

<b>Soil Solutions, Inc. v Trocom Constr. Corp.</b>
2015 NY Slip Op 31789(U)
September 18, 2015
Supreme Court, New York County
Docket Number: 151215/15
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

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SOIL SOLUTIONS, INC.,

Plaintiff,

-against-

Index No. 151215/15

Motion seq. no. 001

**DECISION AND ORDER**

TROCOM CONSTRUCTION CORP., LIBERTY  
MUTUAL INSURANCE COMPANY, JOSEPH  
TROVATO, ANTHONY SANTORO, and NEW YORK  
CITY ECONOMIC DEVELOPMENT CORPORATION,

Defendants.  
-----x

BARBARA JAFFE, JSC:

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By notice of motion, plaintiff moves pursuant to CPLR 603 for an order severing the action as against defendant Trocom Construction Corp. Defendant New York City Economic Development Corporation (NYCEDC) submits a response, but the motion is otherwise unopposed.

On or about February 5, 2015, plaintiff commenced this action to foreclose on a mechanics lien it filed with NYCEDC for a public improvements project in Brooklyn. Plaintiff also asserts claims against Trocom for breach of contract, against defendant Liberty Mutual, Trocom's surety that bonded the lien, and against all defendants for violations of Lien Law § 79-a. (NYSCEF 1). To date, only Liberty has answered. (NYSCEF 11).

By order to show cause efiled on July 31, 2015 and August 10, 2015, defendants were

directed to appear in the motion submission part on August 14, 2015 in order to move this court pursuant to CPLR 603 for an order severing plaintiff's action and permitting plaintiff to proceed against the remaining defendants on the ground that Trocom has filed a Chapter 11 petition in the United States Bankruptcy Court, Eastern District of New York, thereby effecting an automatic stay of judicial proceedings against it pursuant to federal law. (NYSCEF 6, 7, 9).

In support of its motion, plaintiff argues that the automatic stay provisions of the federal bankruptcy laws apply only to Trocom, and that a denial of severance would cause it undue hardship as it would be obliged to await the conclusion of the bankruptcy proceeding, after having invested considerable funds in prosecuting this action. It also claims that the remaining defendants would suffer no prejudice. (NYSCEF 6).

By affirmation dated August 13, 2015, defense counsel alleges that Trocom owes NYCEDC indemnity pursuant to a contract. (NYSCEF 13).

Pursuant to CPLR 603, claims may be severed "[i]n furtherance of convenience and in order to avoid prejudice." Severance is a matter of judicial discretion which will not be disturbed absent an abuse of discretion. (*Freeland v New York Communications Ctr. Assoc.*, 193 AD2d 511 [1<sup>st</sup> Dept 1993]).

It is "well settled that a bankruptcy stay does not prevent a plaintiff from proceeding on causes of action against nonbankrupt defendants, which do not involve the bankrupt's property" (*Ryder v Knopick*, 251 AD2d 732, 732 [3d Dept 1998] [internal quotation marks omitted]; *Centrust Servs., Inc. v Guterman*, 160 AD2d 416, 418 [1<sup>st</sup> Dept 1990]), except when the bankrupt defendant must indemnify the nondebtor defendants (*Ryder*, 251 AD2d at 732). Otherwise, the general rule is that "the balance of the equities lies with plaintiffs when severance is sought

because the case against one defendant is stayed pursuant to [the automatic stay provision].”

(*Katz v Mount Vernon Dialysis, LLC*, 121 AD3d 856, 857 [2d Dept 2014]).

NYCEDC’s assertion, advanced by counsel alone, that Trocom is contractually obligated to indemnify it is of no probative value absent the applicable indemnity contract or provision, and proof that Trocom’s alleged obligation thereunder was triggered. (*Cf. Branham v Loews Orpheum Theatre, Inc.*, 291 AD2d 356, 356 [1<sup>st</sup> Dept 2002] [severance denied in light of “apparently undisputed obligation” of bankrupt defendant to indemnify nondebtor defendants]; *Growbright Enter., Inc. v Barki*, 2015 WL 1973232, \*1 [Sup Ct, NY County 2015] [severance denied where there was “adequate support to indicate” that bankrupt defendant indemnified nondebtor defendant]).

Thus, given the prejudice inuring to plaintiff from the inevitable delay pending resolution of the Chapter 11 proceeding, and absent any claim of prejudice, an order severing Trocom from the action is appropriate. (*See Golden v Moscovitz*, 194 AD2d 385, 386 [1<sup>st</sup> Dept 1993] [prejudice to plaintiff in having to await resolution of complex bankruptcy proceedings outweighed inconvenience to remaining defendants]); *SCR Joint Venture, L.P. v 309 Realty, LLC*, 2008 NY Slip Op 32268, \*4 [Sup Ct, NY County 2008] [severance of defendant to whom stay provisions applied not abuse of discretion where remaining defendants did not oppose severance]).

Accordingly, it is hereby

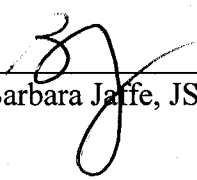
ORDERED, that plaintiff’s motion for an order severing its action against Trocom Construction Corp. is granted, and the action is continued as to the remaining defendants; it is further

ORDERED, that further proceedings in this action are stayed as to defendant Trocom Construction Corp., except for an application to vacate or modify said stay, it is further

ORDERED, that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of, or vacatur of the stay issued by the Bankruptcy Court in, the proceeding known as *In re Trocom Construction Corp.*, Case No. 15-42145 (NHL); and it is further

ORDERED, that plaintiff is directed to serve a copy of this order with notice of entry on the Trial Support Office (Room 158).

ENTER:

  
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Barbara Jaffe, JSC

DATED: September 18, 2015  
New York, New York