

**Jalowski v A.O. Smith Water Prods. Co.**

2014 NY Slip Op 33288(U)

December 12, 2014

Supreme Court, New York County

Docket Number: 190474/12

Judge: Sherry Klein Heitler

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 30

-----X  
IVONA JALOWSKI, Individually and as the  
Executrix of the Estate of ZBIGNIEW THOMAS  
JALOWSKI, deceased,

Index No. 190474/12  
Motion Seq. 008

**DECISION & ORDER**

Plaintiffs,

-against-

A.O. SMITH WATER PRODUCTS CO., *et al.*,

Defendants.

-----X  
TACO, INC.,

TP Index No. 595162/14

Third-Party Plaintiff,

-against-

KENNEDY HOUSE OWNERS, INC.,

Third-Party Defendant.

-----X  
**SHERRY KLEIN HEITLER, J:**

Third-party defendant Kennedy House Owners (“Kennedy” or “TPD”) moves pursuant to CPLR 1010<sup>1</sup> to dismiss as untimely third-party plaintiff Taco Inc.’s (“Taco” or “TPP”) third-party complaint against it (Index No. 595162/14). In the alternative Kennedy moves for an order severing the third-party action from the underlying personal injury action (Index No. 190474/12), granting it twenty days to answer or otherwise respond to the third-party complaint, and directing

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<sup>1</sup> CPLR 1010, entitled “Dismissal or separate trial of third-party complaint”, provides that “[t]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.”

Taco to provide it with all discovery and deposition transcripts from the underlying action.

The underlying action, filed on October 12, 2012, seeks to recover for personal injuries allegedly caused by plaintiffs' decedent's Zbigniew Thomas Jalowski's occupational exposure to asbestos.<sup>2</sup> Pursuant to the New York City Asbestos Litigation Case Management Order ("CMO")<sup>3</sup>, Mr. Jalowski's case was included in this court's October 2013 In-Extremis trial cluster. The discovery schedule associated therewith requires third-party complaints to be filed no later than August 15, 2013.<sup>4</sup>

Mr. Jalowski was deposed on May 23, 2013 and June 3, 2013. Relevant to this motion, Mr. Jalowski testified that he was employed by Kennedy from 1987 to 1994 and that he was exposed to asbestos at the Kennedy House apartments in Queens, New York from debris left behind by contractors who had worked on Taco pumps.<sup>5</sup> After Mr. Jalowski's deposition concluded the parties exchanged medical and employment records and expert witness reports, served responses to interrogatory requests, and designated trial witnesses and exhibits.

By order dated March 25, 2014 this court transferred *Jalowski* and a number of other cases in the October 2013 In-Extremis trial cluster to Justice Madden of this court for trial. On May 28, 2014 plaintiffs amended the complaint to reflect Mr. Jalowski's death.<sup>6</sup> Taco filed the within third-party complaint<sup>7</sup> two weeks later on June 11, 2014, approximately ten months after

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<sup>2</sup> TPD's exhibit A.

<sup>3</sup> The CMO can be accessed at the NYCAL website, [www.nycal.net](http://www.nycal.net).

<sup>4</sup> TPD's exhibit B.

<sup>5</sup> TPP's exhibit F, pp. 293-295.

<sup>6</sup> TPD's exhibit G. Mr. Jalowski's death certificate provides that he died on January 25, 2014.

<sup>7</sup> TPD's exhibit H.

the deadline for the filing of third-party actions had passed.<sup>8</sup>

Kennedy argues that Taco's unjustifiable filing delay coupled with the fact that this case is on the verge of trial requires the outright dismissal of the third-party action. In this regard Kennedy asserts that forcing it to proceed to trial without the benefit of having conducted any meaningful discovery would cause it undue prejudice. However, Kennedy's moving papers do not cover the New York's Workers' Compensation Law<sup>9</sup> which prevented Taco from filing a third-party complaint against Kennedy until Mr. Jalowski's death, or the fact that Mr. Jalowski's death stayed the underlying action until an administrator was appointed to represent his estate.<sup>10</sup> Inasmuch as Taco filed the third-party complaint only two weeks after plaintiffs amended the caption to reflect this substitution, Kennedy's assertion that Taco's delay was unjustified is without merit. As such Kennedy's motion to dismiss the third-party complaint is denied.

The court will however sever the third-party action from the underlying action. While Justice Madden has not yet set a trial date for *Jalowski*, this court anticipates that jury selection for the October 2013 In-Extremis trial cases will commence during the first quarter of 2015.

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<sup>8</sup> The court notes Taco's failure to comply with CMO § XV(E)(2)(f) which requires a party seeking to file a third-party complaint after the discovery schedule deadline to make an application to the court therefor "stating when the information used to substantiate the filing of the third party complaint became available and that such information was not reasonably available prior to the filing deadline."

<sup>9</sup> WCL § 11 provides that "[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

<sup>10</sup> See, i.e., *Peterson v JJ Real Estate, Inc.*, 82 AD3d 859 (2d Dept 2011).

Kennedy will likely need more than just the few months between now and then to locate records from the relevant time period, depose witnesses who are knowledgeable of the events at issue, and prepare for trial. The court recognizes that New York law generally frowns upon severing actions that involve common issues of law and fact<sup>11</sup>, but this policy must be balanced against Kennedy's right to complete discovery and plaintiffs' right to avoid delaying their trial unnecessarily. See *Whippoorwill Hills Homeowners Assn., Inc. v Toll at Whippoorwill, L.P.*, 91 AD3d 864, 865 (2d Dept 2012); *Miro v Branford House, Inc.*, 174 AD2d 363, 363 (1st Dept 1991); *Cortez v New York City Housing Authority*, 163 AD2d 13, 14 (1st Dept 1990); *Vita Food Products, Inc. v A. Epstein & Sons, Inc.*, 52 AD2d 522 (1st Dept 1976). NYCAL cases are particularly complex, and it would be unfair to compel any party joined at this stage of the case though no fault of their own to participate at trial without first having had a chance to obtain what could be far-reaching but necessary discovery.

In light of the foregoing, it is hereby

ORDERED that the branch of Kennedy House Owners' motion which seeks to dismiss the third-party action is denied; and it is further

ORDERED that the branch of Kennedy House Owners' motion which seeks to sever the third-party action from the underlying action is granted; and it is further

ORDERED that the Clerk is directed to sever the within third-party action bearing Index No. 595162/14 from the underlying action bearing Index No. 190474/12; and it is further

ORDERED that, within 20 days from the date hereof, Kennedy shall serve a copy of this

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<sup>11</sup> See *Herrera v Municipal Hous. Auth. of City of Yonkers*, 107 AD3d 949 (2d Dept 2013); *Stark v Greenberg*, 219 AD2d 571 (1st Dept 1995); *Leavitt v New York City Transit Authority*, 111 AD2d 907 (2d Dept 1985).

order with notice of entry on all parties by E-file; and it is further

ORDERED that Kennedy shall answer or otherwise respond to the third-party complaint within twenty days of such service; and it is further

ORDERED that, within 20 days from the date hereof, Kennedy shall also deliver a copy of this order with notice of entry to Justice Madden's clerk (60 Centre St., Part 11, Room 351); and it is further

ORDERED that Kennedy and Taco shall keep Justice Madden apprised of the progress of discovery, which shall be completed no later than June 15, 2014 or as otherwise directed by Justice Madden; and it is further

ORDERED that the parties shall reach out to the Special Master within 20 days from the date of this decision and order to address Kennedy's discovery request; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 12-12-14

  
SHERRY KLEIN HEITLER, J.S.C.