IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KILBRIDE INVESTMENTS LIMITED, et al. Plaintiffs, vs. CUSHMAN & WAKEFIELD OF PENNSYLVANIA, INC., et al. Defendants.	**Case No. 13-CV-5195 (JD)**
CUSHMAN & WAKEFIELD OF PENNSYLVANIA, INC., Third-Party Plaintiff, vs. JFK BLVD. ACQUISITION GP, LLC, CHAIM ZEV LEIFER and HESKEL KISH, Third-Party Defendants.	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO VOLUNTARILY DISMISS DEFENDANT BLANK ROME LLP PURSUANT TO RULE 41(a)(2) AND FOR ENTRY OF FINAL JUDGMENT PURSUANT TO RULE 54(b)

Plaintiffs, Kilbride Investments Limited, Busystore Limited in Liquidation and Bergfeld Co. Limited (collectively, the "Plaintiffs"), by and through their undersigned counsel, hereby move pursuant to Federal Rule of Civil Procedure 41(a)(2) for the dismissal of all Plaintiffs' claims against Defendant Blank Rome LLP ("Blank Rome"), with prejudice, and for entry of final judgment under Rule 54(b). In support thereof, Plaintiffs state as follows:

FACTUAL SUMMARY

The Amended Complaint filed in this case alleges a scheme to defraud Plaintiffs occurring in late 2006 and early 2007. That scheme was the subject of lengthy litigation in this

Court and ultimately led to a jury verdict in favor of the Plaintiffs, and others, and a judgment for an amount in excess of $33 million. The scheme was based on transactions involving Philadelphia real estate, including a property that came to be known as River City. Plaintiffs have been unable to date to collect on most of their judgment.

In this action, Plaintiffs allege that defendants, Cushman & Wakefield of Pennsylvania, Inc. ("C&W"), Cozen O'Connor, P.C. ("Cozen") and Blank Rome, also induced them into investing millions of dollars into River City by fraudulently misrepresenting the nature of the River City project and conspiring to defraud Plaintiffs.[1] Plaintiffs' Amended Complaint alleges one count of fraudulent misrepresentation against defendant C&W and two counts against each of the law firms for civil conspiracy to commit fraud and aiding and abetting fraud under a theory of *respondeat superior* based on the conduct of attorney, Charles M. Naselsky ("Naselsky").

After a two-day private mediation session among the Plaintiffs and Defendants, Plaintiffs and Defendant Blank Rome have agreed to settle the dispute between them and have entered into a Confidential Agreement of Settlement and a Confidential General Release ("Settlement Agreement" and "Release," respectively). The Release provides, among other things, that any judgment rendered in this lawsuit will automatically be reduced by the percentage share of liability attributed by the factfinder to Blank Rome which amount shall, in any event, be no less than the amount paid by Blank Rome in settlement to Plaintiffs:

> Whether or not any Releasee or Naselsky (for any acts or omissions committed during the period Naselsky was a partner of Blank Rome and attributable to Blank Rome) was a joint tortfeasor as defined under Pennsylvania law with any other person or entity, any verdict

[1] Plaintiffs have set forth in detail the facts of the alleged misconduct in Plaintiffs' Counterstatement of Material Facts in Opposition to the Separate Motions for Summary Judgment of Defendants Cushman & Wakefield, Cozen O'Connor and Blank Rome. (Docket No. 149).

> or judgment determined to be recoverable by Releasors shall be reduced in accordance with Pennsylvania law, to the extent of the pro-rata share of legal responsibility or legal liability of any Releasee (whether direct or vicarious, including for any acts or omissions of Naselsky committed during the period Naselsky was a partner of Blank Rome) for Releasors' damages, as determined at trial, but in no event shall the reduction of any verdict or judgment be less than [the settlement amount]. It is the intent of the parties hereto that this Release shall be construed and treated as a pro rata release under Pennsylvania law. It is the parties' further intent that, to the fullest extent permitted under Pennsylvania law, this Release extinguishes any potential contribution claims (whether in law or in equity) against any Releasee (whether direct or vicarious, including for any acts or omissions of Naselsky committed while a partner of Blank Rome). This provision is intended to relieve Releasees of the necessity, time and expense of remaining a party on the record and participating in trial for the mere purpose of obtaining a judicial determination of whether any Releasee or Naselsky (for any acts or omissions committed during the period Naselsky was a partner at Blank Rome and attributable to Blank Rome) was a joint tortfeasor so as to entitle any non-settling party to a pro rata reduction of any verdict or judgment.

In an effort to secure a stipulation of dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), Plaintiffs circulated the form of Release -- including the language set forth above -- to all parties who have entered an appearance in this matter.[2] Counsel for Defendant C&W, third-party defendant JFK BLVD Acquisition GP, LLC, Blank Rome and Plaintiffs were amenable to signing the stipulation. Counsel for Cozen was not. Having secured less than unanimous consent among all parties who have entered their appearance in this action, Plaintiffs now move for the dismissal with prejudice of their claims against Blank Rome and respectfully request that Blank Rome be released from the action with no further obligation of participation at trial. Plaintiffs further respectfully request that any such Order be entered as a final judgment.

[2] The form of release circulated to all parties who have entered an appearance in this matter contained the actual settlement figure.

LEGAL STANDARD

Federal Rule of Civil Procedure 41 governs the dismissal of actions, both voluntary and involuntary. With respect to a voluntary dismissal, the Rule provides that absent a stipulation of all counsel who have entered an appearance in the matter and, as in this case, post-filing of an answer or a motion for summary judgment by the opposing party, "an action may be dismissed at the plaintiff's request only upon court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). It is within the sound discretion of the trial court whether to grant or deny such a motion. *See Sinclair v. Soniform Inc.*, 935 F.2d 599, 603 (3d Cir. 1991) (*citing Ferguson v. Eakle*, 492 F.2d 26, 28 (3d Cir. 1974)).

The purpose of Rule 41(a)(2) is primarily to prevent dismissals that would result in clear legal prejudice to a defendant. *Protocomm Corp. v. Novell Advanced Services, Inc.*, 171 F. Supp. 2d 459, 470 (E.D. Pa. 2001) (*citing Spring City Corp. v. American Bldgs. Co*., 199 WL 1212201, at *1 (E.D. Pa. Dec. 17, 1999); *Environ Prod., Inc., v. Total Containment, Inc.*, 1995 WL 459003, at *4 (E.D. Pa. July 31, 1995). Absent "clear legal prejudice to the defendant," Rule 41 motions to dismiss "should be granted liberally." *Protocomm, supra*, 171 F. Supp. 2d at 470; *In re Innovative Commc'n Corp*., 567 Fed.Appx. 109, 112 (3d Cir. 2014) (*citing In re Paoli R.R. Yard PCB Litig*., 916 F.2d 829, 863 (3d Cir. 1990)). And, where a plaintiff moves for a voluntary dismissal ***with prejudice***, as in this case, " 'it has been held that the district court must grant that request.'" *Protocomm, supra*, 171 F. Supp. 2d at 471, (*quoting Spring City, supra*, 1999 WL 1212201, at *1 and *quoting*, in turn, Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2367, at 318 (2d ed. 1995)). *See also Gilbreth Int'l Corp. v. Lionel Leisure, Inc.*, 587 F. Supp. 605, 614 (E.D. Pa. 1983) ("where the plaintiff has consented to dismissal with prejudice and the defendants will not face a second

lawsuit on plaintiff's claims, the Court should grant the motion for dismissal so long as it is not unfair to the defendant to do so.")

While the language of the Rule refers to the voluntary dismissal by a plaintiff of "an action," courts have interpreted Rule 41(a) to apply to dismissal of all claims against one party in a multi-party action. Thus, as in this case, the Rule allows for dismissal of fewer than all defendants. *Milhouse v. Heath, et al*., 2017 WL 228010, *3 (M.D. Pa. Jan. 19, 2017); *Protocomm, supra*, 171 F. Supp. 2d at 471 (*citing Langer v. Presbyterian-Univ. of Pa. Med. Ctr.*, 1988 WL 33880, at *2 (E.D. Pa. April 5, 1988)); *Plasterer v. Hahn*, 103 F.R.D. 184, 185-86 (M.D. Pa. 1984).

For the reasons set forth below, the Court should grant the Motion, dismiss Blank Rome from the action with prejudice and enter the proposed form of Order as a final judgment under Rule 54(b).[3]

ARGUMENT

A. The Non-settling Defendants Will Not be Prejudiced by the Dismissal of Blank Rome from the Action with Prejudice

In evaluating whether a non-settling party is prejudiced by a proposed settlement in the Rule 41(a)(2) context, it is legal prejudice from the dismissal of the suit itself that a court must consider. *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 2009 WL 1324154, *3 (W.D. Pa. May 12, 2009) (*citing SmithKline Beecham Corp. v. Pentech Pharmaceuticals, Inc.*, 261 F.Supp.2d 1002, 1006–07 (N.D. Ill.2003)). Formal legal prejudice occurs where a non-settling defendant is "strip[ped] of a legal claim or cause of action," *Id.*, (*citing Alumax Mill Prods., Inc. v. Congress Fin. Corp.*, 912 F.2d 996,1001–02 (8th Cir.1990)),

[3] Plaintiffs further request that the Court retain jurisdiction over the Settlement Agreement and Release, effectuating the terms of both documents as to jurisdiction over disputes arising therefrom. Should the Court be inclined to entertain this request, Plaintiffs will provide a copy of the document for the Court's *in camera* review.

or where the agreement restricts his right to seek indemnification or contribution, *Id.*, (*citing Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 247 (7th Cir.1992)). As such, legal prejudice is most commonly found where the settlement attempts to thwart a specific legal right of the non-settling party, such as "a partial settlement which purports to strip [a non-settling defendant] of a legal claim or cause of action ...; a settlement that invalidates the contract rights of one not participating in the settlement ...; [or where] the proposed settlement would eliminate [a non-settling defendant's] right to assert an *in pari delicto* defense." *Id.*, (*citing SmithKline, supra*, 261 F.Supp.2d at 1006–07).

Nothing in the Settlement Agreement or Release in this case purports to strip a non-settling defendant of any claim, defense or right to contribution. To the contrary, the Release guarantees to non-settling defendants the benefits of contribution without the necessity of proving their status as joint tortfeasors.

The Pennsylvania Uniform Contribution Among Tortfeasors Act, 42 Pa. Cons. Stat. Ann. §§ 8321-27 ("UCATA"), provides that:

> [a] release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides, but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release or on any amount or proportion by which the release provides that the total claim shall be reduced if greater than the consideration paid.

42 Pa. Cons. Stat. Ann. § 8326. For the UCATA to apply, however, "'it is necessary to establish that those allegedly culpable are joint tortfeasors.' " *Carr v. Am. Red Cross*, 17 F.3d 671, 683 (3d Cir. 1994) (*quoting Rocco v. Johns-Manville Corp.*, 754 F.2d 110, 114 (3d Cir.1985)). If a "released party is not a joint tortfeasor, he is considered a volunteer," and, "[i]n that circumstance, the amount paid for the release is not deducted from the recovery against a nonreleased party . . . ." *Rocco, supra*, 754 F.2d at 115. Thus, absent a determination of joint

tortfeasor status as among the settling and non-settling defendants, the benefit of the settlement inures to the plaintiff. As such, courts applying Pennsylvania law have held that "'a defendant has the right to require a codefendant settling on a pro-rata release to remain in the case through trial and verdict to establish joint tortfeasor status.'" *Carr, supra*, 17 F.3d at 683 (*quoting Davis v. Miller*, 385 Pa. 348, 123 A.2d 422 (Pa.1956)); *see also Nat'l Liberty Life Ins. Co. v. Klinq P'ship*, 350 Pa.Super. 524, 504 A.2d 1273, 1277 (1986).

Parties who wish to avoid the expense of retaining settling parties in a lawsuit may execute what courts call a "*Griffin* release." *See Griffin v. United States*, 500 F.2d 1059 (3d Cir.1974). In a *Griffin* release, "the plaintiff agrees that the non-settling defendant has a right of setoff without an express determination by the court that the settling defendant is, in fact, a joint tortfeasor." *Claudio v. Dean Machine Co.*, 786 A.2d 224, 233 (Pa.Super.Ct.2001) (citing *Rocco*, 754 F.2d at 115, *rev'd on other grounds*, 574 Pa. 359, 831 A.2d 140 (Pa.2003)). Thus, "the effect of a *Griffin* release is to grant the non-settling defendant a *pro rata* reduction in the judgment without requiring that defendant to establish that the settling defendant is liable to the plaintiff." *Id.* Because, in a *Griffin* release, the "plaintiff effectively concedes that defendants are joint tortfeasors, . . 'the need to keep the settling codefendant in the case no longer exists.' " *Id.* (quoting *Carr, supra*, 17 F.3d at 683).

In this case, Plaintiffs have eliminated the need of litigating the non-settling defendants' joint tortfeasor status with Blank Rome by virtue of the release language that states,

> **Whether or not any Releasee or Naselsky** (for any acts or omissions committed during the period Naselsky was a partner of Blank Rome and attributable to Blank Rome) **was a joint tortfeasor** as defined under Pennsylvania law **with any other person or entity**, **any verdict or judgment determined to be recoverable by Releasors shall be reduced in accordance with Pennsylvania law, to the extent of the pro-rata share of legal responsibility or legal liability of any Releasee** (whether direct or vicarious, including for any acts or omissions of Naselsky

> committed during the period Naselsky was a partner of Blank Rome) **for Releasors' damages, as determined at trial,** . . . (emphasis added in bold).

As part of its release of Blank Rome, and specifically to eliminate the necessity that Blank Rome actively participate in this case through trial, Plaintiffs have agreed that any judgment they obtain in their favor in this case will be automatically reduced by the *pro rata* share of liability attributable to Blank Rome at trial. Moreover, Plaintiffs have further agreed that, in any event, the amount of the automatic reduction will be no less than the amount of the settlement paid by Blank Rome. Far from being prejudicial to the non-settling defendants, this provision is clearly to their benefit. First, because of the automatic reduction, there will be no need for any non-settling defendant to prove it is a joint tortfeasor along with Blank Rome in order to obtain contribution under UCATA.[4] Moreover, this release goes beyond *Griffin* by providing a floor for the reduction. Thus, should the factfinder attribute little or even no liability to Blank Rome, the judgment will be reduced at the very least, *pro tanto*, by the amount of the settlement paid by Blank Rome to Plaintiffs. In short, it is hard to imagine joint tortfeasor release language that is more beneficial to the non-settling defendants.

To further effectuate the release language and Blank Rome's dismissal from this case, Plaintiffs agree that Blank Rome's name will appear on the verdict sheet at trial and Blank Rome has agreed to make available for trial, without the need for subpoena, all present partners

[4] The outcome on this issue is far from clear as Plaintiffs have not alleged joint and several liability and, even at this late date, Defendants have not lodged cross claims against each other for contribution. *Protocomm*, *supra*, 171 F. Supp. 2d at 472. Moreover, given that the claims are based on vicarious liability, it is possible that the law firms may not be considered "tortfeasors" at all and, accordingly, not joint tortfeasors under UCATA.

and employees of the firm and all retired partners as to whom the firm has a relationship through agreement.[5] (See Proposed form of Order).

Given the protections afforded to the non-settling defendants by the Release, and the agreement of Blank Rome with respect to producing witnesses at trial, the non-settling defendants suffer no prejudice by the relief sought by Plaintiffs. Accordingly, the Motion should be granted.

B. Any Order of Dismissal Should be Made a Final Judgment Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure

To the extent the Court grants the requested relief, Plaintiffs further move for the entry of final judgment under Fed. R. Civ. P. 54(b) as to the dismissal of their claims against Blank Rome.

Federal courts of appeals only have jurisdiction over appeals from "final decisions" of federal district courts. 28 U.S.C. §1291. Ordinarily, an order that terminates fewer than all claims, or claims against fewer than all parties, does not constitute a "final" order for purposes of appeal under 28 U.S.C. §1291. *Carter v. City of Phila.*, 181 F.3d 339, 343 (3d Cir. 1999). However, Rule 54(b) creates an exception to the finality rule and provides, in pertinent part:

> **(b) Judgment on Multiple Claims or Involving Multiple Parties.** When an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. . . .

The United States Supreme Court has outlined the steps to be followed in making determinations under Rule 54(b). When deciding whether to exercise its discretion under Rule 54(b), the district court must determine it is dealing with a final judgment and, if so, it must

[5] Blank Rome has advised all counsel that it does not currently control Naselsky.

then determine whether there is just cause for delay of the appeal. *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 7-8 (1980). It must be a "judgment" in the sense that it is a decision upon a cognizable claim for relief, and it must be "final" in the sense that it is "an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Curtis-Wright Corp., supra*, 446 U.S. at 7 (*citing Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956)). The direction of the entry of final judgment pursuant to Rule 54(b) is appropriate and proper in this case because this judgment fully and finally resolves all claims of the Plaintiffs against Blank Rome. Further, no other party has asserted any other claims against Blank Rome, nor has Blank Rome asserted any counterclaims or crossclaims in this case.

With respect to whether there is just cause to delay the appeal, courts have considered the following factors: (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time;(4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final;(5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like. *Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 203 (3d Cir. 2006) (citing *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 365 (3d Cir. 1972)). Depending upon the facts of the particular case, all or some of the above factors may bear upon the propriety of the trial court's discretion in certifying a judgment as final under Rule 54(b).

In this case, there is no just cause to delay any possible appeal because the issue centers only on whether a dismissal with prejudice as to Blank Rome was warranted under the facts

and law. There is no relationship between the claims on the merits against the non-settling parties and the issue of whether dismissal was proper. There is no possibility of mootness of the review based on future developments inasmuch as Blank Rome will no longer be a party to the action and the non-settling defendants get the benefit of an automatic reduction to any verdict. There is no possibility of the Appeals Court having to consider the same issue a second time since it is specific to the dismissal of Blank Rome. There are no set-off implications since the Judgment is not one involving damages. The miscellaneous factors all fall in favor of certification under Rule 54(b). One less party actively participating at trial will shorten the trial and alleviate expense for that party. Blank Rome joins in requesting dismissal and entry of an Order under Rule 54(b).

CONCLUSION

For the reasons set forth above, Plaintiffs hereby request that the Court enter the proposed form of Order dismissing Defendant Blank Rome LLP from this action, with prejudice, retaining jurisdiction over the Settlement Agreement and Release and further ordering the Clerk to enter the Order as a final judgment under Fed. R. Civ. P. 54(b).

Respectfully submitted,

Date: February 27, 2018

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CERTIFICATE OF SERVICE

I, Mary Kay Brown, hereby certify that, on February 27, 2018, I caused true and correct copies of the foregoing document to be electronically filed and served using this Court's e-filing system. The documents are available for viewing and downloading. I further certify that I caused true and correct copies of the foregoing documents to be served via electronic mail to the following counsel:

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