

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

EASTERN AMERICA	:	
TRANSPORT & WAREHOUSING, INC,	:	July Term, 2001
and DAVID C. WENGER,	:	
Plaintiffs,	:	No. 2187
v.	:	
	:	Commerce Program
EVANS CONGER BROUSSARD	:	
& MCCREA, INC., ST. PAUL FIRE	:	Control No. 071266
& MARINE INSURANCE, CO., and	:	
CONTINENTAL CASUALTY COMPANY, INC.	:	
Defendants.	:	

ORDER

AND NOW, this 31st day of July, 2002, upon consideration of the petition to intervene of Burns International Security Services Corp. in which certain Goods Owners have joined, the responses thereto, and in accordance with the contemporaneously filed Opinion, it is hereby ORDERED and DECREED that the petition to intervene is DENIED.

BY THE COURT:

JOHN W. HERRON, J.

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OPINION

Presently before this court is a Motion to Intervene by Burns International Securities (“Burns”) which has been joined in by a number of the goods owners (“Goods Owners”) in related litigation. For reasons set forth, this court concludes that neither Burns nor Goods Owners are indispensable parties and that they are not entitled to intervene in the declaratory judgment action pending before this court.

BACKGROUND

On May 20, 2000, a fire destroyed a warehouse, owned by Eastern America and Wenger. (“Eastern America”). The fire destroyed the warehouse contents owned by several other companies (“Goods Owners”). The present matter involves an eighteen count complaint by Eastern America (and David Wenger) against its broker and its insurance companies for, inter alia, breach of contract relative to the procurement of insurance coverage for Eastern America’s warehouse.

There is also an underlying action against Eastern America by Goods Owners whose property was destroyed in the fire. The present petition to intervene has been brought by Goods Owners and Burns, a co-defendant of Eastern America in the underlying actions.

DISCUSSION

I. Goods Owners and Burns Are Not Indispensable Parties To This Action

As an initial matter, Goods Owners and Burns argue that they are indispensable parties to this, the declaratory judgment action. Under Pennsylvania precedent, failure to join an indispensable party to a declaratory judgment action deprives a court of subject matter jurisdiction. Vale Chemical Co. v. Hartford Accident and Indemnity Company, 512 Pa. 290, 292, 516 A.2d 684, 685 (1986); Insurance Co. of Pa. v. Lumberman's Mutual Casualty Co., 405 Pa. 613, 616, 177 A.2d 94, 95 (1962). As the Vale court explained:

[E]ssential to the adversary system of justice and one of the basic requirements of due process, is the requirement that all interested parties have an opportunity to be heard. Thus all parties whose interest will necessarily be affected must be present on the record.

Vale, 512 Pa. at 296, 516 A.2d at 688. "[T]he basic inquiry in determining whether a party is indispensable concerns whether justice can be done in the absence of a third party...." CRY, Inc. v. Mill Service, Inc., 536 Pa. 462, 640 A.2d 372, 375 (1994). The determination of indispensability involves "at least" the following considerations:

1. Do absent parties have a right or interest related to the claim?
2. If so, what is the nature of that right or interest?
3. Is that right or interest essential to the merits of the issue?
4. Can justice be afforded without violating the due process rights of absent parties?

Centolanza v. Lehigh Valley Dairies, Inc., 540 Pa. 398, 658 A.2d 336, 338- 39 (1995) (quoting CRY, supra) (quoting Mechanicsburg Area School District v. Kline, 494 Pa. 476, 431 A.2d 953, 956 (1981)).

Unlike in Vale, where the issue was a coverage dispute “between the insured and the insurance carrier” thereby making the tort plaintiff indispensable, here Burns is not an indispensable party to this action. 512 Pa. at 293 (quoting Pleasant Township v. Erie Insurance Exchange, 348 A.2d 477, 479-480 (1975)). Eastern America’s Third Amended Complaint contains numerous contract and tort claims against the insurers, Continental and St. Paul, and broker, ECBM. Although, Burns alleges that it is a third party beneficiary to the contracts between Eastern America, Continental and St. Paul, to date, it has not pleaded that it has any rights or interests in these contract and tort claims.

Rather, Goods Owners and Burns argue that they have an interest in Eastern America’s declaratory judgment claims against these insurers and broker. However, this declaratory judgement action is unrelated to any claims Goods Owners and Burns may have as Eastern America does not seek an interpretation of the insurance policy, or the amount of coverage provided under the coverage. As ECBM correctly points out, “Eastern America claims that due to the conduct and promises of the defendants’, it is entitled to damages in excess of the \$1,000,000 limits for legal liability claims provided in the St. Paul policy. Even though Eastern America seeks declaration of the defendants’ obligations to Eastern America, it is not a question of insurance coverage and the underlying claimants’ entitlement to such coverage.” ECBM’s Mem. of Law at II. Therefore, without any rights or interests in these claims, Goods Owners and Burns are not indispensable parties.

II. The Requests to Intervene Are Denied

Having determined that this court has subject matter jurisdiction, as all necessary parties have been joined, it now turns to the requests to intervene of Burns and Goods Owners. As an initial matter, both Burns and Goods Owners have failed to follow the proper procedure in filing a petition to intervene. Pa.R.C.P. 2328 states in pertinent part:

(a) Application for leave to intervene shall be made by a petition in the form of and verified in the manner of a plaintiff's initial pleading in a civil action, setting forth the ground on which intervention is sought and a statement of the relief or the defense which the petitioner desires to demand or assert. The petitioner shall attach to the petition a copy of any pleading which the petitioner will file in the action if permitted to intervene or shall state in the petition that the petitioner adopts by reference in whole or in part certain named pleadings or parts of pleadings already filed in this action.

By Order of June 21, 2002, this court required that all petitions to intervene be filed on or before July 15, 2002 and set oral argument for July 22, 2002. Only Burns filed such a petition. Both Burns and the Goods Owners appeared for oral argument. Goods Owners argued that their previously filed motion to consolidate the two separate actions was to be converted into a petition to intervene, however, any such misunderstanding cannot substitute for a failure to comply with the prerequisites for filing a petition to intervene. In any event, even assuming Goods Owners joined in Burns' petition, the request for intervention fails for the same reasons Burns' request is denied.

Here, as ECBM correctly points out, Burns has not attached a pleading to its petition that it intends to file. Moreover, Burns has failed to sufficiently set forth the ground on which intervention is sought. Although Burns includes in its petition that "[s]ubject to receipt and review of all pleadings in this case, Burns anticipates that it will adopt the well pled averments of Eastern American [sic]" and seeks a declaratory judgment, this statement, in and of itself, and without a pleading, is insufficient to

comply with Pa.R.C.P. 2328(a). See Valentino Motors Corp. v. Grillo, 22 Pa. D.& C. 2d 252, (C.P. Cambria 1960) (holding that a petition is not in compliance with Pa.R.C.P. 2328(a) when the petitioner merely avers that it “‘will’ adopt as his pleadings the pleadings which are now or ‘will’ be filed by defendants in the future..”); see also, Keystone Auto Club Casualty Co. v. Sell, 13 Pa. D.& C. 2d 215, (C.P. Montgomery 1957) (holding that without a pleading attached to the petition, vague conclusions of law are “insufficient to show that the determination of this action in equity will affect any legally enforceable interest of the petitioner”).

In addition to procedural deficiencies, Burns’s petition must be denied for substantive reasons.

Pa.R.C.P. 2327 states that a party may be permitted to intervene if:

1. the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgement may be entered; or
2. such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or
3. such person could have joined as an original party in the action or could have been joined therein; or
4. the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Furthermore, Pa.R.C.P. 2329 allows for this court to refuse a petition to intervene if:

1. the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or
2. the interest of the petitioner is already adequately represented; or
3. the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

Burns claims that it is entitled to intervene under Pa.R.C.P. 2327(4), as it has a “legally enforceable interest” in the present case. The phrase "legally enforceable interest" has been interpreted to require that "the applicant for intervention ... own an interest in or a lien upon property in question or ... own a cause of action which will be affected by the action." 8 Goodrich-Amram, Stand.Pa.Prac. at 373. Here, Burns argues that its legally enforceable interest includes its “clear financial interests in the amount of insurance.” Pet’s Mem of Law at 5. However, this interest, in and of itself, is insufficient to allow for it to intervene as it is an interest based purely on financial gain. Marion Power Shovel Co. v. Fort Pitt Steel Casting, 285 Pa. Super. 45, 53 (1981) (holding that although the following language was deleted from Pa.R.C.P. 2327(4), “the interest justifying intervention must be a right or liability recognized and enforceable at law or in equity as distinguished from an economic motive or interest in seeing one litigant or another prevail in the proceeding,” the underlying policy behind Pa.R.C.P. 2327(4) remains and supports the finding that a union's financial interest in partially completed castings was not sufficient to justify its intervention in the replevin action). Therefore, the court concludes that Burns does not have a legally enforceable interest and may not intervene.

In addition, pursuant to Pa.R.C.P. 2329 (2) and (3), the court cannot permit Burns to intervene. First, Burns’s interests are adequately represented in this litigation by Eastern America. Pa.R.C.P. (2). In the present matter, Eastern America’s interests coincide with Burns’ interests, ie. recovering money from the insurers and broker. Since Burns expects to claim any money recovered from the insurers, its interests are adequately represented by Eastern America in the present action.

Further, the intervention of both the Goods Owners and Burns will undoubtedly unduly delay the trial, as there are many tort plaintiffs who are involved in the underlying tort action. Pa.R.C.P. (3).

Allowing them to intervene would unnecessarily delay and complicate discovery. Specifically, as Eastern America argues, the additional discovery requests “could clearly include the production of documents otherwise protected... pursuant to the attorney client privilege and pursuant to Pa.R.Civ.P. 4003.3.” Pl’s Mem. of Law at 2.

CONCLUSION

For the reasons discussed, the requests to intervene of both Goods Owners and Burns are denied.

BY THE COURT:

JOHN W. HERRON, J.

Dated: July 31, 2002