary

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a)
Robert Kitchen Contracting,)
)
 PLAINTIFF,)
)
 v.)
)
 FRANK M. SHEESLEY, CO.,)
)
 DEFENDANT.)
)

No. 01-1273-CD

NOTICE OF SERVICE

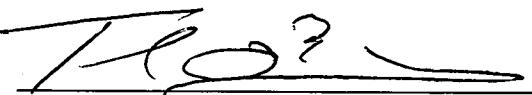
To: William A. Shaw, Prothonotary

Date: September 17, 2001

I, Theron G. Noble, Esquire, attorney for Plaintiff, does hereby certify that I did this 17th day of September, 2001, mail a true and correct copy of Plaintiff's VERIFICATION to his AMENDED CIVIL COMPLAINT to the below listed individual, being counsel of record for the Defendant, by depositing the same in the United States Mail, first class, postage pre-paid, addressed as follows:

Kuyat and Kuyat
150 Central Park Law Building
Gazebo Park at Locust Street
Johnstown, PA 15901

Respectfully Submitted,



Teron G. Noble, Esquire
Attorney for Plaintiff

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

CIVIL ACTION

ROBERT K. KITCHEN, t/d/b/a

:

ROBERT KITCHEN CONTRACTING

:

-vs-

:

No. 01 - 1273 - CD

FRANK M. SHEESLEY CO.

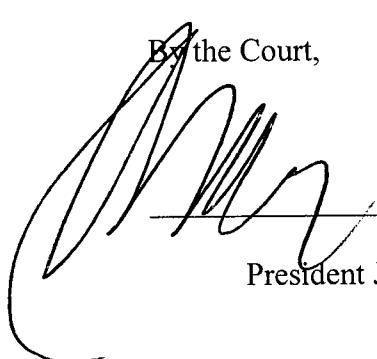
:

ORDER

NOW, this 19th day of November, 2001, following argument into Preliminary Objections filed on behalf of Defendant above-named to Plaintiff's Amended Complaint, it is the ORDER of this Court that said Objections shall be and are hereby sustained in part and dismissed in part as follows:

1. Plaintiff's Complaint for Conversion shall be and is hereby dismissed as this Court is satisfied that it does not have jurisdiction and/or venue.
2. Defendant's Preliminary Objections to Plaintiff's Complaint sounding in Assumpsit based upon an oral agreement shall be and are hereby dismissed and Defendant directed to file Responsive Pleadings thereto within twenty (20) days from date hereof.

By the Court,



President Judge

FILED

NOV 20 2001

**William A. Shaw
Prothonotary**

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a :
ROBERT KITCHEN CONTRACTING, :
PLAINTIFF, : CIVIL ACTION NO.
: 01-1273-CD
: v.
FRANK M. SHEESLEY CO., :
DEFENDANT. : TYPE OF PLEADING:
: PRELIMINARY OBJECTIONS
: FILED BY:
: DEFENDANT
: COUNSEL FOR THIS PARTY:
: Craig E. Kuyat, Esquire
: Supreme Court ID# 39590
: Kuyat & Kuyat
: 150 Central Park Law Building
: Gazebo Park At Locust Street
: Johnstown, PA 15901
: 814-539-8783

FILED
SEP 26 2001
m1249 no cc
William A. Shaw
Prothonotary

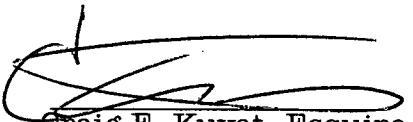
IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN,t/d/b/a)
ROBERT KITCHEN CONTRACTING,)
PLAINTIFF,)
v.) No. 01-1273-CD
FRANK M. SHEESLEY, CO.,)
DEFENDANT.)

NOTICE TO PLEAD

TO: ROBERT K. KITCHEN, t/d/b/a
ROBERT KITCHEN CONTRACTING,
Plaintiff

You are hereby notified to plead to the enclosed Preliminary
Objections within twenty (20) days from service hereof or a default
judgment may be entered against you.



Craig E. Kuyat, Esquire
Attorney for Defendant

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a)
ROBERT KITCHEN CONTRACTING))
PLAINTIFF,))
v.)) No. 01-1273-CD
FRANK M. SHEESLEY, CO.,))
DEFENDANT.))

PRELIMINARY OBJECTIONS

AND NOW comes the Defendant, by and through, its Attorneys, Kuyat and Kuyat, and files the following PRELIMINARY OBJECTIONS to the Amended Civil Complaint which was filed in the above matter, for the reasons hereinafter set forth:

I. Preliminary Objection Raising Lack of Subject Matter Jurisdiction

1. The complaint, in paragraph 8, correctly recites that the piece of heavy equipment in question was used exclusively at a golf course construction site in New Jersey. This Court does not have jurisdiction over the subject matter of this action, and jurisdiction is reposed solely in the state of New Jersey, for the reason that any alleged damage to the equipment, or repairs thereafter, took place outside of the Commonwealth of Pennsylvania and within the state of New Jersey.
2. Therefore, the subject matter of this lawsuit involves alleged damage to personal property and consequential or collateral damages for an incident which occurred outside of the Commonwealth of Pennsylvania, and within the state of New Jersey, where the Plaintiff had delivered the equipment to Defendant.

WHEREFORE, Defendant requests this Court to enter judgment in favor of the Defendant and against the Plaintiff because this Court lacks jurisdiction over the subject matter of this lawsuit.

II. Preliminary Objection Raising Lack of Personal Jurisdiction

3. The Defendant is a corporation with its registered office and principal place of business at 1464 Frankstown Road, Johnstown, Cambria County, Pennsylvania 15907. The Defendant has no other place of business or registered office in the Commonwealth of Pennsylvania.
4. The Plaintiff is a commercial business which supplied Defendant with construction equipment at the defendant's job site in New Jersey.
5. Service of the complaint was made on the Defendant by the Sheriff of Cambria County on August 17, 2001, at the Defendant's registered office in Cambria County, PA.
6. The Defendant has not conducted any business within Clearfield County for at least 5 years, nor have its employees, officers or agents had business dealings, either personally or by telephone, with the Plaintiff at its place of business, set forth in paragraph 1 of the Amended Civil Complaint.
7. Count I of the Complaint alleges breach of contract, when the contract was entered outside of Clearfield County, Pennsylvania, while Plaintiff was at the Defendant's place of business, in Cambria County, PA or at Defendant's work site in New Jersey.
8. Count II of the Complaint alleges conversion of property, resulting from damage, all of which also occurred outside of Clearfield County, Pennsylvania.

WHEREFORE, Defendant requests this Court to enter judgment in favor of the Defendant and against the Plaintiff because this Court lacks jurisdiction over the Defendant under Counts I and II of the Amended Civil Complaint.

III. Preliminary Objection Raising Question of Improper Venue

9. The Defendant is a corporation existing under the laws of the Commonwealth of Pennsylvania, but registered to do business in the state of New Jersey.
10. This action has brought in the County of Clearfield, Commonwealth of Pennsylvania, on claims for damage to Plaintiff's property, which allegedly occurred in the state of New Jersey and outside of Clearfield County, Pennsylvania.

WHEREFORE, Defendant requests this Court to enter judgment in favor of the Defendant and against the Plaintiff because the venue is improper.

IV. Preliminary Objection Raising Question of Improper Venue

11. The Defendant is a corporation with a registered office located at 1464 Frankstown Road, Johnstown, Cambria County, Pennsylvania 15907.

12. This action has been brought in the County of Clearfield on causes of action which allegedly arose in either the state of New Jersey, or the County of Cambria, Pennsylvania.

13. The Defendant has no place of business or registered office in Clearfield County and has not conducted any business within the County of Clearfield, Commonwealth of Pennsylvania over the last 5 years.

WHEREFORE, Defendant requests that judgment be entered in favor of the Defendant and against the Plaintiff because the venue is improper in Clearfield County (and the matter should be transferred to the County of Cambria, Commonwealth of Pennsylvania).

V. Preliminary Objection Raising Lack of Conformity to Rules of Court and/or Insufficient Specificity

14. In paragraph 6 of the Complaint, Plaintiff makes assertions concerning the terms of a rental agreement, including allegations of responsibility for damages and repairs, but no documents are attached to support the supposed terms of such an agreement.

15. In paragraphs 9,10 and 17 of the Complaint, it is alleged that the equipment was delivered to Foley, Inc. in September, 2000, that repairs were performed, and approximately \$11,000 was billed, but Plaintiff failed to attach a copy of such a bill or an itemization of the alleged repairs.

16. In paragraphs 20 and 23 of the Complaint, the value of the 416C Caterpillar Backhoe is asserted, as well as allegations of continued payments, without any documentation or proof thereof.

17. Pa.R.C.P. requires that "averments of time, place and items of special damage be specifically stated." Mere "blanket allegations" regarding items of special damage are impermissible.

WHEREFORE, it is asserted that paragraphs 6,9,10,17,20, and 23 be stricken for lack of specificity or conformity to law, or, alternatively that Plaintiff be ordered to amend the Complaint and attach such documentation within 30 days, or the Complaint will be dismissed.

VI. Preliminary Objection on Ground of Legal Insufficiency of the Pleading
(Demurrer)

18. The Plaintiff's Complaint sets forth facts concerning alleged damage to equipment owned by the Plaintiff, but fails to state facts asserting who caused such damage or whether the Defendant and/or its agents or employees caused any of the claimed damage to said property.
19. The Defendant is unable to ascertain the nature of the claims with sufficient precision to prepare a responsive pleading.

WHEREFORE, Defendant respectfully requests that the Complaint be dismissed, with prejudice, or that Plaintiff be ordered to amend the Complaint.

Respectfully Submitted,



Craig E. Kuyat, Esquire
Attorney for Defendant
Supreme Court ID #39590

Kuyat & Kuyat
132 Gazebo Park
Johnstown, PA 15901
Telephone No. (814)539-8783

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

VERIFICATION

I, Charles J. Wisniewski, president of Frank M. Sheesley Co., state that I have read the information contained in the attached preliminary objections and that the information therein is true and accurate to the best of my knowledge, information and belief. I further understand that the same is made pursuant to 18 Pa.C.S.A. Section 4904 relating to unsworn falsification to authorities.

Dated:

Frank M. Sheesley Co.

9-24-01

Bv:

Charles J. Wisniewski, President

6/

KUYAT & KUYAT
ATTORNEYS AT LAW
150 CENTRAL PARK LAW BUILDING
GAZEBO PARK AT LOCUST STREET
JOHNSTOWN, PENNSYLVANIA 15901

ROBERT K. KITCHEN, t/d/b/a
ROBERT KITCHEN CONTRACTING,

: IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

Plaintiff

: NO. 01-1273 C.D.

vs.

FRANK M. SHEESLEY CO.,

Defendant

:

CERTIFICATE OF SERVICE

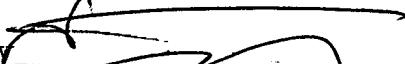
I hereby certify that a true and correct copy of Defendant's Preliminary Objections was forwarded by First Class Mail, postage prepaid, upon the following counsel on September 24, 2001:

Theron G. Noble, Esquire
FERRARACCIO & NOBLE
301 East Pine Street
Clearfield, PA 16830

Respectfully submitted,

KUYAT & KUYAT

By


Craig E. Kuyat, Attorney for
Frank M. Sheesley Co.

FILED

SEP 26 2001

MJD:49/ncc

William A. Shaw
Prothonotary


ED
WAS

KUYAT & KUYAT
ATTORNEYS AT LAW
150 CENTRAL PARK LAW BUILDING

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a :
ROBERT KITCHEN CONTRACTING, :
PLAINTIFF, : CIVIL ACTION NO.
v. : 01-1273-CD
FRANK M. SHEESLEY CO., :
DEFENDANT. : TYPE OF PLEADING:
REPLY TO DEFENDANT'S POS :
FILED BY:
PLAINTIFF :
COUNSEL FOR THIS PARTY:
THERON G. NOBLE, ESQUIRE
FERRARACCIO & NOBLE
301 EAST PINE STREET
CLEARFIELD, PA 16830
814-375-2221
PA I.D.#: 55942

FILED
OCT 01 2001
m 1147 no C
William A. Shaw
Prothonotary
E
Kcs

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a)
Robert Kitchen Contracting,)
)
 PLAINTIFF,)
)
 v.)
)
 FRANK M. SHEESLEY, CO.,)
)
 DEFENDANT.)
)

No. 01-1273-CD

Plaintiff's Reply to Preliminary Objections

AND NOW, comes the Plaintiff, Robert K. Kitchen t/d/b/a Robert Kitchen Contracting, by and through his counsel of record, Theron G. Noble, Esquire, of Ferraraccio & Noble, who avers as follows as his PLAINTIFF'S REPLY TO PRELIMINARY OBJECTIONS:

1 - 19. The same are legal conclusions for which no response is deemed necessary.

WHEREFORE, Plaintiff requests the same be DENIED and Defendant ORDERED to file an ANSWER within 10 days hereof.

Respectfully Submitted,



T. G. Noble, Esquire
Ferraraccio & Noble
Attorney for Plaintiff
301 East Pine Street
Clearfield, PA 16830
(814)-375-2221
PA I.D.#: 55942

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

)
ROBERT K. KITCHEN, t/d/b/a)
Robert Kitchen Contracting,)
)
PLAINTIFF,)
)
v.)
)
FRANK M. SHEESLEY, CO.,)
)
DEFENDANT.)
)

No. 01- 1273 -CD

NOTICE OF SERVICE

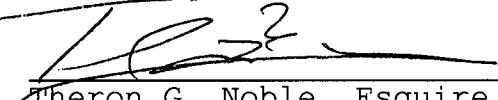
To: William A. Shaw, Prothonotary

Date: September 28, 2001

I, Theron G. Noble, Esquire, attorney for Plaintiff, does hereby certify that I did this 28th day of September, 2001, mail a true and correct copy of Plaintiff's REPLY TO PRELIMINARY OBJECTIONS to the below listed individual, being counsel of record for the Defendant, by depositing the same in the United States Mail, first class, postage pre-paid, addressed as follows:

Kuyat and Kuyat
150 Central Park Law Building
Gazebo Park at Locust Street
Johnstown, PA 15901

Respectfully Submitted,



T G. Noble, Esquire
Attorney for Plaintiff

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a :
ROBERT KITCHEN CONTRACTING, :
PLAINTIFF, :
v. : CIVIL ACTION NO.
FRANK M. SHEESLEY CO., :
DEFENDANT. :
TYPE OF PLEADING:
ANSWER, NEW MATTER AND
COUNTER CLAIM
FILED BY:
DEFENDANT
COUNSEL FOR THIS PARTY:
Craig E. Kuyat, Esquire
Supreme Court ID #39590
Kuyat & Kuyat
150 Central Park Law Building
Gazebo Park At Locust Street
Johnstown, PA 15901
814-539-8783

FILED

DEC 10 2001

M12.261R0CC

William A. Shaw
Prothonotary

WAS

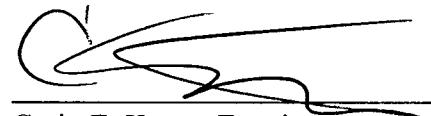
IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a)
ROBERT KITCHEN CONTRACTING,)
)
PLAINTIFF,)
v.) No. 01-1273-CD
)
FRANK M. SHEESLEY, COMPANY,)
)
DEFENDANT,)
)

NOTICE TO PLEAD

TO: ROBERT K. KITCHEN, t/d/b/a
ROBERT KITCHEN CONTRACTING,
Plaintiff

You are hereby notified to plead to the enclosed New Matter and
Counter Claim within twenty (20) days from service hereof or a default
judgement may be entered against you.



Craig E. Kuyat, Esquire
Attorney for Defendant

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a)
ROBERT KITCHEN CONTRACTING)
)
PLAINTIFF,)
)
v.) No. 01-1273-CD
)
FRANK M. SHEESLEY, COMPANY,)
)
DEFENDANT,)
)

ANSWER, NEW MATTER AND COUNTERCLAIM

AND NOW comes the Defendant, by and through, its Attorneys, Kuyat and Kuyat, and files the following Answer, New Matter and Counter Claim to the Amended Civil Complaint which was filed in the above matter, for the reasons hereinafter set forth:

I. ANSWER

1. Denied. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments. Strict proof thereof is demanded at trial.
2. Admitted in part, denied in part. It is admitted that Frank M. Sheesley Company is a Corporation duly registered in Pennsylvania, with it's principal office located at 1464 Frankstown Road, Cambria County, PA 15907. It is specifically denied that Frank M. Sheesley Co. has transacted any business

within Clearfield County, PA over the past five year period, as alleged. Strict proof thereof is demanded at the time of trial.

3. Admitted.

4. Admitted. Robert K. Kitchen tendered his resignation on October 30, 2000, with an effective date 60 days thereafter; a copy of Employee's Notice to Terminate Employment is attached hereto as Exhibit "A".

5. Admitted in part, denied in part. It is admitted that Frank M. Sheesley Co. had orally agreed to pay \$2,200.00 per month to Robert Kitchen Contracting for a caterpillar backhoe to be used at Defendant's New Jersey job site, after Defendant was solicited to do so at their place of business. It is specifically denied that there were any other terms or conditions under that oral agreement. Strict proof thereof is demanded at the time of trial.

6. Admitted in part, denied in part. It is admitted that Frank M. Sheesley Co. had orally agreed to pay \$2,200.00 per month to Robert Kitchen Contracting for a caterpillar backhoe, to be used at Defendant's New Jersey job site after Defendant was solicited to do so at their place of business. It is specifically denied that there were any other terms or conditions under that oral agreement. Strict proof thereof is demanded at the time of trial.

7. Admitted in part, denied in part. It is admitted that Frank M. Sheesley Co. paid \$2,200.00 per month to Robert Kitchen Contracting for a backhoe that was used through August 2000; however, it is denied that Frank M. Sheesley Co. was billed for claimed rentals of \$2,200.00 per month after August 2000. Strict proof otherwise is demanded at trial. In fact, Frank M. Sheesley Co. was only billed \$1,100.00 in September 2000, as evidenced by Plaintiff's note, copy of which is attached hereto as Exhibit "B", because the "backhoe is down". Therefore, Frank M. Sheesley paid \$1,100.00 for the two weeks that said equipment was at Defendant's job site in September 2000 (as evidenced

by copy of check #1983, attached hereto as Exhibit "C"). The Plaintiff stated that no money was due thereafter, since "our backhoe is down".

8. Denied. Robert K. Kitchen and/or Robert Kitchen Contracting retained full and complete control, possession, use and ownership of said backhoe, with Mr. Kitchen present at the construction site in New Jersey while the equipment was in use. Strict proof otherwise is demanded at trial.

9. Denied. The Defendant is without knowledge or information sufficient to form a belief as to the truth of these averments. Strict proof is demanded at trial. Defendant had no knowledge concerning when or where the machinery was taken for repairs, since Mr. Kitchen was physically present at the site and made all arrangements for repairs made to his equipment.

10. Denied. The Defendant is without knowledge or information sufficient to form a belief as to the truth of any averments relating to repairs which may have been performed on Plaintiff's equipment. Strict proof is demanded at trial.

11. Admitted in part, denied in part. It is admitted that the Plaintiff tendered his resignation to the employer on October 30, 2000, in accordance with a sixty day requirement for providing such notice of termination of the Employment Agreement. As to any additional information contained in this paragraph, Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments and they are specifically denied. Strict proof is demanded at trial.

12. Denied. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments Strict proof is demanded at trial.

13. Denied. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments. Strict proof is demanded at trial.

14. Admitted. As outlined above in paragraph 7, Defendant paid the Robert Kitchen Contracting \$1,100.00 for use of the backhoe in September 2000, as was requested by the Plaintiff. However,

no further money was owing because, as Plaintiff recited in his note, "our backhoe is down" and the equipment was never returned to the job site for further use. Therefore, no additional money is owed to the Plaintiff, as alleged in the Amended Complaint. Strict proof otherwise is demanded at trial.

(Answer to Count I: Breach of Contract)

15. Paragraphs 1 through 14 of the above Answer are hereby incorporated at length as though fully set forth herein

16. Denied. As stated above, \$1,100.00 was paid to Plaintiff in September 2000, as evidenced in Exhibits "B" and "C" attached hereto; no additional money was owing after that time, since the equipment was never returned to the job site for use. Furthermore, Defendant was not billed for additional claimed rent, after September, 2000. Strict proof otherwise is demanded at the time of trial.

17. Denied. It is specifically denied that Frank M. Sheesley Co. had agreed to pay for repairs to the Plaintiff's equipment. Frank M. Sheesley Co. had no knowledge of Plaintiff taking his equipment for repairs until after that event had already occurred. Thereafter, Robert K. Kitchen advised representatives of Frank M. Sheesley Co. that he has no line of credit with Foley, Inc., requesting that Defendant use their line of credit to pay for his repairs, with Mr. Kitchen reimbursing Frank M. Sheesley Co. for such costs. The Defendant refused to do so. Strict proof otherwise is demanded at trial.

18-24. No answer is required since these paragraphs were dismissed pursuant to the Court Order of November 19, 2001.

25. Denied. It is denied that there is proper venue in the Court of Common Pleas of Clearfield County, as asserted. Strict proof otherwise is demanded.

26. Denied. It is denied that there is proper jurisdiction in the Court of Common Pleas of Clearfield County, PA. Strict proof otherwise is demanded.

Wherefore, Defendant requests that the Amended Complaint be dismissed, with prejudice.

II. NEW MATTER

27. The Plaintiff is estopped from any claim for additional rental money and admitted that no further money was owing because "our backhoe is down", as evidenced by Exhibit "B" attached hereto. Furthermore, Plaintiff never billed for additional rental money thereafter.

28. Plaintiff has consented to the fact that no rental money was owing while "our backhoe is down". This constitutes an admission against interest by the Plaintiff and defeats any claim for additional rental money.

29. There is also a failure of consideration for any additional claimed rental money. The Plaintiff had his equipment removed from the construction site. Since the equipment was not returned for use at Defendant's job site thereafter, there is a failure of consideration for additional claimed rental money.

30. Defendant also asserts the Defense of Impossibility of Performance. Since Plaintiff did not have a backhoe at the job site, for construction use, it is impossible for Defendant to pay rental money in exchange for the use of that equipment.

31. As to alleged repairs to Plaintiff's equipment, the Defendant asserts that the Statute of Frauds bars such claims because there was no written agreement to pay for claimed repairs, which allegedly exceed \$10,000.00. In fact, the Plaintiff had no line of credit with Foley, Inc., and he wanted to reimburse Frank M. Sheesley Co. for such expenses, if they would permit the charges to be billed to Frank M. Sheesley Co., under their line of credit with Foley, Inc. Defendant refused to do so.

Therefore, Defendant requests that the Amended Complaint be dismissed, with prejudice.

III. COUNTERCLAIM

CONTRACTUAL CLAIM

32. Defendant incorporates herein reference Paragraphs 1 through 31, above, as fully as though the same were set forth herein at length.

33. After receiving a resignation of employment letter (see Exhibit "A" attached hereto) from Robert K. Kitchen, Frank M. Sheesley Co. advised Robert K. Kitchen of two overpayments made to him, on wages he had received. See Exhibit "D" attached hereto.

34. Robert K. Kitchen was aware, and had been previously advised, that he was overpaid \$2,692.31 for the week ending March 4, 2000. A copy of the Payroll History Report, showing the overpayment, is attached hereto as Exhibit "E".

35. Robert K. Kitchen had also requested an advance of \$24,370.43 against estimated future commissions for a golf course construction project at West Windsor Township, New Jersey; that amount was paid to him in October, 1999. A copy of the Payroll History Report, showing such payment, is attached hereto as Exhibit "F".

36. Robert K. Kitchen had calculated that the golf course construction project in West Windsor Township, New Jersey would earn a profit of approximately \$750,000.00 for Frank M. Sheesley Co. Under the terms of an Employment Agreement (attached hereto as Exhibit "G"), Robert K. Kitchen would have been entitled to a commission on the net profits.

37. Robert K. Kitchen's calculations were erroneous and that the golf course construction project in West Windsor Township, New Jersey will not make any profits; in fact, Frank M. Sheesley Co. will lose significant money on the golf course construction project which Robert K. Kitchen bid on

behalf of the Frank M. Sheesley Co.

38. Therefore, the Employee, Robert K. Kitchen, has received overpayments totalling \$27,062.74 from Frank M. Sheesley Co.

39. The Employer, Frank M. Sheesley Co., has requested repayment of said \$27,062.74 from Robert K. Kitchen (see Exhibit "D" attached hereto) and he has refused to do so.

Wherefore, Frank M. Sheesley Co. demands judgment against Robert K. Kitchen in the amount of \$27,062.74, in addition to any other relief which this Honorable Court deems appropriate.

UNJUST ENRICHMENT CLAIM

40. Defendant incorporates herein by reference Paragraphs 1 through 39, above, as though the same were fully set forth herein at length.

41. In the alternative, Robert K. Kitchen has been unjustly enriched, through his actions and assurances, resulting in overpayments from Frank M. Sheesley Co., totalling \$27,062.74.

42. Robert K. Kitchen has refused to reimburse the Employer on these overpayments.

WHEREFORE, Frank M. Sheesley Co. demands judgment against Robert K. Kitchen in the amount of \$27,062.74, in addition to any other relief which this Honorable Court deems appropriate.



Craig E. Kuyat, Attorney for
Frank M. Sheesley Company

KUYAT & KUYAT
150 Central Park Law Building
Gazebo Park at Locust Street
Johnstown, PA 15901
(814) 539-8783

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a
Robert Kitchen, Contracting

PLAINTIFF,

v.

No. 01-1273-CD

FRANK M. SHEESLEY, CO.,

DEFENDANT

VERIFICATION

I, Stuart Whinnie, Sec-Treas of Frank M. Sheesley Co., state that I have read the information contained in the attached Answer, New Matter and Counterclaim and that the information therein is true and accurate to the best of my knowledge, information and belief. I further understand that the same is made pursuant to 18 Pa.C.S.A. Section 4904 relating to unsworn falsification to authorities.

Dated:

12-7-01

Frank M. Sheesley Co.

By: Stuart Whinnie

06:32 10/30/00

PAGE 04

EMPLOYEE'S
NOTICE TO TERMINATE
EMPLOYMENT

THIS NOTICE IS GIVEN ON OCTOBER 30, 2000. ACCORDING TO THE ORIGINAL EMPLOYMENT AGREEMENT DATED MAY 10, 1999 THE EMPLOYEE MUST GIVE WRITTEN NOTICE TO TERMINATE SIXTY (60) DAYS IN ADVANCE.

DETERMINING FACTORS
FOR TERMINATION

THE EMPLOYEE'S HEALTH IS NO LONGER ABLE TO STAND THE STRESS OF THIS TYPE OF EMPLOYMENT, AND IS IN NEED OF TIME OFF.

THE EMPLOYEE HAS SUFFERED OVER \$ 150,000.00 PER YEAR INCOME LOSS IN RELATION TO PRIOR EMPLOYMENT STATUS.

THE EMPLOYEE HAS LIVED THE MAJORITY OF HIS TIME EMPLOYED ON THE ROAD. SPECIFICALLY IN TRENTON, NEW JERSEY. THIS TIME AWAY IS PLACING STRESS ON THE FAMILY OF EMPLOYEE, AND IS NO LONGER TOLERABLE.

THE EMPLOYEE HAS WORKED IN SALES, ESTIMATING, SUPERVISION, HUMAN RESOURCES, SHAPING, AND LABOR. THIS SITUATION IS NO LONGER TOLERABLE.

THE JOB IN MERCER COUNTY, NEW JERSEY HAS HAD MANY OF SET BACKS, MAINLY THE WEATHER HAS HAMPERED THE JOB, AND THE REPRESENTATIVE'S WITHIN THE COUNTY HAVE DRAMATICALLY SLOWED THE PROGRESS BY INDECISION, AND NOT STANDING BY THEIR RESPONSIBILITY'S FOR THE DE-WATERING OF THE PROJECT. THIS IS NO LONGER TOLERABLE.

THE EMPLOYEE HAS BEEN SCRUTINIZED BY PRINCIPALS OF THE EMPLOYER IN A LESS THAN PROPER FASHION, WHICH HAS CHALLANGED THE EMPLOYEE'S PROFESSIONALISM AND ETHICS. THIS IS NOT TOLERABLE.

PROPOSAL
FOR EMPLOYMENT
ALTERNATIVE

THE EMPLOYEE ROBERT KITCHEN IS WILLING TO ALTER THE EMPLOYMENT AGREEMENT AS FOLLOWS. EMPLOYEE WILL WORK AS A GOLF COURSE CONSULTANT TO THE EMPLOYER TO AID IN THE CONSTRUCTION OF GOLF COURSE'S. THIS POSITION WILL ENABLE THE EMPLOYER TO USE THE EMPLOYEE AND HIS WORK HISTORY TO BID AND BUILD GOLF COURSE'S.

THE EMPLOYEE WILL REVIEW BIDS, BE AVAILABLE FOR CONSULTATION WHEN NEEDED.

THE EMPLOYEE WILL BE PAID \$30,000.00 A YEAR PLUS BENEFITS AND RETIREMENT.

THE EMPLOYEE WILL SUB-CONTRACT SHAPING AND OTHER SPECIALTY WORK AS NEEDED.

5pgs w/cover

Stuart:

Here are the time sheets
for last week.

Also, please note our backhoe
is down - therefore we only have
2wks rental coming for this billing
period ($2200 \div 4 = 550 \times 2 = \underline{\underline{\$1100}}$)

No. 99-06 GL# 406-E
PJ No. 0624/00030 Date 9-15-00
Approved _____ Date _____
Approved _____ Date _____



FRANK M. SHEESLEY CO. GENERAL CONTRACTOR
1464 FRANKSTOWN ROAD P.O. BOX 339
(814) 536-5303 JOHNSTOWN, PA 15907
FAX (814) 539-8038

November 27, 2000

Mr. Robert Kitchen
R. D. 2, Box 234
Mahaffey, PA 15757

Dear Mr. Kitchen:

By your letter dated October 30, 2000, this letter acknowledges termination of the Employment Agreement dated May 10, 1999, pursuant to Article V of the Agreement. It is also our understanding that you have filed for disability benefits with our insurance company, The Guardian, stating your actual last day of work was November 2, 2000.

As you are aware, you were previously overpaid by our company for the week ending March 4, 2000 by error in the amount of \$2,692.31. Also, you have previously been paid \$24,370.43 on October 13, 1999 toward compensation under Article III of the Employment Agreement. At that time there was an expectation by both the employee and employer that the golf course construction project in Trenton, New Jersey would make a profit. You are aware that position has changed drastically. These issues along with several others need to be addressed as soon as possible.

We request at this time that you return the company vehicle, company records, credit cards, cell phone, etc. Please call to make these arrangements.

Please be advised that pursuant to Article IV of the Employment Agreement, you have certain responsibilities and obligations. Those provisions are applicable for three years from the date of termination of the Employment Agreement.

Sincerely,

Charles J. Wisniewski
President

Date: 12/22/00
Time: 10:48:42AM

Page: 3

Frank M. Sheesley Co.
EMPLOYEE PAYROLL HISTORY
For period from beginning to end

Earnings		Taxes		Benefits And Deductions							
Type	Amount	Hours	Type	Code	Earnings	Tax.Amt	Def. ST/CD/CS/PA	Description	Type	Earnings	Amount
Check	510										
Check Type	Regular										
Reg	2,692.31	0.00	FT	FT	2,692.31	221.25	WC PA-1	Net Pay	2,169.72		
			SocSec	"SSE"	2,692.31	166.82		Reimbursement	0.00		
			SocSec	"SSR"	2,692.31	166.82					
Med				"MEDICE"	2,692.31	39.04					
Med				"MEDICR"	2,692.31	39.04					
State			PA	"FUTA"	2,692.31	75.38					
FUTA			PA	"SUTA"	0.00	0.00					
SUTA			PA		0.00	0.00					
Total	2,692.31	0.00									
Check	581										
Check Type	Regular										
Reg	5,384.62	0.00	FT	FT	5,384.62	973.02	WC PA-1	Net Pay	3,848.90		
			SocSec	"SSE"	5,384.62	333.85		Reimbursement	0.00		
			SocSec	"SSR"	5,384.62	333.85					
Med				"MEDICE"	5,384.62	78.08					
Med				"MEDICR"	5,384.62	78.08					
State			PA	"FUTA"	5,384.62	150.77					
FUTA			PA	"SUTA"	0.00	0.00					
SUTA			PA		0.00	0.00					
Total	5,384.62	0.00									
Check	635										
Check Type	Regular										
			Issue date		3/22/00			Net Pay	2,169.72		
			Pay period end		3/18/00			Reimbursement	0.00		

EMPLOYEE NUMBER KITC7519 EMPLOYEE NAME ROBERT K. KITCHEN SOCIAL SECURITY NUMBER 267-58-7519

PERIOD ENDING CHK ISSUE DATE CHECK TYPE	----- HOURS -----			----- TAXES -----			DEDUCTIONS -- BENEFITS		
	REGULAR OVTIME	SICK HOLIDAY	PREMIUM VACATION	GROSS PRE-TAX ADJ. GR.	FED SOC SEC MEDICARE	STATE LOCAL DIS	POST-TAX NET PAY CHECK #	II	UNION DED W/C DED MISC. DED
09 OCT 1999	0.00	0.00	24370.43	6823.72	682.37	0.00	II	0.00	0.00
13 OCT 1999	0.00	0.00	0.00	1510.97	0.00	15000.00	II	0.00	1537.77-
Manual	0.00	0.00	24370.43	353.37	0.00	9884	II	0.00	0.00
16 OCT 1999	0.00	0.00	2692.31	223.85	75.38	0.00	II	0.00	0.00
20 OCT 1999	0.00	0.00	0.00	166.92	0.00	2187.12	II	0.00	169.88-
Calculated	0.00	0.00	2692.31	39.04	0.00	9942	II	0.00	0.00
30 OCT 1999	0.00	0.00	2692.31	223.85	75.38	0.00	II	0.00	0.00
03 NOV 1999	0.00	0.00	0.00	166.92	0.00	2187.12	II	0.00	169.68-
Calculated	0.00	0.00	2692.31	39.04	0.00	10059	II	0.00	0.00
13 NOV 1999	0.00	0.00	2692.31	223.85	75.38	0.00	II	0.00	0.00
17 NOV 1999	0.00	0.00	0.00	166.92	0.00	2187.12	II	0.00	169.88-
Calculated	0.00	0.00	2692.31	39.04	0.00	10171	II	0.00	0.00
27 NOV 1999	0.00	0.00	2692.31	223.85	75.38	0.00	II	0.00	0.00
01 DEC 1999	0.00	0.00	0.00	166.92	0.00	2187.12	II	0.00	169.88-
Calculated	0.00	0.00	2692.31	39.04	0.00	10279	II	0.00	0.00

***** EMPLOYEE ROBERT K. KITCHEN TOTALS *****

PERIOD ENDING CHK ISSUE DATE CHECK TYPE	----- HOURS -----			----- TAXES -----			DEDUCTIONS -- BENEFITS		
	REGULAR OVTIME	SICK HOLIDAY	PREMIUM VACATION	GROSS PRE-TAX ADJ. GR.	FED SOC SEC MEDICARE	STATE LOCAL DIS	POST-TAX NET PAY CHECKS	II	UNION DED W/C DED MISC. DED
	0.00	0.00	63408.92	10069.54	1775.38	0.00	II	0.00	0.00
	0.00	0.00	0.00	3931.31	0.00	46713.24	II	0.00	2995.48-
	0.00	0.00	63408.92	919.45	0.00	16	II	0.00	0.00

EMPLOYMENT AGREEMENT

This Agreement is made on this 10th day of May, 1999, between FRANK M. SHEESLEY CO., Employer, having a principal place of business at 1464 Frankstown Road, Johnstown, PA 15907 and ROBERT K. KITCHEN, Employee, R. C. #2, Box 234, Mahaffey, PA 15757. In consideration of the mutual conveyance and agreements set forth below, the parties agree as follows:

ARTICLE I- TERM OF EMPLOYMENT

The Employer employs the Employee and Employee accepts employment with the Employer for a one year term beginning May 10, 1999 and continuing for one year successive periods thereafter, unless terminated in accordance with the provisions of this Agreement or unless terminated earlier, pursuant to the provisions of this Agreement. In the event that either party does not intend to renew this Contract for the next annual term, prior written Notice thereof must be provided to the other party, at least 60 days prior to May 10 of the next scheduled term; if such Notice is not provided, the Contract shall renew for another one year term, until properly terminated.

ARTICLE II - DUTIES OF EMPLOYEE

The Employee is employed as a specialist in golf course construction work and shall work at the main office of the Employer and at any other location,

KUYAT & KUYAT

ATTORNEYS AT LAW

150 CENTRAL PARK LAW BUILDING
GAZEBO PARK AT LOCUST STREET

ROBERT K. KITCHEN, t/d/b/a
ROBERT KITCHEN CONTRACTING,

: IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

Plaintiff

: NO. 01-1273 C.D.

vs.

FRANK M. SHEESLEY CO.,

Defendant

:

:

CERTIFICATE OF SERVICE

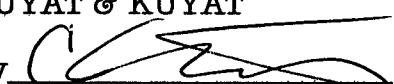
I hereby certify that a true and correct copy of Defendant's Answer, New Matter and Counterclaim was forwarded by First Class Mail, postage prepaid, upon the following counsel on December 7, 2001:

Theron G. Noble, Esquire
FERRARACCIO & NOBLE
301 East Pine Street
Clearfield, PA 16830

Respectfully submitted,

KUYAT & KUYAT

By


Craig E. Kuyat, Attorney for
Frank M. Sheesley Co.

FILED

DEC 10 2001

m/a/lnoc
William A. Shaw
Prothonotary

KUYAT & KUYAT

ATTORNEYS AT LAW

150 CENTRAL PARK LAW BUILDING



(1)

~~P-378~~
~~0-3-9-2~~

Arg - 4-5-02-2002

OFFICE OF COURT ADMINISTRATOR
FORTY-SIXTH JUDICIAL DISTRICT OF PENNSYLVANIA

CLEARFIELD COUNTY COURTHOUSE
230 EAST MARKET STREET, SUITE 228
CLEARFIELD, PENNSYLVANIA 16830

DAVID S. MEHOLICK
COURT ADMINISTRATOR

PHONE: (814) 765-2641
FAX: 1-814-765-~~0000~~ 7649

MARCY KELLEY
DEPUTY COURT ADMINISTRATOR

February 7, 2002

Theron G. Noble, Esquire
Ferraraccio & Noble
301 East Pine Street
Clearfield, PA 16830

Craig E. Kuyat, Esquire
Kuyat & Kuyat
150 Central Park Law Building
Gazebo Park at Locust Street
Johnstown, PA 15901

RE: ROBERT K. KITCHEN, al
vs.
FRANK M. SHEESLEY COMPANY
No. 01-1273-CD

Dear Counsel:

With regard to the above matter, Attorney Noble has filed Preliminary Objections to Defendant's Answer, New Matter and Counterclaim. His Brief will be due on or before Wednesday, February 27, 2002. Attorney Kuyat's reply Brief will be due on or before Tuesday, March 19, 2002.

Oral argument in this case in this case is scheduled for Friday, April 5, 2002 at 2:00 P.M., in Chambers, Clearfield County Courthouse, Clearfield, PA.

You should file your original Brief with the undersigned and forward copies to opposing counsel.

Very truly yours,
Marcy Kelley
Marcy Kelley
Deputy Court Administrator

cc: Honorable John K. Reilly, Jr.

to Del's Art
New matter
Contract

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

FILED

DEC 31 2001

11.2019cc
William A. Shaw
Prothonotary

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a :
KITCHEN CONTRACTING :
PLAINTIFF, : No. 01-1273-CD
v. :
FRANK M. SHEESLEY COMPANY, :
DEFENDANT. :
:

PLAINTIFF'S PRELIMINARY OBJECTIONS
AS TO DEFENDANT'S COUNTER-CLAIMS

AND NOW, comes the Plaintiff, Robert K. Kitchen, t/d/b/a Kitchen Contracting, by and through his counsel of record, Theron G. Noble, Esquire, of Ferraraccio & Noble, who avers as follows in support of Plaintiff's PRELIMINARY OBJECTIONS:

Background

1. This matter was commenced by the filing of a civil complaint by the Plaintiff concerning amounts owed to him by his former employer concerning rental of a backhoe.
2. That defendant timely filed preliminary objections, which were partially sustained.
3. Defendant then timely filed a responsive pleading entitled "Answer, New Matter and Counter-Claim", whereat defendant seeks recoupment of alleged over-payment of wages.

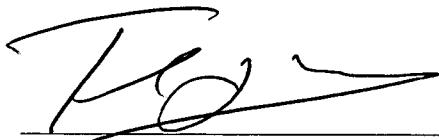
Objection I: Pendency of Prior Action
Pa.R.Civ.P. 1028(a)(6)

4. That in addition to this case, these parties are also engaged in litigation at case no. 01-229-CD, also filed in Clearfield County.
5. The thrust of said other litigation is an attempt to enforce a covenant not to compete.
6. Said litigation is currently pending before the Superior Court on appeal filed by the Defendant.

7. However, Plaintiff also incorporated counts at law in said case including claims for overpayment of wages.
8. That based upon said counts as contained in the civil case filed by defendant herein at 01-229-CD, Defendant's counter-claims herein for overpayment of wages, is already pending.

WHEREFORE, Plaintiff requests, per Pa.R.Civ.P. 1028(a)(6) that Defendant's counter-claims be stricken, as well as any portion of its new matter related to the same.

Respectfully Submitted,



Theron G. Noble, Esquire
Attorney for Plaintiff
Ferraraccio & Noble
301 East Pine Street
Clearfield, PA 16830
(814)-375-2221
PA I.D.No.: 55942

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

ROBERT K. KITCHEN, t/d/b/a :
KITCHEN CONTRACTING :
PLAINTIFF, : No. 01-1273-CD
v. :
FRANK M. SHEESLEY COMPANY, :
DEFENDANT. :
:

CERTIFICATE OF SERVICE

I, Theron G. Noble, Esquire, Attorney or Plaintiff, does hereby certify this 28th day of December, 2001, that I did mail a true and correct copy of Plaintiff's PRELIMINARY OBJECTIONS, to the below indicated person, at said address, being its counsel of record, via United States mail, first class, postage prepaid:

Craig E. Kuyat, Esquire
Kuyat & Kuyat
150 Central Park Law Building
Gazebo Park at Locust Street
Johnstown, PA 15901

Respectfully Submitted,



Theron G. Noble, Esquire
Attorney for Plaintiff
Ferraraccio & Noble
301 East Pine Street
Clearfield, PA 16830
(814)-375-2221
PA I.D.No: 55942

FILED

DEC 31 2001

111-201 norc

William A. Shaw

Prothonotary 

FERRARACCIO & NOBLE

301 East Pine Street
Clearfield, PA 16830
(814) 765-4990
(814) 375-2221
FAX: (814) 765-9377

RECEIVED

Hon. John K. Reilly, Jr., PJ
Court of Common Pleas
Clearfield County Courthouse
2nd and Market Streets
Clearfield, PA 16830

FEB 27 2002

**COURT ADMINISTRATOR'S
OFFICE**

February 26, 2002

Re: Kitchen v. Sheesley, Co.;
01-1273-CD
Plaintiff's Preliminary Objections

VIA FAX: (814)-765-7649

No. of Pages: 3

Original to Followed by a copy of the Plaintiff's Preliminary Objections
Court Administrator's Office, 1000 Franklin Street, Suite 100, Pittsburgh, PA 15219

Dear Judge Reilly:
In re: Kitchen v. Sheesley, Co.

Please accept this letter as Plaintiff's Brief in support of its PRELIMINARY
OBJECTIONS in the above captioned matter.

Procedural Posture

Following ruling on Defendant's preliminary objections, Defendant filed an answer, new matter and counter-claim. Plaintiffs filed thereto timely preliminary objection in accordance with Pa.R.Civ.P. 1028(a)(6), raising a pending prior action.

Note

As the Court will recall, these parties are also involved in 01-229-CD. At present, the Superior Court issued an order and opinion affirming the denial of Shessley's injunction request. We are currently awaiting word whether Sheesley has decided to attempt an appeal to the Supreme Court in that matter.

Counsel have spoken that in the event Sheesley does not so appeal, the two cases (01-229-CD and 01-1273-CD) should be consolidated. In that event, each counsel have indicated agreement to the consolidation rendering the current issue moot.

Page 2

Re: Kitchen V. Sheesley

February 26, 2002

Statement of Facts

On February 15, 2001, Defendant herein, Frank M. Sheesley Co., filed an action at 01-229-CD against Robert K. Kitchen and Kitchen Contracting. Included in this complaint were counts for (i) Breach of Contract and Tortious Interference with Contract; (ii) breach of fiduciary duty; (iii) unfair competition and use of trade secrets and confidential information; and (iv) recoupment of overpayments to Robert K. Kitchen. The fourth count, entitled "RECOUPMENT OF OVERPAYMENTS TO ROBERT K. KITCHEN", concern alleged over-payments made to Mr. Kitchen, in the approximate amount of \$27,000 in the employment setting.

As a counter-claim hereto, Sheesley now asserts a contract count and unjust enrichment count again concerning the approximate \$27,000 over-payment alleged to have been made to Mr. Kitchen while he was so employed.

Statement of Issue

WHETHER A PARTY CAN HAVE TWO SEPARATE LAWSUITS CONCERNING THE SAME ALLEGED WRONGDOING?

Suggested Answer: No.

Discussion

Pa.R.Civ.P. 1028(a)(6) states: "**Preliminary Objections may be filed by any party to any pleading and are limited to the following grounds:**

(6) pendency of a prior action or agreement for alternative dispute resolution."

There is no doubt that Plaintiff Sheesley's claim in case 01-229-CD as its fourth count and Defendant Sheesley's claims, styled as breach of contract and unjust enrichment, arise from its alleged over-payment to Mr. Kitchen while he was employed. As such, the claim for the \$27,000 is contained in each case and was already pending in 01-229-CD when the current counter-claim was filed.

Pa.R.Civ.P. 1028(a)(6) simply but firmly provides Sheesley can not have two lawsuits containing the same claim.

Page 3

Re: Kitchen V. Sheesley
February 26, 2002

Conclusion

Defendant Sheesley's counter-claims, must be stricken as the claim raised by them is presently pending in 01-229-CD.

With regards, I am

Sincerely,



Theron G. Noble, Esquire

tn/TGN
cc: Mr. Robert K. Kitchen.
Craig E. Kuyat, Esquire

KUYAT & KUYAT
ATTORNEYS AT LAW
150 CENTRAL PARK LAW BUILDING
GAZEBO PARK AT LOCUST STREET
JOHNSTOWN, PENNSYLVANIA 15901

EDWARD G. KUYAT, JR.
CRAIG E. KUYAT

FAX
535-4251

539-8783
AREA CODE 814

March 15, 2002

Hon. John K. Reilly, Jr., PJ
Court of Common Pleas
Clearfield County Courthouse
2nd and Market Street
Clearfield, PA 16830

RE: Kitchen v. Sheesley, Co.;
No. 01-1272-CD
Plaintiff's Preliminary Objections

VIA FAX: (814) 765-7649

No. of Pages: 4

Original to Follow

Dear Judge Reilly:

Please accept this responsive letter as Defendant's Brief in response to Preliminary Objections which were filed by Attorney Noble.

Procedural Posture

It is agreed that the Procedural Posture, submitted in Attorney Noble's February 26, 2002 correspondence, is correct. However, in addition, no further appeal has been taken from the Superior Court Decision filed February 8, 2002. It is also agreed that the two pending cases should be consolidated for trial.

Counter Statement of Facts

As outlined in Attorney Noble's Statement of Facts, there was an earlier Complaint filed by Frank M. Sheesley Company against Robert K. Kitchen and Kitchen Contracting, at No. 01-229-CD. As this Honorable Court will recall, those issues mainly revolved around a requested injunction. At the April 16, 2001 hearing, before your Honorable Court, a hearing was held on that sole issue concerning the request for an injunction. Other matters asserted in that Complaint were not heard or decided. There are remaining issues of fact from that prior litigation, which are not involved in the current lawsuit filed to No. 01-1273-CD. However, there are collateral issues, of fact that are similar in both proceedings.

RECEIVED
MAR 18 2002
COURT ADMINISTRATORS
OFFICE

to facilitate intersectoral policy dialogue on health.

THE JOURNAL OF PRACTICAL THEOLOGY, ESTABLISHED 1871
SUMMER, 1881.

Counter Statement of Issues on Preliminary Objection

I. WHETHER THE PRIOR CASE IS THE SAME, THE PARTIES ARE THE SAME, AND THE RELIEF REQUESTED IS THE SAME?

Suggested Answer: No.

II. WHETHER THE CASES FILED TO NUMBERS 01-229-CD AND 01-1273-CD SHOULD BE CONSOLIDATED?

Suggested Answer: Yes

Statement of the Law

Attorney Noble filed Preliminary Objections pursuant to Pa.R.Civ.P. 1028(a)(6) asserting "pendency of a prior action". However, Standard Pennsylvania Practice, 2d., Vol. 5, shows that three elements are necessary in order for the Court to sustain such a Preliminary Objection. See Section 25:103, Page 210 (copy attached hereto as Exhibit "A"). As outlined in that Section of Standard Pennsylvania Practice, where relief requested in the two lawsuits is different "as where the prior suit sought primarily the equitable relief of injunction and the latter suit seeks money damages..." it is error to sustain such a Preliminary Objection. Herein, there is no request for equitable relief in the form of an injunction or assertions of breach of contract; the current proceedings merely involve money damages between the parties.

Clearly, all issues and allegations in these two actions are not the same, nor is the relief requested the same.

Admittedly, the two proceedings should be consolidated for trial, since there are facts in common to both lawsuits.

Conclusion

Since there are different issues and different relief requested in the two proceedings before this Honorable Court, the Preliminary Objection should be dismissed; however, it is agreed that the two cases should be consolidated at trial.

If your Honorable Court feels that this matter can be determined without the necessity of Oral Argument, (which is now scheduled for Friday, April 5, 2002, at 2 P.M.) because both parties agree that the cases should be consolidated, it is respectfully requested that an Order be issued to that effect. This would avoid additional expenses for both parties.

Thank you for your consideration in this matter.

Very truly yours,



Craig E. Kuyat

CEK:ch

Enclosure

cc: Theron G. Noble, Esquire
Frank M. Sheesley Company

§ 25:103 —Requisite showing**Research References**

West's Key Number Digest: Pleading ☞187; Pleading ☞192(1); Pleading ☞193(1); Pleading ☞193(4)

In order to successfully plead an objection on the ground of pendency of a prior action, or *lis pendens*, the party filing the preliminary objection must show that the prior case is the same, the parties are the same, and the relief requested is the same.¹ When any of the three elements of *lis pendens* is missing, a preliminary objection on the ground of pendency of a prior action cannot be sustained.²

Thus, it is error to sustain a preliminary objection on the ground of pendency of a prior action where:

- (1) the relief requested is different,³ as where the prior suit sought primarily the equitable relief of injunction and the latter suit seeks money damages,⁴ or where the prior action is for rescission or reformation of a contract, and the subsequent action involves a suit in contract seeking liquidated damages;⁵
- (2) the prior suit was in federal court and the subsequent suit is in state court;⁶
- (3) one action was based on fraud and the other on breach of contract;⁷
- (4) the prior action was for failure to provide prisoners

[Section 25:103]

¹*Sokoloff v. Strick*, 404 Pa. 343, 172 A.2d 302 (1961); *Penox Technologies, Inc. v. Foster Medical Corp.*, 376 Pa. Super. 450, 546 A.2d 114 (1988); *Com. ex rel. Lindsley v. Robinson*, 30 Pa. Commw. 96, 372 A.2d 1258 (1977).

²*Glazer v. Cambridge Industries, Inc.*, 281 Pa. Super. 621, 422 A.2d 642 (1980).

³*Meinhart v. Heaster*, 424 Pa. Super. 433, 622 A.2d 1380 (1993); *I. W. Levin and Co. v. Oldsmobile Division of General Motors Corp.*, 8

Pa. D. & C.3d 361, 1 Phila. Co. Rptr. 314, 1978 WL 373 (C.P. 1978).

⁴*Glazer v. Cambridge Industries, Inc.*, 281 Pa. Super. 621, 422 A.2d 642 (1980).

⁵*Davis Cookie Co., Inc. v. Wasley*, 389 Pa. Super. 112, 566 A.2d 870 (1989).

⁶*Wilson v. Island Creek Coal Co.*, 40 Pa. D. & C.2d 591, 1966 WL 5950 (C.P. 1966).

⁷*Norristown Auto. Co., Inc. v. Hand*, 386 Pa. Super. 269, 562 A.2d 902 (1989).

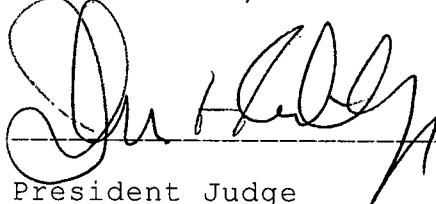
IN THE COURT OF COMMON PLEAS
OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL DIVISION

ROBERT K. KITCHEN, t/d/b/a :
KITCHEN CONTRACTING :
-vs- : No. 01-1273-CD
FRANK M. SHEESLEY COMPANY :

O R D E R

NOW, this 5th day of April, 2002, following argument into Preliminary Objections filed on behalf of Plaintiff above-named; upon agreement of the parties, it is the ORDER of this Court that said Objections be and are hereby dismissed, and trial in the above-captioned matter shall be and is hereby consolidated with that action entered to 01-229-CD for purposes of resolution.

BY THE COURT,



Dr. H. Kelly
President Judge

FILED

APR 05 2002
013:0512cc atty noble
William A. Shaw
Prothonotary 2cc atty Kupat
E
KSB

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

ROBERT K. KITCHEN, :
: Plaintiff : Nos. 01-1273-CD and
: vs. : 01-229-CD
: :
FRANK M. SHEESLEY COMPANY :
: Defendant :
:

NOTICE OF TAKING DEPOSITION ON ORAL EXAMINATION
UNDER PENNSYLVANIA R.C.P. NO. 4007.1

TO: Robert K. Kitchen
c/o Theron G. Noble, Esquire
FERRARACCIO & NOBLE
301 East Pine Street
Clearfield, PA 16830

FILED

JUL 05 2002

William A. Shaw
Prothonotary

NOTICE is given herewith that pursuant to Pennsylvania R. C. P. No. 4007.1, the Deposition of Robert K. Kitchen will be taken on oral examination at the office of Sargent's Court Reporting Service, 106 North Second Street, Clearfield, PA 16830 on Monday, August 5, 2002 at 10:00 a.m. and any and all adjournments thereof.

The deponent is also required to bring with him and produce, at the time of deposition, all papers, documents, photographs, etc. relating to the claims set forth in the above captioned proceedings, including all papers relating to the amount of damages alleged. This request specifically includes:

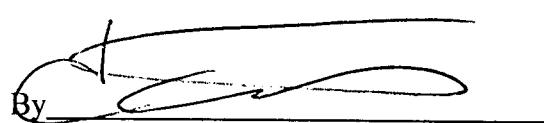
1. Any and all written notes, commentaries, letters or diaries prepared by the deponent or his wife concerning the subject matter of these actions,
2. All W-2's, K-1's, unemployment compensation records, forms or papers, and any other earnings records or statements, including Federal and State Income Tax Returns, for the years 1997 through 2001, for deponent, his wife, their businesses, or the business of

“Greens, Tees and Bunkers” or “Greens, Tees, Bunkers Inc.”,
3. Any and all documents relating to the purchase, repairs and
maintenance costs, and all income derived from the use of the
Caterpillar 416C Backhoe described in the pleadings, from
1997 to date.

The oral examination of the above named individual will be taken before
an Official Court Reporter.

KUYAT & KUYAT

Dated: July 3, 2002



Craig E. Kuyat, Esquire
Attorney for Defendant

cc: ✓William Shaw, Prothonotary
Sargent's Court Reporting Services, Inc.

IN THE COURT OF COMMON PLEAS, CLEARFIELD COUNTY, PENNSYLVANIA
(CIVIL DIVISION)

FRANK M. SHEESLEY CO.,

Plaintiff : No. 01-229-CD

vs.

ROBERT K. KITCHEN and
KITCHEN CONTRACTING,

Defendants

ROBERT K. KITCHEN, t/d/b/a
ROBERT KITCHEN CONTRACTING

Plaintiff : No. 01-1273-CD

vs.

FRANK M. SHEESLEY CO.,

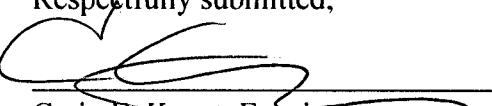
Defendant

CERTIFICATE OF SERVICE

I, Craig E. Kuyat, Esquire, Attorney for Frank M. Sheesley Company, do hereby certify this 2nd day of August, 2002, that I did mail a true and correct copy of Answers to Interrogatories, Answers to Request for Production and Answers to Request for Admissions, to the below counsel of record, via United States Mail, first class, postage pre-paid:

Theron G. Noble, Esquire
Attorney for Plaintiff
Ferraraccio & Noble
301 East Pine Street
Clearfield, PA 16830

Respectfully submitted,


Craig E. Kuyat, Esquire
Kuyat & Kuyat
150 Central Park Law Bldg.
Gazebo Park at Locust Street
Johnstown, PA 15901

FILED

AUG 07 2002

12:45 PM

William A. Shaw
Prothonotary

No. 1273-CD

EK28

KUYAT & KUYAT
ATTORNEYS AT LAW
150 CENTRAL PARK LAW BUILDING
GAZEBO PARK AT LOCUST STREET
JOHNSTOWN, PENNSYLVANIA 15901

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

ROBERT K. KITCHEN, t/d/b/a/ :
ROBERT KITCHEN CONTRACTING, :
PLAINTIFF, : CIVIL ACTION NO. 01-1273-CD
v. :
FRANK M. SHEESLEY COMPANY, :
DEFENDANT :
:

PRAECIPE TO SETTLE AND DISCONTINUE

TO THE PROTHONOTARY:

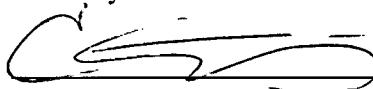
Kindly mark the docket settled, discontinued and forever ended, with prejudice, in the above captioned case. Also, kindly mark the counterclaim settled, discontinued and forever ended, with prejudice, in the above captioned case.

Respectfully submitted,



T G. Noble, Esquire

Attorney for Plaintiff



C. E. Kuyat, Esquire

Attorney for Defendant

FILED

OCT 02 2002

William A. Shaw
Prothonotary

FILED
NOV 18 2002
cc

OCT 02 2002 COPY OF DISC. TO CLA

William A. Shaw Disc. to Amy Kyat
Prothonotary

ED

IN THE COURT OF COMMON PLEAS OF
CLEARFIELD COUNTY, PENNSYLVANIA

COPY

CIVIL DIVISION

**Robert K. Kitchen t/d/b/a
Robert Kitchen Contracting**

Vs. **No. 2001-01273-CD**
Frank M. Sheesley Company

CERTIFICATE OF DISCONTINUATION

Commonwealth of PA
County of Clearfield

I, William A. Shaw, Prothonotary of the Court of Common Pleas in and for the County and Commonwealth aforesaid do hereby certify that the above case was on October 2, 2002 marked:

Settled, Discontinued and Forever Ended with Prejudice; Counterclaim also Settled, Discontinued and Forever Ended with Prejudice

Record costs in the sum of \$154.76 have been paid in full by Theron G. Noble, Esq..

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal of this Court at Clearfield, Clearfield County, Pennsylvania this 2nd day of October A.D. 2002.

William A. Shaw, Prothonotary