

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

METAL SALES & SERVICE, INC.

v.

SAFECO INSURANCE COMPANY OF
AMERICA

CIVIL ACTION

NO. 99-849

M E M O R A N D U M

Broderick, J.

April 29, 1999

Presently before the Court is a motion brought by Defendant Safeco Insurance Company of America ("Safeco") pursuant to Fed.R.Civ.P. 14(a) for leave to file a third-party complaint against The Clark Construction Group, Inc ("Clark"). Plaintiff Metal Sales & Service ("Metal Sales") has filed a response in opposition to Defendant's motion, and Defendant has filed a reply in further support of its motion. For the reasons stated below, the Defendant's motion for leave to file a third-party complaint will be denied.

Defendant Safeco is a surety who issued a payment bond on behalf of its principal, C.J. Rush/Rovico ("Rush"), in connection with a construction project in Washington D.C. Rush, in turn, agreed to indemnify Safeco for any payments made on claims against the bond. Plaintiff Metal Sales was a subcontractor to Rush and seeks to recover monies against the bond for work, labor

and services provided by it to Rush.

The general contractor for the construction project was Clark. Rush entered into a contract with Clark to provide a portion of the work which Clark had contracted to perform for the owner of the project, The Manufacturers Life Insurance Company, Real Estate Division. Rush in turn entered into a subcontract with Metal Sales, the Plaintiff in this case, whereby Plaintiff agreed to perform part of the work which Rush had agreed to perform as a subcontractor for Clark. Plaintiff claims it was required to perform work outside of the scope of its contract with Rush and is therefore entitled to extra compensation from Rush, pursuant to its contract with Rush. Defendant contends that to the extent the work was outside the scope of the Rush-Metal Sales contract, it was also outside the scope of the Clark-Rush contract. Based on an "equitable adjustment" clause governing work outside the scope of the Clark-Rush contract, Defendant contends that Rush is entitled to indemnification from Clark for any additional amounts Rush owes to Plaintiff. Rush has in turn agreed to indemnify Defendant Safeco, and on this basis, Defendant Safeco now seeks leave to file a third-party complaint against Clark.

Rule 14(a) of the Federal Rules of Civil Procedure provides that 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." Fed.R.Civ.P. 14(a). The Rule requires leave of the Court where, as in the instant case, the third-party complaint is not served within ten days of serving the original answer. Id. "A third-party claim maybe asserted under Rule 14(a) only when the third party's liability is in some way dependent on the outcome of the main claim, or when the third party is secondarily liable to defendant." Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1446.

In the instant action, the issue of Clark's liability to Safeco is not dependant on the outcome of Plaintiff's claims against Safeco, nor is Clark secondarily liable to Safeco. The issue of whether Safeco has a right to be indemnified by Clark is an entirely different issue than whether Rush agreed to pay Metal Sales for additional work. If Rush did agree to pay Metal Sales for additional work, then Plaintiff has a cause of action against Safeco on the bond. However, Clark only owes Rush what was required under its contract with Rush. Whether Clark requested additional work of Rush, and whether Rush has a right to recover from Clark for that work, is an entirely different matter which is unrelated to Plaintiff's claims against Safeco.

Thus, under Rule 14(a), impleader is not proper in this case because the issue of Clark's liability to Safeco is not dependant on the outcome of Plaintiff's claims against Safeco, nor is Clark secondarily liable to Safeco.

For the reasons stated above, Defendant's motion for leave

to file a third-party complaint will be denied.

An appropriate Order follows.

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O R D E R

AND NOW, this 29th day of April, 1999; Defendant Safeco Insurance Company of American having brought a motion for leave to file a third-party complaint; Plaintiff Metal Sales & Service, Inc., having opposed the motion; for the reasons stated in this Court's accompanying memorandum;

IT IS ORDERED: Defendant's motion for leave to file a third-party complaint is **DENIED**.

RAYMOND J. BRODERICK, J.