

Bueno v 212 W 95 Owner LLC
2021 NY Slip Op 30963(U)
March 29, 2021
Supreme Court, New York County
Docket Number: 151241/2020
Judge: Phillip Hom
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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. PHILLIP HOM **PART** **IAS MOTION 2**

Justice

-----X

HUGO BUENO,

Plaintiff,

- v -

212 W 95 OWNER LLC, TRANSPARENT CONSTRUCTION
LLC, R.C. STRUCTURES INC.,

Defendant.

-----X

212 W 95 OWNER LLC, TRANSPARENT CONSTRUCTION
LLC

Third-Party Plaintiff,

-against-

IVY SQUARE WOODWORKING CORP, PENNSYLVANIA
LUMBERMENS MUTUAL INSURANCE COMPANY, STARR
INDEMNITY & LIABILITY COMPANY

Third-Party Defendant.

-----X

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595558/2020

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 51, 52, 53

were read on this motion to/for SEVER ACTION.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, it is ordered that Plaintiff, Hugo Bueno's ("Bueno"), motion to sever the third-party action is granted, and motion to amend caption and summons and complaint to add a party is granted.

Background

Bueno commenced this action for personal injuries allegedly sustained on November 11, 2019, during the course of his employment for the Third-Party Defendant Ivy Square

Woodworking Corp. (“Ivy Square”), against Defendants 212 W 95 Owner LLC (“212”), Transparent Construction LLC (“Transparent”), and R.C. Structures Inc. (“RC”) (collectively “Defendants”). 212 impleaded the Third-Party Defendants Pennsylvania Lumbermens Mutual Insurance Company (“Pennsylvania”) and Starr Indemnity & Liability Company (“Starr”). Ivy Square and Pennsylvania have not answered or appeared. Bueno filed the present motions to sever the third-party action and to amend caption and summons and complaint.

Sever action

CPLR §603 states, in relevant part, 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 decision whether to grant a severance pursuant to CPLR §603 is a matter of judicial discretion which should not be disturbed on appeal absent a showing of prejudice to a substantial right of the moving party (*McCrimmon v County of Nassau*, 302 AD2d 372 [2d Dept 2003]).

In the underlying action, on November 11, 2019, Bueno allegedly sustained injuries during the scope of his employment in construction for Ivy Square. The complaint includes claims for negligence, and violations of Labor Law §§200 and 241(6). Bueno further alleges 212 and Transparent were the owner, general contractor and subcontractor of the work being performed at the premises.

The third-party complaint brought by 212 and Transparent, alleges that Pennsylvania issued commercial general liability policy and an umbrella-liability policy purportedly covering some interests of Ivy Square. Similarly, Starr is an insurance company which issued commercial general liability policies and an umbrella-liability policy purportedly covering some interests of the Defendants. The allegations in the third-party complaint are completely different from the main action. The Third-Party Plaintiffs seek indemnification from Pennsylvania and Starr in the main action.

Bueno argues that he would face substantial prejudice if the claims for coverage were tried in front of the same jury that heard the negligence portion of his main action (*Kelly v Yannotti*, 4 NY2d 603 [1958]). Pennsylvania and Starr’s interests in this case are that of insurers, sharing no commonality with the underlying case, and would be confusing to the jury. Severance of a coverage action from its underlying liability action is required to avoid the prejudice that would result from the jury’s awareness of the existence of liability insurance (*Robles v. Microtech Contracting Corp.*, 90 AD3d 531 [1st Dept 2011]).

Amend caption/pleadings

CPLR §3025(b) permits amendments of pleadings and emphasizes that leave shall be freely given upon such terms as may be just including the granting of costs and continuances. In addition, CPLR §2001 states that the court may permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, or if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded.

Bueno moves for an order under CPLR §3025(b) to add JRM Construction Management, LLC (“JRM”) as a Defendant in this action. Bueno includes the amended summons and complaint, and an agreement between Ivy Square and JRM in support of his motion. Therefore, Bueno is granted leave to amend summons and complaint to add JRM.

Conclusion

Accordingly, it is,

ORDERED, the third-party action against Pennsylvania and Starr only is severed; and it is further,

ORDERED, that Bueno is granted leave to amend his summons and complaint to add JRM and shall serve the amended summons and complaint within 30 days of this order; and it is further,

ORDERED, the caption shall be amended on all Court papers to read as:

HUGO BUENO,

Plaintiff,

-against-

212 W 95 OWNER LLC, TRANSPARENT
CONSTRUCTION LLC, R.C. STRUCTURES INC.
AND JRM CONSTRUCTION MANAGEMENT
LLC,

Defendants.

212 W 95 OWNER LLC AND TRANSPARENT
CONSTRUCTION LLC,

Third-Party Plaintiffs,

-against-

IVY SQUARE WOODWORKING CORP.,

Third-Party Defendant.
