

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

<b>THE NORWOOD COMPANY</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>RLI INSURANCE COMPANY and</b>	:	
<b>GREAT AMERICAN INSURANCE</b>	:	
<b>COMPANY</b>	:	
<b>Defendants.</b>	:	<b>NO. 01-6153</b>

**Reed, S.J.**

**April 4, 2002**

**MEMORANDUM**

Plaintiff The Norwood Company (“Norwood”), brings this diversity action against defendants RLI Insurance Company (“RLI”) and Great American Insurance Company (“GAIC”) for alleged breach of surety bonds issued by each defendant to non-party Bennett Composites, Inc. (“Bennett”). Presently before this Court is the motion of GAIC to sever plaintiff’s claims (Document No. 15) pursuant to Federal Rules of Civil Procedure 20(a), 21 and 42(b), and the responses of both Norwood and RLI, as well as the reply thereto. For the reasons which follow, this Court will consider the motion as one to sever parties and will grant the motion.

**I. Background<sup>1</sup>**

Norwood hired Bennett, not a party to this litigation, as a subcontractor to produce and install glass fiber reinforced concrete panels for two separate construction projects administered by the same architect in King of Prussia, Pennsylvania. On December 5, 2000, they entered into a subcontract for a project at 935 First Avenue (“935 project”). On March 22, 2001 they entered into a subcontract for a project at 2301 Renaissance Boulevard (“2301 project”). On or about

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<sup>1</sup> The following facts are gleaned from the complaint.

February 26, 2001, Bennett as principal, and GAIC, as surety, issued a performance bond naming Norwood as obligee for the 935 project. GAIC, however, is not the surety for the performance bond issued for the 2301 project. Rather, on or about March 30, 2001, Bennett, as principal, and RLI, as surety, issued a performance bond naming Norwood as obligee for the 2301 project.

Thereafter, Bennett allegedly failed to perform its obligations under each subcontract. The complaint asserts different performance failures for each project. By letter dated August 16, 2001, Norwood declared Bennett in default on the 935 project and demanded that GAIC complete Bennett's work. By letter dated October 22, 2001, Norwood declared Bennett in default on the 2301 project and demanded that RLI either complete Bennett's work or take steps to assure that Bennett would complete its work in accordance with the subcontract. On August 23, 2001, GAIC representatives attended a meeting with Norwood and Bennett, but according to Norwood, took no action thereafter to complete the work. Norwood believes that in late November, 2001, GAIC began investigating the claim. On October 30, 2001, RLI notified Norwood by letter that because the claim was disputed, it would not take action in the matter and therefore denied Norwood's claim. It is alleged that RLI never investigated the matter.

Norwood brought one suit against both sureties, claiming that damages for Bennett's alleged failure to perform under the subcontracts will be over \$150,000 for each subcontract.

## **II. Analysis**

Federal Rule of Civil Procedure 21 provides that:

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Rule 21 is most commonly invoked to sever parties improperly joined under Rule 20. See 7 Charles Alan Wright, *et al.* Federal Practice and Procedure § 1689 at 515 (3d ed. 2001). GAIC characterizes its motion as seeking severance of plaintiff's claim against GAIC from plaintiff's claims against RLI, and not of severing parties. That portion of Rule 21 which refers to claim severance is read in context of Rule 18 which permits multiple claims to be asserted against the *same* party. See Federal Practice and Procedure § 1689 at 515. In other words, claim severance arises where a party wishes to sever multiple claims asserted against it. Here, plaintiff brought one claim against GAIC. Thus, while technically ruling on joinder is tantamount to severing the claims, this motion is more properly construed as a motion to sever the parties.

While Rule 21 is silent as to the actual grounds for misjoinder, it is generally accepted that parties are deemed misjoined when they fail to satisfy the preconditions for permissive joinder as set forth in Rule 20(a). See Federal Practice and Procedure § 1683 at 475. See also Miller v. Hygrade Food Prod. Corp., 202 F.R.D. 142, 144 n.2 (E.D. Pa. 2001); Fong v. Rego Park Nursing Home, No. 95 Civ. 4445 (SJ), 1996 WL 468660, at \*2 (E.D.N.Y. Aug. 7, 1996).

Rule 20(a) reads in relevant part:

All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, and right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Thus, Norwood must show that its claims arise out of the same series of transactions or occurrences and that a question of law or fact common to all joined parties will arise. See Hygrade, 202 F.R.D. at 144; In re Orthopedic Bone Screw Prod. Liab. Litig., MDL 1014, 1995

WL 428683, at \*1 (E.D. Pa. July 17, 1995).<sup>2</sup>

The purpose of Rule 20(a) is to “promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits.” Federal Practice and Procedure § 1652 at 395. See also Mosley v. General Motors Corp., 497 F.2d 1330, 1332 (8<sup>th</sup> Cir. 1974). Permissive joinder falls within the Court’s sound discretion and is to be liberally granted; “[u]nder the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.” United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724, 86 S. Ct. 1130, 1138, 16 L. Ed. 2d 218 (1966). See also Hygrade, 202 F.R.D. at 144. This liberal standard does not mean, however, that parties may never be severed.

Courts generally apply a case-by-case approach in determining whether a particular factual situation meets the same transaction or occurrence test. See Federal Practice and Procedure § 1653 at 409; Mosley, 497 F.2d at 1333. The test mirrors the one applied under Rule 13,<sup>3</sup> whereby: “‘Transaction’ is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their *logical relationship*.” Mosley, 497 F.2d at 1333 (emphasis added) (quoting Moore v. New York

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<sup>2</sup> In addition to acknowledging that severance is determined in the context of Rule 20(a), the parties present an additional multi-factored test for determining severance, relying on Official Committee of Unsecured Creditors v. Shapiro, 190 F.R.D. 352, 355 (E.D. Pa. 2000) in support thereof. A web of citations led this Court to the discovery that the test presented by the parties is ultimately from Hal Leonard Publ’g Corp. v. Future Generations, Inc., No. 93 Civ 5290 (JSM), 1994 WL 163987, at \*2 (S.D.N.Y. Apr. 22, 1994), wherein the court was discussing factors which are to be considered when deciding whether to sever claims under Rule 42(b). That Rule permits the court to order separate trials of any claims or counterclaims. I therefore conclude that the multi-factored test presented by the parties does not apply in considering a motion to sever parties under Rules 20 and 21. I am aware that GAIC has also filed this motion pursuant to Rule 42(b); however, that Rule raises different issues, which, for reasons which follow, will not be addressed by this Court.

<sup>3</sup> Rule 13 concerns counterclaims and cross claims.

Cotton Exchange, 270 U.S. 593, 610, 46 S. Ct. 367, 371, 70 L. Ed. 750 (1926)). See also Hygrade, 202 F.R.D. at 144; Sap America, Inc. v. Zoldan, No. Civ. A. 99-3923, 1999 WL 907569, at \*4 (E.D. Pa. Oct. 18, 1999); MWM Enter., Inc. v. Princeton Energy Partners, Inc., Civ. A. No. 87-0735, 1987 WL 16097, at \*1 (E.D. Pa. Aug. 24, 1987).

In the context of Rule 13, the Court of Appeals for the Third Circuit has offered the following explanation for a logical relationship:

[A] counterclaim is logically related to the opposing party's claim where separate trials on each of their respective claims would involve a substantial duplication of effort and time by the parties and the courts. Where multiple claims involve many of the same factual issues, or the same factual and legal issues, or where they are offshoots of the same basic controversy between the parties, fairness and considerations of convenience and of economy require that the counterclaimant be permitted to maintain his cause of action.

Xerox Corp. v. SCM Corp., 576 F.2d 1057, 1059 (3d Cir. 1978) (quoting Great Lakes Rubber Corp. v. Herbert Cooper Co., 286 F.2d 631, 634 (3d Cir. 1961)) (cited in Federal Trade Comm'n v. Commonwealth Marketing Group, Inc., 72 F. Supp. 2d 530, 540-41 (W.D. Pa. 1999); Hellauer v. NAFCO Holding Co., LLC, No. Civ. A. 97-4423, 1998 WL 352585, at \*5 (E.D. Pa. June 12, 1998)). As summarized by the Court of Appeals: "a detailed analysis must be made to determine whether the claims involve: (1) many of the same factual issues; (2) the same factual and legal issues; or (3) offshoots of the same basic controversy between the parties." Id. Thus, the law in this Circuit demonstrates that the same series of transactions or occurrences prerequisite under Rule 20 essentially consumes the second requirement that there arise a question of law or fact common to all joined parties.

At the heart of this controversy lay different contracts and different construction projects. It is true that Norwood hired the same subcontractor, Bennett, for both projects which were

administered by the same architect, and that the two subcontracts are apparently identical on key points, such as the requirement that Bennett manufacture custom-fabricated Glass Fiber Reinforced Concrete (“GFRC”) panels at its Alabama facility and the requirement that Bennett meet specified standards of the Precast Concrete Institute. In addition, the same managers at both Bennett and Norwood apparently staffed the two projects, and the subcontracts share nearly identical language. The similarities, however, end there.

It is more significant that the alleged defects in the panels for the two projects are dissimilar. The consequence of this key difference is that Bennett’s alleged failure to perform manifested different problems with respect to the two projects. Specifically, Bennett’s panels on the 935 project are alleged to have the following defects: cracks in wall panel flutes and on flat surfaces, cracks and voids in sloping sills below windows, attempted panel repairs of spalls and cracks that do not match adjacent panel color and/or texture, or which are raised up above the panel surfaces, voids in horizontal or vertical flat surfaces and corners, unstable connections of panels to the building, and panels which do not fit with adjacent panels or are misaligned. (Compl. ¶ 46.) The panels on the 2301 project, on the other hand, are alleged to have the following defects: cracks in the GFRC skin, cracks and voids in the drip notch at the bottom of the spandrel panels; voids in flat surfaces and corners, unsatisfactorily attempted repairs to panels, inadequate or questionable consolidation of GFRC backing, irregular surface on bullnose and voids at the junction of bullnose and flat panels, and panel frame structural problems including improperly installed flex anchors. (Id. ¶ 15.) In addition, it is alleged that certain panels in the 2301 project that were to be cast of GFRC were cast as solid concrete units instead, (Id. ¶ 16), and that Bennett also allegedly promised to repair defects, but never actually

performed the repairs, (Id. ¶ 17.) These additional allegations are not made with respect to the 935 project. These distinguishing assertions demonstrate that this Court and the jury will need to examine evidence from the two construction projects independently. The different defects will require different testimony. Therefore, the key question of whether Bennett breached either subcontract will not involve many of the same factual issues, will not promote trial convenience, and will make the jury's task most burdensome if not confusing.

It is equally important that the defendant sureties for these two projects, despite the fact that the performance bonds apparently contain nearly identical language, are simply different entities who entered into to separate performance bonds. According to the complaint, RLI and GAIC did not engage in the same conduct upon being notified that Norwood declared Bennett in default. Specifically, it is alleged that GAIC undertook an investigation, albeit in an untimely manner, of Norwood's claim. RLI, on the other hand, allegedly contacted Norwood by letter, informing Norwood that a dispute had arisen regarding Norwood's claim and therefore RLI would take no further action. In fact, Norwood attempted to pursue a bad faith claim against RLI, which this Court has previously dismissed, because of its alleged utter failure to investigate the matter. These different responses will likewise create different testimony, as well as an additional need to view each transaction separately. Accordingly, the key issue of whether either defendant failed to perform under the respective performance bonds fails to involve many of the same factual issues and fails to encourage the trial efficiency or convenience.

I therefore conclude that the claims asserted against GAIC and RLI fail to share many of the same factual issues and are clearly not offshoots of the same basic controversy between the

parties. The parties were thus misjoined, and I will grant the motion to sever.<sup>4</sup>

I add in closing that RLI does not oppose the motion of GAIC for severance; however, it requests that this Court rule that nothing in this opinion and its accompanying order shall be deemed to prevent RLI from conducting discovery by documents and testimony relating to the 935 project. This Court finds such a request premature and will instead rule on discovery motions if necessary only when and if the Court is required to do so.

### **III. Conclusion**

This Court concludes that the claims asserted by Norwood against RLI and GAIC were not properly joined under Rule 20(a) and will therefore be severed under Rule 21. Having so concluded, this Court declines to discuss the issues raised herein with respect to Rule 42.

The plaintiff will be required to file an amended complaint in Civil Action 01-6153 against RLI Insurance Company and to file a separate action against Great American Insurance Company

An appropriate Order follows.

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<sup>4</sup> The recasting of these dispute into two separate actions does not suggest that there are not economies and management devices to prevent duplicative discovery and to add efficiency to pretrial procedures.

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<b>COMPANY</b>	:	
<b>Defendants.</b>	:	<b>NO. 01-6153</b>

**ORDER**

**AND NOW** this 4<sup>th</sup> day of April, 2002, upon consideration of the motion of Great American Insurance Company to sever the parties (Document No. 15) pursuant to Federal Rules of Civil Procedure 20(a), 21 and 42(b), and the responses of both plaintiff The Norwood Company and defendant RLI Insurance Company thereto, and for the reasons set forth in the foregoing memorandum that the parties were misjoined, it is hereby **ORDERED** that the motion is **GRANTED**.

**IT IS FURTHER ORDERED** that:

1. The action against the defendants is severed into separate claims, and Great American Insurance Company shall forthwith be severed from this civil action.
2. The Norwood Company shall no later than April 26, 2002 file with this Court a new civil action naming Great American Insurance Company as defendant in the same form as the original complaint but eliminating all claims against RLI Insurance Company and designating that new action as related to the instant action pursuant to Local Rule of Civil Procedure 40.1(b) and (c).
3. The Norwood Company shall no later than April 26, 2002 file an amended complaint in the instant action naming RLI Insurance Company as defendant in the same form as the original

complaint but eliminating the bad faith count against RLI Insurance Company and all counts against Great American Insurance Company.

4. Each defendant in each respective case shall file its answer to the newly filed complaints no later than May 10, 2002.

5. The parties shall consult on the issue of case management and may file a stipulation or motion seeking an order consolidating the two cases only for discovery and pretrial management.

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