

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

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THERMACON ENVIRO SYSTEMS, INC., :	March Term, 2001
Plaintiff	:
	:
v.	:
	:
	No. 4369
	:
	Commerce Case Program
GMH ASSOCIATES OF AMERICA, INC., :	
Defendant	:
	Control No. 020314

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**OPINION**

Additional Defendant Wickersham Construction and Engineering, Inc. (“Wickersham”) has filed preliminary objections (“Objections”) to the amended joinder complaint (“Complaint”) of Defendant GMH Associates of America, Inc. (“GMH”). For the reasons set forth in this Opinion, the Court is sustaining the Objections asserting that GMH failed to comply with Pennsylvania’s rules on joinder.

**BACKGROUND**

The underlying dispute in this case revolves around the claim of subcontractor Plaintiff Thermacon Enviro Systems, Inc. (“Thermacon”) that GMH failed to pay it for certain aluminum tank covers it provided. GMH, in turn, has attempted to join Wickersham, the general contractor, arguing that Wickersham failed to pay GMH.

Of key importance for the purposes of the Objections is the procedural history of this matter. Thermacon’s original complaint in this matter was filed on March 30, 2001, and GMH filed preliminary objections asserting legal insufficiency as to all counts on May 2, 2001. On July 18, 2001, the Court

ruled on these Objections, with the exception of GMH's objection to venue.<sup>1</sup> On August 17, 2001, GMH submitted a motion to amend the July Order to allow it to appeal ("Motion to Amend"), which the Court denied on September 20, 2001. GMH filed an original joinder complaint on October 31, 2001, and, when Wickersham filed preliminary objections, filed the Complaint, as amended, on December 19, 2001. In the Objections, Wickersham asserts that GMH has failed to comply with Pennsylvania Rule of Civil Procedure 2253 ("Rule 2253"), which governs the time and procedure by which a joinder complaint must be filed.<sup>2</sup>

## **DISCUSSION**

Rule 2253 reads as follows:

Except as provided by Rule 1041.1(e), neither 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. Civ. P. 2253.<sup>3</sup> Thus, a defendant seeking to join an additional defendant generally must either do so within 60 days after original service of an initial or amended complaint or request leave from the court.

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<sup>1</sup> The Order overruling these objections is referred to as the "July Order." The Court overruled GMH's venue objections on November 11, 2001 after GMH filed an answer to Thermacon's complaint.

<sup>2</sup> Wickersham also asserts additional Objections, including the existence of an agreement to arbitrate, insufficient specificity and legal insufficiency. However, because GMH joined Wickersham improperly, the Court need not address these other Objections.

<sup>3</sup> Pennsylvania Rule of Civil Procedure 1041.1 applies to asbestos litigation and is not relevant here.

The Pennsylvania Supreme Court carved out a narrow exception to Rule 2253's 60-day period in Graham v. Greater Latrobe School District, 436 Pa. 440, 260 A.2d 731 (1970). In Graham, the initial complaint was filed on February 8, 1968, whereupon the defendant filed preliminary objections. The trial court overruled the objections on July 2, 1968, and two weeks later, the defendant attempted to join four additional defendants. After reviewing the matter's procedural history, the Supreme Court held that the defendant had a right to file its joinder complaint as a matter of right:

Rule 2253 does not explicitly cover the situation of the joinder of additional defendants when the original defendant has filed preliminary objections to the complaint. If the objections are sustained, no problem will arise, however, for either the action will be dismissed or an amended complaint will be filed after which a sixty day period begins. When the objections are overruled, as here, reason and policy require that the defendant be given sixty days to join additional defendants. Preliminary objections attack the validity of the pleading, and until those objections are overruled, a court has not determined that the plaintiff has filed a valid complaint. . . . [T]he most reasonable construction of Rule 2253 would be that the defendant has sixty days from the time it is determined that plaintiff has filed a valid complaint. If no preliminary objections are filed, that will be the date of the filing of the complaint. If they are filed, that will be the date they are overruled. Also, it makes no sense to require the defendant to proceed as if the action will continue when he has before the court objections which, if successful, will terminate the litigation. No reasons of policy require that he follow these inconsistent paths at the same time.

436 Pa. at 443-44, 260 A.2d at 733 (emphasis added).

In the instant case, GMH contends that the Court did not make the definitive determination that the original complaint was valid until the Court ruled on the Motion to Amend on September 20, 2001. Thus, it asserts, the 60-day period began to run on that date and did not close until after GMH joined Wickersham on October 31, 2001.

GMH's attempt to broaden the scope of the Graham exception is at odds with the body of case law interpreting that case narrowly. In Pennsylvania Gas and Water Co. v. Lisbon Contractors,

Inc., 288 Pa. Super. 267, 431 A.2d 1041 (1981), for example, the Superior Court held that preliminary objections toll the 60-day period only where they would terminate the litigation entirely if granted. Likewise, in Kerry Coal Co. v. Beckwith Machinery Co., 316 Pa. Super. 195, 462 A.2d 861 (1983), the court held that the Graham exception did not extend to preliminary objections filed by additional defendants and found that the exception “should be strictly limited to the circumstances found therein.” 316 Pa. Super. at 199, 462 A.2d at 863. See also Kovalesky v. Esther Williams Swimming Pools, 345 Pa. Super. 95, 497 A.2d 661 (1985) (holding that preliminary objections challenging venue would not have resulted in termination of litigation and thus did not allow application of Graham exception).

In light of this constraint, the explicit language of Graham states that the 60-day period begins to run from the date on which the preliminary objections are overruled, not the date when any subsequent motion for reconsideration or motion to amend to allow appeal is ruled on. Any other conclusion would allow a defendant to draw out the joinder period indefinitely by filing additional motions asking for reconsideration of the original order and would run afoul of the strict interpretation directed by the Superior Court. Here, GMH’s preliminary objections were overruled on July 18, 2001,<sup>4</sup> and the Court’s ruling on the Motion to Amend on September 20, 2001 is irrelevant for the purposes of Rule 2253. Accordingly, GMH’s attempt to join Wickersham on October 31, 2001 was made after the 60-

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<sup>4</sup> Although the Court held GMH’s preliminary objections to venue under advisement pending depositions, this type of objection does not carry with it an extension of the 60-day joinder period. See Kovalesky v. Esther Williams Swimming Pools, 345 Pa. Super. 95, 497 A.2d 661 (1985).

day period had expired and could not be realized without leave of the Court. For this reason, the Objections asserting improper joinder are sustained.<sup>5</sup>

### CONCLUSION

Because GMH failed to comply with Rule 2253, the Objections are sustained, and the Complaint is dismissed.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: March 21, 2002

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<sup>5</sup> As an aside, it is worth noting that Rule 2253 also allows a similar extension of the 60-day filing period when the plaintiff has filed an amended complaint. Pennsylvania trial courts have applied this extension even when the amendment adds nothing new of substance to the complaint. See Stauffer v. Sutton, 17 Pa. D. & C.2d 26 (1959); Konopka v. Pittsburgh Coke & Chem. Co., 5 Pa. D. & C.2d 472 (1956). However, even if this is a correct articulation of Pennsylvania law, it is of no comfort to GMH. Although Thermacon filed a motion for leave to file an amended complaint, GMH successfully challenged Thermacon's motion. Accordingly, there is no amended complaint that would reset the 60-day period and allow GMH to join Wickersham without leave of the Court.

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**ORDER**

AND NOW, this 21st day of March, 2002, upon consideration of the Preliminary Objections of Additional Defendant Wickersham Construction and Engineering, Inc. to the Amended Joinder Complaint of Defendant GMH Associates of America, Inc. and the Defendant's response thereto and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that the Preliminary Objections asserting improper joinder are SUSTAINED, and the Amended Joinder Complaint is DISMISSED.

BY THE COURT:

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JOHN W. HERRON, J.