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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

MARTIN SHULMAN J.S.C.

Index Number : 116885/2005

YU, JIAN-GUO

VS.

GREENWAY MEWS REALTY

SEQUENCE NUMBER : 011

DISMISS

PART 1

INDEX NO. 116885/05

MOTION DATE

MOTION SEQ. NO. 011

Notice of Motion/~~Order to Show Cause~~ — Affidavits — Exhibits A-Z | No(s). 1

Answering Affidavits — Exhibits | No(s). 2, 3, 4

Replying Affidavits | No(s). 5

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED

SEP 19 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: Sept. 16, 2011

MARTIN SHULMAN, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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JIAN-GUO YU and HUI-DI TU,

Plaintiffs,

-against-

GREENWAY MEWS REALTY LLC, LITTLE REST TWELVE, INC., DAVID AIM, GEORGE V. RESTAURANTS (NY) LLC, and C&A SENECA ENTERPRISES, INC.,

Defendants.

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Index No.: 116885/05

GREENWAY MEWS REALTY LLC, LITTLE REST TWELVE, INC.,

Third-Party Plaintiffs,

-against-

UAD GROUP,

Third-Party Defendant.

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TP Index No.: 590639/10

MARTIN SHULMAN, J.:

Third-party defendant UAD Group ("UAD") moves, pursuant to CPLR 1010, to dismiss the third-party complaint or, in the alternative, pursuant to CPLR §603 and 1010, to sever the third-party action for trial.

BACKGROUND

The facts of this case have been discussed in detail in the prior decision of this court, which denied third-party plaintiff Little Rest Twelve, Inc.'s ("LRT") motion for summary judgment on the third-party complaint. In that decision, the court found that questions of fact surround the credibility of the plaintiff in the underlying action and the extent to which UAD's negligence, if any, contributed to the plaintiff's accident.

In the current motion, UAD asserts that the third-party action was commenced less than two years ago, whereas the main action was instituted in 2005, and a note of issue was filed for the underlying matter two and a half years ago. UAD claims that LRT was dilatory in filing the third-party action, and it is UAD's position that it might have to conduct its own discovery in this matter, since it did not participate in the discovery in the main action. UAD argues that it would be unfair to the plaintiff to further delay the trial of this action. It is noted that the plaintiff in the main action was already granted summary judgment as against LRT pursuant to the scaffold law. In the third-party action, LRT seeks contractual indemnification from UAD.

In opposition to the instant motion, LRT claims that UAD has not been a viable company since the inception of the underlying lawsuit and that Liberty Mutual Underwriters ("Liberty"), UAD's insurer, has been supervising, directing and controlling the defense of this case since 2006, pursuant to the contract between LRT and UAD. Opp., Ex. E, Liberty's letter, dated August 10, 2006, assuming the defense of the underlying litigation. LRT also argues that, contrary to UAD's position that LRT delayed commencing the third-party action, LRT could not have started the third-party action until 2010, when there was a dispute between the insurers about coverage for LRT.

Specifically, in February of this year, the Liberty attorneys representing both LRT and a co-defendant pursuant to UAD's contractual obligations were permitted to withdraw when the co-defendant was awarded indemnification from LRT, creating a conflict of interest. At that point, the withdrawing attorneys provided the substituted attorneys with the entire file, except for privileged information, and the current attorneys

waived responses to UAD's discovery demands. Opp., Ex. C. LRT contends that there are no outstanding discovery demands.

LRT states that, pursuant to the defense assumed by Liberty, Liberty's lawyers were present at every deposition, including those of plaintiff, his spouse, LRT and defendant C&A Seneca Enterprises, Inc. Opp., Ex. G. Moreover, the same lawyers arranged for all of the defense medical examinations of the plaintiff and served CPLR 3101 (d) exchanges for each expert. Opp., Ex. H. In addition, LRT maintains that the main action will not be delayed since UAD's discovery rights have already been accommodated and no other discovery is needed.

In reply, UAD argues that UAD's insurer is not UAD and therefore any discovery Liberty's attorneys conducted or supervised pursuant to UAD's contract with LRT have no bearing on UAD's defense. UAD further states that, since plaintiff was a UAD employee, the anti-subrogation rules do not apply and LRT could have started the third-party action at the time the main action was commenced. In addition, UAD argues that the only issue left to be resolved in the main action is plaintiff's damages, whereas in the third-party action the issue is UAD's negligence.

DISCUSSION

CPLR 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.

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.

The branch of UAD's motion seeking to dismiss the third-party complaint is denied for the reasons stated in this court's prior motion denying LRT's summary judgment motion on its third-party claims.

The branch of UAD's motion seeking severance of the third-party action is similarly denied. The decision whether to sever claims or to dismiss a third-party complaint, or to conduct a bifurcated trial, rests with the sound discretion of the court. *Naylor v Knoll Farms of Suffolk County, Inc.,* 31 AD3d 726 (2d Dept 2006). 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., Inc.,* 54 NY2d 52, 57 (1981); *New York Cent. Mut. Ins. Co. v McGee,* 87 AD3d 622 (2d Dept 2011). Further, 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 AD3d 482, 485 (2d Dept 2003); *Cole v Mraz,* 77 AD3d 526, 527 (1st Dept 2010); *Curreri v Heritage Prop. Inv. Trust, Inc.,* 48 AD3d 505 (2d Dept 2008). As stated in *Rothstein v Milleridge Inn, Inc.,* 251 ADd2d 154, 155 (1st Dept 1998):

> [S]everance is inappropriate absent a showing that a party's substantial rights would otherwise be prejudiced. To avoid the waste of judicial resources and the risk of inconsistent verdicts, it is preferable for related

actions to be tried together [internal citation omitted].

In the case at bar, UAD has failed to demonstrate prejudice of a substantial right in the absence of severance. *Williams v Prop. Servs., LLC,* 6 AD3d 255 (1st Dept 2004). Although UAD claims that additional discovery may be necessary, it has failed to identify what, if any, discovery in addition to that already completed, is needed. *See Jenrette v Green Acres Mall,* 52 AD3d 386 (1st Dept 2008). Moreover, since the underlying matter has not been set down for a specific trial date,[1] UAD cannot claim that a delay to allow it to conduct discovery would be prejudicial. *Solano v Castro,* 72 AD3d 932 (2d Dept 2010).

Therefore, the court denies that portion of UAD's motion to sever the third-party action, but allows UAD 60 days from entry of this decision in which to conduct any additional discovery that it deems necessary. *Nielsen v New York State Dormitory Auth.,* 84 AD3d 519 (1st Dept 2011); *DeLeon v 650 W. 172nd St. Assoc.,* 44 AD3d 305 (1st Dept 2007); *Jones v Board of Educ. of City of New York,* 292 AD2d 500 (2d Dept 2002). Based on the foregoing, it is hereby

ORDERED that UAD Group's motion is denied; and it is further

ORDERED that UAD Group shall complete all discovery within 60 days of entry of this order.

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[1] This action has been referred to the Part 40 Administrative Coordinating Part for trial assignment and last appeared on that Part's calendar on August 29, 2011. Upon information and belief, the case was marked off the calendar pending the determination of this motion and LRT's motion for summary judgment on the third party complaint.

The foregoing is this court's decision and order. Courtesy copies of this decision and order have been provided to counsel for the parties.

Dated: New York, New York
September 16, 2011

HON. MARTIN SHULMAN, J.S.C.