

Lipari v At Spring, LLC
2012 NY Slip Op 31554(U)
June 8, 2012
Supreme Court, New York County
Docket Number: 106047/07
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KERN
Justice

PART 55

LIPARI, JOSEPH

INDEX NO. 106047/07

MOTION DATE _____

- v -
AT SPRING, LLC, ETAL.

MOTION SEQ. NO. 08

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

JUN 13 2012

NEW YORK
COUNTY CLERK'S OFFICE

Is decided in accordance with the annexed decision.

Dated: 6/8/12

EGK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
JOSEPH LIPARI,

Plaintiff,

Index No. 106047/07

-against-

DECISION/ORDER

AT SPRING, LLC, CJ TAN SPRING, LLC and
SHAWMUT WOODWORKING & SUPPLY, INC.,
d/b/a SHAWMUT DESIGN & CONSTRUCTION
and LONGCHAMP SOHO, LLC,

Defendants.

FILED

JUN 13 2012

-----X
AT SPRING, LLC, CJ TAN SPRING, LLC and
SHAWMUT WOODWORKING & SUPPLY, INC.,
d/b/a SHAWMUT DESIGN & CONSTRUCTION,

Third-party Plaintiffs,

**NEW YORK
COUNTY CLERK'S OFFICE**

Third Party
Index No. 590774/2007

-against-

DECISION/ORDER

IMPERIAL WOODWORKING COMPANY,

Third-party Defendant.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2,3
Affirmations in Opposition to the Cross-Motion.....	_____
Replying Affidavits.....	_____
Exhibits.....	4

Plaintiff Joseph Lipari commenced this action to recover for injuries he allegedly sustained when he tripped and fell in the course of his employment. He brought claims pursuant to Labor Law §§240(1), 241(6), and 200 and common-law negligence claims. Defendants and third-party plaintiffs AT Spring, LLC (“AT”), CJ Tan Spring, LLC (“CJ”), Longchamp Soho, LLC (“Longchamp”) and Shawmut Woodworking & Supply, Inc. (“Shawmut”) commenced the third-party action against Imperial Woodworking Company (“Imperial”) seeking indemnification. By order of the Appellate Division, First Department, plaintiff was granted summary judgment as to liability on his Labor Law §240(1) claim. Plaintiff’s other claims remain. Plaintiff now moves to sever his remaining claims and moves for separate trials, with separate juries, of what remains of the main action and of the third-party action. For the reasons set forth more fully below, plaintiff’s motion is denied.

The relevant facts are as follows. Plaintiff, a carpenter, fell from a height while working at a construction site. Defendants AT and CJ owned the building where the accident took place. Defendant Longchamp leased the building. Longchamp hired Shawmut as the construction manager and general contractor. Shawmut subcontracted with Imperial to provide architectural woodwork for the construction project, which in turn subcontracted with Wood Pro Installers (“Wood Pro”) for installation of the woodwork. Plaintiff was an employee of Wood Pro.

As an initial matter, the court declines to sever plaintiff’s Labor Law §§241(6) and 200 claims and common-law indemnification claim. Those claims are all based on the same facts as plaintiff’s §240(1) claim and plaintiff cannot leave them unresolved. He either has to pursue them, in which case they will be tried, or he may discontinue them.

The court also declines to order separate trials, with one trial of the main action and

another trial for the third-party action. Whether to order separate trials is a matter within the court's discretion and the Court of Appeals has directed that "this discretion should be exercised sparingly." *Shanley v Callanan Inds.*, 54 N.Y.2d 52, 57 (1981). It is well-settled that "[i]t is preferable to try related actions together, in order to avoid a waste of judicial resources and the risk of inconsistent verdicts." *Williams v Property Servs.*, 6 A.D.3d 255 (1st Dept 2004). Where a main action and a third-party action "involve common factual and legal issues" they should be tried together. *Neckles v VW Credit, Inc.*, 23 A.D.3d 191 (1st Dept 2005). Courts may grant separate trials if the party seeking them demonstrates "prejudice to a substantial right" in the absence of severance. *Williams*, 6 A.D.3d 255.

In the instant case, the main action and the third party action involve common factual and legal issues and plaintiff fails to demonstrate prejudice to a substantial right in the absence of severance. Plaintiff argues that, regarding the indemnification issue, Shawmut will try to show that plaintiff was negligent. While that may be true, that prejudice does not arise to the level of "prejudice to a substantial right" in that any prejudice stemming therefrom can be cured by instructions to the jury.

The cases plaintiff cites in support of separate trials are inapposite. *Brown v Petracca & Son*, 124 A.D.2d 772 (2nd Dept) did not involve the issue of separate trials or severance at all. In *Kelly v Yannotti*, 4 N.Y.3d 603 (1958), which involved a third-party defendant insurer, the court found that the main action and third-party action should be severed. Here, insurance coverage will not be an issue at trial. Finally, *Fox v Tioga Constr. Co.*, 1 Misc.3d 909(A) (Sup. Ct, Oneida & Albany Cty, 2004) is not controlling authority.

Accordingly, plaintiff's motion to sever his Labor Law §§241(6) and 200 claims and his

