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

GREAT AMERICAN INSURANCE COMPANY	:	CIVIL ACTION
	:	
v.	:	
	:	
STEPHENS, et al.	:	No. 04-3642

MEMORANDUM

Baylson, J. **February 25, 2005**

I. Introduction

Plaintiff Great American Insurance Company ("GAIC") filed this breach of contract action against Defendants Charles H. Stephens, Floy Stephens, Gary L. Bennett, and Kay Bennett ("Defendants") on August 2, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1332 due to the diversity of citizenship of the parties.

Presently before the Court are: (1) Motions to Dismiss for Lack of Personal Jurisdiction, filed by Defendants Floy Stephens and Kay Bennett, (2) a Motion to Dismiss, or, in the Alternative, to Stay Pending Parallel State Action, filed by Defendants Gary L. Bennett, Kay Bennett, and Charles H. Stephens, (3) Plaintiff's Motion for Summary Judgment, and (4) Defendants' Motions Pursuant to Rule 56(f).

II. GAIC's Complaint

GAIC's complaint alleges the following facts. GAIC is a corporation organized under the laws of the State of Ohio with it principal place of business in Ohio. Defendants are residents of the State of Alabama. Bennett Composites, Inc. ("BCI") is an Alabama Corporation with its principal place of business in Clanton, Alabama.

On December 5, 2000, BCI entered into a contract (the "Contract") with the Norwood

Company ("Norwood"), agreeing to perform construction work in King of Prussia, Pennsylvania, on a project known as 935 First Avenue, King of Prussia, PA (the "935 Project").

On or about February 26, 2001, GAIC as surety issued a performance bond on behalf of BCI as principal in relation to the 935 Project, with a penal limit (i.e. the limit of the surety's liability under the bond) of $391,827.00, naming Norwood as obligee. In consideration for and as a precondition of GAIC issuing the performance bond, Defendants executed an Agreement of Indemnity (the "Indemnity Agreement"). The Indemnity Agreement provides that the Defendants shall indemnify GAIC against any liability and loss, including but not limited to counsel fees and expenses, that GAIC might incur as a result of issuing bonds on behalf of BCI and/or enforcing GAIC's own rights under the Indemnity Agreement. Paragraph 8 of the Indemnity Agreement states:

> That in the event of a claim or suit against the Surety on any such bond or bonds the Principal and Indemnitor shall immediately upon demand deposit with the Surety in current funds an amount sufficient to indemnify the Surety up to the full amount claimed or for which suit is brought.

On or about October 5, 2001, Norwood notified GAIC of BCI's default in completing the 935 Project within the time provided for by the Contract and demanded that GAIC remedy the default pursuant to the terms of the performance bond. GAIC responded to the demand by commencing investigation of Norwood's claims and BCI's defenses, engaging consultants to assist.

BCI objected to the default notice and filed a complaint against Norwood in the state courts of Alabama in November, 2001, alleging breach of contract and requesting damages. Bennett Composites Inc. v. The Norwood Co., et al., Circuit Court of Chilton County, Alabama,

CV 2001 425 (the "Alabama Litigation"). On or about March 15, 2002, the complaint was amended to assert a breach of contract cause of action against GAIC as well, related to GAIC's demand that BCI supply GAIC with funds pursuant to Paragraph 8 of the Indemnity Agreement in relation to litigation instituted by Norwood in this Court. The Norwood Co. v. RLI Ins. Co., et al., No. 01-CV-6153 (the "Performance Bond Litigation").[1] This litigation involved Norwood's claims that BCI defaulted in the performance of the 935 Contract and that the damages sustained by Norwood as a result are compensable under the performance bond.

On May 23, 2002, the Alabama state court entered an order compelling arbitration of the dispute between BCI and Norwood, and an arbitration proceeding occurred before the American Arbitration Association ("AAA") in Plymouth Meeting, Pennsylvania (the "Arbitration"). On July 12, 2002, Magistrate Judge M. F. Angell issued an order staying the Performance Bond litigation pending the result of the arbitration issues. (Docket No. 8, The Norwood Co. v. Great American Ins. Co., No. 02-2435). On January 5, 2004, the AAA found in favor of Norwood, awarding $519,000.00 in relation to the 935 Project.

GAIC's counsel subsequently forwarded a letter dated February 26, 2004, to counsel for BCI and Defendants (the "Demand Letter"). The Demand Letter stated that pursuant to the Indemnity Agreement, BCI and Defendants were required to deposit with GAIC the full penal limit $391,827.00 – as well as the legal expenses and fees incurred by GAIC in investigating Norwood's claims, and in connection with the Alabama Litigation and the Performance Bond Litigation – quoted at $115,614.00. BCI and Defendants refused to deposit the funds, and

[1]Subsequently, Norwood's claims against GAIC were severed from the claims against RLI, and counsel for GAIC and Norwood filed a stipulation of dismissal on July 28, 2004. The Norwood Co. v. Great American Ins. Co., No. 02-2435.

GAIC's Complaint requests judgment against the Defendants in the sum of no less than $425, 365.79, representing the sum of the Settlement ($391, 827.00), the cost of maintaining a irrevocable letter of credit ($6,177.32), attorneys' fees and expenses related the Settlement ($27,361.47). GAIC also requests judgment against Defendants for the amount of attorneys' fees and expenses related to the investigation of Norwood and the Alabama and Performance Bond litigation in an amount no less than $121,268.53, plus an unspecified amount of future attorneys' fees and expenses.

III. Motions to Dismiss for Lack of Personal Jurisdiction

Before the Court are motions to dismiss for lack of personal jurisdiction filed by Defendants Floy Stephens ("Floy") and Kay Bennett ("Kay"). Floy and Kay are both residents of Alabama and deny having any contacts with Pennsylvania. Both were signatories of the Indemnity Agreement, which was executed in Alabama. They argue that the execution of the Indemnity Agreement does not constitute a legitimate basis for this Court's exercise of personal jurisdiction because the agreement: (1) contains no consent to the jurisdiction or venue of this Court; (2) does not refer to or incorporate any such clauses in any other agreements; (3) does not refer to the project in Pennsylvania or to any other project location. Both allege, as Kay's brief states, that the "only extremely weak link to this forum is the fact that, in February 2001, she entered into the Agreement of Indemnity in relation to the Performance Bond for the 935 Project with GAIC, which is an Ohio corporation with its principal place of business in Ohio." (Defendant Kay Bennett's Brief in Support of Motion to Dismiss, p.7).

a. Legal Standard

When a defendant challenges an action for lack of personal jurisdiction, the plaintiff

"need only establish a prima facie case of personal jurisdiction and the plaintiff is entitled to have its allegations taken as true and all factual disputes drawn in its favor." Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 97 (3d Cir. 2004)(citing Pinker v. Roche Holdings Ltd., 292 F.3d 361, 368 (3d Cir. 2002)).

b. Discussion

Federal courts apply the forum state's law to determine whether personal jurisdiction over the defendant is proper. Fed. R. Civ. P. 4(e). Pennsylvania's long arm statute provides for personal jurisdiction over a nonresident "to the fullest extent allowed under the Constitution of the United States." 42 Pa. Cons. Stat. Ann. § 5322(b). Thus, parties with constitutionally sufficient minimum contacts with Pennsylvania are subject to suit in the Commonwealth.

Specific personal jurisdiction over a defendant is proper when the defendant has "purposefully directed his activities at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)(internal citations and quotations omitted). The Court must determine "whether the defendant had minimum contacts with the forum such that it would have reasonably anticipated being haled into court there," and if so, "whether the assertion of personal jurisdiction would comport with fair play and substantial justice." Rotondo Weinreich Enterprises, Inc. v. Rock City Mechanical, Inc., 2005 WL 119571, *2 (January 19, 2005)(quotations and citations omitted).

The Third Circuit has outlined the approach district courts should take in determining whether personal jurisdiction should be exercised in cases involving contracts:

In contract cases, court should inquire whether the defendant's contacts with the

> forum were instrumental in either the formation of the contract or its breach. Parties who reach out beyond [their] state and create continuing relationships and obligations with citizens of another state are subject to the regulations of their activity in that undertaking. Courts are not reluctant to find personal jurisdiction is such instances. [M]odern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

General Elec. Co. v. Deutz AG, 270 F.3d 144, 150 (3d Cir. 2001)(quotations and citations omitted). Purposeful and voluntary contacts by the defendant that give rise to the cause of action justify the exercise of specific jurisdiction.

> [T]he totality of the circumstances, including the parties' prior negotiations, their contemplated future consequences, their actual course of dealing and the terms of the contract must be evaluated in order to determine whether the non-resident is subject to the Commonwealth's forum. It is necessary that the defendant's contacts are purposeful and voluntary and give rise to the cause of action.

Fidelity Leasing Inc. v. Limestone Co. Bd. of Education, 759 A.2d 1207, 1211 (Pa. Super. Ct. 2000)(citations omitted). While the case before us is distinguishable from Deutz and Fidelity in that, here, neither party to the Indemnity Agreement was a Pennsylvania resident, the Third Circuit's statements that the totality of the circumstances of a contract should be considered – including the relationship of the forum to the formation or the breach, any prior negotiations, contemplated future consequences, actual course of dealing, and the terms of the contract – suggests that the fact that the Indemnity Agreement related to the Performance Bond for a construction project in Pennsylvania is not as irrelevant as Floy and Kay suggest.

GAIC argues that Floy and Kay engaged in purposeful conduct directed at Pennsylvania by agreeing, under the terms of the Indemnity Agreement, to "perform all obligations" under the Performance Bond, because these obligations included the construction of the 935 Project in Pennsylvania. Specifically, GAIC asserts that a clear relationship exists between Defendants, the

forum, and the litigation, and that Defendants should have reasonably anticipated being sued in Pennsylvania. To support its position, GAIC relies on two cases in which federal courts have exercised personal jurisdiction over nonresident defendants on the basis of the defendants' execution of a guaranty agreement. National Can Corp. v. K Beverage Co., 674 F.2d 1134 (6th Cir. 1982); Western Franklin Mills Corp. v. FMG, Inc., 1991 WL 126747 (E.D. Pa. 1991).

National Can Corp. involved a "naked minimum contacts case" where the wife of a named shareholder, whose "only relationship to the state is the signing of the guaranty agreement and her marital interest in the [company's] shares," was held to have the necessary minimum contacts with the forum state. The Sixth Circuit found that the wife's economic interest in the transaction was apparent because "[a]ll parties must have recognized the existence of this property interest in that [the wife's] signature[] on the guarantees [was] demanded and received." National Can, 674 F.2d at 1137. The Sixth Circuit therefore held that "guarantees, when signed by a person with an economic interest in the corporation, furnished the necessary minimum contacts." Id.

In Western Franklin Mills Corp., this Court followed National Can and held that where the defendants had signed a guaranty agreement that was a prerequisite for a lease agreement that, they were fully aware, pertained to commercial property in Pennsylvania, specific jurisdiction was proper. "In light of the [defendants'] voluntary acceptance of the agreement, the relationship to Pennsylvania can in no sense be viewed as 'random' or 'fortuitous.'" 1991 WL 126747 *4 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

In other similar cases, judges of this Court have consistently followed National Can and held that "[s]erving as a guarantor may amount to minimum contacts where . . . the guarantor has

a financial interest in the business or person whose obligation it guarantees." Frontier Ins. Co. v. National Signal Corp., 1998 WL 778333 *3 (E.D. Pa. 1998)(citing Hale v. MRM Trucking, Inc., 1991 WL 114829 *2 (E.D. Pa. 1991)). In Frontier, the court held that when the defendants signed, in their individual capacities, the indemnity agreement at issue, and thereby "agreed to indemnify [the plaintiff] for any loss incurred on the performance and payment bonds that guaranteed National's construction work in Pennsylvania," "[t]he Agreement itself is a contact by both of the [defendants] individually with the construction work and therefore with Pennsylvania, and is sufficient to establish specific jurisdiction on a lawsuit arising out of the Agreement." 1991 WL 778333 *3.

> Moreover, performance of the Agreement is centered in Pennsylvania. The very purpose of the Agreement focuses on Pennsylvania. [Plaintiff] entered the Agreement with [Defendants] as security for issuing the performance bonds, which bonds in turn were necessary to enable National to contract to perform the railroad construction work in Pennsylvania. Absent that connection with Pennsylvania, neither party would have entered the Agreement. Performance of the Agreement turned on the execution and completion of the bonded work in Pennsylvania and on [plaintiff's] paying on the bond obligations in Pennsylvania. [Plaintiff] brought this law suit to recover for payments under the Agreement and expenses that it had incurred in Pennsylvania. [Defendants] argue that the contract was not signed or breached in Pennsylvania. However, the question of breach or performance relates to Pennsylvania-focused events. This relationship among Pennsylvania, the parties, and their contract makes it reasonable for the [defendants] to have anticipated being haled into court in Pennsylvania in a dispute over the indemnity Agreement.

Id. at *4 (citing Burger King, 471 U.S. at 474).

Similarly, here, Floy and Kay voluntarily signed the Indemnity Agreement while fully aware that it related to a performance bond for construction of a project in Pennsylvania. Their economic interest in the transaction was apparent in that their signatures of the Indemnity Agreement were demanded and received. As in Frontier, the question of breach or performance

relates to Pennsylvania-focused events. While their contacts with Pennsylvania may be fewer than those of their husbands, their signatures on the Indemnity Agreement are sufficient to demonstrate that Floy and Kay "purposefully directed [their] activities at residents of the forum and the litigation results from alleged injuries that arise out of or relate to those activities." Burger King, 471 U.S. at 472.

Having found the requisite minimum contacts, the Court must consider whether the exercise of specific jurisdiction over Floy and Kay comports with notions of fair play and substantial justice. "To defeat jurisdiction based on this fairness inquiry, a defendant must 'present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.'" Miller Yacht Sales, Inc. v. Smith, 384 F.3d 93, 97 (3d Cir. 2004)(quoting Burger King, 471 U.S. at 476)). To determine whether such a compelling case has been made, courts may consider "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining the most efficient resolution of controversies and the shared interest of the several States in furthering fundamental substantive social policies." Id. (quoting Burger King, 471 U.S. at 477).

Floy has not argued that any other considerations, beyond an alleged lack of minimum contacts, would render jurisdiction unfair or unjust. Kay argues that the burden of defending in Pennsylvania would be substantial, that Alabama – and not Pennsylvania – has an interest in the dispute, and that convenience and judicial economy would be best served by the pursuit of these claims in Alabama, as related claims arising out of the Indemnity Agreement are already at issue in the state proceedings in Chilton County, Alabama.

Neither Floy nor Kay has presented a compelling case that defending against these claims

in Pennsylvania would be a particular burden upon them. As noted above, without any evidence presented to the contrary, courts are reluctant to assume any such burden as "modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." Deutz, 270 F.3d at 150. Moreover, Pennsylvania has an interest in the litigation. As GAIC points out, not only is the 935 Project located in Pennsylvania, but this Court compelled the Arbitration of the dispute between BCI and Norwood, which took place in Pennsylvania, the Settlement Agreement between Norwood and GAIC was executed in Pennsylvania, and GAIC has sustained losses in Pennsylvania for which it seeks indemnification in this action.

Therefore, this Court's exercise of specific personal jurisdiction over Defendants Floy Stephens and Kay Bennett in relation to GAIC's claims is proper, as the requirements of the Pennsylvania long arm statute have been met and such jurisdiction comports with constitutional requirements. Defendants' Motions to Dismiss for Lack of Personal Jurisdiction pursuant to Rule 12(b)(2) are therefore denied.

IV. Motions to Dismiss or To Stay Pending Parallel State Action

Defendants Charles H. Stephens, Gary L. Bennett, and Kay Bennett have filed a motion to dismiss or to stay on the grounds that a parallel state action is pending in the Circuit Court of Chilton County, Alabama, Bennett Composites v. Great American Ins. Co., et al., No. CV 2001-426 (the "Alabama Litigation"). Defendants argue that this Court should abstain from exercising jurisdiction pursuant to Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976) and its progeny, and dismiss the action, or, in the alternative, stay the action pending the conclusion of the state court proceedings. Defendants concede that the parties in the two

actions are not identical – here, Plaintiff's claims are against the Indemnitors individually; in the state court action, they are against BCI. Defendants argue, however, that GAIC's claims here and its counterclaims in the state action both attempt to enforce GAIC's alleged rights under the Indemnity Agreement against the Indemnitors. Pursuant to the Indemnity Agreement, the Indemnitors and BCI, as the Principal, are jointly and severally liable, and Charles Stephens and Gary Bennett are principals of BCI. Defendants argue, therefore, that the issues and the interests of the parties are substantially similar, that the actions are thus parallel, and that judicial economy and convenience weigh in favor of the dismissal or stay of the federal court action.

a. Legal Standard

The Third Circuit has stated that it "is axiomatic that federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them' by Congress," and that "[t]his principle is no less true in cases where . . . there is parallel litigation in a state court." Ryan v. Johnson, 115 F.3d 193, 195 (3d Cir. 1997)(quoting Colorado River, 424 U.S. at 817). In Colorado River, the Supreme Court allowed for the possibility of abstention on the basis of parallel state proceedings, but "only in the exceptional circumstances where the order to repair to the state court would clearly serve an important countervailing interest." Colorado River, 424 U.S. at 813. The presence of such "exceptional circumstances" is determined by considering the following six factors: "(1) which court first assumed jurisdiction over property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained; (5) whether federal or state law controls; and (6) whether the state court will adequately protect the interests of the parties." Id. at 818-19.

b. Discussion

Generally, cases are considered parallel when they involve the same parties and the same claims. Ryan, 155 F.3d at 196. In its counterclaims in the Alabama Litigation, GAIC alleges that BCI has breached the Indemnity Agreement and demands: (1) specific performance from BCI of its obligations under the Agreement of Indemnity, and seeks attorneys' fees, costs and expenses, (2) a judgment against BCI for an amount in excess of $150,000, plus attorneys' fees and expenses, and (3) "a judgment against [BCI] in the nature of a declaratory judgment, costs and expenses, confirming and ordering [BCI] to indemnify GAIC from any and all losses, damages, including attorneys' fees, costs and expenses, which it may incur as a result of the claim made against GAIC on the bonds provided on behalf of [BCI]." (GAIC's Answer and Counterclaim, Alabama Litigation, ¶¶ 7-12).

GAIC does not dispute Defendants' contention that the actions are parallel, and the Court finds that, despite the fact that the parties in the two actions are not identical, the claims in the federal action are essentially the same as in the state action and arise from the same facts, and that the resolution of the state claims would dispose of the claims before the Court. See, e.g., Flint v. A.P. DeSanno & Sons, 234 F. Supp. 506, 510-11 (E.D. Pa. 2002); CFI of Wisconsin, Inc. v. Wilfran Agricultural Indus., Inc., 1999 WL 994021 *2 (E.D. Pa. 1999)("The cases need not be identical, however, there must be a likelihood that the state litigation will dispose of all the claims presented in the federal case."). Therefore, the federal and state proceedings can be considered "parallel" for the purposes of Colorado River abstention.

The Court must therefore turn to the six Colorado River factors to determine if "exceptional circumstances" exist that warrant abstention. The first factor – which court first assumed jurisdiction over property – is neutral as neither the federal nor the state court has

exercised jurisdiction over property. The second factor – the relevant convenience of the federal forum – does weigh slightly in favor of abstention. Defendants are residents of Alabama and thus prefer to defend against the claims in Alabama. However, the federal forum is not entirely inconvenient, because, as mentioned previously, BCI, of which Defendants Charles Stephens and Gary Bennett are principals,[2] has participated in arbitration proceedings before the AAA in Pennsylvania related to the Alabama Litigation.

The third factor – avoiding piecemeal litigation – warrants abstention only where there is a "strongly articulated *congressional policy* against the piecemeal litigation in the specific context of the case under review." Ryan, 115 F.3d at 198 (emphasis in original). There is no such congressional policy present here.

The fourth factor addresses the timing and progress of the two actions. The Alabama Litigation was filed in November, 2001, and amended to include the breach of contract claims against GAIC in March, 2002. GAIC's Answer and Counterclaim were filed on April 8, 2002. The Alabama Litigation was stayed as a result of the Arbitration, is still in the discovery stage, and is apparently set for trial in Spring of 2005.

The action before this Court was filed on August 2, 2004. On January 12, 2005, the Court ordered that Defendants must initiate any discovery within 30 days and that Plaintiffs must do so within 90 days. A pretrial conference has been set for March 16, 2005. While the Alabama Litigation was clearly the first filed, neither action has progressed significantly, and "priority should not be measured exclusively by which complaint was filed first, but rather in

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[2]Defendants Kay Bennett and Floy Stephens are their spouses. It is of course common for an indemnity agreement to require spouses of principals to provide signature so that the indemnity will apply as to jointly held property.

terms of how much progress has been made in the two actions." Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 21 (1983). Therefore the fourth factor does not weigh in favor of abstention.

The fifth factor addresses the source of law. Although the presence of federal issues would clearly militate against abstention, even when a case, such as this one, arises entirely under state law, only truly novel questions of state law will tip the balance toward abstention. Ryan, 115 F.3d at 200. "Although it is possible that some case could involve a skein of state law so intricate and unsettled that resolution in the state courts might be more appropriate," such is not the case here, where GAIC's claim arise under traditional contract law, an area "in which federal courts are called upon routinely to predict state law." Id. Thus the fact that GAIC's breach of contract claims arise under state law does not weigh in favor of abstention.

The final factor – the adequacy of the state court proceedings to protect the parties' rights – is also neutral. Even if both parties' rights could be adequately protected in the state court proceedings, "the mere fact that the state forum is adequate does not counsel in favor of abstention, given the heavy presumption the Supreme Court has enunciated in favor of exercising federal jurisdiction." Ryan, 115 F.3d at 200

Therefore, the Court finds that only one of the Colorado River factors weighs slightly in favor of abstention and thus no exceptional circumstances exist to warrant this Court's abstention. Defendants' Motion to Dismiss or to Stay will be denied.

V. GAIC's Cross Motion for Summary Judgment

GAIC has filed a Cross Motion for Summary Judgment, arguing that no evidence exists which would create a genuine issue of material fact, and that judgment in favor of GAIC is

appropriate as a matter of law. According to GAIC, the fact that Defendants admit that they executed the Indemnity Agreement, and do not contest the fact that GAIC made the settlement payment to Norwood, provides the "conclusive evidence of the fact and extent of the liability of the Indemnitor" provided for in Paragraph 10 of the Indemnity Agreement. Even if this "conclusive evidence" were to be considered only to make prima facie case, the burden would then shift to Defendants to prove that the costs incurred were not recoverable, and according to GAIC, Defendants have presented no evidence to dispute that GAIC is entitled to indemnification for all losses sustained under the Performance Bond.

In their response to Plaintiff's Motion for Summary Judgment, Defendants filed a Cross Motion Pursuant to Rule 56(f), requesting that Plaintiff's Motion be denied on the grounds that it is premature, or in the alternative, that the Court continue GAIC's Motion so that Defendants may obtain affidavits, depositions, and other discovery necessary to Defendants' opposition to the motion.

Rule 56(f) provides that when "it appear[s] from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order as is just." Fed. R. Civ. P. 56(f). The Third Circuit has interpreted Rule 56(f) "as imposing a requirement that a party seeking further discovery in response to a summary judgment motion submit an affidavit specifying, for example, what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not been previously obtained." Dowling v. City of Philadelphia, 855 F.2d 136, 139-40 (3d Cir. 1988).

In support of the Rule 56(f) motion, Defendants have submitted the affidavit of Patricia Clotfelter, an attorney representing Defendants and BCI in the various litigations involving Norwood and GAIC, which states that Defendants have not had an opportunity to conduct discovery with regard to the merits of GAIC's Complaint and that therefore Defendants have not had an opportunity to develop the factual bases of their defenses. According to Clotfelter's affidavit, Defendants deny that they are in breach of the Indemnity Agreement, deny that GAIC has incurred consultant and counsel fees in excess of $120,000, and deny that Defendants are liable to GAIC for the settlement payment to Norwood. (Affidavit of Patricia Clotfelter, p. 5). Defendants also plead affirmative defenses that GAIC breached the duty of good faith and fair dealing and that GAIC is not entitled to recovery under the Indemnity Agreement because GAIC did not act reasonably and in good faith. Specifically, Defendants alleges that the Settlement of the Performance Bond Litigation between GAIC and Norwood was done in bad faith. (Id.). According to the affidavit, Defendants plan to depose, among other individuals, GAIC's corporate representative regarding GAIC's motivation in negotiating and entering into the Settlement Agreement. GAIC argues that BCI has had an opportunity to uncover any such evidence in discovery for the Alabama Litigation, and that such testimony would nevertheless be irrelevant.

Without expressing any opinion as to the merits of Plaintiff's Motion for Summary Judgment or the relevancy of Defendants' proposed discovery, the Court will modify the schedule stated in the order of January 12, 2005. The Court now concludes that discovery shall be focused on the alleged defenses and completed by April 15. Therefore, the Court will grant Defendants' motion under Rule 56(f), delay a ruling on Plaintiff's Motion for Summary

Judgment, and require that Defendants file a substantive response by April 29, 2005. Plaintiff shall file a reply brief within ten days.

V. Conclusion

For the foregoing reasons, the Court denies Defendants' Motions to Dismiss for lack of personal jurisdiction and Motion to Dismiss or to Stay due to pending parallel state action. The Court grants Defendants' motion pursuant to Rule 56(f) and continues Plaintiff's motion for summary judgment.

An appropriate order follows.

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

GREAT AMERICAN INSURANCE COMPANY	:	CIVIL ACTION
	:	
v.	:	
	:	
STEPHENS, et al.	:	No. 04-3642
	:	

ORDER

AND NOW this 25th day of February, 2005 upon consideration of the Motion to Dismiss of Defendant Floy Stephens (Docket No. 3), the Motion to Dismiss of Defendant Kay Bennett (Docket No. 5), the Motion to Dismiss or to Stay of Defendants Gray L. Bennet, Kay Bennett, and Charles H. Stephens (Docket No. 4), and the responses thereto, it is ORDERED that the motions are DENIED.

Upon consideration of the Motion for Summary Judgment of Plaintiff Great American Insurance Company (Docket No. 12) and Cross Motions of Defendants pursuant to Rule 56(f)(Docket Nos. 16 and 17), it is ORDERED that Defendant's Motions are GRANTED and Plaintiff's Motion for Summary Judgment is CONTINUED.

The parties shall complete discovery by April 15, 2005. Defendants shall file a responsive brief by April 29, 2005, and Plaintiff shall file a reply brief within ten days.

BY THE COURT:

/s/Michael M. Baylson
Michael M. Baylson, U.S.D.J.

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