

OVERNITE TRANSPORTATION	:	IN THE COURT OF COMMON PLEAS OF
COMPANY	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 03-00,057
	:	
	:	
	:	
HARPER COLLINS PUBLISHERS, INC.,	:	
Defendant	:	Preliminary Objections

*Date: June 10, 2003*

**OPINION and ORDER**

**Facts/ Procedural Background**

Before the Court are the Preliminary Objections of Defendant Harper Collins Publishers, Inc. (Harper Collins) filed April 21, 2003. The case *sub judice* originated before District Justice Carn. A judgment was issued against Overnite Transportation Company (Overnite) on December 12, 2002. Overnite filed a Notice of Appeal on January 13, 2003. Overnite filed the Complaint that is the subject of the preliminary objections now before the Court on April 4, 2003. Essentially, Overnite is seeking payment from Harper Collins for freight charges resulting from problems allegedly caused by Harper Collins during the course of delivery.

With respect to the preliminary objections, Harper Collins alleges that the complaint is deficient in four respects. First, the complaint fails to set forth a cause of action for breach of contract. Harper Collins asserts that the complaint fails to plead that a valid contract exists between Overnite and Harper Collins.

Second, Harper Collins argues that the complaint is deficient for failing to specifically set forth the material facts giving rise to the breach of contract cause of action. Harper Collins asserts that the complaint fails to set forth the material facts that could establish a contract and uses the general language of “problems” and “charges” to indicate the basis for its claim without stating what those problems and charges were and how Harper Collins was responsible for those allegations.

Thirdly, Harper Collins contends that Overnite failed to join an indispensable party. Harper Collins argues that Overnite admitted in the pleading that the “entities other than Harper were the ones that ordered the alleged subject services.” Defendant’s Brief in Support of Preliminary Objections, *Overnite Transportation Co. v. Harper Collins Publishers, Inc.*, No. 03-00,057, at 4 (Lycoming Cty.). Harper Collins contends that these entities are indispensable parties and the failure to join them deprives the Court of jurisdiction over the action.

Fourthly, Harper Collins asserts that the complaint was untimely filed. Harper Collins contends that a party has twenty days from the notice of appeal from a District Justice judgment to file a complaint. Harper Collins asserts that the complaint was filed almost two months after the notice of appeal, thereby making it untimely.

In response, Overnite argues that the complaint conforms to the rules of civil procedure and is not deficient. Overnite contends that the complaint, with attached bills of lading and invoices, sufficiently apprises Harper Collins of the claim for services rendered. Overnite contends that Harper Collins, as a consignee, is liable for the ancillary services provided by Overnite pursuant to its filed interstate commerce tariffs. Secondly, Overnite

argues that the complaint is not deficient for failing to join an indispensable party, since all such parties have been joined. Overnite contends that it has the option of suing either the consignor or the consignee. Overnite argues that it has exercised this right and elected to bring suit against the recipient of the services. Thirdly, Overnite contends that the complaint is not deficient as being untimely filed. Overnite asserts that there was an agreement between Harper Collins' counsel, Brian Brice C. Paul, Esq., and then Overnite counsel, Michael Kennedy, whereby Overnite "would not have to file a complaint unless and until [Harper Collins] filed a Ten-Day Notice, pursuant to Pa.R.C.P.J.P. 1004." Plaintiff's Brief Contra Preliminary Objections, *Overnite Transportation Co. v. Harper Collins Publishers, Inc.*, No. 03-00,057, at 4 (Lycoming Cty.). Overnite contends that the parties were free to agree on the filing date of the Complaint, and since no notice was ever given by Harper Collins, the Complaint was timely filed.

### **Discussion**

There are four issues before the Court. The first is whether the complaint sets forth a cause of action entitling Overnite to relief when it is alleged that a carrier incurred freight charges resulting from problems encountered while making deliveries to a purported consignee. The second is whether the complaint sufficiently sets forth the material facts that give rise to the cause of action for breach of contract that would entitle a carrier to recover the freight charges from a consignee. The third is whether the complaint is deficient and deprives the Court of jurisdiction when it does not name the shippers that contracted with Overnite for the delivery services as indispensable parties. The fourth is whether the complaint is untimely

when filed two months after the notice of appeal from a District Justice's judgment is filed, despite Harper Collins not give Overnite a ten-day notice.

The Court will address the issues of a more jurisdictional nature before delving into the demurrer and specificity preliminary objection.

### **Timeliness of the Complaint**

If the claimant wishes to appeal a judgment of a district justice, then he must file a complaint within twenty days after the notice of appeal is filed. Pa.R.C.P.D.J. 1004A. The means available for a defendant to assert a violation of the twenty-day requirement is the praecipe to strike the appeal procedure of Rule 1006; preliminary objections are not a viable means of attack given the procedure established under Rule 1006. *See, Friedman v. Lubecki*, 545 A.2d 987 (Pa. Super. 1987). Rule 1006 provides that:

Upon the failure of the appellant to comply with Rule 1004A or Rule 1005B, the prothonotary shall, upon praecipe of the appellee, mark the appeal stricken from the record. The court of common pleas may reinstate the appeal upon good cause shown.

Pa.R.C.P.D.J. 1006. "Rule 1006 is not self-enforcing." *Friedman*, 545 A.2d at 988. Also, the challenging defendant must invoke Rule 1006 before the claimant files the complaint, otherwise he will lose the race to the Courthouse. *Id.* at 989.

The Court will not dismiss the complaint as being untimely filed. Harper Collins has been precluded from asserting a violation of the twenty-day filing requirement. Harper Collins did not avail itself of the Rule 1006 praecipe to strike procedure. Harper Collins also waited to initiate its attack until after the complaint had been filed. Both choices of conduct prevent Harper Collins from asserting that the complaint is untimely. Therefore, the Court will not dismiss the complaint as being untimely filed under Rule 1004A.

### **Indispensable Parties**

If an indispensable party is not joined to a lawsuit, then the Court is deprived of subject matter jurisdiction. *Polydyne, Inc. v. City of Philadelphia*, 795 A.2d 495, 496 (Pa. Cmwlth. 2002). “A party is considered indispensable when its rights are so connected with the claims of the litigants that no decree can be made without impairing its rights and it must be made a party to protect such rights.” *Grimme Combustion, Inc. v. Mergentime Corp.*, 595 A.2d 77, 81 (Pa. Super. 1991). “If no redress is sought against a party, and its rights would not be prejudiced by any decision in the case, it is not indispensable with respect to the litigation.” *Ibid.* There are four criteria to be considered when determining whether a party is indispensable:

- (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?

*Polydyne*, 795 A.2d at 496, n.2. When making the determination, it shall be made from the prospective of protecting the rights of the absent party. *Grimme*, 595 A.2d at 81.

Ordinarily, the shipper is primarily liable to pay for the freight charges. *D.L.& W. R.R. Co. v. Ludwig*, 94 Pa. Super. 289, 292 (1928). The shipper is the party that contracts with the carrier for the transportation of the goods and is responsible for the payment of that service. *Pennsylvania R.R. Co. v. Gen. Crushed Stone Co.*, 76 Pa. Super. 186, 188 (1921). However, a consignee can become liable for freight charges if he takes possession of the goods or assumed to control them. *Feldman*, 107 A.2d at 690.

Overnite has not failed to join any indispensable parties. The case *sub judice* centers on the alleged conduct of Harper Collins. Overnite is seeking to recover the additional

costs of the shipments incurred as the result of Harper Collins' alleged misconduct. There are no allegations that the shippers are responsible for causing the alleged problems and no recovery is sought against them. As such, the shippers have no readily ascertainable interest at stake, let alone a right or interest that is essential to the merits of the case *sub judice*. A possible interest the shippers could have is that Harper Collins might wish to allege that the shippers are liable to Overnite for the additional freight charges. Harper Collins can do so through filing a response that names the shippers as additional defendants. But until such allegations are made, the shippers' responsibility is merely speculation and not sufficient grounds to declare the shippers an indispensable party. Therefore, the Court will not dismiss the Complaint because the shippers are not included as defendants.

**Demurrer and Specificity Preliminary Objection**

The Court can dispose of Harper Collins' demurrer and preliminary objection as to the specificity of the complaint together since they are interrelated. A preliminary objection, in the nature of a demurrer, should only be granted when it is clear from the facts that the party has failed to state a claim upon which relief may be granted. *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189, 1192 (Pa. 2001). The reviewing court in making such a determination "is confined to the content of the complaint." *In re Adoption of S.P.T.*, 783 A.2d 779, 781 (Pa. Super. 2001). "The court may not consider factual matters; no testimony or other evidence outside the complaint may be adduced and the court may not address the merits of matter represented in the complaint." *Ibid*. The court must admit as true all well pleaded material, relevant facts and any inferences fairly deducible from those facts. *Willet v. Pennsylvania Med. Catastrophe Loss Fund*, 702 A.2d 850, 853 (Pa. 1997). " 'If the facts as pleaded state a

claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected.” *Ibid.* (quoting *The County of Allegheny v. the Commonwealth of Pennsylvania*, 490 A.2d 402, 408 (Pa. 1985)).

Pennsylvania is a fact pleading state. *Miketic v. Baron*, 675 A.2d 324, 330 (Pa. Super. 1986); *Santiago v. Pennsylvania Nat’l Mut. Casualty Ins. Co.*, 613 A.2d 1235, 1239 (Pa. Super 1992). The complaint must set forth the material facts upon which a cause of action is based in a concise and summary form. Pa.R.C.P. 1019(a). The complaint must apprise the defendant of the claim being asserted and summarize the material facts needed to support that claim. *Cardenas v. Schober*, 783 A.2d 317, 325 (Pa. Super. 2001); *Alpha Tau Omega Fraternity v. Univ. of Pennsylvania*, 464 A.2d 1349, 1351 (Pa. Super. 1993).

The amount of detail or level of specificity required is “incapable of precise measurement.” *Pike County Hotels Corp. v. Kiefer*, 396 A.2d 677, 681 (Pa. Super. 1978). However, the complaint must set forth enough material facts to allow the defendant to prepare a defense to the allegations contained within the complaint. *Weiss v. Equibank*, 460 A.2d 271, 274 (Pa. Super. 1983); *Commonwealth Dep’t of Transp. v. Shippley Humble Oil Co.*, 370 A.2d 438, 439 (Pa. Cmwlth. 1977). In examining the complaint, the focus is not upon one particular paragraph in isolation. *Yacoub v. Lehigh Valley Med. Associates, P.C.*, 805 A.2d 579, 589 (Pa. Super. 2001). The paragraph at issue must be read in conjunction with the complaint as a whole to determine if there is the requisite level of specificity. *Ibid.*

The liability of the consignee for freight charges is based entirely upon a contract, either express or implied. *Reading Co. v. Sobelman*, 19 A.2d 754 (Pa. Super. 1941).

Normally the shipper who contracts with the carrier is primarily liable for the charges resulting from the transportation of the goods, “nevertheless, a consignee may also become liable if he takes possession of the goods, or has ordered the shipment or assumed to control it.” *Baltimore & Ohio R.R. Co. v. Feldman*, 107 A.2d 689, 690 (Pa. Super. 1954). A consignee’s acceptance of or exercise of dominion over the goods will permit a contract to be implied that will allow a carrier to collect the freight charges from the consignee. *Ibid.* “The reason for this rule is that the consignee is presumed to accept the goods with knowledge that the carrier has a lien for transportation charges which is released by delivery in reliance on the consignee’s implied promise arising from his acceptance of merchandise.” *Pennsylvania R.R. Co. v. DeMaito*, 90 Pa. Super. 216, 219 (1927). The conduct of a consignee assumes this quasi-contractual status only by virtue of the contract for shipment of goods between the shipper and the carrier, which identifies and establishes the status of the parties. *Consolidated Rail Corp. v. Commonwealth of Pennsylvania Liquor Control Bd.*, 496 A.2d 422, 424 (Pa. Super. 1985). “Although a consignee’s liability may rest upon quasi-contract, a party’s status as a consignee is a matter of contract, and must be established as such.” *Ibid.*

The Complaint does not set forth a cause of action entitling Overnite to relief. For Overnite to establish a claim for the additional freight charges against Harper Collins, it must demonstrate that Harper Collins is a consignee and that Harper Collins accepted or exercised dominion over the goods. The complaint fails on both accounts.

Paragraph five of the Complaint states that Harper Collins is a consignee, but there is no evidence of a contract establishing Harper Collins’ status as a consignee. Harper Collins can be a consignee by express contract with Overnite whereby Overnite would



transport the goods ordered from the shippers by Harper Collins and Harper Collins would be designated as consignee. Harper Collins can also be a consignee based on a contract between the shippers and Overnite whereby Harper Collins is designated the consignee of the goods to be shipped. The Complaint does not state in which manner Harper Collins became a consignee of the goods that were shipped.

If Harper Collins is a consignee, it is likely the result of a contract between the shippers and Overnite that designated Harper Collins as such. At oral argument, Overnite asserted that Harper Collins' liability was premised on it accepting or exercising dominion over the goods, which would indicate a consignee status based upon a contract between the shippers and Overnite. However, this is not set forth in the allegations of the Complaint. Overnite needs to plead that there is a contract that establishes the status of Harper Collins in order to bring a claim against it as a consignee for the additional freight charges. A bald allegation that Harper Collins is a consignee is not sufficient to establish its status as such.

While the failure to establish the consignee status of Harper Collins is sufficient reason to grant the demurrer, the Complaint's failure to set forth the specific material facts that could establish acceptance of or exercise of dominion over the goods by Harper Collins prevents Overnite from stating a claim upon which relief may be granted. The complaint makes reference to detention unloading problems, redelivery problems, notification problems, and storage charges. However, the Complaint does not set forth the specifics of the surrounding facts regarding the various problems and charges. The Complaint states that the problems related to the shipments identified on Exhibit "B" attached to the Complaint. Exhibit "B" does not set forth the specifics of what occurred regarding the shipments on the particular

days listed. Exhibit “B” consists, in part, of a summary ledger sheet with check marks under the corresponding column that identifies the type of problem pertaining to that shipment. Another part of Exhibit “B” contains photocopies of freight bills for the disputed shipments, which are of poor quality and mostly illegible. The freight bills, as attached, are simply marked “detention,” “storage,” “redeliver” or “notification.” The freight bills of Exhibit “B” do not set forth the material facts that would provide insight as to the classification and the facts surrounding the shipment that would place it within the particular classification. All that the Complaint and attached documents state is that there were problems; this is not enough in a fact pleading state to establish acceptance of or dominion over the goods, and thereby make Harper Collins liable for the additional freight charges.

### **Conclusion**

The Court will deny in part and grant in part Harper Collins’ Preliminary Objections. The Court will not dismiss the Complaint as being untimely or for failing to include an indispensable party. Harper Collins is forestalled from attacking the timeliness of the Complaint by not pursuing a motion to strike an appeal. The shippers are not indispensable parties since their interests are not at stake and they are not necessary to the resolution of the case *sub judice*. The Court will grant Harper Collins’ demurrer and specificity preliminary objection. The Complaint fails to set forth a cause of action entitling Overnite to recover the additional freight charges because the Complaint fails to establish that Overnite is a consignee and fails to set forth in sufficient detail the facts that would establish that Harper Collins accepted the goods or exercised control over them.

**ORDER**

It is hereby ORDERED that the Preliminary Objections of Defendant Harper Collins Publishers, Inc., filed April 21, 2003, are denied in part and granted in part.

Harper Collins' preliminary objections to the timeliness of the complaint and the failure to join an indispensable party are denied.

Harper Collins' demurrer and preliminary objection to the specificity of the complaint are granted.

Plaintiff Overnite Transportation Company shall have twenty (20) days to file an amended complaint.

BY THE COURT:

William S. Kieser, Judge

cc: Charles A. Szybist, Esquire  
Brice C. Paul, Esquire  
Nogi, Appleton, Weinberger & Wren, P.C.  
415 Wyoming Avenue; Scranton, PA 18503  
Judges  
Christian J. Kalas, Esquire  
Gary L. Weber, Esquire (Lycoming Reporter)