

<b>O'Connor v Otts Ocean LLC</b>
2021 NY Slip Op 31171(U)
April 5, 2021
Supreme Court, Kings County
Docket Number: 505888/2017
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 5<sup>th</sup> day of APRIL, 2021

P R E S E N T:

HON. RICHARD VELASQUEZ

Justice.

-----X  
WILFRED O'CONNOR,

Plaintiff,

-against-

OTTS OCEAN LLC, CHESS BUILDERS LLC,  
And HEADQUARTERS MECHANICAL INC.,

Defendants,

-----X  
OTTS OCEAN LLC and CHESS BUILDERS LLS,

Third-Party Plaintiff,

-against-

M.R. ELECTRICAL MAINTENANCE INC.,

Third-Party Defendants,

-----X  
HEADQUARTERS MECHANICAL INC.,

Second Third-Party Plaintiff,

-against-

M.R. ELECTRICAL MAINTENANCE INC,

Second Third-Party Defendants,

-----X  
HEADQUARTERS MECHANICAL INC.,

Third Third-party Plaintiff,

-against-

TRISTATE FIRE SPRINKLER INC.,

Third Third-Party Defendants,

-----X

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Decision and Order  
Mot. Seq, No 8, 9, 10

The following papers numbered 89 to 177 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed_____	199-212; 227-243; 245-264
Opposing Affidavits (Affirmations)_____	268-272; 274-277; 279-283
Reply Affidavits (Affirmations)_____	284; 288; 290; 292

After having heard Oral Argument on December 21, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Third Third-Party defendant TRISTATE FIRE SPRINKLER, INC. move pursuant to CPLR 1010 dismissing the third-third-party complaint against the third-party defendant TRISTATE FIRE SPRINKLER, INC., or in the alternative pursuant to CPLR 603 and 1010 severing the third-party action against TRISTATE FIRE SPRINKLER, INC. (MS#8). Defendant M.R. ELECTRICAL MAINTENANCE INC., moves Pursuant to CPLR § 2221(d), defendant M.R. ELECTRICAL MAINTENANCE INC (hereinafter referred to as "M.R. Electrical"). seeks leave (1) to reargue M.R.'s Motions for Summary Judgment (Mot. Seq. #6) and affirmations in opposition to plaintiff's Motion for Summary Judgment (Mot. Seq. #4); and plaintiff's Cross-Motion to Amend his Bill of Particulars (Mot. Seq. #7), and defendants OTTS OCEAN, LLC, and CHESS BUILDERS LLC's Motion for Summary Judgment (Mot. Seq. #5) on the basis that the Court overlooked and/or misapprehended matters of fact and/or law in deciding these motions. (MS#9). Defendants OTTS OCEAN LLC and CHESS BUILDERS LLC move pursuant to (1) CPLR § 2221(d) permitting the defendants/third-party plaintiffs, OTTS OCEAN LLC and CHESS BUILDERS LLC, to reargue this Court's decision and order granting plaintiff summary judgment pursuant to Labor Law § 240(1) and to amend the Bill of Particulars; (2) pursuant to CPLR § 2221(d) permitting the defendants/third- party plaintiffs, OTTS OCEAN LLC and CHESS BUILDERS LLC, to reargue this Court's decision and order denying the portion of their motion for summary judgment pursuant to Labor Law § 200

and Labor Law § 241(6) with respect to Industrial Code sections 12 NYCRR 23-1.21(4)(i)-(ii); 1.21(b)(4)(i). (MS#10).

First, the Court shall address Third Third-Party defendant TRISTATE FIRE SPRINKLER, INC. motion pursuant to CPLR 1010 dismissing the third-third-party complaint against the third-party defendant TRISTATE FIRE SPRINKLER, INC., or in the alternative pursuant to CPLR 603 and 1010 severing the third-party action.

It is well settled, “the 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.” NY CPLR 1010 (McKinney). “In 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.” NY CPLR 603 (McKinney). “The proponent of a motion seeking to dismiss or sever must demonstrate that a failure to do so will either cause an undue delay in the determination of the main action or will result in prejudice of the substantial rights of any party to the action.” See *New York Schools Ins. Reciprocal v. Milburn Sales Co., Inc.*, 138 AD3d 940 (2nd Dept. 2016). Significantly, severance is “generally inappropriate where the claims against the defendants involve common factual and legal issues, and the interests of judicial consistency of verdicts will be served by having a single trial.” *Id.* at 941; *Barrett v. New York City Health and Hosp. Corp.*, 150 AD3d 949 (2nd Dept. 2017). Moreover, Appellate courts have routinely held that a” trial court’s discretion to sever third-party claims should be exercised sparingly.” *Id.*

In the present case, it is undisputed that the accident arose out of the course and

scope of plaintiff's work with TRISTATE FIRE SPRINKLER, INC. (hereinafter referred to as "TRISTATE"). It is undisputed that the subject ladder from which plaintiff allegedly fell was provided by TRISTATE, and plaintiff received all of his direction and supervision from the TRISTATE foreman, Jacob. OTTS OCEAN LLC and CHESS BUILDERS LLC have tendered defense and indemnification to TRISTATE throughout the course of this litigation beginning in 2017. (See NYSCEF Doc No. 280). It is also undisputed that plaintiff was working for TRISTATE at the time of the occurrence. The Third-Party Complaint as against TRISTATE is meritorious as the action arose out of TRISTATE's work and there is an indemnity agreement that runs to the benefit of OTTS OCEAN LLC and CHESS BUILDERS LLC.

The court would also like to note, on or about December 19, 2019, OTTS OCEAN LLC and CHESS BUILDERS LLC served responses to all of TRISTATE's initial discovery demands, including a response to the Notice for Discovery and Inspection, a Bill of Particulars as to Affirmative Defenses, and a response to the Third-Party Notice for Discovery and Inspection. (See NYSCEF Doc. No 281). Said discovery responses included all of deposition transcripts and marked exhibits, the Bills of Particulars, copies of all discovery demands exchanged throughout the course of discovery and the responses to same, copies of the court orders and stipulations, responsive photographs and video footage depicting plaintiff and the subject ladder at issue, a copy of the incident report and the exchanged expert witness disclosures. To date, third-party defendant's counsel has not objected to the adequacy or completeness of said discovery responses that were provided well before the pandemic occurred. On or about December 12, 2019, OTTS OCEAN LLC and CHESS BUILDERS LLC served a Notice to Admit on TRISTATE in connection with the contracts that were executed among those parties. (See NYSCEF Doc No 282). In TRISTATE's response to the Notice to Admit, dated January 7, 2020, counsel admitted that the annexed subcontract

between CHESS BUILDERS LLC and TRISTATE was a true and accurate copy, and it was in effect on the date of loss. See NYSCEF Doc. No 283). Moreover, counsel for TRISTATE points out in his motion papers, TRISTATE was previously impleaded into this action on or about October 10, 2017 by defendant HEADQUARTERS MECHANICAL, INC.; however, they failed appear or otherwise answer the third-party complaint at that time. The direct action as against defendant HEADQUARTERS MECHANICAL, INC. was later discontinued without prejudice on or about July 26, 2018. See NYSCEF Doc. No. 208. The court also notes, OTTS OCEAN LLC and CHESS BUILDERS LLC have represented to this court that since Tristate has been impleaded, OTTS OCEAN LLC and CHESS BUILDERS LLC have been ready, willing and able to go forward with additional party depositions, including through virtual means. The court also notes, to date, since as late at January 2020 TRISTATE has not requested any further discovery, again noting, all of which happened before the pandemic began.

Additionally, the trial of this matter has been stayed pending the determination of the instant motion and the summary judgments that were recently decided and are currently pending reargument before this Court. TRISTATE has been afforded ample time to conduct discovery proceedings and to prepare for an eventual trial, and such time began months before the pandemic started. It is also the opinion of this court that the granting of TRISTATE'S motion would likely cause an undue delay of the main action and might result in inconsistent verdicts. New York Courts have routinely held that a joint trial format can serve judicial efficiency and avoid the risk of inconsistent verdicts. See *Vecciarelli v. King Pharms., Inc.*, 71 AD3d 595 Dept. 2010; *Curreri v. Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505 (2nd Dept. 2008) (wherein severance was denied because the court found there were common factual and legal issues involved and the interests of judicial economy and consistency of verdicts will be served by having a single trial). There are common factual and legal issues involved in the present

case, the interests of judicial economy and consistency of verdicts will be best served by having a single trial. See *New York Cent. Mut. Ins. Co. v. McGee*, 87 AD3d 622 (2nd Dept. 2011); *Bentoria Holdings, Inc. v. Travelers Indem. Co.*, 84 AD3d 1135 (2nd Dept. 2011); *Quiroz v. Beitia*, 69 AD3d 957 (2nd Dept. 2009); *Annaquartey v. Passeser*, 260 AD2d 517 (2nd Dept. 1999). As such TriStates motion for dismissal and in the alternative severance is hereby denied. (MS#8).

Next the Court shall address defendant M.R. ELECTRICAL motion to renew. CPLR 2221 in pertinent part states: “(d) A motion for leave to reargue: 1. shall be identified specifically as such; 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. CPLR 2221(d)(2) articulates the standards previously outlined in the caselaw. A motion to reargue, it says: “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion. CPLR 2221.

Upon reviewing said motion this court finds it is granted in part and denied in part. It is granted to the extent that the court wishes to clarify its fact findings. The court acknowledges that in its recitation of the facts misstates that M.R. ELECTRICAL was the employer of the plaintiff. The plaintiff’s employer was Tri State, as evidenced above. M.R. ELECTRICAL was not plaintiff’s employer. M.R. ELECTRICAL was a sub-contractor on the job site contracted to do the electrical work at the job site. However, numerous issues of fact remain regarding M.R. ELECTRICAL’s previous summary judgment MS#6 motion seeking dismissal of the Third-Party Complaint as against M.R. ELECTRICAL. Issues of fact remain as to whether M.R. ELECTRICAL’s alleged failure to clear the accident location of BX cables and debris caused or contributed to plaintiff s

accident. Specifically, Mr. Kosov testified he was the general foreman for M.R. ELECTRICAL in February 2017 at the subject premises located at 1326 Ocean Avenue, Brooklyn, New York. (See NYSCEF Doc. No. 141 at pp. 13: 23-25; 14: 2-4. According to Mr. Kosov, testimony M.R. ELECTRICAL was performing work on the sixth floor at the time of plaintiff s accident. *Id.* at pp. 23: 6-14. M.R. ELECTRICAL employees had left bx cables, materials, and equipment on the floors they were working at, including on the sixth floor prior to plaintiff s accident. *Id.* at pp. 26: 5-25, 27: 2. Additionally, there is an issue of triable fact as to whether or not M.R. ELECTRICAL fully complied with the express terms of the subcontract agreement with Chess with respect to the procurement of insurance requirement. As such, defendant M.R. ELECTRICAL motion seeking leave to renew with respect to their summary judgment motions granted and upon review the summary judgment motion (MS#6) is hereby denied, as numerous issues of fact exist, including but not limited to whether or not any BX cables were on the floor and if so whether or not they contributed to the accident, and whether or not M.R. ELECTRICAL properly stored the materials (i.e. BX cables) at the worksite, for the reasons stated above.

Next the Court shall address the portion of Defendant M.R. ELECTRICAL motion to renew with respect to MS#7 plaintiff's motion to amend is hereby denied. Defendants allege the Court overlooked or misapprehended relevant facts or misapplied controlling principles of law. The Court can find nothing in defendant's renewal which indicates that the Court overlooked or misapprehended relevant facts. Defendants fail to set forth any facts that the Court overlooked in granting plaintiff's motion to amend, however, but contend apparently that the Court misapplied controlling principles of law. The Court disagrees. As such that portion of the defendant motion to reargue is denied.

Next the Court shall address M.R. ELECTRICAL's motion to reargue as to defendants OTTS OCEAN, LLC, and CHESS BUILDERS LLC's Motion for Summary

Judgment (Mot. Seq. #5), said request is denied, The Court can find nothing in defendant's renewal which indicates that the Court overlooked or misapprehended relevant facts.

Finally, the Court shall address Defendants OTTS OCEAN LLC and CHESS BUILDERS LLC motion pursuant to (1) CPLR § 2221(d) permitting the defendants/third-party plaintiffs, OTTS OCEAN LLC and CHESS BUILDERS LLC, to reargue this Court's decision and order granting plaintiff summary judgment pursuant to Labor Law § 240(1) and to amend the Bill of Particulars; (2) pursuant to CPLR § 2221(d) permitting the defendants/third-party plaintiffs, OTTS OCEAN LLC and CHESS BUILDERS LLC, to reargue this Court's decision and order denying the portion of their motion for summary judgment pursuant to Labor Law § 200 and Labor Law § 241(6) with respect to Industrial Code sections 12 NYCRR 23-1.21(4)(i)-(ii); 1.21(b)(4)(i). (MS#10).

As previously stated; CPLR 2221 in pertinent part states: "(d) A motion for leave to reargue: 1. shall be identified specifically as such; 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. CPLR 2221(d)(2) articulates the standards previously outlined in the caselaw. A motion to reargue, it says: "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion but shall not include any matters of fact not offered on the prior motion. CPLR 2221.

In the present case, defendants OTTS OCEAN LLC and CHESS BUILDERS LLC contend that this Court's decision and order granting plaintiff summary judgment pursuant to Labor Law § 240(1) and to amend the Bill of Particulars Court's decision and order denying the portion of their motion for summary judgment pursuant to Labor

Law § 200 and Labor Law § 241(6) with respect to Industrial Code sections 12 NYCRR 23-1.21(4)(i)-(ii); 1.21(b)(4)(i), the Court overlooked or misapprehended relevant facts or misapplied controlling principles of law. The Court can find nothing in defendant's renewal which indicates that the Court overlooked or misapprehended relevant facts. Defendants fail to set forth any facts that the Court overlooked, however, but contend apparently that the Court misapplied controlling principles of law. The Court disagrees. As such, defendants OTTS OCEAN LLC and CHESS BUILDERS LLC motion to reargue is granted and upon re-argument the Court adheres to its previous decision. (MS#10).

Accordingly, Third Third-Party defendant TRISTATE FIRE SPRINKLER, INC. motion pursuant to CPLR 1010 dismissing the third-third-party complaint against the third-party defendant TRISTATE FIRE SPRINKLER, INC., or in the alternative pursuant to CPLR 603 and 1010 severing the third-party action against TRISTATE FIRE SPRINKLER, INC. (MS#8), is hereby denied, for the reasons stated above. Defendant M.R. ELECTRICAL MAINTENANCE INC., motion pursuant to CPLR § 2221(d), is hereby granted in part and denied in part as follows; is granted to the extent that the court finds M.R. Electrical did not employ the plaintiff. M.R. Electrical motion to reargue with respect to MS#6 is granted and upon re-argument the Court adheres to its previous decision denying their request for summary judgment, for the reasons stated above. (MS#9) All other portions of the motion not specifically addressed, are hereby denied. Defendants OTTS OCEAN LLC and CHESS BUILDERS LLC motion pursuant to (1) CPLR § 2221(d) is hereby granted and upon re-argument this court adheres to its previous decision. (MS#10).

Dated: Brooklyn, New York  
April 5, 2021

ENTER FORTHWITH:

  
HON. RICHARD VELASQUEZ