

<b>Alessio v Amsterdam 78 LLC</b>
2016 NY Slip Op 31121(U)
May 4, 2016
Supreme Court, Bronx County
Docket Number: 302288/09
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX

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**Francesco Alessio ,**

*Plaintiff*

*Decision and Order*

Index No. 302288/09

-against-  
**Amsterdam 78 LLC, Marson Contracting Co. Inc.,  
Certified Interiors , Inc.,**

*Defendants*

-----x  
**Amsterdam 78, LLC, and Marson Contracting Co. Inc.,**

*Second Third-Party Plaintiffs*

Second Third-Party  
Index No. 84064/10

-against-  
**Certified Interiors, Inc.**

*Second Third-Party Defendant*

-----x  
**Amsterdam 78, LLC, and Marson Contracting Co. Inc.,**

*Fifth Third-Party Plaintiff*

Fifth Third-Party  
Index No. 84188-2012

-against-  
**Parkview Plumbing , Inc.,**

*Fifth Third-Party Defendant*

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The following papers numbered 1-6 read on this motion to renew and cross-motion for post-note of issue discovery submitted after oral argument May 2, 2016

Notice of Motion - Affirmation , Exhibits A-C	1
Affirmation in Opposition/Partial Opposition	2,3
Affirmation in Opp/Cross-Motion, and Reply	4
Notice of Cross-Motion , Affirmation, Exhibit A	5
Affirmation in Support - Amsterdam 78/Marson	6

Upon the foregoing papers, and after oral argument, the motion of fifth third-party defendant Parkview Plumbing, Inc. (Parkview) for leave to renew that part of this court's prior decision and order denying its motion for order severing the fifth third-party action, and the cross-motion of defendant Certified Interiors, Inc., for an order allowing for post-note discovery, and compelling such discovery are decided as set forth below.

Facts and Procedural History

Plaintiff seeks damages for injuries allegedly sustained when he stepped into an uncovered hole in the cement floor of a residential building under construction located at 230 West 78<sup>th</sup> Street, New York, New York. At the time of the accident, plaintiff was employed by non-party Genetech Building Systems ("Genetech"), and engaged in installing windows and glass in the newly constructed condominium units.

Plaintiff commenced this action in March 2009, as against the owner and general contractor alleging that his injuries were occasioned by causative violations of Labor Law §§ 200, 240(1) and 241(6), as well as by common law negligence. Defendants Amsterdam 78, LLC, ("Amsterdam 78") and Marson Contractors, ("Marson") the respective owner and general contractor, commenced separate third-party actions against subcontractors Certified Interiors, Inc. (Certified Interiors), and Parkview Plumbing Inc. (Parkview).

[ Third-party complaints against six other subcontractors were dismissed upon their respective motions for summary judgment.]

Motion/Cross-Motion

Parkview seeks leave to renew its motion to sever Amsterdam 78/Marson's third-party claim against it on the grounds that since the court denied its motion<sup>1</sup>, plaintiff has filed the Note of Issue, and this has placed inordinate time constraints for completion of outstanding discovery prejudicing the subcontractor, who was impleaded into this action more than three years after its commencement. Alternatively, Parkview requests that the court strike the Note of Issue and remove the action from the trial calendar so that Parkview can engage in expedited discovery.

Amsterdam 78/Marson oppose the motion on the grounds that there is neither a basis for renewal, nor support for the contention that Parkview has been prejudiced by undue delay as Marson has provided the movant with substantial discovery including transcripts.

Plaintiff submits an affirmation supporting the motion to the extent it seeks to sever the third-party action, and opposing the alternative application seeking to strike the Note of Issue. Plaintiff notes that he also sought an order of severance by order to show cause that was denied. Plaintiff opposes granting the alternative relief requested in light of the extensive history of this litigation.

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<sup>1</sup> Parkview filed a Notice of Appeal, however, it is unclear as to whether the appeal has been perfected.

Certified Interiors cross-moves for leave to conduct post-note discovery and for an order compelling Parkview to provide outstanding discovery demands and submit to an examination before trial by a date certain, and for an order estopping Parkview from demanding any further documentary evidence from any party, because Parkview appeared by counsel at depositions, and was afforded a full opportunity to examine the witnesses, and declined to do so.

Amsterdam 78/Marson submit an affirmation in support of the cross-motion.

In opposition to the issues raised in support of the cross-motion, and in reply to the opposition to its motion, Parkview contends that while the parties were accommodating in allowing Parkview to be present at depositions, the movant was not obligated to ask questions of the witnesses, nor absent a court order, required to conduct any post-note discovery.

#### *Discussions and Conclusions*

Upon consideration of the papers on submission, and the oral argument thereon, and the protracted procedural history of this action, and the prior determinations of this court, which has served in large measure to simplify the issues with respect to liability by clarifying the trade purpose for the floor depression into which plaintiff fell, and the stated preference of both the movant and the cross-movant to expedite discovery, it is the finding of this court that the interests of the parties would best be served by allowing for

expedited post-note discovery, while permitting the case to remain on the trial calendar in the event the pending mediation does not culminate in a settlement of the case.

Upon consideration of the undisputed fact that that the movant has been provided with extensive discovery here, including the depositions of now non-party subcontractors concerning the detailed day-to-day operation of the various trades involved in the construction, as well as their specific activities, if any, on the 16<sup>th</sup> floor of the building site at the time immediately before the accident, and plaintiff's depositions, and that of the defendants/third part plaintiffs, and of the only remaining subcontractor, and in light of the movant's tactical decision not to avail itself of the opportunity to fully participate in depositions for which it was noticed, and at which it appeared, the court finds that the filing of the Note of Issue would not change this court's determination that severance would be inappropriate in light of the substantial evidence that the depression into which plaintiff fell was fashioned in connection with the plumbing work to be performed by Parkview pursuant to its Trade Agreement with the general contractor dated December 4, 2006 [Exhibit A to Motion].

It is the further finding of this court that the cross-motion should be granted as the extensive history of the litigation presents unusual or unanticipated circumstances so as to warrant additional discovery under 22 NYCRR § 202.21 (d), and in accordance

with Parkview's stated preference, and in the interest of avoiding even further delay, the discovery is directed to proceed in an expedited fashion, while the time for Parkview to over for dispositive relief extended. The court will render a decision /order within thirty (30) days after the final submission of such motion.

Accordingly, it is

ORDERED that the motion of the Fifth Third-Party defendant Parkview Plumbing for renewal be and hereby is denied, and it is further

ORDERED that the cross-motion of the Second Third-Party defendant Certified Interiors ,Inc., be and hereby is granted to the extent of allowing for post-note discovery and it is further

ORDERED that within sixty (60) days hereof, all outstanding discovery in connection with the Fifth Third-Party Action be completed, and it is further

ORDERED in connection thereto , that within thirty (30 ) days hereof, the Fifth Third-Party defendant PARKVIEW PLUMBING , INC., produce any and all records in response to any outstanding discovery demands from the third-party plaintiffs and the remaining third-party defendant, and it is further

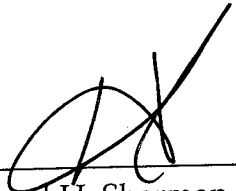
ORDERED that within sixty (60 ) days hereof, PARKVIEW PLUMBING , INC., appear for deposition by a person with first-hand knowledge of the subject construction

project and the work performed by Parkview in connection with the 12/04/06 contract with Marson Contracting Co., Inc., appear for examination before trial , and it is further

ORDERED that the time for the Fifth Third-Party Defendant PARKVIEW PLUMBING , INC. to move for summary judgment be and hereby is extended to ninety days hereof.

This shall constitute the decision and order of this court.

Dated: May 4, 2016

  
Howard H. Sherman