

LYCOMING COUNTY SPCA,	:	IN THE COURT OF COMMON PLEAS OF
Plaintiff	:	LYCOMING COUNTY, PENNSYLVANIA
	:	
vs.	:	NO. 02-01,432
	:	
SNYDER MANUFACTURING COMPANY:	:	
HUSTON CLAY PRODUCTS, INC.,	:	
LYCOMING MASONRY, INC.,	:	
BEAVERTOWN BLOCK COMPANY,	:	
INC., ERICSON CONSTRUCTORS, INC.,	:	
LARSON DESIGN GROUP and STARK	:	
CERAMICS, INC.,	:	
Defendants	:	MOTION TO DISMISS

Date: January 27, 2003

OPINION and ORDER

Before the Court is Plaintiff's, Lycoming County SPCA, Motion for Leave of Court to Dismiss Action Against All Defendants Except Snyder Manufacturing Co., filed October 10, 2002. Plaintiff commenced this action by writ of summons against the defendants, but now, following an investigation, Plaintiff has asserted in the motion that it cannot present proof of liability against any of the named defendants, except Snyder Manufacturing Company (Snyder). Therefore, Plaintiff is asking this Court for leave to dismiss the action against all defendants except Snyder. The Court will grant Plaintiff's motion.

Plaintiff initiated the action by filing a praecipe for a writ of summons on August 21, 2002 against defendants Snyder Manufacturing Co., Huston Clay Products, Inc., Lycoming Masonry, Inc., Beavertown Block Co., Inc., Ericson Constructors, Inc., and Larson Design Group. Plaintiff then filled a praecipe for a writ of summons against Defendant Stark Ceramics on August 28, 2002. On September 27, 2002, Defendant Snyder filed a praecipe to file a complaint. In response, Plaintiff filed a complaint on October 11, 2002 alleging, *inter*

alia, that in February, March, or April 2001 Plaintiff began to notice what they believe were latent defects caused Defendant Snyder's construction of dog kennels at Plaintiff's facility. On October 21, 2002, Plaintiff filed a motion seeking leave of court to dismiss the action against all defendants except Snyder. Defendant Snyder's response to that motion was filed December 5, 2002.

Defendant Snyder filed an answer with new matter on December 4, 2002 that raised the affirmative defense of statute of limitations against Plaintiff's claim. However, Defendant Snyder's answer did not contain a cross claim asserted against the other named defendants. Defendant Snyder filed a separate document asserting a cross claim against defendants Huston Clay Products, Inc., Lycoming Masonry, Inc., Beavertown Block Co., Inc., Ericson Constructors, Inc., and Larson Design Group on December 5, 2002. Plaintiff then filed preliminary objections to Defendant Snyder's cross claim and a motion for a protective order on December 17, 2002. Defendant Snyder filed their responses to these motions on December 30, 2002. An argument is scheduled for February 7, 2003 on the preliminary objections and motion for a protective order.

Before trial has begun, the only method by which a plaintiff can voluntarily terminate an action is by discontinuance. Pa. R.C.P. 229(a). A discontinuance cannot be entered "as to less than all defendants except upon the written consent of all parties or leave of court after notice to all parties." Pa.R.C.P. 229(b). Deciding whether or not to grant the leave is within the discretion of the trial court. *Failor v. Westex, Inc.*, 605 A.2d 390, 393 (Pa. Super. 1992).

This discretion is limited by “the considerations for striking a discontinuance specified in Pa.R.C.P. 229(c).” *Truesdale v. Albert Einstein Med. Ctr.*, 767 A.2d 1060, 1063 (Pa. Super. 2001). A trial court “must consider the extent to which the discontinuance poses ‘unreasonable inconvenience, vexation, harassment, expense or prejudice’ to other parties.” *Ibid.* (quoting Pa. R.C.P. 229(c)). In determining whether a discontinuance would be prejudicial, it is appropriate for the court to consider, “*inter alia*, the length of time for which the case had been pending, the effort and expense those parties have incurred in discovery, and the disadvantage imposed by the passage of additional time on the party’s ability to litigate the claim. *Ibid.*”

Defendant Snyder has not persuaded this Court that the requested discontinuance would be prejudicial. Defendant Snyder contends that they will be prejudiced if the discontinuance is granted in that their cross claims against the other defendants could be jeopardized by the statute of limitations and expose Snyder to possibly greater liability. This concern is not an issue if Defendant Snyder takes the appropriate steps to preserve their cross claims.

A defendant who wishes to join as an additional defendant a party who is not already a defendant on the ground that the additional defendant is solely liable to the plaintiff must act within the statute of limitations applicable to the plaintiff’s cause of action. *Hileman v. Morelli*, 605 A.2d 377, 382 (Pa. Super. 1992). A claim for contribution or indemnity is “the original defendant’s own cause of action which does not even arise until he has been held liable to the plaintiff,” and such a claim does not implicate the statute of limitations governing the plaintiff’s cause of action. *Ibid.* The statute of limitations on the indemnity or contribution

claim does not begin to run until judgment is entered in favor of the original plaintiff. *Bianculli v. Turner Constr. Co.*, 640 A.2d 461, 465 (Pa. Super. 1994).

Where a plaintiff has “sued two defendants, alleging the same cause of action against both of them, the plaintiff’s cause of action against both defendants tolls the statute of limitations on plaintiff’s cause of action as to both defendants.” *Hileman*, 605 A.2d at 383. The filing of a cause of action against both defendants also tolls the statute of limitations on the defendants’ sole liability cross claims. *See, Ibid.* This allows each original defendant to file an answer and new matter under rule 2252(d) “alleging that the other original defendant is solely liable on the plaintiff’s cause of action,” even after the statute of limitations controlling the plaintiff’s claim has passed. *Ibid.* The cross claim of the original defendant “adds nothing to what the plaintiff has already alleged against the other original defendant and the statute of limitations should not bar the joinder.” *Ibid.*

Plaintiff has brought a claim against the other named defendants by filing writs of summons against them on August 21, 2002 and August 28, 2002. This has tolled the statute of limitations that would bar Defendant Snyder from asserting a sole liability cross claim against those named defendants. Defendant Snyder can protect its right to assert such a cross claim in two ways. First, Defendant Snyder can file an answer with new matter setting forth a cross claim against the named defendants. The answer with new matter filed by Defendant Snyder on December 4, 2002 does not contain a cross claim. Defendant Snyder filed a separate cross claim on December 5, 2002. The Court will not rule on the appropriateness or effectiveness of this cross claim at this time. For the purpose of deciding this motion, if Defendant Snyder has filed an effective cross claim, then that cross claim would

be protected from the statute of limitations and Defendants would not be prejudiced by the dismissal of Plaintiff's claim against the other defendants. If the cross claim is not appropriate or effective, Defendant Snyder can still protect its cross claim rights. Defendant Snyder can join the other named defendants as additional defendants under Pa.R.C.P. 2252(c).

The Court will not require Plaintiff to maintain a claim against the other named defendants that it cannot support with evidence. Defendant Snyder suffers no prejudice regarding the cross claims against the other defendants, so long as Defendant Snyder takes the appropriate steps to insure and protect the cross claims. Therefore, the Court will grant Plaintiff's motion and dismiss the Plaintiff's claims against all defendants, except Defendant Snyder.

ORDER

It is HEREBY **ORDERED** that Plaintiff's, Lycoming County SPCA, Motion for Leave of Court to Dismiss Action Against All Defendants Except Snyder Manufacturing, filed October 10, 2002 is granted. Accordingly, defendants Huston Clay Products, Inc., Lycoming Masonry, Inc., Beavertown Block Co., Inc., Ericson Constructors, Inc., Larson Design Group, and Stark Ceramics are dismissed as named defendants without prejudice to the rights of defendant Snyder Manufacturing Company to pursue any properly pleaded claim or cross claim against the dismissed defendants.

BY THE COURT:

William S. Kieser, Judge

cc: Marc F. Lovecchio, Esquire
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Judges
Christian J. Kalas, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)