**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

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| LOUIS S. D'AMICO and RITA D. WILLIS, AS CO-ADMINISTRATORS OF THE ESTATE OF SALVATORE D. D'AMICO, DECEASED, Plaintiffs, | : | CIVIL ACTION NO. 3:03cv2164 (SRU) |
| v. | : | |
| JOHN DOE 1 and JOHN DOE 2, the true names being presently unknown; WARREN ADELSON, ADELSON GALLERIES, INC. and MARK BORGHI, Defendants. | : | |

**RULING ON MOTION TO DISMISS**

Louis S. D'Amico and Rita D. Willis, co-administrators of the estate of Salvatore D. D'Amico (collectively "D'Amico estate"), have sued the defendants, Warren Adelson and the Adelson Galleries (collectively the "Adelson Defendants"), Mark Borghi, and two unidentified defendants, John Doe 1 and John Doe 2 (collectively the "John Doe Defendants"), seeking a declaratory judgment, an order of replevin, and damages for conversion. The Adelson Defendants have moved to dismiss the case for failure to join persons needed for just adjudication in accordance with Rule 19 of the Federal Rules of Civil Procedure. Borghi has also filed a motion to dismiss, substantially adopting the motion filed by the Adelson Defendants. For the reasons that follow, the motions to dismiss are GRANTED.

**Background**

The following facts appear in the amended complaint or in the submissions of the parties.[1] In the spring of either 1978 or 1979, Salvatore D'Amico purchased several paintings at a tag sale. Among his purchases were two works of art that turned out to be very valuable: a painting called "Carmencita Dancing" by John Singer Sargent and an unnamed painting by French artist Nicolas Lancret. D'Amico believed the paintings to be of great value but, unable to have them successfully authenticated, stored them in his basement until his death in 1992.

Beginning around 1983, D'Amico developed a friendship with his cousin, Louis Corneroli. Corneroli drove D'Amico to auctions and ran errands for him.

Shortly after D'Amico's death, his house was burglarized. D'Amico's siblings eventually discovered that the paintings were missing. Although Corneroli denied to D'Amico's brother, Anthony D'Amico, any knowledge of the location of the works of art, the D'Amico estate claims that Corneroli had obtained possession of the paintings after the burglary and, in 1992, brought them to New York art dealer, Mark Borghi. From 1992 to 2003, Corneroli held himself out to all but the D'Amico family as the sole owner of "Carmencita Dancing." From 1992 to 1996, Borghi possessed and held himself out as the sole owner of "Carmencita Dancing." Sometime between 1995 and 2000, Borghi cleaned, restored, and sold the Lancret painting to John Doe 2.

Borghi kept "Carmencita Dancing" from 1992 until 1996, when he approached John Singer Sargent expert, Warren Adelson. Borghi and Adelson entered into an agreement under

[1] When ruling on a motion to dismiss filed pursuant to Rule 12(b)(7) of the Federal Rules of Civil Procedure, the court is not limited to consideration of facts alleged in the complaint. See 5C Wright & Miller, Federal Practice & Procedure: Civil § 1359 at 68 (3d ed. 2004) ("The district judge is not limited to the pleadings.").

which Adelson agreed to pay a sum of money to acquire a half interest in "Carmencita Dancing" once the painting was properly authenticated, which occurred in late 1996. When Borghi discovered that Adelson had prior knowledge of the painting's authenticity, he attempted to back out of the contract. In March 1997, Adelson sued Borghi in New Jersey Superior Court (the "New Jersey lawsuit"). In that suit, Adelson alleged that Borghi told him he purchased the painting from a Connecticut postman in 1985. Borghi claimed he purchased the painting from Salvatore D'Amico in 1987. The New Jersey lawsuit ended in a settlement under which, among other things, Adelson agreed to purchase Borghi's interest in "Carmencita Dancing" for an additional $500,000, and to convey four oil paintings to Borghi, which Borghi then sold for a total of $475,000. Adelson and Borghi exchanged mutual releases. Adelson allegedly sold "Carmencita Dancing" to John Doe 1 for a sum between four and five million dollars.

On or about December 4, 2002, Corneroli sued Borghi, the Adelson Defendants, and John Doe 1 in New York state court (the "New York lawsuit"), claiming conversion, breach of contract, fraud, violation of RICO, constructive trust and replevin. In response, the defendants challenged Corneroli's ownership interest in "Carmencita Dancing." As a result, Corneroli then claimed that he and Salvatore D'Amico were business partners with respect to the painting. Corneroli contacted Anthony D'Amico in April 2003, telling him he had retained a private investigator who had a lead on "Carmencita Dancing" and that the painting was an authentic Sargent piece. This was the first time that anyone in the D'Amico family became aware that the painting had been found and was authenticated. Corneroli allegedly pressured D'Amico's sisters, Esther D'Amico and Jennie D'Amico, to tell anyone who called them from New York that Corneroli and Salvatore D'Amico had been partners.

A four-day hearing was held in New York Supreme Court in July 2003 to determine Corneroli's ownership interest in "Carmencita Dancing." The presiding judge dismissed the claims against all defendants except Borghi. The New York lawsuit did not decide the rights of the D'Amico estate, which was not a party to the action. Esther and Jennie D'Amico voluntarily appeared at the hearing as witnesses for Corneroli. Before completion of the evidentiary hearing, Borghi and Corneroli settled the New York lawsuit. Pursuant to the settlement, Borghi paid Corneroli approximately $300,000 in exchange for Corneroli's ownership interest in the painting, and the parties exchanged mutual releases. Corneroli also appealed the order dismissing the Adelson Defendants and John Doe 1. That appeal remains pending.

The D'Amico estate claims that Salvatore D'Amico purchased "Carmencita Dancing" and the Lancret with his personal funds and that the paintings remained his personal property until his death. The estate filed this suit, seeking both declaratory relief and replevin of the paintings, as well as damages for conversion. The D'Amico estate identifies John Doe 1 as the individual or entity currently in possession of "Carmencita Dancing" and John Doe 2 as the individual or entity currently in possession of the work by Lancret.

**Discussion**

The D'Amico estate claims federal subject matter jurisdiction on the basis of diversity of citizenship under 28 U.S.C. § 1332. The Adelson Defendants and Borghi respond that this case cannot proceed in federal court on diversity grounds because the D'Amico estate has failed to join Corneroli, a party they identify as both non-diverse and indispensable. Naming Corneroli, a

Connecticut resident, would destroy complete diversity.[2] Rule 19 of the Federal Rules of Civil Procedure governs joinder of an indispensable party. The parties disagree about the application of Rule 19 to the current controversy.

Determinating whether or not to dismiss an action for failure to join an indispensable party pursuant to Rule 19 requires two steps. See *Viacom Int'l Inc. v. Kearney*, 212 F.3d 721, 724 (2d Cir. 2000) (citing *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 124 (1968)). The first step, governed by Rule 19(a), involves an inquiry whether the "absent party belongs in the suit" and whether joinder is feasible. *Viacom Int'l*, 212 F.3d at 724-25. If the threshold standard is met, the second step, governed by Rule 19(b), involves an inquiry whether failure to join the absent party warrants dismissal. *Associated Dry Goods Corp. v. Towers Financial Corp.*, 920 F.2d 1121, 1123 (2d Cir. 1990). Application of these steps must be tempered by the need to "entertain[] the broadest possible scope of action, consistent with fairness to parties." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724 (1966). The Supreme Court has long recognized that "joinder of claims, parties and remedies is strongly encouraged." Id.

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[2] Corneroli was the only non-John Doe defendant named in the complaint that initiated this action. Corneroli was dropped by amendment in the face of a challenge to the court's subject matter jurisdiction raised by Adelson, from whom discovery had been sought. In addition to omitting Corneroli, the amended complaint added Borghi and the Adelson Defendants, all citizens of New York, as defendants.

Two John Doe defendants were named in both the initial complaint and the amended complaint. No one has attacked the naming of John Doe defendants, which some courts have held is improper in diversity jurisdiction cases. See *Howell v. Tribune Entertainment Co.*, 106 F.3d 215, 218 (7th Cir. 1977). For present purposes, I will ignore the (unknown) citizenship of the John Doe defendants. Cf. *Macheras v. Center Art Galleries - Hawaii, Inc.*, 776 F. Supp. 1436, 1439-40 (D. Haw. 1991).

**1. Rule 19(a)**

Rule 19(a) governs whether or not an absent party should be named in the lawsuit. The rule seeks to "bring before the court all persons whose joinder would be desirable for a just adjudication of the action." 7 Wright, Miller & Kane, Federal Practice & Procedure: Civil § 1604 at 35 (3d ed. 2001). In relevant part, the rule provides that:

> 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 (1) in the person's absence complete relief cannot be accorded among those already parties, or (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 (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent 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.

Fed. R. Civ. P. 19(a).

The Amended Complaint raises four types of claims. Counts I and II seek a declaratory judgment that each of the paintings is owned by the D'Amico estate. Counts III and IV seek to replevy the paintings from their current owners, John Does 1 and 2. Counts V and VI raise claims for damages for conversion of the paintings against the Adelson Defendants and Borghi. Count VII claims fraud against Borghi. The various claims can be divided into two groups, with Rule 19(a) applying differently to each group.

The declaratory judgment counts essentially seek to quiet title to the paintings; the estate seeks a judgment that it owns the paintings free and clear of any claim to ownership by their current possessors or the galleries that formerly sold them. Under both Rule 19(a)(1) and Rule 19(a)(2)(ii), Corneroli is a necessary party to these claims. In his absence "complete relief cannot be accorded among those already parties," because a declaratory judgment that did not bind him

would not truly quiet title to the paintings. Corneroli surely claims that he legitimately owned the paintings and properly sold them to the galleries. Indeed, on the basis of such a claim, Corneroli obtained a significant cash settlement that would be placed at risk should Borghi lose the present suit. In addition, the Adelson Defendants and Borghi would be "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations" in Corneroli's absence because they could lose this declaratory judgment claim and also lose a similar claim to Corneroli, who would not be bound by any decision in this case.

Rule 19(a) yields a different outcome with respect to the remaining claims. Corneroli is not a necessary party to the replevin claims, which address the right to possess the paintings. See Conn. Gen. Stat. § 52-515. Nor is he a necessary party to the conversion claims, which seek damages for the unauthorized exercise of the right of ownership over property belonging to another. See *Plikus v. Plikus*, 26 Conn. App. 174, 180 (1991). Corneroli certainly is not a necessary party to the estate's fraud claims against Borghi. Complete relief on these claims can be afforded to the present parties, so Rule 19(a)(1) has no bearing. Moreover, no one has suggested that Corneroli claims a present possessory interest in either painting, so Rule 19(a)(2) does not apply. Unlike the declaratory judgment claims, the replevin and conversion claims fall squarely within the holding of *Johnson v. Smithsonian Institution*, 189 F.3d 180, 189 (2d Cir. 1999), and the fraud claim falls within the reasoning of that decision.

Corneroli is a necessary party to the declaratory judgment claims, yet the D'Amico estate cannot sue Corneroli in this case without destroying complete diversity and depriving the court of subject matter jurisdiction. Thus, under Rule 19(b), I must consider whether the case should be dismissed for failure to name Corneroli.

**2. Rule 19(b)**

If a court finds that joinder of a party is desirable but not practicable, it must then turn to the question whether the missing party is an indispensable party, whose absence necessitates dismissal under Rule 19(b). The rule provides:

> If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b); *Jaser v. New York Property Insurance Underwriting Assoc.*, 815 F.2d 240, 242 (2d Cir. 1987). The court has an obligation to closely examine the parties' options to ensure that "very few cases [are] terminated due to the absence of nondiverse parties unless there has been a reasoned determination that their nonjoinder makes just resolution of the action impossible." *Id.*

The four factors identified by the rule will be considered in turn. The first factor involves prejudice to the present parties or to Corneroli should the declaratory judgment claims proceed without Corneroli. Obviously, Corneroli would suffer no prejudice should the declaratory judgment claims proceed without him because he will not be bound by any declaratory judgment rendered. The remaining parties would, however, suffer potential prejudice, because they could be forced to litigate the issue again with Corneroli and could receive inconsistent judgments. The cost and inconvenience of litigating this quiet title action, in other words, would be wasted because title to the paintings could not truly be quieted without Corneroli's presence.

The second factor requires an examination of the ways in which prejudice can be avoided. The Second Circuit has held that "the Rule 19(b) notion of equity and good conscience contemplates that the parties actually before the court are *obliged to pursue* any avenues for eliminating the threat of prejudice." *Associated Dry Goods*, at 1125 (emphasis in original), citing 7 Wright & Miller, Federal Practice & Procedure § 1608 at 112-13 (2d ed. 1986). If a party can "avoid all prejudice to itself by asserting a compulsory counterclaim" or through similar means, dismissal under Rule 19(b) is inappropriate. *Associated Dry Goods*, 920 F.2d at 1124.

Here, although the present defendants would suffer prejudice if Corneroli were not a party to the declaratory judgment claims in this action, arguably they can avoid that prejudice by asserting a declaratory relief counterclaim and adding Corneroli as a party to the counterclaim under Rule 13(h). This court would have supplemental jurisdiction over Corneroli under 28 U.S.C. § 1367; the lack of complete diversity resulting from Corneroli's presence would not destroy diversity jurisdiction because Corneroli was added by a defendant, not by the plaintiffs. *Viacom Int'l*, 212 F.3d at 726-27.

There are at least two problems with this solution. The first problem is that the solution will itself engender prejudice to the defendants. Borghi argues persuasively that he could not avoid prejudice to himself by bringing a claim against Corneroli because he previously settled the New York lawsuit with Corneroli and has released Corneroli from liability. If Borghi sued Corneroli, Borghi would both breach the release and would invite Corneroli to sue Borghi, thereby reopening settled disputes. Similarly, the Adelson Defendants and Borghi could not bring a claim against each other, because they settled the New Jersey lawsuit and exchanged

mutual releases. Thus, Borghi and the Adelson Defendants would suffer immediate prejudice – the breach of contractual obligations set forth in the releases – by the very acts necessary to avoid the prejudice they would suffer should Corneroli not be made a party to this action. Neither Borghi nor the Adelson Defendants could bring a declaratory judgment counterclaim against all necessary parties without breaching at least one release the counterclaim plaintiff entered into with at least one counterclaim defendant.[3]

The second problem with the suggested solution is that the proposed counterclaim is not a compulsory counterclaim as in *Associated Dry Goods*. In *Associated Dry Goods,* the Second Circuit repeatedly emphasized that the defendant could avoid all prejudice to itself by asserting a compulsory counterclaim. 920 F.2d at 1123 ("because Towers has the ability to join 417 Fifth by asserting a compulsory counterclaim against it, the court cannot in equity and good conscience dismiss the suit for failure to join an indispensable party"), 1124 ("[W]e view as dispositive Towers' ability to avoid all prejudice to itself by asserting a compulsory counterclaim against Associated pursuant to Rule 13(a) and adding 417 Fifth as a party to the counterclaim under Rule 13(h)."), 1124-25 ("Towers' putative claims against Associated all arise out of the transactions forming the subject matter of the instant case and are, therefore, compulsory."). By contrast, in this case, a declaratory judgment counterclaim is not one either defendant must bring or wants to bring; the only purpose of such a counterclaim is to preserve plaintiffs' choice of a federal forum. The effect of requiring a declaratory judgment counterclaim would be to cure defects in

[3] I will assume for purposes of this decision that I could render a declaratory judgment that bound all parties even if some were only parties to the declaratory judgment counts of the complaint and others were only parties to a counterclaim seeking a declaration opposite that sought in the complaint.

plaintiffs' claims, but at the cost of certain and immediate prejudice to the defendants. Neither the *Associated Dry Goods* decision, nor any Second Circuit decision I have read, requires such a result.

The third factor used when applying Rule 19(b) asks whether a judgment rendered in Corneroli's absence would be adequate. As discussed above, it would not. Corneroli would not be bound by a declaratory judgment and title to the paintings would not truly be quieted.

Finally, the fourth factor asks whether the plaintiffs will have an adequate remedy if the case is dismissed for nonjoinder. Here all parties agree that all of the plaintiffs' claims could be brought in the state courts of either New York or Connecticut. Thus, plaintiffs have available to them alternative forums for their claims.

Having considered each of the factors identified in Rule 19(b), I conclude that equity and good conscience require that I dismiss this case for failure to join an indispensable party.[4] Plaintiffs' claims can be refiled in state court, where all parties can be joined in an effort to obtain a meaningful declaratory judgment concerning the ownership of these paintings. Although courts are reluctant to dismiss cases under Rule 19, under these circumstances, no other option would be fair to all parties.

**Conclusion**

For the foregoing reasons, Defendants' Motions to Dismiss (**docs. ## 35, 50**) are GRANTED. The clerk shall close the file.

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[4] The defendants also moved to dismiss this case on grounds of laches. It is not necessary or appropriate for me to reach that issue.

SO ORDERED this 20th day of January 2005 at Bridgeport, Connecticut.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge