

**Villamar v 13th & 14th St. Realty, LLC**

2014 NY Slip Op 31607(U)

April 11, 2014

Supreme Court, New York County

Docket Number: 105759/10

Judge: Joan A. Madden

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** How Joan A. Madden  
Justice

**PART** 11

Index Number : 105759/2010  
VILLAMAR, GIOVANNI  
vs  
13TH  
Sequence Number : 005  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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 attached Memorandum Decision + Order.*

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

**FILED**  
APR 23 2014  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: April 11, 2014

[Signature], 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 11

DECISION AND ORDER

-----X  
GIOVANNI VILLAMAR and JULISSA CRUZ,

Plaintiffs,

Index No. 105759/10

-against-

13<sup>th</sup> and 14<sup>th</sup> STREET REALTY, LLC,

Defendant.

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13<sup>th</sup> and 14<sup>th</sup> STREET REALTY, LLC,

Third-Party Plaintiff,

Index No. 590144/13

-against-

HUDSON MERIDIAN CONSTRUCTION GROUP,  
CRYSTAL CURTAIN WALL SYSTEM, CORP.,  
CRYSTAL WINDOW AND DOOR SYSTEMS, LTD.,

**FILED**

Third-Party Defendants.

APR 23 2014

-----X  
JOAN A. MADDEN, J:

NEW YORK  
COUNTY CLERK'S OFFICE

Third-party defendant Hudson Meridian Construction Group ("Hudson Meridian") moves, and third-party defendant Crystal Curtain Wall Systems, Corp. (Crystal Curtain) and Crystal Window and Door Systems, Ltd. (Crystal Window) (together Crystal) cross moves, for an order dismissing and/or severing the third-party action. Plaintiffs partially support the motion and cross motion insofar as they seek to sever the third-party action. Third-party plaintiff 13<sup>th</sup> and 14<sup>th</sup> Street Realty, LLC (the Sponsor), opposes the motion and cross motion.

Background

Plaintiffs, Giovanni Villamar and Julissa Cruz, who are husband and wife (hereinafter

“the Villamar plaintiffs”), purchased Unit 5N, a newly constructed condominium apartment, for a price of \$790,000.00 from the defendant sponsor, 13<sup>th</sup> and 14<sup>th</sup> Street Realty, LLC (the Sponsor) pursuant to a unit purchase agreement (the Purchase Agreement) dated March 22, 2007.

Plaintiffs allege that they entered into the Purchase Agreement based upon the representations in the Offering Plan and, particularly, Sponsor’s representations that the Apartment would be properly constructed and fully complete at the time they took possession and began their occupancy.

The Villamar plaintiffs closed on the purchase of the Apartment on May 1, 2008. They allege that within days of closing, the first leaks appeared and seemed to be the result of rain entering the Apartment through the balcony windows. The leaks resulted in damage to both the floor and the ceiling in the living room and the bedroom of the Apartment. On May 15, 2008, less than three weeks after the closing, the Villamar plaintiffs began corresponding with Sponsor and its employees about the leaks and water damage affecting the Unit. They allege that, notwithstanding Sponsor’s acknowledgment of the problem, and some attempt at repair, the water leaks have continued and worsened. The Villamar plaintiffs contend that the leaks are building-wide problems that are due to construction defects and a faulty curtain wall system.

The Villamar plaintiffs commenced this action against the Sponsor in May 2010, which seeks to rescind their purchase and/or recover damages for breach of contract, fraud, negligent misrepresentation and deceptive business practices based upon persistent water leaks into the apartment which have not been remedied, and which have led to extensive damage and the growth of mold within the apartment.

In February 2013, almost three years after the main action was commenced, the Sponsor

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commenced a third-party action against Hudson, the general contractor and Crystal Curtain, the company responsible for the windows and curtain wall system<sup>1</sup> as well as the window company's parent corporation, Crystal Window. The third-party action asserts claims for: (1) breach of the indemnification provision in the Construction Management Agreement with Sponsor (against Hudson), (2) negligence in the performance of work and hiring of subcontractors (against Hudson), (3) common law indemnification (against Hudson), (4) breach of warranty (against Crystal Curtain), (5) negligence performance of its work (against Crystal Curtain), (6) contractual indemnification (against Crystal Curtain), and (7) breach guaranty (against Crystal Window).

Almost two years earlier, in April, 2011, the Sponsor commenced an action against Hudson, Crystal Curtain and Crystal Window, entitled *13<sup>TH</sup> and 14<sup>TH</sup> Street Realty LLC v Hudson Meridian Construction Group, LLC et al*, index No. 651062/11 (Sponsor's Action), alleging causes of action for negligence, negligent supervision, breach of contract, breach of warranty and breach of guaranty. In the Sponsor's Action, the Sponsor alleges that Hudson was responsible for hiring Crystal Curtain and for the day-to-day operations of the construction site, and that defects in design, materials and construction were the fault of those defendants.

In October 2011, the Board of Managers of the Condominium (Board of Managers) and the owners of 50 separate Units in the Building, including the Villamar plaintiffs, commenced an action against the Sponsor, its principals, the architect of the building, Hudson, the managing agents, Crystal Curtain, Crystal Window and Tingwall, entitled *The Board of Managers of the A Building Condominium, et al., v 13<sup>TH</sup> & 14<sup>TH</sup> Street Realty, LLC, et al.*, index No. 100061/2011

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<sup>1</sup> A "curtain wall system" is an outer covering of a building in which the outer walls are nonstructural, but are designed to keep the weather out.

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(the Building Action). In that action, the plaintiffs allege that the design and construction of their individual units was not done in a skillful manner, that the workmanship and materials used in the construction does not meet the specific regulations of the New York City Building Code and that it does not conform to industry standard. In a detailed complaint, plaintiffs in the Building Action allege numerous instances of violations of the New York City Building Code, as well as construction defects and deviations from the Plans and Specifications filed with the New York City Department of Buildings. The Building Action plaintiffs also allege certain improper actions of the principals and affiliates of the Sponsor and state multiple causes of action for breach of contract as well as causes of action for breach of warranty, breach of guaranty, negligence, professional malpractice, fraud, negligent misrepresentation, deceptive business practices pursuant to New York General Obligations Law, section 349 (a), fraud pursuant to United States Code, 15 USC § 1703 (a) (2), and conversion.

In June 2012, Hudson commenced a third-party action against a number of its subcontractors, entitled *Hudson Meridian Construction Group, LLC, et al., v Demar Plumbing Corp., et al.*, index No 590536/2012 (the Hudson Action), alleging that if the third-party defendant subcontractors had properly fulfilled their duties under their respective subcontracts, the damages claimed by the plaintiffs in the main action would not have occurred. In the Hudson Action, Hudson alleges causes of action for negligence, breach of contract, breach of implied warranties, common law and contractual indemnification, damages for failure to procure insurance and contribution.

The Building Action and the Hudson Action were assigned to Justice Barbara Jaffe. By order dated December 9, 2011, Sponsor's Action, along with a number of other, related actions,

were transferred to Judge Jaffe, for purposes of joint supervision of discovery. The within case was not transferred because discovery was complete and a note of issue was to be filed shortly.

Thereafter, in or about August, 2012, Villamar plaintiffs moved to withdraw their names as plaintiffs the Building Action without prejudice to their present and future claims, but upon opposition of the defendants, agreed to withdraw the claims with prejudice. The Sponsor, as defendant in the Building Action, moved to consolidate this action with those pending before Judge Jaffe.

The court, by order of Judge Jaffe dated June 5, 2013, granted the Villamar plaintiffs' motion to withdraw their names from the caption with prejudice, and denied the Sponsor's motion to consolidate on the ground that "the rights of Villamar plaintiffs to continue their action in Part 11 apace outweighs any benefit to sponsors and third-party defendants to avoid having to defend their positions in two venues" (order, Justice Jaffe, June 5, 2013, index No. 10006/11).

While this motion was pending, by decision and order dated March 12, 2014, this court granted the Villamar plaintiffs' motion for summary judgment as to liability on their breach of contract claim alleging that the Sponsor breached the Offering Plan and Purchase Agreement, and denied the Sponsor's cross motion to dismiss the complaint. In denying Sponsor's cross motion, the court rejected the Sponsor's argument that since the leaks the Villamar plaintiffs' apartment were caused by the defective curtain wall, that the Offering Plan required the Villamar plaintiffs to proceed against Crystal Curtain based upon its warranty.

#### The Instant Motion and Cross Motion

Hudson and Crystal argue that the third-party action should be dismissed and/or severed. The dismissal request is made pursuant to CPLR 3211(a)(4) on the ground that the pendency of

the prior Sponsor action involving the same parties and the same claims warrants the dismissal of the third-party action. Specifically, they point out that, here, like the third-party claims, the Sponsor action arises out of the Sponsor's contract with Hudson and Hudson's subcontract with Crystal Curtain, and contains the same allegations, *inter alia*, as to Hudson's warranty that the work would be conducted in a workman like manner free of defects, that in June 2007 defects existed in the curtain wall system, and that Hudson breached its contract to indemnify the Sponsor and hold it harmless from claims arising out of performance of its contract. As for the request to sever, Hudson and Crystal argue that the Sponsor's undue delay in commencing the third-party action warrants that the court exercise its discretion pursuant to CPLR 603 and 1010 to, respectively, sever or dismiss the third party action without prejudice. Hudson also asserts that the Villamar plaintiffs' fraud claims predominate over the construction issues and that most of these claims have nothing to do with Hudson, and that Sponsor cannot be indemnified by Hudson for its own fraud.

The Villamar plaintiffs support the motion and cross motion to sever the third-party action. However, the Villamar plaintiffs contend that they will require documentary and testimonial discovery from Hudson and Crystal, and that representatives from both of these entities will be called as witnesses at the trial of the action. In this connection, they assert that discovery obtained from Gordon H. Smith (GHS), the Sponsor's curtain wall expert, shows that Hudson has information regarding, *inter alia*, the Sponsor's prior knowledge relative to the misrepresentations Sponsor made to plaintiffs. In addition, the Villamar plaintiffs maintain that there is evidence that Crystal has information regarding, *inter alia*, whether the Sponsor had prior knowledge that the curtain wall did not meet any of the representations regarding performance

and whether Crystal previously informed the Sponsor that it could not guarantee the curtain wall's performance. Thus, if the motion and cross motion are granted, the Villamar plaintiffs seek to reserve their rights to take discovery from Hudson and Crystal by way of third-party subpoenas and to call their representatives as witnesses at trial.

The Sponsor oppose the motion and cross motion to sever, arguing that the third-party complaint is necessary to the main action since under the Offering Plan and Crystal's warranty, the claims of liability as among the Sponsor, Hudson and Crystal are so intertwined that severance would be inappropriate. The Sponsor also argues that there is no prejudice to any party arising out of the inclusion of the third-party action. With respect to the motion to dismiss based on the Sponsor's action, the Sponsor points out that its claims in that action are not identical to those asserted in that third-party action. In addition, the Sponsor notes that discovery is still continuing in the main action, which is not trial ready. As for the three-year delay in commencing the third-party action, the Sponsor asserts that it should not be prejudiced based on the conduct of its previous counsel.

In reply, Hudson and Crystal assert that if the third-party claims are not dismissed they will need to implead various third-party defendants whose negligence may have contributed to the any alleged damage to the Villamar plaintiffs, and such joinder will further delay the litigation.

CPLR 3211(a)(4) provides that a court may dismiss an action where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States" but specifically provides that "the court need not dismiss upon this ground but may make such order as justice requires." Notably, "[t]he court has broad discretion to dismiss

an action on the ground that another action is pending between the same parties arising out of the same subject matter or series of alleged wrongs, and it is inconsequential that different legal theories or claims were set forth in the two actions.” Shah v. RBC Capital Markets, LLC, \_\_\_ AD3d \_\_\_ (1<sup>st</sup> Dept), 981 NYS2d 524 (2014)(internal citations omitted).

CPLR 603 permits a court to sever a claim or action for trial “[i]n furtherance of convenience or to avoid prejudice.” CPLR 1010 which applies specifically third party actions, provides that “[t]he court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim...[and that] in exercising such 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.”

While in determining whether to sever a third party action the court considers issues of judicial economy and prejudice to the third-party plaintiff (Vasquez v. G.A.P.L.W. Realty, Inc., 254 AD2d 232 [1<sup>st</sup> Dept 1998]), it also takes into account whether the main action will be delayed as a result of the third-party action, particularly where there has been undue or inexcusable delay in prosecuting the third party claims. Blechman v. I.J. Peiser’s and Sons, Inc., 186 AD2d 50 (1<sup>st</sup> Dept 1992); Pena v. City of New York, 222 AD2d 233 (1<sup>st</sup> Dept 1995).

Here, the court finds that it is appropriate to sever the third-party action, as the main action, which is almost trial ready, will be substantially delayed by the third-party action, particularly as the third party defendants intend to implead additional parties. In this connection, the court notes that the Sponsor did not commence the third-party action until almost three years after the main action was filed, and its prior attorney’s lack of diligence does not provide an

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excuse for the delay. Moreover, it cannot be said that the Sponsor was unaware of the basis for its claims since the Sponsor's action was filed in April, 2011, while the third-party action was not filed until almost two years later.

Furthermore, while, under the circumstances here, severance is a more appropriate remedy than dismissal based on the pendency of another action, in considering any prejudice to the Sponsor resulting from severance, it must be noted that nearly identical third-party claims against Hudson and Crystal are being pursued in the Sponsor's action, which, at the very least, will provide discovery relevant to the third-party claims asserted here. Additionally, the court's recent grant of summary judgment as to liability on the Villamar plaintiffs' breach of contract claim, and its rejection of the Sponsor's position that plaintiffs may recovery only against Crystal Curtain based upon its warranty, cuts against Sponsor's assertion that severance should be denied on the ground that the liability of the Sponsor, Hudson, and Crystal are intertwined.

Finally, in view of the Villamar plaintiffs' support of the motion to sever, their request that they be permitted to obtain non-party discovery from Hudson and Crystal following severance, is granted only to the extent of permitting the Villamar plaintiffs to seek such discovery by motion detailing the relevance of such discovery to its claims.


#### Conclusion

Accordingly, it is

ORDERED that the motion by third-party defendants Hudson Meridian Construction Group, and the cross motion by third-party defendants Crystal Curtain Wall Systems, Corp. and Crystal Window and Door Systems, Ltd. are granted to the extent of severing the third-party action; and it is further

ORDERED that the Villamar plaintiffs' request for non-party discovery from third-party defendants Hudson Meridian Construction Group, Crystal Curtain Wall Systems, Corp. and Crystal Window and Door Systems, Ltd. is granted only to the extent of permitting the Villamar plaintiffs to seek such discovery by motion detailing the relevance of such discovery to its claims.

DATED: April 11, 2014

  
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J.S.C.

**FILED**  
APR 23 2014  
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