SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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BRIAN HARRIS and FUKUKO YAHAGI-HARRIS
and EVEREST NATIONAL INSURANCE COMPANY
a/s/o BRIAN HARRIS and FUKUKO YAHAGI-HARRIS,

Plaintiffs,

Index No. 151291/2012

-against-

DECISION/ORDER

ARANI BOSE, SHUMITA BOSE, et al.

Defendants.

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THINK CONSTRUCTION LLC,

Third-Party Plaintiff,

-against-

AVALANCHE RESTORATION CORP., et al.,

Third-Party Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmations in Opposition.....	2
Reply Affidavits.....	3
Exhibits.....	4

Plaintiffs commenced the instant action for property damages allegedly caused by defendants during excavation work on an adjoining property. Plaintiff Everest National Insurance Company a/s/o Brian Harris and Fukuko Yahagi-Harris ("Everest") now moves for an order pursuant to CPLR § 3212 granting it summary judgment as to liability and damages.

Plaintiffs Brian Harris and Fukuko Yahagi-Harris (collectively referred to herein as the "Harris Plaintiffs") cross-move for an order severing the third-party action and directing a hearing on their damages in the main action. The motions are resolved as described below.

The relevant facts are as follows. The Harris Plaintiffs are the owners of a four-story townhouse located at 320 East 18th Street in Manhattan. Defendants Arani and Shumita Bose (the "Bose Defendants") own the adjoining townhouse directly east of the Harris Plaintiffs' home. Sometime in 2010, the Bose Defendants hired defendant Think Construction LLC ("Think Construction") as the general contractor to perform renovation work at their home, which included demolition, excavation and underpinning (the "Project"). In or around October 2012, the excavation and underpinning process began. As the excavation work progressed, the Harris Plaintiffs' home sustained severe damage as a result of the work. Specifically, during this time floors became un-level, the walls became separated from the floors and numerous cracks appeared along the interior and exterior walls and facade.

By decision/order dated June 23, 2014, this court granted the Harris Plaintiffs partial summary judgment on the issue of liability based on the Bose Defendants' violation of New York City Administrative Code § 27-103(b)(1). Based on this decision, the Harris Plaintiffs' insurer, Everest, now moves for summary judgment as to liability and damages. Additionally, the Harris Plaintiffs cross-move to sever the third-party action and to direct an inquest as to damages.

As an initial matter, Everest's motion for summary judgment as to liability is granted without opposition. As Everest stands in the shoes of its insured, the Harris Plaintiffs, and this court has already granted them partial summary judgment as to liability, Everest is also entitled

to the same relief.

However, Everest's motion for summary judgment as to damages is denied as there remains material issues of fact with respect to the amount of damages Everest is entitled to recover from defendants. Everest contends that it is entitled to summary judgment as its damages are liquidated as it already paid in excess of its 1 million dollar insurance policy to the Harris Plaintiffs. However, contrary to Everest's assertion, its damages are not liquidated. Rather, Everest, as the Harris Plaintiffs' insurer, is entitled to the amount of damages the Harris Plaintiffs' are entitled to recover, which is a factual issue that must be determined by the trier of fact. Indeed, the record contains several competing affidavits as to the estimated costs of repairs for the Harris Plaintiffs' home. Accordingly, Everest's motion for summary judgment as to damages must be denied.

Additionally, the Harris Plaintiffs' cross-motion to sever the third-party action is denied. Pursuant to CPLR § 603, "[i]n 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." Additionally, CPLR § 1010 provides as follows:

> The courts 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.

It is well-settled that "[i]t is preferable to try related actions together, in order to avoid a waste of judicial resources and the risk of inconsistent verdicts." *Williams v. Property Servs.*, 6 A.D.3d 255 (1st Dept 2004). Courts may grant separate trials if the party seeking them demonstrates "prejudice to a substantial right" in the absence of severance. *Id.*

In the present case, the court finds that the third-party action should not be severed as the main action and the third-party action involve common factual and legal issues and the Harris Plaintiffs fail to demonstrate prejudice to a substantial right in the absence of severance. The Harris Plaintiffs contend that the third-party action should be severed as they have discontinued their direct claims against third-party defendants Avalanche Restoration Corp. ("Avalanche"), Penmax Engineering ("Pennmax"), Independent Testing Laboratories, Inc. ("Independent") and Metric Consulting & Inspection, Inc. ("Metric") and the main action and third-party action no longer involve common issues. Moreover, the Harris Plaintiffs contend that they would be prejudiced without severance as there remains outstanding discovery in the third-party action and they should not have to wait for such discovery to be complete to move forward with their claims. The court finds these arguments to be without merit. As an initial matter, the Harris Plaintiffs' stipulation of discontinuance discontinuing their claims against the third-party defendants is invalid as it is not signed by the Bose Defendants or Think Construction. CPLR § 3217 makes clear that the stipulation of discontinuance must be signed by the attorneys "for all parties," which includes those against whom the discontinuance is sought as well as those against whom the suit is to be continued. *See C.W. Brown Inc. v. HCE, Inc.*, 8 A.D.3d 520, 521 (2nd Dept 2004). Thus, without the Bose Defendants and Think Construction's signatures, the stipulation is invalid and the Harris Plaintiffs' claims against third-party defendants remain. As these claims remain, it simply cannot be argued that the main action and the third-party action involve different issues warranting severance. Indeed, even if the claims were discontinued the main action and the third-party action would still involve common questions and issues as the amount of damages the Harris Plaintiffs can recover affects all parties who may potentially be

liable for such damages. Furthermore, contrary to the Harris Plaintiffs' contention, the record reveals that the third-party action has been on the same discovery schedule as the main action and discovery was only delayed due to the plaintiffs moving for summary judgment. Thus, this court finds no reason why the third-party action should be severed and an inquest as to damages in the main action should be held at this time. Rather, these actions should be tried together.

Based on the foregoing, Everest's motion for summary judgment is granted only to the extent that they are entitled to summary judgment as to liability against the Bose Defendants and Think Construction but is otherwise denied. Additionally, the Harris Plaintiffs' cross-motion is denied in its entirety. This constitutes the decision and order of the court.

Dated: 4/15/15

Enter: CSK
J.S.C.

CYNTHIA S. KERN
J.S.C.