

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

FEDERAL REALTY INVESTMENT TRUST, :	:	CIVIL ACTION
Plaintiff, :	:	NO. 00-667
:	:	
v. :	:	
:	:	
JUNIPER PROPERTIES GROUP et al. :	:	
Defendants. :	:	
:	:	

MEMORANDUM

BUCKWALTER, J.

April 18, 2000

This is an action by Plaintiff Federal Realty Investment Trust (“Plaintiff” or “Federal”) in which it seeks to assert its purported right to possession of certain real estate in Bala Cynwyd, Pennsylvania. The Defendants are Juniper Properties Group, a Pennsylvania Partnership, (“Juniper”); Audrey Kaplan and M. David Kaplan, in their capacity as co-executors of the Estate of Myron Kaplan (the “Kaplan Estate”); Audrey Kaplan as an individual who resides in Pennsylvania (“Kaplan”); Firstrust Bank, a Pennsylvania corporation (“Firstrust”) and Schottenstein Stores Corporation, a Delaware Corporation (“Schottenstein”). Federal is a Maryland Real Estate Investment Trust. Its Trustees reside in either Belgium, New York or Maryland, but they are not citizens of either Pennsylvania, Delaware or Ohio. The case is before this Court based on diversity subject matter jurisdiction pursuant to 28 U.S.C. § 1332.

A similar action was commenced before this Court in July, 1999. The action was dismissed by an order dated January 21, 2000 (the “January Opinion”). At the time, the Court

found that ACME, a Delaware corporation with a principal place of business in Pennsylvania, was an indispensable party under Federal Rule of Civil Procedure 19. If ACME were joined as a party, the Court would lose jurisdiction as complete diversity would have been destroyed. Therefore, the Court dismissed the action. The present Complaint was filed on February 4, 2000. Presently before the Court are the Motions to Dismiss of Defendants Juniper and Firsttrust. For the reasons stated below, the Motions are Denied.

I. FACTUAL BACKGROUND

The relevant facts are taken from the Complaint. The disputed real property consists of an ACME retail store and a Firsttrust Bank (together, the “Acme Premises”). The portion of the Acme Premises currently occupied by Firsttrust will be referred to as the “Non-Acme Portion”¹. Federal alleges that it acquired fee simple title of the Acme Premises from Acorn Associates in 1994. (Compl. ¶¶ 9-10). On March 23, 1999, Federal and ACME entered into a ground lease (the “American Stores Lease”) pursuant to which ACME leased from Federal a separate building area located at the Bala Cynwyd Shopping Center on City Line Avenue (“New Premises”). Pursuant to the American Stores Lease, ACME would move from its current retail center in the Acme Premises to a different location in the New Premises. (Compl. ¶ 29-30). As a result of the American Stores Lease, ACME assigned all of its rights, title and interest to any portion of the Acme Premises to Federal. (Compl. ¶ 31).

The Complaint alleges that prior to 1979, the Acme Premises fell under two separate leases. The “Penn Fruit” Lease controlled the portion now containing the ACME retail

1. During the relevant time period (1976-present), the Non-Acme Portion has been occupied by two banks. The first occupant was Bell Savings Bank (“Bell Savings”) and the current occupant is Defendant Firsttrust Bank.

center, whereas the “Bell Savings” lease controlled the Non-Acme Portion. A subsidiary or affiliate of Defendant Schottenstein (“MCP”) subleased the Non-Acme Portion from Newcorp Supermarkets, Inc. (“NSI”) on October 3, 1976 (“the NSI Assignment”). (Compl. ¶¶ 18-19). The NSI Assignment required that MCP accept the Bell Savings sublease subject to all of the terms of the Penn Fruit Lease. One term of the NSI Assignment required the termination of the Bell-Savings Lease in the event the Penn Fruit Lease was terminated. On or about June 29, 1979, NSI entered into an agreement with ACME by which it sold, assigned and transferred to ACME and all of its rights in the Penn Fruit Lease. (Compl. ¶¶ 20-21). In September, 1979, Acorn Associates and ACME entered into a Termination Agreement (“Termination Agreement”) pursuant to which the Penn Fruit Lease was terminated. The Termination Agreement also terminated MCP’s interest in the Non-Acme Portion because of the terms of the NSI Assignment from October, 1976. (Comp. ¶¶ 25-26). Therefore, Federal alleges that as of September, 1979, Defendant Schottenstein’s subsidiary had no interest in the Acme Premises. Acorn and ACME also entered into a lease by which ACME occupied the Acme Premises (the “Acme Lease”). The termination of the Penn Fruit lease and the Bell Savings Lease gave ACME the exclusive right to occupy the Acme Premises.

As a result of the Termination Agreement which extinguished MCP’s interests in the Acme Premises, Defendant Schottenstein’s assignment of all its rights in the Acme Premises to Defendant Juniper in 1989 was invalid. At that time, and continuing through March 23, 1999, only ACME had the right to possess the entire Acme Premises. As part of the Juniper-Schottenstein transaction, Juniper executed a mortgage in favor of Schottenstein on the entire Acme Premises (the “Juniper Mortgage”). The Plaintiff alleges that the Juniper Mortgage was

fraudulently delivered as both parties were aware that Juniper could hold no ownership interest in the property. (Compl. ¶¶ 55-58). Juniper sublet the Non-Acme Portion to Defendant Firstrust on September 22, 1992. Plaintiff claims that as of September, 1979, Schottenstein and Juniper have had no right to collect any rent from the Non-Acme Portion's tenant. (Compl. ¶ 42) In effect, Federal alleges that only Acme has had the right to collect rent from either Bell Savings, or the current occupant, Defendant Firstrust, who occupied the Non-Acme portion.

On or about June 29, 1999, Federal provided written notice to Juniper advising that Juniper did not have the right to either sublease the Non-Acme Portion or to collect rent from any tenant occupying that portion. On October 7, 1999, Federal provided written notice to Firstrust that it did not have the right to lawful possession of the Non-Acme Portion.

The Complaint alleges six causes of action. Count I is for ejectment against Firstrust and Juniper. Count II demands Ejectment with damages for the non-payment of rent from all Defendants. Count III alleges Trespass against all Defendants. Count IV claims Unjust Enrichment against all Defendants except Firstrust. Count V alleges Conversion against all Defendants. Finally, Count VI is an action to quiet title.

Juniper and Firstrust have submitted Motions to Dismiss. Firstrust joins in Juniper's Motion and adds some arguments of its own. Firstrust and Juniper move under Fed. R. Civ. P. 12(b)(1) to dismiss the case for lack of subject matter jurisdiction. They also move to dismiss certain counts of the Complaint, under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

II. LEGAL STANDARD

When deciding to dismiss a claim pursuant to Rule 12(b)(6) a court must consider the legal sufficiency of the complaint and dismissal is appropriate only if it is clear that "beyond a doubt ... the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." McCann v. Catholic Health Initiative, 1998 WL 575259 at *1 (E.D. Pa. Sep. 8, 1998) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The court assumes the truth of plaintiff's allegations, and draws all favorable inferences therefrom. See, Rocks v. City of Philadelphia, 868 F.2d. 644, 645 (3d. Cir. 1989). However, conclusory allegations that fail to give a defendant notice of the material elements of a claim are insufficient. See Sterling v. SEPTA, 897 F.Supp. 893, 895 (E.D. Pa.1995). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d. Cir. 1993). The Court must determine whether, under any reasonable reading of the pleadings, the law allows the plaintiff a remedy. See, Nami v. Fauver, 82 F.3d 63, 65 (3d. Cir. 1996).

In considering a motion to dismiss for lack of subject matter jurisdiction, the person asserting jurisdiction bears the burden of showing that the case is properly before the court at all stages of the litigation. See Packard v. Provident National Bank, 994 F.2d 1039, 1045 (3d Cir. 1993). In reviewing a motion to dismiss for lack of subject matter jurisdiction, the district court must accept as true the allegations contained in the plaintiff's complaint, except to the extent federal jurisdiction is dependent on certain facts. Haydo v. Amerikohl Mining, Inc., 830 F.2d 494, 496 (3d Cir.1987). In determining whether subject matter jurisdiction exists, the district court is not limited to the face of the pleadings. Armstrong World Industries v. Adams,

961 F.2d 405, 410, n.10 (3d Cir. 1992). In assessing a Rule 12(b)(1) motion, the parties may submit and the court may consider affidavits and other relevant evidence outside the pleadings. Berardi v. Swanson Memorial Lodge No. 48 of Fraternal Order of Police, 920 F.2d 198, 200 (3d Cir.1990). When a defendant supports its attack on jurisdiction with supporting affidavits, the plaintiff has the burden of responding to the facts so stated. A conclusory response or a restatement of the allegations of the complaint is not sufficient. International Association of Machinists & Aerospace Workers v. Northwest Airlines, Inc., 673 F.2d 700, 711 (3d Cir.1982).

III. DISCUSSION

A. Diversity Jurisdiction

Pursuant to 28 U.S.C. § 1332, a plaintiff must allege both that the parties are of completely diverse citizenship and that the amount in controversy exceeds \$75,000. Juniper first attacks subject matter jurisdiction by claiming that Federal has not alleged complete diversity. Federal has done that by alleging diverse citizenship of both the Trust itself (Maryland) and its Trustees (Maryland, New York and Belgium). The Defendants are alleged to be citizens (for diversity purposes) of Ohio, Pennsylvania and Delaware. Therefore, assuming that the Trustees are the “real parties in interest” pursuant to Fed. R. Civ. P. 17, Federal has sufficiently alleged diversity jurisdiction.

B. Joinder

As in the prior litigation, the question arises whether ACME is an indispensable party that must be joined. Defendants argue that ACME, a Delaware corporation², is an indispensable party that must be joined. If ACME is joined, complete diversity will be destroyed and the Court can not properly exercise subject matter jurisdiction. The Plaintiff counters that Acme is not an indispensable party that needs to be joined.

Fed. R. Civ. P. 19 determines when joinder of a particular party is compulsory. A court must first determine whether a party should be joined if "feasible" under Rule 19(a).³ See Janney Montgomery Scott v. Shepard Niles, 11 F.3d 399, 404 (3d Cir. 1993). If the party should be joined but joinder is not feasible because it would destroy diversity, the court must determine under Rule 19(b) whether "in equity and good conscience" the action should proceed without the absent party or whether the absent party is indispensable and the action should be dismissed.⁴ See Steel Valley Authority v. Union Switch & Signal Division, 809 F.2d 1006, 1013 (3d Cir.

2. It appears that Acme, incorporated in Delaware, has its principal place of business in Pennsylvania. Assuming this to be true, Acme would be a citizen of both Pennsylvania and Delaware for diversity purposes. 28 U.S.C. § 1332(c).

3. Fed. R. Civ. P. 19(a) provides, 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 the person be made a party.

4. 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; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

1987). If the party is indispensable, the action therefore cannot go forward. Bank of America Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 844 F.2d 1050, 1053-54 (3d Cir.1988).

1. Should Acme be joined as a necessary party?

A party is only necessary under Rule 19(a)(1) if the Court could not make a complete determination of the rights of those already parties to the action without that additional party. See Sindia Expedition, Inc. v. Wrecked and Abandoned Vessel ("Sindia"), 895 F.2d 116, 121 (3d. Cir. 1990). Plaintiff argues that Acme is not a necessary party because it has assigned its entire interest in the property to Federal. Defendants Firsttrust and Juniper claim that Acme is a real party of interest because it retains an interest in the Acme Premises. When all rights to a claim have been assigned, courts generally have held that an assignor no longer may sue. However, when there has only been a partial assignment the assignor and assignee each retain an interest in the claim and can both be real parties in interest. When a defendant is faced with an action by only one of the parties to whom he ultimately may be liable, he may move to join the absent person in order to avoid the burden of multiple lawsuits. See Wright, Miller & Kane, §1545, p. 349-353. Therefore, the Court must determine whether the assignment eliminated Acme's rights to the Acme Premises under its lease with Federal.

The American Stores⁵ Lease reads, in pertinent part:

Tenant [Acme] hereby assigns to Landlord [Federal], without representation or warranty, all of Tenant's right, title and interest, if any, with respect to the Occupied Portion, and Landlord accepts such assignment. Pl. Exh. M, p. 5-6.

5. ACME is an affiliate of American Stores Properties, Inc., a Delaware corporation. For simplicity purposes, the Court will talk of ACME as the party of interest under the American Stores Lease.

Tenant agrees to execute further documentation prepared by Landlord, and reasonably acceptable to Tenant, to further evidence the assignment set forth in the immediately preceding sentence. Pl. Exh. M, p.6.

In the January Opinion, the Court found that it could not read this lease as a complete assignment. Federal has now brought further documentation to the attention of the Court. On February 2, 2000, Federal and ACME entered a Letter Agreement that restated and clarified the American Stores Lease (the “Clarification”). The Clarification allows the Court to read the original American Stores Lease as a complete assignment of rights from ACME to Federal. Therefore, ACME will no longer be able to sue Defendants in order to enforce their rights with respect to the Acme Premises. Accordingly, the Court finds that ACME is not a necessary party.

C. Collusion to Manufacture Diversity Jurisdiction

A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court. 28 U.S.C. § 1359. When determining whether the parties have colluded in order to manufacture diversity jurisdiction, courts consider several factors, including: the assignee's lack of a previous connection with the claim assigned; the remittance by the assignee to the assignor of any recovery; whether the assignor actually controls the conduct of the litigation; the timing of the assignment; the lack of any meaningful consideration for the assignment; and the underlying purpose of the assignment. See, Airlines Reporting Corp. v. S and N Travel, Inc., 58 F.3d. 857, 863 (3d Cir. 1995).

The Court does not find that the Clarification is a “new, after-the-fact” assignment to create diversity jurisdiction. In the January Opinion, the Court found that it could not read the American Stores Lease as extinguishing all of ACME’s rights, including the right to collect rent,

and control litigation. The American Stores Lease had been agreed upon months before the commencement of the Previous Litigation. The timing of the original assignment embodied in the American Stores Lease does not appear to be overly suspicious. The Clarification is obviously a response to the Court's Opinion regarding the ambiguity of the American Stores Lease concerning the assignment of rights. Its timing does not suggest an attempt to collude either.

Also, the assignment between ACME and Federal was part of a business transaction between independent companies. Federal claims to own this land and therefore, has a direct interest in enforcing its rights. ACME, on the other hand, had an interest in avoiding expense and liability when it moves to the New Premises. The Clarification makes clear that ACME no longer has an interest in what Federal may recover from Defendants. There is no evidence that ACME merely assigned to Federal its right to collect. In short, the Court does not find sufficient evidence of collusion between Federal and ACME to manufacture diversity.

D. Estoppel

Defendants argue that Federal should be estopped from asserting its claims because "it knew about the Schottenstein mortgage and about the [Firsttrust's] possession [of the Non-Acme Portion] when it bought the property". The doctrine of equitable estoppel prevents a party from acting differently than the manner in which it induced another party to expect. Novelty Knitting Mills, Inc. v. Siskind, 500 Pa. 432, 457 A.2d 502 (1983). In order to establish the conditions to assert estoppel, the party asserting the estoppel must establish by clear, precise and unequivocal evidence that: (1) the entity intentionally or negligently misrepresented a material fact (silence can be misleading); (2) the other entity knew or had reason to know that

the party would justifiably rely on the misrepresentation; and (3) the party acted to his or her detriment by justifiably relying on the misrepresentation. See Quinn v. Pa. Bureau of Professional & Occupational Affairs, 650 A.2d 1182, 1184 (Pa. Cmwlth Ct. 1994).

At this point in the proceeding, the Court can not say as a matter of law that Federal should be estopped from asserting its claims. Defendants claim that Federal may not assert any claims because it had record notice of an encumbrance on the property. It is true that the Schottenstein Mortgage was recorded at the time Federal became an owner of the Acme Premises in 1994. However, Federal is challenging the legitimacy of the sublease under which the banks, first Bell Savings and then Firstrust, occupied the Non-Acme Portion. (the Bell Savings Lease). Therefore, it is not clear how Federal's alleged knowledge of the mortgage should bar it from making its claims. Secondly, if as Federal alleges, the Defendants have been occupying the Non-Acme Portion without the legal right to do so, it is difficult to see how they have detrimentally relied on Federal. The Court likewise finds that Federal should not be estopped from asserting what had been ACME's rights to collect rent because of estoppel. Defendants are correct that Federal's rights go no farther than ACME's would if it were a plaintiff. However, ACME's failure to bring suit against the moving Defendants does not necessarily suggest that they would be barred from doing so at this point. Therefore, Federal is not estopped from bringing this action.

E. Unjust Enrichment (Count IV)

Federal alleges that Juniper and Schottenstein have been unjustly enriched by receiving rental income from Firstrust and Bell Savings without a legal right to do so. Essential elements of an "unjust enrichment" claim are that benefits were conferred on defendant by

plaintiff, appreciation of such benefits by defendant, and acceptance and retention of benefits under such circumstances that it would be inequitable for defendant to retain benefit without payment for value. Wolf v. Wolf, 514 A.2d 901, 905-06 (Pa. Super. 1996). Unjust enrichment provides a remedy only when the defendant attempts to profit by its own wrong at the expense of another.

Federal has alleged that Juniper knew that it had no ownership interest in the Non-Acme Portion, and that it nevertheless collected rent from Bell Savings and Firstrust. According to the Complaint, this rent was legally due ACME. A plain reading of the Complaint finds that Federal has at least stated that Juniper knowingly collected and appreciated benefits that belonged to another party. If these allegations were true, it would be inequitable for Juniper to retain these rents. At this stage of the proceedings, the allegations are enough to survive a Motion to Dismiss.

F. Action to Quiet Title (Count VI)

This Count arises from Federal's desire to have Juniper's mortgage given to Schottenstein in 1989 declared invalid so that it can have clear title to the Acme Premises. The general rule is that it is procedurally improper to simultaneously commence both an action in ejectment and an action to quiet title regarding the same parcel of real estate. See, Plauchak, 439 Pa. Super. at 162. Ordinarily, the plaintiff in an action to quiet title must be in possession of the land in controversy; if he is out of possession, his sole remedy is an action in ejectment. Grossman v. Hill, 384 Pa. 590, 593, 122 A.2d 69, 71 (1956). However, the rule requiring that plaintiff be in possession to bring an action to quiet title is not absolute. See Sutton v. Miller, 405 Pa. Super. 213, 597 A.2d. 83, 88n.3. An action to quiet title may be brought only where an

action in ejectment will not lie, to determine any right, lien, title or interest in the land or determine the validity or discharge of any document, obligation or deed affecting any right, lien, title or interest in land. Grossman, 122 A.2d at 71; Pa. R. C. P. No. 1061(b)(2). Ejectment, being a possessory action, can be maintained if the plaintiff has a right to immediate possession with the concomitant right to demand that the defendant vacate the land. See Pa.R.C.P. 1061(b)(2) provides that an action to quiet title may be brought 'where an action of ejectment will not lie, Therefore, where an action of ejectment is not available an action to quiet title may be maintained. Brennan v. Shore Brothers, Inc., 380 Pa. 283, 286, 110 A.2d 401, 403 (1955).

In this case, Federal alleges that the Juniper Mortgage was fraudulently made and delivered, and places a lien on the entire Acme Premises. As Federal seeks to have quiet title to the entire Acme Premises and is in possession of the Acme Portion of the Acme Premises, it can bring forth a claim to quiet title. In order to have granted the relief it seeks against Schottenstein and Juniper as to the title to the entire Acme Premises, an ejectment action would not suffice. The ejectment action in Count I seeks to have Firstrust and Juniper, the current possessors, ousted from the Non-Acme Portion. Count VI to quiet title is asking for a different type of relief against at least one Defendant who does not currently possess any of the disputed property. An action in ejectment would “not lie” under these circumstances. Therefore, Count VI will not be dismissed.

IV. CONCLUSION

The Court also declines to strike Federal's request for attorneys fees and punitive damages at this stage of the proceedings. Therefore, the Motions to Dismiss will be denied in their entirety.

An appropriate Order follows.

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	:	
Plaintiff,	:	CIVIL ACTION
	:	NO. 00-667
v.	:	
	:	
JUNIPER PROPERTIES GROUP et al.	:	
	:	
Defendants.	:	
	:	

ORDER

AND NOW, this 18th day of April, 2000, upon consideration of the Defendants' Motions to Dismiss (Docket Nos. 3 & 4) and the Plaintiff's Response thereto (Docket No. 14), it is hereby **ORDERED** that the Motions are **DENIED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.