

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FEDERAL REALTY INVESTMENT TRUST,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	NO. 99-3389
v.	:	
	:	
JUNIPER PROPERTIES GROUP et al.	:	
	:	
Defendants.	:	

**MEMORANDUM**

BUCKWALTER, J.

January 21, 2000

This is an action by Plaintiff Federal Realty Investment Trust (“Plaintiff” or “Federal”) in which it seeks to assert its purported right to possession of certain real estate in Bala Cynwyd, Pennsylvania. The Defendants are Juniper Properties Group, a Pennsylvania Partnership, (“Juniper”); Audrey Kaplan and M. David Kaplan, in their capacity as co-executors of the Estate of Myron Kaplan (the “Kaplan Estate”); Audrey Kaplan as an individual who resides in Pennsylvania (“Kaplan”); Firsttrust Bank, a Pennsylvania corporation (“Firsttrust”) and Schottenstein Stores Corporation, a Delaware Corporation (“Schottenstein”). Federal is a Maryland Real Estate Investment Trust. Its Trustees reside in either Belgium, New York or Maryland, but they are not citizens of either Pennsylvania, Delaware or Ohio. The case is before this Court based on diversity subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

## I. FACTUAL BACKGROUND

The relevant facts are taken from the Third Amended Complaint filed October 15, 1999 (“Complaint”). The disputed real property consists of an Acme retail store and a Firstrust Bank (together, the “Acme Premises”). The portion of the Acme Premises currently occupied by Firstrust will be referred to as the “Non-Acme Portion”<sup>1</sup>. Federal alleges that it acquired fee simple title of the Acme Premises from Acorn Associates in 1994. (Compl. ¶¶ 9-10). On March 23, 1999, Federal and Acme entered into a ground lease (the “American Stores Lease”) pursuant to which Acme leased from Federal a separate building area located at the Bala Cynwyd Shopping Center on City Line Avenue (“New Premises”). Pursuant to the American Stores Lease, Acme would move from its current retail center in the Acme Premises to a new location in the New Premises. (Compl. ¶ 30). As a result of the American Stores Lease, Acme assigned all of its rights, title and interest to any portion of the Acme Premises to Federal. (Compl. ¶ 31).

The Complaint alleges that prior to 1979, the Acme Premises fell under two separate leases. The “Penn Fruit” Lease controlled the portion now containing the Acme whereas the “Bell Savings” lease controlled the Non-Acme Portion. A subsidiary or affiliate of Defendant Schottenstein (“MCP”) subleased the Non-Acme Portion from Newcorp Supermarkets, Inc. (“NSI”) on October 3, 1976. (Compl. ¶¶ 18-19). This sublease required that MCP accept the Bell Savings sublease subject to all of the terms of the Penn Fruit Lease. One term of this sublease required its termination in the event the Penn Fruit Lease was terminated. On or about June 29, 1979, NSI entered into an agreement with Acme by which it sold, assigned

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1. During the relevant time period (1976-present), the Non-Acme Portion has been occupied by two banks. The first occupant was Bell Savings Bank (“Bell Savings”) and the current occupant is Defendant Firstrust Bank.

and transferred to Acme any and all of its rights in the Penn Fruit Lease. (Compl. ¶¶ 20-21). In September, 1979, Acorn Associates and Acme entered into a Termination Agreement (“Termination Agreement”) pursuant to which the Penn Fruit Lease was terminated. The Termination Agreement also terminated MCP’s interest in the Non-Acme Portion because of the terms of its sublease agreement with NSI dated October, 1976. ( Comp. ¶¶ 25-26). Therefore, Federal alleges that as of September, 1979, Defendant Schottenstein’s subsidiary had no interest in the Acme Premises.

As a result of the Termination Agreement which extinguished MCP’s interests in the Acme Premises, Defendant Schottenstein’s assignment of all its rights in the Acme Premises to Defendant Juniper in 1989 was invalid. At that time, and continuing through March 23, 1999, only Acme had the right to possess the entire Acme Premises. As part of the Juniper-Schottenstein transaction, Juniper executed a mortgage in favor of Schottenstein on the entire Acme Premises ( the “Juniper Mortgage”). The Plaintiff alleges that the Juniper Mortgage was fraudulently delivered as both parties were aware that Juniper could hold no ownership interest in the property. (Compl. ¶¶ 55-58). Juniper sublet the Non-Acme Portion to Defendant Firstrust on September 22, 1992. Plaintiff claims that as of September, 1979, Schottenstein and Juniper have had no right to collect any rent from the Non-Acme Portion’s tenant. (Compl. ¶ 42) In effect, Federal alleges that only Acme has had the right to collect rent from either Bell Savings, or the current occupant, Defendant Firstrust, who occupied the Non-Acme portion.

On or about June 29, 1999, Federal provided written notice to Juniper advising that Juniper did not have the right to either sublease the Non-Acme Portion or to collect rent

from any tenant occupying that portion. On October 7, 1999, Federal provided written notice to Firstrust that it did not have the right to lawful possession of the Non-Acme Portion.

The Complaint alleges six causes of action. Count I is for ejectment against Firstrust and Juniper. Count II demands Ejectment with damages and Count III Trespass against all Defendants. Count IV alleges Unjust Enrichment against all Defendants except Firstrust. Count V alleges Conversion against all Defendants. Finally, Count VI is an action to quiet title. Each of the Defendants has submitted a Motion to Dismiss. Juniper, the Kaplan Estate and Kaplan have filed a joint Motion to Dismiss. The Court will refer to Juniper when addressing the arguments made by these three Defendants. Firstrust and Juniper move under Fed. R. Civ. P. 12(b)(1) to dismiss the case for lack of subject matter jurisdiction. All Defendants move to dismiss the Complaint, or certain counts of the Complaint, under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

## **II. LEGAL STANDARD**

When deciding to dismiss a claim pursuant to Rule 12(b)(6) a court must consider the legal sufficiency of the complaint and dismissal is appropriate only if it is clear that "beyond a doubt ... the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." McCann v. Catholic Health Initiative, 1998 WL 575259 at \*1 (E.D. Pa. Sep. 8, 1998) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The court assumes the truth of plaintiff's allegations, and draws all favorable inferences therefrom. See, Rocks v. City of Philadelphia, 868 F.2d. 644, 645 (3d. Cir. 1989). However, conclusory allegations that fail to give a defendant notice of the material elements of a claim are insufficient. See Sterling v. SEPTA, 897 F.Supp.

893, 895 (E.D. Pa.1995). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d. Cir. 1993). The Court must determine whether, under any reasonable reading of the pleadings, the law allows the plaintiff a remedy. See, Nami v. Fauver, 82 F.3d 63, 65 (3d. Cir. 1996).

In considering a motion to dismiss for lack of subject matter jurisdiction, the person asserting jurisdiction bears the burden of showing that the case is properly before the court at all stages of the litigation. See Packard v. Provident National Bank, 994 F.2d 1039, 1045 (3d Cir. 1993). In reviewing a motion to dismiss for lack of subject matter jurisdiction, the district court must accept as true the allegations contained in the plaintiff's complaint, except to the extent federal jurisdiction is dependent on certain facts. Haydo v. Amerikohl Mining, Inc., 830 F.2d 494, 496 (3d Cir.1987). In determining whether subject matter jurisdiction exists, the district court is not limited to the face of the pleadings. Armstrong World Industries v. Adams, 961 F.2d 405, 410, n.10 (3d Cir. 1992). In assessing a Rule 12(b)(1) motion, the parties may submit and the court may consider affidavits and other relevant evidence outside the pleadings. Berardi v. Swanson Memorial Lodge No. 48 of Fraternal Order of Police, 920 F.2d 198, 200 (3d Cir.1990). When a defendant supports its attack on jurisdiction with supporting affidavits, the plaintiff has the burden of responding to the facts so stated. A conclusory response or a restatement of the allegations of the complaint is not sufficient. International Association of Machinists & Aerospace Workers v. Northwest Airlines, Inc., 673 F.2d 700, 711 (3d Cir.1982).

### III. DISCUSSION

#### A. Diversity Jurisdiction

Pursuant to 28 U.S.C. § 1332, a plaintiff must allege both that the parties are of completely diverse citizenship and that the amount in controversy exceeds \$75,000. Juniper first attacks subject matter jurisdiction by claiming that Federal has not alleged complete diversity. Federal has done that by alleging diverse citizenship of both the Trust itself (Maryland) and its Trustees (Maryland, New York and Belgium). The Defendants are alleged to be citizens (for diversity purposes) of Ohio, Pennsylvania and Delaware. Therefore, assuming that the Trustees are the “real parties in interest” pursuant to Fed. R. Civ. P. 17, Federal has sufficiently alleged diversity jurisdiction.

#### B. Joinder

Defendants Juniper and Firstrust also challenge the subject matter jurisdiction because they claim that Acme, a Delaware corporation<sup>2</sup>, is an indispensable party that must be joined. If Acme is joined, complete diversity will be destroyed and the Court can not properly exercise subject matter jurisdiction. The Plaintiff counters that Acme is not an indispensable party that needs to be joined.

Fed. R. Civ. P. 19 determines when joinder of a particular party is compulsory. A court must first determine whether a party should be joined if "feasible" under Rule 19(a).<sup>3</sup> See

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2. It appears that Acme, incorporated in Delaware, has its principal place of business in Pennsylvania. Assuming this to be true, Acme would be a citizen of both Pennsylvania and Delaware for diversity purposes. 28 U.S.C. § 1332(c).

3. Fed. R. Civ. P. 19(a) provides, in pertinent part: “A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the  
(continued...)

Janney Montgomery Scott v. Shepard Niles, 11 F.3d 399, 404 (3d Cir. 1993). If the party should be joined but joinder is not feasible because it would destroy diversity, the court must determine under Rule 19(b) whether "in equity and good conscience" the action should proceed without the absent party or whether the absent party is indispensable and the action should be dismissed.<sup>4</sup> See Steel Valley Authority v. Union Switch & Signal Division, 809 F.2d 1006, 1013 (3d Cir. 1987). If the party is indispensable, the action therefore cannot go forward. Bank of America Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 844 F.2d 1050, 1053-54 (3d Cir.1988).

1. Should Acme be joined as a necessary party?

A party is only necessary under Rule 19(a)(1) if the Court could not make a complete determination of the rights of those already parties to the action without that additional party. See Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel ("Sindia"), 895 F.2d 116, 121 (3d. Cir. 1990). Plaintiff argues that Acme is not a necessary party because it has assigned its entire interest in the property to Federal. Defendants Firstrust and Juniper claim that Acme is a real party of interest because it retains an interest in the Acme Premises. When all rights to a claim have been assigned, courts generally have held that an assignor no longer may sue. However, when there has only been a partial assignment the assignor and assignee each retain an

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3. (...continued)

person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party.

4. The factors to be considered by the court include: First, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

interest in the claim and can both be real parties in interest. When a defendant is faced with an action by only one of the parties to whom he ultimately may be liable, he may move to join the absent person in order to avoid the burden of multiple lawsuits. See Wright, Miller & Kane, §1545, p. 349-353. Therefore, the Court must determine whether the assignment eliminated Acme's rights to the Acme Premises under its lease with Federal.

The American Stores Lease reads, in pertinent part:

Tenant [Acme] hereby assigns to Landlord [Federal], without representation or warranty, all of Tenant's right, title and interest, if any, with respect to the Occupied Portion, and Landlord accepts such assignment. Pl. Exh. M, p. 5-6.

Tenant agrees to execute further documentation prepared by Landlord, and reasonably acceptable to Tenant, to further evidence the assignment set forth in the immediately preceding sentence. Pl. Exh. M, p.6.

The Court does not read this Assignment as being complete. It explicitly calls for further documentation of evidence of the assignment. Such documentation has not been brought to the Court's attention. Also, the Court can not determine whether this purported assignment covers all rights, including the right to collect rent for a period stretching back over twenty years. The Assignment does not refer to the right to control litigation. In essence, the Court disagrees with Federal's argument that the three quoted lines of the Termination Agreement are enough to preclude Acme from asserting claimed rights to this property.

Under Rule 19(a)(2)(ii) the absent person can be joined if its absence would leave one of the other parties at substantial risk of incurring inconsistent obligations as a result of the claimed interest. Since it is not clear the extent of the rights that Acme has assigned to Federal, it is entirely possible that Defendants could face similar claims from Acme that Federal now asserts against them. Therefore, Acme is a necessary party.

2. Should the action proceed without Acme?

As discussed above, the joinder of Acme as party to this action will destroy diversity jurisdiction. Accordingly the Court must decide whether Acme is indispensable to the action under Rule 19(b) or if in “equity and good conscience” the action should proceed without Acme. The Court has already discussed the lack of clarity in the Assignment. Acme could be prejudiced if this action was to proceed without it. “In an action to determine lease rights, all parties who may be affected by the determination of the action are indispensable.” Fluent v. Salamanaca Indian Lease Authority, 928 F.2d 542, 547 (2d. Cir. 1991). The Court also heeds the admonition that in real property disputes, “a federal court should not hesitate to require joinder of absentees whose interest may be affected by the action or who otherwise are needed for a just adjudication of the dispute”. Likewise, the Defendants could be prejudiced without Acme as a party. If Defendants litigated in this forum, they could be forced to do so again in state court by Acme. It seems clear that having Acme in this case would allow for a more just adjudication of the various claims made against Defendants.

Federal also has an alternative forum. The Court of Common Pleas, Montgomery County, could exercise jurisdiction over all the Defendants. A dismissal in this court will not leave Federal without an opportunity to pursue its claims. Unlike many situations, a state court may be in a better position to entertain a real property action than is a federal court. 7 Wright, Miller & Kane, Federal Practice and Procedure, Civil § 1621 at 304 (2d Ed. 1990). The Court finds that Acme is an indispensable party in this action.

#### **IV. CONCLUSION**

This case must be dismissed because of a lack of subject matter jurisdiction. Federal asserts that it has assumed all of Acme's rights through the American Stores Lease. From the information presented, the Court can not determine the extent to which Acme has assigned its right to litigate against the Defendants for claims similar to those asserted by Federal. Therefore, the Court finds that Acme is indispensable to the just adjudication of this action. If Acme joins this action, the diversity of citizenship between the parties will be destroyed. Therefore, the Court can not exercise jurisdiction and will dismiss the action.

An appropriate Order follows.

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	:	
Plaintiff,	:	CIVIL ACTION
	:	NO. 99-3389
v.	:	
	:	
JUNIPER PROPERTIES GROUP et al.	:	
	:	
Defendants.	:	

**ORDER**

AND NOW, this 21st day of January, 2000, upon consideration of the Defendants' Motions to Dismiss under Rule Fed. R. Civ. P. 12(b)(1) for Lack of Subject Matter Jurisdiction (Docket Nos. 16 &17 ) and the Plaintiff's Response thereto (Docket No. 19), it is hereby **ORDERED** that the Motions are **GRANTED**.

This case may be marked as Closed.

BY THE COURT:

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RONALD L. BUCKWALTER, J.