

SC98227

IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI EX REL. WOODCO, INC.

Relator,
vs.

HONORABLE JENNIFER PHILLIPS, JUDGE OF THE SIXTEENTH
JUDICIAL CIRCUIT IN THE COUNTY OF JACKSON
DIVISION 12

Respondent,

Writ Proceeding from the Circuit Court of Jackson County, Missouri
Honorable Jennifer M. Phillips, Circuit Judge
Case No. 1816-cv-10399

REPLY BRIEF OF RELATOR WOODCO, INC.

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INTRODUCTION TO REPLY

Three defendants filed separate motions to add BSP Masonry and Moses Davila as necessary parties under Rule 52.04. In fact, defendant Bob D. Campbell was the first to file such a motion and was joined by two other defendants, including Haren & Laughlin. Interestingly, defendant Bob Campbell did not file a brief or an answer to the petition for writ after a preliminary writ was issued. That is telling.

Also, Haren & Laughlin uses terms like “equity” and “good conscience” numerous times throughout its brief to support its assertion that BSP Masonry and Moses Davila (collectively, “BSP Masonry”) is a necessary party. However, these terms are not used in determining whether a non-party is a necessary party. Instead, these terms are used only in determining whether a non-party is an indispensable party—a determination that cannot be made until a non-party is determined to be a necessary party. See Rule 52.04(b). This Writ only addresses whether BSP Masonry is a necessary party. Thus, Haren & Laughlin’s repeated use of the terms “equity” and “good conscience” is inappropriate and should therefore be ignored.

I. The parties may obtain complete relief under the claims asserted by Relator, without the addition of BSP Masonry as a party defendant.

Haren & Laughlin first argues that BSP Masonry is a necessary party to this litigation because it cannot obtain “complete relief” without BSP Masonry being added as a party defendant. (Respondent’s Brief, p. 21). While Rule 52.04 and its federal counterpart Rule 19 both use the phrase “complete relief” in describing a necessary party, Haren & Laughlin misapplies and misinterprets the phrase “complete relief”. The case of

*GP&W, Inc. v. International Exchange Services, LLC*¹, illustrates the proper application and interpretation of the phrase “complete relief” in relation to potential necessary parties.

In *GPW*, plaintiff engaged in the business of purchasing, marketing, and distributing fuels and energy products. *Id.* at *2. In 2010, plaintiff and defendant entered into an agreement, pursuant to which plaintiff was to purchase Renewable Identification Numbers² (“RIN”) from defendant. *Id.* The agreement allegedly required that the RINs be generated and purchased in compliance with federal law. *Id.* The agreement also required defendant to have marketable title and the right to sell and transfer the RINs. *Id.* Defendant delivered the RINs to plaintiff who paid the purchase price, and plaintiff sold the RINs to other buyers. *Id.* Plaintiff later learned that 943,515 of the RINs purchased from defendant were fraudulently created by another company, Clean Green Fuels (“CGF”), and were invalid. *Id.* Plaintiff sued defendant for breach of contract and breach of warranties for selling it fraudulent and invalid RINs. *Id.* Defendant filed a motion to dismiss the case, in part, for failure to join CGF as a party defendant. *Id.* at *1. To support this argument, defendant claimed CGF, as the issuer of the allegedly invalid

¹ Case No. 4:12-CV-00404, 2012 WL 4513851 (E.D. Mo. Oct. 2, 2012) (applying Missouri law).

² To facilitate compliance under the Clean Air Act, the EPA adopted a system of RINs for reporting purposes. *Id.* at *1. Under the Act, certain obligated parties had to show that they had introduced a required volume of renewable fuel into domestic gasoline pool each year. *Id.* When an obligated party has satisfied its annual quota, it can sell the excess RINs to other obligated parties. *Id.*

RINs, must be joined under Rule 19 to avoid inconsistent obligations, afford complete relief, and to reduce the risk of additional lawsuits. *Id.* at *6.

The United States District Court for the Eastern District of Missouri disagreed with defendant's argument that CGF was a necessary and indispensable party. *Id.* at *7. In so holding, the district court held that defendant failed to offer any reason why defendant could not bring CGF, who defendant alleged was required for complete relief, into the action as a third-party under Rule 14.³ *Id.* As the district court stated, "A defendant can always protect itself from the possibility of inconsistent verdicts by impleading the absent party under Rule 14." *Id.*, quoting *Pasco Int'l. Ltd. v. Stenograph Corp.*, 637 F.2d 496, 503 (7th Cir. 1980).

Like GPW, Haren & Laughlin failed to offer any valid reason as to why it cannot bring BSP Masonry into the action as a third party under Rule 52.11. Haren & Laughlin claims that, because it does not have contractual privity with BSP Masonry, it cannot assert an indemnity claim against BSP Masonry. However, this argument completely ignores that Haren & Laughlin may bring a contribution claim against BSP Masonry, as a contribution claim does not require indemnity between the parties. *Gramex Corp. v. Green Supply, Inc.*, 89 S.W.3d 432, 442 (Mo. banc 2002) (holding all that is required to maintain an action for contribution is that both the party seeking contribution and the defendant against whom contribution is sought must be originally liable to the plaintiff-injured party).

³ Federal R. Civ. P. 14 relates to third-party practice and is the equivalent to Rule 52.11 of the Missouri Rules of Civil Procedure.

More significantly, Haren & Laughlin admits that it does not have privity of contract with BSP Masonry. Because Haren & Laughlin does not have privity of contract with BSP Masonry, BSP Masonry is not a necessary party. *See Bunting v. McDonnell Aircraft Corp.*, 522 S.W.2d 161 (Mo. banc 1975) (holding that, even though the United States had an interest in the patent dispute, the only necessary parties to the lawsuit on a contract was the parties who executed the contract); *see also Cunningham v. Burke*, 705 S.W.2d 120 (1986) (holding parties to the contract being sued upon are the only necessary parties to the suit).

Haren & Laughlin also argues BSP Masonry is a necessary party because “there can be no finding of liability against Haren & Laughlin without first making a finding of liability against BSP Masonry.” (Respondent’s brief, p. 22) However, liability as to Haren & Laughlin rests on (a) whether it met its obligations under its contract with Relator, (b) whether Haren & Laughlin negligently performed its contract, (c) whether Haren & Laughlin negligently supervised and managed the subcontractors, and (d) whether Haren & Laughlin made misrepresentations regarding its services. (Ex. 1, pp. 7-12) Even if, in determining Haren & Laughlin’s liability, the trier of fact must make a finding as to the quality of work performed by BSP Masonry, it does not make BSP Masonry a necessary party. In *GPW*, liability as to defendant would require a finding as to whether the RINs defendant sold to plaintiff were valid—RINs that defendant received from another non-party company that sold it the allegedly fraudulent and invalid RINs. Nevertheless, the non-party company (CGF) was not deemed a necessary party. *GP&W*,

2012 WL 4513851, at *7. Additionally, the Missouri Supreme Court further dismissed this argument in the *Bunting* case:

This is a lawsuit on a contract between the only two parties who executed the same. The United States need not participate in the resolution of the dispute which has arisen as to the rights of the parties therein. This is true, even though it might become necessary for the court to decide what, if any, effect the provisions of the earlier contract between defendant and the government had on the contract between the instant parties.

Bunting, 522 S.W.2d at 169.

Haren & Laughlin next argues “[a] verdict against Haren Laughlin would likely result in a verdict for both the damages for the negligence and breach of contract of Relator’s subcontractor BSP Masonry **AND** the damages for whatever negligence or breach of contract the jury finds against Haren Laughlin for its discreet acts.” (Respondent’s brief, p. 23) Because of this, Haren & Laughlin argues this will cause it to be subject to double or multiple liability. However, this argument is misguided as Haren & Laughlin will not be subject to double or multiple liability if BSP Masonry is not added as a party defendant.

Relator’s contract claims against Haren & Laughlin relate to a contract where Relator and Haren & Laughlin are the only parties. Double or multiple liability occurs in contract claims where not all obligees under a contract are parties to a suit. *See e.g., Cunningham v. Burke*, 705 S.W.2d 120 (Mo. App. 1986) (finding parties who, along with the plaintiff, owned a herd of dairy cattle, and who negotiated with an auctioneer for sale of cattle, were necessary parties to the plaintiff’s breach of contract action against the auctioneer); *see also Gardner v. Blahnik*, 832 S.W.2d 919 (Mo. App. 1992) (holding

where evidence indicated that a corporation created by a real estate broker might have been a party to the listing contract, in a suit for real estate commissions, the corporation had to be joined as a necessary party; otherwise, the defendant could be subjected to risk of double liability if a later action was brought for the commission by the corporation), *abrogated* on other grounds by *KMS, Inc. v. Wilson*, 857 S.W.2d 525, 529 (Mo. App. 1993); *Schmitz v. Taylor-Morley-Simon, Inc.*, 708 S.W.2d 786 (Mo. App. 1986) (finding the buyer's wife was a necessary party to the contract case because she was the co-signor on the contract). Because all parties to the contract upon which Relator is suing are parties to this suit, there is no risk of double or multiple liability against Haren & Laughlin.

Relator's negligence claims relate to the negligent performance of the contract and negligent supervision of subcontractors. Once again, Relator is the only that may make these negligence claims. And, even if BSP Masonry is a joint tortfeasor, Relator is not required to sue all joint tortfeasors. Instead, the joint tortfeasors may be brought in the suit as third-party defendants under a contribution claim. *See e.g., Missouri Pac. R. Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466, 474 (Mo. banc 1978) (holding "[c]oncurrent or joint tortfeasors not sued by plaintiff, however, may now be brought in by third party practice for a determination in due course of their relative part of the responsibility, if such is the case, for the overall injury and damage to the plaintiff").

Haren & Laughlin next argues that Missouri law requires all parties who have joint obligations pursuant to a contract be parties to the litigation. In support of this argument, Haren & Laughlin cites to *Justus v. Webb*, 634 S.W.2d 567 (Mo. App. 1982).

However, this case does not support Haren & Laughlin’s overly broad assertion of the law. The Court in *Justus* held that all obligees under a contract must be joined as parties to the litigation in which the contract is being litigated. *Id.* at 570. Thus, in *Justus*, plaintiff husband had to add his ex-wife to the litigation because they were both obligees under the contract in which plaintiff husband was suing. *Id.*

An “obligee” is “[t]he person in favor of whom some obligation is contracted, whether such obligation be to pay money or to do or not to do something.” Black’s Law Dictionary, p. 1226. (4th ed. 1968). In this case, Relator is the obligee as it is the party whom obligations are being performed and is the party enforcing the contractual obligations. As Relator is the only obligee under its contract with Haren & Laughlin, no other parties are deemed necessary parties under Missouri law and the *Justus* case cited by Haren & Laughlin.

Therefore, the parties can obtain complete relief on the claims alleged by Relator, without adding BSP Masonry as a necessary party. Accordingly, BSP Masonry is not a necessary party under Rule 52.04.

II. Any alleged reasons for why Relator did not elect to sue BSP Masonry are irrelevant.

Surprisingly, Haren & Laughlin’s next “argument” was only set forth in the header to Section IB of its brief and should be disregarded. *See, Tribus, LLC v. Greater Metro, Inc.*, 589 S.W.3d 679, 692 n. 7 (Mo. App. 2019) (noting that appellate review is limited to arguments developed in the argument portions of the brief). In fact, Haren & Laughlin’s entire argument section for Section IB simply regurgitates case law regarding

necessary parties and indispensable parties. Even then, Haren & Laughlin does not apply two pages worth of case law to any facts of this case or even make a conclusion. (See, Respondent’s brief, pp. 24-26.) Among the pages of case law cited by Haren & Laughlin, not a single case explicitly or implicitly supports its argument—the alleged reasons why Relator failed to sue BSP Masonry is relevant under Rule 52.04.

Furthermore, Haren & Laughlin uses terms like “equity” and “good conscience” and cites to case law explaining indispensable parties. But these terms relate only to whether BSP Masonry is an indispensable party. See Rule 52.04(b) (stating that if a necessary party cannot be made a party, “the court shall determine whether in *equity* and *good conscience* the action should proceed among the parties before it or should be dismissed”) (italics added). And whether BSP Masonry is an indispensable party is irrelevant to this writ because BSP Masonry is not a necessary party. The issue of whether a party is an indispensable party is not ripe until it is determined that the party is a necessary party and is not subject to a circuit court’s jurisdiction. See *Pauli v. Spicer*, 445 S.W.3d 677 (Mo. App. 2014).

Notwithstanding these numerous shortcomings, it is clearly irrelevant why Relator decided not to sue BSP Masonry. Indeed, Relator may choose who to sue and what theories to pursue. See *Burg v. Dampier*, 346 S.W.3d 343, 360 (Mo. App. 2011) (holding that “a plaintiff may sue all or any of the joint or concurrent tort-feasors” which plaintiff desires); see also *Wagner v. Bondex International, Inc.*, 368 S.W.3d 340, 259 (Mo. App. 2012) (holding that plaintiffs had the right to sue and seek settlement from the tortfeasors of their choosing).

Furthermore, Rule 52.04 only relates to whether a non-party is a necessary and indispensable party—not the reason for a non-party’s omission from the suit. As explained above, BSP Masonry is not a necessary party because (1) it is not a party to any of the contracts Relator is suing on; and (2) simply being an alleged joint tortfeasor does not make BSP Masonry a necessary party. Therefore, any alleged reasons for why Relator elected not to sue BSP Masonry is irrelevant under Rule 52.04.

III. Whether a judgment is collectable does not negate an otherwise valid third-party claim, nor does it make BSP Masonry a necessary party.

Haren & Laughlin next argues that Relator’s alleged negligence and breach of the Prime Contract in failing to ensure BSP Masonry had valid insurance makes it impossible for it to assert a third-party negligence claim. (Respondent’s brief, pp. 26-27). In other words, Haren & Laughlin is arguing that traditional third-party practice is impossible and not an alternative to a direct action by Relator because BSP Masonry is allegedly judgment-proof. (Respondent’s brief, p. 9).⁴ However, whether a party allegedly is judgment-proof does not invalidate a third-party claim against that party. The issue of whether a judgment is collectable is entirely separate and distinct from whether a third-party claim (or any claim) may be brought. Thus, not only is it entirely irrelevant whether BSP Masonry is judgment-proof in determining if BSP Masonry is a necessary party, it is also irrelevant in whether a third-party claim may be asserted against BSP Masonry.

Haren & Laughlin also argues that it cannot bring a third-party tort claim against BSP Masonry because of the economic loss doctrine. (Respondent’s brief, p. 27). As a

⁴ “Traditional third-party practice is not an alternative in this case because...Moses Davila d/b/a BSP Masonry...are effectively judgment proof and cannot be located.”

result, Haren & Laughlin admits that Relator controls the pleadings and should assert a tort claim against BSP Masonry, even if Relator elects to dismiss such a claim against BSP Masonry. Interestingly, Haren & Laughlin admits that Relator controls its pleadings, yet argues that it must assert a tort claim against BSP Masonry. Those statements are incongruent. Haren & Laughlin cannot argue on the one hand that Relator has control of its pleadings; but, on the other hand, argue Relator can dismiss a tort claim against a non-party it elected not to sue in the first place.

Additionally, Haren & Laughlin recognizes that it could assert a third-party tort claim against BSP Masonry but for the economic loss doctrine. However, this argument ignores the possibility that a third-party contribution claim may be asserted against BSP Masonry if it is a joint tortfeasor—as Haren Laughlin implies. *Missouri Pac. R. Co.*, 566 S.W.2d at 474.

Therefore, whether any third-party judgment against BSP Masonry may be collected is irrelevant as to whether BSP Masonry is a necessary party nor does it negate a valid third-party contribution claim.

IV. Equitable principles do not apply in determining whether a non-party is a necessary party and the cited case by Haren & Laughlin does not apply.

Even though Haren & Laughlin previously admitted that Relator controls the pleadings, in its final argument, it argues that Relator should not be able to use this control because this case presents unique circumstances. In support of this assertion, Haren & Laughlin cites to *Westerhold v. Carroll*, 419 S.W.2d 73, 80 (Mo. 1967).

First, cases citing *Westerhold* have significantly limited its holding to specific factual circumstances. Specifically, the holding in *Westerhold* is directly related to the fact that the third-party claimant was a surety, making a claim against the architect. As a result, courts have applied *Westerhold* in cases involving sureties. See e.g., *Fleischer v. Hellmuth, Obata & Kassabaum, Inc.*, 870 S.W.2d 832 (Mo. App. 1993) (finding that the result in *Westerhold* did not apply to a construction manager's claim against an architect because *Westerhold* applies to cases involving sureties); *Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc.*, 392 F.2d 472 (8th Cir. 1968) (relying on the holding in *Westerhold* in holding an architect liable in tort to a surety for its negligent supervision of a construction project). In this case, no party is a surety. Thus, *Westerhold* is not applicable to the facts of this case.

Moreover, *Westerhold* is also not applicable in that it has nothing to do with whether a party is a necessary party under Rule 52.04, which is the very issue before this Court.

CONCLUSION

BSP Masonry and Moses Davila are not necessary parties to the claims asserted by Relator. As to the contractual claims, BSP Masonry and Moses Davila are not parties to the contracts on which Relator is suing. As to the tort claims, BSP Masonry and Moses Davila are, at best, joint tortfeasors, which is not enough to make them necessary parties. Should Haren & Laughlin believe BSP Masonry and Moses Davila are necessary parties, it may bring them into the action as third-parties under Rule 52.11. Therefore, because

BSP Masonry and Moses Davila are not necessary parties under Rule 52.04, Relator requests this Court to make the preliminary writ absolute.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 84.06(c), that this Brief for Relator Woodco, Inc. complies with Rule 55.03, and with the limitations contained in Rule 84.06(b). I further certify that this brief contains 3,516 words, excluding the cover, this certificate, and the signature block, as determined by the Microsoft Word 2010 word-counting function.

/s/ Michael F. Barzee

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May 2020, pursuant to Rule 103.08, I electronically filed the foregoing Brief for Relator Woodco, Inc. with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

/s/ Michael F. Barzee

Attorney for Relator