

<b>Wavertree Corp. v Bellet Constr. Co., Inc.</b>
2015 NY Slip Op 30949(U)
May 28, 2015
Supreme Court, New York County
Docket Number: 651551/11
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
WAVERTREE CORPORATION,

Plaintiff,

- against -

BELLET CONSTRUCTION CO., INC.,

Defendant.

Index No. 651551/11

Mot. seq. no. 004

**DECISION AND ORDER**

-----X  
BELLET CONSTRUCTION CO., INC.,

Third-Party Plaintiff,

-against-

ERGON CONSTRUCTION CORP. and CITYWIDE  
MAINTENANCE, INC.,

Third-Party Defendants.

Index No. 590368/12

-----X  
BELLET CONSTRUCTION CO., INC.,

Second Third-Party Plaintiff,

-against-

MERRITT ENGINEERING CONSULTANTS, P.C.,

Second Third-Party Defendant.

Index No. 590642/12

-----X  
BELLET CONSTRUCTION CO., INC.,

Third Third-Party Plaintiff,

-against-

ERGON RENOVATIONS INC. and AVG CONSTRUCTION  
CORP.,

Third Third-Party Defendants.

Index No. 595605/14

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BARBARA JAFFE, J.:

**For plaintiff:**

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By notice of motion, plaintiff moves pursuant to CPLR 603 and 1010 for an order severing the main action from the third-party action, second-third-party action, and third-third-party action. Defendant opposes.

I. PROCEDURAL BACKGROUND

On or about June 1, 2011, plaintiff, owner and manager of a cooperative building located in Manhattan, commenced this action against defendant construction company, alleging breach of contract, breach of warranty, negligence, delay damages, and attorney fees, in connection with a façade restoration project at its building. (NYSCEF 1).

On April 11, 2012, defendant commenced the third-party action against third-party defendants seeking contribution and indemnification. (NYSCEF 8). Third-party defendant Ergon Construction neither answered nor appeared. On July 30, 2012, defendant commenced the second third-party action against second third-party defendant, also seeking contribution and indemnification. (NYSCEF 12).

On September 7, 2012, defendant filed a notice of discontinuance in favor of second third-party defendant, withdrawing that action with prejudice. (NYSCEF 16). On November 14, 2012, third-party defendant Citywide answered the third-party complaint and interposed cross-claims and counterclaims. (NYSCEF 17).

On May 30, 2013, upon completion of discovery in the main action, plaintiff served and

filed a note of issue . (NYSCEF 24).

By order dated September 24, 2013, I denied defendant's motion for a default judgment against Ergon Construction. (NYSCEF 57). By order dated September 25, 2013, I granted Citywide's motion for summary judgment dismissing Bellet's third-party complaint against it. (NYSCEF 58).

By decision and order dated February 19, 2014, I denied plaintiff's motion for partial summary judgment. (NYSCEF 79). Fruitless settlement conferences were held on June 17, 2014 and August 13, 2014, and the case was placed on the trial calender. (NYSCEF 87, 103).

On November 18, 2014, defendant commenced the third third-party action against third third-party defendants Ergon Renovations Inc. and AVG Construction Corp., seeking contribution and indemnification. (NYSCEF 83). Neither third third-party defendant has answered or appeared. (NYSCEF 86).

At oral argument, defendant indicated that the case was scheduled for additional settlement negotiations, and plaintiff conceded that a trial was not imminent. (NYSCEF 112).

## II. CONTENTIONS

Plaintiff asserts that as discovery has been completed and a note of issue filed in the main action more than 18 months ago, and as settlement conferences have not been productive, the case is ready for trial. It argues that allowing for more discovery in the third-party actions, where parties have either been dismissed from the case or have not yet appeared, would cause an unreasonable delay in the main action and unfairly prejudice it. Moreover, the third-party actions concern parties and issues that have no bearing on the resolution of the main action, particularly here, where defendant's third-party claims are for contribution and indemnity. (NYSCEF 86,

105).

Defendant claims to have recently learned that third-party defendant Ergon Construction may have gone by the corporate name Ergon Renovation and/or AVG Construction, the commencement of the third third-party action was delayed. It maintains that plaintiff will suffer no substantial prejudice absent severance, as another settlement conference will be held, and that a trial is not imminent. In any event, defendant also alleges that limited additional discovery in the third-party actions can be completed in time for trial, and that the parties named in the third-party actions are its subcontractors who performed the work at issue in the main action, and thus the actions share a common nucleus of fact. (NYSCEF 107).

In reply, plaintiff asserts that defendant offers no explanation for its delay in discovering the correct name or names of Ergon Construction in the third third-party action, and argues that the settlement conferences are irrelevant. (NYSCEF 111).

### III. ANALYSIS

Pursuant to CPLR 603, claims may be severed “[i]n furtherance of convenience or to avoid prejudice.” The court may order a separate trial or dismissal of a third-party claim where “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.” (CPLR 1010; *Skolnick v Max Connor, LLC*, 89 AD3d 443 [1<sup>st</sup> Dept 2011]; *Gomez v City of New York*, 78 AD3d 482 [1<sup>st</sup> Dept 2010]).

However, where complex issues of law and fact are inextricably interwoven and intertwined, a single trial may be held. (*Shanley v Callahan*, 54 NY2d 52, 57 [1981]; *see also Marbilla, LLC v 143/145 Lexington LLC*, 116 AD3d 544 [1<sup>st</sup> Dept 2014] [where third-party

action shares common nucleus of law and fact with main action, severance proper only where main action is unduly delayed or substantial right of party prejudiced)). The severance of third-party claims for indemnification and contribution, while based on common operative facts, does not pose a risk of inconsistent verdicts because the claims are based on legal questions that differ from those advanced in the main action. (*See Admiral Indemn. Co. v Popular Plumbing & Heating Corp.*, 127 AD3d 419 [1<sup>st</sup> Dept 2015] [no possibility of inconsistent verdicts where indemnification and contribution claims premised on defendant's liability in main action, and thus third-party action and main action involved "disparate issues of law"]).

Where the main action is ready for trial but discovery is incomplete or ongoing in the third-party action, a single trial may prejudice the plaintiff, as the outstanding discovery would unreasonably delay the main action from proceeding to trial. (*Rothstein v Milleridge Inn, Inc.*, 251 AD2d 154, 155 [1<sup>st</sup> Dept 1998]; *Pena v City of New York*, 222 AD2d 233 [1<sup>st</sup> Dept 1995]).

#### A. Third third-party action

Although future settlement conferences between plaintiff and defendant are scheduled, defendant's belated commencement of the third third-party action and failure to commence discovery thereon will indefinitely delay the main action and thereby prejudice plaintiff, which has completed all discovery and has been trial-ready for eighteen months. (*See Singh v City of New York*, 294 AD2d 422, 423 [2d Dept 2002], *citing Cusano v Sankyo Seiki Mfg. Co.*, 184 AD2d 489 [2d Dept 1992] ["To allow impleader at this late date would result in . . . prejudice to the plaintiffs by the delay necessary to allow the second third-party defendants to engage in discovery and examine prior voluminous disclosure . . ."]; *Garcia v Geshel Realty Corp.*, 280 AD2d 440, 440 [2d Dept 2001] [delays that would necessarily attend prosecution of belated

third-party claims constituted prejudice to plaintiff, who was ready for trial]; *Miro v Branford House, Inc.*, 174 AD2d 363 [1<sup>st</sup> Dept 1991] [convening medical malpractice panel and completing discovery in belated third-party action would cause delays in main action proceeding to trial, thereby prejudicing plaintiff]).

Although it is preferable to hold a joint trial, here, defendant's indemnification and contribution claims are based on legal theories that are distinct from the contract issues presented in the main action between plaintiff and defendant, and thus there is no risk of inconsistent verdicts in separate trials. (*See Admiral Indemn. Co.*, 127 AD3d at 422).

Moreover, from the commencement of the main action to defendant's commencement of the third third-party action, more than three years passed during which the note of issue was filed and two early settlement conferences held. Absent any explanation for its lengthy delay in discovering the other names for Ergon Construction, defendant provides no basis for finding that it was diligent. (*Compare Garcia v Geshner Realty Corp.*, 280 AD2d 440 [1<sup>st</sup> Dept 2001] [modicum of diligence would have revealed identities of third-party defendants], and *Maron v Magnetic Const. Grp. Corp.*, AD3d , 2015 NY Slip Op 03790 [1<sup>st</sup> Dept 2015] [defendants dilatory in bringing third-party action, and did nothing to advance discovery when plaintiff filed motion to sever], with *Rago v Nationwide Ins. Co.*, 110 AD2d 831, 831 [2d Dept 1985] [delay in commencing third-party action not due to lack of diligence, as defendants encountered legitimate difficulties identifying parties with ownership interests in subject premises]).

And, while the court may condition the denial of a motion to sever on expedited discovery (*see Rogers v U-Haul Co.*, 161 AD2d 214, 216 [1<sup>st</sup> Dept 1990] [denying motion to sever and striking note of issue only to extent of directing completion of discovery within 90

days]), here, as third third-party defendants have neither answered nor appeared, there is nothing to expedite.

B. Third party and second third-party actions

The third-party action seeking indemnification and contribution was dismissed as to third-party defendant Citywide, but continues as to third-party defendant Ergon Construction, who, like third third-party defendants, has neither answered nor appeared. Accordingly, and for the reasons set forth above, severance of third party action from the main action is appropriate.

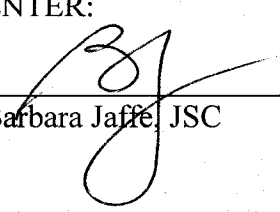
As the second third-party action was voluntarily discontinued pursuant to CPLR 3217(a)(7), that branch of plaintiff's motion seeking severance of the second third-party action is denied as moot. (*See eg, Copiague Pub. Sch. Dist. v Heath & Educ. Equip. Corp.*, 2011 NY Slip Op 30395 [Sup Ct Suffolk County 2011] [motion for severance denied as moot where main action had been dismissed]).

IV. CONCLUSION

According, it is hereby

ORDERED, that plaintiff's motion to sever the main action from the third-party, second third-party, and third third-party actions is granted only to the extent the main action shall be severed from the third-party action and the third third-party action, and there shall be separate trials for the third-party action and third third-party action.

ENTER:

  
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Barbara Jaffe, JSC

DATED: May 28, 2015  
New York, New York