

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

CARNEYS POINT METAL	:	
PROCESSING, INC.,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO. 04-4869
v.	:	
	:	
RECO CONSTRUCTORS, CARBOLINE	:	
COMPANY and STONE & WEBSTER,	:	
INC.,	:	
	:	
Defendants.	:	
	:	
_____	:	
	:	
RECO CONSTRUCTORS,	:	
	:	
Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
INTERNATIONAL FIDELITY	:	
INSURANCE COMPANY,	:	
	:	
Third-Party Defendant.	:	

MEMORANDUM

BUCKWALTER, S. J.

April 6, 2006

Presently before the Court is the Motion of Plaintiff Carneys Point Metal Processing, Inc. and Third-Party Defendant International Fidelity Insurance Company to Strike the Amended Third-Party Complaint of Defendant/Third-Party Plaintiff RECO Constructors, Inc.

(Docket No. 54),¹ Defendant/Third-Party Plaintiff RECO Constructors, Inc.'s Response (Docket No. 61)² and Plaintiff Carneys Point Metal Processing, Inc.'s and Third-Party Defendant International Fidelity Insurance Company's Reply (Docket. No. 70). For the reasons set forth below, Plaintiff Carneys Point's and Third-Party Defendant International Fidelity's Motion is granted.

I. FACTS³

Plaintiff Carneys Point ("Carneys Point") filed a complaint ("original complaint") against Defendant RECO Constructors ("RECO") and Carboline Company on October 15, 2004. After a stipulation extending the time to answer, RECO filed its answer ("original answer") on December 3, 2004. On March 1, 2005, RECO filed a third-party complaint against International Fidelity Insurance Company ("International Fidelity") alleging breach of contract and a performance/payment bond claim.⁴ On May 16, 2005, Carneys Point filed an amended complaint ("amended complaint").⁵ RECO filed its answer ("amended answer") to Carneys Point's amended complaint nearly eight months later on February 1, 2006.⁶ On February 9, 2006, RECO

1. Third-Party Defendants Speros Thomas, Sr. and S.P. Thomas Coatings, Inc. join in the Motion. (Docket No. 60.)

2. Defendant/Third-Party Plaintiff RECO Constructors also responded to Speros Thomas, Sr.'s and S.P. Thomas Coatings, Inc.'s Motion to Strike the Amended Third Party Complaint. (Docket No. 66.)

3. The following is a summary of the facts relevant only to the present Motion.

4. The Court granted RECO leave to file the third-party complaint against International Fidelity on February 28, 2005.

5. The Court granted Carneys Point leave to file an amended complaint on May 16, 2005.

6. Under Federal Rule of Civil Procedure 12(a)(1), RECO's amended answer to Carneys Point's amended complaint is untimely. The Court notes that RECO did not seek leave of Court to file its amended answer nor was a stipulation filed under Local Rule 7.4(b)(2) permitting RECO to file an untimely answer.

filed an amended third-party complaint, naming International Fidelity, the original third-party defendant, and naming S.P. Thomas Coatings, Inc., Speros Thomas Sr. and Ute Thomas,⁷ new third-party defendants. In addition to RECO's original claims against International Fidelity, RECO's amended third-party complaint also alleges breach of contract and an "alter ego-piercing the corporate veil claim" against S.P. Thomas Coatings, Inc., Speros Thomas Sr. and Ute Thomas.

II. DISCUSSION

A. Analysis under Federal Rule of Civil Procedure 14(a) and Local Rule 14.1(a)

The present Motion is governed by Federal Rule of Civil Procedure 14(a).⁸ RECO argues that its amended answer, filed on February 1, 2006, in response to Carneys Point's amended complaint should be deemed its "original answer" for purposes of Rule 14(a), as opposed to its answer filed on December 3, 2004, in response to Carneys Point's original complaint. Therefore, RECO argues that it did not need to seek leave of Court because it filed its amended third-party complaint on February 9, 2006, within 10 days after serving its "original answer."

7. RECO notes that on February 28, 2006 it learned that Ute Thomas is deceased and had no ownership interest in Carneys Point or S.P. Thomas Coatings. Thus, RECO agreed to dismiss the third-party complaint against Ute Thomas. (Docket No. 61 n. 1.)

8. Federal Rule of Civil Procedure 14(a) provides:

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave motion upon notice to all parties to the action.

RECO cites Nelson v. Quimby Island Reclamation District Facilities Corporations, 491 F. Supp. 1364, 1387 (N.D. Cal. 1980), for the proposition that any answer to an amended complaint becomes the “original answer” under Rule 14(a) because it supplants any prior answers. However, “no court in [the Third Circuit] has adopted such a strict interpretation.” Reynolds v. Rick’s Mushroom Servs., Inc., No. 01-3773, 2003 U.S. Dist. LEXIS 22154, * 8 (E.D. Pa. Nov. 17, 2003).⁹ Instead, the Third Circuit allows an answer to an amended complaint to function as an “original answer” only if the amended complaint sets forth new theories of liability. Id. at *9 (citing Oberholtzer v. Scranton, 59 F.R.D. 572, 575 (E.D. Pa. 1972)).

Determining whether RECO’s amended answer to Carneys Point’s amended complaint should be viewed as the “original answer” requires the Court to inspect both the original and amended complaints. Here, the original complaint asserts four counts against RECO: two breach of contract counts, a count for violation of the Pennsylvania Contractor and Subcontractor Payment Act and a count for unjust enrichment. In comparing the amended complaint to the original complaint, Carneys Point added a negligence count, and the corresponding facts, against Stone & Webster, Inc. Except for renumbering the paragraphs and correcting various typographical errors appearing in the original complaint, the claims against RECO in the amended complaint are identical. The amended complaint does not set forth any new theories of liability against RECO.

9. Reynolds rejected the reasoning of Nelson for several reasons: (1) the Nelson court’s interpretation is contrary to the plain text of Rule 14(a); (2) the Nelson court’s rule provides a disincentive for plaintiffs to file amended complaints and, (3) the Nelson court’s rule provides a disincentive for defendants to seasonably implead. Reynolds, 2003 U.S. Dist. LEXIS 22154 at *9-10.

Therefore, the Court will use the filing date of the original complaint, October 15, 2004, and RECO's original answer on December 3, 2004, for purposes of Rule 14(a). Because RECO filed its amended third-party complaint more than ten days after filing its original answer, pursuant to Rule 14, RECO's amended third-party complaint is untimely.

Also relevant to the Court's analysis is Local Rule 14.1(a) of the United States District Court for the Eastern District of Pennsylvania.¹⁰ Similar to the Court's analysis under Federal Rule of Civil Procedure 14(a), the Court will use the filing date of the original complaint, October 15, 2004, and RECO's original answer on December 3, 2004. RECO's amended third-party complaint was filed on February 9, 2006, more than ninety days after service of RECO's original answer. Because RECO filed its amended third-party complaint more than ninety days after service of its original answer, the Court finds that pursuant to Local Rule 14.1(a), RECO's amended third-party complaint is also untimely.

In determining whether to permit the untimely filing of a Third Party Complaint, the Court should generally consider: (1) the possible prejudice to Plaintiffs; (2) the potential for complication of issues at trial; (3) the probability of trial delay; and (4) the timeliness of the attempt to join third parties. Con-Tech Sales Defined Benefit Trust v. Cockerham, 715 F. Supp. 701, 704 (E.D. Pa. 1989). RECO bears the burden of demonstrating that the delay in filing the

10. Local Rule 14.1(a) of the United States District Court for the Eastern District of Pennsylvania provides:

Applications pursuant to Fed. R. Civ. P. 14 for leave to join additional parties after the expiration of the time limits specified in that rule will ordinarily be denied as untimely unless filed not more than ninety (90) days after service of the moving party's answer. If it is made to appear to the satisfaction of the court, that the identity of the party sought to be joined, or the basis for joinder could not with reasonable diligence have been ascertained within said time period, a brief further extension of time may be granted by the Court in the interests of justice.

amended third-party complaint was justified. Zielinski v. Zappala, 470 F. Supp. 351, 353 (E.D. Pa. 1979).

First, the Court finds that adding new parties to this action would prejudice Carneys Point by increasing the inconvenience and cost of this litigation. After four amendments to the discovery plan, fact discovery ended March 3, 2006. RECO already served eight new sets of written discovery, seeking records for the last seven years.¹¹ Undoubtedly, additional depositions will also be required also resulting in an increase in inconvenience and cost.

Second, the Court finds that RECO's third-party amended complaint would complicate the issues at trial. RECO itself states that "this is a breach of contract/breach of warranty case." (RECO's Resp. at 2.) As Carneys Point notes, the new claims "will require testimony and evidence on how the corporate affairs of Carneys Point and S.P. Thomas have been conducted . . . matters that have nothing to do with whether the painters employed by Carneys Point in 2003 properly applied the Plasite 7156 to the two water tanks in accordance with the specified coating procedure." (Carneys Point/International Fidelity's Reply at 5.)

Third, trial would undoubtedly be delayed. Although there is no trial date set, fact discovery ended March 3, 2006, and expert reports are due shortly. RECO argues that the trial would not be delayed because it already served the additional discovery required of the newly joined parties. (RECO's Resp. at 6.) Yet, as noted above, the additional discovery is extensive and will likely result in additional amendments to the discovery plan.

11. Carneys Point and International Fidelity did not respond to this new discovery because it was not due until after the end of the fact discovery period. (Carneys Point/ International Fidelity's Reply at 4 n.2.)

Fourth, the Court has already deemed RECO's third-party amended complaint untimely pursuant to Federal Rule 14(a) and Local Rule 14.1(a). RECO argues that the delay was justified because International Fidelity "only recently disclosed that the bond is unsecured" and "as such, it is likely that Speros Thomas, Sr. and anyone who jointly owns assets with him signed a personal pledge to indemnify [International Fidelity] and satisfy any claim against it." Id. at 2. Yet, RECO likely learned the basis for amending its third-party complaint quite some time ago. Not only has it been fifteen months since the commencement of this action, RECO itself concedes that "the parties joined are all intimately related to Carneys Point and have in some way been active participants in this litigation from day one." Id. at 5. RECO also took the depositions of Carneys Point's witnesses and received a production of documents from Carneys Point and International Fidelity many months ago.

RECO also argues that failure to join the parties "would be a waste of resources of all parties and the Court." Id. at 6. Although one policy underlying Rule 14 is to avoid "circuitry of action" and settle related matters in one suit, Scott v. Walter Kidde Portable Equip., Inc., No. 02-1460, 2002 U.S. Dist. LEXIS 15337, at *1 (E.D. Pa. Aug. 12, 2002), the Court concludes that the factors discussed above outweigh these concerns. Accordingly, Plaintiff Carneys Point and Third-Party Defendant International Fidelity's Motion to Strike is granted.

B. Analysis under Federal Rule of Civil Procedure 15(a)

Alternatively, the counts in RECO's amended third-party complaint pertaining to International Fidelity are governed by Federal Rule of Civil Procedure 15(a).¹² International

12. Federal Rule of Civil Procedure 15(a) states:

(continued...)

Fidelity filed its answer to RECO's original third-party complaint on March 23, 2005. Thus, leave of court was necessary for RECO to amend its third-party complaint against International Fidelity. Although Rule 15(a) states that "leave shall be freely given when justice so requires," even if RECO had requested leave to file its amended third-party complaint, leave would have been denied for the reasons set forth above.

III. CONCLUSION

For the foregoing reasons, the Motion of Plaintiff Carneys Point Metal Processing, Inc. and Third-Party Defendant International Fidelity Insurance Company to Strike the Amended Third-Party Complaint of Defendant/Third-Party Plaintiff RECO Constructors, Inc. is granted.

An appropriate order follows.

12. (...continued)

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

CARNEYS POINT METAL
PROCESSING, INC.,

Plaintiff,

v.

RECO CONSTRUCTORS, CARBOLINE
COMPANY and STONE & WEBSTER,
INC.,

Defendants.

CIVIL ACTION NO. 04-4869

RECO CONSTRUCTORS,

Third-Party Plaintiff,

v.

INTERNATIONAL FIDELITY
INSURANCE COMPANY,

Third-Party Defendant.

ORDER

AND NOW, this 6th day of April, 2006, upon consideration of the Motion of Plaintiff Carneys Point Metal Processing, Inc. and Third-Party Defendant International Fidelity Insurance Company to Strike the Amended Third-Party Complaint of Defendant/Third-Party Plaintiff RECO Constructors, Inc. (Docket No. 54),¹ Defendant/Third-Party Plaintiff RECO

1. Third-Party Defendants Speros Thomas, Sr. and S.P. Thomas Coatings, Inc. join in the Motion. (Docket No. 60.)

Constructors, Inc.'s Response (Docket No. 61)² and Plaintiff Carneys Point Metal Processing, Inc.'s and Third-Party Defendant International Fidelity Insurance Company's Reply (Docket. No. 70), it is hereby **ORDERED** that Plaintiff Carneys Point and Third Party Defendant International Fidelity's Motion is **GRANTED**.

The Court hereby **STRIKES** the Amended Third-Party Complaint of Defendant and Third-Party Plaintiff RECO Constructors. The Clerk of Court shall mark this pleading as **STRICKEN** from the case docket.

BY THE COURT:

s/ Ronald L. Buckwalter, S. J.
RONALD L. BUCKWALTER, S.J.

2. Defendant/Third-Party Plaintiff RECO Constructors also responded to the Speros Thomas, Sr. and S.P. Thomas Coatings, Inc.'s Motion to Strike the Amended Third Party Complaint. (Docket No. 66.)