

**Marroquin v American Express Co.**

2014 NY Slip Op 34037(U)

October 1, 2014

Supreme Court, New York County

Docket Number: 111956/2009

Judge: Eileen A. Rakower

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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY**  
**PRESENT: Hon. EILEEN A. RAKOWER *Justice* PART 15**

REGINALDO MARROQUIN,

Plaintiff,

- v -

INDEX NO. 111956/2009  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 2  
MOTION CAL. NO. \_\_\_\_\_

**AMERICAN EXPRESS CO., HENEGAN  
CONSTRUCTION CO., BROOKFIELD PROPERTIES,  
BROOKFIELD PROPERTIES HOLDINGS, INC.,  
BROOKFIELD PROPERTIES MANAGEMENT LLC,  
BROOKFIELD PROPERTIES ONE WFG G.P. CORP.,  
BROOKFIELD FINANCIAL PROPERTIES LP,  
BROOKFIELD REAL ESTATE FINANCIAL PARTNERS  
LLC, BROOKFIELD FINANCIAL LLC, RBC CAPITAL  
MARKETS CORP. AND HI TECH DATA FLOOR INC.,  
AND BFP TOWER C. CO. LLC.**  
Defendants.

AMERICAN EXPRESS CO., HENEGAN  
CONSTRUCTION CO., RBC CAPITAL  
MARKETS CORP. and BFP TOWER CO. CO.,  
LLC,

Third-party plaintiffs,  
-v-

EUROTECH CONSTRUCTION CORP.,

Third-party defendant.

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OCT 06 2014

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for/to  
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NEW YORK

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answer – Affidavits – Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1-4  
5, 6, 7  
8, 9

**AMENDED ORDER**

This is an action for negligence and violations of the Labor Law. Reginaldo Marroquin ("Plaintiff") brings this action to recover for injuries allegedly sustained on September 4, 2007, while performing construction work for non-party Forest Electric Corp. ("Forest"), at a construction project located at Three World Financial Center in the New York, New York. On the date of accident,

Plaintiff was employed as a union electrician with Forest. Plaintiff claims that while in the course of removing a tile which was part of a raised flooring system to access electrical wires underneath the raised floor, Plaintiff slipped and fell on the underlying concrete floor. After Plaintiff stepped down into the opening to access previously installed wiring, Plaintiff tripped on construction debris, causing injury to his right knee.

Plaintiff moves for an Order, pursuant to CPLR §1010, severing the main and third party actions.

Third-party defendant, Eurotech Construction Corp. (“Eurotech”), cross moves, pursuant to CPLR § 1010, to sever the main and third party actions or in the alternative, to strike the note of issue, remove the case from the trial calendar, and set the matter down for a discovery conference.

Plaintiff opposes Eurotech’s cross motion to the extent that it seeks to strike the note of issue and remove the case from trial calendar as alternative relief to severance.

Defendants/third party plaintiffs, American Express Company (“American Express”), Henegan Construction Co. (“Henegan”), RBC Capital Markets Corp. (“RBC”), and BFP Tower C. Co., LLC (“BFP”), oppose Plaintiff’s motion and Eurotech’s cross motion to sever, and support Eurotech’s cross motion which seeks an Order vacating the Note of Issue as alternative relief.

This action was commenced by plaintiff by the filing of a summons and complaint on or about August 21, 2009. The Complaint was thereafter amended on two occasions. Defendants/third party plaintiffs, American Express, Henegan, RBC, and BFP (collectively, “Defendants/Third Party Plaintiffs”) interposed an Answer to the Second Amended Complaint on February 9, 2010.

The action was discontinued as against defendants Brookfield Properties, Brookfield Properties Holding, Inc., Brookfield Properties Management LLC, Brookfield Properties One WFC G.P. Corp., Brookfield Financial Properties LP, Brookfield Real Estate Financial Partners, LLC and Brookfield Financial LLC per stipulation dated April 7, 2011. The action against defendant, Hi-Tech, was dismissed by the Court’s Order dated November 12, 2013. The remaining direct

defendants are: American Express, Henegan, RBC, and BFP.

American Express and BFP were the owners of the premises located at Three World Financial on the date of the accident. RBC was the tenant-in-possession of three floors, including the floor where Plaintiff's accident took place on September 4, 2007. Henegan was the general contractor hired to build out the three abovementioned floors pursuant to a contract with RBC. Henegan, in turn, hired the subcontractors, including Forest, Plaintiff's employer, and the third party defendant, Eurotech.

All discovery in this matter has been completed. A note of issue was filed on February 4, 2013.

American Express, Henegan, RBC, and BFP moved for summary judgment. Hi Tech cross moved for summary judgment on all claims and cross claims. Oral argument was held on November 12, 2013, and the Court rendered a decision on November 12, 2013, dismissing all claims against Hi-Tech, discontinuing the Labor Law 240(1) claims against American Express, Henegan, RBC, discontinuing the Labor Law 200 claims against American Express and BFP, discontinuing the Labor Law 241(6) claims premised upon Industrial Code 23-1.5, 23-1.7(b), 23-1.15, 23-1.16, 23-1.17, 23-1.30, 23-2.1(b), 23-2.2 and 23-2.4, and dismissing the Labor Law 200 claims against Henegan and RBC. The Labor Law 241(6) claims premised upon Industrial Code 23-1.7(e)(2) remained.

Following this Court's decision on the motion for summary judgment on November 12, 2013, Defendants/third party plaintiffs American Express, Henegan, RBC, and BFP filed a Notice of Impleader against Eurotech, which was filed in the County Clerk's Office on December 16, 2013. The impleader contains four causes of action against Eurotech, which included the following claims: (1) Plaintiff's accident arose of Eurotech's work, since Eurotech's work on the project involved sheetrock; (2) Eurotech was required under its contract to purchase and maintain comprehensive general liability insurance for the benefit of the third party plaintiffs as additional insureds and Eurotech breached that contractual obligation; (3) common law indemnification; and (4) a claim for equitable contribution.

Plaintiff seeks to sever the main and third party actions upon the ground that

without such severance, the substantial rights of Plaintiff and Eurotech will be prejudiced. Plaintiff contends that Defendants/third party plaintiffs were aware of Plaintiff's testimony on September 7 and September 8, 2011 that he had slipped on debris located underneath the raised floor which included, among other things, pieces of sheetrock, and that Defendants/third party plaintiffs knew of Eurotech's role as the entity responsible for the installation of sheetrock on the jobsite no later than February 13, 2012, when Yuen Fee Yee testified on behalf of Henegan.

Plaintiff contends that as of the date of its motion, this case had been on the trial calendar for approximately ten months, that summary judgment motions have already been decided, and "[g]iven the fact that the third party plaintiffs obviously knew of Eurotech's involvement in the project for almost two years, if not longer, there can be no good faith basis for counsel's decision to delay the commencement of the instant third party until now." Plaintiff contends that the failure to sever the third party action will delay Plaintiff's trial, as well as Eurotech, which will require additional discovery. In its cross motion, Eurotech also requests severance.

CPLR §603 states:

In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.

CPLR §1010 states:

The 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.

Where a defendant unduly delays bringing a third-party action, discovery is substantially completed in the main action, and the third-party defendant is prevented from conducting its own meaningful discovery, severing of the action is

warranted. (*Ramos v. City of New York*, 30 A.D.3d 201[1st Dept. 2006]). Despite the fact that a main and third-party action contain common issues of fact, it may be severed when not doing so would cause further delay, thereby prejudicing the plaintiff. (*Garcia v. Gesher Realty Corp.*, 280 A.D.2d 440, 440-41 [1st Dept. 2007]).

Defendants/third-party plaintiffs did not commence the third party action against Eurotech until after discovery was completed, Plaintiff had filed the note of issue, and Defendants' motion for summary judgment was already decided. The court is mindful of the third party defendant Eurotech's right to conduct their own meaningful discovery and plaintiff's interest in proceeding to trial without further delay.

Wherefore it is hereby

ORDERED that plaintiff's motion to sever is granted; and it is further

ORDERED that third-party defendant's cross motion to sever is granted; and it is further

ORDERED that the main and third party actions are hereby severed for separate trials; and it is further

ORDERED that a copy of this order with notice of entry shall be served upon the County Clerk, who is hereby directed to divide the case records into appropriately separate files and assign the appropriate index numbers to each file; and it is further

ORDERED that the main action in all other respects continues.

**FILED**

This constitutes the decision and order of the court. All other relief requested is denied.

OCT 06 2014

Dated: 10/1/14

  
COUNTY CLERK'S OFFICE  
NEW YORK  
**HON. EILEEN A. RAKOWER**

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Check if appropriate:  DO NOT POST  REFERENCE