BRUCE THOMPSON,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 99-01,102
	:	MOTION IN LIMINE
MARK HUFFSMITH,	:	MOTION TO DISMISS FOR FAILURE TO
	:	JOIN INDISPENSABLE PARTY
Defendant	:	

OPINION and ORDER

The matters presently before the Court are two Motions filed by Defendant Mark Huffsmith (hereinafter "Defendant"). The first is a Motion to Dismiss for Failure to Join an Indispensable Party, filed March 8, 2000; the second is a Motion in Limine, filed March 21, 2000.

This case arose out of an oral agreement between Defendant and Plaintiff Bruce Thompson (hereinafter "Plaintiff") on August 17, 1997. Defendant was to cut and harvest certain timber on Plaintiff's property, which Plaintiff owns with his wife Kathryn M. Thompson as tenants by the entireties. Defendant was also to remove tree stumps, level land and restore any affected roadways to their original condition.

Plaintiff subsequently filed the instant Complaint, alleging Defendant breached the oral contract by failing to compensate him as promised for the timber he cut, failing to do the work as agreed and cutting timber which Plaintiff did not authorize be cut. The Complaint contains three counts: Breach of Contract, a claim for damages pursuant to 42 Pa.C.S. §8311, which provides for damages in actions for conversion of timber, and a count in Trespass.

Motion in Limine

In his Complaint, Plaintiff makes a claim for damages due to Defendant's alleged unauthorized removal of trees on land adjacent to Plaintiff's, as opposed to land owned by Plaintiff. *See* Complaint, paragraphs 15, 17(f), 19(f), 24(f). Plaintiff refers to these trees as a "buffer" between his property and his neighbor's. Plaintiff claims he suffered recoverable damages as a result of Defendant's removal of these buffer trees from the neighboring property, as Plaintiff was required to incur the cost of replacing them by planting trees on his own property. ***Ibid****; see also* Plaintiff's Brief in Opposition to Defendant's Motion in Limine at p. 4.

Plaintiff argues that this cost is a recoverable item of damages as the cost to replace the buffer trees is a consequential damage resulting from the breach of contract claim. We disagree. Plaintiff has cited no law, nor is this Court aware of any, wherein Plaintiff is entitled to seek recovery for alleged damages to property in which he has no ownership interest. Plaintiff was not subject to any claim for damages from his neighbor, which would have allowed him to name Defendant in this case as an additional defendant. Plaintiff states he was "required" to replace the buffer trees, but does not indicate the existence of any legal obligation (*e.g.,* that Plaintiff was required by covenant to maintain the buffer trees) which mandated the trees be replaced. Rather, it appears Plaintiff simply preferred to have the "buffer trees" separate his property from his neighbor's; presumably, the neighbor has no such preference and does not intend to recreate the buffer. Plaintiff's preference is insufficient to maintain a claim for damages, and Defendant's Motion in Limine must be granted.

Motion for Failure to Join an Indispensable Party

The parties do not dispute that the property from which the timber was cut is owned by Plaintiff and his wife Kathryn M. Thompson as tenants by the entireties.[1] Defendant now argues that Kathryn M. Thompson is an indispensable party to the litigation, but Plaintiff has failed to join her. As the pleadings are now closed and the statute of limitations has expired, Defendant claims the Complaint must be dismissed pursuant to Pa.R.C.P. 1032 (b) and Pa.R.C.P. 2227(a). Plaintiff responds that Kathryn M. Thompson is not an indispensable party; however, in the event the Court determines she is and indispensable party, Plaintiff requests leave to amend the Complaint to join her, noting that no prejudice would be caused to Defendant and that, as the entire matter stems from a contract entered into on August 17, 1997, the four year statute of limitations has not yet run.

Defendant relies on several cases in support of his argument. Defendant cites the case of ***Magee v. Morton B. & L. Association***, 158 A. 647 (1931), for its holding that an action to recover the value of the entireties property must be brought in the names of both owners. Brief of Defendant in Support of Motion to Join an Indispensable Party, p. 4. However, the case is distinguishable on its facts, because here the action is brought on behalf of only one spouse, while ***McGee*** actually involved the question of whether a husband's choice to discontinue an action brought in the names of both spouses precluded his wife from maintaining the action. In ***McGee***, the wife instituted a lawsuit against a building and loan association to recover the withdrawal value of stock in the association. The stock was held by the couple as tenants by the

[1] In Plaintiff's Response to Defendant's Motion to Dismiss, Plaintiff stated only that "Ownership of the real property is a matter of public record." However, at argument Plaintiff's counsel acknowledged the property is held by Mr. and Mrs. Thompson as tenants by the entireties.

entireties. Husband cashed in the stocks and the association paid the value of them to the husband alone. Wife received nothing, and subsequently filed suit against the association. The claim was brought in the name of both husband and wife, although only the wife actually brought the suit. The husband filed to have the suit discontinued and ended as to him. The association filed a demurrer, and the trial court entered judgment in favor of the association on a demurrer, holding that as the stock was owned by both husband and wife as tenants by the entireties, no action could be maintained by the wife alone; both parties in interest had to jointly demand recovery. However, the Superior Court reversed. The appellate Court found that the wife had a right to bring the action in the name of her husband as well as her own, and neither the husband's discontinuance nor the association's wrongful payment to the husband could defeat the association's obligation to the wife. In so finding, the Court stated:

> We are, therefore, of opinion that the wife had a right to bring this action in the name of her husband as well as in her own; by virtue of the nature of the tenancy either had a right to act for both for the preservation, as against the association, of the estate and neither could deal with the estate to the prejudice of the other.

Id. at 649.

Defendant next relies upon the case of ***Maloney v. Rodgers***, 135 A.2d 88 (Pa.Super. 1957), arguing that in a claim to recover compensation for damage to a jointly owned vehicle, both owners are indispensable parties. Brief p. 4. In that case, the Superior Court relied upon the ***Magee*** decision to state that a claim for damages to jointly owned property must be enforced in a joint action; the failure to join all joint owners would require the action be dismissed. ***Maloney*** at 92. The Court noted that it was unclear from the record whether the vehicle was owned by the plaintiffs as tenants in common or joint tenants, in any event the

property was obviously not held as tenants by the entireties, as in this case. Accordingly, the ***Maloney*** case does not control in the instant matter.

Conversely, ***Moorehead v. Lopatin***, 445 A.2d 1308 (Pa.Super. 1982), is a case where property was held by a husband and wife as tenants by the entireties. Plaintiff brought a suit alleging negligent maintenance of the property against the husband only. The trial Court granted summary judgment in favor of the defendant husband, due to plaintiff's failure to join defendant's wife as a necessary party pursuant to Rule 2227(a) of the Pennsylvania Rules of Civil Procedure relating to compulsory joinder. The Superior Court affirmed, relying upon the Pennsylvania Supreme Court case of ***Minner v. Pittsburgh***, 69 A.2d 384 (Pa. 1949). In ***Minner***, the Supreme Court stated: "The liability for the negligence complained of having grown out of ownership of real estate held by tenants in common, all three owners were required to be joined." ***Id***. at 387. In the instant case, however, the owner's liability is not in question. Accordingly, the rationale for that holding, as well as the holding in ***Moorehead***, is inapplicable.

In ***Glen Rock Borough v. Miller***, 720 A.2d 800 (Pa.Cmwlth. 1998), cited by Defendant, husband and wife owned an automobile repair shop upon which a daily fine was imposed by a district justice against the husband and wife individually for zoning violations at the borough's request. Only the husband appealed. The borough filed a complaint against the husband. The trial Court entered a verdict against the husband in the amount of $1,654.35. The borough then tried to collect the daily fine imposed by the district justice against the wife, which had been entered as a judgment. The amount owed by that time was $28,100.00. Wife filed a petition to strike off/open the judgment, which the trial Court denied.

In vacating the trial Court's Order and remanding the case, the Commonwealth Court found that, from the limited facts on ownership of the subject property as presented, the wife should have been joined in her husband's appeal pursuant to Pa.R.C.P. No. 2227(a). ***Glen Rock Borough*** at 802. The Court stated that the borough's actions in proceeding against the husband and wife were confusing and clearly contributed to the wife's belief that her husband's appeal from the district justice judgment must have also included her. The Court determined that, even though there was no question the husband and wife had received adequate and separate notice of the judgments against them, by failing to include the wife in the suit brought against the husband, the borough may have unwittingly denied her the opportunity to be heard in her capacity as owner of the property, particularly if the property was owned as tenants by the entireties, since the wife would have reasonably relied on her status as her husband's spouse to think the appeal necessarily included her. Accordingly, due process considerations were implicated. ***Ibid.***

Conversely, in the instant case no due process rights are implicated. Therefore, the holding of the ***Glen Rock Borough*** Court does not advance the argument of Defendant.

Instead, we believe the reasoning set forth in ***Miller v. Benjamin Coal Company***, 625 A.2d 66 (Pa.Super. 1993), must control the outcome of the instant Motion. In ***Miller***, husband brought an action against the coal company in his name to recover damages caused to a truck owned by both husband and wife when the coal company's loader backed into it. At trial, after husband rested, the coal company moved for directed verdict on the grounds that the wife was an indispensable party who had not been joined. The trial Court denied the motion, and the jury subsequently found in favor of plaintiff.

On appeal, the Superior Court affirmed. The Court stated:

> Our research…has disclosed neither Superior Court nor Supreme Court decision which holds that an action for money damages to entireties property cannot be maintained by one of the spouses acting as agent for both tenants by the entireties. Indeed, the Supreme Court announced in ***J.R. Construction Co. v. Olevksy***, 426 Pa. 343, 232 A.2d 196 (1967) the rule to be as follows:
>
> > 'There is,…with respect to entireties property, a well established presumption that during the term of a marriage either spouse has the power to act for both, without specific authorization, so long as the benefits of such action inure to both…'

Id. at 67 (citations omitted). Conceding that in actions intended to affect title to property held as tenants by the entireties, the Court nevertheless stated that, where a marriage continues to exist, it perceived no reason for holding that one spouse cannot act as agent for the entireties estate in bringing an action to recover damages for injury to the entireties property. ***Id***. at 68.

Defendant in the case at bar points to the dissenting opinion of Judge Cercone, in ***Miller***, who wrote that Pennsylvania law required the wife be joined as an indispensable party, citing to, *inter alia*, the case of ***DeCoatsworth v. Jones***, 607 A.2d 1094 (Pa.Super. 1992). However, the principles enunciated in ***DeCoastworth*** and relied upon by Judge Cercone are no longer the law of that case, nor of Pennsylvania. In ***DeCoatsworth***, the Superior Court did determine that, even though either spouse presumptively has the power to act for both, the interest of neither may be affected without notice to both and both are necessary to litigation respecting the assets held by the entireties. ***Id***. at 1099-1100 (citations omitted). Thus, the Superior Court found that where a husband files a counterclaim to a complaint to evict him, alleging fraud that deprives him of the property, and that property is co-owned by the wife as tenants by the entireties, the wife is equally the victim of the alleged fraud and must be joined as

an indispensable party. However, two years later the issue was considered on appeal by the Supreme Court in ***DeCoatsworth v. Jones***, 639 A.2d 792 (Pa. 1994). At that time, the Supreme Court found the wife was *not* an indispensable party, and it was error for the Superior Court to find that she was. ***Id***. at 797. The Supreme Court pointed out that the husband and wife were estranged and had jointly conveyed their interest in the real estate, thereby severing the entireties estate. Accordingly, in the instant case the ***DeCoatsworth*** opinion as set forth by the Superior Court cannot control, not only because it has been reversed by the Supreme Court, but also because it is factually distinguishable from the instant case.

Based upon our analysis of the law as submitted by both parties, we conclude that Kathryn M. Thompson is not an indispensable party to the instant case. Pursuant to ***Miller v. Benjamin Coal Company***, *supra*, Plaintiff may lawfully maintain the instant action to recover damages for the alleged injury to the entireties property; joinder of Mrs. Thompson is not required.[2]

[2] *See also* ***Sokol v. Steel***, 6 D.&C.3d 751 (Bucks County 1978) (where husband enters into contract for roof installation on premises owned with wife as tenants by entireties, husband may sue in his own name; wife may be joined as co-plaintiff but such is not required).

ORDER

AND NOW, this 7th day of April, 2000, Defendant's Motion in Limine is HEREBY GRANTED. Defendant's Motion to Dismiss for Failure to Join an Indispensable Party is DENIED.

BY THE COURT,

William S. Kieser, Judge

cc: Court Administrator
Joseph R. Musto, Esquire
Rhonda L. Davis, Esquire
Judges
Nancy M. Snyder, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)