

Burkett v City Hall Tower Corp.
2014 NY Slip Op 33948(U)
July 24, 2014
Supreme Court, New York County
Docket Number: 107283/11
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

COOPER BURKETT, a minor under the age of 18 years of age by his mother and natural guardian SHANNON BURKETT and SHANNON BURKETT, individually,

Plaintiffs,

-against-

CITY HALL TOWER CORP., MATTHEW ADAMS PROPERTIES, INC., LINMAR CONSTRUCTION CORP., WARREN STREET ASSOCIATES LLC, and TD Bank, N.A., successor in interest to Commerce Bank, N.A.,

Defendants

INDEX NO. 107283/11
MOTION DATE 07-23-2014
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

WARREN ASSOCIATES, LLC i/s/h/a WARREN STREET ASSOCIATES, L.L.C.,

Third-Party Plaintiffs,

-against-

Third-Party Index No. 590641/12

LIBERTY CONTRACTING CORP., RCC CONCRETE CORP., TECHNO ACOUSTICS HOLDING, LLC, TM&M MECHANICAL CORP., NORTH EASTERN FABRICATORS, INC., AIR STREAM AIR CONDITION CORP., LAB PLUMBING & HEATING CO., INC., MJC ELECTRIC INC., CLARIDON CONTRACTING INC.,

Third-Party Defendants,

FILED

JUL 28 2014

NEW YORK COUNTY CLERK'S OFFICE

WARREN ASSOCIATES, LLC i/s/h/a WARREN STREET ASSOCIATES, L.L.C.,

Second-Third- Party Plaintiffs,

-against-

Second-Third Party Index No. 590142/12

RCC CONCRETE CORP., AIRSTREAM AIR CONDITION CORP., MJC ELECTRIC INC., and CLARIDAN CONTRACTING INC.,

Second-Third-Party Defendants.

LINMAR CONSTRUCTION CORP., TD BANK, LIBERTY CONTRACTING CORP., RCC CONCRETE CORP., TECHNO ACOUSTICS HOLDINGS, LLC, TM&M MECHANICAL CORP., NORTHEASTERN FABRICATORS, INC. AIR STREAM AIR CONDITION CORP., LAB PLUMBING & HEATING CO., INC., MJC ELECTRIC, INC., CLARIDIAN CONTRACTING, INC.,

Third-Third- Party Plaintiffs,

-against-

Third-Third Party Index No.

ANDREW KRIS, SHANNON BURKETT, CITY HALL TOWER CORP., and MATTHEW ADAMS PROPERTIES, INC.,

Third-Third-Party Defendants.

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

The following papers, numbered 1 to 19 were read on this motion by Plaintiff severe all of the third-party actions, sanctions and to compel discovery, preclude or strike the answer of Warren Street Associates, LLC.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...	<u>1 - 3</u>
Answering Affidavits – Exhibits _____	<u>4,5,6,7,8, 9-10,11-12,13-14,15-16,17 -18</u>
Replying Affidavits _____	<u>19</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is ordered that plaintiffs' motion to sever all of the third-party actions; for sanctions pursuant to 22 NYCRR 130-1.1[c][2] for willful delay of resolution of this action; to compel discovery from Warren Street Associates, LLC, to preclude or pursuant to CPLR §3126 to strike Warren Street Associates, LLC's Answer, is denied.

Plaintiffs brought this action to recover for personal injuries to the infant plaintiff Cooper Burkett, resulting from lead poisoning. The complaint alleges that two construction projects at the building where the plaintiffs resided, 258 Broadway, New York, New York, produced an emission of dangerous and toxic lead dust, which permeated the co-operative building. The Third-party and Second Third-party actions were brought against various sub-contractors identified through discovery as having worked at the construction site. On August 14, 2013, the Third Third-party action was commenced asserting causes of action for indemnification and contribution. Plaintiff Shannon Burkett and Andrew Kriss, the infant plaintiff's parents were named as third third-party defendants, because they are the named owners of their residence, cooperative apartment #3G, and had repair or renovation work performed in the apartment prior to the construction projects. There are also claims asserted in the Third Third-party action against plaintiff Shannon Burkett for contribution and indemnification derived from negligence in the storage and use of exposed toys.

Plaintiffs' seek an Order severing all of the Third-party actions, and especially the Third Third-party action contending that the remaining discovery is unreasonably delaying the main action which is ready for trial. They contend that the numerous third parties delayed attempts to settle through mediation and are further delaying the completion of discovery in this action. Plaintiffs argue that they are prejudiced by the delay and that the claims asserted in the Third-party actions can be resolved separately.

Pursuant to CPLR §1010, severance of a third-party action rests within the sound discretion of the Court, to avoid prejudice resulting from unduly delaying the main action (*Annanquartey v. Passeser*, 260 A.D. 2d 517, 688 N.Y.S. 2d 252 [N.Y.A.D. 2nd Dept. 1999]). Severance is not proper where the main action and Third-party action involve common facts and legal issues, unless there is a demonstration of substantial prejudice. A single trial is appropriate to avoid inconsistent verdicts and in the interest of judicial economy (*Neckles v. VW Credit, Inc.*, 23 A.D. 3d 191, 803 N.Y.S. 2d 531 [N.Y.A.D. 1st Dept., 2005] and *Villatoro v. Talt*, 269 A.D. 2d 390, 702 N.Y.S. 2d 381[N.Y.A.D. 2nd Dept., 2000]).

Defendants, the Third-party defendants, Second Third-party defendants and Third Third-party plaintiffs, have sufficiently opposed the severing of the Third-party actions. Plaintiffs have failed to establish that they are prejudiced by having the Third-party actions tried with the main action as all of the actions are derived from common facts and related issues.

Plaintiffs have also failed to establish that they will be substantially prejudiced by the completion of discovery in the Third-party actions. They did not seek severance at the time of the commencement of the Third-party actions. Plaintiffs also did not object to the discovery directed to the Third-party actions in the December 12, 2013 Order, of the Hon. Doris Ling-Cohan (Mot. Exh. L), which provided final dates for depositions and completion of discovery through April 8, 2014. Plaintiff's motion dated January 22, 2014, seeks to sever the actions over a month after the December 12, 2013 Order, during the completion of discovery in the Third-party actions. Defendants, the Third-party defendants, Second Third-party defendants and Third Third-party plaintiffs, have advised this Court at oral argument that depositions in all the Third-party actions are now complete and that the only remaining discovery is a further medical examination of the plaintiff, Cooper Burkett. Discovery in the Third-party actions is nearing completion and would not substantially delay the trial of this action.

Plaintiffs seek sanctions pursuant to 22 NYCRR 130-1.1[c][2] for the willful delay of resolution of this action resulting from the commencement of the Third Third-party action, which they contend was brought solely to delay or prolong the resolution of this litigation and for harassment purposes.

Frivolity as defined by 22 NYCRR 130-1.1[c] [2], applies to the use of dilatory strategy designed to prolong the resolution of litigation or harass another party. The Court in its discretion may award sanctions. The imposition of sanctions requires repetition or a pattern of conduct (Jason v. Chusid, 78 N.Y. 2d 1099, 586 N.E. 2d 50, 578 N.Y.S. 2d 867 [1991]). Litigation involving redundant matters, or seeking to re-litigate previously decided matters, should be sanctioned. Arguments brought in good faith requiring review of existing law are exempt from sanctions (Levy v. Carol Management Corp., 260 A.D. 2d 27, 698 N.Y.S. 2d 226 [N.Y.A.D. 1st Dept., 1999]).

Plaintiffs have not established a pattern of redundancy in the bringing of the Third Third-party action for contribution and indemnification. The Third Third-party action was brought as a result of deposition testimony and related discovery which revealed potential negligence for which claims of contribution and indemnification can be asserted. Plaintiffs have not demonstrated that the failure to settle the action at mediation, and subsequent commencement of the Third Third-party action was an intentional or dilatory effort to prolong the resolution of this litigation. The mediation between the parties delayed discovery, and the resulting determination that indemnification and contribution claims should be brought as to Shannon Burkett and Andrew Kriss.

Plaintiffs seek to compel discovery from Warren Street Associates, LLC, to provide the original report from their medical examination of plaintiff Cooper Burkett,

by Dr. David Mansur, and to preclude testimony or pursuant to CPLR §3126 to strike Warren Street Associates, LLC's Answer.

Pursuant to CPLR §3126, there must be a showing of a willful violation of a prior Order for discovery and that the failure to provide discovery was willful, contumacious or due to bad faith (Weissman v. 20 East 9th Street Corporation, 48 A.D. 3d 242, 852 N.Y.S. 2d 67 [N.Y.A.D. 1st Dept., 2008]). This would include a lax and unresponsive manner resulting in predicate failures to provide the discovery sought without adequate excuses (Byam v. City of New York, 87 A.D. 3d 513, 890 N.Y.S. 2d 612 [N.Y.A.D. 1st Dept., 2009]). Merely allowing small amounts of discovery to be provided without exercising proper diligence should result in adverse consequences (Henderson v. City of New York, 87 A.D. 3d 498, 928 N.Y.S. 3d 536 [N.Y.A.D. 1st Dept., 2011]).

Warren Street Associates, LLC, has exchanged with the plaintiffs, a copy of Dr. David Mansur's report from their medical examination of plaintiff Cooper Burkett and annexed a copy of the report to their opposition papers. This Court agrees with Warren Street Associates, LLC's contentions that it has not acted either willfully or contumaciously by the delay in exchanging Dr. Mansur's report.

Accordingly, it is ORDERED, that plaintiffs' motion to sever all of the Third-party actions; for sanctions pursuant to 22 NYCRR 130-1.1[c][2] for willful delay of resolution of this action; to compel discovery from Warren Street Associates, LLC, to preclude or pursuant to CPLR §3126 to strike Warren Street Associates, LLC's Answer, is denied, and it is further,

ORDERED, that the parties are directed to complete any outstanding discovery in all of the Third-party actions within thirty (30) days from the date of this order.

FILED ENTER:

JUL 23 2014

NEW YORK
COUNTY CLERK'S OFFICE
MANUEL J. MENDEZ,
J.S.C.

Dated: July 24, 2014

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE