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| <b>Lisella v Consolidated Edison, Inc.</b>   |
| 2019 NY Slip Op 33929(U)   |
| June 3, 2019   |
| Supreme Court, Westchester County  |
| Docket Number: 54429/2017  |
| Judge: Joan B. Lefkowitz   |
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| This opinion is uncorrected and not selected for official publication.   |

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER-COMPLIANCE PART

-----X  
LOUIS LISELLA & CINZIA LISELLA and  
ALLSTATE INSURANCE COMPANY, as subrogee of  
LOUIS LISELLA & CINZIA LISELLA,

Plaintiffs,

**DECISION and ORDER**

Index No.54429/2017  
Motion Date: June 3, 2019  
Seq. Nos. 2 & 3

-against-

CONSOLIDATED EDISON, INC. and CABLEVISION  
SYSTEMS CORPORATION,

Defendants.

-----X  
CONSOLIDATED EDISON COMPANY OF  
NEW YORK, INC.,

Third-Party Plaintiff,

-against-

CABLEVISION SYSTEMS CORPORATION,  
CABLEVISION OF SOUTHERN WESTCHESTER, INC.,  
CABLEVISION SYSTEMS WESTCHESTER CORPORATION,  
NATIONAL UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH, AND ACE PROPERTY & CASUALTY  
INSURANCE COMPANY,

Third-Party Defendants.

-----X  
LEFKOWITZ, J.

The following papers were read on this motion (sequence 2) by defendant Cablevision Systems Corporation (“Cablevision Systems”) and third-party defendants Cablevision Systems, Cablevision of Southern Westchester, Inc. and Cablevision Systems Westchester Corporation (collectively “Cablevision”) for an order (1) pursuant to CPLR 603 and CPLR 1010 severing the third-party action and (2) for such other and further relief as this court deems just and proper:

Order to Show Cause; Affirmation of Good Faith; Affirmation in Support,  
Exhibits A-I  
Affirmation Opposition by Defendant/Third-Party Plaintiff Consolidated Edison  
Company of New York, Inc.;<sup>1</sup> Exhibits A-F; Memorandum of Law in  
Opposition<sup>2</sup>  
NYSCEF Court File

The following papers were read on this motion (sequence 3) by third-party defendant National Union Fire Insurance Company of Pittsburgh, PA (“National Union”) for an order (1) pursuant to CPLR 603 and CPLR 1010 severing the claims for insurance coverage against National Union asserted by Edison into a separate action; or alternatively, (2) pursuant to 22 NYCRR §202.21 vacating plaintiffs’ note of issue; and (3) for such other and further relief as may be just, proper and equitable:

Order to Show Cause; Affirmation of Good Faith; Affirmation in Support, Exhibits A-C  
Plaintiffs’ Joint Affirmation in Support  
NYSCEF Court File

Upon the foregoing papers and the proceedings held on June 3, 2019, these motions are determined as follows:

This action arises out of a fire which occurred on February 28, 2016 which destroyed the home of plaintiffs Louis and Cinzia Lisella (“Lisellas”). The Lisellas filed a claim with their insurer, plaintiff Allstate Insurance Company (“Allstate”), but the Lisellas claimed that the damages exceeded Allstate’s policy limits. On or about April 4, 2017, the Lisellas and Allstate (collectively “plaintiffs”) commenced this action seeking damages from Edison and Cablevision Systems alleging that both defendants bore responsibility for the fire and the resulting damages.

Edison filed its answer on May 16, 2017 and Cablevision Systems filed its answer on June 15, 2017. Thereafter the parties engaged in significant discovery including a preliminary conference, numerous compliance conferences and 15 depositions. By letter dated October 1, 2018 Edison demanded that Cablevision defend and indemnify Edison in the present action pursuant to the terms of the Agreement. By letters dated October 23, 2018 Edison advised National Union and Ace Property & Casualty Insurance Company (“Ace”) that pursuant to the terms of the Agreement Cablevision was required to obtain liability insurance naming Edison as an additional insured. Edison asserted that National Union and Ace were required to defend and indemnify and advised that unless the insurers acknowledged this demand on or before November 22, 2018, Edison “will consider commencing a third party action.”

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<sup>1</sup> Hereinafter referred to as “Edison.”

<sup>2</sup> Edison has filed one set of opposition papers in response to both motions.

Following a compliance conference held on December 20, 2018, the court issued a Compliance Conference Referee Report & Order entered on NYSCEF on December 24, 2018, which directed, inter alia, the parties to appear for a final compliance conference on February 1, 2019.

On January 31, 2019, Edison filed a third-party summons and complaint against Cablevision, National Union and Ace. In its third-party complaint Edison alleges that on February 10, 1986 third-party defendant Cablevision Systems Westchester Corporation (“Cablevision Westchester”) entered into a Pole Attachment Agreement with Edison pursuant to which Cablevision Westchester and its assignees were allowed to attach their cables and equipment to Edison’s utility poles (the “Agreement”). Edison alleges that the Agreement contains language pursuant to which Cablevision agreed to indemnify Edison under certain circumstances. Edison alleges that Cablevision breached the Agreement and is required to indemnify Edison against plaintiffs’ claims. The third-party complaint also asserts claims against National Union and Ace seeking a declaratory judgment and injunctive relief against both carriers and requiring them to undertake the defense of this action on behalf of Edison and to indemnify it for all losses incurred.

The court issued a Trial Readiness Order on March 7, 2019. Plaintiffs filed a note of issue on March 26, 2019. Cablevision filed its answer to the third-party complaint on March 29, 2019. National Union filed its answer to the third-party complaint on April 4, 2019. In lieu of an answer, on April 22, 2019 Ace filed a motion seeking dismissal of the third-party action against it, or alternatively, severance of the third-party action. On or about May 10, 2019 Edison filed a motion seeking leave to file an amended answer and for summary judgment. Both Edison and Ace’s motions are returnable on June 28, 2019.

Cablevision argues that the third-party action should be severed because it was commenced almost two years after the main action was commenced and shortly prior to the issuance of the Trial Readiness Order. Cablevision argues that the commencement of the third-party action at this point in the litigation of the main action substantially prejudices the rights of the newly added Cablevision third-party defendants. Cablevision argues that Edison knew or should have known of the Agreement’s existence, but waited until over a year and half after answering the complaint to institute the third-party action. Cablevision states that it was not until October 2018 that it was first placed on notice by Edison that it would be seeking defense and indemnification pursuant to the Agreement. Cablevision further contends that Edison did not assert a claim for indemnification in its answer or in its bill of particulars on its cross-claim dated June 15, 2017. Cablevision states that the Agreement was not exchanged during discovery but was uploaded as an exhibit to the third-party complaint.<sup>3</sup> Cablevision argues that there has been no discovery with respect to the Agreement. Cablevision further argues that severability is

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<sup>3</sup> The Agreement that was annexed to the third party complaint is by Edison’s own admission not the correct Agreement. Edison asserts that it has annexed the correct Agreement in its opposition to these motions.

appropriate since the main action involves claims of negligence whereas the third-party claims, insofar as they apply to Cablevision, pertain to issues of contractual defense and indemnification. Cablevision argues that unless the third-party action is severed, it would be substantially prejudiced as it will not have the opportunity to conduct any discovery concerning Edison's claims.

National Union contends that the third-party action should be severed because it will be prejudiced if the insurance coverage issues are tried in conjunction with the underlying liability issue. National Union argues that Edison's delay in filing the third-party action substantially prejudices National Union's ability to defend itself against Edison's claims. National Union contends that since the note of issue has been filed National Union will be deprived of the opportunity to conduct discovery unless the third-party action is severed, or alternatively, the note of issue is vacated to allow for additional discovery concerning Edison's claims against National Union. National Union further contends that any determination in the main action will be unduly delayed if additional discovery is directed in the main action.

Plaintiffs join in support of the branch of National Union's motion which seeks to sever the third-party complaint. Plaintiffs oppose the branch of National Union's motion which seeks to vacate the note of issue.

In response, Edison first argues that its motion for summary judgment should be decided before the motions to sever are considered.<sup>4</sup> In an apparent attempt to explicate Edison's delay in commencing the third-party action Edison's counsel states that it was substituted as counsel on May 25, 2018. Edison further states that subsequent to its October 1, 2018 letter Edison's counsel and Cablevision's counsel had multiple telephone conversations regarding whether Cablevision would defend and indemnify Edison, during which Edison contends that Cablevision's counsel never objected to the timeliness of Edison's demand.

Edison argues that its claims for defense and indemnification from Cablevision should not be severed from plaintiffs' claims as they involve common factual and legal issues. Edison further asserts that Cablevision will not be prejudiced if the actions are not severed as no further discovery is necessary or relevant as the Agreement speaks for itself.

Motions to sever should be granted sparingly (*see Shanley v Callahan Industries, Inc.*, 54 NY2d 52, 57 [1981]). Nevertheless, CPLR 603 provides the court with discretion to order severance when doing so will avoid prejudice (Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, CPLR 603).

The third-party action was commenced almost two years after the action was commenced. During that time eight compliance conferences and 15 depositions were held. Although Edison

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<sup>4</sup> This relief has not been considered by the Court inasmuch as there was no request for a pre-motion conference with respect thereto and consequently no briefing schedule was established. Moreover, this relief, even if properly requested, would have been denied without prejudice and with a direction to move by Notice of Motion before the IAS Part.

seems to try to explain the delay on the substitution of counsel, which notably occurred six months prior to the filing of the third-party action, no allegations have been made that Edison was unaware of the Agreement at the commencement of the action. Edison has not provided an explanation why it did not commence the third-party action in October, 2018 when it clearly knew, as evidenced by the October 1, 2018 and October 23, 2018 letters, of the existence of the Agreement. Notably, there is no mention of the Agreement or Edison's claims of indemnification in any of the compliance conference orders, including the Compliance Conference Order from the November 1, 2018 conference which directly followed the October, 2018 letters. Any mention of the Agreement or Edison's intention to commence a third-party action is also strikingly absent from the Compliance Conference Referee Report & Order entered on NYSCEF on December 24, 2018, which directed, inter alia, the parties to appear for a final compliance conference on February 1, 2019.

It is not the fault of the third-party defendants that Edison delayed in bringing the third-party action. Contrary to Edison's assertions, the third-party defendants are entitled to discovery and should not be disadvantaged by being deprived of the opportunity to conduct discovery concerning Edison's claims against them (*Cusano v. Sankyo Seiki Mfg. Co.*, 184 A.D.2d 489 [2d Dept. 1992]). Discovery in the main action is complete and the note of issue has been filed. It would be equally unfair at this stage of the litigation to plaintiffs to vacate the note of issue in order to allow the third-party defendants to conduct the discovery they are entitled to. Any delays occasioned by severance are outweighed by the potential for prejudice to the third-party defendants if they are deprived of their ability to engage in meaningful discovery. Moreover, insofar as the third-party complaint involves issues of contribution and indemnification, it is readily severable from the main action.

In light of the foregoing, and in order to prevent significant prejudice to plaintiffs and third-party defendants, it is appropriate to sever the third-party action from the main action. In the event that the parties complete discovery in the severed action in a timely manner, the parties may make an application to join the matters for trial.

All other arguments raised on these motions and evidence submitted by the parties in connection thereto have been considered by this court, notwithstanding the specific absence of reference thereto.

In view of the foregoing, it is

ORDERED that motions sequence 2 and 3 are granted to the extent that the third-party action is severed; and it is further

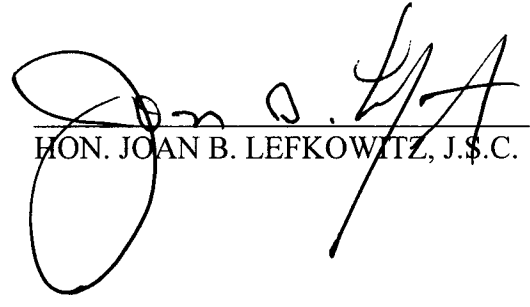
ORDERED that on or before June 17, 2019 Cablevision's counsel is directed to file an RJI and pay the RJI fee in the new action, provide the County Clerk's Office with a copy of this Order, and request that a new index number be issued. The County Clerk is directed to issue a new index number for the new action at no additional charge; and it is further

ORDERED that all other relief sought on these motions is herewith denied; and it is further

ORDERED that all parties in the new action are directed to appear for a conference in the Compliance Conference Part, Courtroom 800, on June 26, 2019 at 9:30 a.m.; and it is further

ORDERED that Cablevision's counsel shall serve a copy of the Order with notice of entry upon counsel for all parties within ten days of entry.

Dated: White Plains, New York  
June 3, 2019



HON. JOAN B. LEFKOWITZ, J.S.C.

Service upon all counsel via NYSCEF  
cc: Compliance Part Clerk