

**WENDELL BETH RULE MARELLA, Plaintiff, v. AUTOZONE, INC., AUTOZONE WEST, INC., CHIEF AUTO PARTS, INC., all d/b/a AUTOZONE, AND ECKERD CORPORATION, Defendants.**

**Civil No.3:04-CV-1157-H**

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION**

**December 10, 2004, Decided**

**December 10, 2004, Filed**

**DISPOSITION:** Defendants' Motion to Add Third Party Defendants denied.

**COUNSEL:** For Wendell Beth Rule Marella, Plaintiff: Bob Gorsky, Lyon Gorsky Baskett Haring Gilbert & Cates, Dallas, TX.

For Eckerd Corporation, Defendant: Timothy D Howell, Cantey & Hanger, Fort Worth, TX.

For Autozone Inc, Defendant: Henry Scott Wehrmann, Stradley & Wright, Dallas, TX.

For Autozone West Inc, Defendant: Henry Scott Wehrmann, Stradley & Wright, Dallas, TX.

For Chief Auto Parts Inc, doing business as Autozone Defendant: Henry Scott Wehrmann, Stradley & Wright, Dallas, TX.

For Frank Andrews, Provider: Pro se, Dallas, TX.

**JUDGES:** BAREFOOT SANDERS, SENIOR JUDGE, UNITED STATES DISTRICT COURT.

**OPINION BY:** BAREFOOT SANDERS

**OPINION**

**MEMORANDUM OPINION AND ORDER**

Before the Court are Defendants' Joint Motion for Leave to Designate Responsible Third Parties, filed November 15, 2004; and Plaintiff's Response, filed December 6, 2004. Defendants seek to add Thaten & Thaten Construction Company ("Thaten") and Alan H. Smith Consulting Engineers, Inc. ("Engineers") as responsible third parties under Chapter 33 of the Texas Civil Practices and Remedies Code ("the Code"). *TEX. CIV. PRAC. & REM. CODE* §§ 33.004, 33.011(6) (Vernon 2004 & Supp.). Chapter 33 of the Code is limited to actions sounding in tort or in the *Texas Deceptive Trade Practices-Consumer Protection Act*. See *id.* § 33.002(a).

Plaintiff seeks to hold Defendants liable for damages arising from a slip and fall caused, according to Plaintiff, by "uneven ground at the base of the stairs." (Pl.'s Orig. Pet. at 3.) Defendants seek to add the architect, Engineers, and the general construction contractor, Thaten, believed by Defendants to be responsible for the design and construction of the stairs as responsible third parties. (Def.'s Mot. at 2.)

The Court may join third party defendants to an action under *Federal Rule of Civil Procedure 14(a)*. *Fed. R. Civ. Pro. 14(a)*. See *Kelley v. Wal-Mart Stores, Inc.*, 224 F. Supp. 2d 1082, 1084 (E.D. Tex. 2002). The Federal Rules, including *Rule 14(a)*, "govern the procedure in United States district courts in all suits of a civil nature. . . ." *FED. R. CIV. PRO. 1*. To the extent that *Rule 14* conflicts with *section 33.004* of the Code, *Federal Rule 14* must take priority, as *section 33.004* is procedural in nature. See *Mills v. Davis Oil Co.*, 11 F.3d 1298,1304 (5th Cir. 1994) ("In the absence of a valid Federal Civil Rule addressing the point, the Court must determine whether a particular rule is procedural or substantive. . . ."). Since *section 33.004* of the Code is only a joinder statute, and contribution and indemnity actions are allowed under *Sections 33.016* and *33.017* of the Code, "no substantive provisions of Texas law are being ignored by this court's ruling" to use *Federal Rule 14* to determine whether to add third party defendants to the case. See *Kelley*, 224 F. Supp. 2d at 1084.

In the instant case, joinder is improper. Under Texas law, a "responsible third party" means any person to whom all of the following apply:

- (i) the court in which the action was filed could exercise jurisdiction over the person;
- (ii) the person could have been, but was not, sued by the claimant; and
- (iii) the person is or may be liable to the plaintiff for all or a part of the damages

claimed against the named defendant or defendants."

*TEX. CIV. PRAC. & REM. CODE ANN. § 33.011 (6)(A)(iii)* (Vernon 2004). "It is well established that under Texas case law that neither contribution nor indemnification can be recovered from a party against whom the injured party has no cause of action." *Arnold v. Garlock, Inc.*, 278 F.3d 426, 439 (5th Cir. 2001), citing *Safway Scaffold Co. of Houston, Inc. v. Safway Steel Prods., Inc.*, 570 S.W.2d 225, 228-29 (Tex.Civ.App. -- Houston [1st Dist.] 1978, writ *ref'd n.r.e.*). The same is true under *Rule 14. FED. R. CIV. P. 14.*

Defendants seek to add responsible third parties without formally adding them as parties to the action. (See Def.'s Br. at 4.) This approach, however, has been rejected by Texas case law. See *In re Thornton*, 2004 Tex. App. LEXIS 714, No. 14-03-00712-CV, 2004 WL 114978 (Tex. App.-Houston [14 Dist.] Jan. 26, 2004) ("The express language of the Proportionate Responsibility Statute in effect for this case requires that responsible third parties be joined in this lawsuit, not simply named or designated.").

The pleadings before the Court fail to establish that joinder is appropriate under either Texas law or *Rule 14*. Defendant claims that Thaten is a defunct corporation. (Def.'s Br. at 4.) Joinder of defunct corporations is futile

and possibly prejudicial to a plaintiff's interests. See *Lone Star Indus., Inc. v. Redwine*, 757 F.2d 1544, 1553 (5th Cir. 1985). Additionally, Defendants do not allege any cause of action against Engineers or Thaten occurring within the ten year statute of limitations period for building or property improvement design and construction defects. *TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.008, .009*; see also *Goose Creek Consol. Indep. Sch. Dist. of Chambers v. Jarrar's Plumbing*, 74 S.W.3d 486, 492-93 (Tex.App.-Texarkana 2002). Accordingly, Defendants fail to establish a cause of action against Thaten or Engineers warranting joinder under either *Rule 14* or *section 33.004*. The Court concludes that the parties which Defendants seek to add as responsible third parties are not indispensable to this action and that Defendants suffer no irreparable harm from this Court's ruling.

Accordingly, Defendants' Motion to Add Third Party Defendants Alan H. Smith Consulting Engineers, Inc. and Thaten & Thaten Construction Company is **DENIED**.

SO ORDERED.

DATED: December 10, 2004

BAREFOOT SANDERS, SENIOR JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS