

Fromer v Fisher, Fisher & Berger

2007 NY Slip Op 32696(U)

August 22, 2007

Supreme Court, New York County

Docket Number: 0602826/1999

Judge: Joan Madden

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

PRESENT: HON. JOAN A. MADDEN

PART 11

Justice

**DAVID FROMER, SHIRLEY FROMER,
and FIRST DAUGHTERS TRUST,**

Plaintiffs,

- v -

FISHER, FISHER & BERGER,

Defendant.

INDEX NO. :602826/99

MOTION DATE: 7-23-07

MOTION SEQ. NO.: 003
MOTION CAL. NO.:

FISHER, FISHER & BERGER,

INDEX NO. 590339/07

Third-party plaintiff

-v-

LAWRENCE R. GORDON,

Third-party defendant

FILED

AUG 28 2007

NEW YORK COUNTY CLERK'S OFFICE

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: [X] Yes [] No

Defendant moves to vacate plaintiffs' note of issue and certificate of readiness on the ground that discovery has not been conducted with respect to its third-party action. Plaintiffs David Fromer, Shirley Fromer and First Daughters Trust (together "the Fromers") oppose the

motion and cross-move to sever the third-party action. For the reasons below, the motion is denied, and the cross motion is granted.

Background

In this legal malpractice action, the Fromers allege that Andrew Fisher, Esq. ("Fisher") of the defendant law firm entered into a settlement agreement on their behalf without authority, and that the settlement allegedly caused them to incur millions of dollars in damages.

Defendant represented the Fromers with respect to two matters in the mid-1990's one which was venued in the United States District Court for the Southern District of New York ("Restifo action") and the other which was venued in the United States Bankruptcy Court for the Southern District of Florida ("Tropin action"). Both actions arose out of In re Premium Sales Corporation a bankruptcy matter venued in the United States Bankruptcy court for the Southern District of Florida ("the Premium matter"). Premium Sales Corporation ("Premium") was a business allegedly profiting from interstate grocery trading. The Fromers invested in Premium and plaintiff David Fromer, together with certain business associates, created a number of corporations which also invested in and/or participated in the business of Premium.

When Premium declared bankruptcy, a number of investors in the Premium related corporations brought the Restifo action against the Fromers alleging violations of state and federal securities laws and the Racketeer Influenced and Corrupt Organizations Act. The Tropin action was brought against the Fromers by the court-appointed trustee in the Premium bankruptcy, and alleged preferential transfer of funds from Premium and related entities prior to Premium's filing for bankruptcy protection.

The settlement agreement which provides the basis for this action was executed on behalf of the Fromers by Fisher on June 13, 1996, and resulted in the settlement of the Tropin action and the dismissal of Fromers' third-party action in the Restifo action. Defendant alleges that in or about February 1996, third-party defendant in the instant action, Lawrence Gordon, Esq. ("Gordon"), an attorney from California and personal friend of Mr. Fromer, became involved in the various actions as personal counsel to the Fromers. It is defendant's position that Gordon represented to Fisher that he was acting as the Fromers' agent, and that Gordon directed him to execute the June 13, 1996 settlement agreement on behalf of the Fromers.

This action was commenced on June 8, 1999 by service of a summons with notice. After defendant appeared in this action, the Fromers served a complaint and defendant served an answer on November 23, 1999. In September 2003, the Fromers filed a request for judicial intervention and for a preliminary conference. On November 13, 2003, a preliminary conference was held. In February 2006, after Gordon, who was not yet a party, refused to come to New York for a deposition, defendant moved for an order granting an open commission to depose Gordon in California. By order dated February 27, 2006, the court granted this relief. Nonetheless, according to defendant, due to various scheduling conflicts, defendant were unable

to obtain Gordon's deposition. Defendant fails to specify the reasons it was unable to depose Gordon, despite the court's issuance of a commission.

On April 12, 2007, defendant filed the third-party action against Gordon, who was served on May 15, 2007. Depositions in the main action were completed in early May 2007, and on May 17, 2007, the court directed plaintiffs to file the Note of Issue on or before May 31, 2007. Plaintiffs filed their note of issue and statement of readiness on May 30, 2007. Notice of the third-party action was served on plaintiffs on June 12, 2007.

The Motion and Cross Motion

Defendant now moves to vacate the note of issue, arguing that discovery in the third party action is central to its defense in the main action, and that defendant has attempted for years to obtain Gordon's deposition. In explaining the delay in bringing a third-party action, defendant's counsel states that "during the time when the undersigned was seeking to depose Gordon, it became clear that Gordon was the tortfeasor responsible for most, if not all, of the damages in this action. Accordingly, a third party action was commenced against Gordon."

Plaintiffs oppose the motion and cross move to sever the third-party action, arguing that they will be prejudiced by the delay involved in obtaining discovery in the third-party action and assert that defendant knew about their potential claims against Gordon since 1996 and submit a complaint in an action brought by defendant against Gordon in November 1996, based on similar conduct to that alleged in the third-party complaint.¹ Plaintiffs also seeks a trial preference based on proof of Mr. and Mrs Fromer's age.²

In opposition to the cross-motion, defendant argues, *inter alia*, that its third-party action was timely since as required by the preliminary conference order, it was commenced within 60 days of the completion of depositions.

The court has broad discretion in determining whether a third-party action should be severed from a main action. Abreo v. Baez, 29 AD3d 833 (2d Dept 2006). In exercising this discretion, the court examines the reason for the delay in commencing the third-party action, whether the delay in commencement of the third-party action will prejudice the plaintiff by delaying the trial of the main action, and whether such prejudice to the plaintiff would exceed

¹Plaintiffs contend that the action was dismissed, but do not indicate the grounds for such dismissal.

²By order dated June 20, 2007, the court granted plaintiffs' request for a special preference conditioned on the submission of proof regarding Fromer's and his spouse's age within 30 days.

any prejudice to defendant resulting from the severance. See CPLR 1010; Garcia v. Geshner Realty Corp., 280 AD2d 440 (1st Dept 2001); Cortez v. New York City Housing Authority, 163 AD2d 13 (1st Dept 1990).

In this case, consideration of these factors weighs in favor of severing the third-party action. Significantly, it appears from the record that defendant has known about its potential claims against Gordon since 1996, but nonetheless waited until 2006 to obtain a commission to depose Gordon, and does not explain their failure to enforce the commission. Moreover, defendant waited until 2007, which is more than seven years after the commencement of the action and four years after discovery began, to commence the third-party action against him. See e.g. 17 Vista Fee Associates v. Teachers Ins. and Annuity Association of America, 226 AD2d 298 (1st Dept 1996)(court properly exercised discretion in severing third-party action when party commencing third-party action was aware of the third-party defendant's performance of services in connection with claimed breach of contract from the inception of the main action). Under these circumstances, that the preliminary conference order permits impleader 60 days after the completion of depositions does not justify the belated commencement of the action against Gordon since such provision was intended to permit the joinder of parties first learned about in discovery, and not to encourage unnecessary or strategic delays.

Next, while the third-party claims are related to the main action, any prejudice resulting to defendant from severance of the third-party action is outweighed by the prejudice which will be suffered by plaintiffs if the trial-ready main action, which has been pending since 1999 and arises out of events occurring in the 1996, is delayed so that discovery can first be conducted in the third-party action. Garcia v. Geshner Realty Corp., 280 AD2d at 440-441; Cortez v. New York City Housing Authority, 163 AD2d at 14. Notably, a judgment against defendant in the main action will not preclude defendant from proceeding against Gordon. Garcia v. Geshner Realty Corp., 280 AD2d at 440-441 (delays in involved in prosecuting third-party action and resulting prejudice to plaintiff outweighed any prejudice to defendant who will not be impeded from obtaining a judgment against third-party defendants in the severed third-party action).

Furthermore, defendant's reliance on Jambrone v. A.J.C. Food Market Corp., 159 AD2d 298 (1st Dept 1990) is misplaced as, unlike here, in that case, "the main action was not ready for trial...and there was no significant delay in the commencement of the third-party action."

Finally, as plaintiffs have submitted proof of their age, they are entitled to a trial preference.

Conclusion

In view of the above, it is

ORDERED that defendant's motion to vacate the note of issue is denied; and it is further

ORDERED that plaintiffs' motion to sever the third-party action is granted and the third-

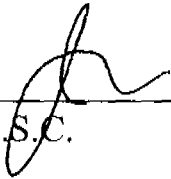
party action is hereby severed; and it is further

ORDERED that a copy of this decision and order is to be served on the Clerk of Trial Support (room 158) and the Clerk of the Court who are directed to mark their records to note that severance of the third-party action; and it is further

ORDERED that plaintiffs are granted a trial preference; and it is further

ORDERED that a pre-trial conference shall be held in Part 11, room 351, 60 Centre Street, New York, NY on October 18, 2007 at noon.

DATED: August 22, 2007



J.S.C.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

FILED
AUG 28 2007
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