IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL

ELEMENT CONSTRUCTION, LLC	:	December Term, 2017
and	:	Case No. 00261
705—707 S. 5TH STREET, LLC	:	
	:	
Plaintiff	:	
v.	:	Commerce Program
	:	
BRIAN V. DOUGHERTY, RICK FRANCHI, THE LUNAR AGENCY, INC. *et al.*	:	
	:	
Defendants	:	
	:	
v.	:	
	:	
PROBUILD COMPANY, PROBUILD HOLDINGS, INC.	:	
and	:	
FIRSTSOURCE, INC.	:	Control No. 18041209
	:	
Joinder Defendants	:	

ORDER

AND NOW, this 26th day of June, 2018, upon consideration of the preliminary objections of joinder defendants to the joinder complaint, the response in opposition, the respective *memoranda* of law, and the reply brief of joinder defendants in support of their preliminary objections, it is **ORDERED** that the preliminary objections are **SUSTAINED** and the joinder complaint is **DISMISSED**.

BY THE COURT,

MCINERNEY, J.

MEMORANDUM OPINION

The preliminary objections require the Court to determine whether the joinder plaintiffs may seek contribution and indemnity from the joinder defendants. For the reasons below, this Court finds that the joinder plaintiffs may not maintain their claim of negligence and may not seek contribution and indemnity.

BACKGROUND[1]

Plaintiffs are two Pennsylvania limited liability companies, Element Construction, LLC ("Element"), and 705-707 S. 5th Street, LLC ("5th Street"). Element was the manager of a renovation project taking place at a "Building" owned by 5th Street. Defendant Lunar Agency, Inc. ("Lunar"), is an insurance brokerage company licensed to conduct business in Pennsylvania. Individual defendants are Brian V. Dougherty ("Mr. Dougherty"), an insurance producer, and Rick Franchi ("Mr. Franchi"), an insurance broker. Messrs. Dougherty and Franchi are percentage owners of Lunar.[2]

In December 2014, Element and 5th Street engaged Lunar to determine the types of insurance coverage required during the renovation work, to procure the necessary policies of insurance, and to manage any insurance claims, if needed.[3] At some point, 5th Street obtained a policy of insurance issued by an entity named Catlin Insurance Company (the "Insurer"). This policy, effective January 15, 2015 through July 15, 2015, No. IMI—750595—0715, was issued to 5th Street through a Pennsylvania-based insurance agency named JimCor.[4]

On February 14, 2015, a "Subcontractor" employed by Element was operating a

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[1] The descriptions of the various parties are gleaned from the allegation in the amended complaint, as admitted in the answer thereto of defendants, ¶¶ 1—10.
[2] Amended complaint, ¶ 1.
[3] Id., ¶ 14.
[4] Insurance Policy, Exhibit A to the amended complaint.

special forklift at the renovation site: allegedly, the forklift crashed onto the wall, destabilized the Building, and resulted in damages of nearly $3 million.[5]

On December 5, 2017, Element and 5th Street commenced the instant action against defendants. The amended complaint of Element and 5th Street aver that Lunar, Dougherty and Franchi failed to timely notify the Insurer of the accident.[6] The amended complaint also avers that the failure to timely inform the Insurer impaired investigation of the accident and resulted in a near total denial of the insurance claim.[7] Specifically, the amended complaint asserts the claims of negligence and professional malpractice (Count I) as well as breach-of-fiduciary-duty (Count II), against Lunar, Dougherty and Franchi, and the claim of negligent supervision against Mr. Franchi (Count III).

On March 15, 2018, Lunar, Dougherty and Franchi filed a joinder complaint sounding in negligence alone against the Subcontractor. Specifically, the joinder complaint avers as follows: "to the extent that [Element and 5th Street] suffered any of the ... damages as alleged in [their amended complaint,] such losses are due solely to the negligence of [Subcontractor]."[8]

On April 9, 2018, Subcontractor filed the instant preliminary objections asserting that the joinder complaint of Lunar, Dougherty and Franchi is legally insufficient; subsequently, Lunar, Dougherty and Franchi timely filed their response in opposition to the preliminary objections. On May 1, 2018, the Subcontractor filed a reply brief in further support of its objections.

DISCUSSION

[5] Amended Complaint, ¶ 16.
[6] Id., ¶¶ 27—28, 30.
[7] Id., ¶ 24.
[8] Joinder compliant, ¶ 10.

The law of preliminary objections is well-settled:

> [p]reliminary objections in the nature of demurrers are proper when the law is clear that a plaintiff is not entitled to recovery based on the facts alleged in the complaint. Moreover, when considering a motion for a demurrer, the trial court must accept as true all well-pleaded material facts set forth in the complaint and all inferences fairly deducible from those facts.
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> * * *
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> Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.[9]

I. Lunar, Dougherty ad Franchi on one side, and the Subcontractor on the other, are not joint tort-feasors.

In the joinder complaint, Lunar, Dougherty and Franchi assert that if they are liable to Element and 5th Street, then the Subcontractor is jointly liable for contribution and indemnity.[10] Challenging this position, the Subcontractor argues that the averments in question are legally insufficient because the Subcontractor is not a joint tort-feasor of Lunar, Dougherty and Franchi.[11]

In Pennsylvania,

> to be a joint tort-feasor, the parties must either act together in committing the wrong, or their acts, if independent of each other, must unite in causing a single injury.... A joint tort is defined as where two or more persons owe to another the same duty and by their common neglect such other is injured.[12]

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[9] Bargo v. Kuhns, 98 A.3d 686, 689 (Pa. Super. 2014).
[10] Joinder complaint, ¶ 19.
[11] Preliminary objections, ¶ 21.
[12] Neal v. Bavarian Motors, Inc., 882 A.2d 1022, 1028 (Pa. Super. 2005).

In this case, nothing in the amended complaint suggests that the Subcontractor on one side, and Lunar, Dougherty and Franchi on the other, acted together in committing a wrong, or that their independent actions united to cause a single injury. Indeed, the amended complaint shows that the parties' respective negligent acts have nothing in common: the negligent acts of Subcontractor occurred when it crashed a forklift onto a building managed by Element and owned by 5th Street; conversely, the negligent acts of Lunar, Dougherty and Franchi allegedly occurred through their repeated failure to timely inform the Insurer of the existence of an insurance claim. Simply stated, the Subcontractor allegedly breached a duty owed to Element and 5th Street to perform construction work in a diligent manner, whereas Lunar, Dougherty and Franchi allegedly breached their duty to Element and 5th Street by neglecting to timely handle an insurance claim. Based on the foregoing, neither the Subcontractor on one side, nor Lunar, Dougherty and Franchi on the other, are joint tort-feasors. Since these parties are not joint tort-feasors, it follows that Lunar, Dougherty and Franchi may not seek contribution from the Subcontractor.[13]

II. The Subcontractor owes no duty to indemnify the joinder plaintiffs

In the joinder complaint, Lunar, Dougherty and Franchi seek in the alternative to recover indemnity from the Subcontractor.[14] Challenging this position, Subcontractor asserts in its preliminary objections that the claim for indemnification is legally insufficient and must fail. Subcontractor specifically asserts that the claim of indemnification is legally insufficient because "[i]ndemnification is not available to a

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[13] The term joint tort-feasor "means two or more persons jointly or severally liable in tort for the same injury to persons or property...." 42 Pa. C.S.A. 8322, the Uniform Contribution Among Joint Tort-Feasors Act. In addition, "Pennsylvania only authorizes contribution **among joint tort-feasors**." Kemper Nat'l P & C Companies v. Smith, 615 A.2d 372, 380 (Pa. Super. 1992) (emphasis added).

[14] Joinder complaint, "Wherefore" clause.

defendant who is liable for a separately identifiable act of negligence from the party by which it seeks to be indemnified."[15]

The law on indemnification is well-settled:

> [i]ndemnity is a common law remedy which shifts the entire loss from one who has been compelled, by reason of some legal obligation, to pay a judgment occasioned by the initial negligence of another who should bear it.... It is not a fault sharing mechanism it is a fault shifting mechanism where a defendant seeks to recover his loss from a defendant who was actually responsible for the accident which occasioned the loss.[16]

In addition, "[o]ne is entitled to indemnity if that person, **although not at fault**, becomes legally obligated to pay damages to a plaintiff who has suffered injury caused by a third party."[17]

In a persuasive case decided by the United States District Court for the Eastern District of Pennsylvania, plaintiff ("TVSM"), was a seller of television program guides. TVSM published and sold its guides based on the schedules provided by an entity named Showtime Entertainment ("Showtime").[18] On July 27, 1982, TVSM published and sold its guides for the week thereof. However, the entire batch contained a scheduling mistake: as a result, all the listings were in error by one hour. After suffering damage, TVSM tendered an insurance claim to an entity named Wasau Underwriters (hereinafter, the "Insurer"). At first, the Insurer agreed that the policy provided coverage for the type of damage suffered by TVSM; however, the Insurer later refused to pay the claim. As a result, TVSM filed a suit against the Insurer and the broker who had

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[15] Preliminary objections, ¶ 18.
[16] Willet v. Pennsylvania Med. Catastrophe Loss Fund, 702 A.2d 850, 854 (Pa. 1997).
[17] Oblon v. Ludlow-Fourth Corp., 605, 595 A.2d 62, 69 (Pa. Super. 1991) (emphasis supplied).
[18] TVSM, Inc. v. Alexander & Alexander, Inc. *et al.*, v. Showtime Entertainment, 583 F. Supp. 1089, 1090—1091 (E.D. Pa. 1984).

obtained the policy (the "Broker"). In turn, the Broker joined Showtime as an additional defendant. The Broker joined Showtime on the theory that "if TVSM incurred damages ... [then] the damages were caused by the Negligence of Showtime [in supplying the erroneous scheduling]."[19] Showtime moved for summary judgment in its favor, and one of the issues before the U.S. District Court was whether the Insurer could seek indemnity from Showtime for the scheduling error which Showtime had provided to TVSM.[20] Granting summary judgment in favor of Showtime, the U.S. District Court explained that under Pennsylvania law, "indemnity is available only from those who are primarily liable to those who are merely secondarily or vicariously liable."[21] The Court further stated that indemnity—

> 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.[22]

Finally, the U.S. District Court held that—

> in the present case, [TVSM's] complaint cannot be construed to allege secondary negligence on the part of [the Broker,] and primary negligence on the part of Showtime...."
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> **If the Jury finds against ... [the Broker], it will do so based on the theory that ... [the Broker] was negligent in obtaining the ... insurance policy.... This negligence, if found by the jury, would be active fault on the part of ... [the Broker] and [the Insurer] could not shift its loss to Showtime because there is not secondary relationship between ... [the Broker] and Showtime.**[23]

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[19] Id., at 1091.
[20] Id.
[21] Id.
[22] Id., (citing Builders Supply Co. v. McCabe, 77 A. 2d 368 (Pa. 1951)).
[23] Id. at 1092 (emphasis supplied).

In this case the facts are strikingly similar and indemnification is not available because the amended complaint of Element and 5th Street exclusively ascribes the cause of their damage to the negligence of Lunar, Dougherty and Franchi for their acts as handlers of the insurance claim. The amended complaint of Element and 5th Street does not allege the existence of a secondary relationship between the Subcontractor on one side, and Lunar, Dougherty and Franchi, on the other; therefore, a trier-of-fact may not find that the Subcontractor owes a duty to indemnify Lunar, Dougherty and Franchi.

For these reasons, the preliminary objections of Subcontractor are sustained and the joinder complaint of Lunar, Dougherty and Franchi is dismissed.

BY THE COURT,

***MCINERNEY*, J.**