

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

HOMEAMERICAN CREDIT, INC.	:	CIVIL ACTION
d/b/a UPLAND MORTGAGE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
DALE R. VERMILLION, et al.,	:	
	:	
Defendants.	:	NO. 97-2139

MEMORANDUM

Reed, J.

December 8, 1997

Plaintiff Homeamerican Credit, Inc. d/b/a Upland Mortgage (“Upland”) brought this action against defendants Dale R. Vermillion (“Vermillion”), the Investment Marketing Group, Inc. (“Investment Marketing Group”), Vermillion Consulting, Inc. d/b/a/ Vermillion Consulting, Vermillion Associates, and/or Vermillion Consultants (“Vermillion Consulting”), Chapel Mortgage Corporate (“Chapel Mortgage”), and Richard J. Arbogast (“Arbogast”). In its complaint, Upland alleges a plethora of causes of action under state law arising from the alleged inducement of employees from one mortgage firm to another and the alleged wrongful use of confidential information.

Currently before the Court are two motions to dismiss. I will first consider the motion to dismiss of defendants Chapel Mortgage and Arbogast for lack of subject matter jurisdiction and for failure to join a party under Rule 19 pursuant to Federal Rules of Civil Procedure (1) and (7) (Document No. 12). With respect to the first motion to dismiss, I conclude that the absent parties are necessary and indispensable, thus I will grant the motion and dismiss without prejudice the lawsuit for lack of subject matter jurisdiction. Because

the lawsuit will be dismissed, I need not analyze the second motion of defendants Vermillion and Vermillion Consulting to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) (Document No. 13). Instead, I will dismiss this motion without prejudice as moot.

I. FACTUAL BACKGROUND

The following facts are based upon the well-pleaded allegations of the complaint. See Miree v. DeKalb County, 433 U.S. 25, 27 n.2 (1977); Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). Upland is a retail mortgage business engaged in direct lending to B and C quality borrowers. (Banks and traditional lenders will only lend to A quality borrowers). On two occasions, in November 1995 and March 1996, Vermillion acting by and through Investment Marketing Group and Vermillion Consulting provided consulting services to and conducted seminars for Upland, including training of Upland loan officers, namely Steve Rescigno (“Rescigno”) and Craig Mignon (“Mignon”). Rescigno and Mignon had been valued, standout employees of Upland, each generating average monthly sales in excess of \$420,000.00.

Vermillion began to establish a retail operation in direct competition with Upland. In March 1997, Vermillion induced both Rescigno and Mignon to resign from Upland and commence employment with defendants, which were in direct competition with Upland.¹

It is alleged that both Mignon and Rescigno had known the trade secrets of Upland and removed and converted those trade secrets, including confidential customer

¹ The complaint does not specify by which defendants Rescigno and Mignon were ultimately employed.

information, loan documents and internal sales information, at the behest of and for the benefit of defendants. Upland attaches to its complaint two “Receipt and Acknowledgment of ABFS Employment Handbook” that contains a provision regarding confidentiality of Upland’s trade secrets.² Both Mignon and Rescigno signed their respective documents.

Upland claims against all defendants tortious interference with existing contractual business relations (Count I), tortious interference with prospective contractual business relations (Count II), conversion (Count III), misappropriation of trade secrets (Count IV), unfair competition (Count V), procuring confidential business information by improper means (Count VI), unjust enrichment (Count IX), and civil conspiracy (Count X). Upland is suing Vermillion for breach of fiduciary and/or confidentiality duties (Count VII), and for breach of contract (Count VIII). Particularly relevant to the instant motion is Upland’s request for injunctive relief set forth in a separate count (Count XI). Upland seeks an order that defendants be enjoined from doing business with any customer of Upland, from soliciting or inducing Upland current employees to terminate their employment in favor of defendants or to disseminate trade secrets of Upland, and from “employing [Upland’s] former employees Steve Rescigno and Craig Mignon in any sales or other capacity in which [Upland’s] trade secrets could be utilized by them.” Complaint ¶ 86 (e). Upland also

² Each of these documents contain the following pertinent provision:

I am aware that during the course of my employment confidential information will be made available to me, i.e., customer lists, pricing policies and other related information. I understand that this information is critical to the success of ABFS and must not be disseminated or used outside of ABFS’s premises. In the event of termination of employment, whether voluntary or involuntary, I hereby agree not to utilize or exploit this information with any other individual or company.

(Complaint Exhs. A, B).

requests that defendants and their agents return all documents containing trade secrets.

Upland has subsequently voluntarily dismissed defendant Arbogast (Document No. 14) and defendant Investment Marketing Group (Document No. 29) from the lawsuit.

II. DISCUSSION

A. Failure to Join Necessary and Indispensable Parties

Noticeably absent as named defendants from this lawsuit are employees Rescigno and Mignon. Chapel Mortgage³ contends that Mignon and Rescigno are necessary and indispensable parties to the lawsuit, and because the joinder of Mignon will destroy diversity jurisdiction, the suit must be dismissed.

Federal Rule of Civil Procedure 19 governs the joinder of non-parties to a present lawsuit. Rule 19(a) provides the factors to be considered in determining whether joinder of a party is necessary for a just adjudication of the civil action. Rule 19(a) states 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 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 person be made a party.

³ Although the motion to dismiss was filed by defendants Chapel Mortgage and Arbogast, I will refer only to Chapel Mortgage due to Upland's voluntary dismissal of Arbogast.

Fed. R. Civ. P. 19(a).

If the court determines that joinder is necessary, then the party must be joined if feasible. If joinder of a party is not feasible because the presence of that party will destroy diversity jurisdiction, the court must determine under Rule 19(b)⁴ whether in equity and good conscience the action should proceed without the party or whether the party is indispensable and the action should be dismissed. There is no prescribed formula for determining whether a person is an indispensable party and courts are given substantial discretion when making a determination under Rule 19. See Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 118 & n.14 (1968); Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1608 (1986).

As a preliminary matter, I note that Mignon is allegedly a Pennsylvania citizen. For purposes of the instant motion, I will presume that Mignon is a non-diverse party. Rescigno, however, absent any indication from the parties otherwise, is a diverse party. Thus, Rescigno is subject to the necessary joinder analysis of Rule 19(a), whereas Mignon is subject to both the necessary joinder analysis of Rule 19(a) *and* the indispensable joinder analysis of Rule 19(b).⁵

Chapel Mortgage argues that Rescigno and Mignon are necessary parties

⁴ See infra note 10.

⁵ Upland misstates the law when it says Rule 19(a) is inapplicable when the joinder of the absent party would destroy diversity jurisdiction. (See Pl. Mem. at 3). Rather, a court must engage in a two-step inquiry when a non-diverse party is involved, *i.e.*, a necessary analysis under Rule 19(a) and indispensable analysis under Rule 19(b). See Angst v. Royal Maccabees Life Ins. Co., 77 F.3d 701, 705-06 (3d Cir. 1996); Schulman v. J.P. Morgan Inv. Management, Inc., 35 F.3d 799, 805 (3d Cir. 1994).

under Rule 19(a)(2)(i)⁶ because they have a substantial interest in the subject matter of this action, that being their professional livelihoods, and have no way to protect that interest. Chapel Mortgage cites The Torrington Company v. Yost, a factually similar case, where the court held that the nonjoined party was necessary and indispensable. In that case, a Delaware corporation sued a former employee, who was a citizen of South Carolina, seeking to enjoin his employment with a competitor, also a Delaware corporation, and seeking damages for misappropriation of trade secrets. Torrington, 139 F.R.D. 91, 92 (D.S.C. 1991). On a motion to dismiss by the employee defendant for failure to join the employee's new employer, the court determined that the new employer was necessary due to its employment contract with the employer and "its interest in fulfilling that contract will be adversely affected if [the plaintiff] were granted an injunction." Id. at 93. The court further concluded that the employer was indispensable on the basis that the employee defendant may be forced to breach its contract with the new employer or be subject to inconsistent obligations, that the new employer if not joined could not be prevented from using plaintiff's trade secrets, and the availability of an alternative forum in state court. Id. at 93-94.

Upland relies primarily on two cases, Pasco International (London) Ltd. v. Stenograph Corp.⁷ and Thunder Basin Coal v. Southwestern Public Service,⁸ in its briefs. However, both of these cases deal only with the issue of indispensability under Rule

⁶ Chapel Mortgage does not invoke Rule 19(a)(1) or Rule 19(2)(ii). Therefore, I will limit my analysis to Rule 19 (a)(2)(i).

⁷ 637 F.2d 496 (7th Cir. 1980).

⁸ 104 F.3d 1205 (10th Cir. 1997).

19(b), discussed *infra*, and not whether the parties were necessary under Rule 19(a).

Upland cites no other relevant cases.

The facts demonstrate that Rescigno and Mignon have some type of employment agreement or arrangement with the named defendants. Although the terms of that agreement or arrangement have not been disclosed to the Court, it is likely that, if the injunctive relief requested were granted, thereby limiting the capacity by which defendants may employ Rescigno and Mignon, their employment relationship would be affected. Rescigno and Mignon may be unable to continue their employment, or particular projects therein, in the present manner. No evidence has been submitted regarding whether Rescigno and Mignon are qualified and willing to do work in another capacity for defendants, or even whether such work would be available.

Against this factual backdrop, I conclude that Rescigno and Mignon have an interest in the subject of the lawsuit, that being their employment with defendants in its current form and their interest in the resolution of the charges that they allegedly removed and converted trade secrets. The conduct of Rescigno and Mignon will undoubtedly be a central focus of this litigation. While it is unclear whether a judgment cannot be entered in favor of Upland without a finding that Rescigno and Mignon were involved in the passing along of confidential information, it is clear that such a result is a reasonable likelihood.

The certain involvement of Rescigno and Mignon in this case in the form of depositions and/or live testimony provides a mechanism for Rescigno and Mignon to address the allegations in which they were named. However, appearing as a witness is very different from appearing as a litigant in terms of having an opportunity to influence the

outcome of the action. The latter is better situated for protecting one's interest. While the Court is aware that the interests of Rescigno and Mignon are virtually aligned with the interests of the named defendants who employ them, and while the Court is aware of the possibility that the named defendants who employ them will protect their interest, there is no certainty that the interests of Rescigno and Mignon will be adequately represented. Any argument that Rescigno and Mignon's interest will be protected in their absence is speculative. As well, both Rescigno and Mignon may be saddled with the specter of collateral estoppel or issue preclusion in any subsequent litigation if the case went to a conclusion sought by plaintiff. Therefore, I find that, the absence of Rescigno and Mignon from the lawsuit will impair their ability to protect their interests.

Because I conclude that Rescigno and Mignon are necessary parties under Rule 19(a)(2)(i), the inquiry ceases as to Rescigno. The inquiry pertaining to Mignon, whose presence will destroy diversity, must proceed to determine whether he is indispensable.

2. Indispensability Under Rule 19(b)

To repeat my earlier statement of the law, the primary consideration under Rule 19(b) is whether in equity and good conscience the action can proceed without Mignon. Upland relies heavily on a decision from the Courts of Appeals for the Seventh Circuit that held that the non-joined party was not indispensable. In Pasco International (London) Ltd. v. Stenograph Corp., 637 F.2d 496 (7th Cir. 1980), the plaintiff sued three corporations for breach of contract, interference with contractual relations, and interference with prospective economic relations. Plaintiff, through its chief engineer, began negotiating with the Nigerian

Government to sell a computerized stenographic system. Id. at 499. The chief engineer conspired with one of the defendant corporations to obtain the Nigerian business for that corporation and the chief engineer then became the sales agent for that corporation. Id. Plaintiff sought to enjoin defendant corporation and its agents from, *inter alia*, entering into contracts for stenographic services with the Nigerian Government. Id. at 500. The district court dismissed the suit for failure to join the chief engineer, finding him indispensable. Id.

The Court of Appeals for the Seventh Circuit reversed. It based part of its decision on its finding that there was no prejudice to either the non-joined party or the named parties. The appellate court noted that any injunction against the corporation would bind the chief engineer to the extent of his agency under Rule 65(d) of the Federal Rules of Civil Procedure. Id. at 501. The court stated that Rule 65 “obviously contemplates that agents need not be parties to suits for injunctive relief against their principals” and thus is not a “source of prejudice under the tests of Rule 19(b).” Id. The court also recognized that Rule 24(a) of the Federal Rules of Civil Procedure permits the chief engineer to intervene if the present defendants could not adequately protect his interest. Id. at 502 n.13. With respect to any prejudice of named parties, the court noted that there is no prejudice to the defendant corporations with regard to the possibility of inconsistent judgments in later litigation because they could implead the chief engineer under Federal Rule of Civil Procedure 14. Id. at 503 & n.15. In sum, the Pasco court reasoned that the various Federal Rules of Civil Procedure could be utilized to diminish any potential prejudice suffered by the parties or the non-joined party. Also cited by Upland is Thunder Basin Coal v. Southwestern Public Service, 104 F.3d 1205 (10th Cir. 1997), where the Court of Appeals

for the Tenth Circuit closely followed the reasoning of Pasco.

Chapel Mortgage, however, urges this Court to follow the reasoning of the Torrington case.⁹ Because the Court of Appeals for the Third Circuit, while never expressly rejecting the reasoning in Pasco, has never considered procedural rules for impleader and intervention as undermining a claim of indispensability, and because Torrington is the most factually similar to the case at bar, I am persuaded by the reasoning and application of law to facts in the Torrington case. I will now apply the four factors under Rule 19(b).¹⁰

As to the first factor, while Chapel Mortgage is correct in arguing that the tools provided in the Federal Rules of Civil Procedure could diminish any prejudice that may potentially be suffered either by Mignon or by the remaining defendants, I find that Pasco is distinguishable. The relief sought in Pasco does not implicate the rights and interests of the absent party as severely and critically as the relief sought in the instant case.¹¹ Thus, the

⁹ 139 F.R.D. 91, 92 (D.S.C. 1991).

¹⁰ Rule 19(b) provides:

If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person thus being regarded as indispensable. 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; and *fourth*, whether plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b) (emphasis added).

¹¹ The injunctive relief sought in Pasco consisted of “enjoin[ing] [defendant] and its agents from entering into the contracts for stenographic services with the Nigerian Government and the constituent states of Nigeria. The plaintiff also seeks to enjoin the defendants from making any future false or injurious statements to the Nigerian officials.” Pasco, 637 F.2d at 500. There, the employment relationship between the absent party and his new employer was not affected by the relief sought. By contrast, the relief sought in our case restricts the capacity in which Rescigno and Mignon may be employed by the defendants.

potential impact on and prejudice toward Mignon is greater and more direct and immediate than any potential impact on the absent party, *i.e.*, the chief engineer, in Pasco. And, without having more information regarding the employment agreement between Mignon and the named defendants, I cannot rule out the possibility that the relief sought in the instant lawsuit may result in a breach of that employment agreement, or at least an alteration of that agreement, and thus cause a separate action to eventually emerge between those parties with potentially inconsistent results.

The second factor of Rule 19(b) requires consideration of the shaping of relief to lessen or avoid prejudice. The parties have not suggested any alternative shaping of relief.

Nor have the defendants themselves averted prejudice by impleading Mignon. Nor has Mignon himself avoided prejudice by intervening in the case. I can contemplate no change in the remedy sought other than eliminating it as it pertains to Rescigno and Mignon altogether. This is not a viable option or likely result because relief enjoining Rescigno and Mignon's use of confidential information is a main avenue of recourse for Upland. I find that this factor weighs only slightly in favor of indispensability.

The third factor is whether a judgment rendered in the absence of Mignon may be adequate. This criterion refers to the interest of the courts and the public in resolving disputes completely in a single proceeding. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111 (1968). If Upland prevails in this action, it can be afforded the complete monetary relief that it seeks from the named defendants. The complaint does not seek monetary relief against Mignon. And, the injunctive relief is sought against those

defendants who employ Mignon, and not Mignon directly. However, as mentioned above, it is possible that litigation may emerge at a later point between Mignon and his current employer on essentially the same subject matter present here and an adverse result to Mignon here may harm his position in that litigation both philosophically and legally. I find that this risk of a future lawsuit is uncertain, but conceivable. This factor does not militate heavily in favor of or against indispensability. In the end, it is neutral.

Finally, the fourth factor weighs strongly in favor of indispensability. I see no reason, nor has Upland argued any, why Upland could not effectively file his complaint in a Pennsylvania state court if this action were dismissed for nonjoinder. In fact, Pennsylvania law provides that matters dismissed by a federal court for lack of subject matter jurisdiction may be refiled in the appropriate state court with the date of institution of the federal suit serving as the state court filing date, thereby obviating any statute of limitations problems caused by the dismissal. See Pa. Cons. Stat. Ann. § 5103. And, the early stage of this litigation further diminishes any unfairness caused by dismissal.

Indeed, this action is essentially a tort and breach of contract action, which is highly appropriate for a state forum. No federal interests are invoked and the Court is hard pressed to find any important policy justification to prevent the dismissal of the case.

On balance, I conclude that this case cannot proceed in equity and good conscience without the presence of Mignon.¹²

¹² Earlier I concluded that Rescigno is a necessary party to be joined in this lawsuit. A conclusion that Mignon was not a necessary, indispensable party would have the seemingly unfair, if not bizarre, result of treating two facially similar employees and their similar conduct differently. The equity and good conscience test underlying Rule 19(b) belies this type of outcome.

B. Failure to State a Claim

Because I will dismiss the lawsuit without prejudice, I need not reach the merits of the motion of defendants Vermillion and Vermillion Consulting to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Accordingly, I will deny without prejudice this motion, thus allowing defendants, if they so choose, to raise their arguments again in the appropriate forum.

III. CONCLUSION

For the foregoing reasons, I conclude that this action should be adjudicated in a forum where all affected parties, specifically Rescigno and Mignon, can be present. I conclude that Rescigno and Mignon are necessary parties under Rule 19(a) and Mignon is an indispensable party under Rule 19(b). The joinder of Mignon destroys diversity and thus deprives this Court of subject matter jurisdiction. Accordingly, I will grant the motion of defendants and dismiss the lawsuit without prejudice. In doing so, it becomes unnecessary to rule on the motion to dismiss of defendants Vermillion and Vermillion Consulting. Thus, I will dismiss this motion as moot.

An appropriate Order follows.

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

HOMEAMERICAN CREDIT, INC.	:	CIVIL ACTION
d/b/a UPLAND MORTGAGE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
DALE R. VERMILLION, et al.,	:	
	:	
Defendants.	:	NO. 97-2139

ORDER

AND NOW, on this 8th day of December, 1997, upon consideration of the motion of defendants Chapel Mortgage Corporation and Richard J. Arbogast to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(7) (Document No. 12), and responses of all parties thereto, and for the reasons stated in the foregoing memorandum, it is hereby **ORDERED** that the motion is **GRANTED** and the complaint is **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction subject to the right of plaintiff Homeamerican Credit, Inc., d/b/a Upland Mortgage to refile the action in state court.

IT IS FURTHER ORDERED that the motion of defendants Dale R. Vermillion and Vermillion Consulting, Inc. (Document No. 13) is **DENIED WITHOUT PREJUDICE AS MOOT**.

This case is closed.

LOWELL A. REED, JR., J.