COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2017-00943-A

KEVIN S. DEBERARDINIS and SHARLENE E. DEBERARDINIS,
Plaintiffs

vs.

DANDREO BROTHERS GENERAL CONTRACTORS & MASONRY, INC.,
Defendant

MEMORANDUM AND DECISION ON PLAINTIFF'S MOTION TO AMEND COMPLAINT

Plaintiffs Kevin DeBerardinis ("DeBerardinis") and Sharlene E. DeBerardinis (collectively with DeBerardinis, the "plaintiffs") commenced this personal injury action on June 19, 2017. The events giving rise to this action occurred on October 26, 2014. At that time, DeBerardinis was employed as an electrician at General Electric's plant in Lynn, Massachusetts. He alleges that he suffered serious injuries when a door closing device became partially detached and struck him in the head as he was entering or exiting the plant. Sharlene DeBerardinis alleges a claim for loss of consortium. The only named defendant in the complaint is defendant Dandreo Brothers General Contractors & Masonry, LLC ("Dandreo"), who was the general

contractor on an improvements project at the plant that was valued in the several hundreds of thousands of dollars. A part of the project, and a small part of the project, was the installation of a new exit door, with an automatic closing devise located at the interior top of the door. Dandreo hired Donald Belcourt ("Belcourt"), an independent subcontractor, to install the door and closing devise. Dandreo, a general contracting/masonry company, did not have employees experienced in such an installation and subcontracted with Belcourt, who had perform similar installations for Dandreo in the past. Belcourt performed the door installation in 2011.

Now before the court is plaintiffs' motion to amend complaint and add Belcourt as a defendant. [D. 10]. It was filed with the court on February 14, 2019. DeBerardinis claims only to have learned of Belcourt's involvement in installing the door in question through recent discovery and information received from Dandreo. Belcourt argues that any cause of action arising out of his installation of the door/closing device in 2011 is barred by the six-year statute of repose. G. L. c. 260, § 2B. The court agrees with Belcourt that if the statute of repose applies, he cannot be added to this action by plaintiffs. The relation back doctrine applicable to general statutes of limitations, G. L. c. 231, § 51, is not applicable to the statute of repose. *Casco v. Warley Electric Company, Inc.*, 37 Mass. App. Ct. 701, 703-704 (1995). Thus, the determinative issue is whether Belcourt's installation of the door/closing

device falls within the protection of the six-year statute of repose. A non-evidentiary hearing was held on March 28, 2019. For reasons discussed below, plaintiffs' motion to amend complaint and add Belcourt as a party defendant [D. 10] is **DENIED**.

DISCUSSION

The manner in which a party may amend a pleading is governed by Mass. R. Civ. P. 15(a), which provides in pertinent part:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served and prior to entry of an order of dismissal . . . . Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

Although leave to amend under Rule 15(a) should be freely given when justice so requires, a motion for leave to amend may be denied when there is good reason to do so. *Castellucci* v. *United States Fid. & Guar. Co.*, 372 Mass. 288, 289 (1977). "A liberal amendment policy does not justify overriding the rights of a person who would be prejudiced by the last minute allowance of a motion to amend." *Id.* at 292. In *Castellucci*, the Supreme Judicial Court provided the following non-exhaustive list of reasons justifying the denial of a motion to amend: "'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of [the] amendment.'" *Id.* at 290, quoting

Foman v. *Davis*, 371 U.S. 178, 182 (1962). Undue delay is particularly concerning when combined with an attempt to add new theories of liability or new claims. *Walsh* v. *Chestnut Hill Bank & Trust Co.*, 414 Mass. 283 (1993), quoting *Goulet* v. *Whitin Mach. Works, Inc.*, 399 Mass. 547, 552 (1987). "'Futility' means that the complaint, as amended, would fail to state a claim upon which relief could be granted." *Glassman* v. *Computervision Corp.*, 90 F. 3d 617, 623 (1st Cir. 1996).

It is futility that drives this court's denial of plaintiffs' motion to amend. Futility in this case is controlled by the statute of repose for tort actions arising out of improvements to real property. G. L. c. 260, § 2B. The statute provides in pertinent part at follows:

> Action of tort for damages arising out of any deficiency or neglect in the design, planning, construction or general administration of an improvement to real property, ... shall be commenced only within three years next after the cause of action accrues; provided, however, that in no event shall such actions be commenced more than six years after the earlier of the dates of: (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the taking of possession for occupancy by the owner.

As stated by the Massachusetts Appeals Court:

> The repose statute applies to those who perform acts of "individual expertise akin to those commonly thought to be performed by architects and contractors – that is to say, . . . parties who render particularized services for the design and construction of particular improvements to particular pieces of real property." *Dighton* v. *Federal Pac. Elec. Co.*, 399 Mass. 687, 696 (1987) (manufacturer of defective circuit breaker

> panel, who did not claim to have rendered any particularized services with respect to design or construction of building in which component it supplied was installed could not claim protections of § 2B). The Legislature enacted G. L. c. 260, § 2B, to limit the liability of architects, engineers, contractors, or others involved in the design, planning, construction, or general administration of an improvement to real property." *Klein* v. *Catalano*, 386 Mass. 701, 720 (1982).

Fine v. *Huygens, DiMella, Shaffer & Assoc.*, 57 Mass. App. Ct. 397, 401-402 (2003).

A statute of repose begins to run from the time the design, planning, construction, or general administration of the improvement to real property was furnished. *Klein*, 386 Mass. at 705. It imposes an absolute limit on the time within which actions to which it refers may be brought, irrespective of when the plaintiff was injured or discovered the wrong. *Conley* v. *Scott Products, Inc.*, 4021 Mass. 645, 646 (1988). It may not be tolled for any reason, as tolling would deprive a defendant of the certainty of the statute of repose. *Protective Life Ins. Co.* v. *Sullivan*, 425 Mass. 615, 631, n.19 (1997), citing *Sullivan* v. *Iantosca*, 409 Mass. 796, 798 (1991). Courts have adopted a dictionary definition of the word improvements: "a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs." *Conley*, 401 Mass. at 647, quoting Webster's Third New Int'l Dictionary 1138 (1961).

The court rules, given the above legal guidance, that the installation of an exit

door and closing device at General Electric's plant by Belcourt in 2011 is an improvement for purposes of the statute of repose, in so far as it is a betterment of real property designed to make the property more useful, as distinguished from ordinary repairs.[1] Ordinary repairs would include repairing the door and any existing closing device that might have been attached (if any). But, here we have a complete new installation of a door and closing device, which was a part of a "multi-hundreds of thousands of dollars contract" between General Electric and Dandreo. In that respect, the installation of the door/closing device was a included contractual part of a larger improvements project. The entire project undertaken by Dandreo would unquestionably fall within the statute of repose if Dandreo had not been sued by plaintiffs within six years of the conclusion of the improvements in 2011 (or 2012). It should make no difference for statute of repose purposes whether Belcourt installed the door/closing device or it was installed by Dandreo's employees.

This case is distinguishable from the decision of the Plymouth Superior Court in *Miele* v. *Wash Mass, LLC*, PLCV2014-00955 (October 14, 2014) (Yessayan, J.). In *Miele*, the court declined to classify installation of automatic, power-operated

[1]More specifically, and to the degree that the statute of repose issue is not a question of law for the court, the court finds that adding Belcourt to the complaint would be futile, as the proposed amended complaint does not plausibly suggest a viable cause of action against Belcourt, and plaintiffs would stand no reasonable expectation of proving at trial that the installation of the door/ closing device, as part of a much larger improvements project, was not an improvement within the meaning of the statute of repose.

double front doors as an improvement within the meaning of the statute of repose. In *Miele*, there is no mention that the installation of the doors was part of a larger improvement project, as we have here. Moreover, the *Miele* decision , which is of persuasive value but not precedential value, was made in the context of the denial of a summary judgment motion, and it is not clear to this court that the improvements issue was decided as a matter or law, or was found to include disputed issues of fact (i.e. whether the work was an improvement under § 2B) that would be put to a jury. Finally, Dandreo's subcontracting part of its contractual responsibilities to Belcourt, as opposed to using its own employees, shows that a certain amount of specialized expertise was required to install the door and closing device. Dandreo obviously did not have the required expertise within its own employees to install the door and closing device.

ORDER

Plaintiffs' motion to amend complaint to add Belcourt as a defendant [D. 10] is **DENIED**.

Timothy Q. Feeley
Associate Justice of the Superior Court

April 3, 2019