

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

ROBERT DePIPPPO and THARON  
O'MALLEY, )  
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 )  
 Plaintiffs, )  
 )  
 )  
 vs. )  
 )  
 MILT RADFORD and DEANNE )  
 RADFORD, )  
 )  
 Defendants. )

Case No. 3AN-01-8827 Civil

REPLY TO DEFENDANTS' OPPOSITION TO MOTION TO AMEND

I. INTRODUCTION

Defendants oppose allowing the plaintiffs to amend their complaint for three reasons. Defendants assert that (1) the plaintiffs' claims are factually distinct; (2) the defendants would be prejudiced by the aggregation of claims; and (3) no judicial efficiency will result from the joinder. Defendants also argue that Civil Rule 20(a) rather than Civil Rule 15(a) governs this motion. This reply first addresses the defendants' arguments regarding the applicability of Civil Rule 20(a) and then demonstrates that the plaintiffs should be allowed to amend their complaint as requested under either Civil Rule.

II. RULE 15(a) v. RULE 20(a)?

Alaska Civil Rule 15(a) and 20(a), like their federal counterparts, are ambiguous with regard to which controls in the context of adding parties to a suit at an early stage of litigation. The Supreme Court of Alaska has not addressed

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this issue. However, Wright and Miller recognize this ambiguity or confusion and suggest in the present context courts should apply the liberal amendment standard of Civil Rule 15(a).<sup>7</sup> Practically speaking it matters little which standard the Court adopts since adding the additional plaintiffs is appropriate under either standard.

The Alaska Supreme Court has interpreted Civil Rule 15(a) to mean that “a party should be granted leave where there is no showing that the amendment will result in an injustice.”<sup>2</sup> The defendants have not asserted, nor could they given the early stage of litigation, that injustice would result from amending the complaint to allow the additional plaintiffs to join the suit. Consequently, under Civil Rule 15(a) the plaintiffs should be granted leave to amend their complaint.

### III. JOINER IS APPROPRIATE UNDER CIVIL RULE 20(a)

Even if this Court applied the standard under Civil Rule 20(a), plaintiffs’ motion should be granted. Under Civil Rule 20(a) joinder of plaintiffs in one action is proper whenever: (1) the plaintiffs assert any right to relief arising out of the same transaction, occurrence, or series of transactions or occurrences; and (2) there are common question of law or fact.<sup>3</sup> The purpose of the rule is to promote

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<sup>2</sup>See 7 Wright & Miller, Federal Practice and Procedure, Section 1479, p.572-573 (2001)(“Moreover, the amendment of Rule 15(c) in 1966, providing for the relation back of amendments changing parties, impliedly sanctions the view that parties may be changed by a Rule 15 amendment, including one without leave of court when it is accomplished before a responsive Pleading has been filed”).

Estate of Thomson v. Mercedes-Benz, Inc., 514 P.2d 1269 (Alaska 1973).

<sup>3</sup> Alaska Civil Rule 20(a). See also, 7 Wright & Miller, Federal Practice and Procedure, Section 1653 at p. 401 (2001).

trial convenience, expedite the final determination of disputes, and prevent multiple lawsuits.<sup>4</sup>

The claims of the existing plaintiffs and the proposed additional plaintiffs all arise out of the same transaction or occurrence, the closure of the LaHonda trailer park and the disclosures or non-disclosures made by the defendants. According to Wright and Miller, the “transaction or occurrence test”:

would permit all reasonably related claims for relief by or against different parties to be tried in a single proceeding. Absolute identity of all events is unnecessary.<sup>7</sup>

The existing plaintiffs and the proposed additional plaintiffs all intend to prove the same ultimate facts: that the defendants were aware as early as 1994 that LaHonda’s infrastructure was failing and that the defendants intended to sell the park; that all of the plaintiffs purchased homes in the park after the date that the defendants knew this material information; that they failed to disclose this information to all of the plaintiffs; and that all of the plaintiffs will be harmed by the park’s closure and that enjoining the park’s closure is appropriate. It is hard to imagine a case where joinder would be more **appropriate**.<sup>6</sup>

<sup>4</sup> Jackson v. Nangle, 677 P.2d 242,252 n.17 (Alaska 1984). See *also*, 7 Wright & Miller, Federal Practice and Procedure, Section 1652 at p. 395 (2001).

<sup>5</sup> Saval v. BL Ltd., 710 F.2d 1027, 1031 (4<sup>th</sup> Cir 1983) *citing* Moslev v. General Motors Corn., 497 F.2d 1330, 1332 (8<sup>th</sup> Cir. 1974).

<sup>6</sup> The defendants rely on Saval v. BL Ltd., 710 F. 2d 1027 (4<sup>th</sup> Cir. 1983) and Pananniannis v. Pontikis, 108 F.R.D. 177 (N.D. Ill. 1985) to support their argument that the present claims do not arise under the same transaction or occurrence. However, the facts of those cases are easily distinguishable from those presented here. In Saval, the plaintiffs were seeking to join a single suit in an effort to obtain federal court jurisdiction by the aggregation of alleged damages. Joinder for that purpose, to get around the federal jurisdictional limit, was held inappropriate. Papiangiannis v. Pontikis, 108 F.R.D. 177 (N.D. Ill. 1985) is similarly inappropriate. There the plaintiffs tried to join claims regarding two wholly separate oil well investments. Given the disrelation, the court found joinder inappropriate. But see, e.g. In re Normlant Contraceptive Prods. Liability Litigation In re Normlant Contraceptive Prods. Liability Litigation, 168 F.R.D. 579 (D.C. Tex. 1996)(the court allowed plaintiffs to join in a products-liability litigation involving a contraceptive implant. The Court held that the Rule 20 requirements are met by allegations **that** defendants failed to

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#### IV. Defendants will not be Unfairly Prejudiced

The defendants argue that the cumulative prejudice to the defendants by permitting the jury, in one trial, to determine the multiple claims at issue would be render the proceedings against the defendants unfair.' This argument is without merit. Under the defendants' logic, class action lawsuits would be never be permitted as the aggregate testimony of claimants would outweigh that of the defendants.

#### V. Failure to Allow Joinder will Result in Judicial Inefficiencies.

Civil Rule 20(a):

establishes a procedure under which the demands of several parties arising out of the same litigable event maybe tied together, thereby avoiding unnecessary loss of time and money to the court and parties that the duplicate presentation of evidence relating to facts common to more than one demand for relief would entail.'

Refusal to allow the putative plaintiffs to join this suit would be an invitation to chaos not to mention judicial inefficiency; the putative plaintiffs would be forced to file individual lawsuits each seeking the same injunctive relief and all presenting the same evidence. Defendants' statement that ". . . joinder of all the plaintiffs in one action will produce no efficiencies . . ." is so mistaken as to

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adequately warn all plaintiffs of the risks and severity of side effects and by the fact that all plaintiffs presented common questions as to the defendants' liability under the same theories due to inadequacy of warnings); and Kohn v. American Housing Foundation I, Inc., 170 F.R.D. 474 (D.C. Colo. 1996)(the court found that joinder of additional care-facility residents was appropriate in resident's action alleging breach of Medicare contracts, negligence, and violations of the Colorado Consumer Protection Act, when, although there might have been different treatment of each resident by the facility, the policy favoring joinder would be served by the fact that the incidents allegedly giving rise to the claims shared a common locale and close proximity in time, and the fact that the claims shared common allegations of inadequate **staffing** and violations of state and federal standards).

<sup>7</sup> Defendant's Opposition to Motion to Amend, p. 6.

<sup>8</sup> 7 Wright & Miller, Federal Practice and Procedure, Section 1652 at p. 397 (2001).

hardly merit comment.<sup>9</sup> As stated above each plaintiff will at a minimum need to establish the onset date for the park's infrastructure problems; when the defendants became aware of the park's infrastructure problems; when the defendants developed the intent to sell the park; and when the defendants first disclosed this information to the tenants. Multiple witnesses and substantial documentary evidence will be needed to prove each allegation.

Not only would having at least three separate trials on these issues waste judicial resources it would create an environment ripe for inconsistent results. Such a result would be an anathema to Rule 20(a) the purpose of which is to "promote trial convenience and expedite the final determination of disputes, and thereby preventing multiple lawsuits."

#### VI. CONCLUSION

For all the foregoing reasons the plaintiffs should be allowed to amend their complaint to include the additional plaintiffs or alternatively the Court should permit the joinder of the additional plaintiffs.

DATED: August 28, 2001.

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<sup>9</sup> Defendant's Opposition to Motion to Amend, p. 7.

<sup>10</sup> 7 Wright & Miller, Federal Practice and Procedure, Section 1652 at p. 395 (2001).

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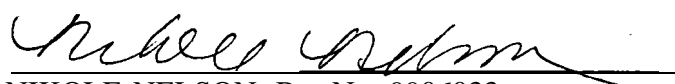
**CERTIFICATE OF SERVICE**

I, NIKOLE NELSON, certify that:

1. I am a staff attorney with Alaska Legal Services Corporation, counsel for plaintiff in this proceeding.
2. On August 29, 2001, I served counsel for defendants, Lawrence Hartig with the following documents by sending them via first class mail to his business address:
  - a) Reply to Defendants' Opposition to Motion to Amend
  - b) Certificate of Service.

DATED this 29th day of August, 2001.

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Case No. 3AN-01-8827 Civil

OPPOSITION TO MOTION TO AMEND

1. Introduction

Rule 20 permits the joinder of additional plaintiffs only when their claims arise from the same transaction or series of transactions. Two new sets of tenants in a trailer park seek to join this suit as plaintiffs. Each says that their separate rental agreement was induced by a representation made to them. Should claims by different people based on separate contracts and separate alleged acts of misrepresentation be litigated separately or all together?

2. Alleged Facts - separate causes of action, separate fact patterns

The complaint in this case alleges that each of the two plaintiffs is a resident of the La Honda Mobile Home Park. Plaintiff O'Malley allegedly entered into a purchase of a mobile home in November, 1998, following which she allegedly entered into a lease agreement with the defendants. She also allegedly built an addition to her home in February of 2001. She claims that in her negotiations with the defendants prior to entering into the lease, and again

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with respect to the building of her addition, the defendants failed to disclose certain alleged facts, regarding the condition of the park and plans to sell it, that they had a duty to disclose. She demands injunctive and declaratory relief, and damages, because, she says, she was induced to buy her trailer, execute the lease, and build the addition because of this alleged failure to disclose to her.

Plaintiff **DePippo** alleges that he bought a “historic log cabin mobile home” at La Honda in December, 1999. He alleges that the defendants approved this sale and entered into a lease with him. He alleges that in these negotiations and transactions the defendants failed to disclose to him their plans regarding the trailer park, and the condition of its infrastructure. The allegations of the proposed amended complaint add two new stories: that of the **Bogarts**, and that of the **Petricks**. The **Bogarts** are alleged to be older people with disabilities. Their transactions occurred in 1996. The **Petricks** are alleged to have purchased their home and entered into a lease in 1997.

No common contract or transaction is alleged that involves all the parties. Each alleged failure to disclose occurred in the course of specific and separate transactions with specific plaintiffs. The purchases and lease agreements of the various plaintiffs were entered into years apart. The defendants represent to the Court that certain of these proposed plaintiffs, particularly the **Petricks**, will be the subject of counterclaims for failures to pay rent and other defaults; whereas other plaintiffs will not.

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3. **Argument**

- a. **The motion to amend seeks to add additional parties with new claims; the joinder of these new parties is controlled by Civil Rule 20(a)**

Plaintiffs' motion to amend seeks to join new plaintiffs with their own claims against the defendants. They do not proposed to amend or add to their own claims. This motion is really one to join new parties plaintiff. Joinder of parties, both plaintiff and defendant, is addressed in Civil Rule 20.

Civil Rule 20 is entitled "Permissive Joinder of Parties," and provides the standards for determining when it is proper to add new plaintiffs to an existing action. Subsection (a) of that rule provides that "all persons" may join in an action as plaintiffs if their claims relate to "the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action."

The plaintiffs will **certainly** not be contending that Rule 19, concerning compulsory joinder of parties, is applicable as to the joinder of the new plaintiffs. The claims of each of the existing plaintiffs go only against the defendants, and the relief they request does not require additional claimants.

So the appropriate question for the court to consider is whether the **two** sets of additional plaintiffs proposed in the amended complaint should appropriately be joined in this case because their **claims** both (1) concern the same transaction, occurrence, or series; and also

'Emphasis, of course, was supplied.

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(2) raise issue of law or fact common with those of the original plaintiffs.<sup>2</sup>

The amended complaint does not comply with the first of these requirements, and joinder of these additional parties should be denied.

b. Similar **but factually distinct claims are not appropriate for joinder**

Joinder of plaintiffs under Rule 20 requires that claims arise from “the same” transaction, occurrence, or series. Claims that are merely similar do not meet this standard.<sup>3</sup> In this case, the plaintiffs assert in their motion that the new proposed plaintiffs have claims that are “identical” to the existing claims of the existing plaintiffs. But the allegations show that the claims are in fact “similar” claims. The new claims do not arise from the same lease contract, negotiations, or alleged misrepresentations as the first claims, but merely from different leases, negotiations, and alleged misrepresentations that are claimed to be similar, although occurring at different times.

Illustrations drawn from the many federal cases upholding this principle show that it should govern in our case. In *Savul v BL, Ltd.*<sup>4</sup>, several persons who purchased Jaguar automobiles alleged that they had been induced to purchase by the same false advertisements, that they were given the same warranties, and that their cars suffered from the same six problems. The court held that merely having bought the same product with the same warranty

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<sup>2</sup> *Coughlin v Rogers*, 130 F.3d 1348, 1351 (9th Cir. Cal. 1997).

<sup>3</sup> 4 Moore’s Federal Practice §20.05[3] at 20-38 (1999).

<sup>4</sup> 710 F.2d 1027 (4<sup>th</sup> Cir. 1983).

as a result of the same representations in advertising was not enough to permit joinder of the claims under Rule 20. The transactions, although similar, were not the same. The court noted that merely to keep the facts of the individual transactions straight, severance would have to be granted to try the cases separately.<sup>5</sup>

An even closer parallel to the facts in our case is provided by *Papagiannis v Pontikis*<sup>6</sup>, where two plaintiffs each claimed to have been victims of an identical scam perpetrated by the defendants. The allegedly fraudulent scheme was that each plaintiff was induced to invest in separate oil wells on the same leasehold. Although the court conceded that the nature of the alleged misrepresentations was much the same for each plaintiff, and that the separate transactions might even be considered a “pattern of conduct,” it concluded that Rule 20 did not permit joinder of these claims.

The court remarked that the separate allegedly fraudulent transactions were not the same or a series of transactions or occurrences, but were separate incidents requiring individualized proof. In our case as well, each plaintiff will have to separately demonstrate that misrepresentations, whether affirmative or negative, were made to him or her. Proof of a misrepresentation to O'Malley does not establish, and is in fact not even relevant to, the question of whether a misrepresentation was made to the Bogarts.

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<sup>5</sup> 710 F.2d at 1031.

<sup>6</sup> 108 F.R.D. 177 (N.D. Ill. 1985).

- c. Defendants would be prejudiced unfairly by the aggregation of a group of claimants each testifying on unrelated matters, but whose collective impact would outweigh the testimony of the defendants.

In addition to plaintiffs' failure to meet the bright-line standards of Rule 20, joinder of new plaintiffs with new claims would render the proceedings against the defendants unfair. The cumulative prejudice to the defendants by permitting the jury, in one trial, to determine the multiple claims at issue would make such a trial unfair. *Glussi v Fortune Brands, Inc.*<sup>7</sup>

Each plaintiff will assert that defendants lied by omission to him or her, separately. The jury may well conclude that the weight of testimony by many plaintiffs outweighs repeated denials by two defendants. Or it may find one of the plaintiffs persuasive, and consequently disbelieve the testimony of the defendants as to every plaintiff. It may also become difficult to keep straight the details of numerous separate transactions involving different parties.

Also, the transactions occurred at widely differing times. The defendants' state of knowledge regarding their plans and the park's condition is critical to the claims of the plaintiffs, but that state will have been different at different times, assuming the plaintiffs are correct in alleging that at some time the defendants conceived a plan to sell the park, and at some time became aware of defects in the park's infrastructure. It will be difficult for the trier of fact to keep the separate time frames in mind in determining each plaintiff's claims independently. As the *Saxal* and *Glussi* decisions held, fair trials cannot be held when joinder is

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<sup>7</sup> 276 A.D.2d 586, 714 N.Y.S.2d 516 (2000).

likely to produce confusion.

Further confusion will be engendered by the existence of separate and unrelated counterclaims that may be asserted against some of the plaintiffs. Issues concerning failures of some the plaintiffs to adhere to La Honda park rules and regulations, and failures to pay rent, are certainly individual to each plaintiff, and adding them all together can only produce confusion and prejudice all around.

d. **The prejudice and confusion caused by joinder will not be offset by any judicial efficiency.**

The plaintiffs will each individually need to prove their cases, arising as they do from separate transactions. The defense will also need to be particular to each set of plaintiffs. Because of this, joinder of all the plaintiffs in one action will produce no efficiencies to offset the prejudice and confusion that joinder is certain to produce.

### **Conclusion**

The amended complaint seeks to add new plaintiffs with similar claims, but those similar claims do not arise from the same transaction, occurrence, or series as those of the original plaintiffs. Rule 20 does not permit joinder in this case. Joinder would also produce confusion and prejudice, which would not be offset by any efficiency. The motion to amend should be denied.

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DATED at Anchorage, Alaska, this 24<sup>th</sup> day of August, 2001.

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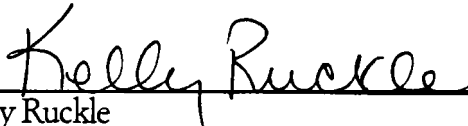
By: 

Michael Jungreis  
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing  
was served on the below-identified attorneys  
of record via hand-delivers on the 24<sup>th</sup> day  
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