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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Richter Justice PART 24

0113975/2002

VERIZON-NEW YORK
vs
RECKSON ASSOCIATES REALTY

SEQ 3

SEVER ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 08 2004
NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/3/04

Rosalyn Richter J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

HON. ROSALYN RICHTER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 24

Verizon-New York, Inc.,

Plaintiff,

-against-

Reckson Associate Realty Corp.,

Defendant

Decision & Order
Index No. 113975/03
Motion Sequences 3 & 4

Reckson Associates Realty Corp.,

Third-Party Plaintiff,

-against-

Cappelli Enterprises, Inc.,

Third-Party Defendant

Index No. 590654/03

Cappelli Enterprises, Inc.,

Second Third-Party Plaintiff,

-against-

Patriot Contracting Corp.,

Second Third-Party Defendants

Index No. 591189/03

Reckson Associates Realty Corp.,

Third Third-Party Plaintiff

-against-

Patriot Contracting Corp., Pennacchio Brothers, Inc. and Damico, Inc.

Third Third-Party Defendants

Index No. 590101/04

Richter, J.:

This series of motions stems from a negligence action in which plaintiff seeks to recover for damage to its telephone equipment located at a premises allegedly owned by defendant Reckson Associates Realty Corp. ("Reckson"). The equipment allegedly was damaged during a renovation of the building, for which third-party defendant Cappelli Enterprises, Inc. ("Cappelli") was the general contractor. Second and third third-party defendants Patriot Contracting Corp., ("Patriot"), Pennacchio Brothers, Inc. and Damico, Inc. ("Damico") were hired as various subcontractors on the project.

Third third-party defendant Damico moves, pursuant to CPLR 603, for an order severing it and the entire third third-party action from the main action. It is undisputed that the main action was commenced in July 2002, and the note of issue was filed on March 25, 2004. Damico was brought into the case on March 15, 2004, and now argues that it will be prejudiced if forced to proceed since discovery has been completed. However, as Reckson and Patriot point out Damico was given a complete set of documents on March 31, 2004, and therefore no significant prejudice exists. Damico has not explained why it needs a significant time to complete any remaining discovery, and in fact, only states in general terms that is does not want discovery to be rushed.

The decision to sever claims or third-party controversies from the main action, and to order a separate trial thereof, rests in the sound discretion of the trial court. *Finning v. Niagara Mohawk Power Corp.*, 281 A.D.2d 844 (3d Dept. 2001); *Rothstein v. Milleridge Inn, Inc.*, 251 A.D.2d 154 (1st Dept. 1998). Here, the sole basis for the motion is Damico's concerns about the time needed to complete discovery. The Court believes that such concerns are not sufficient to outweigh the legitimate need to try all the claims in this property damage action in a single

proceeding. Any potential prejudice can be alleviated by granting Damico time to complete discovery. Accordingly, the motion for severance is denied. *See, e.g., Belkin v. New York City Transit Auth.*, 265 A.D.2d 178 (1st Dept. 1999) (no severance where fourth-party defendant joined at the time the note of issue was filed and was granted twenty days to complete discovery). However, the Court grants an additional sixty days from the date of this decision for the parties to complete discovery with regard to Damico. The parties and the Court shall set dates for any additional discovery, which must be completed by Nov. 8, at the conference that already is scheduled for Sept. 8.

In addition, Reckson cross-moves seeking leave to amend its answer to assert the affirmative defense of the statute of limitations, summary judgment on several claims, and an order compelling Cappelli and Patriot to comply with various discovery orders. The Court grants that part of Reckon's motion seeking leave to amend its answer to assert the affirmative defense of the statute of limitations, and orders Patriot to comply with certain of the discovery requests. In all other respects, the cross-motion is denied.

CPLR 3025(b) provides that leave to amend the pleadings shall be freely given at any time "upon such terms as may be just." Leave to amend will be denied where the proposed pleading fails to state a cause of action, is palpably insufficient as a matter of law, or where prejudice or surprise to the other side would result. *See Davis & Davis, P.C. v. Morson*, 286 A.D.2d 584 (1st Dept. 2001); *Alexandria Condominium v. Broadway/72nd Assoc.*, 285 A.D.2d 422 (1st Dept. 2001). In support of the merits of the proposed defense, and its argument that the equipment was damaged before the July 1999 date alleged in the complaint, Reckson relies on the deposition testimony of its employee, Mr. Barnes. Mr. Barnes stated that in April 1999, he

observed that telephone cables inside the building were "hacked off" and that the building lacked phone service. He further stated that he notified Bell Atlantic (the then-current owner of the equipment) of the problems and requested phone service be provided. If it is true that the damage to plaintiff's equipment occurred prior to April 1999, plaintiff's claim would be outside the three-year statute of limitations for property damage and therefore time-barred.

Plaintiff does not argue that it will be prejudiced by the addition of a statute of limitations defense, but rather contends that the defense has no merit. Specifically, plaintiff claims that the April 1999 request for phone service was not a request to repair the severed cables at issue here. The conflicting evidence as to the date of the property damage precludes summary judgment for either Reckson or Cappelli on their statute of limitations defense.

Reckson and Cappelli also seek summary judgment dismissing that part of plaintiff's damages claim seeking recovery of the labor costs and administrative fees expended in the repair of the damaged property. Reckson and Cappelli assert that plaintiff may not recover expenses attributable to work performed by its salaried employees, or for the use of its equipment. However, under New York law, the appropriate measure of recovery for damaged utility property is either "the entire cost of the repairs," *State of New York v. Sossei,* 144 A.D.2d 888 (3d Dept. 1988), or "the actual cost of emergency expenses together with the present day cost of replacing damaged or destroyed equipment, less accrued depreciation, and any allowance for salvage." *New York State Elec. and Gas Corp. v. Fischer,* 24 A.D.2d 683 (3d Dept. 1965). Here, the cost of repairing the damaged property would include the amounts plaintiff paid its employees to repair the equipment, as well as the various other overheard costs involved. There is no legal prohibition against damages for the wages paid to salaried employees or the amounts expended

on the use of previously-owned equipment. In fact, the court in *New York State Thruway Auth. v. Civetta Constr. Corp.*, 62 A.D.2d 530 (3d Dept. 1978), cited by Cappelli, reversed the trial court because it failed to allow plaintiff utility to recover the wages paid to plaintiff's personnel for the time spent repairing the damaged property. The court noted that there was no other way for plaintiff to be made whole, and that plaintiff should not be penalized because the repairs were performed by its employees rather than an outside contractor. *Id. Accord State of New York v. Sossei,* 144 A.D.2d 888 (3d Dept. 1988) (noting the plaintiff utility's "entitlement to a full recovery of the reasonable cost of repairs"); *New York State Elec. & Gas Corp. v. Goettsche,* 48 Misc.2d 786 (Sup. Ct. Tompkins Co. 1965) (labor overhead, wages and transportation costs were proper items of damages).

Further, Cappelli's reliance on *Media Logic, Inc. v. Xerox Corp.*, 261 A.D.2d 727 (3d Dept. 1999) is misplaced as this case is distinguishable on the facts. The court in *Media Logic* disallowed the plaintiff's claim for increased internal labor costs–specifically, gifts to employees and an open-house reception– because no evidence was presented linking them to the subject matter of the litigation, which involved a fire caused by a faulty xerox machine. *Id.* Here, plaintiff does not seek to recover for general increases in labor costs, but has provided documentary evidence linking the cost to the labor necessary to complete the repairs to the allegedly damaged property. Accordingly, summary judgment is denied and the trier of fact shall be allowed to consider what amount of the alleged damages, if any, plaintiff is entitled to.

Reckson and Cappelli also move for summary judgment on the ground that plaintiff has not established an ownership interest in the disputed telephone equipment, and therefore is not the proper party to bring this action. However, the documents put forth by defendants in support

of this motion do not conclusively refute plaintiff's claims that it acquired the equipment from Bell Atlantic, the previous owners. In any event, in light of the conflicting positions of the parties, the question of the true corporate ownership of the equipment at the time it was damaged is an issue of fact to be resolved at trial. Accordingly, that part of Reckson and Cappelli's motions which seek summary judgment on this basis also are denied. To the extent that Patriot's cross-motion merely incorporates and adopts the arguments seeking summary judgment and dismissal of the second third-party action on the basis of improper plaintiff and statute of limitations, it too is denied.

Cappelli's final argument in favor of its motion for summary judgment is that its duties as general contractor terminated in February 1999, prior to the July date of damage set forth in the complaint. Reckson now claims that the damage to equipment occurred prior to April 1999, and therefore, Cappelli may have been responsible. Reckson also disputes the testimony of a Cappelli witness who stated that there was at least some telephone service in the building at one point during Cappelli's work there. Reckson contends that the phone service was not fully operable, and therefore the damage may have occurred during the time of Cappelli's oversight as general contractor. As previously discussed in this decision, the Court finds the determination of the date the equipment was damaged to be an issue of fact for the jury. Accordingly, the motion for summary judgment is denied.

In response to Reckson and Cappelli's discovery motions, Patriot offers no legal reasons for its failure to provide the requested items but rather argues that it does not yet have them or has encountered difficulties in obtaining the information and scheduling depositions. It is therefore ordered that Patriot forward to Reckson and Cappelli copies of the Patriot/Cappelli

contract at issue in this action within 30 days of the date below, or inform Reckson and Cappelli in writing that it no longer can locate the document. Further, within thirty days from the date of this decision, Patriot is to provide complete copies of its insurance policy to both Reckson and Cappelli, and produce a party for deposition. If Patriot does not comply with the directions in this paragraph within this thirty day period, absent good cause, the Court will preclude Patriot from introducing evidence at trial with respect to those items. That part of Cappelli's motion seeking to compel plaintiff to respond to "Cappelli's 2004 discovery notices" is denied without prejudice since the motion papers do not contain any details as to the items that were requested but not provided.

This constitutes the decision and order of the Court.

Rosalyn Richter

September 3, 2004 Justice Rosalyn Richter