

Rigolini v City of New York

2008 NY Slip Op 33494(U)

December 16, 2008

Supreme Court, New York County

Docket Number: 122049/03

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER
Justice

PART 5

Index Number : 122049/2003
RIGOLINI, JOHN
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
SEVER ACTION

INDEX NO. 122049/03
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
1, 2, 3

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

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

JAN 05 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/16/08

[Signature]
EILEEN A. RAKOWER J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
JOHN RIGOLINI and MAUREEN RIGOLINI,

Plaintiffs,

Index No.
122049/03

- against -

Decision and Order

THE CITY OF NEW YORK, CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.,
EMPIRE CITY SUBWAY COMPANY (LIMITED),
PETROCELLI ELECTRIC CO., INC., TRIUMPH
CONSTRUCTION CORP. and KENNETH J. DELANEY
CONTRACTING CORP.,

Motion Seq. No. 001

Defendants.

-----X
CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.

Third-Party Plaintiff,

Third-Party Index No.

- against -

TODINO SEWER AND WATER SERVICE
INC. and ETNA MAINTENANCE CORP.,

FILED
9044/08
JAN 05 2009
COUNTY CLERK'S OFFICE
NEW YORK

Third-Party Defendants.

-----X
CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.

Second Third-Party Plaintiff

-against-

Second Third-
Party Index No.:
590224/08

NICO ASPHALT, INC., ROADWAY
CONTRACTING INC., and FELIX EQUITIES,
INC.

Second Third-Party Defendants

-----X
HON. EILEEN A. RAKOWER

Plaintiff, John Rigolini brings this action for personal injuries allegedly sustained on September 27, 2002, when, while driving a fire truck in performance of his duty as a firefighter, his vehicle hit a raised mound of asphalt located in the roadway of 57th Street, approximately 30 feet east of Broadway, New York, New York. His wife, Maureen Rigolini, brings a derivative action. Defendant Consolidated Edison Company of New York, Inc. ("Con Edison") brings a third-party action against Todino Sewer and Water Service, Inc. ("Todino") and Etna Maintenance Corp. ("Etna") for indemnification. Con Edison also brings a second third-party action against Nico Asphalt, Inc. ("Nico"), Roadway Contracting Inc., ("Roadway"), and Felix Equities, Inc. ("Felix"). Todino moves to sever the third party action pursuant to CPLR §603 and CPLR 1010. Con Edison opposes Todino's motion, and no other party submits papers.

On September 27, 2005, plaintiffs commenced the main action against Con Edison, Empire City Subway Company (Limited), Petrocelli Electric Co., Inc., Triumph Construction Corp., and Kenneth J. Delaney Contracting Corp. Con Edison filed its third-party action against Todino and Etna on January 18, 2008, and Todino answered on May 19, 2008.

In support of its motion, Todino submits: (1) a notice of motion; (2) counsel's affirmation; (3) the summons and complaint; (4) Con Edison's third-party summons and complaint against Todino and Etna; (5) Todino's answer to Con Edison; (6) Todino's June 19, 2008, Notice for Discovery and Inspection (the "D&I request"); (attaching Todino's demands for insurance information, statements, and witnesses, and also dated June 19, 2008); and (7) a July 29, 2008 so-ordered stipulation. Todino claims that it has not received any discovery from Con Edison and, specifically, that

[* 4]

Con Edison has not responded to discovery requests contained in the D&I request or to Todino's demand for photos and accident reports, as memorialized in the October 28, 2008 so-ordered discovery stipulation. Todino contends that it will be substantially prejudiced unless the court severs the third-party action from the underlying action because it would otherwise be required to conduct depositions of remaining defendants without having received complete responses from Con Edison.

Con Edison argues that there is no basis to sever the third-party action, because it has responded to Todino's discovery demands. In support, Con Edison attaches a copy of its October 2, 2008 response to Todino (without exhibits).

By way of reply, Todino attaches two so-ordered stipulations dated July 29, 2008 and October 28, 2008 which schedule depositions and order all parties to respond to prior demands and demands of newly impleaded parties. Todino re-asserts that Con Edison's response is incomplete. Moreover, Todino states that it has not had an opportunity to participate in the previously held depositions. It further argues that the court ordered stipulations provide for an expedited discovery schedule which will result in the first party action being placed on the calendar before Todino has had an opportunity to complete discovery.

CPLR §603 states:

In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.

CPLR Rule 1010 states:

The Court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party.

[* 5]

Where a defendant unduly delays bringing a third-party action, discovery is substantially completed in the main action, and the third-party defendant is prevented from conducting its own meaningful discovery, severing of the action is warranted. (*Ramos v. City of New York*, 30 A.D.3d 201 [First Dept. 2006]). Despite the fact that a main and third-party action contain common issues of fact, it may be severed when not doing so would cause further delay, thereby prejudicing the plaintiff. (*Garcia v. Gesher Realty Corp.*, 280 A.D.2d 440, 440-441 [First Dept. 2007]).

While Con Edison waited nearly three years after the first-party action was commenced to file its summons and complaint against Todino, Todino has been afforded an expedited discovery schedule. To the extent Todino was not a party when certain depositions were held, it can make the proper motion for limitations on the use of such depositions at trial before the trial court. The court is mindful of Todino's right to conduct its own meaningful discovery, but is also mindful that plaintiffs have not submitted papers indicating any urgency to proceed to trial without further delay. "Severance is inappropriate absent a showing that a party's substantial rights would otherwise be prejudiced." (*Rothstein v. Milleridge Inn, Inc.*, 251 AD2d 154, 155 [1st Dept. 1998]). Further, it is well settled that "[t]o avoid the waste of judicial resources and the risk of inconsistent verdicts, it is preferable for related actions to be tried together." (*Id.*).

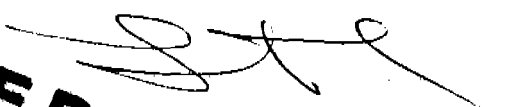
Wherefore it is hereby

ORDERED that third-party defendant Todino's motion to sever is denied, and it is further

ORDERED: that the parties shall appear for the previously scheduled compliance conference on January 20, 2009 at 2:00 p.m..

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: December 17, 2007


EILEEN A. RAKOWER, J.S.C.
FILED
JAN 05 2009
COUNTY CLERK'S OFFICE
NEW YORK