

Lois v Flintlock Constr. Servs., LLC
2015 NY Slip Op 32856(U)
September 10, 2015
Supreme Court, Bronx County
Docket Number: 304208/09
Judge: Elizabeth A. Taylor
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, I.A.S. PART 2
JORGE LOIS,

Plaintiff,

-against-

FLINTLOCK CONSTRUCTION SERVICES, LLC and
BASS ASSOCIATES, LLC,
Defendants.

FLINTLOCK CONSTRUCTION SERVICES, LLC and
BASS ASSOCIATES, LLC,

Third-Party Plaintiffs,

-against-

J & R GLASSWORKS, INC.,
Third-Party Defendant.

FLINTLOCK CONSTRUCTION SERVICES, LLC and
BASS ASSOCIATES, LLC,

Second Third-Party Plaintiffs,

-against-

FLAG ART PROPERTY, LLC and HME HOLDINGS OF
NEW YORK,
Second Third-Party Defendants.

Index No. 304208/09

DECISION/ORDER

Present:
HON. ELIZABETH A. TAYLOR

Index No. 83755/10

Index No. 84082/13

FLINTLOCK CONSTRUCTION SERVICES, LLC and
BASS ASSOCIATES, LLC,

Index No. 83692/15

Third Third-Party Plaintiffs,

-against-

FLAG ART PROPERTY, LLC,

Third Third-Party Defendant.

The following papers numbered 1 to ____ read on this motion, _____

No	On Calendar of	PAPERS NUMBERED
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1-2
	Answering Affidavit and Exhibits-----	3-4, 5-6
	Replying Affidavit and Exhibits-----	7
	Affidavit-----	
	Pleadings -- Exhibit-----	
	Stipulation -- Referee's Report --Minutes-----	
	Filed papers-----	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Motion pursuant to CPLR 1010, for an order dismissing the third third-party complaint, or alternatively, pursuant to CPLR 603, for an order severing the third third-party complaint from the main action, is denied.

Plaintiff Jorge Lois commenced this action for personal injuries he alleges to have suffered on July 27, 2007, as a result of an accident on a construction site. Defendants/third-party plaintiffs/second third-party plaintiffs/third third-party plaintiffs, Flintlock Construction Services (Flintlock) and Bass Associates, LLC (Bass), commenced the second third-party and third third-party actions alleging, among other things, that at the time of the accident, Flag Art Property, LLC (Flag) was in control of the subject premises and was performing renovations. Third third-party defendant Flag moves to dismiss the third third-party action, alleging that Flintlock and Bass

significantly delayed the commencement of this action. Alternatively, Flag seeks an order severing the third third-party action from the main action, alleging that it will be prejudiced as it has not had the opportunity to conduct discovery or preserve evidence relating to the injury.

It is well settled that a third-party action will be dismissed or severed where it is established that either: 1) third-party plaintiff "knowingly and deliberately delayed the commencement of the third-party action;" or 2) the third-party action will cause a considerable delay that will prejudice a substantial right of a party (see CPLR 603, 1010, *Skolnick v Max Connor, LLC*, 89 AD3d 443, [1st Dept 2011]; *Klein v City of Long Beach*, 154 AD2d 346, 347 [2d Dept 1989]). However, even where there is "considerable delay," severance of an action will be denied where "questions of law and fact are inextricably interwoven," and movant fails to demonstrate that an additional brief delay to permit discovery will cause substantial prejudice to a party to the action (see *Fries v Sid Tool Co.*, 90 AD2d 512, 512 [2d Dept 1982] [court denied motion to sever although third-party plaintiff, without justification, waited some 24 months after issue was joined, and at least seven months after the service of the certificate of readiness, before commencing the third-party action]).

Here, plaintiff's action was commenced on May 9, 2009. The note of issue and certificate of readiness was filed on November 20, 2013. Flintlock and Bass commenced the third third-party action on January 8, 2015, approximately 13 months after the note of issue and the certificate of readiness were filed. Flag argues that Flintlock and Bass were aware of the potential claim since May 8, 2012, when plaintiff

stated during his deposition that the accident occurred on the eighth or ninth floor of the subject premises. However, it is unclear whether this statement alone, could have made Flintlock and Bass aware of the potential claim against Flag. It appears that throughout discovery, there were issues raised relating to the ownership interest of the subject premises (see *Calcanes v City of New York*, 154 AD2d 327 [2d Dept 1989][court excused delay attributed to difficulties inherent in identifying individual material suppliers in a large and complex construction project]; *Rago v Nationwide Ins. Co.*, 110 AD2d 831 [2d Dept 1985][court excused delay due to difficulties inherent in identifying various ownership issues involving the shopping mall]).

Additionally, Justice Friedlander's order dated December 4, 2014, 12 months after the filing of the note of issue, which indicates that deeds were recorded transferring title of the eighth and ninth floors to Flag and HME Holdings of New York, LLC (HME), does not establish Flintlock and Bass' knowledge of a potential claim against Flag. It is noted that on November 21, 2013, one day after the note of issue was filed, Flintlock and Bass commenced a second third-party action against Flag and HME. HME answered the complaint. Flintlock and Bass attempted to serve Flag by delivering the summons and complaint to the Secretary of State; however, they failed to complete service by mailing the summons and complaint to Flag. Thereafter, Flintlock and Bass commenced the third third-party action against Flag on January 8, 2015.

Based upon the record before this court, Flag has failed to demonstrate that Flintlock and Bass "knowingly and deliberately delayed the commencement of the third

third-party action," or that the third third-party action will cause a considerable delay that will prejudice a substantial right of Flag.

Moreover, while there was a delay in commencing the third third-party action against Flag, questions of law and fact in the actions are inextricably interwoven as there are issues involving the ownership or control of the subject premises by HME and Flag. Additionally, Flag merely makes conclusory assertions of prejudice, which are insufficient to establish that a brief delay to permit discovery will cause it substantial prejudice (see *DeLeon v 650 West 172nd Street Assoc.*, 44 AD3d 305 [1st Dept 2007]). It is noted that the action has not been placed on the trial calendar and there is a motion for preclusion returnable on September 11, 2015.

Based upon the foregoing, Flag's application for an order dismissing or alternatively, severing the third third-party action from the main action, is denied.

Within 20 days of the date of this order, Flag shall file and serve an answer. Any alleged prejudice to Flag shall be cured by expeditious discovery.

Renewal of this application may be made at the discretion of the Justice presiding when this case reaches the Special Trial Part.

The foregoing shall constitute the decision and order of this court.

Dated: SEP 10 2015



A.J.S.C.