

**Schutt v Dynasty Transp. of Ohio, Inc.**

2015 NY Slip Op 31081(U)

June 16, 2015

Supreme Court, Suffolk County

Docket Number: 31979/2011

Judge: Joseph Farneti

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

**PRESENT:**

**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

---

ROBERT J. SCHUTT and DIEDRE SCHUTT,

Plaintiffs,

-against-

DYNASTY TRANSPORTATION OF OHIO,  
 INC., T.G. NICKEL & ASSOCIATES, LLC,  
 HABBERSTAD SUNRISE REALTY LLC, and  
 CANTON ELEVATOR, INC.,

Defendants.

-----  
 T.G. NICKEL & ASSOCIATES, LLC,

Third-Party Plaintiff,

-against-

NOBLE ELEVATOR COMPANY, INC.,

Third-Party Defendant.

-----  
 HABBERSTAD SUNRISE REALTY LLC,

Second Third-Party Plaintiff,

-against-

ELEVATOR EQUIPMENT CORPORATION,

Second Third-Party Defendant.

---

ORIG. RETURN DATE: JULY 17, 2014  
 FINAL SUBMISSION DATE: JULY 17, 2014  
 MTN. SEQ. #: 004  
 MOTION: MD

**PLAINTIFFS' ATTORNEY:**  
 DAVIDSON & COHEN, P.C.  
 265 SUNRISE HIGHWAY  
 ROCKVILLE CENTRE, NEW YORK 11570  
 516-763-6700

**ATTORNEY FOR DEFENDANT**  
**DYNASTY TRANSPORTATION OF OHIO, INC.:**  
 MIRANDA SAMBURSKY SLONE  
 SKLARIN VERVENIOTIS LLP  
 240 MINEOLA BOULEVARD  
 MINEOLA, NEW YORK 11501  
 516-741-7676

**ATTORNEY FOR DEFENDANT/  
 THIRD-PARTY PLAINTIFF**  
**T. G. NICKEL & ASSOCIATES, LLC:**  
 AHMUTY, DEMERS & McMANUS  
 200 I.U. WILLETS ROAD  
 ALBERTSON, NEW YORK 11507  
 516-294-5433

**ATTORNEY FOR DEFENDANT**  
**HABBERSTAD SUNRISE REALTY LLC:**  
 CONWAY, GOREN & BRANDMAN  
 58 SOUTH SERVICE ROAD - SUITE 350  
 MELVILLE, NEW YORK 11747  
 631-845-2600

**ATTORNEY FOR DEFENDANT**  
**CANTON ELEVATOR, INC.:**  
 HERZFELD & RUBIN, P.C.  
 125 BROAD STREET  
 NEW YORK, NEW YORK 10004  
 212-471-8500

**ATTORNEY FOR THIRD-PARTY  
DEFENDANT NOBLE ELEVATOR COMPANY, INC.:**  
GOTTLIEB SIEGEL & SCHWARTZ, LLP  
207 EAST 94<sup>TH</sup> STREET  
NEW YORK, NEW YORK 10128  
646-449-8141

**ATTORNEY FOR SECOND THIRD-  
PARTY DEFENDANT ELEVATOR  
EQUIPMENT CORPORATION:**  
HAVKINS ROSENFELD RITZERT  
& VARRIALE, LLP  
114 OLD COUNTRY ROAD - SUITE 300  
MINEOLA, NEW YORK 11501  
516-620-1700

Upon the following papers numbered 1 to 13 read on this motion \_\_\_\_\_  
**TO SEVER SECOND THIRD-PARTY ACTION**

Notice of Motion and supporting papers 1-3; Affirmation in Opposition 4; Affirmation in  
Opposition 5; Affirmation in Opposition and supporting papers 6, 7; Affirmation in  
Opposition and supporting papers 8, 9; Affirmation in Opposition 10; Affirmation in  
Support 11; Affirmation in Opposition to Affirmation in Support 12; Reply Affirmation  
13; it is,

**ORDERED** that this motion by plaintiffs, ROBERT J. SCHUTT and DIEDRE SCHUTT, for an Order, pursuant to CPLR 1010 and 603, severing and ordering a separate trial of the second third-party action against ELEVATOR EQUIPMENT CORPORATION which involves a products liability claim, and additionally, pursuant to Uniform Rules for Trial Courts (22 NYCRR § 202.21 [d]), deeming the pre-trial proceedings complete and allowing plaintiffs to file their Note of Issue in the main action, hereby **DENIED** in its entirety for the reasons set forth hereinafter. The Court has received opposition hereto from DYNASTY TRANSPORTATION OF OHIO, INC., T.G. NICKEL & ASSOCIATES, LLC, HABBERSTAD SUNRISE REALTY LLC, CANTON ELEVATOR COMPANY, INC. and NOBLE ELEVATOR COMPANY, INC. The Court has also received support for this application from second third-party defendant ELEVATOR EQUIPMENT CORPORATION.

The instant action was commenced by plaintiffs, ROBERT J. SCHUTT and DIEDRE SCHUTT, on or about October 7, 2011, against defendants DYNASTY TRANSPORTATION OF OHIO, INC. ("Dynasty"), T.G. NICKEL & ASSOCIATES, LLC ("T.G. Nickel"), HABBERSTAD SUNRISE REALTY LLC. ("Habberstad"), and CANTON ELEVATOR, INC. ("Canton"). The action arises out of a work-related accident that occurred on or about May 1, 2009, wherein plaintiff allegedly slipped and fell on oil that was leaking from an elevator jack, and sustained personal injuries. Specifically, plaintiffs allege that at the time of his accident, ROBERT SCHUTT was unloading a truck leased to Dynasty for transport and loaded by Canton, the distributor of elevator parts. Plaintiffs contend that the 1000-pound elevator jack that was being unloaded at

the time of plaintiff's accident was then to be assembled and installed as part of a renovation construction project which was ongoing at Habberstad's commercial premises located in Bay Shore, New York. Plaintiffs indicate that T.G. Nickel was the general contractor for this construction project. Plaintiffs have alleged violations of Labor Law §§ 240, 241 (6) and 200, as well as common law negligence claims in the main action, and seek damages in the amount of \$30 million.

On the date of the subject accident, Mr. Schutt was an employee of third-party defendant NOBLE ELEVATOR COMPANY, INC. ("Noble"). The first third-party action was commenced by T.G. Nickel on or about March 7, 2012, against Noble, asserting causes of action sounding in breach of contract and failure to procure insurance. Plaintiffs allege that discovery is complete in the main action and in the first third-party action, and requests that this Court now "deem the Pre Trial Proceedings in this action complete and allow plaintiffs to file their Note of Issue." Plaintiffs contend that discovery proceedings in the second third-party action is in the early stages.

With respect to plaintiffs' application to sever the second third-party action, CPLR 603 provides in pertinent part, "[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" (CPLR 603). The determination to grant or deny a request for a severance pursuant to CPLR 603 is a matter of judicial discretion which should not be disturbed absent a showing of abuse of discretion or prejudice to a substantial right of the party seeking the severance (see e.g. *Naylor v Knoll Farms of Suffolk County, Inc.*, 31 AD3d 726 [2006]; *Mothersil v Town Sports Intl.*, 24 AD3d 424 [2005]; *McCrimmon v County of Nassau*, 302 AD2d 372 [2003]).

Moreover, CPLR 1010 provides:

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

(CPLR 1010).

Plaintiffs allege that the main action and the first third-party action are ready to be certified for trial and should not be delayed by the recently filed second third-party action allegedly sounding in products liability, which was commenced by Habberstad against ELEVATOR EQUIPMENT CORPORATION (“Elevator”), the manufacturer of the elevator jack. Habberstad alleges that Elevator was negligent and seeks contribution from it for shipping a leaking product or for defectively packaging the product. The Court notes that the second third-party action was commenced on or about March 21, 2014, approximately two and one-half years after the commencement of the main action.

As noted, Dynasty, T.G. Nickel, Habberstad, Canton, and Noble all oppose this application. These parties allege that the second third-party action is not based upon products liability but rather sounds in negligence, contribution and common law indemnity, and is based upon the same claims that plaintiffs are making, to wit: that the elevator jack leaked oil as a result of the packaging of the jack, loading of the jack, and/or the transportation of the jack across three state lines. Furthermore, as Elevator was allegedly involved in the manufacturing, packaging and transport of the elevator jack before it was delivered to Canton, defendants contend that they will be severely prejudiced if forced to proceed to trial without a potential tortfeasor.

Elevator has submitted an affirmation in support of plaintiffs’ motion. Elevator contends that it has been impleaded into this action more than two years after its commencement and five years after the subject accident. Consequently, Elevator argues that it has had no opportunity to conduct any discovery herein, which is essential to claims such as plaintiffs’ that are more difficult to investigate after the passage of time.

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 (see *Ramos v City of New York*, 30 AD3d 201 [2006]). However, the Court has considerable discretion in deciding whether severance is appropriate, and this discretion should be exercised sparingly (see CPLR 603, 1010; *Shanley v Callanan Indus.*, 54 NY2d 52 [1981]; *Quiroz v Beitia*, 68 AD3d 957 [2009]; *Naylor v Knoll Farms of Suffolk County, Inc.*, 31 AD3d 726 [2006]; *Baseball Office of the Comm’r v. Marsh & McLennan, Inc.*, 295 AD2d 73 [2002]). A severance motion should not be granted where there are common factual and legal issues involved in the claims, “and the interests of judicial economy and consistency will be served by having a single trial” (*Ingoglia v Leshaj*, 1 AD3d

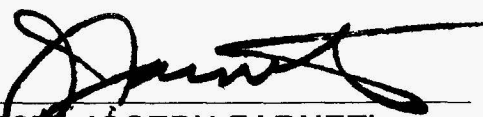
482, 485 [2003]; see *Shanley*, 54 NY2d 52; *McCrimmon v County of Nassau*, 302 AD2d 372 [2003]; *Vieyra v Briggs & Stratton Corp.*, 184 AD2d 766 [1992]).

Here, the Court finds that the main action and the second third-party action share common questions of fact and law. The Court has reviewed the second third-party complaint and finds that it asserts causes of action sounding in contribution and indemnification, not products liability, based upon Elevator's alleged negligence relative to the elevator jack. Further, although discovery may be mostly complete in the main and first third-party actions, the Court finds that Habberstad did not unduly delay in bringing the second third-party action, as it first learned of the particular circumstances of plaintiff's accident at his deposition on July 23, 2013, and of the name of the manufacturer of the subject elevator jack on December 11, 2013, at the deposition of Canton. Thereafter, on or about December 13, 2013, Habberstad served a follow-up Notice for Discovery Inspection upon Canton seeking documents concerning the purchase and delivery of the elevator jack from Elevator, which was responded to by Canton on or about February 3, 2014. As discussed *supra*, Habberstad commenced the second third-party action the following month on or about March 21, 2014. While the denial of a severance may delay a trial of this matter, the Court finds that the interests of judicial economy and consistency will be served by having a single trial (see *Ingoglia*, 1 AD3d 482).

Accordingly, plaintiffs' motion to sever the second-third party action from the main action herein is **DENIED**. The Court shall address any outstanding discovery issues at the compliance conference of this matter scheduled for **June 18, 2015, at 9:30 a.m.**, in this Part.

The foregoing constitutes the decision and Order of the Court.

Dated: June 16, 2015

  
\_\_\_\_\_  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_ FINAL DISPOSITION

X  NON-FINAL DISPOSITION