

**143/145 Lexington Ave., LLC v M&R European
Constr. Corp.**

2013 NY Slip Op 30151(U)

January 17, 2013

Sup Ct, New York County

Docket Number: 603831/2008

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C.
Justice

PART 2

143-145 Lexington Avenue
198 European Construction Corp.
et al.
and third party actions

INDEX NO. 603831/08
MOTION DATE 12/12/12
MOTION SEQ. NO. 004

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

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

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

FILED

JAN 25 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/17/13

[Signature], J.S.C.

LOUIS B. YORK

- 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

-----x

143/145 LEXINGTON AVENUE, LLC,
Plaintiff,

Index No.: 603831/2008

-against-

M&R EUROPEAN CONSTRUCTION CORP., JOHN
DOE NO. 1 through JOHN DOE NO. XX and XYZ
CORP. NO. 1 through XYZ CORP. NO. XX, the last
forty names being persons or entities intended to be con-
tractors, subcontractors, or sub-subcontractors whose
names are fictitious and unknown to Plaintiff,
Defendants,

FILED

JAN 25 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

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M&R EUROPEAN CONSTRUCTION CORP.,
Third-Party Plaintiff,

Index No. 590571/2010

-against-

GREEN CIRCLE CONSTRUCTION, LLC, HOWARD I.
SHAPIRO & ASSOCIATES CONSULTING ENGINEERS,
P.C., JAMES SHELD, MANUAL GAS VERSATILE
CONSULTING & TESTING SERVICES, INC., VERSATILE
ENGINEERING, P.C., ROMAN SOROKKO, WARREN
GEORGE, INC.,
Third-Party Defendants,

-----x

M&R EUROPEAN CONSTRUCTION CORP.,
Second Third-Party Plaintiff,

Index No. 591144/2010

-against-

IRON HEAD ENTERPRISES, LLC.,
Second Third-Party Defendant,

-----x

-----X

M&R EUROPEAN CONSTRUCTION CORP.,

Third Third-Party Plaintiff,

-against-

SKYSCRAPER STEEL CORP.

Third Third-Party Defendant.

-----X

M&R EUROPEAN CONSTRUCTION CORP.,

Fourth Third-Party Plaintiff,

-against-

DELTA TESTING LABORATORIES INC. and
WARREN GEORGE INC.,

Fourth Third-Party Defendant.

-----X

M&R EUROPEAN CONSTRUCTION CORP.,

Fifth Third-Party Plaintiff,

-against-

IRON HEAD ENTERPRISES LLC,

Fifth Third-Party Defendant.

-----X

M&R EUROPEAN CONSTRUCTION CORP.,

Sixth Third-Party Plaintiff,

-against-

SKYSCRAPER STEEL CORP.,

Sixth Third-Party Defendant.

-----X

YORK, J.:

Third party defendant Skyscraper Steel Corp. (“Skyscraper Steel”) in two actions joined for discovery and trial, moves for an order, (1) pursuant to CPLR §1010, dismissing all third-party complaints and cross-claims against it, or, alternatively (2) pursuant to CPLR §603 and §1010, to sever the third party actions against it.

BACKGROUND

The two joined actions are for property damage related to construction of a 13-story residential building at 143/145 Lexington Avenue, New York, New York (the “Premises”). In the first action (index No. 117132/2006), Marbilla LLC, the fee owner of 141 Lexington Avenue, New York, New York (the “Adjoining Property”) sued 143/145 Lexington LLC, the fee owner of the Premises, the general contractor, engineers and other parties for negligence in demolition, excavation and other construction activities on the Premises which resulted in cracks at the Adjoining Property. In the second action (index No. 603831/08) 143/145 Lexington LLC sued M&R European Construction Corp. (“M&R”), a demolition and excavation subcontractor for the project at the Premises for negligence in performance of its work, resulting in additional construction costs, construction delays and damages to the Premises and the Adjoining Property. The Marbilla and Lexington actions were joined in 2010 for discovery and trial.

Six third-party actions were filed in the Marbilla action, and four third-party actions in the Lexington action. The sixth third-party complaint in the Marbilla action and the third third-party complaint in the Lexington action were both filed on May 1, 2012, by M&R against Skyscraper Steel.

Skyscraper Steel was brought to the construction project in January 2006, when Roman Sorokko, a professional engineer, identified problems in the excavation and underpinning work performed by M&R at 143/145 Lexington Avenue. As the result the adjoining buildings started to settle, tipping towards the Premises. Mr. Sorokko recommended that M&R install temporary shoring between the buildings according to his drawings. Skyscraper Steel prepared shop drawings based on Sorokko's recommendations and installed steel beams between the exterior walls of 141 and 147 Lexington Avenue. With the construction of each concrete floor at 143/145 Lexington, the corresponding beams for that floor were dismantled.

On April 5, 2012, in the course of his deposition, Mr. Sorokko produced photographs which he took in January 2006 showing Skyscraper Steel installing the beams. The engineer retained as an expert by M&R, Joseph Mills PE, having examined the pictures, offered an opinion that Skyscraper Steel had significantly departed from shoring plans drawn by Roman Sorokko. Based on this opinion, M&R impleaded Skyscraper Steel in the two joined actions.

Skyscraper Steel moves to dismiss or sever these third-party actions against itself on the ground that discovery in the two main actions is almost finished, the note of issue has been filed, and it would be seriously prejudiced were it to go to trial without an opportunity to re-depose all the parties. If it exercised its right to full discovery, the litigation would extend for several years, thus prejudicing other parties as well. It objects to the use of Mr. Mills' affidavit in M&R's opposition to its motion since M&R had not disclosed its intent to retain him prior to the filing of the note of issue.

DISCUSSION

Courts have broad discretion in deciding a motion to dismiss without prejudice or to sever the third-party action, pursuant to CPLR §1010. The relevant considerations for the court

are whether : (1) the third-party action is based on the same issues of law and fact as the main action; (2) there were unreasonable delays in starting the third-party action; (3) plaintiff in the main action is prejudiced by delays due to extended discovery; (4) prejudice to plaintiff in keeping the third party in the action is stronger than prejudice to defendant if the third party is removed. Nielsen v New York State Dormitory Auth., 84 AD3d 519, 520; 923 N.Y.S.2d 66 [1st Dept 2011]; Erbach Fin. Corp. v Royal Bank of Can., 203 AD2d 80; 610 N.Y.S.2d 20 [1st Dept 1994].

The two main actions and third-party actions are all related to the same facts -- allegedly negligent construction at 143/145 Lexington Avenue resulting in property damage and economic loss to the owner of the premises and its neighbor. The involvement of numerous parties in the litigation (fifteen altogether) resulted from their involvement, in varying extent, in the construction project. When issues at trial concern apportionment of liability for alleged negligence among several parties, it is highly desirable to hold a joint trial, rather than a series of separate trials with overlapping parties, avoiding the waste of judicial resources and the risk of inconsistent verdicts. Rothstein v Milleridge Inn, Inc., 251 AD2d 154, 155; 674 N.Y.S.2d 346 [1st Dept 1998].

Defendant in the main action, and third-party plaintiff, M&R, provided an explanation of why it did not start the third-party action against Skyscraper Steel until six years into the litigation of the Marbilla Action. M&R admits that it was aware of Skyscraper Steel's role in the construction project, but not of its potential liability. It is only with the production of photographs by Mr. Sorokko, that it could allege negligence by the third-party defendant.

Plaintiffs in both actions did not respond to the motion to dismiss or sever the proceedings against Skyscraper Steel. Had they been prejudiced by delays in starting the trial,

they would have supported Skyscraper Steel's motion. The only party that claims prejudice is Skyscraper Steel itself. It has legitimate concerns that it has to join discovery at this late date – it could participate in depositions only starting in June 2012. Skyscraper Steel should have an opportunity to obtain additional documents not yet produced in discovery and to ask additional questions of parties already deposed. However it cannot repeat full-scale depositions, as it proposes to do in its motion papers. It should have the same opportunity to complement the interrogation with questions relevant to defending its case, as it would have had had it been present at the original depositions.

Skyscraper Steel contends that Joseph Mills' affidavit should not be considered on this motion. In a recent case, the First Department endorsed the long-established precedent in the Second Department, which required that an expert opinion be rejected on a motion for summary judgment if a party failed to disclose its expert according to CPLR §3101(d). Garcia v City of New York, 98 AD3d 857, 951 N.Y.S.2d 2 [1st Dept 2012].¹ In that case defendant submitted his demand for expert disclosures in 2004, plaintiff never responded to it, retained an expert in 2007 and presented his opinion in 2010, after the note of issue. "The expert's affidavit should not have been considered in light of plaintiff's failure to identify the expert during pretrial discovery as required by defendants' demand." (*id.* at 858-59). In this opinion, the First Department penalized a party that did not play fairly. The party could, and should have disclosed its expert prior to filing the note of issue. In the present case the third-party defendant was brought into the action after the note of issue. There is no evidence in the record that Skyscraper Steel submitted demands for expert disclosures which were ignored by M&R. In addition, the role of an expert

¹ After this decision by the First Department, the Second Department interpreted its precedents as allowing the trial courts discretion to consider expert affidavit even when an expert was not disclosed to the opposing party. *See, Rivers v Birnbaum*, 953 NYS2d 232 [2d Dept 2012]

opinion on the motion to dismiss or sever the third-party action is distinct from its role in supporting or opposing the motion for summary judgment. The affidavit of Joseph Mills PE described the nature of allegations against Skyscraper Steel and presented supporting evidence. It demonstrated that the third-party action is closely related to the main action, and thus assisted this court.

CONCLUSION

For the foregoing reasons, it is

ORDERED that Skyscraper Steel's motion to dismiss or sever the third-party action against it is denied; and it is further

ORDERED that parties in ^{the} two joined actions shall appear in Part 2, room 205, 71 Thomas Street on January 30, 2013, at 2 p.m., for a status conference and to schedule remaining discovery in the third-party actions.

Dated: 1/17/13

FILED

JAN 25 2013

ENTER:

NEW YORK
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J.S.C.

LOUIS B. YORK
J.S.C.