

Sefranek v Pizzo Brothers, Inc.

2007 NY Slip Op 33401(U)

October 5, 2007

Supreme Court, Queens County

Docket Number: 0002899/2006

Judge: James P. Dollard

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES P. DOLLARD IA PART 5
Justice

	x	Index Number <u>2899</u> 2006
JIRI SEFRANEK		
- against-		Motion Date <u>August 7,</u> 2007
PIZZO BROTHERS, INC., et al.		Motion Cal. Numbers <u>40</u>
	x	Motion Seq. No. <u>2</u>
BRIAN WILSON ROSS, et al.		
- against-		
O'CONNELL CONSTRUCTION, INC.		
	x	
O'CONNELL CONSTRUCTION, INC.		
- against-		
ATLANTIC CASUALTY INSURANCE COMPANY, et al.		
	x	

The following papers numbered 1 to 25 read on this motion by fourth-party defendant Atlantic Casualty Insurance Company for an order dismissing or severing the fourth-party action. Fourth-party co-defendant John Mackey Insurance Brokerage, Inc. cross-moves for an order dismissing or severing the fourth-party action. Defendants and third-party plaintiffs Brian Wilson Ross, Ann Curry, Pizzo Brothers, Inc., John Hite and Hite Construction, Inc. cross-move for an order compelling fourth-party defendant Atlantic Casualty Insurance Company to provide a complete copy of its insurance policy and all endorsements.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits (A-Z, AA) ..	1-4
Opposing Affirmation	5-6
Opposing Affirmation	7-8
Reply Affirmation - Exhibits (A)	9-11
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Notice of Cross Motion - Affirmation - Exhibit (A) ...	23-25

Upon the foregoing papers the motions are determined as follows:

Plaintiff Jiri Sefranek alleges in his complaint that on August 12, 2005, he sustained personal injuries while performing masonry work, when he was struck by a large stone and knocked onto the floor of a scaffold. At the time of the accident, plaintiff was employed by O'Connell Construction, Inc. Plaintiff alleges that the accident occurred at the building located at 336 West 71st Street, in Manhattan, which is owned by Brian Wilson Ross and leased to Ann Curry, and that defendants Pizzo Brothers, Inc., John Hite and Hite Construction, Inc. are all contractors who were performing certain construction work in the subject building. Plaintiff's claims are based upon common-law negligence and violations of Labor Law §§ 200, 240 and 241.

Defendants Brian Wilson Ross, Ann Curry, Pizzo Brothers, Inc., John Hite and Hite Construction, Inc., commenced a third-party action against plaintiff's employer, O'Connell Construction, Inc., and allege that O'Connell agreed to hold the third-party plaintiffs harmless and to defend and indemnify them against any claims arising out of the construction work, and to procure insurance naming one or more of the defendants as an additional insured in connection with that work. Third-party defendants assert claims for contractual indemnification, indemnification under the insurance agreement, and common-law indemnification or contribution.

O'Connell Construction, Inc. commenced a fourth-party action against Atlantic Casualty Insurance Company and John Mackey Insurance Brokerage in which it seeks declaratory judgment as regards an insurance policy with Atlantic, and damages for fraud, negligence, breach of contract and a violation of GBL § 349(a)

against the insurance broker.

Fourth-party defendant Atlantic Casualty Insurance Company's motion for severance of the fourth-party action from the main action must be granted (see CPLR 603, 1010; Cruz v Taino Constr. Corp., 38 AD3d 391, 392 [2007]; Dreizen v Morris I. Stoler, Inc., 98 AD2d 759, 759, [1983]). The injection of the issue of insurance coverage into the main action would be inherently prejudicial to Atlantic (see Kelly v Yannotti, 4 NY2d 603 [1958]; Cruz, 38 AD3d at 392; Emmetsberger v Mitchell, 7 AD3d 483 [2004]; Schorr Bros. Dev. Corp. v Continental Ins. Co., 174 AD2d 722, 722 [1991]; Winstead v Uniondale Union Free School Dist., 170 AD2d 500 [1991]).

Fourth-party defendant John Mackey Insurance Brokerage's cross motion for severance of the fourth-party action from the main action must also be granted. The objections raised by counsel regarding the timeliness of the service of the cross motion are rejected, as the within motions were adjourned to August 7, 2007, and counsel had an opportunity to serve opposing papers. Severance of the negligence and Labor Law actions from the fourth-party action which involves questions of insurance coverage and procurement, is warranted, and no basis exists for delaying such relief (see Kelly v Yannotti, supra; Hoffman v Kew Gardens Hills Assocs., 187 AD2d 379 [1992]); see also Golfo v Loevner, 7 AD3d 568 [2004]).

Defendants and third-party plaintiffs Brian Wilson Ross, Ann Curry, Pizzo Brothers, Inc., John Hite and Hite Construction Inc.'s cross motion for an order compelling fourth-party defendant Atlantic Casualty Insurance Company to provide a complete copy of its insurance policy and all endorsements is denied. The compliance conference order of July 24, 2007 directed the fourth-party defendants to provide all parties with any and all documents, including the insurance policies. Defendants and third-party plaintiffs have not established that Atlantic failed to comply with said order. In addition, on the face of these papers it does not appear that defendants and third-party plaintiffs have asserted any claim against Atlantic which would entitle them to relief.

In view of the foregoing, the motion by fourth-party defendant Atlantic Casualty Insurance Company and the cross motion by fourth-party defendant John Mackey Insurance Brokerage to sever the fourth-party action is granted. Plaintiff in the now severed action shall contact the County Clerk in order to obtain an index number for said action. Defendants and third-party plaintiffs Brian Wilson Ross, Ann Curry, Pizzo Brothers, Inc., John Hite and Hite Construction, Inc.'s cross motion is denied.

Dated: October 5, 2007

