

COURT OF COMMON PLEAS, LYCOMING COUNTY, PENNSYLVANIA

EARLY BIRD CAR WASH, INC., MR. BIRD'S CUSTOM	:	CV-21-0448
CAR WASH EQUIPMENT, LLC, and MICHAEL J. EARLY,	:	
Plaintiffs,	:	CIVIL ACTION
v.	:	
	:	<i>Preliminary</i>
DEAN PIERMATTEI and RHOADS & SINON, LLP,	:	<i>Objections</i>
Defendants	:	
v.	:	
	:	
FRANK C. BOTTA,	:	
Additional Defendant	:	

OPINION AND ORDER

AND NOW, this 7th day of October 2022, following argument held June 15, 2022 on Additional Defendant Frank C. Botta's Preliminary Objections to the Complaint to Join Frank C. Botta as Additional Defendant filed by Defendants Dean Piermattei and Rhoads & Sinon, LLP, the Court hereby issues the following OPINION and ORDER.

BACKGROUND

Plaintiffs commenced this case by filing a Complaint on May 17, 2021 alleging legal malpractice against Defendants¹ concerning previous litigation arising out of a contract dispute (the "Prior Action"). The procedural history of this case is detailed in this Court's December 6, 2021 Order sustaining Defendants' Preliminary Objections to Plaintiffs' first Complaint. In short, Defendant Piermattei initially represented

¹ Plaintiffs' Complaint alleges legal malpractice solely against Defendant Piermattei, Breach of Contract against both Defendants, and Respondeat Superior against Defendant Rhoads & Sinon, LLP. For ease of reading, this Opinion and Order refers to Plaintiffs' "claims" as "against Defendants" to avoid repeatedly specifying which claim is at issue and which Defendants are subject to that claim.

Plaintiffs in the Prior Action.² In March of 2019, Plaintiffs fired Defendant Piermattei and hired Frank C. Botta, Esq. to represent them in the Prior Action. Plaintiffs allege that Defendant Piermattei negligently failed to file a complaint until after the relevant statute of limitation had expired, resulting in a grant of summary judgment against them on December 13, 2019.

Pursuant to this Court's Order granting Defendants' Preliminary Objections, Plaintiffs filed an Amended Complaint on December 23, 2021. Defendants filed an Answer and New Matter to Plaintiffs' Amended Complaint on January 20, 2022, and Plaintiffs filed a Response to the New Matter on January 31, 2022.

On January 21, 2022, Defendants filed a Complaint to Join Attorney Botta as an Additional Defendant (the "Complaint to Join").³ The Complaint to Join alleges, essentially, that the entry of summary judgment against Plaintiffs in the prior action was due to the legal malpractice of Attorney Botta rather than Defendants.

PRELIMINARY OBJECTIONS TO DEFENDANTS' COMPLAINT TO JOIN

On March 28, 2022, Additional Defendant filed Preliminary Objections to the Complaint to Join, raising four separate grounds for demurrer.⁴ Additional Defendant's first preliminary objection avers that the Complaint to Join fails to state a claim because Defendants are unable as a matter of law to establish the element of duty necessary to bring a malpractice claim. Additional Defendant's second

² During his representation of Plaintiffs in the prior action, Defendant Piermattei was employed by Defendant Rhoads & Sinon, LLP.

³ Prior to the filing of the Complaint to Join, Attorney Botta represented Plaintiffs in this action. Attorney Botta has since withdrawn and David C. Weber, Esq. has entered his appearance for Plaintiffs.

⁴ Pa. R.C.P. 1028(a)(4) permits a preliminary objection on the grounds of "legal insufficiency of a pleading (demurrer)...."

preliminary objection is a demurrer to Defendant's contribution and indemnity claims. Additional Defendant's third preliminary objection is, essentially, the defense that the Court's grant of summary judgment in the Prior Action was legally correct. Additional Defendant's fourth preliminary objection is a demurrer on the grounds that Additional Defendant, rather than failing to meritoriously defend against summary judgment in the Prior Action, did in fact argue the (ultimately futile) theories that Defendants claim could have avoided summary judgment.

Defendants filed an Answer and Brief in Response to Additional Defendant's Preliminary Objections on May 16, 2022. On June 6, 2022, Plaintiffs joined Additional Defendant's Preliminary Objections, additionally contending that the filing of the Complaint to Join deprived them of their preferred representation, Attorney Botta, in this matter by creating a conflict of interest. On June 16, 2022, Defendants filed a Motion to Strike Plaintiffs' Joinder to Additional Defendant's Preliminary Objections as "highly improper, irrelevant, and immaterial." The Court held argument on Additional Defendant's Preliminary Objections to Defendants' Complaint to Join on June 15, 2022.

A. Additional Defendant's First and Second Preliminary Objections

Additional Defendant's first preliminary objection is grounded on the premise that "successor counsel owes no duty of care to predecessor counsel and cannot be joined" as an additional defendant in a legal malpractice suit, absent special circumstances not present here. Additional Defendant's second preliminary objection avers that "the contribution and indemnity claims" in Defendants' Complaint to Join "state no viable claims," because the acts forming the basis of Defendants'

allegations are “dissimilar and severable as to time” from Plaintiffs’ claims. Specifically, Additional Defendant notes that Plaintiffs’ claims are that Defendants missed the statute of limitations in the Prior Action before they filed the complaint in 2014, whereas Additional Defendant did not enter his appearance for Plaintiffs in the Prior Action until 2019. Additionally, Additional Defendant argues that based on the principle stated in his first preliminary objection, he has no possible duty to indemnify Defendants because his “duty of care is solely to his client and does not run directly to predecessor counsel....”

1. Rule 2252

In order to properly frame the issues contained in Defendants’ Complaint to Join, it is necessary to review Pennsylvania Rule of Civil Procedure 2252 governing joinder prior to evaluating the parties’ arguments. Rule 2252 permits joinder of an additional defendant who is not already party to the action in two scenarios:

“(a) [A]ny party may join as an additional defendant any person not a party to the action who may be

(1) solely liable on the underlying cause of action against the joining party, or

(2) liable to or with the joining party on any cause of action arising out of the transaction or occurrence or series of transactions or occurrences upon which the underlying cause of action against the joining party is based.”

Thus, joinder here is proper under Rule 2252 only if:

1) Additional Defendant may be solely liable “on the underlying cause of action” that Plaintiffs are bringing against Defendants;

2) Additional Defendant is liable *with* Defendants “on any cause of action arising out of the... series of transactions or occurrences upon which the underlying cause of action” that Plaintiffs are bringing against Defendants is based; or

3) Additional Defendant is liable to Defendants “on any cause of action arising out of the... series of transactions or occurrences upon which the underlying cause of action” that Plaintiffs are bringing against Defendants is based.

Whether any of these situations apply depends on how “the underlying cause of action” is defined. Prior to 2007, Rule 2252 referred instead to “the cause of action declared upon by the plaintiff....”⁵ The courts construed that phrase “broadly... to mean the harm of which the plaintiff complains.”⁶ This construction is in accordance with the Supreme Court of Pennsylvania’s directive that “the phrase ‘cause of action,’ as used in Rule 2252, cannot be taken too literally. Rather, the Court require[s] only that the ‘additional defendant’s liability [be] related to the original claim which plaintiff asserts against the original defendant....”⁷ Conversely, “[j]oinder is not permitted where the allegations contained in the original complaint and the allegations contained in the joinder complaint ‘relate to different harms to be proven with different evidence as to different occurrences happening at different times.’”⁸

It is clear that the change in language caused by the 2007 revision to Rule 2252 was stylistic rather than substantive. The Explanatory Comment to Rule 2007 notes that the purposes of that revision were to place the procedure for cross-claims in a separate rule,⁹ to allow “any party” rather than just a defendant or additional

⁵ See, e.g., *Garrett Electronics Corp. v. Kampel Enterprises, Inc.*, 555 A.2d 216, 217 (Pa. Super. 1989).

⁶ *Id.*

⁷ *Somers v. Gross*, 574 A.2d 1056, 1058 (Pa. Super. 1990) (citing *Incollingo v. Ewing*, 282 A.2d 206, 220 (Pa. 1971)).

⁸ *Goodman v. Kotzen*, 647 A.2d 247, 250 (Pa. Super. 1994).

⁹ Prior to 2007, Rule 2252 addressed the joinder of “any person” rather than “any person not a party to the action....” The 2007 revision created Rule 1031.1 addressing “cross-claims,” that is, the joinder of a person who is already a party to the action.

defendant to effect a joinder, and to make over some procedural requirements for filing joinder complaints. Thus, the requirements of Rule 2252 should still be interpreted broadly to achieve its purpose of “avoid[ing] multiplicity of suits and... permit[ting] the adjudication of the rights and liabilities of all parties to the particular transaction or occurrence to be effectuated in one action.”¹⁰

The fundamental disagreement between the parties here regards whether the allegations forming the basis of the Complaint to Join are synonymous with “the underlying cause of action” and “the harm of which [Plaintiffs] complain[.]” in their Amended Complaint, or instead “relate to different harms [that must be] proven with different evidence as to different occurrences happening at different times.”

2. Arguments

Additional Defendant’s first preliminary objection essentially argues that Defendants are categorically forbidden from joining them in this case, because “successor counsel owes no duty of care to predecessor counsel and cannot be joined” as an additional defendant in a legal malpractice suit, absent special circumstances not present here. Additional Defendant cites *Mentzer & Rhey, Inc. v. Ferrari* for this claim.¹¹

In *Mentzer & Rhey*, the defendant sold real property to the plaintiff in 1970; fourteen years later, a portion of the property collapsed.¹² The plaintiff sued the defendant alleging that the collapse was caused by the defendant’s negligent construction of a culvert and fraudulent concealment of the culvert’s existence prior to

¹⁰ *Findlay Tp. V. Ryan Homes, Inc.*, 420 A.2d 1341, 1343 (Pa. Super. 1980).

¹¹ *Mentzer & Rhey, Inc. v. Ferrari*, 532 A.2d 484 (Pa. Super. 1987).

¹² *Id.* at 485.

the sale.¹³ The defendant filed a complaint to join the law firm that had represented plaintiff in the sale, alleging the firm had performed a negligent title search in connection with the sale.¹⁴ The defendant argued that because a non-negligent title search would have revealed the existence of the culvert, the law firm was either solely liable or jointly liable with the defendant for any damages suffered by the plaintiff.¹⁵

The trial court sustained the law firm's preliminary objections to the defendant's complaint to join, and the Superior Court affirmed on "the principle that 'the general rule in Pennsylvania is that an attorney will be held liable for negligence only to his client. In the absence of special circumstances, he will not be held liable to anyone else.'¹⁶ In such cases, "a party must show an attorney-client relationship or a specific undertaking by the attorney furnishing professional services... as a necessary prerequisite for maintaining a suit."¹⁷

Additional Defendant also cited *Austin J. Richards, Inc. v. McClafferty* and *Goodman v. Kotzen* in support of this principle.¹⁸ In *Austin J. Richards*, the defendant maintained that the plaintiff's attorneys had accepted the defendant's offer to purchase real property on the plaintiff's behalf, but the plaintiff denied their ability to do so and ultimately accepted a better offer.¹⁹ The defendant, maintaining that his purchase was valid and the plaintiff's sale to a third party was wrongful, filed a lis

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 486.

¹⁷ *Id.*

¹⁸ *Austin J. Richards, Inc. v. McClafferty*, 538 A.2d 11 (Pa. Super. 1988); *Goodman*, 647 A.2d 247.

¹⁹ *Austin J. Richards*, 538 A.2d at 13.

pendens action, which delayed the sale to the third party and caused the plaintiff to sustain additional costs.²⁰ The defendant offered to settle the issue, but plaintiff declined, insisting that the lis pendens was invalid.²¹ Ultimately, the plaintiff sued the defendant for filing the lis pendens.²² The defendant joined as additional defendants the plaintiff's attorneys who represented her regarding the sale, averring that the attorneys "had negligently advised [the plaintiff] to reject offers of settlement made by [the defendant]... and that it had been this negligent advice which had caused the damages...."²³ The Superior Court upheld the trial court's grant of summary judgment to the additional defendants and dismissal of the joinder complaint.²⁴ In so doing, the Court easily concluded that an "attorney cannot be liable to [a] third party adversary because of [a] client's refusal to settle a claim," and that a "defendant will not be allowed to force [a plaintiff] to... assert a claim for malpractice against her attorneys...."²⁵

In *Goodman*, the plaintiff hired the defendant financial firm to assist with his estate planning; the plaintiff ultimately alleged that the defendant's negligence caused him to sustain a large tax burden resulting in a lawsuit that the plaintiff ultimately settled.²⁶ The defendant joined as an additional defendant the law firm that represented the plaintiff in the separate lawsuit, alleging that the additional defendant law firm was solely liable to the plaintiff.²⁷ The Superior Court upheld the trial court's

²⁰ *Id.* at 15.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Goodman*, 647 A.2d at 248.

²⁷ *Id.* at 249.

grant of summary judgment.²⁸ The Court explained that under Rule of Civil Procedure 2252 governing joinder, because the defendant contended the additional defendant was solely liable to the plaintiff, “the cause of action raised in [the defendant’s complaint against the additional defendants] must be the same cause of action set forth by the [plaintiff].”²⁹ In practice, this requires “the additional defendants’ liability be related to the original claim which plaintiff asserts against the original defendant. Joinder is not permitted where the allegations contained in the original complaint and the allegations contained in the joinder complaint relate to different harms to be proven with different evidence as to different occurrences happening at different times.”³⁰

Additional Defendant characterizes this case as similar to those he cited in that Defendants – Plaintiffs’ predecessor counsel – seek “to second guess the strategy and handling decisions of Attorney Botta” despite the fact that his only legal duty was to Plaintiffs and not Defendants. Ultimately, Additional Defendant argues, “in Pennsylvania... [t]he client, and not the former attorney, decides who to sue for malpractice.” Although Defendants are free to assert Attorney Botta’s actions as a *defense* to their own liability, Additional Defendant argues, they may not join Attorney Botta as Additional Defendant in light of the principles in *Mentzer & Rhey*, *Austin J. Richards*, and *Goodman*.

In response, Defendants cite the principle that Rule of Civil Procedure 2252 “is to be broadly construed to effectuate its purpose of avoiding multiple lawsuits by

²⁸ *Id.* at 249-50.

²⁹ *Id.* at 250.

³⁰ *Id.* (internal citations omitted).

setting forth in one action all claims arising out of the transaction or occurrence which gave rise to the plaintiff's action." Thus, Defendants argue that when a defendant alleges a third party is solely liable to the plaintiff, jointly or severally liable with the defendant, or liable to indemnify the defendant, "the only substantive limitation placed upon the right to join an additional defendant... is that liability must be premised upon the same cause of action alleged by the plaintiff in his or her complaint."

In support of their position, Defendants cite *Somers v. Gross*.³¹ In *Somers*, the plaintiffs filed a professional negligence action against the defendant accounting firm alleging that the defendant was negligent in its calculation of plaintiffs' tax liabilities.³² The defendant filed a joinder complaint to join the plaintiffs' attorney, alleging that the tax liability arose from the plaintiffs' reliance on the attorney's advice rather than the defendant's.³³ The trial court granted the additional defendant attorney's motion for summary judgment on the grounds of *Mentzer & Rhey* and *Austin J. Richards*, but the Superior Court reversed and permitted the joinder.³⁴ In those prior cases, the Court noted, the nature of the harm the additional defendant allegedly inflicted on the plaintiff was different from the harm for which the plaintiff was seeking to hold the defendant liable.³⁵ In *Somers*, however, the Court explained

³¹ *Somers*, 574 A.2d 1056.

³² *Id.* at 1057.

³³ *Id.*

³⁴ *Id.* at 1057-58.

³⁵ *Id.* at 1060-61. Specifically, the Court noted that in *Austin J. Richard*, "[t]he joinder issue... arose in connection with a related dispute [and therefore] the joinder complaint alleged liability of the attorney on a cause of action different from that pleaded by the plaintiff against [the defendant]... [I]n *Austin*, the plaintiff sued [the defendant] for interference with contract and slander of title, whereas the joinder complaint alleged professional negligence by the attorneys." Similarly, the Court explained that in *Mentzer & Rhey*, "the attorney could not be liable to the original defendant who was not its client," and explained that Rule 2252 does not permit joinder of a party that "could only be held secondarily liable to plaintiff," such as "for having failed to discover the defect caused by the original defendant" in that case.

that “the plaintiffs’ cause of action, i.e. the harm of which plaintiffs complain, consists of professional negligence in the form of allegedly improper tax advice and related services regarding plaintiffs’ 1984 taxes, resulting in tax penalties and fees. This is precisely what the joinder complaint alleges against the attorney defendant.”³⁶

Defendants argue that *Somers* is analogous to this case, at least with regard to Defendants’ claims that Additional Defendant is solely liable to Plaintiffs. This is because, Defendants contend:

“In the present case, there is a common question of causation associated with both [Plaintiffs’ suit against Defendants] and the Joinder Complaint against [Additional Defendant]. That common question is, who is responsible for the ultimate granting of the summary judgment motion [in the Prior Action], which caused the alleged damages suffered by [Plaintiffs]. The facts associated with each of these suits are the same, in the sense that it is the same series of facts, some of which take place before [Additional Defendant] is involved and others that take place after [Additional Defendant] begins representing [Plaintiffs], but all are on the path from the time when the praecipe for writ of summons is filed through the granting of the summary judgment motion [in the Prior Action].”

At argument, Additional Defendant contended that *Somers* is factually distinguishable from this Case, because in *Somers* the defendant and the additional defendant were advising the plaintiffs at the same time; thus, the causes of action were the same because they both consisted of the allegation that the particular party’s advice caused the plaintiffs’ large tax bill. Conversely, Additional Defendant suggests, in the instant case the two causes of action are non-overlapping: although both Defendant and Additional Defendant are alleged to have caused the grant of summary judgment in the Prior Action, Plaintiffs claim that Defendant’s actions leading to summary judgment occurred and were completed prior to the filing of the

³⁶ *Id.* at 1058.

complaint – and years before Additional Defendant began representing Plaintiffs – whereas Defendants claim that Additional Defendant’s actions leading to summary judgment occurred after May 2019 during Additional Defendant’s defense against that motion. In response, Defendants again stressed that here both Plaintiffs and Defendants are complaining of harms arising out of the same cause of action – the grant of summary judgment in the Prior Action – and not unrelated, collateral, or secondary harms.

With regard to Additional Defendant’s second preliminary objection, both parties essentially relied on their arguments concerning the first preliminary objection. Additional Defendant argued that, because Defendants’ alleged negligence was complete five years before Additional Defendant became involved in the case, it is impossible for Defendants and Additional Defendant to be joint tortfeasors. With regard to the claim for indemnity, Additional Defendant argued that the principle that predecessor counsel may not bring a malpractice action, nor compel the plaintiff bring such an action, squarely forecloses any possibility that he may be liable to indemnify Defendants.

In response, Defendants argue that Additional Defendant has taken a “narrow view of the events that cause the granting of the summary judgment motion” in the Prior Action, but that an appropriate analysis – taking into account the parties’ factual disputes about “the development of the case leading up to the entry of summary judgment” and Defendants’ contention that Additional Defendant’s “lack of action and argument” caused the grant of summary judgment – easily falls within the ambit of Rule 2252.

3. Analysis

As explained above, there are three possible situations here in which joinder would be appropriate under Rule 2252:

1) Additional Defendant may be solely liable “on the underlying cause of action” that Plaintiffs are bringing against Defendants;

2) Additional Defendant is liable *with* Defendants “on any cause of action arising out of the... series of transactions or occurrences upon which the underlying cause of action” that Plaintiffs are bringing against Defendants is based; or

3) Additional Defendant is liable *to* Defendants “on any cause of action arising out of the... series of transactions or occurrences upon which the underlying cause of action” that Plaintiffs are bringing against Defendants is based.

As explained below, the Court can deal with the second and third of these scenarios in a straightforward manner: as a matter of law, Additional Defendant can be liable neither *with* Defendants nor *to* Defendants concerning the cause of action in Plaintiffs’ Amended Complaint. The first scenario, whether joinder is appropriate based on Defendants’ allegations that Additional Defendant is *solely* liable to Plaintiffs, presents a far more difficult question.

a. Additional Defendant not Liable *With* Defendants

Although Defendants plead that Additional Defendant may be “liable with” Defendants or “liable for contribution,” it is clear that as a matter of law Additional Defendant’s potential liability is an all-or-nothing proposition; there is no situation in which Defendants and Additional Defendant both have non-zero liability to Plaintiffs.

The factual allegation at the heart of Plaintiffs’ claim against Defendants for legal malpractice is that Defendants failed to file the complaint in the Prior Action

before the statute of limitations had run. As a factual matter, this is either true or false.

Assume it is true that Defendants filed the complaint in the Prior Action late. This would mean that, when Defendants filed the complaint in 2014, it was already doomed to fail, barring an oversight by the opposing party. As a matter of law, there was nothing Additional Defendant could have done five years later to rescue the complaint from this fatal defect.³⁷ In this case, Defendants may still have an argument that their failure to file the complaint within the time period provided by statute was not negligent, but this would be entirely independent of anything Additional Defendant may have done five years later.

The other possibility is that Defendants did, in fact, file the complaint in the Prior Action before the expiration of the statute of limitations. In that case, Plaintiffs' claim against Defendants is flatly without merit, as its sole basis is that Defendants "failed to timely file the [complaint in the Prior Action]... and did not file until after the four (4) year statute of limitations had expired." In this case, Defendants' liability is necessarily zero, regardless of whether Additional Defendant was entirely or partially responsible for the ultimate dismissal of the Prior Action.

The two scenarios detailed above are exhaustive – either the complaint in the Prior Action was filed late, or it was not. Therefore, there is no situation in which a factfinder apportioning liability between Defendants and the Additional Defendant

³⁷ In other words, Additional Defendant did not *cause* the harm complained of by Plaintiffs – the grant of summary judgment – because it would have occurred regardless of Additional Defendant's actions. Because causation is an element of negligence, including legal malpractice, the fact that Additional Defendant did not cause Plaintiffs' harm precludes a claim of negligence against him as a matter of law.

could simultaneously attribute nonzero liability to both of them. Thus, there it is no possible situation in which Additional Defendant “may be... liable... *with*” Defendants as would permit joinder under that portion of Rule 2252(a)(2).

b. Additional Defendant not Liable To Defendants

It is similarly clear that, although Defendants plead that Additional Defendant may be “liable to” Defendants or “liable for indemnity,” there is no scenario in which Defendants are liable to Plaintiffs but are able to obtain indemnity from Additional Defendant. As detailed above, there is no scenario in which 1) Defendants failed to timely file the complaint in the Prior Action and 2) Additional Defendant is liable for negligence to Plaintiffs. In the absence of Additional Defendant’s negligence, Defendants would need to either a) establish an independent source of indemnification, such as a contract, or b) establish some duty Additional Defendant owed *to Defendants* rather than Plaintiffs.

Defendants have not pled any basis for indemnification or recovery from Additional Defendant independent of their allegation that Additional Defendant’s negligence in defending against the summary judgment motion was responsible for Plaintiffs’ damages. Therefore, Defendants can only force Additional Defendant to indemnify them if they can cite some legal duty Additional Defendant owes them to do so.

The cases cited by the parties and discussed above, however, forcefully establish that no such duty exists. As discussed below, *Mentzer & Rhey*, *Austin J. Richards*, and *Goodman* may leave room for debate over whether joinder is appropriate on the grounds that an additional defendant is *solely liable to the plaintiff*.

There is no uncertainty, however, with regard to any liability the additional defendant may have *to the original defendant*; namely, there is none. This is because, in Pennsylvania, “an attorney will be held liable only to his client [and] will not be held liable to anyone else” in the absence of “an attorney-client relationship or a specific undertaking by the attorney furnishing professional services....”³⁸

Somers, the case cited by Defendants, is in agreement. That case involved “joinder sought by the accountant defendants... on the single theory that [the attorney defendant] *alone* was liable *to the plaintiffs* for professional negligence... The accountant defendants are not alleging that the plaintiffs’ attorney is liable to the accountant defendants.”³⁹ Thus, the Superior Court’s analysis in *Somers* was based solely on a duty owed by the additional defendant to the plaintiff, rather than any duty owed to the original defendant.

For these reasons, Additional Defendant is neither “liable to [nor] with the joining party,” Defendants, “on any cause of action arising out of the... series of transactions or occurrences upon which the underlying cause of action” brought by Plaintiffs is based. Therefore, Rule 2252(a)(2) does not permit joinder of Additional Defendant, and the Court will grant Additional Defendant’s second preliminary objection.

c. Joinder on the Basis of Sole Liability to Plaintiffs

Whereas Rule 2252(a)(2) clearly does not permit joinder, whether Defendants may join Additional Defendant under Rule 2252(a)(1) remains a more difficult question. The answer to this question turns on whether, as a matter of law,

³⁸ *Mentzer & Rhey, Inc.*, 532 A.2d at 486.

³⁹ *Somers*, 574 A.2d at 1058.

Additional Defendant “may be... solely liable on the underlying cause of action” to Plaintiffs. The difficulty in answering this question arises out of the factual scenario here falling somewhere between *Mentzer & Rhey*, *Austin J. Richards*, and *Goodman* on the one hand and *Somers* on the other.

In each of the trio of cases cited by Additional Defendant, the attorneys that the original defendants sought to join as additional defendants were each negligent in some action – in both a *legal* and *physical* sense – that was separate from the original defendants’ negligence. In *Mentzer & Rhey*, the plaintiff claimed the original defendants negligently placed a culvert and then lied about it; the original defendants claimed the attorneys negligently conducted a title search in a subsequent sale of real property. In *Austin J. Richards*, the plaintiff claimed the original defendant abused legal process to cause delay in a sale of real property to a third party; the original defendant claimed the attorneys were negligent in advising her to refuse to accept his offer to settle the disputed issue prior to the lawsuit. In *Goodman*, the plaintiff claimed the original defendant gave him bad tax advice causing him to incur a large bill and sparking litigation concerning control of the plaintiff’s company; the original defendants claimed the attorneys were negligent in advising the plaintiff regarding the subsequent litigation and the plaintiff’s decision to settle.

As discussed above, the phrase “cause of action” in Rule 2252 has been interpreted to mean “the harm of which the plaintiff complains....” Given the mismatch between the ways in which the original defendant and the additional defendant allegedly harmed the plaintiffs in each of the cases cited by Plaintiffs, it is clear why those courts concluded that the additional defendants in those cases were

not, as a matter of law, potentially “solely liable on the underlying cause of action against the joining party...” Conversely, in this case, Defendants and the Additional Defendant are both alleged to have harmed Plaintiff in the Prior Action, the alleged means of the harm caused by each is legal malpractice, and the alleged harm complained of is ultimately the same – the dismissal of the Prior Action on statute of limitation grounds.

There are, however, countervailing considerations that similarly render *Somers* less than fully on point. In that case, the harm was that the plaintiffs filed their 1984 tax returns in a manner that incurred a large bill. At that time, the plaintiffs were receiving advice from both the original defendant financial firm and the additional defendant attorneys. Thus, that case involved one singular *action* – in both a *legal* and *physical* sense – that led to the plaintiffs’ harm: providing bad tax advice. The only question was which of the two potential culprits was responsible for that advice.

As discussed above, “[j]oinder is not permitted where the allegations contained in the original complaint and the allegations contained in the joinder complaint ‘relate to different harms to be proven with different evidence as to different occurrences happening at different times.’”⁴⁰ In *Somers*, it is clear why the court concluded that joinder was appropriate: the plaintiffs’ underlying cause of action was that they sustained a financial loss because they received bad tax advice, and either the original defendant or the additional defendant provided the bad advice leading to the loss; there was no mismatch between the *actions* the original defendant and the

⁴⁰ *Goodman*, 647 A.2d at 250.

additional defendant were alleged to have taken. Conversely, in this case, although Defendants and Additional Defendant are both alleged to have caused the dismissal of the prior action, they are alleged to have done so in mutually exclusive ways, completely independent of each other, five years apart.

Ultimately, *Mentzer & Rhey*, *Austin J. Richards*, and *Goodman* dealt with situations in which the additional defendant was alleged to have caused the plaintiff *different harms*, by taking *different actions*, in a *different legal action*, from the original defendant. In *Somer*, the additional defendant was alleged to have caused the plaintiff *the same harm*, by taking *the same actions*, in *the same legal action*, as the original defendant. Thus, none of these cases deals with the situation presented here: Additional Defendant is alleged to have taken different actions from Defendants, but in the same legal action.

Whether the Additional Defendant and Defendants allegedly caused Plaintiffs the same harm or different harms depends on the level of generality. Construed broadly, the harm is the same: the dismissal of the prior action. Viewed more narrowly, the harms are very different: the failure to comply with statutory deadlines in 2014 vs. the negligent argument of a legally meritorious position in 2019.

A resort to considerations of policy applicable to Rule 2252 generally is of little use. On the one hand, the principle of broad construction of Rule 2252 to “permit... the adjudication of the rights and liabilities of all parties to the particular transaction or occurrence to be effectuated in one action” seems to support joinder. So too does the history of broad construction of the phrase “cause of action” in the Rule. Conversely, the Superior Court in *Austin J. Richards* was emphatic in its admonition

that a “defendant will not be allowed to force [a plaintiff] to... assert a claim for malpractice against her attorneys,” which would be the practical effect of allowing Defendants to hale Additional Defendant into court based solely on Additional Defendant’s alleged liability *to Plaintiff*. Further, the fact that Defendants’ negligence was allegedly complete years before Additional Defendant became involved in the Prior Action suggests that the allegations against Defendants and Additional Defendant “relate to different harms to be proven with different evidence as to different occurrences happening at different times.”

The Court concludes that joinder in this case is not permissible under Rule 2252(a)(1). The primary purpose of Rule 2252 is to avoid a multiplicity of suits and ensure that single, contiguous issues are not adjudicated piecemeal. Here, there is no danger that judicial economy will be wasted in such a manner or that the failure to join Additional Defendant will delay the resolution of all parties’ rights. As discussed above, Defendants have no claim against Additional Defendant, and Plaintiffs have made clear that they do not wish to pursue any action against Additional Defendant. Joinder here would also undeniably have the effect of forcing Plaintiffs to bring a malpractice claim against their attorneys against their will, a circumstance that is – understandably – strongly disfavored.

Furthermore, this is a case in which “the allegations contained in the original complaint and the allegations contained in the joinder complaint ‘relate to different harms to be proven with different evidence as to different occurrences happening at different times,’” as becomes apparent when one considers how the issues would necessarily be presented to a factfinder. As pled, Plaintiffs would initially argue that

Defendants failed to file the complaint in the Prior Action before the deadline, resulting in a grant of summary judgment. Defendants would then argue 1) Defendants actually filed the Complaint in a timely manner; and 2) Additional Defendant committed malpractice when defending against summary judgment, and that was the cause of Plaintiffs' damages.

These two theories of liability do not overlap, except to the superficial extent that each allegedly caused the dismissal of the Prior Action. Defendants' liability to Plaintiff rises and falls entirely on actions that occurred in or before 2014, and no evidence produced by Plaintiffs to establish that Defendants failed to timely file the pleadings – nor any evidence produced by Defendants to demonstrate that they did – is relevant to whether Additional Defendant was negligent in their handling of the motion for summary judgment five years later. Ultimately, the alleged harm of filing a pleading that is defective *ab initio* due to its untimeliness is distinct from the alleged harm of failing to convince a court that a contested motion is without merit. That each has the same ultimate result does not render them factually intertwined in a manner that would justify joinder.

The Court does not believe this decision will in any way prejudice Defendants. The Court does not intend this ruling to prevent Defendants from suggesting to the factfinder an alternative cause of the Plaintiffs' harms, which might be necessary to avoid the risk of the factfinder concluding that the only possible reason for the dismissal of the prior action was a late filing. Although this case is still at the pleading stage, the parties have not yet suggested a reason why Defendants may not *argue* to the factfinder that the dismissal is explainable because of a failure of subsequent

counsel to appropriately defend against the motion for summary judgment, thereby providing an alternative theory of causation. Nothing in this Opinion and Order should be construed as expressing an opinion on the relevance or admissibility of any particular discovery issue or defense.⁴¹

Ultimately, the Court concludes that Additional Defendant is not potentially “solely liable on the underlying cause of action against” Defendants, which is that the complaint in the Prior Action was negligently filed late. This is because Defendants do not allege that Additional Defendant is responsible for the late filing of the complaint in the prior action, and therefore Additional Defendant’s purported liability is not “related to the original claim” of failure to abide by the statute of limitations “which [P]laintiff asserts against” Defendants. Therefore, joinder is not appropriate pursuant to Rule 2252(a)(1).

B. Remaining Preliminary Objections

Because the Court has determined that joinder is not permissible under Rule 2252, Additional Defendant’s remaining preliminary objections are moot.

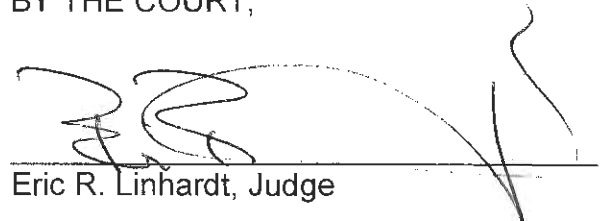
⁴¹ As such discovery matters are not before the Court, the Court expresses no opinion on any potential disagreement that may arise concerning the scope of discovery. The parties may of course seek this Court’s intervention should they be unable to resolve any discovery disputes among themselves, and the Court will provide the parties a deadline for motions in limine to argue the admissibility of any proposed theory or defense.

ORDER

AND NOW, for the foregoing reasons, the Court finds that Rule 2252 does not permit Defendants' joinder of Additional Defendant in this action. Therefore, the Court SUSTAINS Additional Defendant's First and Second Preliminary Objections in the nature of a demurrer. Defendants' Complaint to Join Frank Botta as an Additional Defendant, filed January 21, 2022, is DISMISSED WITH PREJUDICE.

IT IS SO ORDERED this 7th day of October 2022.

BY THE COURT,



Eric R. Linhardt, Judge

ERL/jcr

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