

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

<b>FREEDOM INTERNATIONAL TRUCKS, INC. OF NEW JERSEY,   Plaintiff,</b>	:	<b>CIVIL ACTION</b>
	:	
	:	
<b>v.</b>	:	
	:	
<b>EAGLE ENTERPRISES, INC., ROBERT FERRO, SONYA FERRO and PATRICIA FERRO,   Defendants.</b>	:	<b>NO. 97-4237</b>

**MEMORANDUM ORDER**

**Reed, J.**

**October 5, 1998**

**AND NOW**, this 5th day of October, 1998, upon consideration of the motion of plaintiff Freedom International Trucks, Inc. ("Freedom") to sever the claims against the individual defendants Robert Ferro, Sonya Ferro, and Patricia Ferro (the "Ferros") from the claims against Eagle Enterprises, Inc. ("Eagle") pursuant to Federal Rule of Civil Procedure 21, (Doc. No. 23), the accompanying letter briefs and the response of the Ferros to the motion, after a hearing and arguments thereon and having made the following findings and conclusions, the motion will be granted:

1. This case involves claims against both Eagle Enterprises and the Ferros as well as separate claims against each.<sup>1</sup> After Freedom filed its complaint, however, Eagle

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<sup>1</sup>The claims against all defendants are: breach of contract (Count I); enforcement of check (Count III); fraud (Count IV); civil conspiracy (Count V); piercing the corporate veil (Count VI). The second amended complaint also contains a claim for replevin against Eagle (Count II) and a civil RICO claim against the Ferros (Count VII).

filed for bankruptcy.<sup>2</sup> Freedom now moves to sever its claims against the bankrupt defendant, Eagle, from its claims against the Ferros so it can proceed with its case against them;

2. Federal Rule of Civil Procedure 21 permits a court to add or drop parties to an action when doing so would serve the ends of justice and further the prompt and efficient disposition of the litigation. German by German v. Federal Home Loan Mortg. Corp., 896 F. Supp. 1385, 1400 (S.D.N.Y. 1995). The decision whether to sever a party or claim from an action is within the broad discretion of the district court. Id.; 7 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1689 (1988);
3. A motion to sever pursuant to Rule 21 necessarily requires the Court to consider whether the party is “indispensable” to the litigation, a decision that “must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests.” Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 119 (1968); see also Dental Benefit Management Inc., 153 B.R. 26, 28 (E.D. Pa 1992) (severing bankrupt debtor to allow plaintiff to proceed against co-defendants in civil RICO scheme after determining bankrupt debtor is not indispensable party); Cushman & Wakefield, Inc. v. Backos, 129 B.R. 35, 36 (E.D. Pa. 1991) (severance of bankrupt defendant is proper unless

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<sup>2</sup>On January 30, 1998, Eagle filed a petition for relief under Chapter 11 (Doc. No. 22). On February 26, 1998, the Bankruptcy Court converted Eagle’s Chapter 11 case to a case under Chapter 7 of the Bankruptcy Code. (Id.).

party is indispensable). In opposition to the motion, the Ferros argue that the claims against the Ferros are “inexorably related to the claims against Eagle and, as a result, the resolution of these issues involves Eagle as an indispensable party.” (Def. Brief at 3). In addition, the Ferros assert that there are numerous questions of law and fact common to Freedom’s claims against Eagle and the Ferros and that granting the motion to sever would in fact be a de facto grant of summary judgment on Count VI, piercing the corporate veil.<sup>3</sup> (Id. at 3-4). The Ferros also assert that severing the claims may subject the Ferros to inconsistent judgements in separate actions and would be unduly burdensome. (Id.);

4. Federal Rule of Civil Procedure 19 defines what it means to be an indispensable party by setting forth a “two step inquiry for determining whether an action must be dismissed for failure to join an indispensable party.” Associated Dry Goods Corp. v. Towers Fin. Corp., 920 F.2d 1121, 1123 (2d Cir. 1990); Bank of America Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs., 844 F.2d 1050, 1053-54 (3d Cir. 1988). The first step in determining whether a party is indispensable is found in Rule 19(a), which provides that a party is necessary and therefore must be joined 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

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<sup>3</sup>The Ferros argument is without merit. Simply asserting a claim against the Ferros in no way diminishes the rigorous standard Freedom must meet in proving Count VI.

the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). If a court is satisfied that a party is necessary within the language of rule 19(a), and if the necessary party cannot be joined, then the court “must proceed to the second step of the analysis, which requires it to assess whether or not, in equity and good conscience, the action should proceed in the necessary party’s absence.” Associated Dry Goods, 920 F.2d at 1124. This analysis, contained in Rule 19(b), calls for the court to weigh several factors in determining whether a necessary party’s absence requires dismissal of a case. See Provident Tradesmens Bank & Trust Co., 390 U.S. at 109-11 (discussing four factors outlined in Rule 19(b));

5. Applying the two part test to the instant case, I conclude that the Ferros have not satisfied the preliminary requirement of showing that Eagle is a necessary party as defined in Rule 19(a). A fortiori, I find that Eagle is not an indispensable party under 19(b). See Associated Dry Goods, 920 F.2d at 1123 (“Unless Rule 19(a)’s threshold standard is met, the court need no consider whether dismissal under Rule 19(b) is warranted”); Bank of America Nat’l Trust & Sav. Ass’n, 884 F.2d at 54. First, the absence of Eagle will not prevent relief from being accorded among Freedom and the Ferros. In addition, the Ferros have not established that they will be subject to multiple or inconsistent obligations if Eagle is not a party to this litigation. Although it is true that Freedom’s complaint alleges that Eagle, among other things, breached its contract with Freedom, it is clear that Freedom seeks to

impose personal liability on the individual defendants for their own tortious and intentional conduct. See Westmont Indus., Inc. v. Weinstein, 762 F. Supp. 646, 649 (M.D. Pa. 1989). Indeed, Count VII (civil RICO) of the second amended complaint is directed solely at the Ferros;

6. Moreover, it is well established that Rule 19 does not require the joinder of joint tortfeasors, nor principals and agents, nor persons against whom the defendant may have a claim for contribution. Hall v. Nat'l Serv. Indus., Inc., 172 F.R.D. 157, 159-60 (E.D. Pa. 1997); Westmont Industries, Inc., 762 F. Supp. at 648. Likewise, severance is not precluded simply because the claims against Eagle are related to the claims against the Ferros. Cruzan Terraces, Inc. v. Antilles Ins., Inc., 138 F.R.D. 64, 66 (D.V.I. 1991) (upholding magistrate's order severing claims against solvent individual from claims against insolvent company subject to bankruptcy stay); see also Spencer, White & Prentis Inc. of Conn v. Pfizer, Inc., 498 F.2d 358, 364 (2d Cir. 1974) (fact that counter claim is compulsory does not per se preclude its severance). Thus, whether Eagle is a joint tortfeasor, principal or contributor to an award, it is not an indispensable party for purposes of Freedom's claims against the Ferros;
7. Having decided that Eagle is not an indispensable party, I must now consider whether severing Freedom's claims against the Ferros from those against Eagle is "just." E.I. Du Pont De Nemours & Co. v. Fine Arts Reproduction Co., Inc., 1995 WL 312505 at \*4 (S.D.N.Y. May 22, 1995). To do so I must determine whether severing Freedom's claims would frustrate the underlying automatic stay

provisions of the Bankruptcy Code. Id. I conclude that it would not;

8. The general rule is that the automatic stay of the bankruptcy court does not protect non-bankrupt co-defendants. McCartney v. Integra Nat'l Bank North, 106 F.3d 506, 509-10 (3d Cir. 1997); Dental Benefit Management, Inc., 153 B.R. at 28. The Court of Appeals for the Third Circuit, however, has recognized that in “unusual circumstances” the automatic stay may protect non-bankrupt co-defendants. MaCartney, 106 F.3d at 510. “Unusual circumstances” exist when “there is such identity between the debtor and third-party defendant that the debtor may be said to be the real party defendant and that a judgement against the third party defendant will in effect by a judgment or finding against the debtor” or where the protection of a stay is essential to the debtor’s reorganization efforts. Id. (quoting A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994, 999 (4<sup>th</sup> Cir.), cert. denied, 479 U.S. 876 (1986));
9. Here, no “unusual circumstances” which justify extending the automatic stay to the Ferros have been shown on the record or otherwise. First, because Eagle is in Chapter 7 bankruptcy (liquidation), Eagle is not involved in a reorganization effort which would require the attention of the Ferros in their capacity as officers or directors. Second, there is no evidence that the Ferros personally guaranteed any loans or payments or that proceeding against the Ferros individually will adversely impact the bankrupt estate. Moreover, Freedom is asserting its claims against the Ferros for their personal conduct and not for their conduct as officers and directors of Eagle Enterprises. Thus, the automatic stay does not extend to

the Ferros;

10. In addition, in exercising the Court's discretionary power to sever, I have weighed the competing factors of benefit and prejudice that would result from different courses of action. Cashman v. Montefiore Medical Center, 191 B.R. 558, 563 (S.D.N.Y. 1996). In so doing, I find that the prejudice to Freedom if the proceedings are stalled further, combined with the lack of any clear showing of prejudice to the Ferros, outweighs the potential inefficiencies in discovery or multiple trials. The procedural posture of this case also distinguishes it from many others involving severance. While in some cases the alternative to severance is the joint trial of the claims or parties, here the alternative would be denying Freedom any trial until Eagle's bankruptcy proceedings are resolved. Thus, the potential prejudice to the parties should be given particular weight; accordingly

it is hereby **ORDERED** that the motion of Freedom to sever its claims against the Ferros is **GRANTED** and all claims against Robert Ferro, Sonya Ferro and Patricia Ferro are severed from the action and plaintiff shall proceed with the prosecution of those claims.

**IT IS FURTHER ORDERED** that the individual defendants shall respond to the second amended complaint no later than **October 26, 1998** as previously ordered.

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