WVH Hous. Dev. Fund Corp. v Brooklyn Insulation & Soundproofing, Inc.
2021 NY Slip Op 30389(U)
February 8, 2021
Supeme Court, New York County
Docket Number: 651665/2016
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
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

WVH HOUSING DEVELOPMENT FUND CORPORATION,

Plaintiff,

- v -

BROOKLYN INSULATION & SOUNDPROOFING, INC.,FORMACTIV ARCHITECTURE DESIGN & TECHNOLOGY, P.C.,JONATHAN BECKER, RONG ENG,

Defendants.

----------X

INDEX NO. 651665/2016

MOTION DATE 2/2/2021

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

BROOKLYN INSULATION & SOUNDPROOFING, INC.

Third-Party Plaintiff,

-against-

FORT-CICA ROOFING & GENERAL CONTRACTORS, INC., ROCK STAR RENOVATION, LLC, JEFFREY LYDON. R.A., LYDON ASSOCIATE, LAWRENCE PROPERTIES, LAWRENCE PROPERTIES D/B/A HALSTEAD LAWRENCE MANAGEMENT. LLC.

Third-Party Defendants.

----------X

Third-Party
Index No. 595183/2020

The following e-filed documents, listed by NYSCEF document number (Motion 006) 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181

were read on this motion to/for SEVER ACTION.

I. INTRODUCTION

In this breach of contract action, commenced in March 2016, third-party defendant Fort-Cica Roofing and General Contractors, Inc. moves pursuant to CPLR 603 to sever the third-party action. Third-party defendants Jeffrey Lydon, R.A., individually, and Lydon Associates LLC

cross-move for the same relief. The defendant/third-party plaintiff Brooklyn Insulation & Soundproofing, Inc. opposes. The motion and cross-motion are granted.

II. BACKGROUND

In October 2013, the plaintiff, owner of a 42-building apartment complex in Manhattan, entered a contract with Brooklyn Insulation to perform roof repair and install insulation on some of the buildings. The plaintiff claims that Brooklyn Insulation breached the contract and performed substandard roofing work causing the plaintiff's property to suffer extensive water damage. The plaintiff seeks damages of $1.2 million, plus interest from October 13, 2013.

A pre-answer motion to dismiss by Brooklyn Insulation was denied (MOT SEQ 001) and it thereafter filed an answer with counterclaims, alleging that it fully performed under the contract, and that the plaintiff controlled the roof work done by Brooklyn Insulation, was satisfied with the quality of the work performed and was aware of the risk of leaks arising from its work. Brooklyn Insulation seeks $200,000 in payment for the additional roofing work it performed for the plaintiff.

Discovery was commenced in August 2016 by service of demands by Brooklyn Insulation on the plaintiff. Around the same time, Brooklyn Insulation commenced a prior third-party action but discontinued it soon thereafter. Three years passed with no activity by either side. A preliminary conference was held on November 18, 2019, and, in light of the dormancy of the case, the parties were given short dates to complete discovery. According to this court's compliance conference order dated February 13, 2020, plaintiff did not respond to Brooklyn Insulation's demands for over three years, and Brooklyn Insulation took no action to address that conduct, without excuse. Further, Brooklyn Insulation had not yet responded to the plaintiff's demand served in November 2019. The court directed that all discovery was to be completed on or before February 25, 2020, and any depositions not conducted were to be deemed waived.

The same week, on February 22, 2020, Brooklyn Insulation commenced a new third-party action against several subcontractor defendants including Fort-Cica Roofing and General Contractors, Inc., a "roof patcher", architect Jeffrey Lydon, R.A., individually, and Lydon Associates LLC, an architectural firm, asserting claims for contribution and common law indemnification. These third-party claims are vaguely pleaded.

The plaintiff filed a Note of Issue three days later on February 25, 2020, representing that all discovery was completed or waived. Three depositions were taken the same day – Devin O'Brien of Brooklyn Insulation, Daniel Benedict, a board member of the plaintiff, and third-party defendant/architect Jeffrey Lydon. Also on February 25, 2020, Brooklyn Insulation served post-deposition demands on the plaintiff.

Brooklyn Insulation moved to strike the Note of Issue (MOT SEQ 002). In denying that motion, the court reasoned that, under these circumstances, the late filing of a third-party action does not provide a basis to strike the Note of Issue or compel further discovery in the main action, and noted that the third-party action could be severed.

The court thereafter denied three more motions by Brooklyn Insulation, one to reargue the motion to Strike the Note of Issue (MOT SE 003), one for leave to amend its answer (MOT SEQ 004) and one to reargue the motion to amend (MOT SEQ 005) . A settlement conference scheduled for April was cancelled due to the COVID-19 public health emergency. The instant motion and cross-motion to sever were filed in December 2020, and January 2021, respectively.

III. DISCUSSION

CPLR 603 provides that "[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims." In a case 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); CPLR 1010. Thus, where a third-party action is commenced after the main action is placed on the trial calendar, severance is the appropriate remedy since 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 (1st Dept. 2015); Admiral Indem. Co. v Popular Plumbing & Heating Corp., 127 AD3d 419 (1st Dept. 2015). 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).

At this juncture, with discovery concluded in the main action, per the representations made in the Note of Issue and per court order, the third-party action, which was commenced inexplicably late by Brooklyn Insulation - after three years of inaction and within days of the filing of the Note of Issue in the main action - must be severed. In light of the dilatory conduct of Brooklyn Insulation, it should not be heard to complain of prejudice it may suffer if its third-party action is now severed. Indeed, Brooklyn Insulation does not sufficiently explain why, if the issues in the main action and the third-party action are so intertwined as not to be severable, it did not see fit to join those defendants until 2020. Indeed, since Brooklyn Insulation hired and/or worked at the job site with each of these third-party defendants, it clearly knew of them even prior to 2016. It is the plaintiff who would suffer prejudice if the trial were delayed.

Finally, Brooklyn Insulation's third-party claims of indemnification and contribution, pleaded with little factual support, can be litigated separately from the plaintiff's claims of breach of contract and negligence as asserted against Brooklyn Insulation and the similar counterclaims asserted by Brooklyn Insulation against the plaintiff. Even though there will be

some overlap in evidence in the main action and the severed action (see Abbondandolo v Hitzig, supra), "individual issues predominate" and "concern[] particular circumstances applicable to each [party]" in the two actions. Bender v Underwood, supra at 748. The outstanding discovery in the third-party action may proceed as set forth below.

IV. CONCLUSION

Upon the papers submitted and this court's prior orders and for the reasons stated above, the motion and cross-motion to sever the third-party action are granted.

Accordingly, it is

ORDERED that the motion and cross-motion are granted and the third-party action is severed from the main action, and it is further

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

ORDERED that all parties to the third-party action shall confer and complete all outstanding discovery on or before April 30, 2021, and shall jointly contact the court on or before April 1, 2021, to schedule a status conference, and it is further

ORDERED that all parties shall comply with any ADR referral order issued separately by the court.

This constitutes the Decision and Order of the court.

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

2/8/2021
DATE

CHECK ONE:

	CASE DISPOSED			X	NON-FINAL DISPOSITION		
X	GRANTED		DENIED		GRANTED IN PART		OTHER