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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

D. Douglas Gandy, D.O.,  
Plaintiff,  
vs.  
Lynne Shaklan-Brown, et al.,  
Defendants.

No. CV-06-3072-PHX-PGR

ORDER

Pending before the Court is Defendant Lynne Shaklan-Brown’s Motion to Amend Answer, and to Add Counterclaim and Third-Party Complaint (doc. #49), to which co-defendant Robert K. Brown has filed a joinder (doc. #84). The plaintiff has filed a relatively cursory response in which he objects to the motion solely on the grounds that the proposed amendments are in effect untimely and will result in the need for pretrial scheduling deadlines to be extended.<sup>1</sup> Having considered the parties’ memoranda in light of the record, the Court finds that the motion should be granted in part and denied in part.

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At the time the motion to amend was filed, the deadlines for completing discovery and for filing dispositive motions had not yet passed. Both deadlines have now passed and all three parties have a motion for summary judgment pending.

1 A. Affirmative Defenses

2 Shaklan-Brown, acting through substituted counsel, seeks in part to amend  
3 her answer pursuant to Fed.R.Civ.P. 15(a) in order to specify various affirmative  
4 defenses. Her answer (doc. #17), filed by her original counsel, merely stated that  
5 she was incorporating those affirmative defenses set forth in Fed.R.Civ.P. 12(b)  
6 and that she would be amending her answer to designate specific affirmative  
7 defenses after her counsel received and reviewed the documents referenced in  
8 the complaint. She now proposes to add affirmative defenses of failure of  
9 consideration, unclean hands, illusory contract, misrepresentation, breach of the  
10 covenant of good faith and fair dealing, non-performance, wrongful repossession,  
11 and failure to state a claim upon which relief may be granted.

12 As Shaklan-Brown correctly points out, the liberal amendment standard of  
13 Fed.R.Civ.P. Rule 15(a), rather than the “good cause” standard of Fed.R.Civ.16  
14 as suggested by the plaintiff, governs the proposed amendment inasmuch as the  
15 Scheduling Order (doc. #43) did not set forth a deadline for amending pleadings  
16 or adding parties.<sup>2</sup> Since Shaklan-Brown’s request to amend her answer was

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18 In light of Shaklan-Brown’s repeated references to the fact that the  
19 Scheduling Order did not contain a deadline for her to amend her answer, the  
20 Court wishes to make very clear that it did not set forth any Rule 15(a)-related  
21 deadline in the Scheduling Order, as it normally does in its scheduling orders,  
22 solely in reliance on the parties’ statement in their Joint Case Management Report  
23 (doc. #21), which was signed on Shaklan-Brown’s behalf by her original counsel,  
24 that “[t]he parties do not intend to file any motions pursuant to Rule 12(b),  
25 Fed.R.Civ.P., motions to amend pleadings and motions to join additional parties[,]”  
26 and the parties’ consequential decision not to propose any such deadlines. While  
Shaklan-Brown, through her current counsel, entered into a stipulation (doc. #41)  
with the plaintiff prior to the Scheduling Conference to revise certain of the dates  
proposed in the Joint Case Management Report, the parties again failed to  
reference any desire to amend pleadings or add parties and no proposed Rule  
15(a)-related deadline was then requested.

1 not unduly delayed given that it was made less than three months after the  
2 Scheduling Conference was held and since the plaintiff has not established that  
3 he would be unduly prejudiced by the addition of specific affirmative defenses,  
4 the Court will permit Shaklan-Brown to amend her answer.

#### 5 B. Counterclaim

6           Shaklan-Brown seeks to add a counterclaim for conversion based on her  
7 allegation that the plaintiff's agents removed equipment from her office that was  
8 not part of her contract with the plaintiff. Since the plaintiff has not established  
9 any undue delay in seeking the amendment or undue prejudice to him stemming  
10 from the addition of the conversion claim, and apparently cannot since he was  
11 previously made aware of the conversion allegation through the prior disclosure  
12 of preliminary report of Kenneth Goodman, Shaklan-Brown's expert, and since  
13 the Court believes that the addition of the conversion counterclaim is in the  
14 interest of justice, the Court will permit the counterclaim to be filed pursuant to  
15 Fed.R.Civ.P. 13(f).

16           Any current need by a party to reopen discovery related to the added  
17 affirmative defenses or counterclaim can be brought to the Court's attention after  
18 the resolution of the pending motions for summary judgment.

#### 19 C. Third-Party Complaint

20           Shaklan-Brown further seeks to add a third-party complaint against Med-  
21 Surge Advances, Inc. and its employee, Paul Hershman, and his wife. The gist of  
22 the proposed third-party complaint is that Med-Surge and Hershman made  
23 numerous misrepresentations to Shaklan-Brown and failed to disclose numerous  
24 material facts to her while seeking to have her enter into the sublease with the  
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1 plaintiff.<sup>3</sup>

2 Although it is never once mentioned, much less discussed, by Shaklan-  
3 Brown, Fed.R.Civ.P. 14(a) governs the propriety of the filing of the proposed  
4 third-party complaint. It is well established that a third-party claim can be  
5 maintained pursuant to Rule 14(a) only where a third-party defendant's liability to  
6 the third-party plaintiff is dependent on the outcome of the main claim and is  
7 secondary or derivative thereto. Stewart v. American International Oil & Gas Co.,  
8 845 F.2d 196, 199 (9<sup>th</sup> Cir. 1988). Since the crucial characteristic of a Rule 14(a)  
9 claim is that the third-party plaintiff is attempting to transfer to the third-party  
10 defendant the liability asserted against her by the original plaintiff, *id.* at 200, a  
11 proper third-party claim is typically one that involves one joint tortfeasor  
12 impleading another, an indemnitee impleading an indemnitor, or a secondarily  
13 liable party impleading one who is primarily liable. Rule 14(a) does not permit a  
14 third-party complaint to be founded on a defendant's independent cause of action  
15 against a third-party defendant even if it arises out of the same transaction or  
16 same set of facts underlying the plaintiff's claim. *Id.*

17 The Court, in the exercise of its sound discretion, declines to allow  
18 Shaklan-Brown to file the proposed third-party complaint. First, while Shaklan-  
19 Brown's claims against Med-Surge and Hershman are obviously transactionally  
20 related to the plaintiff's claims against her, she has not met her burden of  
21 establishing that her third-party misrepresentation and fraud claims are in fact  
22 wholly dependent upon the outcome of the main claims, *i.e.* that Med-Surge and

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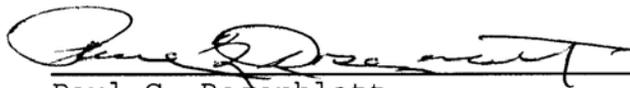
24 Conceding that the addition of the third-party complaint will necessarily  
25 delay the resolution of the original action, Shaklan-Brown states in her reply that  
26 she is willing to withdraw the third-party complaint from the proposed  
amendments if the Court deems it appropriate for her to do so.

1 Hershman would be liable for indemnification, subrogation, contribution, or under  
2 any other theory that would make them secondarily or derivatively liable to her in  
3 the event she is held liable to the plaintiff. Second, the addition of the third-party  
4 claims would obviously disadvantage the existing action, which is now in the  
5 procedural posture of awaiting resolution of cross-motions for summary judgment.  
6 See Southwest Administrators, Inc. v. Rozay's Transfer, 791 F.2d 769, 777 (9<sup>th</sup>  
7 Cir.1986), *cert. denied*, 479 U.S. 1065 (1987) ("The decision whether to implead  
8 a third-party defendant is addressed to the sound discretion of the trial court. ... It  
9 is not an abuse of discretion to deny an application for impleader where it will  
10 disadvantage the existing action.") Therefore,

11 IT IS ORDERED that Defendant Lynne Shaklan-Brown's Motion to Amend  
12 Answer, and to Add Counterclaim and Third-Party Complaint (doc. #49) is  
13 granted to the extent that it seeks permission to file an amended answer with  
14 specified affirmative defenses and a counterclaim for conversion, and it is denied  
15 to the extent that it seeks permission to file a third-party complaint.

16 IT IS FURTHER ORDERED that defendant Lynne Shaklan-Brown shall file  
17 her amended answer and counterclaim no later than **October 10, 2008**.<sup>4</sup>

18 DATED this 30<sup>th</sup> day of September, 2008.

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22 Paul G. Rosenblatt  
23 United States District Judge

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26 The form of the amended answer and counterclaim shall be that set forth in the lodged proposed document (doc. #50), minus the proposed third-party complaint.