

**Whippoorwill Hills Homeowners Assoc., Inc. v Toll
at Whippoorwill, L.P.**

2010 NY Slip Op 34030(U)

September 13, 2010

Supreme Court, Westchester County

Docket Number: 24785/07

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

FILED
AND
ENTERED
ON 9-15 2010
WESTCHESTER
COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
WHIPPOORWILL HILLS HOMEOWNERS
ASSOCIATION, INC., on its own behalf, and on
behalf of individual owners of all homes located
within and comprising the Whippoorwill Hills
Homeowners Association, Inc., and as subrogee
of individual homeowners of all homes located within
and comprising the Whippoorwill Hills
Homeowners Association, Inc.,

Plaintiff,

DECISION & ORDER

-against-

Index No.: 24785/07
Motion Date: Sept. 13, 2010

TOLL AT WHIPPOORWILL, L.P., TOLL
PEPPERTREE, INC., TOLL HOLDINGS, INC.,
TOLL BROTHERS, INC. and WHIPPOORWILL
HILLS ASSOCIATES, LLC,

Seq. No. 8, 9, 10, 11

Defendants.

-----X
TOLL AT WHIPPOORWILL, L.P., TOLL
PEPPERTREE, INC., TOLL HOLDINGS, INC.,
and TOLL BROTHERS, INC.,

Third-Party Plaintiffs,

FILED
SEP 15 2010
TIMOTHY C. EDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

-against-

Index No.: T24785/07

MM CONSTRUCTION and A.P. ROOFING &
SIDING, INC.,

Third-Party Defendants.

-----X

-----X
A.P. ROOFING & SIDING, INC.,

Second Third-Party Plaintiff,

-against-

Index No.: T24785/07

AXE SIDING COMPANY, INC., JOSE
ABELEIRA, individually and d/b/a U.T.P.L.
CONSTRUCTION, INC., and U.T.P.L.
CONSTRUCTION, INC.,

Second Third-Party Defendants.

-----X
A.P. ROOFING & SIDING, INC.,

Third Third-Party Plaintiff,

-against-

Index No.: T24785/07

P & R UNIVERSAL PAINTING and PIOTR
ANDROSZ, individually and d/b/a P & R
UNIVERSAL PAINTING,

Third Third-Party Defendants.

-----X
A.P. ROOFING & SIDING, INC.,

Fourth Third-Party Plaintiff,

-against-

Index No.: T24785/07

LUIS BASTOS CONSTRUCTION, INC., LMB
CONSTRUCTION, INC. and GONZANAMA
CONSTRUCTION, INC.,

Fourth Third-Party Defendants.

-----X
LEFKOWITZ, J.,

The following papers numbered 1 to 47 were read on:

(1) motion by A.P. Roofing & Siding, Inc., third-party defendant, second third-party plaintiff, and third third-party plaintiff (hereinafter "A.P."), for an order pursuant to 22 NYCRR 202.21(e) vacating the Note of Issue and striking the matter from the trial calendar, or, alternatively, severing the third party action pursuant to CPLR 603 and CPLR 1010, compelling certain discovery, scheduling a conference regarding outstanding discovery, and extending the time to file a motion for summary judgment to 60 days after completion of discovery;

(2) motion by P & R Universal Construction, incorrectly sued as P & R Universal Painting, third-third party defendant (hereinafter "P & R") for an order severing the third third- party action, or, alternatively, vacating the Note of Issue and Certificate of Readiness;

(3) motion by MM Construction, third-party defendant (hereinafter "MM"), for an order pursuant to 22 NYCRR 202(e) vacating the Note of Issue, or, alternatively, severing the third-party action against MM Construction from the main action pursuant to CPLR 603, or, alternatively, extending the time to file dispositive motions to 60 days from the completion of discovery; and

(4) motion by defendants Toll at Whippoorwill, L.P., Toll Peppertree, Inc., Toll Holdings, Inc., and Toll Brothers, Inc. (hereinafter "Toll defendants") for an order pursuant to 22 NYCRR 202.21(e) vacating the Note of Issue and striking the case from the trial calendar.

Orders to Show Cause - Affirmations - Exhibits	1-43
Memorandum in Support	44
Answering Affirmations	45-46
Filed Papers: Compliance Conference Order dated March 22, 2010 (Lefkowitz, J.)	

Upon the foregoing papers, and upon oral argument on September 13, 2010, this motion is decided as follows:

By summons with notice dated November 15, 2007 and filed in December, 2007, plaintiffs commenced the present action to recover for property damage sustained by the residential units in the development known as Whippoorwill Hills allegedly due to construction defects. Defendants were the owner/seller, selling agent, builders, and general contractors of the development. Plaintiffs served a complaint on or about February 10, 2009, with the consent of defendants as the parties were in settlement negotiations. Defendants joined issue by service of their answer on or about May 12, 2009, with the consent of plaintiffs. On the same date, defendants served various discovery demands upon plaintiffs. By Order dated June 16, 2009, the Court (Orlando, J.H.O.) directed depositions to commence on September 18, 2009 and continue from day to day until complete, and that all third-party actions were to be commenced no later

than 30 days after the depositions or the date of the Order. Plaintiffs and defendants complied with each other's discovery demands and completed paper discovery. Plaintiffs and defendants, however, agreed to delay depositions until contemplated third-party defendants appeared and completed paper discovery, so that each parties' witness would be examined only once. Toll defendants commenced the third-party action against MM and A.P., subcontractors who worked at the development, by third-party complaint dated July 1, 2009.

The parties appeared for a conference in the Compliance Part on December 17, 2009 and were orally directed to complete discovery by March 10, 2010, and commence the second third-party action within 45 days. A.P. commenced the second third-party action against Axe Siding Company, Jose Abeleira and U.T.P.L. Construction, Inc. by filing a third-party summons and complaint on or about March 29, 2010. The second third-party defendants failed to serve an answer. The parties again appeared for a conference in the Compliance Part on March 10, 2010, and the Court issued an order on March 22, 2010, directing, *inter alia*, plaintiffs' depositions be completed on or before May 14, 2010, defendants' depositions be completed on or before June 18, 2010, and third-party defendants' depositions be completed on or before July 9, 2010. The order further directed counsel to appear for a conference on August 2, 2010, at which time all discovery shall be complete.

A.P. commenced the third third-party action by summons and complaint against P & R and Piotr Androsz on or about April 19, 2010. P & R and Piotr Androsz joined issue by answer dated June 7, 2010, and served discovery demands. Despite, the prior order directing counsel to appear for a conference on August 2, 2010, the parties appeared for a compliance conference on June 8, 2010. Thereafter, the Court issued a Trial Readiness Order dated June 8, 2010 and entered on June 10, 2010, which directed plaintiffs to file a Note of Issue within 90 days. A.P. served Notices for Depositions on the Toll defendants on or about June 24, 2010. Plaintiff filed the Note of Issue on or about July 1, 2010.

On July 30, 2010, the parties appeared for a conference in the Compliance Part and the parties were given briefing schedules for the present motions. By summons and complaint filed on August 4, 2010, A.P. commenced a fourth third-party action against Luis Bastos Construction, Inc., LMB Construction, Inc. and Gonzanama Construction, Inc.

The third-party parties A.P., P.R. and MM now move for various relief, including vacating the Note of Issue or, alternatively, severing the third-party actions from the main action, on the ground that discovery in the third-party actions is not complete. The third-party movants contend that the Certificate of Readiness incorrectly states that they have waived their right to discovery. Third-party movants assert that discovery in the third-party actions has just begun and they are entitled to discovery, including depositions and an inspection of the subject property. In the event the Note of Issue is not vacated, A.P. also moves, as limited by its papers, for an order compelling the Toll defendants to provide certain discovery, including certain documents, a supplemental Bill of Particulars, and responses to interrogatories regarding the alleged defects in the work performed by A.P. A.P. and MM further move to extend the time to file a motion for

summary judgment for 60 days after completion of discovery. MM contends that if the Note of Issue is not vacated, then severance of the third-party action is appropriate since it would be prejudiced by going to trial without depositions and other substantive discovery due to the Toll defendants' delay in commencing the third-party action. MM notes that the Toll defendants were well aware of the identity of the third-party defendants when the main action was commenced, but nonetheless waited two years to commence the third-party action.

The Toll defendants also move to vacate the Note of Issue on the ground that discovery is not complete in the main action or the third-party actions. Specifically, the Toll defendants contend that no depositions have been taken and no discovery has been conducted involving the parties named in the second third-party action, third third-party action or fourth third-party action. The Toll defendants further assert that they have not waived their right to depositions, and the depositions are necessary to determine the identity, meaning and completeness of the paper discovery in the main action and third-party action. The Toll defendants also contend that the third-party actions should not be severed from the main action since the claims in the third-party actions and main action are inextricably connected because the third-party defendants are the parties that actually performed the work at issue. Accordingly, the Toll defendants contend that they would be extremely prejudiced by a severance. With respect to that branch of A.P.'s motion to compel further discovery, the Toll defendants oppose that branch of the motion insofar as the discovery which A.P. seeks from them regarding alleged defects in their work should be directed to plaintiffs, not the Toll defendants. The Toll defendants note that they do not allege any work performed by A.P. was defective, and only allege that if it is determined that the work is defective, then A.P. and the other third-party defendants are liable to the Toll defendants for contribution and indemnification. The Toll defendants also assert that they have responded to relevant and non-duplicative demands from A.P. and that A.P. has failed to identify any specific, material discovery which is outstanding.

Plaintiffs do not oppose those branches of the motions seeking to vacate the Note of Issue and agree that discovery, including depositions, is still outstanding. Plaintiffs assert that they filed the Note of Issue as directed by the Trial Readiness Order. Plaintiffs request, however, that if the Note of Issue is vacated, the Court closely supervise the remaining discovery and the set a final date for the completion of discovery. The parties, including plaintiffs, contend that during the compliance conference held on June 8, 2010, they informed the Court Attorney Referee that discovery was not complete and requested more time for discovery, but were told that a Trial Readiness Order had to be issued directing a Note of Issue to be filed within 90 days.

Insofar as the Trial Readiness Order was inconsistent with the Court's order dated March 8, 2010, which directed that all discovery be completed by August 2, 2010, the motions are granted to the extent that the Trial Readiness Order and the Note of Issue are vacated. However, insofar as the Court's order dated March 8, 2010 directed all discovery be completed by August 2, 2010, a new Trial Readiness Order shall issue on this date as all discovery should have now been completed. Those branches of the motions seeking severance of the third-party actions from the main action are also granted insofar as discovery is not complete in the third-party

actions. Although the main action and third-party action share common questions of law and fact, severance is appropriate when the main action is ready to proceed to trial for a resolution and discovery in the third-party action is incomplete due to a delay in the commencement of the third-party action (*Abreo v Baez*, 29 AD3d 833). The Toll defendants have failed to offer any reasonable justification for their substantial delay in commencing the third-party action, and any prejudice they will suffer from severance is outweighed by the prejudice which will be suffered by plaintiffs if the main action, which has been pending since 2007, is delayed so that discovery can be completed in the third-party actions (*Garcia v Geshner Realty Corp.*, 280 AD2d 440).

In view of the foregoing, it is ORDERED that those branches of the motions seeking to vacate the Note of Issue are granted to the extent that the Trial Readiness Order dated June 8, 2010 and the Note of Issue are vacated as the Trial Readiness Order was issued in error since the Court's order dated March 22, 2010 directed that all discovery be completed by August 2, 2010; and it is further

ORDERED that insofar as the deadline for discovery set forth in the Court's order dated March 22, 2010 has now passed and all discovery should have been completed, a new Trial Readiness Order will issue on this date; and it is further

ORDERED that those branches of the motions seeking an order severing the third-party actions from the main action are granted; and it is further


J.B.
J.S.C.

ORDERED that A.P. Roofing & Siding, Inc. is directed to file a Request for Judicial Intervention within 10 days of this order; and it is further ^{to obtain an index number without charge and}

ORDERED that counsel in the third-party actions are directed to appear for a conference in the Preliminary Conference Part, Room 808, on October 12, 2010 at 9:30 A.M.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
September 13, 2010


HON. JOAN B. LEFKOWITZ, J.S.C.