

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

DESTEFANO & ASSOCIATES, INC. and	:	COMMERCE PROGRAM
RICHARD DESTEFANO	:	
	:	JUNE TERM 2000
v.	:	
	:	NO. 2775
ROY S. COHEN; COHEN, SEGLIAS, PALLAS	:	
& GREENHALL, P.C.; ROBERT GENDELMAN;	:	Control No. 050800
and BOB GENDELMAN & CO., INC.	:	

ORDER

AND NOW, this 25th day of June 2001, on consideration of the motion of defendants Roy Cohen and Cohen, Seglias, Pallas & Greenhall, P.C. (together, "Cohen") for leave to join Kenneth Federman, Esq. as an additional defendant, and the response of the plaintiffs, and in accordance with the court's contemporaneously-filed opinion, IT IS HEREBY ORDERED that

- (1) The motion is GRANTED, and
- (2) Cohen shall file an additional defendant complaint against Federman within twenty (20) days of the entry of this order.

BY THE COURT:

JOHN W. HERRON, J.

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OPINION

Defendants Roy Cohen, Esq. and Cohen, Seglias, Pallas & Greenhall (together, “Cohen”) have filed a motion under Pa.R.C.P. 2253 for leave to file an additional defendant complaint against Kenneth Federman, Esq. Federman is the plaintiffs’ counsel in this action. The court grants the motion.

BACKGROUND

Plaintiff Richard DeStefano is the owner of plaintiff DeStefano & Associates, Inc. (“DAI”). In February 1999, the plaintiffs were negotiating to buy the assets of defendant Bob Gendelman and Company (“BGC”). Defendant Bob Gendelman was the owner of BGC. The plaintiffs allege that Cohen initially represented both sides in the purchase. At the end of February 1999, plaintiffs hired separate counsel, Federman and his firm, Rothberg & Federman, to represent them. Cohen continued to represent Gendelman and BGC. The plaintiffs allege that while Cohen was representing the plaintiffs, Cohen intentionally or negligently concealed and misrepresented material information about BGC. On

March 3, 1999, DeStefano, DAI, Gendelman and BGC signed an asset purchase agreement.

The plaintiffs allege that Cohen represented them in a dispute with a labor union in September 1999. The plaintiffs allege that Cohen had a close personal relationship with the union's business manager that compromised Cohen's loyalty to the plaintiffs.

The plaintiffs allege that Cohen now represents five other companies in debt collection suits against DAI.

On June 22, 2000, the plaintiffs began this action by filing a praecipe for writ of summons. On that same day, DAI filed a petition for Chapter 7 bankruptcy. In re DeStefano Assocs., No. 00-17881 (Bankr.E.D.Pa.). On November 9, 2000, the plaintiffs filed the complaint. The complaint alleges (1) fraud against all defendants, (2) breach of fiduciary duty and negligence against Cohen, and (3) breach of contract and unjust enrichment against Gendelman and BGC. The complaint also asks for an injunction against Cohen to bar him from representing the five companies against the plaintiffs.

Cohen filed preliminary objections arguing that (1) the bankruptcy petition stayed this action, (2) that DAI lacks standing because its claims now belong to the bankruptcy estate, (3) that the court should dismiss DeStefano's claims against Cohen because DAI is an indispensable party to those claims and cannot be joined for lack of standing, and (4) that Counts I and II are legally insufficient. On April 9, 2001, the court entered an order sustaining the preliminary objection to lack of standing and dismissing all claims by DAI against Cohen without prejudice. The court overruled the objections to DeStefano's claims, and DeStefano's claims against Cohen remain. Gendelman and BGC filed preliminary objections, but the court overruled those objections as untimely in accordance with Phila.Civ.R. *1028(B). Therefore, both plaintiffs' claims against Gendelman and BGC remain.

On May 14, 2001, Cohen filed a motion for leave to file a additional defendant complaint against Federman. Cohen alleges that Federman was negligent in his representation of the plaintiffs in the purchase of BGC and the dispute with the labor union, and that Federman is solely, jointly or severally liable on those claims, or liable over to Cohen.

DISCUSSION

The court grants the motion for leave to join Federman as an additional defendant. In non-class actions,

any defendant or additional defendant may join as an additional defendant any person, whether or not a party to the action, who may be

- (1) solely liable on the plaintiff's cause of action, or
- (2) liable over to the joining party on the plaintiff's cause of action, or
- (3) jointly or severally liable with the joining party on the plaintiff's cause of action, or
- (4) liable to the joining party on any cause of action arising out of the transactions or occurrences upon which the plaintiff's cause of action is based.

Pa.R.C.P. 2252(a). Federman is not a party to this suit. As a matter of course, an original defendant may join a non-party as an additional defendant by filing a praecipe for a writ or a complaint against the additional defendant. Pa.R.C.P. 2252(b). The additional defendant, once joined, may file preliminary objections, an answer or any other pleadings against the joining defendant as if the joining defendant were a plaintiff. Pa.R.C.P. 2255; Somers v. Gross, 393 Pa.Super. 509, 574 A.2d 1056, 1057 n.2 (1990) (“[T]he proper challenge to joinder is by way of preliminary objection to the joinder complaint.”).

Rule 2253 governs timeliness of a joinder praecipe or complaint:

[N]either praecipe for a writ to join an additional defendant nor a complaint if the

joinder is commenced by complaint, shall be filed by the original defendant or an additional defendant later than sixty days after the service upon the original defendant of the initial pleading of the plaintiff or any amendment thereof unless such filing is allowed by the court upon cause shown.

Pa.R.C.P. 2253. Rule 2253 expressly sets forth three time periods within which the original defendant must file the joinder praecipe or complaint: “(1) within sixty days after service on the defendant of the plaintiff’s complaint; (2) within sixty days after service on the defendant of an amendment of the plaintiff’s complaint; [or] (3) within such greater time as may be allowed by the court upon cause shown.” Graham v. Greater Latrobe Sch. Dist., 436 Pa. 440, 260 A.2d 731, 733 (1970). The plaintiffs served the complaint by mail on November 9, 2000. Apparently assuming that the 60 day period began to run on November 9, 2000, see Pa.R.C.P. 440(b) (“Service by mail of legal papers other than original process is complete upon mailing.”), Cohen thought that the third time period was applicable, and he filed a Rule 2253 motion for late joinder of Federman.¹

Cohen’s apparent interpretation of the rule is incorrect. In Graham, the Supreme Court read into Rule 2253 a fourth time period for filing a joinder praecipe or complaint. Graham, 260 A.2d at 733 (1985). If the original defendant files preliminary objections that, if sustained, would require the termination of the action as to that defendant or would require the filing of an amended complaint, the 60 day period does not begin to run until the date that the court rules on the objections. Graham, 260

¹ To join an additional defendant under the third time period, the defendant must file a petition alleging (1) reasonable justification for the delay, (2) a statement of the facts alleged to render the defendant solely, jointly or severally liable to the plaintiff, liable over to the defendant or liable to the defendant on a proper cross-claim, and (3) absence of prejudice caused by the delay to the proposed additional defendant. Consul v. Burke, 403 Pa.Super. 400, 589 A.2d 246, 249 (1991); Riccobono v. Keystone Helicopter Corp., 352 Pa.Super. 186, 507 A.2d 834, 836 (1986); Pa.R.C.P. 2253.

A.2d at 733; Jonas v. Wiesmeth Constr. Co., 360 Pa.Super. 173, 520 A.2d 40, 42-43 (1987);
Kovalesky v. Esther Williams Swimming Pools, 345 Pa.Super. 95, 497 A.2d 661, 664-65 (1985).

Cohen's indispensable party objection to Richard DeStefano's claims, had the court sustained it, would have resulted in dismissal of the action because DAI could not be joined. Pa.R.C.P. 1032(b).

Therefore, the 60 day period began to run on April 9, 2001, when the court issued its order on the preliminary objections. When Cohen filed this motion on May 14, 2001, joinder was timely and Cohen could have joined Federman as a matter of course, without leave, simply by filing the joinder complaint. Pa.R.C.P. 2252(b). Therefore, the court grants Cohen's motion for leave to join Federman.

Plaintiffs have attacked the sufficiency of the joinder complaint. As Cohen is entitled to joinder as a matter of right, the court will not address the plaintiffs' arguments. Once joined, Federman may challenge the joinder by filing preliminary objections to the joinder complaint. Somers, 574 A.2d at 1057 n.2; NPW Med. Ctr. of N.E. Pa. v. LS Design Group, P.C., 353 Pa. 341, 509 A.2d 1306, 1308 n.2 (1986).

CONCLUSION

The court will enter a contemporaneous order granting the motion for leave to file a complaint joining Federman as an additional defendant.

BY THE COURT:

JOHN W. HERRON, JR.

DATED: June 25, 2001