

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

ROBERT K. WORTON : CIVIL ACTION
 :
 v. :
 :
 FRED DIEKMANN¹ : NO. 96-6366

MEMORANDUM ORDER

Presently before the court is defendant's motion to dismiss for failure to join an indispensable party pursuant to Fed. R. Civ. P. 12(b)(7).

In this diversity action plaintiff seeks to recover from defendant pursuant to a guaranty agreement (the "Guaranty"). Defendant contends that the principal debtors are indispensable parties to this action. The parties agree that joining the principals would destroy diversity of citizenship.

Both the Guaranty and underlying note have choice of law provisions designating Pennsylvania law as the law by which these agreements are to be governed and construed and, accordingly, Pennsylvania law governs this action. See American Air Filter Co., Inc. v. McNichol, 527 F.2d 1297, 1299 n.4 (3d Cir. 1975).

As defendant concedes, Pennsylvania law permits a creditor to enforce his claim against the surety without first proceeding against the principal debtor. See Read v.

1. Defendant points out that he was named improperly as Fred Diekman. The docket will be changed to reflect that the proper spelling of defendant's last name is Diekmann.

Pennsylvania Co. for Ins. of Lives & Granting Annuities, 12 A.2d 925, 927 (Pa. 1940); Meritor Sav. Bank v. Peachtree Assoc., Ltd., 1991 WL 91562, * 2 (E.D. Pa. May 29, 1991); 123 S. Broad St. Corp. v. Cushman & Wakefield, Inc., 121 F.R.D. 42, 43 (E.D. Pa. 1988). See also Downer v. United States Fidelity & Guaranty Co., 46 F.2d 733, 735 (3d Cir. 1931) ("The common law rule is that the plaintiff may sue the surety without first suing the principal, and the surety must pay and seek reimbursement from the principal."). Hence, federal courts applying Pennsylvania law have uniformly concluded that the principal debtor is not an indispensable party to an action against the surety. See Meritor Sav. Bank, 1991 WL 91562 at *2; 123 S. Broad St. Corp., 121 F.R.D. at 43; FinanceAmerica Credit Corp. v. Kruse Classic Auction Co., Inc., 428 F. Supp. 135, 137 (E.D. Pa. 1977).

Defendant nonetheless argues that the principal debtors are indispensable parties to this action because (1) they may have defenses to the enforceability of the underlying obligation of which defendant is not aware, (2) defendant has a claim for contribution and indemnity against them and, (3) defendant will have to pursue further litigation to recover from them should he be found liable in this action. Defendant's arguments are without merit.

Pennsylvania law permits a creditor to sue a surety separately from the principal debtor despite the fact that the surety may have his own claim against the principal which he may have to pursue in a separate proceeding. Defendant offers

absolutely no explanation as to why he cannot ascertain what, if any, defenses the principal debtors may have. It would clearly appear to be in their interest to cooperate with defendant regarding any defense which may exist and in any event, if necessary, they could be deposed in a manner that would allow for an amended answer. That another party may have information from which a defense could be fashioned which is not currently known to defendant does not remotely constitute prejudice within the meaning of Fed. R. Civ. P. 19(b).

ACCORDINGLY, this day of July, 1997, upon consideration of defendant's Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(7) and plaintiff's response thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED**, defendant shall respond to the complaint within twenty (20) days hereof and the caption of this action shall be changed to reflect that the correct spelling of defendant's name is Diekmann.

BY THE COURT:

JAY C. WALDMAN, J.