

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

V-TECH SERVICES, INC.	:	February Term, 2001
Plaintiff,	:	
	:	No. 1291
v.	:	
	:	Commerce Program
MURRAY MOTORS CO., INC. t/a	:	
MURRAY DODGE and,	:	Control No. 080178
	:	
U.S. MUNICIPAL SUPPLY INC.,	:	
Defendants.	:	

ORDER

AND NOW, this 11th day of October, 2001, upon consideration of the Preliminary Objections of Defendant U.S. Municipal Supply Inc., (“U.S. Municipal”) to the Second Amended Complaint of Plaintiff V-Tech Services, Inc. (“V-Tech”) and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

1. The Preliminary Objection requesting that the Second Amended Complaint be stricken for pleading against an additional defendant is DENIED.

2. The Preliminary Objection asserting legal insufficiency of a civil conspiracy pleading is OVERRULED.

3. Plaintiff’s request for leave of court to amend the captions to Count II (Fraud) and Count VI (Misrepresentation) of its Second Amended Complaint to include U.S. Municipal is GRANTED, and therefore, Plaintiff shall file its Third Amended Complaint within twenty (20) days of this order.

BY THE COURT

JOHN W. HERRON, J.

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U.S. MUNICIPAL SUPPLY INC.,	:	
Defendants.	:	

MEMORANDUM OPINION

Defendant U.S. Municipal Supply Inc., (“U.S. Municipal”) filed these Preliminary Objections to the Second Amended Complaint of Plaintiff V-Tech Services, Inc. (“V-Tech”). For the reasons stated below, the preliminary objection of U.S. Municipal requesting that the Second Amended Complaint be stricken for pleading against an additional defendant is denied. Furthermore, the preliminary objection asserting legal insufficiency of a civil conspiracy pleading is overruled.

BACKGROUND

This matter arises as a result of the purchase by V-Tech of four snow removal trucks from defendant Murray Dodge for work to be done under a snow removal contract V-Tech had with Southeastern Pennsylvania Transport Authority (“SEPTA”). As part of the sale, V-Tech also alleges that there was a promise by defendant Murray Dodge that U.S. Municipal would service the vehicles. However, once purchased, there arose complications with the trucks. As a result, V-Tech was unable to complete the snow removal for SEPTA and therefore lost its contract. Furthermore, V-Tech alleges

that it suffered additional losses when defendants failed to properly service and repair all the trucks.

On February 13, 2001, V-Tech commenced an action against Murray Dodge. Thereafter, defendant Murray Dodge joined U.S. Municipal as an Additional Defendant. As a result of preliminary objections filed by both defendants Murray Dodge and U.S. Municipal, V-Tech filed its First Amended Complaint. After another set of preliminary objections by both defendants, V-Tech, on July 16, 2001, filed its Second Amended Complaint stating claims of breach of contract, fraud, breach of warranty, breach of warranty of fitness, and misrepresentation against defendant Murray Dodge. The Second Amended Complaint also contains a claim of civil conspiracy against both defendants Murray Dodge and U.S. Municipal.¹ U.S. Municipal then timely filed these preliminary objections.

DISCUSSION

I. The Court Denies the Preliminary Objection Requesting that the Amended Complaint Be Stricken for Pleading Against an Additional Defendant.

U.S. Municipal contends that since it was made a party to this action by defendant Murray Dodge, and not V-Tech, Pa.R.C.P. 2255(b) prevents V-Tech from filing any additional pleadings against U.S. Municipal. This court disagrees because Pa.R.C.P. 2255(b) is inapplicable here.

Under Pa.R.C.P. 1007, a party is entitled to commence an action either by a praecipe for a writ of summons, or a complaint. “Where a praecipe for a writ of summons is issued for one defendant but not another, the action commences against the first defendant when the praecipe is issued and against the second [defendant] when the complaint is served.” 2 Standard Pa. Practice 2d 8:6; see also

¹In its reply to U.S. Municipal’s Preliminary Objections, V-Tech requests leave of court to amend its complaint and add U.S. Municipal to the captions of Count II (Fraud) and Count VI (Misrepresentation). This court grants plaintiff’s request to amend the captions of Count II (Fraud) and Count VI (Misrepresentation) to include U.S. Municipal.

Ritter v. Pendergrass et al, 514 A.2d 930 (Pa.Super. 1986). Then, “[o]riginal process shall be served... within thirty days after the issuance of the writ or the filing of the complaint.” Pa.R.C.P. 401(a). Thereafter a party may file preliminary objections to any pleading. Pa.R.C.P 1028(a). Moreover, Pa.R.C.P. 1028(c) allows for a party to amend its complaint within twenty days after service of a copy of the preliminary objections. When an amended complaint is filed, it ends all prior pleadings, takes the place of the original pleading and allows for new preliminary objections to be filed. Skelton v. Lower Merion TP., 318 Pa. 356, 358, 178 A. 387, 388 (1935); Vetenshtein v. City of Philadelphia, 755 A.2d 62, 67 (Pa.Commw.Ct. 2000) (“when an amended complaint is filed it withdraws the original complaint and takes the place of the original pleading...”). “The decision whether to allow an amendment is within the discretion of the trial court, but such discretion is not unfettered.” Burger v. Borough of Ingram, 697 A.2d 1037, 1041 (Pa.Commw.Ct 1997) (citing to Mistick Inc., v. City of Pittsburgh, 646 A.2d 642 (1994)). “Amendments are to be liberally permitted except where surprise or prejudice to the other party will result, or where the amendment is against a positive rule of law.” Id (citing to Berman v. Herrick, 424 Pa. 490, 227 A.2d 840 (1967)).

Pa.R.C.P. 2255(b) does not apply here because U.S. Municipal is an original defendant to the Second Amended Complaint and not an additional defendant. On February 13, 2001, V-Tech originally commenced this action by filing a writ of summons listing only Murray Dodge as defendant. Of course, U.S. Municipal was not served a copy of this writ since it was not a party to this original writ of summons. However, on or about April 24, 2001, V-Tech commenced its action against U.S. Municipal by filing its original Complaint which not only included Murray Dodge, but also U.S. Municipal as defendants. Accordingly, a copy of this original complaint was properly and duly served upon U.S. Municipal on May 14, 2001. After the timely filing of preliminary objections by both U.S.

Municipal and Murray Dodge, V-Tech filed the First Amended Complaint and then properly served U.S. Municipal and Murray Dodge. This First Amended Complaint had the effect of rendering all prior preliminary objections to the previous complaint moot. This is also true of V-Tech's Second Amended Complaint filed and served upon the defendants after their preliminary objections to the First Amended Complaint. Since the Second Amended Complaint takes the place of the original pleading, it is the Second Amended Complaint to which this court now looks.

The argument that Rule 2255(b) bars V-Tech from pleading against U.S. Municipal after U.S. Municipal had already been joined by Murray Dodge is unpersuasive. To begin with, as mentioned above, V-Tech was entitled to commence an action against Murray Dodge by writ of summons, and then to commence an action by complaint against U.S. Municipal. Not only were the substantial rights of U.S. Municipal not prejudiced by this action, but allowing V-Tech to commence an action by complaint against U.S. Municipal "secure[s] the just, speedy, and inexpensive determination" of this action. Pa.R.C.P 126.

Furthermore, Rule 2255(b) is of no significance here. Specifically, what Pa.R.C.P 2255(b) bars, namely the filing of pleadings "between the additional defendant and any other party other than the one joining the additional defendant," has not occurred here. After the filing of the Second Amended Complaint there were no additional defendants joined by any of the parties. Unlike what it had done following the original writ of summons, which is now moot, Murray Dodge did not join U.S. Municipal as an additional defendant because U.S. Municipal was already included as an original defendant to V-Tech's Second Amended Complaint. Therefore, it is impossible for V-Tech to plead against an additional defendant, since there is no additional defendant to be found. Since V-Tech properly commenced its action against Murray Dodge and U.S. Municipal, and also properly filed its subsequent

amended complaints, the preliminary objection is denied.

II. The Court Overrules the Preliminary Objection Asserting Legal Insufficiency of a Civil Conspiracy Pleading

U.S. Municipal contends that V-Tech lacks the legal sufficiency of a civil conspiracy pleading. This court disagrees. For purposes of reviewing preliminary objections based upon legal insufficiency, “all well-pleaded material, factual averments and all inferences fairly deducible therefrom” are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa.Super.Ct. 2000). When presented with preliminary objections whose end result would be the dismissal of a cause of action, a court should sustain the objections where “it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief.” Bourke v. Kazaras, 746 A.2d 642, 643 (Pa.Super.Ct. 2000) (citations omitted). Furthermore,

[I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa.Super.Ct. 1999).

V-Tech’s complaint, on its face and by the facts averred, raises doubt as to whether the law indicates with certainty that no recovery for civil conspiracy is possible. To begin with, V-Tech alleges that it was defendant Murray Dodge and U.S. Municipal who agreed to do an unlawful act - namely that they agreed “knowingly, willfully, and with the intent” to defraud V-Tech and obtain secret profits at V-Tech’s expense. Second Amended Complaint ¶ 30. Moreover, in furtherance of this conspiracy V-Tech alleges that the defendant “sales agent falsely depicted the suitability of the trucks while... U.S.

Municipal... deliberately or gross negligently adapted the trucks with the consent of both parties.” Id at ¶ 33. Finally, as a result of this alleged conspiracy, V-Tech avers that it suffered legal damages in an amount in excess of fifty thousand dollars. Id at ¶¶ 14, 23 and 28. Therefore, presuming these facts to be true, V-Tech has sufficiently alleged this cause of action of conspiracy for purposes of pleadings. Whether V-Tech can prove that the defendants conspired to injure it will be determined by the evidence presented. For now, however, it is enough that the factual averments of the entire complaint are legally sufficient. Therefore, the court overrules U.S. Municipal’s preliminary objection to Count III.

CONCLUSION

For the above reasons, the preliminary objection requesting that the Second Amended Complaint be stricken for pleading against an additional defendant is denied. Further, the preliminary objection asserting legal insufficiency of a civil conspiracy pleading is overruled.

Plaintiff's request for leave of court to amend the captions to Count II (Fraud) and Count VI (Misrepresentation) of its Second Amended Complaint to include U.S. Municipal is granted, and therefore, Plaintiff shall file its Third Amended Complaint within twenty (20) days of this order.

BY THE COURT

JOHN W. HERRON, J.

Date: October 11, 2001