

**Baker v 40 E. 80 Apt. Corp.**

2007 NY Slip Op 34052(U)

December 5, 2007

Supreme Court, New York County

Docket Number: 0603683/2003

Judge: Michael D. Stallman

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**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**  
**PRESENT: Hon. MICHAEL D. STALLMAN** **PART 7**  
*Justice*

**JANET GREENBERG BAKER and NORMAN BAKER,**

**Plaintiffs,**

- v -

**40 EAST 80 APARTMENT CORP, PENMARK REALTY CORPORATION, SELWIN R. SILVER, BARBARA NAFISSIAN, JAY B. FISCHOFF, BENJAMIN S. KLAPPER, MIRIUM H. WEINGARTEN, STEPHEN A. MARSHALL and BRAD D. BUTLER,**

**Defendants.**

INDEX NO. 603683/03

MOTION DATE 11/29/07

MOTION SEQ. NO. 012

MOTION CAL. NO. 1

(And two third-party actions).

The following papers, numbered 1 to 12 were read on this motion and cross motions to sever

	<u>PAPERS NUMBERED</u>
Revised Notice of Motion — Affidavits — Exhibits A-H; A-E	<u>1-3</u>
Notice of Cross Motion — Answering Affidavits — Exhibits A-B; A-B	<u>4-6</u>
Notice of Cross Motion — Answering Affidavits — Exhibits	<u>7-8</u>
Answering Affidavits — Exhibits A-F	<u>9-10</u>
Replying Affidavits	<u>11-12</u>

**Cross-Motions (2) : X Yes  No**

Upon the foregoing papers, It is ordered that this motion and cross motions are decided in accordance with the annexed memorandum decision and order.

**MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:**

J.S.C.

Dated: 12/5/07  
New York, New York

**FILED**  
DEC 14 2007  
NEW YORK COUNTY CLERK'S OFFICE  
*[Signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

**MICHAEL D. STALLMAN**  
**MICHAEL D. STALLMAN**  
J.S.C.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7**

-----X  
JANET GREENBERG BAKER and NORMAN BAKER,

Plaintiffs,

Index No. 603683/03

- against -

40 EAST 80 APARTMENT CORP, PENMARK REALTY CORPORATION, SELWIN R. SILVER, BARBARA NAFISSIAN, JAY B. FISCHOFF, BENJAMIN S. KLAPPER, MIRJUM H. WEINGARTEN, STEPHEN A. MARSHALL and BRAD D. BUTLER,

Defendants.

Decision and Order

**FILED**  
DEC 14 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
**HON. MICHAEL D. STALLMAN, J.:**

In this action, plaintiffs claim that their cooperative apartment experienced chronic water infiltration, which has not been adequately repaired, resulting in mold growth. Plaintiffs commenced this action in 2003, and in June 2006, defendant Penmark Realty Corporation (Penmark) impleaded two masonry subcontractors, defendants S. Kraus Restoration Corp. (S. Kraus) and Yates Restoration Group, Ltd. (Yates), which allegedly performed defective constructive work on the exterior of plaintiffs' apartment.

On July 24, 2007, Yates commenced the second third-party action against Edy Zingher and ETNA Consulting, ETNA Consulting Structural Engineering, ETNA Consulting Services (collectively, ETNA), sounding in negligence, common-law indemnification and contribution, contractual indemnification, and breach of an agreement to procure insurance. Plaintiffs and the second third-party defendants move and cross-move to sever this third-party action. Yates cross-moves to sever all third-party actions.

At Penmark's deposition on August 10, 2007, its property manager for the building testified that Edy Zingher had been the building's engineer, and that Zingher would set forth the specifications of structural work to be performed by a contractor that the building hired, and would sign off on the work. Zingher is the alleged principal of ETNA. See Minero Affirm., Ex B at 13-14, 49-51.

In the exercise of discretion, the Court orders severance of the second third-party action. After four years, discovery in the main action is nearing completion, and the recently commenced second third-party action will only result in delay of the trial. Plaintiffs would be substantially prejudiced by a long delay if compelled to await completion of disclosure in the second third-party action. Blechman v I.J. Peiser's and Sons, Inc., 186 AD2d 50, 51 (1st Dept 1992); Cusano v Sankyo Seiki Mfg. Co., 184 AD2d 489 (2d Dept 1992).

Moreover, much of the second third-party action does not share substantial factual and legal issues in common with the main action and third-party action. Whether S. Kraus of Yates performed the contracted work with requisite due care does not depend on whether Zingher inspected and signed off it. Zingher and ETNA do not need to be parties to this action in order for Yates or S. Kraus to call Zingher as a witness of the work that either performed.

Issues of contractual indemnification and breach of an agreement to procure insurance need not be tried with this tort action. Defendants' liability, and the liability of the third-party defendants, do not depend on the breach of any alleged agreement between Yates and the second third-party defendants. Admixture of those unrelated issues will substantially prolong a trial and confuse the jury.

S. Kraus and Penmark argue that issues of the second third-party action are intertwined with

this action is without any support, yet S. Kraus undermines this very argument by seeking severance of all third-party actions.

Although Penmark and S. Kraus make much of the claim that issues of Zingher's and ETNA's negligence and intricately interwoven with the action, it is curious that neither Penmark nor S. Kraus impleaded ETNA. Indeed, counsel to S. Kraus claims that he and Yates's counsel agreed that ETNA should be impleaded after Penmark's deposition took place. However, Yates already commenced the second third-party action prior to Penmark's deposition, which belies the contention that discovery due from Penmark explains the commencement of the second third-party action at this late stage of this action. Yates admits that Penmark has designated Zingher as its expert, and that he was present during the parties' mediation before JAMS (see Taustine Opp. Affirm. ¶ 7), which occurred in November 2006, eight months before Yates commenced the second third-party action.

As Penmark indicates, completing discovery in the second third-party action on an expedited basis might alleviate any delay of the trial of the main action. However, the Court must take into account the fairness to, and burden upon, the newly impleaded second third-party defendants to proceed expeditiously while weighing the prejudice resulting from a delay of the trial of this case, now four years old. Non-party depositions to be taken would be adjourned for several months so that second-third party defendants could be prepared to participate meaningfully in those EBTs. Moreover, the likelihood of completing discovery expeditiously is low, given that compliance with discovery deadlines has been an ongoing problem in this action. Therefore, severance is without prejudice to a motion to rejoin only the negligence claims of the severed second third-party action with this action if discovery in the severed second third-party action is completed within 4 months, and whether this action is scheduled for a definite trial date, among other issues.

The Court agrees with Penmark that severance of the first third-party action is not appropriate, given the claim that these defendants performed defective work on the exterior of the building that allegedly permitted water to infiltrate into plaintiffs' apartment.

Accordingly, it is hereby

ORDERED that plaintiffs' motion and the cross motion of second third-party defendants to sever the second third-party action is granted, the second third-party action is severed and shall be a separate action; and it is further

ORDERED that the second third-party summons and complaint and answer of the second third-party defendants shall stand as the summons and complaint and answer in the separate action; and it is further

ORDERED that the second third-party defendants are directed to serve the Clerk of the Court with a copy of this order, a copy of its second third-party summons and complaint and the answer, and upon such service, and payment of the RJI fee, the Clerk of the Court is directed to issue a no-fee index number for the severed third-party action (i.e., 400 000 series); and it is further


ORDERED that cross motion of third-party defendant Sykline Windows LLC, sued herein as S. Kraus Restoration Corp., to sever all third-party actions is denied; and it is further

ORDERED that counsel to Yates Restoration Group, Ltd. and counsel to Edy Zingher and ETNA Consulting, ETNA Consulting Structural Engineering, ETNA Consulting Services are

directed to appear at a preliminary conference for the severed second third-party action on December 20, 2007, at 9:30 AM.

This opinion constitutes the decision and order of the Court. Copies to counsel.

Dated: 12/5/07  
New York, New York

ENTER:   
\_\_\_\_\_  
J.S.C.

~~Michael J. ...~~  
J.S.C.

**FILED**  
DEC 14 2007  
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