

Advanced Voice Data Solutions, Inc.	:	Court of Common Pleas
	:	County of Philadelphia
	:	
Plaintiff	:	May TERM, 2016
	:	No.: 03722
	:	
v.	:	
	:	
Berkeley Point Capital, LLC,	:	
Oppenheimer Multifamily Housing &	:	
Healthcare Finance, Inc., and	:	
Oppenheimer & Co. Inc.	:	
	:	
Defendants	:	

PROPOSED ORDER

AND NOW, this ____ day of _____, 2016, upon consideration of Plaintiff's Preliminary Objections to Defendant Berkeley Point Capital, LLC's Preliminary Objections, it is hereby ORDERED and DECREED that said Defendant's Preliminary Objections to Plaintiff's First Amended Complaint are denied, dismissed, and stricken from the record.

BY THE COURT

J.

Stuart A. Carpey, Esquire
 Attorney I.D. No.: 49490
 Carpey Law, P.C.
 100 W. Elm Street, Suite 310
 Conshohocken, PA 19428
 (610) 834-6030
 (610) 834-6035 (fax)
scarpey@carpeylaw.com

NOTICE TO PLEAD

To Defendant: You are hereby notified to file a written response to the enclosed Preliminary Objections within 20 days from the service hereof or a judgment may be entered upon you as per the Pennsylvania Rules of Civil Procedure.

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Oppenheimer & Co. Inc.	:	
	:	
Defendants	:	

PLAINTIFF’S PRELIMINARY OBJECTIONS TO DEFENDANT BERKELEY POINT CAPITAL, LLC’S PRELIMINARY OBJECTIONS

AND NOW, comes the Plaintiff, Advanced Voice Date Solutions, Inc., by and through its attorney Stuart A. Carpey, Esquire, and files the following Preliminary Objections to Defendant Berkeley Point Capital, LLC’s Preliminary Objections to Plaintiff’s First Amended Complaint.

MOTION TO STRIKE

1. The instant action was commenced by Plaintiff in the Court of Common Pleas of Philadelphia County by filing a Complaint on June 1, 2016.
2. Plaintiff’s Complaint alleges that in November 2015 the parties entered into a contract for the installation of telephone and cable wires and materials at two of Defendant’s commercial facility and that after the work was completed, Defendant refused to pay. The sum certain under the contract was \$54,024.00. See Exhibit “A”.

3. Defendant, Berkeley Point Capital, LLC, was served with a copy of the Complaint by Certified Mail, Return Receipt Requested on June 7, 2016, and an Affidavit of Service was filed on June 20, 2016. See Exhibit “B”.

4. On June 17, 2016, Plaintiff’s counsel received a telephone call, and email, from Jason R. Scherr, Esquire, an attorney at Morgan, Lewis & Bockius, LLP, in Washington DC. Mr. Scherr stated he represented Berkeley and requested an extension of time to answer the Complaint. Plaintiff’s counsel agreed to that request. As such, Mr. Scherr sent Plaintiff’s counsel an email confirming that an Answer to the Complaint needed to be filed by July 19, 2016, but that Preliminary Objections had to be filed by June 27, 2016. Plaintiff’s counsel agreed to same. See Exhibit “C”.

5. Eli H. Klein, Esquire at Morgan, Lewis & Bockius, LLP in Philadelphia, did not formally enter his appearance as counsel for Defendant Berkeley, on the dockets, but filed Preliminary Objections to Plaintiff’s Complaint on June 27, 2016 on behalf of Defendant Berkeley. See Exhibit “D”.

6. On July 6, 2016, Plaintiff filed its First Amended Complaint. See Exhibit “E”.

7. On July 11, 2016, (Exhibit “F”) Plaintiff’s counsel received a telephone call from Nirav S. Shah, Esquire, an attorney at Cantor Fitzgerald in New York, stating he too represented Defendant Berkeley. Mr. Shah requested an extension of time for discovery and for purposes of filing a responsive pleading to the First Amended Complaint. Specifically, in an email dated July 21, 2016, Mr. Shah stated:

“I am out next week on holiday, so I propose we agree to the following by COB tomorrow – please confirm by email:

- *Depositions adjourned until late September*
- *Responses to document requests adjourned until August 31, 2016*

- *Any answer to the Complaint and preliminary objection to be filed no later than August 19, 2016*

Let me know, and feel free to call to discuss.

*Best,
Nirav”*

Plaintiff’s counsel agreed to these dates and confirmed by email dated July 22, 2016. See Exhibit “F”.

8. On August 3, 2016, Eli H. Klein, Esquire withdrew his appearance on behalf of Defendant Berkeley. See Exhibit “G”.

9. On August 3, 2016, Lily G. Becker, Esquire at Morgan, Lewis & Bockius, LLP in Philadelphia entered her appearance on behalf of Defendant Berkeley. See Exhibit “H”.

10. Defendant Berkeley, by and through counsel, Lily G. Becker, Esquire, filed an Answer to Plaintiff’s First Amended Complaint on August 19, 2016. See Exhibit “I”.

11. On August 22, 2016, Defendant Berkeley, by and through counsel, Lily G. Becker, Esquire, withdrew its Answer and filed Preliminary Objections to Plaintiff’s First Amended Complaint. The sole issue raised in Defendant’s Preliminary Objections is whether Plaintiff’s claim should be heard in Arbitration or whether it should remain on the major jury track. See Exhibits “J” and “K”. Defendant Berkeley Point Capital, LLC admits that it did not file the Preliminary Objections to Plaintiff’s First Amended Complaint until August 22, 2016, which would be beyond the date agreed to, August 19, 2016, as between the parties. See correspondence dated August 22, 2016 and August 23, 2016 from Lily G. Becker, Esquire, Exhibits “L” and “M”. This is also clear from the filings and the dockets.

12. Defendant individually or through counsel never asked for any other extensions of time within which to file a responsive pleading to Plaintiff’s First Amended Complaint other

than as identified. Thus, Preliminary Objections to Plaintiff's First Amended Complaint had to be filed by August 19, 2016. Because they were filed on August 22, 2016, they were untimely.

13. Pennsylvania Rule of Civil Procedure 1026 (a) provides that every pleading subsequent to the Complaint shall be filed within twenty days after service.

14. The twenty day time requirement to respond to Plaintiff's Complaint was extended twice by Plaintiff's counsel; first with Jason R. Scherr, Esquire on June 17, 2016 and then on July 22, 2016 with Nirav S. Shah, Esquire. At no time did Eli Klein, Esquire, or Lily G. Becker, Esquire, Defendant's counsel of record, ever request any other extension and there was never any other written agreement between the parties or by order of court permitting Defendant Berkeley to file Preliminary Objections after August 19, 2016.

15. Plaintiff although not required to prove prejudice under the Rules, will nevertheless suffer severe prejudice if Defendant's Preliminary Objections are not denied, dismissed and stricken.

WHEREFORE, Plaintiff requests this Honorable Court to deny, dismiss and strike Defendant Berkeley Point Capital, LLC's Preliminary Objections.

Respectfully submitted,

By: _____
Stuart A. Carpey, Esquire
Attorney for Plaintiff

Stuart A. Carpey, Esquire
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**BRIEF IN SUPPORT OF PLAINTIFF’S PRELIMINARY OBJECTIONS TO
 DEFENDANT’S BERKELEY POINT CAPITAL, LLC’S PRELIMINARY OBJECTIONS**

Pursuant to Pa. R.C.P. 1028 and Phila. R.C.P. 1028 (c), Plaintiff, Advanced Voice Data Solutions, Inc., by and through its undersigned counsel, Stuart A. Carpey, Esquire, hereby submits the following Brief in Support of its Preliminary Objections to Defendant Berkeley Point Capital, LLC’s Preliminary Objections to Plaintiff’s First Amended Complaint.

I. MATTER BEFORE THE COURT

Plaintiff’s Preliminary Objections to Defendant Berkeley Point Capital, LLC’s Preliminary Objections to Plaintiff’s First Amended Complaint.

II. STATEMENT OF QUESTION INVOLVED

Should Defendant Berkeley Point Capital, LLC’s Preliminary Objections be denied, dismissed, and stricken because they were filed untimely?

Suggested answer: Yes.

III. STATEMENT OF THE OPERATIVE FACTS

The instant action was commenced by Plaintiff in the Court of Common Pleas of Philadelphia County by filing a Complaint on June 1, 2016. Defendant, Berkeley Point Capital, LLC, was served with a copy of the Complaint by Certified Mail, Return Receipt Requested on June 7, 2016, and an Affidavit of Service was filed on June 20, 2016. See Exhibit "B".

Plaintiff's Complaint alleges that in November 2015 the parties entered into a contract for the installation of telephone and cable wires and materials at two of Defendant's commercial facility and that after the work was completed, Defendant refused to pay. The sum certain under the contract was \$54,024.00. See Exhibit "A".

On June 17, 2016, Plaintiff's counsel received a telephone call, and email, from Jason R. Scherr, Esquire, an attorney at Morgan, Lewis & Bockius, LLP, in Washington DC. Mr. Scherr stated he represented Berkeley and requested an extension of time to answer the Complaint. Plaintiff's counsel agreed to that request. As such, Mr. Scherr sent Plaintiff's counsel an email confirming that an Answer to the Complaint needed to be filed by July 19, 2016, but that Preliminary Objections had to be filed by June 27, 2016. Plaintiff's counsel agreed to same. See Exhibit "C".

Eli H. Klein, Esquire at Morgan, Lewis & Bockius, LLP in Philadelphia, did not formally enter his appearance as counsel for Defendant Berkeley, on the dockets, but filed Preliminary Objections to Plaintiff's Complaint on June 27, 2016 on behalf of Defendant Berkeley. See Exhibit "D". On July 6, 2016, Plaintiff filed its First Amended Complaint. See Exhibit "E". On July 11, 2016, Plaintiff's counsel received a telephone call from Nirav S. Shah, Esquire, an attorney at Cantor Fitzgerald in New York, stating he too represented Defendant Berkeley. Mr. Shah requested

an extension of time for discovery and for purposes of filing a responsive pleading to the First Amended Complaint. Specifically, in an email dated July 21, 2016, (Exhibit “F”) Mr. Shah stated:

“I am out next week on holiday, so I propose we agree to the following by COB tomorrow – please confirm by email:

- *Depositions adjourned until late September*
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Let me know, and feel free to call to discuss.

*Best,
Nirav”*

Plaintiff’s counsel agreed to these dates and confirmed by email dated July 22, 2016. See Exhibit “F”.

On August 3, 2016, Eli H. Klein, Esquire withdrew his appearance on behalf of Defendant Berkeley. See Exhibit “G”. On August 3, 2016, Lily G. Becker, Esquire at Morgan, Lewis & Bockius, LLP in Philadelphia entered her appearance on behalf of Defendant Berkeley. See Exhibit “H”. Defendant Berkeley, by and through counsel, Lily G. Becker, Esquire, filed an Answer to Plaintiff’s First Amended Complaint on August 19, 2016. See Exhibit “I”. On August 22, 2016, Defendant Berkeley, by and through counsel, Lily G. Becker, Esquire, withdrew its Answer and filed Preliminary Objections to Plaintiff’s First Amended Complaint. The sole issue raised in Defendant’s Preliminary Objections is whether Plaintiff’s claim should be heard in Arbitration or whether it should remain on the major jury track. See Exhibits “J” and “K”.

Defendant Berkeley Point Capital, LLC admits that it did not file the Preliminary Objections to Plaintiff’s First Amended Complaint until August 22, 2016, which would be beyond the date agreed to, August 19, 2016, as between the parties. See correspondence dated August 22, 2016 and

August 23, 2016 from Lily G. Becker, Esquire, Exhibits “L” and “M”. This is also clear from the filings and the dockets.

Defendant individually or through counsel never asked for any other extensions of time within which to file a responsive pleading to Plaintiff’s First Amended Complaint other than as identified.

IV. ARGUMENT

This is an extremely straightforward issue for the Court to rule upon. Defendant’s Preliminary Objections being untimely filed, violate Pennsylvania Rules of Civil Procedure 1026. Pennsylvania Rule of Civil Procedure 1026 (a) provides that every pleading subsequent to the Complaint shall be filed within twenty days after service. The twenty day time requirement to respond to Plaintiff’s Complaint was extended twice by Plaintiff’s counsel; first with Jason R. Scherr, Esquire on June 17, 2016 and then on July 22, 2016 with Nirav S. Shah, Esquire. Mr. Shah’s e mail, agreed to by Plaintiff’s counsel establishes the agreed to date of August 19, 2016 for the filing of any responsive pleading to the First Amended Complaint, and this of course included Preliminary Objections. The parties were certainly free to modify the time within which the Preliminary Objections had to be filed, pursuant to Pa. R.C.P. 248. And the parties did that. But, the extension of time was specific. Such agreements should and must be honored. Menaquale v. Cardile, 61 Pa. D & C. 2d (Chester County 1973), Britton v. Continental Min. & Smelt Corp., 366 Pa. 82 (1950). Because the Preliminary Objections were filed on August 22, 2016, they were untimely.

At no time did Eli Klein, Esquire, or Lily G. Becker, Esquire, Defendant’s counsel of record, ever request any other extension and there was never any other written agreement between

the parties or by order of court permitting Defendant Berkeley to file Preliminary Objections after August 19, 2016.

Plaintiff does not have to establish prejudice under the rules. By way of example, had Plaintiff filed its cause of action beyond the statute of limitations, Defendant's counsel would be duty bound to file a motion for judgment on the pleadings seeking dismissal. The Rules regarding the filing of legal documents are strict. Defendant Berkeley has failed to follow the fundamental rules of pleading practice under the Rules. Under the aforescribed **undisputed** facts, Preliminary Objections to Plaintiff's First Amended Complaint had to be filed by August 19, 2016. They were not.

V. RELIEF REQUESTED

Plaintiff asks this Court to deny, dismiss and strike Defendant Berkeley's Preliminary Objections.

WHEREFORE, Plaintiff respectfully requests this Honorable Court deny dismiss and strike Defendant's Preliminary Objections to Plaintiff's First Amended Complaint.

Respectfully submitted,

By: _____
Stuart A. Carpey, Esquire
Attorney for Plaintiff

Stuart A. Carpey, Esquire
Attorney I.D. No.: 49490
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Oppenheimer & Co. Inc.	:	
	:	
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CERTIFICATE OF SERVICE

I do hereby certify that service of a true and correct copy of the within Preliminary Objections to Defendant's Preliminary Objections was made on this _____ day of _____, 2016 to the counsel named below electronically in accordance with Pa. R.C.P. 205.4(g).

Lily Becker, Esquire
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103

William E. Mahoney, Jr.
Stradley Ronon Stevens & Young, LLP
2005 Market Street
Suite 2600
Philadelphia, PA 19103

By: _____
Stuart A. Carpey, Esquire
Attorney for Plaintiff