IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBIN S. WELDE, et al.	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 04-CV-4190
	:	
BENEFICIAL PARTNERS, L.P., et al.	:	

SURRICK, J. **SEPTEMBER 1, 2006**

MEMORANDUM & ORDER

Presently before the Court is Beneficial Partners, L.P.'s Motion For Leave To Add Additional Defendants Through Third Party Complaint (Doc. No. 67). For the following reasons, the Motion will be denied.

I. BACKGROUND

This case arises out of an incident that occurred on September 6, 2002. Plaintiff Robin Welde alleges that she was on the "sidewalks, walkways, and streets, located adjacent to 1600 Chestnut Street" in Philadelphia, Pennsylvania and was "caused to slip/trip and fall," suffering "serious and permanent injuries." (Doc. No. 1 at 3-4.) Plaintiffs filed the original Complaint on September 3, 2004 and filed an Amended Complaint adding three additional Defendants, Beneficial Mutual Savings Bank,[1] Pennoni Associates, Inc. ("Pennoni"), and Ramos and Associates, Inc. ("Ramos") on June 15, 2005. (Doc. No. 31.) Plaintiffs' Amended Complaint alleges claims of negligence/gross negligence (Count One), willful and wanton disregard of Plaintiff's safety (Count Two), product defect/products liability (Count Three), loss of

[1] The submissions of the parties indicate that the parties use the name Beneficial Savings Bank and Beneficial Mutual Savings Bank interchangeably.

consortium (Count Four), punitive damages (Count Four [sic]), and joint and several liability (Count Five). (Doc. No. 31 at 6-12.)

In the instant Motion filed January 25, 2006, Defendant Beneficial Partners, L.P. ("Beneficial Partners") seeks leave to join Pennoni and Ramos as third party defendants. (Doc. No. 67.) The City of Philadelphia filed a similar motion for leave to join these same two parties on March 22, 2005 (Doc. No. 16) and, after approval from this Court, filed a Third Party Complaint against Pennoni and Ramos on May 2, 2005. (Doc. No. 29.) The City's Third Party Complaint alleges that if the sidewalk on which the Plaintiff fell was dangerous or defective, such condition was due to Pennoni's negligent design of the sidewalk or the negligent construction of the sidewalk by Ramos. That Complaint also alleges that the City had contracts with Ramos and Pennoni, which provided that Pennoni and Ramos were required to defend and indemnify the City for claims like Plaintiff's. Pennoni and Ramos both argue that we should deny the instant Motion and the attempt by Beneficial Partners to join them as third party defendants. Pennoni filed an Answer, disputing specific passages in Beneficial Partners' Motion and Proposed Third Party Complaint. (Doc. No. 68.) Ramos filed a Reply to the Motion, arguing that the Court should deny the Motion as untimely. (Doc. No. 69.)

II. DISCUSSION

A. Joinder Under Theories of Contribution and Indemnity

Beneficial Partners alleges that Ramos and Pennoni are "solely liable to plaintiffs or are jointly and/or severally liable to Plaintiff or are liable over to defendant Beneficial Partners L.P." (Doc. No. 67 at 3.) Beneficial Partners alleges that it seeks to join Ramos and Pennoni "to protect its right of contribution and/or indemnity in the event that Beneficial Partners, L.P. is

jointly and/or severally liable to plaintiffs." (*Id.*) However, joinder of Pennoni and Ramos in a "third party action is only proper [if] a right to relief exists under the applicable substantive law." *Foulke v. Dugan*, 212 F.R.D. 265, 269-70 (E.D. Pa. 2001); *see also Morris v. Lenihan*, 192 F.R.D. 484, 488 (E.D. Pa. 2000). We are compelled to conclude, under the facts of this case, that this joinder is improper.

Initially, we note that impleading parties through a third party complaint is governed by Rule 14 of the Federal Rules of Civil Procedure. Under that Rule, "a direct line of liability must be alleged to exist between the third party plaintiff and the third party defendant independent of that between the first party plaintiff and defendant." *Id.* Thus, under Rule 14, a third party may be joined only on the theory that he is or may be liable to the original defendant for all or part of the plaintiff's claim against him. The original defendant cannot join a third party claimed to be solely liable to plaintiff. *Millard v. Mun. Sewer Auth. of Twp. of Lower Makefield*, 442 F.2d 539, 541 (3d Cir. 1971); *see also Tesch v. United States*, 546 F. Supp. 526, 529 (E.D. Pa. 1982) ("A third party defendant cannot be joined simply because that party may be solely liable to the plaintiff."). Clearly, Beneficial Partners's claim of sole liability on the part of Ramos and Pennoni as Third Party Defendants is prohibited.

In the Third Party Complaint which Beneficial Partners seeks to file in this case, it "demands judgment in its favor by way of contribution and/or indemnity." (Doc. No. 67 at 12.) However, Beneficial Partners has failed to offer any indication as to why the joinder of these parties would be proper based upon theories of indemnification or contribution. In addressing these theories and their application to the present case, the discussion of indemnification and

contribution set forth in *Morris v. Lenihan*, 192 F.R.D. 484, 488-89 (E.D. Pa. 2000), which quotes at length from *Builders Supply Co. v. McCabe*, 77 A.2d 368 (Pa. 1951), is instructive:

> The right of indemnity rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on a difference in degrees of negligence or on any doctrine of comparative negligence. . . . It depends on a difference in the character or kind of the wrongs which cause the injury and in the nature of the legal obligation owed by each of the wrongdoers to the injured person. . . . [T]he important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible. In the case of concurrent or joint tortfeasors, having no legal relation to one another, each of them owing the same duty to the injured party, and involved in an accident in which the injury occurs, there is complete unanimity among the authorities everywhere that no right of indemnity exists on behalf of either against the other; in such a case, there is only a common liability and not a secondary one, even though one may have been very much more negligent than the other.

Morris, 192 F.R.D. at 488-489 (quoting *Builders Supply*, 77 A.2d at 370-71). In cases involving slip and fall injuries on sidewalks, there are two general categories of cases, each of which has its own rules regarding liability. In cases in which the injury was caused by a failure to maintain or repair the sidewalk, that is where the defect "was occasioned, or knowingly permitted to exist, by either the tenant in sole possession or the owner," *Golden v. City of Phila.*, 57 A.2d 429, 430 (Pa. Super. Ct. 1948), the primary duty is on the property owner or tenant. The "[c]ity's liability to see that the sidewalk is left in repair is secondary." *Psichos v. Sauvion*, 520 A.2d 945, 946 (Pa. Commw. Ct. 1987). In these cases, if a plaintiff recovers from the city, the city may, in turn, seek

indemnification from the property owner who is primarily liable.[2] Because the property owner is primarily liable, it cannot seek indemnification from the city. *Golden*, 57 A.2d at 430. In contrast, where the defect is a result of the construction or design of the sidewalk, and such defect was created by the municipality, the municipality is the "active tortfeasor," and it cannot seek indemnification from the property owner. *Id.* Where the city itself has created a hazardous condition through its contractors or architects, the property owner has no duty to eliminate the condition. *Psichos*, 520 A.2d at 946. Therefore, there can be no occasion for the property owner to seek indemnification or contribution from the municipality. Applying these general principals to the case at hand compels us to conclude that Beneficial Partners cannot demonstrate any circumstances under which it would be entitled to either indemnification or contribution from the City or its contractors, Ramos and Pennoni.

With regard to Beneficial Partners's claim that they would be entitled to indemnification from Ramos and Pennoni, as alluded to above, "a defendant is entitled to indemnification when its liability arises not out of its own conduct, but out of a relationship that legally compels the defendant to pay for the act or omission of a third party." *Morris*, 192 F.R.D. at 489. There is no

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[2] As the Pennsylvania Supreme Court explained:

> The general rule is that the liability, if any, of a municipality for an injury due to a defective or dangerous sidewalk is only a secondary one; the primary obligation rests with the abutting property owners. . . . "Recovery against the city is permitted on a theory that the city has neglected to perform its duty to require the property owner or tenant to maintain the sidewalk in a condition reasonably safe for travel." Consequently, where the plaintiff is awarded a verdict against the city, the city is entitled to a verdict over against the additional defendant upon whom the ultimate burden rests.

Flynn v. City of Chester, 239 A.2d 322, 323-24 (Pa. 1968) (internal citations omitted).

indication in this case of any legal relationship between Ramos and Beneficial Partners or between Pennoni and Beneficial Partners that would trigger the right to indemnification. We note that in its proposed Third Party Complaint, Beneficial Partners asserts only that Ramos and Pennoni had a contractual relationship with the City. (Doc. No. 67 at Ex. B, ¶ 3.)

Moreover, if this were a case involving a defect which the property owner was under a duty to repair, the city would only be secondarily liable for injuries sustained because of that defect. *Golden*, 57 A.2d at 430. If Plaintiff's injuries resulted from a failure to maintain or repair the sidewalk, Beneficial Partners would be primarily liable, and the City would be entitled to indemnification. Beneficial Partners would have no right to indemnification from the City and certainly no right of recovery from Ramos and Pennoni who simply contracted with the City to design and construct the sidewalk.

Similarly, Beneficial Partners can have no claim for contribution from Ramos and Pennoni. The right of contribution is available only among joint tortfeasors. 42 Pa. Cons. Stat. § 8324; *see also Kemper Nat'l P&C Cos. v. Smith*, 615 A.2d 372, 380 (Pa. Super. Ct. 1992); *Morris*, 192 F.R.D. at 490. In order to determine whether defendants are separate or joint tortfeasors, courts consider the following factors:

> the identity of a cause of action against each of two or more defendants; the existence of a common, or like duty; whether the same evidence will support an action against each; the single, indivisible nature of the injury to the plaintiffs; identity of the facts as to time, place or result; whether the injury is direct and immediate, rather than consequential, [and] responsibility of the defendants for the same injuria as distinguished from damnum.

Voyles v. Corwin, 441 A.2d 381, 383 (Pa. Super. Ct. 1982) (quoting Prosser, Law of Torts § 46 n.2 (1971)). Beneficial Partners has offered nothing to indicate that Ramos and/or Pennoni are

joint tortfeasors with it. Plaintiff alleges injuries arising out of a defect in the design and construction of the sidewalk, an allegation, in effect, that the defect was created by the City and its contractors. (Pl.'s Dep. at 154, 161.) As discussed above, in cases "where the municipality itself creates a defect there can be no recovery over, for in such case the municipality is the active tortfeasor." *Golden*, 57 A.2d at 430 (city is liable with no right to indemnification where injury was caused by step in sidewalk created when city replaced sidewalk after subway building project). If Beneficial Partners is correct—and Plaintiff's deposition certainly indicates that it is[3]—and Plaintiff's claims are based on a defect in the design and construction of the sidewalk, then Beneficial Partners would not be jointly and/or severally liable with any other party, including Ramos and Pennoni. As a result, Beneficial Partners cannot join Ramos and Pennoni as third party defendants since they cannot establish liability for either contribution or indemnification.

B. Timeliness

In addition, the Motion seeking leave to join Ramos and Pennoni is untimely. Federal Rule of Civil Procedure 14(a) provides that a defending party as a third party plaintiff must obtain leave by motion to bring in a third party defendant if the third party complaint is filed

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[3] Plaintiff testified that the street was dry on the day of her accident: "I didn't see any wet spots. . . . It's fair to say it was dry. I didn't notice any wet spots on the sidewalk." (Pl.'s Dep. at 154.) When asked what she believed caused her fall, Plaintiff responded:

> I think it was a slippery surface. And right where the slope was, where my foot landed, it landed on the slippery surface right at the slope area. And it didn't—it had no traction, it just slipped out in front of me. *So I think it was the surface combined with the slope.*

(*Id.* at 161. (emphasis added).)

more than ten days after serving the original answer. Fed. R. Civ. P. 14(a). Local Rule 14.1 adds that applications for leave to join additional parties after the ten-day period has expired "will ordinarily be denied as untimely unless filed not more than ninety (90) days after the service of the moving party's answer." Local Rule 14.1. However, "[i]f it is made to appear, to the satisfaction of the court, that the identity of the party sought to be joined, or the basis for joinder, could not, with reasonable diligence, have been ascertained within said time period, a brief further extension of time may be granted by the court in the interests of justice." *Id.*

In this case, Beneficial Partners filed its Answer on January 6, 2005 and did not file the instant Motion for leave to add Pennoni and Ramos until January 25, 2006, more than one year later. Beneficial Partners asserts that it was not aware that Plaintiff's claim was based on the "design, composition, and construction of the curb cut" and thus that Ramos and Pennoni were proper parties until Plaintiff's deposition on December 12, 2005, less than two months before Beneficial Partners filed the instant Motion. However, on March 22, 2005, the City of Philadelphia joined Ramos and Pennoni as Third Party Defendants in this case, an action which certainly should have alerted Beneficial Partners to both the identity of these additional parties as well as the basis for their joinder. Nevertheless, Beneficial Partners filed the instant Motion nearly ten months later. Accordingly, this Motion is untimely.

In determining whether to permit the untimely filing of a third party complaint, district courts consider: "(1) the possible prejudice to Plaintiffs; (2) the potential for complication of issues at trial; (3) the probability of trial delay; and (4) the timeliness of the attempt to join third parties." *Carney's Point Metal Processing, Inc. v. RECO Constructors*, Civ. A. No. 04-4869, 2006 WL 924992, at *2 (E.D. Pa. Apr. 6, 2006) (citing *Con-Tech Sales Defined Benefit Trust v.*

Cockerham, 715 F. Supp. 701, 704 (E.D. Pa. 1989)). The party seeking to join additional parties "bears the burden of demonstrating that the delay in filing the amended third-party complaint was justified." *Id.* (citing *Zielinski v. Zappala*, 470 F. Supp. 351, 353 (E.D. Pa. 1979)). While some delay might have been excusable, Beneficial Partners's ten-month delay in filing this Motion is not. Moreover, Beneficial Partners has offered no justification for this lengthy delay. Accordingly, leave to add these additional parties will be denied.

An appropriate Order follows.

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ORDER

AND NOW, this 1st day of September, 2006, upon consideration of Beneficial Partners, L.P.'s Motion For Leave To Add Additional Defendants Through Third Party Complaint (Doc. No. 67), it is ORDERED that the Motion is DENIED.

IT IS SO ORDERED.

BY THE COURT:

/s/ R. Barclay Surrick
United States District Court Judge