

1 of contract, breach of express warranties, breach of implied warranties, building safety code violations,
2 negligence and consumer protection act violations.¹ A seventh cause of action in the counter-complaint
3 is trespass. However, a close reading of the factual allegations and the requested relief on this claim
4 shows that the trespass claim is actually a complaint against Magcalas individually.² Park, not a party
5 to the action and without permission from the Court, joined herself into the lawsuit as a counterclaim
6 plaintiff joining in each of Kang’s causes of action.

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8 **II. MOTION TO QUASH SUMMONS**

9 RPM and Magcalas contend that joinder of additional parties in the counter complaint is
10 improper under Rules 19 and 20 of the Commonwealth’s Rules of Civil Procedure, arguing, among
11 other things, that there was no leave of court to join additional parties. Kang and Park argue that
12 nothing in Rules 19 or 20 require leave of court and that nevertheless, the parties’ joinder is proper
13 under Rule 14.

14 **A. Joinder Under Rule 14 is Improper in this Case**

15 Rule 14(a) is commonly known as “impleader,” and authorizes the addition of a new party by
16 a claim asserted against that party.³ Third-party pleading under Rule 14 is only appropriate where the
17 third-party defendant’s liability to the third-party plaintiff is dependant on the outcome of the main
18 claim. *See e.g., American Zurich Ins. Co. v. Cooper Tire & Rubber Co.*, 512 F.3d 800 (6th Cir. 2008).
19 The basic function of third-party practice under Rule 14 is to allow the original defendant to seek to
20 transfer to the third-party defendant the liability asserted by the original plaintiff. The Rule only
21 authorizes the joinder of a person who is liable to a defendant on a theory such as indemnity or
22 contribution. Therefore, the issue becomes whether, under the alleged facts, the third-party defendant
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24 ¹Def.’s First Amended Answer, Affirmative Defenses and Counter Complaint (“Counter Complaint”).

25 ²The relief requested for trespass is “[t]hat judgment be entered in favor of Mr. Kang and Ms. Kang and against
26 Mr. Mascaras for actual damages for trespassing” (Counter Complaint at 15.)

27 ³*See e.g., Property Management, Inc. v. Inoue*, Civ. No. 92-1455 (NMI Super. Ct. May 25, 1994) (Decision
28 and Order on Def.’s Motions for Leave to File Third-Party Complaint and to Dismiss for Failure to Name Indispensable
Party at 3-4).

1 would be liable to the third-party plaintiff if the third-party plaintiff is found liable to the original
2 plaintiff. Kang fails to allege how Magcalas would be liable to Kang if Kang is found liable to RPM.
3 Therefore, Rule 14 does not apply in this case at this time.

4 **B. Joinder of Additional Parties through a Counter Complaint**

5 Rule 13(h), NMI R. Civ. P., provides that “persons other than those made parties to the original
6 action may *be made* parties to a counterclaim or cross-claim in accordance with the provisions of Rules
7 19 and 20.” NMI R. Civ. P. 13(h) (emphasis added). The Commonwealth’s Rule 13(h) mirrors its
8 federal counterpart which was amended in 1966 to clarify the intent to include both compulsory and
9 permissive joinder by specifically referencing Rules 19 and 20. In addition, the Advisory Committee
10 Notes to Rule 13(h) explain that “[t]he party pleading the claim is to be regarded as a plaintiff and the
11 additional parties as *plaintiffs or defendants* as the case may be, and amended Rules 19 and 20 are to
12 be applied in the usual fashion.” Fed. R. Civ. P. 13(h) Advisory Comm. Notes to 1966 Amendment
13 (emphasis added).⁴

14 In the case at bar, Park, who is a nonparty, attempted to interject herself into this action by
15 including her name in each of the counterclaims. The Court will not allow unilateral joinder by a
16 nonparty. Persons who are not parties of record to an action have no standing which enables them to
17 take part in or control the proceedings. If Park seeks relief in relation to the matters involved in this
18 action, she must either make a motion to obtain the status of a party or institute an independent suit.

19 Under the Commonwealth Rules of Civil Procedure, a nonparty may obtain the status of a party
20 through the process of intervention. NMI R. Civ. P. 24. Rule 24 requires that the person seeking to
21 intervene must file a motion with the Court and with each party whom the intervenor asserts a right.
22 As an alternative to intervention, Park has the option of instituting an independent action and then

24 ⁴The language used in the Advisory Committee Notes can be read to support an argument that a
25 counter-plaintiff may join both additional counter-plaintiffs as well as counter-defendants via a counter-complaint so
26 long as Rules 19 or 20 are complied with. In addition, the Court notes that joinder of additional parties under Rule 13(h)
27 does not require leave of court. At least one court, *Mountain State Sports, Inc. v. Sharman*, 353 F.Supp. 613, 618 (D.
28 Utah 1972) held that while 13(h) no longer required a court order to join additional parties, the general practice was to
seek leave of court and obtain an order. Accordingly, the motion to quash process was granted and defendants had to
file a motion seeking leave of court. *Id.* This decision has been criticized since “[t]he question is not what is the general
practice; the question is whether the rules *require* such a motion.” *Northfield Ins. Co. v. Bender Shipbuilding & Repair
Co.*, 122 F.R.D. 30, 32 (S.D. Ala. 1988) (emphasis in original).

1 consolidating it with this action. *See* NMI R. Civ. P. 42(a).

2 Allowing nonparties to join lawsuits at anytime without leave of court or by being brought in
3 by a party in the litigation would be chaotic and prevent the Court from processing cases in an orderly
4 manner. In addition, to allow such a procedure, would in effect, circumvent our rules of intervention
5 and consolidation and this would be inconsistent with the Commonwealth Rules of Civil Procedure.
6 Accordingly, Park is stricken from this lawsuit. Therefore, the next issue becomes whether joinder of
7 Magcalas is proper under Rules 19 or 20.

8 **C. Joinder Under Rule 19**

9 NMI R. Civ. P. 19(a) states the considerations for compulsory joinder:

10 A person who is subject to service of process and whose joinder will not
11 deprive the court of jurisdiction over the subject matter of the action
12 shall be joined as a party in the action if (1) in the person's absence
13 complete relief cannot be accorded among those already parties, or (2)
14 the person claims an interest relating to the subject of the action and is
15 so situated that the disposition of the action in the person's absence may
16 (i) as a practical matter impair or impede the person's ability to protect
17 that interest or (ii) leave any of the persons already parties subject to a
18 substantial risk of incurring double, multiple, or otherwise inconsistent
19 obligations by reason of the claimed interest.

20 The absence of Magcalas would not impede the granting of complete relief against RPM for any
21 of the claims in the counter complaint. Magcalas was not a party to the construction contract and under
22 the facts alleged he is at most a material witness. Magcalas' failure to be joined does not impair the
23 Court's ability to accord complete relief to the parties. Therefore, Magcalas is not a party to be joined
24 if feasible and his joinder does not comport with Rule 19.

25 **D. Joinder Under Rule 20**

26 NMI R. Civ. P. 20(a) establishes two requirements for permissive joinder:

27 All persons may be joined in one action as defendants if there is
28 asserted against them jointly, severally, or in the alternative, any right
29 to relief in respect of or arising out of the same transaction, occurrence
30 or series of transactions or occurrences and if any question of law or fact
31 common to all defendants will arise in the action.

32 In the case at bar, the trespass claim against Magcalas arose out of the same transaction or
33 occurrence as did the rest of the counterclaims against RPM. Indeed, Magcalas seeks to dismiss the

1 trespass claim under NMI R. Civ. P. 12(b)(6) claiming that Magcalas was permitted to be on the
2 premises pursuant to the Contract. Thus, a review of the record indicates that the breach of contract
3 claim and the counterclaim of trespass involve common issues of fact and law and will be contested
4 using overlapping evidence. Therefore, the joinder of Magcalas complies with Rule 20.

6 **III. MOTION TO DISMISS PURSUANT TO NMI R. Civ. P. 12(b)(6)**

7 **A. Legal Standard**

8 A motion to dismiss a complaint pursuant to NMI R. Civ. P 12(b)(6) tests the legal sufficiency
9 of the claims within the complaint. Generally, a complaint must satisfy the notice pleading
10 requirements of NMI R. Civ. P. 8(a) to avoid dismissal under Rule 12(b)(6). *Cepeda v. Hefner*, 3 NMI
11 121, 126 (1992). Commonwealth Rule of Civil Procedure 8(a)(2) requires only “a short and plain
12 statement of the claim showing that the pleader is entitled to relief,” so that “fair notice of the nature
13 of the action is provided.” *Govendo v. Maianas Pub. Land Corp.*, 2 NMI 482, 506 (1992) (quoting *In*
14 *re Adoption of Magofna*, 1 NMI 449 (1990)). A complaint fails to satisfy the pleading requirements
15 of Rule 8(a) where it lacks a cognizable legal theory or fails to allege facts constituting a cognizable
16 legal theory. *Bolalin v. Guam Publications, Inc.*, 4 NMI 176 (1994).

17 In considering a motion to dismiss, a court must treat the complaint’s factual allegations as true,
18 “even if doubtful in fact.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). However, a court
19 need not accept as true legal conclusions set forth in a complaint. *Ashcroft v. Iqbal*, 129 S. Ct. 1937,
20 1949 (2009). “While legal conclusions can provide the framework of a complaint, they must be
21 supported by factual allegations. When there are well-pleaded factual allegations, a court should
22 assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”
23 *Id.* at 1950.

24 **B. Discussion**

25 Having determined that the counterclaim is a permissive counterclaim and that it was asserted
26 in a procedurally appropriate manner, the Court must address RPM’s substantive argument, that the
27 counterclaim for trespass must be dismissed pursuant to NMI R. Civ. P 12(b)(6) for failure to state a
28 claim upon which relief can be granted. In support of this assertion, RPM argues that Kang and RPM

