

JOHN v. GIANT FOOD STORES, INC., et al. No. 2, C.P. C.D. Franklin County Branch, No. A.D. 1978-31

Trespass - Joinder of Additional Defendant - Pa. R.C.P. 2253 - Petition for Permission to Join

1. Pa. R.C.P. 2253 permits joinder of an additional defendant as of course within 60 days of service of the complaint or any amendment thereto by filing a praecipe for a writ or a complaint.
2. Within 60 days of service of the amended complaint, defendant filed a petition to join additional defendants which was the procedure under prior rules, but not under Pa. R.C.P. 2253.
3. Petitions for permission to join additional defendants can only be granted "upon cause shown."
4. In order to establish sufficient "cause" for joinder, a defendant must set forth a reasonable excuse for delay, a statement of facts alleged to render the proposed additional defendant liable, and allegations that late joinder will not be prejudicial to the additional defendant.

Robert D. Myers, Esq., Counsel for Plaintiff

Dennis J. Harnish, Esq., Counsel for Giant Food Stores, Inc., Defendant

James W. Evans, Esq., Counsel for Central Tractor Parts Co.
William F. Martson, Esq., Counsel for Frank Black Mechanical Services, Inc.

OPINION AND ORDER

KELLER, J., February 28, 1980:

On June 20, 1979, defendant in the above-captioned action, Frank Black Mechanical Services, Inc., (hereafter "Black") filed a petition for permission to join as additional defendants Temp Con and McDonnell & Miller, ITT. This petition was filed under Pa. R.C.P. 2253.

This action was commenced on January 16, 1978, when plaintiffs, Harold A. John and Rubie G. John filed a complaint in trespass which was served upon the original named defendants, including Giant Food Stores, Inc. (hereafter "Giant") and Central Tractor Parts Co., Inc. (hereafter "Central Tractor"). Both Giant and Central Tractor independently filed as of course a praecipe for a writ of summons in trespass under Pa. R.C.P. 2252 naming Black as an additional defen-

dant. No complaints were filed by either Giant or Central Tractor, and Black did not enter an appearance.

On April 30, 1979, plaintiffs petitioned the Court under Pa. R.C.P. 2232 (c) to order joinder of Black as a co-defendant. On the same date, an order was signed granting the petition and plaintiffs' first amendment to complaint was filed, stating a cause of action against Black. Black subsequently filed preliminarily objections to the amended complaint on May 16, 1979 which were withdrawn by Black on July 23, 1979 under stipulation between the parties, (plaintiffs and Black).

Under Pa. R.C.P. 2252 and 2253 the defendants in this action had sixty(60) days from the service of the amended complaint to join additional defendants as of course by filing a praecipe for a writ or a complaint. Defendant Black elected to file the petition presently under consideration, seeking Court approval for the joinder of additional defendants under Pa. R.C.P. 2253; this petition was filed on June 20, 1979 before the expiration of the sixty (60) day period for joinder.

When approval by the Court is sought for joinder, Rule 2253 specifies that the extension of time may be granted "upon cause shown." Granting the extension is within the discretion of the court. *Marnell v. Cross*, 372 Pa. 82, 92 A. 2d 688 (1952). The rule does not define what is sufficient cause nor does it delineate the factors that the Court should consider when deliberating upon such a petition. The Pennsylvania Supreme Court in *Coppoge v. Smith*, 381 Pa. 400, 404, 113 A. 2d 247, 250 (1955) quotes the lower court and stated:

"Our modern procedures, as exemplified by the Rules of Civil Procedure, and particularly those governing the joinder of additional defendants, is to the effect that such Rules should be interpreted liberally to accomplish their purpose, which is to further simplify and expedite the disposition of matters involving numerous parties with divergent interests."

The discretion of the Court in matters such as that presented by this petition is further defined by Pa. R.C.P. 126:

"The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties."

In deliberating upon the present petition, therefore, the Court must consider the purpose of the rules governing join-

der. The original rules permitted successive joining of additional defendants, thus permitting almost unlimited delay of the action. This delay was detrimental to the plaintiffs' cause of action, and actually permitted unwarranted control of the progress of the action by defendants. Under the present rules, joinder is permitted as of course by the defendants within sixty (60) days of service of the complaint; the plaintiff allows a renewal of this sixty (60) day period by service of any amendment to the complaint. Joinder as of course is accomplished by filing a praecipe for a writ or a complaint. It is an expeditious procedure which eliminates the requirement in the original rules for a petition to join an additional defendant with its attendant delay of argument before the Court and issuance of an opinion by the Court.

By electing to file a petition to join additional defendants rather than following the prescribed procedure of the new rules, defendant Black has created the delay in joining additional defendants which the rules clearly intend to eliminate. After creating this delay, by noncompliance with the rules, Black cannot expect the Court to grant an extension as of course under the rules on the rationale that the petition was filed within sixty (60) days of service of the amended complaint.

This Court will, therefore, apply the standards set forth by the Pennsylvania courts in similar petitions for permission to join additional defendants. Such petitions can only be granted "upon cause shown."

The provision for extensions upon cause shown excludes extension as a matter of course. *Christman v. Chadderton*, 55 D&C 325 (1945). Pennsylvania courts have denied petitions for joinder where, inter alia, no excuse for the delay was shown, *Pandolph v. Perry*, 39 Wash. Co. Rep. 12 (1958), and where the petition disclosed no basis for joinder of the additional defendant, *Langione v. York Bank & Trust Co.*, 78 York Leg. Rec. 34 (1963). Sufficient "cause," therefore, would encompass both an explanation for the filing of the petition (usually because of delay, but, in the present case, because of noncompliance with the rules), and a justification for joining the proposed additional defendant.

The court in *Swabb Equipment Company v. Westchester Fire Insurance Co.*, 51 Luzerne L.R.R. 39, 43 (1960), defines requirements for such petitions which have been frequently adopted by other Pennsylvania courts:

"The application should be made by petition averring the

facts justifying the granting of an extension. The petition must contain: (1) some reasonable justification or excuse for the delay; (2) a statement of the facts alleged to render the proposed additional defendant alone liable, or liable with, or liable over to defendant; and (3) allegations that the late joinder will not be prejudicial to the proposed additional defendant." See 8 Goodrich-Amram Sec 2253:3.1; *Graham v. Latrobe School District*, 51 Westmore L.J. 97 (1969).

The petitioner must be specific in pleading the facts which show cause for late joinder. Citing appellate court decisions, the court in *Berguy v. Musselman*, 11 Lebanon Co. L.J. 457, 459 (1967) states:

"A defendant seeking an extension of time to join an additional defendant must plead facts to support his theory of joint liability and the mere averment of the conclusion that joint liability exists is insufficient and does not take the place of factual pleadings. *Zachrel, Admr. v. Universal Oil Products Co.*, 355 Pa. 324; *Carlin v. Pennsylvania Power & Light Co.*, 363 Pa. 543, *Wnek v. Boyle*, 172 Pa. Superior Court 222."

The defendants' petition for extension in the present case states that Black was not aware of the involvement of the proposed additional defendants until after the time period for joinder had expired. Defendant Black avers that the possible liability of Temp Con and McDonnell and Miller, ITT was discovered after depositions of several persons. Depositions taken on January 16, 1979 (the date on which plaintiffs filed the original complaint) are part of the record, and the Court assumes these are, in fact, the depositions to which Black refers. Defendant Black, therefore, had adequate time to join the proposed additional defendants under Rule 2252. Black's stated "justification for delay" does not appear to be "reasonable."

Black is required, in establishing cause to allow joinder, to include in its petition a "statement of facts alleged to render the proposed additional defendants alone liable, or liable with, or liable over to defendant." *Swabb*, supra. Black states that Temp Con's failure to perform work on the heating system from 1974 to 1976 caused the damages to plaintiff. These averments in the petition are inadequate to appraise the court of the factual basis of Temp Con's alleged liability.

Pennsylvania courts, in determining whether there is adequate factual support for the conclusion that the additional defendant may be liable for damages, have looked

to the entire record presented, including deposition testimony of parties, *Ciarrochi v. Olkowski*, 57 Del. Co. R. 66 (1969), and the pleadings filed in the case, *Swabb*, supra. Plaintiffs' claim against Black is based upon Black's performance of "service, replacement, and repair work in a shoddy, unworkmanlike and negligent manner." (Plaintiffs' First Amendment to Complaint, p. 40) Said work was contracted to be performed on the oil-fired heating system on the premises at 1351 Lincoln Way East, Guilford Township, Franklin County, Pa., in August of 1976. (Amendment to Complaint, p. 38.) Deposition testimony indicates that Black, in performing the work to rehabilitate heating system, found no oil leaks in the underground piping, and that Black replaced these underground lines sometime after August 2, 1976. (Tuckey deposition, pp. 7, 37, 97-98, 118.) Defendant, therefore, has failed to state with specificity in its petition any factual basis which would render Temp Con liable for any damage caused by a heating system malfunction after Black's performance of its contract work to rehabilitate that system. (Tuckey deposition, p. 13.- "replace the defective parts and put the thing in operation and see what all worked.")

Defendant Black also seeks to join McDonnell and Miller, ITT, and avers that the float assembly in the day tank of the heating system malfunctioned and that this malfunction caused the damages to the plaintiff. Plaintiffs have averred in their complaint that damages resulted from "long continued leakage of oil." (Complaint p. 18.) Defendant's petition for permission to join additional defendants does not state any factual relationship between the "leakage of oil" which caused damages and the malfunctioning of the float assembly located inside the building. The depositions in this case, which, defendants aver, made it aware of the liability of McDonnell and Miller, ITT, do not clearly establish any factual connection.

Defendant Black's position also fails to allege that a permissive late joinder will not be prejudicial to the proposed additional defendants. Further, plaintiffs protest the joinder of these additional defendants on the basis of further delay of their action.

Certainly the Court recognizes the importance and value of avoiding multiplicity of suits, but we cannot rely upon this rationale alone to ignore the plain meaning of the Rules of Civil Procedure. See *Mercer Gas, Light & Fuel Co. v. Steiger*, 18 D&C 2d 361 (1959). Defendant Black will not be prejudiced by a denial of permission to join Temp Con and McDonnell and Miller, ITT; Black may file a separate suit against the proposed additional defendants. The Statute of

Limitations for an action for indemnity or contribution does not begin to run until after judgment is obtained in the original action. *First National Bank of Ashley v. Reily*, 165 Pa. Super. Ct. 168, 67 A. 2d 679 (1949); *Fasher v. City of Philadelphia*, 112 Pa. Super. 226, 170 A. 875 (1934).

Defendant's petition will be denied.

ORDER

NOW, this 28th day of February, 1980, the Petition of Frank Black Mechanical Services, Inc. to Join Additional Defendants is denied.*

*Editor's Note: Earlier opinion in this case reported at 2 Franklin 40 (1978)

HIPPENSTEEL v. HIPPENSTEEL, C. P. Franklin County Branch, No. F.R. 1978 - 469 -S

Non-support - Termination of Order - Intentional Withholding of Visitation

1. As a general rule, denial of visitation by the custodial spouse will not give rise to a right to terminate support by the non-custodial parent.
2. There is an exception to the general rule, where the conduct of the custodial parent constitutes a flagrantly willful and intentional concealment of the children.
3. Where the custodial parent has evaded a bench warrant and concealed himself and his children from enforcement of a court's visitation order and from supervision of the children by the court's Children and Youth Service, there is flagrantly willful and intentional concealment so as to justify a stay of the prior support order.

David W. Rahausser, Assistant District Attorney, Attorney for the Commonwealth

Grace E. D'Alo, Esq., Attorney for Plaintiff

OPINION AND ORDER

KELLER, J., March 18, 1980:

On November 17, 1978, Dennis W. Hippensteel executed his petition for modification under the Pennsylvania Civil Pro-