

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MICHAEL CARDIFF and :
BARBARA CARDIFF, :
Plaintiffs, :
v. : CA 10-39 S
NATIONAL GRANGE MUTUAL :
INSURANCE COMPANY, :
Defendant. :

**MEMORANDUM AND ORDER
DENYING MOTION FOR PERMISSION
TO FILE THIRD-PARTY COMPLAINT**

Before the Court is Defendant's Motion for Permission to File a Third-Party Complaint (Docket ("Dkt.") #18) ("Motion for Permission to File a Third-Party Complaint" or "Motion"). By the Motion, Defendant National Grange Mutual Insurance Company ("Defendant" or "National Grange") seeks permission to file a third-party complaint against Louis Panciera, Inc., beyond the fourteen days after serving its original answer.¹ See Motion at 1.

¹ Federal Rule of Civil Procedure 14(a) provides in relevant part:

(a) When a Defending Party May Bring in a Third Party.

(1) Timing of the Summons and Complaint. A defending party may, as third party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third party plaintiff must, by motion, obtain the court's leave if it files the third party complaint more than 14 days after serving its original answer.

A hearing was held on April 25, 2011.²

Law

The First Circuit has instructed that a district court should allow impleader on any colorable claim of derivative liability that will not unduly delay or otherwise prejudice the ongoing proceedings. Lehman v. Revolution Portfolio LLC, 166 F.3d 389, 393 (1st Cir. 1999). The decision whether to allow a third-party claim lies within the "informed discretion," id., of the district court, see id. In exercising this discretion, a court should consider the following factors: (1) whether the third-party claim would prejudice the plaintiff; (2) the risk of unduly complicating the issues or unnecessarily delaying the resolution of the controversy; (3) the timeliness of the motion to implead; (4) the merit of the third-party claim; and (5) any additional expenses the claim may impose on the parties. Zeus Projects Ltd. v. Perez y CIA. de Puerto Rico, 187 F.R.D. 23, 33 (D.P.R. 1999). Leave to file a third-party complaint should be denied if the claim will disadvantage or delay the original action or if the third-party claim lacks merit. Id.

² The pendency of the Motion was noted by the Court and counsel at the April 19, 2011, hearing on Plaintiffs' Motion to Vacate Order Granting Defendant's Motion to Extend Discovery Deadlines (Docket ("Dkt.") #16). However, the Motion for Permission to File a Third Party Complaint had only been referred to this Magistrate Judge the day before and had not yet been scheduled for hearing. The Court, therefore, deemed it preferable to address the Motion at a separate hearing which was then scheduled for April 25, 2011.

Discussion

National Grange seeks to file a third-party complaint against its agent, Louis Panciera, Inc. ("Panciera"), for negligence (Count I), breach of contract (Count II), breach of a fiduciary duty (Count III), and equitable indemnification (Count IV). See Motion, Exhibit ("Ex.") B (proposed third-party complaint). The basis for these causes of action is National Grange's contention that Panciera failed to notify it in a timely fashion of Plaintiffs' claims and that Panciera thereafter sought an expansion of the insured's activities accepted by National Grange to include those which created Plaintiffs' loss. See Motion at 2.

Turning to the first factor, the Court concludes that granting the instant Motion would prejudice Plaintiffs because the action would be further delayed by the need to conduct additional discovery relative to these new claims. At the hearing, counsel for non-party Panciera opined that if the Motion were granted, the case could not be tried this year.³ This assessment is not unrealistic. It is now the end of April, and Panciera would be entitled to a reasonable opportunity to conduct discovery. This would require extension of the discovery deadlines, and those

³ Counsel for non party Panciera was allowed to appear at the April 25, 2011, hearing after counsel for both Plaintiffs and National Grange stated that they did not oppose Non Party, Louis Panciera, Inc.'s, Motion to Enter a Special Appearance for the Limited Purpose of Objecting to Defendant's Motion for Permission to File a Third Party Complaint (Dkt. #20) ("Motion to Enter Special Appearance"). The Motion to Enter Special Appearance was granted by an oral order at the beginning of the April 25th hearing.

deadlines have already been extended twice.⁴ Another extension would be unfair to Plaintiffs who filed this action on January 29, 2010, almost fifteen months ago. See Dkt.

The Court is also persuaded that there is a risk that allowing the third-party action will unduly complicate this case which involves allegations of construction damage due to contractor negligence. Defendant's claims against Panciera are distinct from the contractor negligence and bad faith claims in the original Complaint. Moreover, as noted by non-party Panciera:

If the court allows the third party complaint to proceed against Panciera, the jury will be confronted with, among other issues, confusing notice issues because of the fact that Plaintiffs as well as the contractors, Albert Lorenzo, Jr., and John Gordon, were all insured through the Westerly based Panciera agency.

Non-Party, Louis Panciera, Inc.'s, Memorandum of Law in Support of Its Objection to Defendant's Motion for Permission to File a Third-Party Complaint ("Panciera Mem.") at 5. The Court agrees that this unusual circumstance may cause confusion on the part of the jury and will undoubtedly complicate its work. The Court also agrees that the trial of a construction claim case allegedly involving

⁴ The discovery deadlines were extended via text orders on December 3, 2010, and March 7, 2011. The March 7, 2011, text order was subsequently vacated because it had been entered in error. See Order Granting Motion to Vacate (Dkt. #21). However, on April 19, 2011, the Court granted a second extension of discovery deadlines. See Order Granting in Part Motion to Extend Discovery Deadline (Dkt. #22). The extension was for two months, see id., and not the six months sought by Defendant, see Defendant's Motion to Extend Discovery Deadline (Dkt. #12). However, it was granted over the opposition of Plaintiffs who opposed any extension beyond one month (to which Plaintiffs were agreeable as a courtesy to Defendant's counsel).

damages of more than \$500,000 is not a simple matter and that adding difficult legal issues of notice and agency into the mix will further tax the jury.

With respect to the timeliness of the Motion, Defendant argues that until March 2011 it had no reason to suspect that its agent, Panciera, failed to report Plaintiffs' claim in a timely manner, expanded the insurance policy of the insured (Lorenzo), and then belatedly reported the claim. See Memorandum of Law Filed in Support of Defendant's Motion for Permission to File Third-Party Complaint ("Defendant's Mem.") at 4. However, Defendant has been aware at least since February 2008 that Plaintiffs made a claim to their insurer, Vermont Mutual Insurance Company ("Vermont Mutual"), for damage to the same building for which recovery is sought in the instant lawsuit and that as a result of a subrogation claim Defendant paid \$8,000 in 2008 to Vermont Mutual. While Defendant argues that it was only after Defendant saw the materials which Plaintiffs received in response to a subpoena (issued by Plaintiffs) that Defendant noticed the two month gap between the reporting dates to Vermont Mutual and to Defendant, see Defendant's Mem. at 2, Defendant could have sought these same materials itself and done so earlier. Defendant's suggestion that it had no reason to suspect impropriety by its agent prior to March 2011 does not entirely excuse Defendant's failure to investigate all aspects of the claim once this lawsuit was filed. A full investigation, in

the Court's view, reasonably would include gathering information about a prior claim on the same property which was relatively close in time to the instant loss and examining the differences and similarities between them. Such an examination may have resulted in the discovery of the information which Defendant contends provides the basis for its third-party complaint. While the Court acknowledges that this is not a certainty, as between Plaintiffs, who took the initiative to obtain the information, and Defendant, who did not, the Court is disinclined to, in effect, penalize Plaintiffs for their diligence by granting the instant Motion while simultaneously rewarding Defendant for not exercising the greatest degree of diligence in investigating the claim.

As for the merit of Defendant's third-party claim against Panciera, assuming the truth of the allegations in the proposed third-party complaint, the claims against Panciera appear meritorious. However, it is less clear that these claims provide a defense against Plaintiffs' claims. There is no evidence that Plaintiffs themselves are guilty of any impropriety with respect to the failure of Defendant to receive timely notice or that they are in any way responsible for the expansion of the insurance coverage. Even assuming that Panciera breached its obligations to Defendant, that would not necessarily invalidate the original insurance policy which Defendant issued to Lorenzo. As for the expansion of coverage alleged to have been improperly procured by Panciera, even

if the instant Motion is denied, Defendant is still free to argue that the damage for which Plaintiffs seek to recover in the instant action is not covered by the policy which was in effect at the time the work was performed.

Regarding the final factor, imposition of additional expenses as a result of the claim, granting the Motion will undoubtedly impose an added financial burden on Plaintiffs and Panciera by significantly increasing their attorneys' fees from what they would be if the action against Panciera were kept separate.⁵ As already noted, the Court would have to allow Panciera a reasonable opportunity for discovery, and Plaintiffs' counsel would have to at least monitor that discovery by reading the various requests and responses and obtaining copies of depositions. The likelihood of further motion practice also would be increased by the presence of Panciera. Most importantly, the length of the trial would be significantly increased, and both Plaintiffs and Panciera would be burdened with all of the expenses associated with a longer trial (e.g., more days away from their businesses, more days commuting between Westerly and Providence, increased attorney's fees, etc.).

In summary, the Court finds that none of the five factors weigh in favor of granting the instant Motion. The risk of

⁵ The Court recognizes that Plaintiffs' counsel may be working on a contingent fee basis and that granting the instant Motion would not result in Plaintiffs having to pay any money "out of pocket" to their attorney. Nevertheless, the Court declines to treat the additional work which will be required of Plaintiffs' attorney if the Motion is granted as being valueless.

complicating this action by allowing the third-party complaint weighs especially strongly against granting the Motion.

Conclusion

For the reasons stated above, Defendant's Motion for Permission to File a Third-Party Complaint is DENIED.

ENTER:

/s/ David L. Martin
DAVID L. MARTIN
United States Magistrate Judge
April 26, 2011