

Weyrauch v City of New York
2018 NY Slip Op 30279(U)
January 11, 2018
Supreme Court, New York County
Docket Number: 152481/2015
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7**

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ROBERT WEYRAUCH,

Plaintiff,

Index No. 152481/2015

-against-

CITY OF NEW YORK, NEW YORK CITY SCHOOL
CONSTRUCTION AUTHORITY, and E.W. HOWELL
CO., LLC,

Defendants.

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CITY OF NEW YORK, NEW YORK CITY SCHOOL
CONSTRUCTION AUTHORITY, and E.W. HOWELL
CO., LLC,

Third Party Plaintiffs,

Index No. 595225/2016

-against-

METROPOLITAN STEEL INDUSTRIES, INC.,
d/b/a STEELCO, J.M.R. CONCRETE CORP. and
FIVE STAR ELECTRIC CORP.,

Third Party Defendants.

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Gerald Lebovits, J.S.C.:

This personal-injury action brought by plaintiff, who was injured at a construction site, has been stayed since third-party defendant Metropolitan Steel Industries, Inc., d/b/a Steelco (Metropolitan), filed for bankruptcy on August 3, 2016. Plaintiff now moves to sever his personal injury action from the third-party action, on the grounds that he is prejudiced by the lengthy stay and is entitled to proceed with his personal-injury action.

Factual and Procedural Background

Plaintiff, an iron worker, was allegedly injured when he fell off of a ladder resting on a horizontal rebar protruding from a foundation wall while working at a construction site known as 1 Peck Slip PS 343 in New York, New York. Plaintiff was an employee of nonparty J.C. Steel, Corp., a sub-subcontractor on the construction project. Defendants/third-party plaintiffs, City of New York and New York City School Construction Authority, are alleged to be the owners of the construction site, and defendant/third-party plaintiff, E.W. Howell Co., LLC, was the project's general contractor. The ladder belonged to third-party defendant Five Star Electric Corp. Third-

party defendant J.M.R. Concrete Corp. installed the rebar, and plaintiff's employer, J.C. Steel Corp., was hired by third-party defendant Metropolitan, a subcontractor on the construction project.

On March 13, 2015, plaintiff commenced this personal-injury action against defendants City of New York, New York City School Construction Authority, and E.W. Howell, Co., LLC. On March 21, 2015, defendants commenced a third-party action against third-party defendants Metropolitan, J.M.R. Concrete Corp., and Five Star Electric Corp. Metropolitan filed an answer to the third-party action on June 22, 2016. On August 3, 2016, Metropolitan filed for bankruptcy in the Eastern District of Pennsylvania. As a result, this action has been stayed since August 15, 2016, when Metropolitan informed the court of the bankruptcy filing.

Plaintiff now moves to sever the third-party action from the main personal-injury action, on the ground that severance is appropriate where a third-party action has been stayed by the bankruptcy of a third-party defendant. Plaintiff argues further that defendants are taking advantage of this stay and that they have not taken any action to lift the stay of the third-party action in the bankruptcy proceeding. Plaintiff claims that he is prejudiced by the stay, noting that he is living off borrowed funds.

In opposition, defendants/third-party plaintiffs argue that severance should be denied because the main action and the third-party action involve common issues of fact and law. Defendants/third-party plaintiffs argue that plaintiff's accident occurred while he was improperly attempting to access the site using the ladder resting on the rebar. The rebar then gave way, causing the ladder to slip and plaintiff to fall. Defendants/third-party plaintiffs argue that based on these facts, they are entitled to contractual and common-law indemnification, as well as contribution, from the third-party defendants. Defendants/third-party plaintiffs claim that the matter should be stayed so that they can assert a claim against Metropolitan. Finally, defendants/third party plaintiffs argue that plaintiff himself could have moved in the bankruptcy court to lift the stay.

In reply, plaintiff argues that severance is appropriate to prevent any further prejudice to his case and that defendants/third-party plaintiffs will not be prejudiced because, while Metropolitan will not participate in the litigation, the defendants/third-party plaintiffs have the benefit of CPLR Article 16, which grants a right of contribution.

Discussion

CPLR 603 provides:

"In 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. The court may order the trial of any claim or issue prior to the trial of the others."

It is within the court's discretion to sever a third-party action (*see Rothstein v Milleridge Inn*, 251 AD2d 154, 155 [1st Dept 1998]). It has been generally held that "the balance of the equities lies with plaintiff[] when one defendant has received an automatic stay pursuant to 11 USC § 362 (a) [of the Bankruptcy Code] and codefendants request a stay of the entire action" (*Lottes v Slater*, 114 AD2d 580, 581 [3d Dept 1985]; *accord Rosenbaum v Dane & Murphy*, 189 AD2d 760 [2d Dept 1993]). Courts also routinely hold that the potential inconvenience to a defendant is outweighed by the inequity of requiring a plaintiff to await the conclusion of a bankruptcy proceeding before obtaining any remedy (*see Moy v St. Vincent's Hosp. & Med. Ctr. of N.Y.*, 92 AD3d 651, 652 [2d Dept 2012]; *Rosenbaum*, 189 AD2d at 761). Moreover, "[a]ppellate courts in this State have repeatedly held 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" (*Golden v Moscowitz*, 194 AD2d 385 [1st Dept 1993], quoting *CenTrust Servs. v Guterma*n, 160 AD2d 416, 418 [1st Dept 1990]; *accord Torre v Fay's Inc.*, 259 AD2d 896, 897-898 [3d Dept 1999] [internal citations omitted] ["(I)t is well settled that the automatic bankruptcy stay does not apply to nonbankrupt defendants and, therefore, this case may proceed against the codefendants. Under these circumstances, where an automatic stay remains in effect and the trial court has indicated that the trial shall proceed, we conclude that severance of the third-party action at this juncture is appropriate"]).

Here, while there are common issues of fact and law between the main action and the third-party action, plaintiff has experienced more than a one-year delay in this matter due to the automatic stay imposed by Metropolitan's bankruptcy filing. Further, although Metropolitan will not be a party to the action upon severance, defendants/third-party plaintiffs retain their right of contribution, which they can exercise, if necessary, upon the resolution of Metropolitan's bankruptcy matter (*see Kharmah v Metropolitan Chiropractic Ctr.*, 288 AD2d 94, 94 [1st Dept 2011] ["(W)hile the bankrupt defendants will not participate in the trial, equity requires that defendants-appellants have the benefit of CPLR article 16 rights, even though there is an automatic stay by virtue of the bankruptcy"]).

Accordingly, it is

ORDERED that the third-party action is severed as to third-party defendant Metropolitan Steel Industries, Inc. d/b/a Steelco, and is continued as to the remaining third-party defendants; and it is further

ORDERED that the proceedings in this action are stayed as to third-party defendant Metropolitan Steel Industries, Inc. d/b/a Steelco, except for an application to vacate or modify said stay; and it is further

ORDERED that any party in the main action and the third-party action 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 Metropolitan Steel Industries, Inc.*, which is pending before the United States Bankruptcy Court for the Eastern District of Pennsylvania, Action No. 16-Civ-15510; and it is further

ORDERED that movant is directed to serve a copy of this order with notice of entry on the County Clerk's Office.

DATED: January 11, 2018



J.S.C.

HON. GERALD LEBOVITS
J.S.C.