

**Shehu v Board of Mgrs. of the 210 Joralemon St.
Condominium**

2020 NY Slip Op 33723(U)

November 6, 2020

Supreme Court, New York County

Docket Number: 162198/2015

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

-----X

FITIM SHEHU,
Plaintiff,

- v -

THE BOARD OF MANAGERS OF THE 210 JORALEMON
STREET CONDOMINIUM, STANTEC CONSULTING
SERVICES INC., STANTEC ARCHITECTURE INC.,
ASHNU INTERNATIONAL INC., ZDG LLC., 210 MUNI, LLC,
UNITED AMERICAN LAND, LLC,

Defendant.

-----X

THE BOARD OF MANAGERS OF THE 210 JORALEMON
STREET CONDOMINIUM,

Plaintiff,

-against-

ALLIEDBARTON SECURITY SERVICES LLC

Defendant.

-----X

STANTEC CONSULTING SERVICES INC., STANTEC
ARCHITECTURE INC.

Plaintiff,

-against-

ALLIEDBARTON SECURITY SERVICES, LLC

Defendant.

-----X

INDEX NO. 162198/2015
MOTION DATE 9/2/2020
MOTION SEQ. NO. 014

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595807/2019

Second Third-Party
Index No. 595898/2019

The following e-filed documents, listed by NYSCEF document number (Motion 014) 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477

were read on this motion to/for SEVER.

In this personal injury action, the third-party/second third-party defendant AlliedBarton Security Services LLC (Allied) moves pursuant to CPLR 603 and 1010 to sever the

defendant/third-party plaintiff The Board of Managers of the 210 Joralemon Condominium's (the Board) third-party claim against it and the defendants/second third-party plaintiffs Stantec Architecture Inc. and Stantec Consulting Inc.'s (Stantec) second third-party claim against it, or in the alternative, for an order directing the parties to enter into an expedited discovery schedule. The plaintiff in the main action, Fitim Shehu, supports Allied's motion. Stantec opposes the portion of Allied's motion seeking to sever the third-party claims but supports the portion of Allied's motion seeking further discovery. The motion is granted to the extent discussed herein.

In the main action, the plaintiff is seeking to recover for injuries allegedly sustained when he fell through a window while performing construction work on the building located at 210 Joralemon Street in Brooklyn. The plaintiff was to perform façade work on the building. However, on the first day of the construction project, the plaintiff and a co-worker were assigned to fasten the top of the scaffolding erected for the project to the building. To do so, the plaintiff and his co-worker entered the building and were escorted by a security guard, purportedly employed by Allied, to a 10th floor window from which they could access a ledge to fasten the scaffolding. The security guard opened the window and drew the blinds for the plaintiff and his co-worker. The plaintiff then used an overturned bucket to exit onto the ledge. When the plaintiff and his co-worker later attempted to reenter the building, the plaintiff's ankle allegedly became caught in the window blind cord, causing him to fall approximately five feet and sustain injury.

The plaintiff alleged claims for negligence and violations of Labor Law §§ 200, 240(1), and 241(6) against Stantec and the Board for their failure to provide him with a ladder or other adequate safety device. The Board and Stantec later commenced the two third-party actions as against Allied. Both third-party complaints assert causes of action for common law indemnification, contractual indemnification, and contribution, alleging that the security guard was negligent and contributed to the plaintiff's injuries. Stantec's second third-party complaint also alleges a cause of action for breach of contract for Allied's purported failure to procure personal injury insurance under which Stantec is listed as an additional insured.

A final Note of Issue date was set by this court's order dated September 12, 2019. The final date was October 25, 2019, and based upon prior orders, was marked "No Extensions." The Board's third-party complaint was filed against Allied on September 20, 2019. Stantec's second third-party complaint was filed against Allied on October 17, 2019. On October 18, 2019, the plaintiff filed his Note of Issue in this matter. On November 19, 2019, Stantec moved to

strike the plaintiff's Note of Issue and for an order directing further discovery based, in part, upon the third-party complaints served upon Allied. On December 18, 2019, Allied answered the two third-party complaints.

On January 27, 2020, the court denied Stantec's motion, noting that (i) discovery had been ongoing for over four years, (ii) aside from an outstanding independent medical examination, the parties had represented that all other discovery in the main action was completed, (iii) Stantec had already filed its motion for summary judgment, and (iv) that Stantec had failed to demonstrate "unusual or unanticipated circumstances" (22 NYCRR 202.21[d]) that warranted post-note discovery. As the Note of Issue has already been filed and Allied has not had an opportunity to conduct discovery, Allied now moves to sever the two third-party complaints as against it.

By an order dated September 17, 2020, the court dismissed the plaintiff's claims for negligence and violations of Labor Law §§ 200 and 241(6). Therefore, the plaintiff's only remaining claims are against the Board and Stantec for a violation of Labor Law § 240(1) for failure to provide an adequate safety device.

CPLR 603 provides that "[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims." Similarly, CPLR 1010 provides that, "[t]he court may...order a separate trial of the third-party claim or of any separate issue thereof... 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." In a case, such as this one, where the main action is 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 may constitute prejudice to the plaintiff. See Pena v City of NY, 222 AD2d 233, 233 (1st Dept. 1995); see also Rothstein v Milleridge Inn, Inc., 251 AD2d 154 (1st Dept. 1998).

"The grant or denial of a request for severance is a matter of judicial discretion, which should not be disturbed on appeal absent a showing of prejudice to a substantial right of the party seeking severance." Zili v City of New York, 105 AD3d 949, 950 (2nd Dept. 2013) citing Chiarello v Rio, 101 AD3d 793, 797 (2nd Dept 2012). Even where a party "will to some extent rely on the same evidence" in the main action and the severed action (Abbondandolo v Hitzig,

282 AD2d 224, 225 [1st Dept. 2001]), severance is appropriate where “individual issues predominate, concerning particular circumstances applicable to each [defendant]...[and there] is the possibility of confusion for the jury.” Bender v Underwood, 93 AD2d 747, 748 (1st Dept. 1983). Conversely, “[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). Furthermore, “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).

Allied has demonstrated that, absent a severance of the third-party claims, either it or the plaintiff will be prejudiced, as either Allied would not be able to conduct full and complete discovery in the time remaining before trial or the plaintiff’s action would be unreasonably delayed while the parties are allowed to conduct further discovery. Allied has also shown that severance in this instance is proper because (i) the Board and Stantec waited four years after this action was commenced to commence their respective third-party actions on the eve of the final Note of Issue filing date, and (ii) the claims against Allied sound in breach of contract for failure to indemnify or procure insurance and contribution for negligence, and therefore individual issues predominate the third-party actions that may confuse the jury if tried with the plaintiff’s remaining Labor Law § 240(1) claims. As such, severance is proper.

Contrary to Stantec’s argument in opposition to severance, the issues in the first-party action and the third-party actions are not so inextricably interwoven that the actions cannot be severed. By this court’s order dated September 17, 2020, all of plaintiff’s claims against Stantec and the Board were dismissed except for the plaintiff’s claim under Labor Law § 240(1) which is based upon the claim that Stantec and the Board’s failed to provide a ladder or other adequate safety device. Both third-party complaints seek contribution from Allied based upon alleged negligence by the security guard in escorting the plaintiff to the window and drawing the window blinds for him, along with wholly separate claims by Stantec for breach of contract for failure to procure insurance. As such, these claims do not have substantive common issues of law and fact and are not susceptible to inconsistent verdicts such that the motion to sever must be denied. See New York Cent. Mut. Ins. Co. v McGee, 87 AD3d 622, 624 (2nd Dept. 2011).

Therefore, Allied's motion to sever the third-party complaint and the second third-party complaint is granted. The court does not reach Allied's alternative request for an expedited discovery schedule.

Accordingly, it is hereby,

ORDERED that the motion by third-party/second third-party defendant, AlliedBarton Security Services LLC pursuant to CPLR 603 and 1010 to sever the third-party action and the second third-party action against it from the main action is granted, and the third-party action and second third-party action are severed, and it is further

ORDERED that the Clerk of the court shall mark his records to reflect the severance; and it is further,

ORDERED that the parties to the third-party actions shall contact the court on or before November 30, 2020, to schedule a preliminary/settlement conference.

This constitutes the Decision and Order of the court.


 NANCY M. BANNON, J.S.C.
 HON. NANCY M. BANNON

11/6/2020
 DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE