

<b>Scagnelli v Air &amp; Liquid Sys. Corp.</b>
2021 NY Slip Op 31115(U)
April 2, 2021
Supreme Court, New York County
Docket Number: 190065/2014
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 13

Justice

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JAMES SCAGNELLI,

Plaintiff,

- v -

AIR & LIQUID SYSTEMS CORPORATION, AS SUCCESSOR-BY-MERGER TO BUFFALO PUMPS, INC, AMCHEM PRODUCTS, INC.,N/K/A RHONE POULENC AG COMPANY, N/K/A BAYER CROPSCIENCE INC, QCP, INC.,INDIVIDUALLY AND AS SUCCESSOR TO BAKERS PRIDE OVEN COMPANY, INC.,CBS CORPORATION, F/K/A VIACOM INC.,SUCCESSOR BY MERGER TO CBS CORPORATION, F/K/A WESTINGHOUSE ELECTRIC CORPORATION, CERTAINTEED CORPORATION, EMPIRE-ACE INSULATION MFG. CORP., FMC CORPORATION, ON BEHALF OF ITS FORMER CHICAGO PUMP & NORTHERN PUMP BUSINESSES, FOSTER WHEELER, L.L.C., GENERAL ELECTRIC COMPANY, GOULDS PUMPS, INC.,IMO INDUSTRIES, INC., OWENS-ILLINOIS, INC.,PFIZER, INC. (PFIZER), THE FAIRBANKS COMPANY, U.S. RUBBER COMPANY (UNIROYAL), UNION CARBIDE CORPORATION, WARREN PUMPS, LLC,BLODGETT CORPORATION,

Defendant.

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QCP, INC., INDIVIDUALLY AND AS SUCCESSOR TO BAKERS PRIDE OVEN COMPANY, INC.

Plaintiff,

-against-

DAVID FABRICATORS OF N.Y., INC.

Defendant.

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DECISION + ORDER ON MOTION

Third-Party Index No. 595551/2017

The following e-filed documents, listed by NYSCEF document number (Motion 001) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is ordered that third-party defendant David Fabricators

of N.Y., Inc.'s (herein after referred to as "David Fabricators") motion to either sever or dismiss the instant action is granted without opposition.

Third-party defendant David Fabricators moves to sever the third-party action or to dismiss the third-party action pursuant to CPLR §§1010 and 603. Here, plaintiff commenced the instant underlying action on February 27, 2014 to recover monetary damages for personal injuries sustained as a result of exposure to asbestos allegedly through defendants' products. Defendant/third-party plaintiff Bakers Pride Oven Company, Inc. (hereinafter referred to as "Bakers Pride") filed an answer on July 29, 2014. Thereafter, the instant action was included in the October 2014 In Extremis Trial Cluster. Discovery was ordered and completed pursuant to such accelerated Trial Cluster. Following the completion of discovery, plaintiff filed the Note of Issue on May 27, 2014. Over three years after the Note of Issue was filed, third-party plaintiff Bakers Pride filed the instant third-party action against third-party defendant David Fabricators on July 11, 2017.

Here, third-party defendant David Fabricators argues that it is severely prejudiced by the late commencement of the third-party action in that obtaining discovery in this action, where discovery has been complete for over three years, will be extremely challenging. Third-party defendant David Fabricators further argues that should the third-party action be allowed to continue, or not severed, plaintiff will be prejudiced by the resulting delay due to discovery in the third-party action.

Dismissal of a third-party complaint is governed by CPLR §1010 which states that "[t]he court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. 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.” As to severance, CPLR §603 states that “[i]n 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. The court may order the trial of any claim or issue prior to the trial of the others.”

The Case Management Order dated June 20, 2017 (hereinafter referred to as the “CMO”) explicitly states that “[t]hird party complaints not e-filed on or before the filing deadline set forth in the discovery order may only be e-filed upon motion and with permission of the Special Master or the Court after appeal of a ruling by the Special Master. Any such motion to e-file a third party complaint after the filing deadline shall be made upon notice to all remaining parties and putative third parties. The motion must include an affidavit stating when the information used to substantiate the filing of the third party complaint became available and that such information was not available upon reasonable effort prior to the filing deadline.” CMO, §XVIII. B. Here, it is undisputed that third-party plaintiff Bakers Pride failed to seek permission from the Special Master prior to filing the third-party complaint, and, thus, failed to comply with the CMO. Furthermore, third-party plaintiff Bakers Pride fails to provide any explanation or justification for the delay in commencing the third-party action which was not filed for over three years from the deadline. In fact, the instant motion is unopposed. Thus, third-party defendant David Fabricators’ motion is granted and the third-party complaint is dismissed.

Accordingly, it is

ORDERED that the motion of third-party defendant David Fabricators of N.Y., Inc. to dismiss the third-party complaint herein is granted and the third-party complaint and all related cross-claims are dismissed in its entirety without prejudice pursuant CPLR §1010, with costs and

disbursements to said third-party defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said third-party defendant only; and it is further

ORDERED that the main action shall continue as against the defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the Decision/order of the Court.



4/2/2021  
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: