

Brigandi v Bong Ju Shim
2018 NY Slip Op 31106(U)
May 29, 2018
Supreme Court, New York County
Docket Number: 161509/14
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 42

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JOHN BRIGANDI

Plaintiff

Index No. 161509/14

v

DECISION AND ORDER

BONG JU SHIM, ANN HWA SHIM, and
 MANHATTAN MANAGEMENT GROUP, LLC

MOT SEQ 002

Defendant.

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BONG JU SHIM, ANN HWA SHIM, and MANHATTAN
 MANAGEMENT GROUP, LLC

Third- Party Plaintiff

v

AGGRESSIVE HEATING d/b/a ROMEO HEATING

Third-Party Defendant.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for personal injuries allegedly sustained by the plaintiff at a building owned by the defendants/ third-party plaintiffs Bong Ju Shim (Bong) and Ann Hwa Shim (Ann), and managed by the defendant/ third-party plaintiff Manhattan Management Group, LLC (collectively, with Bong and Ann, the "defendants"), the defendants move, (1) pursuant to CPLR 3402 and 22 NYCRR 202.21(e) to strike this

action from the trial calendar and vacate the note of issue filed on October 26, 2016, and (2) pursuant to CPLR 2004 and CPLR 3212(a) to extend the defendants' time to file a motion for summary judgment to 120 days following completion of discovery. The plaintiff, John Brigandi, cross-moves, pursuant to CPLR 603 and CPLR 1010, to sever the third-party action from the main action. The third-party defendant, Aggressive Heating d/b/a Romeo Heating, separately cross-moves to (1) stay the trial in this matter until all discovery has been completed, (2) pursuant to CPLR 3402 and 22 NYCRR 202.21(e) to vacate the note of issue, (3) pursuant to CPLR 3124 to compel further discovery, and (4) to extend its time to file dispositive motions, or, in the alternative, (1) pursuant to CPLR 603 and CPLR 1010, to sever the third-party action, (2) to strike the third-party action from the trial calendar, (3) to compel the exchange and completion of all discovery in the third-party action, and (4) to extend its time to file dispositive motions. The defendants' motion is granted in part, the plaintiff's cross-motion is denied, and the third-party defendant's cross-motion is granted in part.

II. BACKGROUND

This action arises out of personal injuries allegedly sustained by the plaintiff on February 23, 2014, at an apartment building owned and managed by the defendants. The plaintiff

asserts that he was severely burned by a sudden burst of hot water while soaking his feet in his bathtub in his apartment. The plaintiff commenced this action on November 19, 2014, the defendants filed their answer on January 15, 2015, and the parties proceeded to discovery.

The most recent status conference order, dated September 29, 2016, recites that document discovery ordered in a prior status conference order, dated June 16, 2016, remained outstanding. For that reason, the court directed the plaintiff to respond to paragraph seven of the defendants' post-deposition demands, and to respond to the defendants' letter regarding lost wages, dated November 12, 2015, each within 20 days. The defendants were directed to serve a bill of particulars as to affirmative defenses and to provide photos from their medical examination within 20 days. The court set the Note of Issue deadline for October 28, 2016, and further noted, "All dates final."

By October 7, 2016, the defendants had commenced a third-party action against Aggressive Heating, d/b/a Romeo Heating, a company that allegedly performed service on the subject boiler at the premises prior to the date of the plaintiff's injury. On October 26, 2016, the plaintiff filed the Note of Issue and Certificate of Readiness, representing that the plaintiff is full compliance with all prior orders, and that there was no outstanding discovery.

The third-party defendant filed an answer to the third-party complaint and served discovery demands on November 9, 2016. The defendants served discovery demands on the third-party defendant on November 15, 2016. Also on November 15, 2016, the defendants filed the instant motion to vacate the Note of Issue, contending that the plaintiff failed to provide any information regarding his lost earnings claim, as ordered by the court, and that significant discovery remained outstanding with regard to the third-party action. The defendants also seek an extension of time to file a motion for summary judgment.

In response to the defendants' motion, the plaintiff submits a letter sent from his counsel to the defendants' counsel on December 27, 2016, advising that the plaintiff makes no claim for lost wages, and that the plaintiff is not presently in possession of any bills and/or receipts regarding special damages. The plaintiff also cross-moves to sever the third-party action from the main action.

The third-party defendant separately cross-moves to stay this action pending the completion of discovery, strike the Note of Issue, compel discovery pursuant to CPLR 3124, and extend its time to file dispositive motions, or, in the alternative, to sever the third-party claim from the main action, strike the action from the trial calendar, compel the exchange and

completion of all discovery in the third-party action, and extend its time to file dispositive motions.

In regard to these motions, the court issued an interim order dated August 9, 2017, requiring the third-party defendant to respond by August 23, 2017, to the defendants' combined discovery demands dated November 15, 2016, and to appear for an EBT on October 3, 2017 at 10:00 am, with "location tbd." The court scheduled a status conference for October 19, 2017. The court's records show that the conference was adjourned without a date.

III. DISCUSSION

A. Vacatur of Note of Issue

The court may vacate a Note of Issue where, as here, it appears that a material fact set forth therein, i.e., the representation that discovery is complete, is incorrect. See 22 NYCRR 202.21(e); Rivers v Birnbaum, 102 AD3d 26 (2nd Dept 2012); Gomes v Valentine Realty LLC, 32 AD3d 699 (1st Dept 2006); Herbert v Sivaco Wire Corp., 1 AD3d 144 (1st Dept 2003). Further, CPLR 3101 provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof."

The defendants have shown that, at the time the Note of Issue and Certificate of Readiness were filed on October 26, 2016, the plaintiff had yet to comply in full with the court's status conference order dated September 29, 2016. Specifically, the defendants note that, as of the date of their motion, the plaintiff had not responded to their letter dated November 12, 2015, inquiring as to the plaintiff's claim for lost wages. Indeed, in opposing the motion, the plaintiff states that he did not respond to the letter until well after he filed the Note of Issue.

Moreover, the third-party defendant was added to this case as of October 7, 2016, and, at the time of the filing of the Note of Issue, had not had an opportunity to complete any discovery. Indeed, no party disputes that there was discovery outstanding as to the third-party defendant as of the date that the Note of Issue was filed.

Since the defendants have demonstrated that there was discovery outstanding at the time the Note of Issue was filed, the motion is granted and the case stricken from the trial calendar. The court notes that the parties have had two pre-trial conferences and have been scheduled for judicial mediation, but this does not alone warrant denial of the motion where the Note of Issue was improperly filed in the first instance.

B. Severance of Third-Party Action

"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." CPLR 603. Further, where, as here, a third-party action is commenced after the main action is placed on the trial calendar, severance is the appropriate remedy if delay in the disposition of the main action would ensue absent a severance, discovery is already complete in the main action, and the plaintiff, which is ready for trial, would be prejudiced if compelled to await the commencement and completion of discovery in the third-party action. See CPLR 603, 1010; Maron v Magnetic Constr. Group Corp., 128 AD3d 426, 427 (1st Dept. 2015); Admiral Indem. Co. v Popular Plumbing & Heating Corp., 127 AD3d 419, 419 (1st Dept. 2015); Whippoorwill Hills Homeowners Assn., Inc. v Toll at Whippoorwill, L.P., 91 AD3d 864, 865 (2nd Dept. 2012).

However, "[s]everance is inappropriate where the claims against the defendants involve common factual and legal issues, and the interests of judicial economy and consistency of verdicts will be served by having a single trial." New York Cent. Mut. Ins. Co. v McGee, 87 AD3d 622, 624 (2nd Dept. 2011). Moreover, "severance is inappropriate absent a showing that a party's substantial rights would otherwise be prejudiced." Rothstein v Milleridge Inn, 251 AD2d 154, 155 (1st Dept. 1998)

While a third-party action was commenced in this case, severance is nonetheless unwarranted. The third-party action was commenced prior to the filing of the Note of Issue and both the third-party action and the main action arise from an identical nucleus of facts. Moreover, more than 18 months have passed since the third-party action was commenced. This is ample time for all outstanding discovery to have been completed. Indeed, the court's interim order dated August 9, 2017, directed the parties to complete that discovery, including a deposition of the third-party defendant on or before October 3, 2017. Additionally, in this order, the court provides an additional month for any outstanding discovery to be completed with any non-complying party risking the imposition of sanctions pursuant to CPLR 3126, and schedules a status conference for the purpose of setting a new Note of Issue date. Thus, prejudice to the plaintiff is minimized.

C. Extension of Time For Dispositive Motions

The branch of the defendants' motion seeking an extension of time to file any dispositive motions is denied as academic as the parties' will have 60 days from the re-filing of the Note of Issue to make any such motions, in accordance with this court's part rules. The branch of the third-party defendant's motion seeking identical relief is likewise denied as academic.

D. Discovery Schedule

The third-party defendant's request for a schedule to complete discovery is denied without prejudice to raise the issues at a status conference on July 12, 2018. In the meantime, all parties are directed to provide any outstanding discovery, including the discovery directed in this court's orders, prior to the conference date so as to avoid preclusion or striking of a pleading pursuant to CPLR 3126.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the motion of defendants/third-party plaintiffs Bong Ju Shim, Ann Hwa Shim, and Manhattan Management Group, LLC, and the cross-motion of third-party defendant Aggressive Heating d/b/a Romeo Heating are granted to the extent that the Note of Issue is vacated and the action is stricken from the trial calendar, and the motions are otherwise denied without prejudice; and it is further,

ORDERED that the cross-motion of the plaintiff John Brigandi is denied; and it is further

ORDERED that the parties shall appear for a status conference in Part 42 on July 12, 2018, at 11:30 a.m., and it is further,

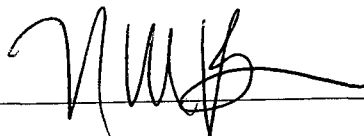
ORDERED that the defendants shall serve a copy of this order on the Trial Support Office within 20 days; and it is further,

ORDERED that the defendants shall notify the judicial mediation office of this order before June 13, 2018.

This constitutes the Decision and Order of the court.

Dated: May 29, 2018

ENTER: _____



J.S.C.

HON. NANCY M. BANNON