



SO ORDERED.

SIGNED this 25 day of September, 2006.

Dale L. Somers

Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In Re:

**ASHRAF FOUAD HASSAN,
IRINA HASSAN,**

DEBTORS.

**CHRISTOPHER J. REDMOND,
Trustee,
KANSAS EXPRESS INTERNATIONAL,
INC.,**

PLAINTIFFS,

v.

**ASHRAF FOUAD HASSAN,
BILAL SAID,
INTERNATIONAL FOOTBALL CLUB,
INC.,
OVERLAND PARK SPORTS
COMPLEX, LLC,
TERRA SPORTS GROUP, LLC,
TERRA VENTURE, INC.,**

**CASE NO. 04-20332-7
CHAPTER 7**

ADV. NO. 05-6215

**TERRA VENTURE INVESTMENTS,
LLC,
ANALYTICAL MANAGEMENT
LABORATORIES, INC.,
MARK MURPHY,
THE MURPHY LAW FIRM,

DEFENDANTS.**

**ORDER GRANTING MOTION FOR JOINDER OF PERSONS NEEDED FOR
JUST ADJUDICATION, AND REQUIRING PLAINTIFFS TO BRING
THOSE PERSONS INTO THIS PROCEEDING**

This proceeding is before the Court on a motion for joinder of persons needed for just adjudication, or in the alternative, to stay this proceeding pending the resolution of related state court litigation. The motion was filed, along with a supporting brief, by defendants Mark Murphy and the Murphy Law Firm. Defendant Bilal Said also filed a brief in support of the motion. The Plaintiffs objected to the joinder portion of the motion only on the procedural ground that it was not timely, but contested the substance of the alternative request for a stay. Murphy and his law firm appeared by counsel George D. Halper, Daniel F. Church, and Byron A. Bowles of McAnany, Van Cleave & Phillips, P.A. Said appeared by counsel Richard C. Wallace of Evans & Mullinix, P.A. The Plaintiffs initially appeared by counsel Kasey A. Rogg, Kevin M. Bright, and Eric J. Howe of Husch & Eppenberger, LLC, but Christopher J. Redmond of the same firm later entered his appearance as well, and Mr. Rogg and Mr. Howe withdrew. The Court has reviewed the relevant materials and is now ready to rule.

FACTS

The Court's resolution of this dispute is governed by allegations made in the Plaintiffs' complaint and uncontested assertions made in the motion.

When the Debtors filed for bankruptcy in February 2004, they owned all the stock of Kansas Express International, Inc. ("Kansas Express"), which became property of their Chapter 7 bankruptcy estate. Nevertheless, the Plaintiffs allege, Debtor Ashraf Hassan ("Debtor") thereafter agreed to sell the stock to Al Moser for \$550,000. Attorney and defendant Mark Murphy and the Murphy Law Firm, P.A. ("the Murphy Defendants"), were involved in preparing papers dealing with the sale. After Moser had paid some of the sale price but before the transaction was completed, he learned of the Debtors' bankruptcy case and contacted the Murphy Defendants about it. The Plaintiffs allege the sale agreement was then substantially modified so it appeared to be a sale of the Debtor's services, rather than the corporation's stock. The parties signed the new agreement and Moser paid more of the sale price. Said and the Debtor allegedly own interests in defendant International Football Club, Inc. ("IFC"), and the Debtor invested a significant portion of the proceeds of the sale in IFC. The Plaintiffs claim both Said and IFC knew those proceeds belonged to the Debtors' bankruptcy estate. Within a few weeks of the sale, Moser rescinded the contract with the Debtor and demanded his money back, but the Debtor refused to repay him.

Said and IFC allegedly tried to conceal from the Plaintiff-trustee their association with the Debtor and their receipt of the proceeds of his sale of Kansas Express.

According to the Plaintiffs, Said used various other entities, defendants Overland Park Sports Group, LLC, Terra Sports Group, LLC, Terra Venture, Inc., Terra Venture Investments, LLC, and Analytical Management Laboratories, Inc., as facades for his business operations. The Plaintiffs claim these entities are Said's alter egos, whose separate existence should be disregarded to prevent fraud or injustice. The Debtor or Said, or both of them, the Plaintiffs add, used these entities to try to keep the Debtors' bankruptcy estate from obtaining any of the proceeds of the sale to Moser.

In December 2005, the Plaintiffs commenced this adversary proceeding against the Debtor, IFC, the Murphy Defendants, Said, and Said's alleged alter egos, seeking, among other things, to recover the proceeds of the Debtor's sale of Kansas Express. After answers were filed, a scheduling order gave the defendants until April 30, 2006, to join additional parties. In March 2006, Moser, his wife, and two Kansas corporations he owns (collectively "the Mosers") commenced a suit in a Kansas state court, seeking, among other things, to recover the money paid for Kansas Express. On May 17, 2006, the Mosers amended their petition to add the Murphy Defendants as defendants in that suit. With that amendment, all the defendants in this adversary proceeding are also defendants in the Mosers' suit. There are three more defendants in the Mosers' suit, but the Murphy Defendants contend a settlement the Plaintiff-trustee made with those three, documented in the Debtors' main bankruptcy case by pleading number 88 and number 90, concerned the claims the Plaintiffs are asserting in this adversary proceeding; the Plaintiffs do not contest this characterization of the settlement.

On June 1, 2006, the Murphy Defendants filed the motion addressed by this order, seeking to join the Mosers as parties in this adversary proceeding. They allege the Mosers claim an interest in the same assets the Plaintiffs are trying to recover here, and not joining the Mosers as parties would subject the Murphy Defendants to a substantial risk of incurring multiple obligations. The Plaintiffs' only objection to the effort to add the Mosers as parties is that the Murphy Defendants failed to make the motion before the scheduling order's April 30 deadline for the defendants to join additional parties. In the alternative, the Murphy Defendants ask the Court to stay this proceeding pending resolution of the Mosers' state court suit, a request the Plaintiffs oppose. Said has filed a brief in support of the motion. For the reasons discussed below, the Court will grant the motion to join the Mosers as parties in this proceeding, rendering moot the alternative relief sought.

DISCUSSION

With two exceptions not yet involved here,¹ Federal Rule of Bankruptcy Procedure 7019 makes Civil Rule 19, labeled "Joinder of Persons Needed for Just Adjudication," apply to adversary proceedings. In relevant part, Rule 19(a) provides:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if . . . (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may . . . (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent

¹The exceptions can arise only if the person joined under Rule 7019 as a party claims (1) the Court does not have jurisdiction over the subject matter, or (2) venue is improper.

obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.

The Plaintiffs do not dispute the assertion that in the state court suit, the Mosers are trying, among other things, to recover from the Murphy Defendants the purchase money that Moser paid the Debtor, money the Plaintiffs are also trying to recover from them in this proceeding. If the suits proceed as they now stand, then, the Murphy Defendants could possibly be required by the state court to refund the purchase price to the Mosers and by this Court to turn the same money over to the Plaintiffs. The Court concludes that the reason described in Rule 19(a)(2)(ii) for ordering joinder exists in this proceeding.

The question remains whether any of Rule 19's limitations on ordering joinder also exist. The Murphy Defendants claim that Moser and his wife live in Johnson County, Kansas, and that Moser owns the two Kansas corporations who are co-plaintiffs in the state court suit. Bankruptcy Rule 7004(d) authorizes nationwide service of the summons and complaint in an adversary proceeding, so these allegations indicate that the Mosers are all subject to service of process from this Court. The subject-matter jurisdiction problem generally arises only when a federal court's subject-matter jurisdiction is based on diversity of citizenship, and joining the new person under Rule 19 would destroy the diversity of the parties.² This Court's jurisdiction of the subject matter of this proceeding is not based on diversity of citizenship, though, so joining the Mosers as parties will not

²See 7 Wright, Miller & Kane, *Fed. Prac. & Pro.: Civil 3d*, § 1610 (2001).

likely raise a question of subject-matter jurisdiction. Consequently, the Murphy Defendants' motion for joinder of the Mosers satisfies all the requirements of Rule 19(a)(2).

Although the Plaintiffs do not dispute the conclusion that Rule 19's requirements for joinder are met, they contend the Murphy Defendants' motion comes too late, because it was filed after the deadline set in the scheduling order for the defendants to join any parties in this proceeding. The Court cannot agree. Bankruptcy Rule 7016 makes Civil Rule 16 apply in adversary proceedings. Rule 16(b) specifies various matters that may be included in a scheduling order and declares: "A schedule shall not be modified except upon a showing of good cause and by leave of the [judge presiding over the proceeding.]" In effect, the Plaintiffs' objection is merely that the Murphy Defendants filed their motion for joinder without formally seeking an extension of the scheduling order deadline for adding parties. The Court believes it has discretion to treat the motion as if it also asked for such an extension and will do so. The Court is convinced good cause exists to justify extending the deadline. The Murphy Defendants claim they did not learn the Mosers would try to recover the purchase money from them until the Mosers filed their amended petition in the state court more than two weeks after the scheduling order deadline. The Plaintiffs do not dispute this claim. Even assuming the Murphy Defendants knew about the claims being asserted in the state court suit before the Mosers added them as defendants in that suit, the Murphy Defendants' alleged involvement as legal counsel in the transaction between the Debtor and Moser was not the kind that would typically result

in one of the parties suing to recover from them purchase money paid in the transaction. Under the circumstances, the Murphy Defendants should not be subjected to the risk of double liability for failing to realize earlier that the Mosers would try to recover that money from them.

For these reasons, the Court concludes the motion for joinder of the Mosers should be granted. This ruling makes the alternative request to stay this proceeding moot, and it is denied. It is therefore ordered that Moser, his wife, and his two corporations shall be made parties to this proceeding. The question remains how this is to be accomplished.

Rule 19(a) includes three possibilities for dealing with a person who is ordered to be made a party and should join the case as a plaintiff: (1) the person can choose to do so; (2) if the person refuses to join as a plaintiff, the person may be made a defendant; and (3) if the person refuses to join as a plaintiff, the person may be made an involuntary plaintiff “in a proper case.” Since the Mosers are seeking relief from the same defendants as the Plaintiffs are, it would initially seem the Mosers should become additional plaintiffs in this proceeding. Case law has indicated “a proper case” for making a person an “involuntary plaintiff” is one where the person is not subject to service of process issued from the court where the case is pending and the person is under some sort of obligation to join the current plaintiff’s lawsuit or allow that plaintiff to use his, her, or its name in the suit, but refuses to fulfill that obligation.³ The Mosers all appear to be subject

³See *Eikel v. States Marine Lines, Inc.*, 473 F.2d 959, 961-62 (5th Cir. 1973); see also 7 Wright, Miller, & Kane, *Fed. Prac. & Pro.: Civil 3d*, § 1606 (2001); Jean F. Rydstrom, Annotation, *What Constitutes “Proper Case” Within Meaning of Provision of Rule 19(a) of Federal Rules of Civil*

to service of process from this Court and have not been alleged to have any sort of obligation to join the Plaintiffs in this suit or allow their names to be used to pursue it. In fact, their interests conflict with those of the Plaintiffs because they want to undo their sale agreement with the Debtor and recover their payments, while the Plaintiffs in effect want to affirm the sale agreement and recover the benefits the Debtor obtained under it. Clearly, this is not the kind of case where the Mosers could be joined as involuntary plaintiffs. This means the Mosers can either choose to join the case as plaintiffs or be forced to come into the case as defendants.

The Court has found one published decision by a federal court of appeals discussing how parties are to be joined to a suit when Rule 19 requires their joinder. In *Eikel v. States Marine Lines, Inc.*,⁴ two attorneys sued a company for legal fees, and the company filed a motion to dismiss the suit for failure to join a third attorney who was a partner of the plaintiff-attorneys when services were provided to the company. The district court granted the motion, concluding (1) the third attorney was a necessary party because he had previously demanded some or all of the same fees from the company, (2) the third attorney had to be joined as a defendant, apparently because he disputed the plaintiffs' right to the fees, and (3) his joinder would destroy the court's diversity

Procedure that When Person Who Should Join as Plaintiff Refuses to Do So, He May Be Made Involuntary Plaintiff "in a Proper Case," 20 A.L.R. Fed. 193, 196-97 & 202-11 (1974) & 2005 Supp. at 55-56 (discussing numerous cases on this point).

⁴473 F.2d 959 (5th Cir. 1973).

jurisdiction.⁵ On appeal, the necessity of joining the third attorney was conceded, and the Fifth Circuit considered whether he should be added as an involuntary plaintiff or as a defendant.⁶ In the course of deciding he should be added as a defendant, the circuit said:

The law generally disfavors forced joinder of a party as a plaintiff with whatever procedural handicaps that normally entails. [Footnote omitted.] Under our adversary system the general rule is that only the party who initiates the lawsuit should be saddled with the procedural burdens of a plaintiff. For that reason, absent the “proper case” exception, where there is an obligation to join as a plaintiff, the preferred method is to designate and serve involuntary parties as defendants, regardless of their appropriate interest alignment. [Citation omitted.]⁷

Unfortunately, the circuit did not indicate which of the parties already in the case was required to designate and serve the involuntary party.

Rule 19 itself does not indicate how a person who should be made a party is to be brought into the case. The reason under the rule for joining the Mosers as parties in this case is to protect the Murphy Defendants from potential double, multiple, or otherwise inconsistent obligations, suggesting it might be appropriate to require them to summon the Mosers to join the proceeding. However, Bankruptcy Rule 7012(b) makes Civil Rule 12(b) apply to adversary proceedings, and Civil Rule 12(b)(7) specifies that failure to join a party under Rule 19 is one of the seven defenses to a claim for relief in any pleading that may be asserted not only as part of a responsive pleading, but also by a motion to

⁵*Id.* at 960-61.

⁶*Id.* at 961-62.

⁷*Id.* at 962. The balance of the opinion concerned the effect on diversity jurisdiction of joining the third attorney as a party, *id.* at 962-66; as indicated, that question is not involved here because the Court’s jurisdiction is not based on diversity.

dismiss. This leads the Court to conclude the burden is on the parties claiming relief to bring the additional party into the proceeding. Consequently, the Plaintiffs will be required to get the Mosers added to this proceeding, either by getting them to join voluntarily as plaintiffs or, as seems more likely to succeed here, by amending their complaint to add the Mosers as defendants and serving process on them. The Plaintiffs are hereby given 30 days from the date of this order to accomplish one of these alternatives.

The Murphy Defendants also have a motion pending that asks the District Court to withdraw the reference of this proceeding for purposes of trial, based on their asserted right to a jury trial. District of Kansas Local Rule 83.8.6(f) requires this Court to issue written recommendations about such motions before they are transmitted to the District Court Clerk. Because the joinder of the Mosers to the proceeding might lead to additional motions to withdraw reference, the Court will hold the Murphy Defendants' motion in abeyance until the Mosers have been joined and the pleadings concerning them have been completed. The Court will then issue one recommendation dealing with this motion and any others that might be filed.

#