

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33646
Y/ct

_____AD3d_____

Submitted - December 16, 2011

MARK C. DILLON, J.P.
THOMAS A. DICKERSON
RANDALL T. ENG
JOHN M. LEVENTHAL, JJ.

2010-10551
2011-01970

DECISION & ORDER

Whippoorwill Hills Homeowners Association, Inc.,
etc., plaintiff-respondent, v Toll at Whippoorwill, L.P.,
et al., defendants third-party plaintiffs-appellants, et al.,
defendant; MM Construction, third-party defendant-
respondent, A.P. Roofing & Siding, Inc., third-party
defendant/second third-party plaintiff/third third-party
plaintiff-respondent; Axe Siding Company, Inc., et al.,
second third-party defendants; P&R Universal
Painting, et al., third third-party defendants-respondents
(and a fourth third-party action).

(Index No. 24785/07)

McCarter & English, New York, N.Y. (Robert S. Bernstein and Renee A. Gallagher
of counsel), for defendants third-party plaintiffs-appellants.

Brill & Associates, P.C., New York, N.Y. (Corey M. Reichardt of counsel), for third-
party defendant-respondent.

White and Williams, LLP, New York, N.Y. (Rafael Vergara of counsel), and
O'Connor Redd, LLP, White Plains, N.Y. (Steven R. Lau of counsel), for third-party
defendant/second third-party plaintiff/third third-party-plaintiff-respondent (one brief
filed).

Ahmuty, Demers & McManus, Albertson, N.Y. (Brendan T. Fitzpatrick of counsel),
for third third-party defendants-respondents.

January 24, 2012

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WHIPPOORWILL HILLS HOMEOWNERS ASSOCIATION, INC. v TOLL AT
WHIPPOORWILL, L.P.

In an action, inter alia, to recover damages for negligence, the defendants third-party plaintiffs appeal from (1) so much of an order of the Supreme Court, Westchester County (Lefkowitz, J.), entered September 15, 2010, as granted those branches of the motion of third-party defendant MM Construction, the separate motion of the third-party defendant A.P Roofing & Siding, Inc., and the separate motion of the third third-party defendants, P&R Universal Painting and Piotr Androsz, individually and doing business as P&R Universal Painting, which were to sever the third-party actions, and (2) so much of an order of the same court dated January 13, 2011, as, upon reargument, adhered to the original determination.

ORDERED that the appeal from the order entered September 15, 2010, is dismissed, as the portion of that order appealed from was superseded by the order dated January 13, 2011, made upon reargument; and it is further,

ORDERED that the order dated January 13, 2011, is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the respondents appearing separately and filing separate briefs.

Under the circumstances of this case, the Supreme Court did not improvidently exercise its discretion in directing the severance of the third-party actions at issue from the main action. Severance will avoid undue delay in the main action, which was commenced more than four years ago and has been certified ready for trial, and will avoid prejudice to the third-party defendants, who have not had an adequate opportunity to complete discovery (*see* CPLR 1010; *Meczkowski v E.W. Howell Co., Inc.*, 63 AD3d 803, 804; *Abreo v Baez*, 29 AD3d 833, 834; *Wassel v Niagara Mohawk Power Corp.*, 307 AD2d 752; *Singh v City of New York*, 294 AD2d 422, 423).

DILLON, J.P., DICKERSON, ENG and LEVENTHAL, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court