

Jones v New York City Health and Hosps. Corp.

2017 NY Slip Op 31929(U)

August 7, 2017

Supreme Court, Bronx County

Docket Number: 21064/2014

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

-----X
CORNELIUS JONES and JACKLYN JONES,

Plaintiffs,

- against -

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, THE CITY OF NEW YORK and
STALCO CONSTRUCTION, INC.,

Defendants.
-----X

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, THE CITY OF NEW YORK and
STALCO CONSTRUCTION, INC.,

Third-Party Plaintiffs,

- against -

ADVANCED CONTRACTING SOLUTIONS,

Third-Party Defendant.
-----X

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, THE CITY OF NEW YORK and
STALCO CONSTRUCTION, INC.,

Second Third-Party Plaintiffs,

- against -

JEMCO ELECTRICAL CONTRACTORS, INC.,
RICHARDS PLUMBING AND HEATING CO., INC.,
HUNTER ROBERTS CONSTRUCTION GROUP,
L.L.C. and KAZANECKI CONSTRUCTION CORP.,

Second Third-Party Defendants.
-----X

PRESENT: Hon. Lucindo Suarez

Upon the following papers:

Motion Sequence #9: plaintiffs' notice of motion dated November 23, 2016 and the
affirmation and exhibits submitted in support thereof; defendants' and second third-party
plaintiffs' affirmation in opposition dated December 9, 2016 and the exhibits submitted

DECISION AND ORDER

Index No. 21064/2014

Third-Party Index No.
43905/2014

Second Third-Party Index No.
83947/2016

therewith; plaintiffs' affirmation in reply dated December 14, 2016 and the affirmation and exhibit submitted therewith; second third-party defendant Jemco Electrical Contractors, Inc.'s affirmation in support dated December 15, 2016 and the exhibits submitted therewith; second third-party defendant Jemco Electrical Contractors, Inc.'s notice of cross-motion dated December 22, 2016 and the affirmation and exhibits submitted in support thereof; plaintiffs' affirmation in partial opposition dated January 6, 2017 and the exhibits submitted therewith; defendants' and second third-party plaintiffs' affirmation in opposition dated January 9, 2017; second third-party defendant Hunter Roberts Construction Group, L.L.C.'s notice of cross-motion dated April 27, 2017 and the affirmation, exhibits and memorandum of law submitted in support thereof; defendants' and third-party plaintiffs' affirmation in opposition dated June 20, 2017 and the exhibits submitted therewith; second third-party defendant Hunter Roberts Construction Group, L.L.C.'s affirmation in reply dated June 21, 2017 and the exhibits submitted therewith; second third-party defendant Hunter Roberts Construction Group, L.L.C.'s affirmation in reply dated June 28, 2017 not being considered as improper;

Motion Sequence #10: the order to show cause signed January 11, 2017 and the affirmation and exhibits submitted in support thereof; defendants' and second third-party plaintiffs' affirmation in opposition dated January 23, 2017 and the exhibits submitted therewith; second third-party defendant Hunter Roberts Construction Group, L.L.C.'s affirmation in reply dated February 14, 2017 and the exhibits submitted therewith;

Motion Sequence #11: the order to show cause signed February 22, 2017 and the affirmation and exhibits submitted in support thereof; defendants' and second third-party plaintiffs' affirmation in opposition dated February 20, 2017 and the exhibits submitted therewith;

Motion Sequence #12: the order to show cause signed April 10, 2017 and the affirmation and exhibits submitted in support thereof; there being no opposition to the application;

Motion Sequence #13: the order to show cause signed May 11, 2017 and the affirmation and exhibits submitted in support thereof; defendants' and second third-party plaintiffs' affirmation in opposition dated May 23, 2017 and the exhibits submitted therewith; second third-party defendant Kazanecki Construction Corp.'s affirmation in reply dated June 21, 2017;

and upon the aforesaid motions having been referred to the undersigned by the Hon. Douglas E. McKeon, J.S.C.; and due deliberation; the court finds:

Motion Sequences 9-13 are consolidated for decision herein, as they involve common questions of law and fact. The issues in these consolidated motions to sever or dismiss the third-party complaint are defendants' diligence, or lack thereof, in commencing the third-party action and the resultant prejudice to the other parties.

In this Labor Law action, defendants and third-party plaintiffs New York City Health and Hospitals Corporation ("HHC") and City of New York ("CNY") are alleged to be the owners of a construction site. Defendant and third-party plaintiff Stalco Construction, Inc. ("Stalco") was the construction contractor. Defendants previously moved to vacate plaintiffs' note of issue, filed August 3, 2016, because of outstanding damages-related discovery owed by plaintiffs and to extend their time to commence third-party actions. On October 4, 2016, the court (Hon. Douglas E. McKeon, J.S.C.) granted the motion to the extent of directing plaintiff's production of various discovery and permitting defendants forty-five days (i.e. to November 18, 2016) to implead third parties. Defendants filed the third-party summons and complaint on November 4, 2016. The only filed affidavit of service of the third-party summons and complaint indicates service upon one of the third-party defendants on November 17, 2016. The third-party complaint alleges that HHC

entered into direct contracts with third-party defendants Jemco Electrical Contractors, Inc. (“Jemco”), Richards Plumbing and Heating Co., Inc. (“Richards”) and Hunter Roberts Construction Group, L.L.C. (“Hunter”) and that Stalco entered into a subcontract with third-party defendant Kazanecki Construction Corp. (“Kazanecki”). It asserts causes of action for contractual and common-law indemnity and contribution and breach of contract for failure to procure insurance.

Plaintiff and all third-party defendants now move to dismiss or sever the third-party action or to permit discovery to proceed while the action remains on the trial calendar. Defendants object to plaintiff’s motion as untimely; however, inasmuch as defendants were not prevented from opposing the motion substantively and vigorously, the motion is considered.

Because plaintiffs were previously granted summary judgment on the Labor Law § 240(1) claim, they are entitled to a damages-only trial. They claim they would be prejudiced by the probability of juror confusion arising from the introduction of liability issues at trial if the third-party action were tried simultaneously. They also argue that defendants delayed commencement of the third-party action unreasonably and without explanation, which prejudices plaintiffs by delaying resolution of the issue of damages. The third-party defendants argue similarly in their motions. They also argue that, given the limited discovery performed in the main action, they would be prejudiced by being forced to participate in expedited discovery in the absence of severance. They further argue that the main action and third-party action do not share common issues. For example, Jemco counter-claimed against third-party plaintiffs for contribution and indemnity and cross-claimed against the other third-party defendants, making all third parties’ negligence an issue, whereas defendants’/third-party plaintiffs’ liability – or any party’s negligence - is not an issue in the main action.

Plaintiffs interposed no written opposition to an extension of defendants' time to implead at the time of defendants' motion to vacate the note of issue. Plaintiffs have not sought renewal or reargument of Justice McKeon's order, and to the extent the present motion could be deemed such an attempt, plaintiffs do not argue that Justice McKeon's order was erroneous in fact or law, nor do plaintiffs submit any explanation for failing to oppose defendants' motion. Defendants argue that the arguments offered by plaintiffs now were made at oral argument of the prior motion and obviously, given Justice McKeon's order, were deemed insufficient. There is no record of such proceedings.

Defendants argue that Judge McKeon's order is "law of the case." That doctrine, however, applies exclusively to questions of law and has no application to discretionary case management decisions. *See Allstate Ins. Co. v. Buziashvili*, 71 A.D.3d 571, 897 N.Y.S.2d 88 (1st Dep't 2010). Furthermore, even if plaintiffs are collaterally estopped from relitigating joinder of the third-party claims, third-party defendants are not. *See Allied Chemical v. Niagara Mohawk Power Corp.*, 72 N.Y.2d 271, 276, 528 N.E.2d 153, 155, 532 N.Y.S.2d 230, 232 (1988), *cert. denied*, 488 U.S. 1005, 109 S. Ct. 785 (1989).

It is also worth noting that, in defendants' motion to strike the note of issue, after over 13 ½ pages of argument as to why the note of issue should be stricken solely because of damages-related discovery remaining outstanding from plaintiffs, defendants' argument regarding third-party practice was contained, in its entirety, in one sentence in the paragraph labeled "Conclusion:" "If the court does not vacate the note of issue, defendants request that this court enter an order staying the trial of this matter until after the completion of discovery as outlined above, extending their time to implead third-parties [sic] and commence third-party actions until one hundred twenty (120) days after the completion of all discovery."

All of the discovery that defendants sought was damages-related and would have had no bearing on defendants' ability to implead. There is simply nothing in the record to indicate that the court's attention was directed to, nor that it decided, any issue other than defendants' right, in the abstract, to pursue third-party practice. There is no basis to conclude that the parties are estopped from making the present motions. Accordingly, defendants' claim that plaintiff should be sanctioned, even disregarding defendants' failure to cross-move for such relief, is meritless.

There is no argument that the third-party action was timely commenced with respect to Justice McKeon's post-note of issue order. The parties, however, cite defendants' inexplicable failure to commence an action against their own direct contractors until over two and half years after commencement of the action and nearly four months after the note of issue was filed, when defendants were able to commence a third-party action against plaintiff's employer fairly promptly. Even after the course of five motions and two cross-motions regarding this issue, defendants have still provided no explanation for their failure to name and pursue their own contractors sooner. While the court may agree here that it would be unfair to dismiss outright a third-party action that the court expressly permitted defendants to commence, it is not known if defendants made known to the court that they intended to implead their own contractors, whose identities and involvement they would have been aware of at all times. Nevertheless, it must be noted that while Justice McKeon permitted defendants to commence an impleader action, he simultaneously permitted the action to remain on the trial calendar.

Defendants argue that plaintiffs will not be prejudiced by any delay because the court can order expedited discovery or stay the main action to permit third-party discovery. Discovery, however, is presumed to be voluminous, complex and time-consuming, particularly given the truncated discovery conducted in the main action. Defendants also argue that plaintiff will not be

prejudiced by any delay because, given the current trial backlog, there is no guarantee that the case would be called for trial before third-party discovery was completed. They further argue that the main and third-party actions involve common factual and legal issues; however, the only common issue they identify is the amount of plaintiff's damages, without explaining how that single issue is identical in each action and without adequately demonstrating how the commonality of that single issue should permit joinder of multiple liability claims – including that of the defendants - which are simply not at issue in the main action. The cases cited by defendants – *Garcia v. City of New York*, 290 A.D.2d 379, 736 N.Y.S.2d 592 (1st Dep't 2002); *Vasquez v. G.A.P.L.W. Realty*, 254 A.D.2d 232, 679 N.Y.S.2d 140 (1st Dep't 1998); and *Huttick v. Biograph Realty Corp.*, 37 A.D.2d 597, 322 N.Y.S.2d 827 (2d Dep't 1971) – are not instructive, as none of those decisions addressed the untimeliness of the third-party claims and focused on the commonality of issues.

Defendants argue that a jury should hear all the evidence in a tort case involving multiple tortfeasors. However, the main action is not a tort case with multiple tortfeasors. The defendants have all been deemed liable solely by virtue of statute without regard to any party's actual negligence or relative fault. For this reason, there is also no risk of inconsistent verdicts in the event of severance.

Pursuant to CPLR 1010, the court may make any order with respect to the third-party action “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.” “Although it is within a trial court's discretion to grant a severance, this discretion should be exercised sparingly. Where complex issues are intertwined, albeit in technically different actions, it would

be better not to fragment trials, but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time. Fragmentation increases litigation and places an unnecessary burden on court facilities by requiring two separate trials instead of one.” *Shanley v. Callanan Industries, Inc.*, 54 N.Y.2d 52, 57, 429 N.E.2d 104, 107, 444 N.Y.S.2d 585, 588 (1981).

Third-party practice allows “the avoidance of multiplicity and circuitry of action, and the determination of the primary liability as well as the ultimate liability in one proceeding, whenever convenient.” *George Cohen Agency, Inc. v. Donald S. Perlman Agency, Inc.*, 51 N.Y.2d 358, 365, 414 N.E.2d 689, 693, 434 N.Y.S.2d 189, 193 (1980). Where the third-party action involves the same factual issues, to permit its severance “would cause an unnecessary drain upon judicial resources and create a risk of inconsistent results.” *Id.* at 366, 414 N.E.2d at 693, 434 N.Y.S.2d at 194.

Third-party defendants are not incorrect that insurance issues should not go before the same jury deciding the liability claims. *See Cruz v. Taino Constr. Corp.*, 38 A.D.3d 391, 830 N.Y.S.2d 902 (1st Dep’t 2007). The question is whether, under these circumstances and with the additional claims interposed by the various third-party plaintiffs, the competing interests of convenience, prejudice, justness and delay are best served by severance. *See* CPLR 603, 1010. The mere mention of insurance does not automatically mean severance, when the issues of insurance are inextricably interwoven with more substantive issues. *See e.g. Baseball Office of the Comm’r v. Marsh & McLennan, Inc.*, 295 A.D.2d 73, 742 N.Y.S.2d 40 (1st Dep’t 2002). The possibility of inconsistent verdicts may in some cases outweigh the prejudice to the carrier and warrant a unified trial. *See e.g. Pierre-Louis v. DeLonghi Am., Inc.*, 66 A.D.3d 855, 887 N.Y.S.2d 632 (2d Dep’t 2009).

Liability for personal injuries and the failure to procure liability insurance do not involve common questions of law or fact. *See Golfo v. Loevner*, 7 A.D.3d 568, 777 N.Y.S.2d 159 (2d Dep't 2004); *see also Paramount Ins. Co. v. Rosedale Gardens, Inc.*, 293 A.D.2d 235, 743 N.Y.S.2d 59 (1st Dep't 2002); *People v. Rivera*, 187 A.D.2d 379, 590 N.Y.S.2d 99, 590 N.Y.S.2d 197 (1st Dep't 1992), *lv denied*, 81 N.Y.2d 793, 610 N.E.2d 413, 594 N.Y.S.2d 740 (1993). While the issues regarding procurement of insurance and to whom indemnity based upon such insurance is to be extended may have common facets, they have no relation to the main issues of liability, from which they would detract and potentially prejudice a jury. *See Smith v. McClier Corp.*, 38 A.D.3d 322, 831 N.Y.S.2d 413 (1st Dep't 2007); *Transamerica Ins. Co. v. Tolis Inn, Inc.*, 129 A.D.2d 512, 514 N.Y.S.2d 351 (1st Dep't 1987); *cf. Bridger v. Donaldson*, 36 A.D.2d 915, 321 N.Y.S.2d 243, 321 N.Y.S.2d 852 (1st Dep't 1971), *affirmed*, 29 N.Y.2d 769, 276 N.E.2d 626, 326 N.Y.S.2d 565 (1971). Severing causes of action predicated upon insurance coverage serves to focus the jury and minimize the risk of such prejudice. *See Ventricelli v. Kinney System Rent A Car, Inc.*, 51 A.D.2d 904, 380 N.Y.S.2d 668 (1st Dep't 1976).

Causes of action for the breach of an agreement to procure insurance may be severed on the court's own initiative to avoid this prejudice. *See e.g. Almodovar v. Gannon Contr., LLC*, 20 Misc.3d 1143(A), 872 N.Y.S.2d 689 (Sup Ct N.Y. County 2008). Given the court's discretion to order a separate trial of third-party claims, taking into account delay of the main action and prejudice to the substantial rights of the parties, *see* CPLR 1010, severance ensures that insurance issues are not brought before the jury deciding the liability issues, collects the related insurance issues together for disposal prior to trial of the main action and all related liability issues and addresses the concerns raised herein.

Defendants have submitted no excuse or explanation to justify their delay in commencing this action when surely they have known all along the identities of the third-party defendants and the salient facts underlying their third-party claims. *Cf. Bevilacqua v. Bloomberg, L.P.*, 70 A.D.3d 411, 895 N.Y.S.2d 347 (1st Dep't 2010). Where defendants "knowingly and deliberately delayed the commencement of the third-party action" until months after the note of issue was filed and failed to diligently pursue their claims against the third-party defendants, the third-party action was not merely severed but dismissed outright. *See Skolnick v. Max Connor, LLC*, 89 A.D.3d 443, 444, 932 N.Y.S.2d 453, 453 (1st Dep't 2011).

Delay in commencing the third-party action, by itself, does not necessarily warrant severance. *See e.g. Nielsen v. New York State Dormitory Auth.*, 84 A.D.3d 519, 923 N.Y.S.2d 66 (1st Dep't 2011); *Escourse v. City of New York*, 27 A.D.3d 319, 812 N.Y.S.2d 478 (1st Dep't 2006). However, the desirability of trying related actions together will not necessarily prevent severance in the appropriate circumstances. *See Pena v. City of New York*, 222 A.D.2d 233, 635 N.Y.S.2d 10 (1st Dep't 1995).

This is not a case where the defendants would be deprived of a complete trial of their liability in its complete context. *Cf. Rothstein v. Milleridge Inn, Inc.*, 251 A.D.2d 154, 674 N.Y.S.2d 346 (1st Dep't 1998); *Karama Supermarket v. Frawley Plaza Assocs.*, 200 A.D.2d 355, 606 N.Y.S.2d 177 (1st Dep't 1994). Nor does a determination of liability in both actions require exploration of the same facts. *Cf. Vitiello v. Mayrich Constr. Corp.*, 255 A.D.2d 182, 184, 680 N.Y.S.2d 482, 485 (1st Dep't 1998); *Garcia, supra* (third-party action for indemnity or contribution "clearly" should be tried with main action if possible). "In a case where the main action was trial-ready but still-outstanding discovery on the third-party action would unreasonably delay bringing the plaintiff's case to trial, a joint trial of the main and the third-

party actions could prejudice the plaintiff.” *Rothstein*, 251 A.D.2d at 155, 674 N.Y.S.2d at 348.

The prejudice caused to the plaintiff by undue delay in commencing a third-party action may be countered by an appropriate court order providing sufficient time for disclosure. *See DeLeon v. 650 W. 172nd St. Assoc.*, 44 A.D.3d 305, 841 N.Y.S.2d 867 (1st Dep’t 2007). However, to delay resolution of plaintiffs’ action seems to reward late-acting parties while penalizing diligent ones. *See Karama Supermarket, supra*. Furthermore, given the number of parties involved and the intricacy of the liability issues considering the addition of the third-party entities, the court cannot be certain that “expedited discovery” is even realistic in this matter, nor that any delay caused by accommodating discovery in the third-party action would be “brief,” *see e.g. Klein v. Long Beach*, 154 A.D.2d 346, 545 N.Y.S.2d 825 (2d Dep’t 1989), particularly given that any momentum on that front will most likely be materially hampered by the winter holidays, *see Byers v. Baxter*, 69 A.D.2d 343, 419 N.Y.S.2d 497 (1st Dep’t 1979). Rather, it appears that the delay of the main action to accommodate discovery in the third-party actions would be “inordinate.” *Attie v. City of New York*, 221 A.D.2d 274, 274, 634 N.Y.S.2d 88, 89 (1st Dep’t 1995). While plaintiffs have not explicitly stated that the action is “trial-ready,” defendants do not claim that any discovery or proceeding in the main action remains outstanding.

Given the posture of this action, it is not the case that “the claims in the main action and third-party action are so intertwined that one trial is both appropriate and judicially efficient,” *Erbach Fin. Corp. v. Royal Bank of Can.*, 203 A.D.2d 80, 80, 610 N.Y.S.2d 20, 20-21 (1st Dep’t 1994), nor are the third-party claims “highly relevant to and interrelated with the economical resolution of the primary action,” *Gross v. De Meglio*, 143 A.D.2d 609, 610, 533 N.Y.S.2d 386, 387 (1st Dep’t 1988). If the issues of liability and damages are intertwined, it is only in the context of the third-party action, and defendants have not set forth a valid reason why damages

and liability are intertwined here. *Cf. Smith, supra*.

Where defendants' fault is not at issue in the main action, simultaneous assessment of their culpability in the third-party action invites "comparative review of the claims." *Toscani v. One Bryant Park, LLC*, 139 A.D.3d 644, 644, 31 N.Y.S.2d 863, 864 (1st Dep't 2016). Given plaintiff's grant of summary judgment on the Labor Law § 240(1) claim, severance would avoid undue delay of the determination of damages. *See Imbriale v. Richter & Ratner Contr. Corp.*, 103 A.D.3d 478, 960 N.Y.S.2d 9 (1st Dep't 2013). The court would prefer resolution of this motion that can adequately and simultaneously "accommodate plaintiffs' legitimate interest in having a prompt trial of the main action, third-party defendants' legitimate interest in having an opportunity to conduct disclosure and prepare for trial of the third-party actions, and defendants and third-party plaintiffs', and also the court's, legitimate interest in having a single trial on the intertwined factual and legal issues raised in the main and third-party actions." *Baker v. Wight*, 158 A.D.2d 293, 294, 550 N.Y.S.2d 701, 701-702 (1st Dep't 1990) (citation omitted).

No discovery of any significance has occurred in the third-party action, and depositions, including experts, have not even been scheduled. Where defendants provide no reason for their failure to implead parties, known to them at all times, until years after commencement of the main action and months after the filing of the note of issue, *see Freeland v. New York Communications Ctr. Assocs.*, 193 A.D.2d 511, 598 N.Y.S.2d 454 (1st Dep't 1993), the balance of relative prejudices tips in favor of severance. *See Garcia v. Gesher Realty Corp.*, 280 A.D.2d 440, 721 N.Y.S.2d 343 (1st Dep't 2001); *Miro v. Branford House, Inc.*, 174 A.D.2d 363, 570 N.Y.S.2d 570 (1st Dep't 1991). The substantial prejudice to plaintiffs from the inevitable and significant delay warrants severance of the third-party action. *See 17 Vista Fee Assocs. v. Teachers Ins. & Annuity Ass'n of Am.*, 226 A.D.2d 298, 642 N.Y.S.2d 625 (1st Dep't 1996);

Blechman v. I.J. Peiser's & Sons, Inc., 186 A.D.2d 50, 587 N.Y.S.2d 640 (1st Dep't 1992).

Hunter cross-moves to amend its answer to assert an anti-subrogation defense, and, upon such amendment, for summary judgment dismissing the third-party complaint in its entirety. HHC, CNY and Stalco are correct that the cross-motion impermissibly seeks relief against a non-moving party. *See Mango v. Long Is. Jewish - Hillside Med. Ctr.*, 123 A.D. 2d 843, 507 N.Y.S. 2d 456 (2nd Dep't 1986). However, inasmuch as they were able to respond meaningfully to the cross-motion and do not appear to have been prejudiced by its submission, the cross-motion is considered. *See Keller v. Merchant Capital Portfolios, LLC*, 103 A.D.3d 532, 962 N.Y.S.2d 48 (1st Dep't 2013); *Daramboukas v. Samlidis*, 84 A.D.3d 719, 922 N.Y.S.2d 207 (2d Dep't 2011).

A meritorious amendment, even if sought after the filing of the note of issue, may be permitted in the absence of a claim of prejudice or surprise. *See Lettieri v. Allen*, 59 A.D.3d 202, 873 N.Y.S.2d 39 (1st Dep't 2009); *Byrne v. Fordham University*, 118 A.D.2d 525, 500 N.Y.S.2d 253 (1st Dep't 1986). Despite the laxity of CPLR 3025(b), the court may examine the merit of a proposed amendment in the interest of the conservation of judicial resources, see *Non-Linear Trading Co. v. Braddis Assocs.*, 243 A.D.2d 107, 675 N.Y.S.2d 5 (1st Dep't 1998), and the amendment may be denied in the absence of a demonstration of merit, see *Eighth Ave. Garage Corp. v. H.K.L. Realty Corp.*, 60 A.D.3d 404, 875 N.Y.S.2d 8 (1st Dep't 2009), *lv dismissed*, 12 N.Y.3d 880, 910 N.E.2d 1003, 883 N.Y.S.2d 174 (2009); *American Theatre for the Performing Arts, Inc. v. Consolidated Credit Corp.*, 45 A.D.3d 506, 846 N.Y.S.2d 60 (1st Dep't 2007).

Unless the "alleged insufficiency or lack of merit is clear and free from doubt," the proposed amendment should be permitted. *Miller v. Staples the Off. Superstore E., Inc.*, 52 A.D.3d 309, 313, 860 N.Y.S.2d 51, 55 (1st Dep't 2008). The proponent of the motion need not establish the defense as on a motion for summary judgment; the amendment may be permitted

even where questions as to its precise application remain. *See e.g. Ifajore v. Lebron*, 111 A.D.3d 570, 976 N.Y.S.2d 44 (1st Dep't 2013); *Babcock v. Mann*, 167 A.D.2d 572, 563 N.Y.S.2d 204 (3d Dep't 1990).

“Pursuant to the common-law antisubrogation rule, an insurer ‘has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered.’” *New York City Dept. of Transp. v. Petric & Assoc., Inc.*, 132 A.D.3d 614, 614, 19 N.Y.S.3d 48, 49 (1st Dep't 2015). For purposes of application of the rule, it is generally immaterial whether the claim is brought by or against the insured or the insurer, *see id.*, and therefore may apply in the context of claims between contractors, *see 50 Gramercy Park N. Owners Corp. v. GPH Partners, LLC*, 2017 NY Slip Op 31201(U) (Sup Ct N.Y. County June 5, 2017).

Here, Hunter claims that Stalco's contract with HHC required it to procure insurance naming the construction manager as an additional insured together with HHC and CNY. Although the bid document appended to the motion identifies Hunter as “technical engineers/designers,” HHC's opposition to plaintiff's motion to vacate the note of issue states that Hunter was the construction manager. Thus, as the proposed amendment is not patently devoid of potential merit, it may be permitted.

As to the cross-motion for summary judgment, it is not duplicative of Hunter's motion to dismiss or sever the third-party action, which is premised upon the third-party plaintiffs' delay in commencing it after plaintiff filed the note of issue. As differing standards of review govern the two motions, they may both be entertained. *See RXR WWP Owner LLC v. WWP Sponsor, LLC*, 145 A.D.3d 494, 43 N.Y.S.3d 298 (1st Dep't 2016).

Defendants also argue that the cross-motion was not made within one hundred twenty

days after the filing of the note of issue and Hunter did not seek leave to make it or demonstrate good cause for its untimeliness. *See* CPLR 3212(a). The court is well aware that by its simultaneously permitting third-party practice and allowing the note of issue to stand, the third-party defendants could not have made timely summary judgment motions pursuant to CPLR 3212. However, an existing note of issue is effective as against parties added after its filing. *See* CPLR 3402(b); *Hope v. Fortunato*, 20 Misc.3d 1117(A), 2008 NY Slip Op 51384(U) (Sup Ct Kings County July 11, 2008). Even those late-added parties will not be excused from demonstrating good cause upon becoming aware of a constraint on their time to move for summary judgment. *See Pope v. Safety and Quality Plus, Inc.*, 2009 NY Slip Op 30132(U) (Sup Ct Queens County Jan. 16, 2009), *lv dismissed*, 74 A.D.3d 1040, 903 N.Y.S.2d 124 (2d Dep't 2010). Hunter answered on December 20, 2016 and amended its answer on January 5, 2017. Although it does not appear that third-party plaintiffs served third-party defendants with a copy of the note of issue, *see* CPLR 3402(b), Hunter did not make this cross-motion until May 1, 2017, nearly five months after its appearance. Even considering the cross-motion on its merits, however, Hunter is not entitled to summary judgment.

The Stalco contract required its insurance policy to name the construction manager as an additional insured only “where applicable/required,” and Hunter did not demonstrate that naming it as an additional insured was “applicable” or “required.” Furthermore, the “Blanket Additional Insured (Contractors)” endorsement of the Travelers Indemnity Company policy appended to the motion requires a contract signed by Stalco, and the motion did not append such proof. Furthermore, the certificate of insurance submitted by Hunter purportedly naming it as an additional insured listed numerous policies all expiring *prior* to the date of plaintiff’s accident. The Travelers policy was not one of the policies listed in the certificate. Thus, Hunter’s proof did

not establish *prima facie* that both it and the third-party plaintiffs were co-insureds. Even if had adduced such proof, the anti-subrogation rule bars only claims exceeding the policy limits, *see New York State Supt. of Ins. v. New York Cent. Mut. Fire Ins. Co.*, 98 A.D.3d 856, 951 N.Y.S.2d 1 (1st Dep't 2012), and does not require outright dismissal of the third-party complaint.

The letters purportedly demonstrating Travelers' concession that Hunter was a co-insured under the Travelers policy were not submitted until Hunter's reply, and were not merely responsive to issues raised by the opposition, *see Ritt v. Lenox Hill Hosp.*, 182 A.D.2d 560, 582 N.Y.S.2d 712 (1st Dep't 1992), as it was Hunter's *prima facie* burden to establish the lack of an issue of fact in the first place, *see Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). Hunter's second untimely sur-reply to its own reply, denominated a "reply," and served without leave of court, is not considered.

As a final matter, given the discontinuance of the third-party action against plaintiff's employer, the court *sua sponte* amends the caption of the main action to excise such claims.

Accordingly, it is

ORDERED, that plaintiff's motion to sever the second third-party action or permit post-note of issue discovery is granted to the extent of severing the second third-party action (Motion Sequence #9); and it is further

ORDERED, that the cross-motion of second third-party defendant Jemco Electrical Contractors, Inc. to sever the second third-party action, vacate the note of issue or stay the trial in the main action is granted to the extent of severing the second third-party action (Motion Sequence #9); and it is further

ORDERED, that the cross-motion of Hunter Roberts Construction Group, L.L.C. to amend its answer to assert an affirmative defense premised upon the anti-subrogation doctrine is

granted (Motion Sequence #9); and it is further

ORDERED, that within thirty (30) days after service of a copy of this order with written notice of its entry, Hunter Roberts Construction Group, L.L.C. shall serve a second amended answer to the third-party complaint in the form as annexed to the cross-moving papers as Exhibit M; and it is further

ORDERED, that the cross-motion of Hunter Roberts Construction Group, L.L.C. for summary judgment is denied (Motion Sequence #9); and it is further

ORDERED, that the motion of second third-party defendant Hunter Roberts Construction Group, L.L.C. to dismiss or sever the second third-party action is granted to the extent of severing the second third-party action (Motion Sequence #10); and it is further

ORDERED, that the motion of second third-party defendant Richards Plumbing and Heating Co., Inc. to dismiss or sever the second third-party action is granted to the extent of severing the second third-party action (Motion Sequence #11); and it is further

ORDERED, that the motion of second third-party defendant Richards Plumbing and Heating Co., Inc. to dismiss or sever the second third-party action is denied as duplicative of motion considered under Motion Sequence #12 (Motion Sequence #12); and it is further

ORDERED, that the motion of second third-party defendant Kazanecki Construction Corp. to dismiss the second third-party action or vacate the note of issue is granted to the extent of severing the second third-party action (Motion Sequence #13); and it is further

ORDERED, that the second third-party action is severed and shall proceed under the index number assigned therein under the same caption and that all papers in the second third-party action shall be filed under such index number; and it is further

ORDERED, that given the discontinuance of the third-party action against plaintiff's

employer, the caption of the main action is amended to reflect such discontinuance and all papers in the main action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
CORNELIUS JONES and JACKLYN JONES,

Plaintiffs,

Index No. 21064/2014

- against -

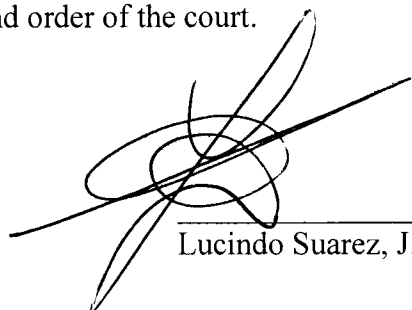
NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, THE CITY OF NEW YORK and
STALCO CONSTRUCTION, INC.,

Defendants.

-----X

This constitutes the decision and order of the court.

Dated: August 7, 2017



Lucindo Suarez, J.S.C.