

urt by filing a complaint.) On April
unsel entered their appearances in the
On June 5, 1981 Plaintiffs filed a
ce. American Motors petitioned this
discontinuance and consolidate this
ion Plaintiffs brought in this court, an
ual defendants including the operators
ed in the accident.

) allows the court, upon petition and
a discontinuance "in order to protect
y from unreasonable inconvenience,
ense or prejudice." American Motors
e prejudices them by denying them
remedies, allegedly more favorable to
inder remedies. Under Pennsylvania
ce is stricken and this action consoli-
y-filed Franklin County one, the cor-
nd the individual defendants (vehicle
vious action may be found liable to
. See Pa. R. Civ. P. 2255(d). Under
ividual defendants, made third-party
Motors, can only be liable to American
on and contribution. See Fed. R. Civ.
ors wants all potentially responsible
footing.

iscontinuances rests within the trial
v. T.W. Phillips Gas and Oil Co., 365
950). Before we can strike the discon-
rs must show that it has been deprived
will be prejudiced by the discontinu-
185 Pa. Super. 323, 138 A.2d 690
oy, 223 Pa. Super. 130, 299 A.2d 19
ere is no such showing.

ill not be put to unreasonable incon-
the discontinuance is allowed to
ong-pending case involving extensive
(see, e.g., Kaminski v. Moore, 8 D&C
which could be rendered worthless by
no doubt, some time and money have
atter, both have been minimal, relative-
ngs here consist only of a praecipe, a
ry of appearance and a voluntary dis-
al litigation efforts have been made.

strike the discontinuance to thwart a
g., Mechanics' Bank v. Fisher, 1 Rawle

341 (Pa., 1841)) because the discontinuance has no such characteristics. The Hermsdorfers' purpose in filing the Franklin County action was a non-vexatious one: to preserve their cause of action while obtaining jurisdiction in federal court. Once federal jurisdiction seemed assured, they entered the discontinuance without delay.

Finally, we conclude that discontinuance of the Franklin County action will not prejudice American Motors. The fact that, following discontinuance, it may no longer take advantage of the Pennsylvania joinder rules does not constitute prejudice for purposes of Rule 229(c). We do not view the differences in the Pennsylvania/Federal joinder rules as significant. Petitioners may still defend against liability in federal court on the ground that the individual defendants are at fault regardless of whether they are on "the same line of defense." Like the Superior Court in *Pesta v. Barron*, supra, "we are unable to see how any alleged procedural difference between the Pennsylvania practice and the federal practice may be made the basis of a mandate that the Plaintiffs pursue their action in the state court rather than in the federal court." 185 Pa. Super. at 327, 138 A.2d at 693.

Having concluded that American Motors failed to show that it has been deprived of a substantial right or will be prejudiced by the discontinuance, we will dismiss the petition to strike off discontinuance and consolidate actions.

ORDER OF COURT

December 15, 1981, the defendants' motion to strike off the discontinuance entered by the plaintiffs in this case is denied.

KALATHAS vs. LITITZ MUTUAL INSURANCE CO., C.P.
Franklin County Branch, No. A.D. 1981 - 274

Declaratory Judgments - Civil Procedure - Preliminary Objections - Non-joinder of Necessary Parties - Propriety of Form of Action - 42 Pa. C.S.A. Sect. 7541

1. In actions for declaratory judgment, all persons who have or claim any interest which would be affected by the declaration shall be made parties,

judice the rights of persons not parties to the

dering declaratory relief unavailable when an
or a special statutory remedy is available has
nature to unreasonably limit the availability of
en abolished by statute — 42 Pa. C.S.A. Sect.

, Attorney for Plaintiff

Attorney for Defendant

ION AND ORDER

, 1982:

claratory judgment was commenced by
on September 2, 1981. The plaintiffs
construe certain portions of insurance
defendant and Everett Cash Mutual Insur-
r the defendant to pay a specified sum
f. Preliminary objections in the nature
and/or dismiss the complaint for non-
ies and also to strike the complaint as
ion because the case should be brought
n September 28, 1981. Argument was
y objections on November 5, 1981. At
or the parties the Court deferred taking
er negotiations in determining whether
uld be disposed of amicably.

81, a stipulation executed by the Presi-
Trust Company as a mortgagee of the
ed. The stipulation provided that the
gagee agreed to be bound by the results
ing the fire loss of the plaintiff involv-
ses, and "with the understanding and
that any payments by Lititz Mutual
rett Cash Mutual Insurance Co. on
loss, shall be made payable to Tom M.
urg Trust Company." This stipulation
tgagee and thus disposes of defendant's
to the Chambersburg Trust Company's

rief is sought, all persons shall be made
aim any interest which would be affect-
and no declaration shall prejudice the

rights of persons not parties to the proceeding." 42 Pa. C.S.A.
Sect. 7540.

Since the plaintiff alleges Everett Cash Mutual Insurance
Company also issued a policy on the building of the plaintiff
which suffered the fire loss, it too is a party whose rights would
be affected by this proceeding. Therefore, the defendant's
motion to strike must be sustained and leave granted the plain-
tiff to amend his complaint to join Everett Cash Mutual Insur-
ance Company as a necessary party.

The defendant's second motion to strike is based on his
contention that the plaintiff can secure full, complete and ade-
quate relief by way of an action in assumpsit rather than pro-
ceeding under the Declaratory Judgment Act. We find no
merit in this contention, for 42 Pa. C.S.A. Sect. 7541 provides:

"The General Assembly finds and determines that the prin-
ciple rendering declaratory relief unavailable in circumstances
where an action at law or in equity or a special statutory
remedy is available has unreasonably limited the availability of
declaratory relief and such principle is hereby abolished. The
availability of declaratory relief shall not be limited by the
provisions of 1. Pa. C.S. Sect. 1504 (relating to statutory
remedy preferred over common law) and the remedy provided
by this subchapter shall be additional and cumulative to all
other available remedies. . ."

In our judgment, it is clearly proper for the plaintiff to
proceed as he has elected and it matters not whether another
form of action would also have been available to him and be
fully appropriate. *Mutual Fire Insurance Company v. Rose*,
364 Pa. 15, 70 A. 2d 316 (1950).

The subject matter of a declaratory judgment action has
within its ambit the construction of particular contract
terms. Therefore, construction of the coinsurance clause and
the definition of "actual cash value" is found in both policies
within the purview of this proceeding, and the defendant's pre-
liminary objection as to these points is dismissed.

The defendant's motion to strike the plaintiff's request for
the award of damages and interest under the policies is clearly
well taken, for this Court may only construe contract terms and
may not order specific monetary relief. Therefore, that motion
will be sustained and the plaintiff will be granted leave to
amend.

ORDER OF COURT

NOW, this 19th day of January, 1982, the defendant's motion to strike for failure to join Everett Cash Mutual Insurance Company as a necessary party is granted; the defendant's motion to strike the plaintiff's prayers for the award of damages and interest is granted; all other preliminary objections are dismissed. The plaintiff is granted twenty (20) days from date of this Order to file an amended complaint pursuant to the above Opinion.

Exceptions are granted the parties.

PECK AND JONES v. FIRST NATIONAL BANK OF
McCONNELLSBURG, C.P. Franklin County Branch, No. 103
of 1981-C

Confession of Judgment - Execution - Residential real property - Attorney Fees

1. Section 407 of the Act of 1974, January 30, P.L. 13, No. 6, 41 P.S. Sec. 407 restricts the right of a plaintiff to levy or execute on residential real property of a debtor solely on the basis of a confessed judgment.
2. Section 407 requires a plaintiff to file an appropriate action and proceed to judgment against the defendant as in any original action.
3. Where judgment was entered on a note containing a confession of judgment clause and a complaint in Confession of Judgment was thereafter filed, a writ of execution and levy on the debtor's real estate was untimely and improper.
4. Attorney's fees can only be taxed when shown to have been actually charged.

James M. Schall, Esq., Legal Services, Inc.

OPINION AND ORDER

EPPINGER, P.J., January 18, 1982:

In 1979 John L. Peck and Anna M. Jones (Peck and Jones) signed a \$15,000 note in favor of The First National Bank of

FIRST NATIONAL

bank and trust co.

13 West Main St.
WAYNESBORO, PA. 17268
717-762-3161



TRUST SERVICES
COMPETENT AND COMPLETE

CITIZENS *National Bank*
OF **AND TRUST COMPANY**
WAYNESBORO, PENNSYLVANIA
17268

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