

Nakasato v 331 W. 51st Corp.
2013 NY Slip Op 31403(U)
June 28, 2013
Sup Ct, NY County
Docket Number: 103045/09
Judge: Barbara Jaffe
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK

NEW YORK COUNTY

BARBARA JAFFE
J.S.C.

~~WALTER S. FENNER~~ JAFFE

PRESENT: _____
Justice

PART 12

Index Number : 103045/2009
NAKASATO, AKIRA
vs.
331 W 51ST
SEQUENCE NUMBER : 004
SEVER ACTION

INDEX NO. 103045/2009
MOTION DATE _____
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) 47, 52

Answering Affidavits — Exhibits _____ | No(s) 53-56

Replying Affidavits _____ | No(s) 58

Upon the foregoing papers, it is ordered that this motion is

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

Dated: 6/28/13

BA J.S.C.
BARBARA JAFFE
J.S.C.
 NON-FINAL DISPOSITION

- 1. CHECK ONE: CASE DISPOSED
- 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 : IAS PART 12

-----X
AKIRA NAKASATO,

Plaintiff,

-against-

331 W. 51st CORP and ELEBAN YAU-MEI WONG,

Defendants.

-----X
ELEBEN YAU-MEI WONG,

Third-Party Plaintiff,

- against -

SWA ARCHITECTS & PLANNERS, SWA
ARCHITECTURES PLLC, and MIGUEL SALVATIERRA
CONSTRUCTION d/b/a MIGUEL SALVATIERRA,

Third-Party Defendants.

-----X
BARBARA JAFFE, JSC:

For plaintiff:
Jonathan R. Ratchik, Esq.
Kramer & Dunleavy, LLP
350 Broadway
New York, NY 10013
212-226-6662

For 331 W. 51st Corp.:
Gregory S. Katz, Esq.
Lewis, Brisbois *et al.*
77 Water St., 21st Fl.
New York, NY 10005
212-232-1300

For SWA:
Gregory Freedman, Esq.
DeSena & Sweeney, LLP
1383 Veterans Mem. Hwy., Ste. 32
Hauppauge, NY 11788
631-360-7333

By notice of motion dated May 11, 2011, third-party defendants SWA Architects & Planners and SWA Architectures PLLC (collectively, SWA) move pursuant to CPLR 603 for an order severing the main action from the third-party action on the ground that the main action is ready for trial but no discovery has occurred in the third-party action. Defendant 331 W. 51st Corp. (331) opposes.

Index No. 103045/09

Subm.: 3/6/13
Motion seq. no.: 004

DECISION & ORDER

By notice of cross motion dated May 25, 2012, defendant/third-party plaintiff Wong moves for an order striking the action from the trial calendar on the ground that plaintiff delayed in impleading Wong until after eight months after filing the note of issue and granting Wong permission to file a motion for partial summary judgment. Plaintiff opposes.

The motions are consolidated for disposition.

I. PERTINENT BACKGROUND

On or about March 2, 2009, plaintiff instituted the main action to recover for personal injuries she allegedly sustained as a result of a trip-and-fall that occurred in front of premises owned and/or managed by 331. (Affirmation of Gregory Freedman, Esq., dated May 11, 2012 [Freedman Aff.], Exh. A).

On October 1, 2010, plaintiff filed a note of issue certifying that discovery was complete, and the main action was subsequently placed on the trial calendar for July 7, 2011.

On June 30, 2011, plaintiff filed a supplemental summons and complaint naming Wong as a defendant based on his status as the owner of the subject premises. On March 21, 2012, Wong commenced the third-party action.

The case was set for trial and adjourned on July 7, 2011, July 25, 2011, October 17, 2011, October 31, 2011, November 21, 2011, January 30, 2012, March 26, 2012, April 30, 2012, May 14, 2012, June 1, 2012, June 27, 2012, July 27, 2012, August 7, 2012, September 12, 2012, November 2, 2012, December 3, 2012, January 18, 2013, April 10, 2013, June 12, 2013, and finally to September 16, 2013.

At the court appearance on September 12, 2012, the court so-ordered a stipulation in which the parties scheduled depositions of Wong, 331, and SWA; SWA was ordered to respond

to plaintiff's and Wong's discovery demands.

At the appearance on April 10, 2013, SWA was directed to conduct a site inspection of the premises within 60 days of plaintiff's deposition, depositions of plaintiff, SWA, and a non-party were scheduled, SWA was granted leave to file a summary judgment motion by July 15, 2013, and SWA waived its right to again depose plaintiff.

II. MOTION TO SEVER

A. Contentions

SWA contends that it would be severely prejudiced if the case were to proceed to trial without an opportunity to conduct discovery in the third-party action. (Freedman Aff.).

331 argues that as the third-party action is inextricably intertwined with the main action, the two actions should be tried simultaneously. It also asserts that the parties may conduct expedited discovery without unduly prejudicing any party. (Affirmation of Gregory S. Katz, Esq., dated May 29, 2012).

In reply, SWA argues that where a third party has not had an adequate opportunity for discovery, the interrelatedness of the main action and the third party action does not necessarily require a joint trial, and that here, it must conduct extensive discovery to be ready for trial. (Affirmation of Paul Felicione, Esq., dated June 4, 2012).

B. Analysis

CPLR 603 authorizes courts to sever claims "[i]n furtherance of convenience or to avoid prejudice." CPLR 1010 authorizes a separate trial of a third-party claim and permits the court to "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.”

Severance of claims is subject to the sound discretion of the trial judge and may be used to facilitate the speedy disposition of cases. (*Cross v Cross*, 112 AD2d 62 [1st Dept 1985]). However, where complex issues of law and fact are inextricably interwoven and intertwined, courts typically order a single trial. (See *Shanley v Callahan Indus.*, 54 NY2d 52, 57 [1981] [“[I]t would be better not to fragment trials, but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time.”]; *Sichel v Community Synagogue*, 256 AD2d 276 [1st Dept 1998] [where two actions arise from common nucleus of facts, court should only sever actions to prevent prejudice or substantial delay to party]). In tort cases in particular, where the issue is the respective liability of the defendant and the third-party defendant for the plaintiff's injury, it is preferable for related actions to be tried together. (*Sichel*, 256 AD2d 276; *Dolce v Jones*, 145 AD2d 594, 595 [2d Dept 1988]).

Whether or not to grant a motion to sever depends usually on whether the third-party defendant has had an adequate opportunity for discovery. (*Compare Solano v Castro*, 72 AD3d 932 [2d Dept 2010] [denying defendant's motion to sever third-party action from main personal injury action where defendant could not claim prejudice by delay in commencement of third-party action as main action was taken off trial calendar and defendant was afforded opportunity to conduct discovery in third-party action], with *Singh v City of New York*, 294 AD2d 422 [2d Dept 2002] [upholding severance order to avoid prejudice to plaintiff where plaintiff was ready for trial on sole issue of damages while third-party defendants had yet to begin discovery in connection with indemnification claim]; *Cusano v Sankyo Seiki Mfg. Co. Ltd.*, 184 AD2d 489 [2d Dept 1992] [upholding severance order where impleader would either prejudice plaintiffs by

delaying trial or prejudice third-party defendants by requiring them to proceed to trial without opportunity for discovery)).

Here, since SWA first filed its motion to sever, the court has adjourned the trial numerous times, apparently in order to allow the parties to complete discovery. Thus, severance is no longer necessary to avoid prejudice as SWA has been given an adequate opportunity to conduct discovery before trial begins. (*See Sichel*, 256 AD2d at 277 [as third-party action was trial ready, actions should be tried together]; *see also Stark v Greenberg, Dauber & Epstein*, 219 AD2d 571 [1st Dept 1995] [even though defendants should not have waited year and half to commence third-party action, severance was not warranted as main action and third-party action involved common issues of law and fact and should proceed together; instead, discovery on third-party claim was ordered to be completed on expedited basis]; *Rogers v U-Haul Co.*, 161 AD2d 214 [1st Dept 1990] [court properly exercised discretion in denying severance of third-party action to prevent contradictory results and in interest of judicial economy and by striking note of issue only to extent of directing completion of discovery within 90 days]).

III. CROSS MOTION TO STRIKE

For the same reasons as above, Wong's cross motion to strike the action from the trial calendar is denied, as the parties have been given many opportunities to complete discovery before the trial commences.

However, as SWA was granted leave to file a late summary judgment motion, Wong's motion for leave to file a summary judgment is granted to the extent that the motion must be served and filed on or before August 1, 2013.

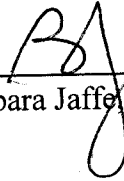
IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that third-party defendants SWA Architects & Planners and SWA Architectures PLLC's motion for an order severing the main action from the third-party action is denied; and it is further

ORDERED, that defendant/third-party plaintiff Wong's cross motion for an order striking the action from the trial calendar and granting him permission to file a motion for partial summary judgment is granted solely to the extent of permitting Wong to file and serve a motion for summary judgment on or before August 1, 2013.

ENTER:



Barbara Jaffe JSC

DATED: June 28, 2013
New York, New York