

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

<b>VP BUILDINGS, INC.</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>JOSEPH A. CAIRONE, INC., et al.,</b>	:	
<b>Defendants/Third-Party Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>E.P. GUIDI, INC.,</b>	:	
<b>Third-Party Defendant.</b>	:	<b>NO. 00-6045</b>

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<b>METRO STEEL, INC.</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>JOSEPH A. CAIRONE, INC., et al.,</b>	:	
<b>Defendants/Third-Party Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>E.P. GUIDI, INC.,</b>	:	
<b>Third-Party Defendant.</b>	:	<b>NO. 01-1033</b>

**Reed, S.J.**

**September 27, 2001**

**MEMORANDUM**

These cases center around a construction project at the Philadelphia International Airport gone awry. Presently before this Court are two identical motions of third-party defendant E.P. Guidi, Inc. (“Guidi”) to compel to arbitration claims brought against it by defendant/third-party plaintiff, Joseph A Cairone, Inc., (“Cairone”) and to stay the proceedings, pursuant to the Federal Arbitration Act, 9 U.S.C. § § 3-4,<sup>1</sup> or, in the alternative to dismiss the claims for lack of

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<sup>1</sup> Guidi does not expressly move this Court to compel claims to arbitration and rather moves this Court to stay proceedings. Upon reading its motion and supporting papers thereto, however, it is clear that Guidi has impliedly requested that the claims be compelled to arbitration.

jurisdiction, pursuant to Federal Rule of Civil Procedure 12 (b) (1) and 28 U.S.C. § 1367 (c), (Civ. A. No. 00-6045, Document No. 14; Civ. A. No. 01-1033, Document No. 14), and the responses of Cairone, plaintiff VP Buildings, Inc. (“VP Buildings”) and plaintiff Metro Steel, Inc. (“Metro Steel”) thereto. For the reasons that follow, the motions to dismiss for lack of subject matter jurisdiction will be granted with leave to plead over; the merits of the motions to compel arbitration will not be reached.

## **I. Background**

On or about February 21, 1999, Guidi and Atlantic Aviation Corporation (“Atlantic Aviation”) entered into an agreement (“prime contract”) whereby Guidi agreed to serve as the Construction Manager for a project which included the erection of two hangers at the Philadelphia International Airport (“the project”). On or about September 29, 1999, Guidi and Cairone entered into an agreement (“subcontract”) whereby Cairone agreed to erect, and possibly supply, two steel hangers and one equipment maintenance building. Sometime thereafter, Cairone entered into two sub-subcontracts. Cairone and VP Buildings entered into an agreement (“sub-subcontract I”) whereby VP Buildings agreed to fabricate and deliver steel building components to the project site. Cairone and Metro Steel entered into an agreement (“sub-subcontract II”) whereby Metro Steel agreed to install certain steel building components at the project.

Construction on the site was originally scheduled to begin on October 6, 1999; however, start up was delayed due to Atlantic Aviation’s decision to eliminate one of the hangers from the project. Atlantic Aviation later reversed this decision. The last minute change caused disruption and delays in the project.

On November 29, 2000, VP Buildings brought suit against Cairone and Liberty Mutual

Insurance Company (“Liberty Mutual”), the issuer of the payment bond on the project, alleging that VP Buildings had not been paid for work it had completed under sub-subcontract I.

Jurisdiction is based on 28 U.S.C. § 1332, as VP Buildings is a Delaware corporation, Cairone is a Pennsylvania corporation and Liberty Mutual is a Massachusetts corporation. Cairone filed an answer, plead affirmative defenses, and brought a counterclaim. On March 1, 2001, Cairone filed a third-party complaint against Guidi, a Pennsylvania corporation, alleging that Guidi is directly liable to VP Buildings, is liable over to Cairone for any award in favor of VP Buildings and against Cairone, and that Guidi is jointly and severally liable to VP Buildings. In addition, Cairone asserts that it had not been paid for work it had completed under the subcontract. Guidi now files this motion.

On March 1, 2001, Metro Steel brought suit against Cairone and Liberty Mutual, alleging that Metro Steel had not been paid for work it had completed under sub-subcontract II. Jurisdiction in that case is also based on 28 U.S.C. § 1332, as Metro Steel is a Delaware corporation. On May 9, 2001, Cairone filed the exact same third-party complaint against Guidi that it had filed in the action brought by VP Buildings. These motions now follow.

## **II. Analysis**

I begin with Guidi’s motions brought under Federal Rule of Civil Procedure 12 (b) (1), for if this Court lacks subject matter jurisdiction, it may not address the merits of the motion brought under the Federal Arbitration Act. Rule 12 (b) (1) allows litigants to bring a factual or facial challenge to a court’s subject matter jurisdiction. See Gould Elec. Inc. v. U.S., 220 F.3d 169, 176 (3d Cir. 2000) (citing Mortensen v. First Fed. Sav. and Loan Ass’n., 549 F.2d 884, 891 (3d Cir. 1977)). In a facial attack, a court may consider only allegations made in the complaint. See id. In a factual attack, a court may look beyond the pleadings. See id. If the defendant raises

no challenge to facts alleged in the complaint, a court may accept such allegations as true. See id. at 177. The plaintiff bears the burden of proving that subject matter jurisdiction exists. See Carpet Group Int’l v. Oriental Rug Importers Ass’n., Inc., 227 F.3d 62, 69 (3d Cir. 2000).

Although not explicitly stated, Guidi appears to bring forth a factual attack but does not bring forth any additional evidence in support of its motion to dismiss.

Guidi contends that this Court lacks subject matter jurisdiction over the claims brought by Cairone against Guidi because there is no diversity of citizenship between these two parties and the requirements of supplemental jurisdiction are not satisfied.<sup>2</sup> The parties appear to agree that Cairone joined Guidi as a third-party defendant under Federal Rule of Civil Procedure 14 (a) which provides:

At any time after the commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff’s claim against the third-party plaintiff.

It is well settled that supplemental jurisdiction exists over a properly brought third-party complaint. See F.D.I.C. v. Bathgate, 27 F.3d 850, 874 (3d Cir. 1994) (a district court has “ancillary jurisdiction ... over additional party defendants to a compulsory counterclaim, or over third party defendants.”) (quoting In re Texas Eastern Transmission Corp. PCB. Contamination Ins. Coverage Litig., 15 F.3d 1230, 1236-37 (3d Cir. 1994) (citing Field v. Volkswagenwerk AG, 626 F.2d 293, 299 (3d Cir. 1980)); King Fisher Marine Serv., Inc. v. 21st Phoenix Corp., 893 F.2d 1155, 1161 (10th Cir. 1990) (“A court has ancillary jurisdiction of a defendant’s proper Rule 14(a) claim against a third-party defendant without regard to whether there is an independent basis of jurisdiction, so long as the court has jurisdiction of the main claim between

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<sup>2</sup> The statutory provision governing supplemental jurisdiction is codified at 28 U.S.C. § 1367 and replaces the former judicially created concepts of pendant and ancillary jurisdiction.

the original parties.”); Morris v. Lenihan, 192 F.R.D. 484, 486-87 (E.D. Pa. 2000); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, § 1444, at 321 (2d ed. 1990) (“The cases on point almost all hold that defendant’s claim against a third-party defendant is within the ancillary jurisdiction of the federal courts.”).

The reasoning behind this rule is quite nicely explained in the practice commentary to 28 U.S.C.A. § 1367, which reads:

Rule 14 of the Federal Rules of Civil Procedure is the procedural rule governing third-party practice (impleader). Its primary role is to permit defendant D to implead third-party defendant X whenever X’s relationship to D is such that D can call on X to indemnify or contribute to D all or part of what D may be held liable for to P, the plaintiff. *D’s impleader claim against X gets ancillary jurisdiction, and nothing in subdivision (b) of § 1367 changes that.*

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In Owen [Equipment & Erection Co. v. Kroger, 437 U.S. 365, 98 S. Ct 2396, 57 L. Ed. 2d 274 (1978)], P of Iowa sued D of Nebraska, who impleaded X, a corporation and a citizen of both Nebraska and Iowa. . . . There was no trouble about jurisdiction for D’s impleader claim against X, even though it lacked diversity: ancillary (now supplemental) jurisdiction supported it. But the doctrine was not allowed to support the claim P attempted to interpose directly against X (which also lacked diversity) after X was impleaded. *That would have been a back door by which plaintiff could secure the equivalent of an otherwise lacking original jurisdiction against given defendant.* Owen closed that back door, and Congress keeps it locked with § 1367(b).

David D. Siegel, Practice Commentary, reprinted in 28 U.S.C.A. § 1367, at 832-33 (West 1993) (emphasis added). See also Viacom Int’l, Inc. v. Kearney, 212 F.3d 721, 727 (2d Cir.), cert. denied, 121 S.Ct. 655 (2000) (“[b]ecause defendants are involuntarily brought into court, their [claims a]re not deemed as suspect as those of the plaintiff, who is master of his complaint”) (alteration in original) (quoting United Capitol Ins. Co. v. Kapiloff, 155 F.3d 488, 493 (4<sup>th</sup> Cir. 1998); Associated Dry Goods Corp. v. Towers Financial Corp., 920 F.2d 1121, 1126 (2d Cir. 1990) (“ancillary jurisdiction should be more readily available to one haled into court against his

or her will than to a plaintiff who has chosen the forum for litigation”) (citing Owen, 437 U.S. at 376).

While supplemental jurisdiction is proper with respect to claims brought under Rule 14(a), what no party hereto addressed in its papers was whether the third-party complaints themselves are proper. Where such a complaint is not properly brought, this Court has no subject matter jurisdiction, and the complaint must be dismissed. See Bathgate, 27 F.3d at 873 (district court may not entertain a third-party complaint where there is no basis for liability between the defendant and third-party defendant); Morris, 192 F.R.D. at 487 (same); Santana Prod., Inc. v. Bobrick Washroom Equip., Inc., 69 F. Supp. 2d 678, 690 (M.D. Pa. 1999) (third-party complaint that does not set forth basis for derivative or secondary liability “is not proper under Rule 14 and thus falls outside of this Court’s ancillary jurisdiction”) (citations omitted); Salisbury Township Sch. Dist. v. Jared M. ex rel. Glenn M., No. 98-6396, 1999 WL 346237, at \*2 (E.D. Pa. June 1, 1999) (because none of third-party defendants could be liable to defendant/third-party plaintiff, entire complaint dismissed *sua sponte*, notwithstanding third-party defendant’s acquiescence to suit). Thus, in determining whether a third-party complaint was properly brought under Rule 14, a court looks to whether the pleadings provide a basis for the third-party defendant’s liability to the defendant/third-party plaintiff. See Morris, 192 F.R.D. at 488.

The purported Rule 14 claims brought in the third-party complaints in these case are identical and assert that:

19. Guidi caused the work performed by Cairone on the Project to be delayed.

20. As a result of the delay caused by Guidi, Cairone has incurred damages in excess of \$250,000.00.

21. Despite demand therefore, Guidi has failed and refused to compensate Cairone for its damages as a result of the delay caused by Guidi.

22. Guidi is directly liable to Plaintiff ... on Plaintiff’s claims against

Cairone as set forth in Plaintiff's Complaint.

23. Guidi is liable over to Cairone for any award in favor of Plaintiff and against Cairone based on the claims set forth in Plaintiff's Complaint.

24. Guidi is jointly and severally liable to Plaintiff in the amount of any award which may be entered against Cairone and in favor of Plaintiff based on the claims set forth in Plaintiff's Complaint.

(Third-Party Compl. at ¶¶ 22-24.) I begin with the assertion in ¶ 22 of the respective complaints that Guidi is directly liable to plaintiffs. It is well settled that a defendant/third-party plaintiff may not implead a person who is or may be liable solely to the plaintiff. See Millard v. Municipal Sewer Auth., 442 F.2d 539, 541 (3d Cir. 1971); Hellauer v. NAFCO Holding Co., LLC, No. 97-4423, 1998 WL 352585, at \*2 (E.D. Pa. June 11, 1998) (citations omitted).<sup>3</sup> Rather, “[A] direct line of liability must be alleged to exist between the third-party plaintiff and third-party defendant independent of that between the first party plaintiff and defendant.” Morris, 192 F.R.D. at 488 (citation omitted). See also Millard, 442 F.2d at 541. Thus, I conclude that the assertion in ¶22 that Guidi is directly liable to plaintiff must be stricken because no claim of direct liability of the third party defendant to plaintiff is permitted and no liability between Cairone and Guidi is alleged in ¶22 of either third-party complaint.

The assertion in ¶ 24 of the respective complaints that Guidi is jointly and severally liable to plaintiff runs into the same problem. From its reading of the plain language of ¶24 this Court is compelled to observe that joint and several liability is most typically alleged in tort actions and involves liability of multiple wrongdoers. See Tilcon Capaldi, Inc. v. Feldman, 249 F.3d 54, 62 (1<sup>st</sup> Cir. 2001). “It means that damages are a single sum specified in the judgment, that each wrongdoer is liable for the full amount, but the wronged party cannot collect under the judgment

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<sup>3</sup> Prior to an amendment in 1946, Rule 14 also permitted the “impleading of a party who is or may be liable to the plaintiff.” Fed. R. Civ. P. 14 advisory committee’s note. That language was deleted from the rule for reasons of efficiency and to prevent collusion between plaintiffs and defendants intended to circumvent limitations on plaintiff’s ability to join third parties. See id.

more than the single sum.” Id. (citing Restatement (Third) of Torts § 20 & cmt. b (Proposed Final Draft (Revised) 1999)) (emphasis omitted). While there is no language in ¶24 invoking a similar principle in contract law, perhaps joint liability in a breach of contract suit does not differ in this respect. Thus, in a joint liability situation, if properly pled and proved, the multiple wrongdoers are ( as pled here by Cairone) each liable to the wronged party (plaintiff) and *not* to each other. A claim for contribution, which is not alleged in either third party complaint before me, denotes an action “by and between jointly and severally liable parties for an appropriate division of payment one of them has been compelled to make.” I therefore conclude that the allegations in the two complaints that Guidi is jointly and severally liable to plaintiff must be stricken because by the allegations of ¶24 claim Cairone has alleged that Guidi is liable directly to plaintiff which is impermissible and there is in ¶24 no claim of any liability on behalf of Guidi to Cairone.

The assertion in ¶ 23 of the respective complaints that Guidi is liable over to Cairone faces a different hurdle. While the allegation does not run into the problem of liability not running between the proper parties, it must also be remembered that Rule 14 does not provide an independent legal basis for a third-party cause of action; it merely provides the procedural mechanism for the assertion of such a claim under recognized substantive law. See Morris, 192 F.R.D. at 488; McCurdy v. Wedgewood Capital Mgmt. Co., No. 97-4304, 1999 WL 554590, at \*2 (E.D. Pa. July 16, 1999). A court must apply the governing substantive law,<sup>4</sup> to determine whether there is a substantive basis for defendant’s third-party complaint. See Morris, 192

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<sup>4</sup>As the parties failed to address the propriety of the third-party complaint, they also did not address the potential conflict of laws issues. Typically, a district court sitting in a diversity case is directed to apply the conflict of law rules of the forum state. See Kirschbaum v. WRGSB Assoc., 243 F3d 145, 150 (3d Cir. 2000). As both Cairone and Guidi are Pennsylvania corporations, it would appear the Pennsylvania law would apply. However, for reasons which will become clear below, this Court need not address this issue at this time.

F.R.D. at 488; Santana Prod., Inc. v. Bobrick Washroom Equip., Inc., 69 F. Supp. 2d 678, 690 (M.D. Pa. 1999). The glaring problem with these two third-party complaints is their utter failure to plead a cause of action. Cairone pleads no common law concept or contract term supporting the notion that a general contractor is liable to its subcontractor for paying claims brought by the sub-subcontractor.

This Court recognizes that the motion before it has been brought under Federal Rule of Civil Procedure 12(b)(1) and not 12(b)(6). This Court is also well aware that the Court of Appeals for the Third Circuit has cautioned against treating a 12(b)(1) motion as a 12(b)(6) motion and reaching the merits of a claim. See Gould Elec. Inc. v. U.S., 220 F.3d 169, 178 (3d Cir. 2000) (citing Kehr Packages, Inc. v. Fidelcor, 926 F.2d 1406, 1409 (3d Cir. 1990)). It is when faced with a 12(b)(6) motion that the court determines whether the complaint states a claim as a matter of law. At the same time, where a complaint fails to state a claim upon which relief can be granted, as is the case here, it is clearly improperly brought as it provides no basis for the third-party defendant's liability to the defendant/third-party plaintiff. Thus, I conclude that the allegation that Guidi is liable over must also be stricken. As this ruling borders on a *sua sponte* 12(b)(6) determination, I will grant Cairone leave to plead over and cure the stated defects if it can, as long as the law, the facts and Rule 11 will allow.

In addition to the claims brought under Rule 14, Cairone also alleges in each third-party complaint that it has not been paid for work done pursuant to the contract between Guidi and Cairone (Count I) and for work done pursuant to change order requests (Count II). If the claims brought under Rule 14 had survived this motion, Cairone may have been possible to invoke jurisdiction for the failure to pay claims under Rule 18. See Schwab v. Erie Lackawanna R.R. Co., 438 F.2d 62, 70 (3d Cir. 1971). See also Schaffler v. McDowell Nat'l Bank of Sharon, Civ.

A. No. 85-558, 1985 WL 17715, at \*2 (W.D. Pa. Oct. 25, 1985) (citing Schwab for proposition that defendant bringing proper third-party complaint under Rule 14 may join any and all claims that arise out of the same transaction or occurrence); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, § 1452, at 414 (2d ed. 1990) (“Once a court has determined that proper third-party claim has been asserted, it should allow joinder of any other claims the third-party plaintiff may have against the third-party defendant.”). Cairone makes a blanket statement that this Court has supplemental jurisdiction over all third-party claims brought pursuant to 28 U.S.C. § 1367, arguing that the claims brought arise out of the same transaction and occurrence as the claims brought by the respective plaintiffs. Cairone, however, never addresses the predicate step necessary to reaching the question of supplemental jurisdiction. Also, it has never alleged in the complaint or argued to this Court under which provision of the contract, statute, rule of law or civil procedure the now stand-alone claim against Guidi for unpaid services is being asserted. I therefore conclude that Cairone has failed to meet its burden under Rule 12(b)(1) in demonstrating that this Court has jurisdiction over the remaining claim in each action.

### **III. Conclusion**

The motions of Guidi to dismiss for lack of subject matter jurisdiction will be granted with leave for Cairone to amend the third-party complaint and fix the defects if the facts and Rule 11 permit. As this Court currently lacks subject matter jurisdiction, I will not address the merits of the motions brought under the Federal Arbitration Act.

An appropriate Order follows.



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

<b>VP BUILDINGS, INC.</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>JOSEPH A. CAIRONE, INC., et al.,</b>	:	
<b>Defendants/Third-Party Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>E.P. GUIDI, INC.,</b>	:	
<b>Third-Party Defendant.</b>	:	<b>NO. 00-6045</b>

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<b>METRO STEEL, INC.</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>JOSEPH A. CAIRONE, INC., et al.,</b>	:	
<b>Defendants/Third-Party Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>E.P. GUIDI, INC.,</b>	:	
<b>Third-Party Defendant.</b>	:	<b>NO. 01-1033</b>

**ORDER**

**AND NOW** this 27<sup>th</sup> day of September, 2001, upon consideration of the two identical motions of third-party defendant E.P. Guidi, Inc. (“Guidi”) to compel to arbitration claims brought against it by defendant/third-party plaintiff, Joseph A Cairone, Inc., (“Cairone”) and to stay the proceedings, pursuant to the Federal Arbitration Act, 9 U.S.C. § § 3-4, or, in the alternative to dismiss the claims for lack of jurisdiction, pursuant to Federal Rule of Civil Procedure 12 (b) (1) and 28 U.S.C. § 1367 (c), (Civ. A. No. 00-6045, Document No. 14; Civ. A. No. 01-1033, Document No. 14), and the responses of Cairone, plaintiff VP Buildings, Inc. (“VP

Buildings”) and plaintiff Metro Steel, Inc. (“Metro Steel”) thereto, and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that:

1. The motions of Guidi to dismiss for lack of subject matter jurisdiction are **GRANTED**.
2. This Court makes no ruling with respect to the motions of Guidi to stay the proceedings, pursuant to the Federal Arbitration Act

**IT IS FURTHER ORDERED** that assuming that the facts and Rule 11 allow, Cairone is **GRANTED** leave to file and serve an amended third-party complaint correcting the deficiencies set forth in the foregoing Memorandum no later than October 29, 2001.

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LOWELL A. REED, JR., S.J.