

Damone v Americon Constr. Inc.

2011 NY Slip Op 30047(U)

January 4, 2011

Sup Ct, Nassau County

Docket Number: 005179/08

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 18

_____ X

CURTIS DAMONE,

Plaintiff,

Index No.: 005179/08

Motion Sequence...01, 02, 03, 04, 05

Motion Date...11/19/10

-against-

AMERICON CONSTRUCTION INC., GOMIDAS
HOLDING CORP., and TAMARA PROPERTIES,

Defendants.

_____ X
AMERICON CONSTRUCTION INC.,

Third-Party Plaintiff,

-against-

GALLAGHER ELECTRICAL CONTRACTORS,
INC.,

Third-Party Defendant.

_____ X
GALLAGHER ELECTRICAL CONTRACTORS,
INC.,

Fourth-Party Plaintiff,

-against-

LAB PLUMBING & HEATING CO., INC.,

Fourth-Party Defendant.

_____ X

GALLAGHER ELECTRICAL CONTRACTORS,
INC., X

Second Fourth-Party Plaintiff,

-against-

PAR PLUMBING CO., INC., RITE-WAY
INTERNAL REMOVAL, INC., BP
MECHANICAL CORP., AND ISLAND FIRE
SPRINKLER, INC.,

Second Fourth-Party Defendants.

BP MECHANICAL CORP., X

Fifth-Party Plaintiff,

-against-

GPA MECHANICAL PIPING OF NY, INC., COOL
WIND VENTILATION CORP., JOHN GRANDO,
INC. AND CASCADE WATER SERVICES, INC.,

Fifth-Party Defendants.

X

- Papers Submitted:
- Notice of Motion (Mot. Seq. 01).....x
- Notice of Cross-Motion (Mot. Seq. 02).....x
- Notice of Motion (Mot. Seq. 03).....x
- Notice of Motion (Mot. Seq. 04).....x
- Notice of Cross-Motion (Mot. Seq. 05).....x
- Affirmation in Opposition.....x
- Affirmation in Opposition.....x
- Affirmation in Opposition.....x
- Affirmation in Opposition.....x
- Affirmation in Opposition.....x
- Affirmation in Support.....x
- Reply Affirmation.....x
- Reply Affirmation.....x

The Defendants in the Second-Fourth Party action, BP Mechanical Corp., Rite-Way Internal Removal, Inc., Island Fire Sprinkler, Inc., and PAR Plumbing Co., Inc., each separately move (Mot. Seqs. 01 through 04), pursuant to CPLR § 603 and CPLR Rule 1010, for an Order severing and dismissing the Fourth-Party action against themselves. Similarly, the Plaintiff, Curtis Damone, cross-moves (Mot. Seq. 05), pursuant to CPLR § 603 and Rule 1010, for an Order dismissing and/or severing the Second Fourth-Party Action and the Fifth-Party Action in its entirety. All four (4) motions, as well as the Plaintiff's Cross-motion, are determined as hereinafter provided.

The Plaintiff, Curtis Damone's cause of action stems from a construction accident that occurred on October 25, 2006, during a gut renovation of the building located at 368 Bleecker Street, New York, New York. It is alleged that an internal drainpipe fell on the Plaintiff. The renovation for the store has now been completed.

On March 3, 2008, the Plaintiff commenced this action against Gomidas Holding Corp., Tamara Properties, and Americon Construction, Inc. based upon violations of the Labor Law §§ 200, 240 (1) and 241 (6). Americon Construction, Inc., the general contractor, in turn, brought a Third-Party action against the Plaintiff's employer, Gallagher Electrical Contractors, Inc., for indemnification pursuant to contract. The Plaintiff's employer, Gallagher Electrical Contractors, Inc., in turn, commenced a Second Fourth-Party action on July 27, 2010 against PAR Plumbing Co., Inc., Rite-Way Internal Removal, Inc., BP Mechanical Corp. and Island Fire Sprinkler, Inc., to recover damages claimed to have been sustained by the Plaintiff as a result of the Second Third-Party Defendants' alleged

negligence. Claims sounding in negligence were not alleged in either the main or the Third-Party action.

On August 10, 2010, the Plaintiff filed the Note of Issue and Statement of Readiness, certifying that discovery in the matter has been completed.

Then, on October 28, 2010, BP Mechanical Corp. filed a Fifth-Party Summons and Verified Complaint against GPA Mechanical Piping of NY, Inc., Cool Wind Ventilation Corp., John Grando, Inc. and Cascade Water Services, Inc.

Upon the instant motions, the Second Fourth-Party Defendants, each separately move for an Order severing and dismissing the Second Fourth-Party action against themselves. The Plaintiff also cross-moves for an Order dismissing and/or severing the Second Fourth-Party action and the Fifth-Party action in its entirety.

CPLR § 603 provides:

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 provides:

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.

The decision whether to sever various issues and claims or to dismiss a Third-Party complaint without prejudice, or to conduct a bifurcated trial, rests within the discretion

of this court (CPLR § 603; CPLR Rule 1010; *Naylor v. Knoll Farms of Suffolk County, Inc.*, 31 A.D.3d 726, 727 [2d Dept. 2006]; *Wright v. New York City Hous. Auth.*, 273 A.D.2d 378 [2d Dept. 2000]). However, the Court of Appeals has advised that “[a]lthough it is within a trial court’s discretion to grant a severance, this discretion should be exercised sparingly” (*Shanley v. Callanan Indus.*, 54 N.Y.2d 52, 57 [1981]). Severance should not be ordered where “there are common factual and [legal] issues involved in the claims ..., and the interests of judicial economy and consistency will be served by having a single trial” (*Ingoglia v. Leshaj*, 1 A.D.3d 482, 485 [2d Dept. 2003]; *Vierya v. Briggs & Stratton Corp.*, 184 A.D.2d 766, 767 [2d Dept. 1992]).

With these guidelines in mind and under the circumstances of this case, this Court deems it appropriate to sever and dismiss the Second Fourth-Party action as well as the Fifth-Party action, to avoid further delay of the main action, which was commenced more than two years ago (CPLR § 603, Rule 1010; *Singh v. City of New York*, 294 A.D.2d 422 [2d Dept. 2002]; *Garcia v. Geshner Realty Corp.*, 280 A.D.2d 440 [1st Dept. 2001]).

By filing a Note of Issue, counsel for the Plaintiff has indicated that discovery has been completed as between the Plaintiff and the Defendants in this action. The Plaintiff is ready to proceed with the trial.

Moreover, it is plainly clear that Gallagher Electrical Contractors, Inc.’s impleader of the Second Fourth-Party Defendants was beyond the deadline set forth in the Preliminary Conference Order. While Gallagher Electrical Contractors, Inc. was not a party to the Order, it was nonetheless bound by its directives, particularly because by its appearance

as a Third-Party Defendant, it did not make an application to modify the Preliminary Conference Order. This Court is convinced that the Plaintiff will undoubtedly be prejudiced as a result of Gallagher Electrical Contractors, Inc.'s late impleader as there are now eight additional parties to this action and even on the tightest schedule, discovery, including depositions, will significantly delay resolution of this matter and prejudice the Plaintiff.

Moreover, it cannot be overlooked by this Court that, as the Plaintiff's employer, Gallagher Electrical Contractors, Inc. knew about the accident on the day it occurred and was in a position to conduct immediate investigation to determine if any other parties could have been responsible. Instead, they waited almost four years after the accident and a week prior to the deadline for filing the Note of Issue to commence the Second Fourth-Party action.

It is evident that the failure to deny dismissal by this Court will also substantially prejudice the rights of the Second Fourth-Party Defendants, including PAR Plumbing, Rite Way Internal Removal, BP Mechanical and Island Fire Sprinkler, to properly prepare for a defense and trial of this action (*Santos v. Sure Iron Works*, 166 A.D.2d 571, 573 [2d Dept. 1990]).

These circumstances together with the delays that will unnecessarily attend prosecution of the Second Fourth-Party action and the Fifth-Party action including the Second Fourth-Party Defendants' (and the Fifth-Party Defendants) own needs for disclosure warrant severance and dismissal of the Second Fourth-Party action and the Fifth-Party action in order to avoid prejudice to the Plaintiff. While the main and Fourth-Party actions do involve

common issues, any prejudice thereby caused to the Defendants is less than the prejudice caused to the Plaintiff by further delay. There has been no discovery on the issue of the Second Third-Party Defendants' negligence or even the Fifth-Party Defendants' role in this action. Therefore, while the accident underlying all the claims may be the same, the claims themselves are totally different, requiring different discovery, different parties and different proof.

Accordingly, based upon the foregoing, this Court finds that dismissal of the Second Fourth-Party action and the Fifth-Party action is proper and in the interests of justice (*Ambriano v. Bowman*, 245 A.D.2d 404 [2d Dept. 1997]; *Cusano v. Sankyo Seiki Mfg. Co.*, 184 A.D.2d 489, 490 [2d Dept. 1992]).

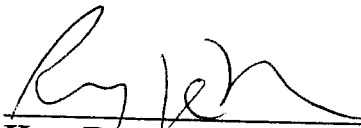
The motions (Mot. Seq. 01, 02, 03, 04) by the Defendants in the Second Fourth-Party action, BP Mechanical Corp., Rite-Way Internal Removal, Inc., Island Fire Sprinkler, Inc., and PAR Plumbing Co., Inc., are **GRANTED**.

Similarly, the Plaintiff's Cross-motion (Mot. Seq. 05) seeking an Order severing and dismissing the Second Fourth-Party action and the Fifth-Party action is also **GRANTED**.

All applications not specifically addressed herein are **DENIED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
January 4, 2011


Hon. Randy Sue Marber, J.S.C.

ENTERED
JAN 06 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE