

KUMAGAI GUMI CO., LTD.

vs.

**COMMONWEALTH PORTS
AUTHORITY, et al.**

**Civil Action No. 82-0045
District Court NMI**

Decided June 6, 1984

1. Jury - Civil Actions - Waiver
Where amended complaint made no new allegations nor otherwise raised new or different issues of fact against the defendant that were not raised by the original pleading, the defendant waived its right to demand a jury trial by not doing so within ten days of its original answers and this right was not revived by the amended complaint, which merely added another defendant. Fed.R.Civ.P. 38(a).

**2. Jury - Civil Actions -
Discretionary Grant**
Where virtually identical factual issues are to be decided as between the plaintiff and a newly added defendant and the plaintiff and another defendant, and as a jury has properly been demanded to decide the issues between plaintiff and the newly added defendant, the other defendant's belated request for trial by jury may be granted as a matter of discretion, based on judicial efficiency. Fed. R. Civ.P. 39(b).

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FILED
Clerk
District Court

JUN 06 1984

IN THE DISTRICT COURT
FOR THE
NORTHERN MARIANA ISLANDS

For The Northern Mariana Islands
By _____

KUMAGAI GUMI CO., LTD.,)	CIVIL ACTION NO. 82-0045
)	
Plaintiff,)	
)	
v.)	<u>DECISION</u>
)	
COMMONWEALTH PORTS AUTHORITY,)	
et al.,)	
)	
Defendants.)	

Kumagai Gumi Company, Ltd. (Kumagai) filed the Complaint in this matter on August 7, 1982. No demand for a jury trial was made in conjunction with the filing of such Complaint. On August 26, 1982 defendant Commonwealth Ports Authority (CPA) answered the Complaint, but did not demand a jury trial in its pleading; neither did Kumagai nor CPA make such a demand within ten days after service of the answer.

On July 22, 1983 Kumagai filed an Amended Complaint, adding the engineering firm of Daniel, Mann, Johnson and Mendenhall (DMJM) as a new and additional party defendant. The Amended Complaint did not allege any new issues against CPA but simply duplicated the issues in the original complaint. On July 26, 1983 CPA filed a first Amended Answer, Cross-Claim and Demand for Trial by Jury.

1 Kumagai contends that the Demand for Jury Trial applies
2 only to the Cross-Claim against DMJM; and to the extent that CPA
3 intended the demand to apply to Kumagai's claims against CPA, it
4 is ineffective in that CPA's right to demand trial by jury was
5 waived by the original Answer to the first Complaint, which
6 failed to make any such demand. CPA argues that the addition of
7 a new defendant in the matter vastly changed the entire perspec-
8 tive of the case, and that the demand for trial by jury was
9 plainly addressed to both the first Amended Complaint and the
10 Cross-Claim against DMJM.

11 In the two Motions now before the Court, Kumagai seeks
12 to strike the Demand for Trial by Jury, as having been waived by
13 the failure to make such demand within 10 days after the original
14 answer was filed; CPA requests the Court to grant Relief from any
15 such Waiver of Jury Trial. The Court will address these Motions
16 in the order in which they were argued.

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19 MOTION TO STRIKE DEMAND FOR JURY TRIAL

20 Rule 38 of the Federal Rules of Civil Procedure
21 provides that any party may demand a trial by jury by serving
22 upon the other parties a written demand therefor not later than
23 ten days after service of the last pleading directed to such
24 issue, Rule 38(a), F.R.C.P. The failure to serve a demand
25 pursuant to this rule constitutes a waiver of the right to trial
26 by jury. Rule 38(d), F.R.C.P.

1 Kumagai argues that CPA's failure to demand trial by
2 jury on or before September 5, 1982, ten days after service of
3 its Answer, constituted a waiver of the right to later make such
4 a demand with respect to those issues. Kumagai argues that such
5 a waiver is complete and cannot be revived by subsequent amend-
6 ment of the original pleadings where the amended pleadings raise
7 no new issues. The Court agrees.

8 [] It is well settled that while demand for a jury trial
9 may be made within ten days after service of the amended or
10 supplemental pleading for new issues raised by that pleading, the
11 amendment does not revive a right, previously waived, to demand
12 jury trial on the issues already framed by the original plead-
13 ings. Walton v. Eaton Corporation, 563 F.2d 66 (3rd Cir. 1977).
14 Kumagai has cited numerous cases wherein amended complaints were
15 filed which sought only different forms of relief, Guajardo v.
16 Estelle, 580 F.2d 748 (5th Cir. 1978); or which stated more
17 specifically the claims set forth in the original Complaint,
18 Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center,
19 95 F.R.D. 194 (E.D.Pa. 1982); or even which added new causes of
20 action based upon identical facts as the claims set forth in the
21 original complaint, Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d
22 614 (9th Cir. 1979). In each of these cases the Court found the
23 previously waived right to demand a trial by jury was not revived
24 by the amended pleadings.

25 In this case, the amended complaint made no new allega-
26 tions nor otherwise raised new or different issues of fact

1 against CPA that were not raised by the original pleading. CPA
2 waived its right to demand a jury trial by not doing so within
3 ten days of its original answer, and this right was not revived
4 by the Amended Complaint, which merely added DMJM as a defendant.

5 Therefore, Kumagai's Motion to Strike Demand for Jury
6 Trial on issues in the Amended Complaint relating to CPA is
7 GRANTED.

8
9 MOTION FOR RELIEF FROM WAIVER OF JURY TRIAL

10 CPA requests that the Court grant relief from any
11 waiver of its right to the trial of this matter by jury, and to
12 order that the trial of all issues be had by jury, pursuant to
13 Rule 39(b) of the Federal Rules of Civil Procedure.

14 Rule 39(b), Federal Rules of Civil Procedure provides:

15 Issues not demanded for trial
16 by jury as provided in Rule 38
17 shall be tried by the court; but,
18 notwithstanding the failure of a
19 party to demand a jury in an action
20 in which such a demand might have
21 been made of right, the court in
22 its discretion upon motion may
23 order a trial by a jury of any or
24 all issues.

25 A review of the cases wherein the courts have addressed
26 motions brought under Rule 39(b), indicates that this rule is
27 designed to achieve substantial justice, and to promote fairness,
28 economy and efficiency in the courts. See Merritt v. Faulkner,
697 F.2d 761 (7th Cir. 1983), Litterfield v. Ft. Doge Messenger,
614 F.2d 581 (8th Cir. 1980), cert. den. 445 U.S. 945, 100 S.Ct.

1 1342, 63 L.Ed.2d 779. Nonetheless, it appears on its face to
2 specifically conflict with Rule 38(d), and read in conjunction,
3 the two Rules would seem to completely emasculate each other.
4 Rule 38(d) clearly provides that the failure to comply with the
5 requirements of part (a) of that Rule constitutes a waiver of
6 trial by jury. The case law supports this strict language,
7 finding that unretractable waivers are made regardless of
8 intention, oversight or misunderstanding. Bush v. Allstate Ins.
9 Co., 425 F.2d 393 (5th Cir. 1970); Noonan v. Cunard S.S. Co., 375
10 F.2d 69 (2d Cir. 1967). Rule 38 thus leaves a party no right
11 whatever to later demand a trial by jury where no proper demand
12 was made within ten days of service of the last pleading directed
13 to the issues.

14 Rule 39(b), on the other hand, is on its face somewhat
15 confusing. While it specifically provides that those issues not
16 properly demanded for trial by jury pursuant to Rule 38 shall be
17 tried by the court, the very same sentence goes on to give the
18 court discretion to order, upon motion, a trial by jury where
19 such a demand might have been made of right but the moving party
20 failed to do so. The case law is equally confusing, with some
21 courts taking a very liberal, and others a very strict approach
22 to granting relief from a waiver of the right to trial by jury.

23 The courts that take a very broad view of Rule 39(b)
24 seem to simply read Rule 38(d) out of the Federal Rules. The
25 Ninth Circuit epitomizes this view, saying that Rule 39(b) must
26 be applied so liberally that the trial court has only limited

1 discretion to deny relief from a waiver of jury trial. Pacific
2 Queen Fisheries v. Symes, 307 F.2d 700 (9th Cir. 1962), cert.
3 den. 372 U.S. 907, 83 S.Ct. 721, 9 L.Ed.2d 717. Other courts
4 take a very restrictive view of the Rule, holding that exception-
5 al circumstances must be shown before relief from a waiver will
6 be granted, thereby seeming to ignore the permissive language of
7 Rule 39 (b). See Noonan v. Cunard S.S. Co., 375 F.2d 69, supra.
8 It appears that anything more or less than a moderate approach to
9 this issue will serve to emasculate one or the other Rule, and
10 here, the case law is very helpful in determining which Rule is
11 controlling in these circumstances.

12 A review of the numerous cases cited by both parties is
13 well summarized in the case of Wallace v. Nationwide Ins. Co., 94
14 F.R.D. 563 (1982), wherein the court began its analysis by
15 recognizing that Rule 39(b) "is not intended to serve as a device
16 to circumvent or bypass the positive action that must be taken
17 under Rule 38 to obtain jury trial," citing 9 Wright & Miller,
18 Federal Practice and Procedure, § 2334, p.115 (1971). The Court
19 went on to find that:

20 "The factors which courts have
21 weighed when deciding whether to
22 grant a jury trial under Rule 39(b)
23 include (1) whether the issues are
24 more appropriate for determination
25 by a jury or a judge (i.e., factual
26 versus legal, legal versus equi-
table, simple versus complex)...
(2) any prejudice that granting a
jury trial would cause the opposing
party... (3) the timing of the
motion (early or late in the pro-
ceedings)... (4) any effect a jury

1 trial would have on the court's
2 docket and the orderly administra-
3 tion of justice...." Citing Malbon
4 v. Pennsylvania Millers Mut. Ins.
5 Co., 636 F.2d 936 (4th Cir. 1980)
6 at 940.

7 In this case, there appears to be no significant reason
8 why CPA's demand for a jury trial should not be accommodated.
9 Plaintiff itself pointed out that the allegations of the Amended
10 Complaint are identical as to both CPA and DMJM; DMJM is clearly
11 entitled to and has demanded trial of those issues by jury.
12 Thus, while a persuasive argument might have been made that the
13 issues involved in this litigation are highly technical and far
14 too complicated to be effectively tried by a jury, this argu-
15 ment loses all force in light of the fact that a jury has been
16 rightfully demanded and will be sitting as the trier of fact on
17 identical issues with respect to another defendant.

18 In addition, a jury trial has previously been demanded
19 for all aspects of this case, save one; the resolution of all
20 issues between Kumagai and CPA. Those issues arise from the same
21 matrix of facts, and are identical to, the issues between Kumagai
22 and DMJM which are to be tried by a jury. A peculiar situation
23 would arise were the court to try, and find differently on, the
24 very same issues simultaneously being decided by the jury.
25 Where, as here, a demand could have been made of right had CPA
26 complied with Rule 38(a), such a situation should be avoided.

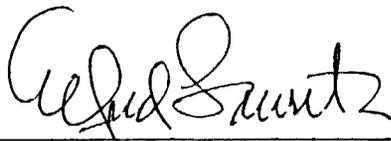
Further, no prejudice will result to plaintiff if a
jury trial is awarded to CPA, again because timely demand for

1 jury trial has already been made by DMJM, both in response to
2 plaintiff's complaint (wherein the issues are identical as to
3 both defendants) and on the cross-claim involving CPA and DMJM.
4 Moreover, CPA's instant request is made well in advance of trial
5 on this matter and plaintiff thus has ample opportunity to make
6 any necessary changes in the presentation of its case as a result
7 thereof.

8 [2] Thus, since virtually identical factual issues are to
9 be decided as between Kumagai and defendant DMJM and Kumagai and
10 defendant CPA, and as a jury has properly been demanded to decide
11 the issues between Kumagai and DMJM, judicial efficiency dictates
12 that in the discretion under Rule 39(b), CPA's belated request
13 for trial by jury be granted

14 The Motion for Relief from Waiver is hereby GRANTED.

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16 DATED this 6th day of June, 1984.

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22 JUDGE ALFRED LAURETA