

Fargiano v WFP Tower D Co., L.P.
2022 NY Slip Op 30280(U)
January 27, 2022
Supreme Court, Kings County
Docket Number: Index No.: 512302/2015
Judge: Lillian Wan
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
COUNTY OF KINGS: PART 17

-----X
ALPHONSE FARGIANO,

Plaintiff,

– against –

WFP TOWER D CO., L.P., and HOLT
CONSTRUCTION CORP.,

Defendants.

-----X
WFP TOWER D CO., L.P., and HOLT
CONSTRUCTION CORP.,

Third-Party Plaintiffs,

– against –

BURGESS STEEL OF NEW YORK, LLC,
SHELBOURNE CONSTRUCTION CORP., and
ALLRAN ELECTRIC OF NY, LLC,

Third-Party Defendants.

-----X
WFP TOWER D CO., L.P., and HOLT
CONSTRUCTION CORP.,

Second Third-Party Plaintiffs,

– against –

JOHN L. XETHALIS, M.D.,

Second Third-Party Defendant.

-----X

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of these motions.

The following e-filed documents, listed by NYSCEF document number (Motion 09) 256-281, 287-308, and 337-339; (Motion 10) 282-285, 309-319, and 321-322; (Motion 13) 379-404, 439-447, and 458-463; and (Motion 14) 406-413 and 448-457, were read on these motions to dismiss and to sever.

Index No.: 512302/2015
Motion Seq.: 09, 10, 13, 14

DECISION AND ORDER

In this action to recover damages for personal injuries, third-party defendant Burgess Steel Erectors of New York, LLC (Burgess) moves for an order (Motion 09) severing the third-party action against it. Third-party co-defendant Allran Electric of NY, LLC (Allran) cross moves for an order (Motion 10) pursuant to CPLR § 1010, dismissing the third-party complaint against Allran or, in the alternative, pursuant to CPLR §§ 603 and 1010, severing the third-party action brought by third-party plaintiffs WFP Tower D Co., L.P. and Holt Construction Corp. (WFP/Holt) against Allran on the ground that there is substantial prejudice to Allran. Plaintiff Alphonse Fargiano also cross moves for an order (Motion 13) severing the second third-party action against John L. Xethalis, M.D. Second third-party defendant Dr. Xethalis also cross moves for an order (Motion 14) pursuant to CPLR § 1010, dismissing the second third-party complaint against second third-party defendant John L. Xethalis, M.D. or, in the alternative, pursuant to CPLR §§ 603 and 1010, severing the second third-party action against Dr. Xethalis on the ground that there is substantial prejudice to him. At oral argument, counsel for Burgess withdrew Motion 09 and counsel for Allran withdrew Motion 10. Accordingly, the Court will only address Motions 13 and 14. After oral argument and a consideration of the parties' submissions, the motions are denied.

The main action arises out of personal injuries the plaintiff allegedly suffered while performing construction work. The plaintiff moves (Motion 13) for severance of the second third-party action against Dr. Xethalis. In support of its motion the plaintiff submits, inter alia, the pleadings, the verified bills of particulars, and the plaintiff's deposition transcript. Plaintiff asserts that Dr. Xethalis was initially a party to a related action in which the plaintiff sought damages for medical malpractice related to the injuries he alleges he suffered in the instant action. Plaintiff states that a motion to consolidate that matter with the instant action was denied for lack of commonality and the potential for juror confusion, and that the matter was voluntarily discontinued by the plaintiff shortly thereafter, rendering a motion to reargue the issue moot. Plaintiff states that the second impleader action was not commenced until approximately two years after the motion to consolidate the Labor Law and medical malpractice actions was denied. Plaintiff also states that he has already appeared for three depositions, and that no attorney for Dr. Xethalis appeared at the most recent deposition despite having the opportunity to do so.

Dr. Xethalis also moves (Motion 14) for dismissal of the second third-party complaint or, in the alternative, severance on the ground that he has been substantially prejudiced by the delays in this action, given that the second third-party action was not commenced until approximately five years after the main action. Dr. Xethalis argues that the second third-party complaint should be dismissed because a contribution claim against him is barred by General Obligations Law § 15-108. Dr. Xethalis further argues that the stipulation of discontinuance in the medical malpractice action, in which the plaintiff discontinued its claims against Dr. Xethalis with prejudice, acts as a release, even if not signed by defendants and even if the releasor received no consideration. Dr. Xethalis also contends that the doctrine of collateral estoppel bars the second third-party plaintiffs from recovering on its claims. Dr. Xethalis further seeks dismissal of the claim against him for indemnification, stating that this claim is inappropriate in this instance.

Only WFP/Holt filed any opposition to the motions, and submits in support of its opposition, inter alia, the pleadings, copies of motion papers from the related action, and copies of the plaintiff's deposition transcripts. WFP/Holt asserts depositions have been not yet been

completed as of the filing of its opposition and that, as such, discovery is still ongoing. WFP/Holt further notes that it filed a motion to compel discovery on March 6, 2020, which was adjourned to October 6, 2020 because of the COVID-19 pandemic. WFP/Holt contends that the main issue here is whether the impleaded party will suffer prejudice, and that the movants in this instance have failed to show the existence of prejudice. WFP/Holt also cites to CPLR § 1007, which states that “a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff’s claim against that defendant,” and that there is no timeframe prescribed in the statute.

With regard to the plaintiff’s motion, WFP/Holt argues that it brought its second third-party action within the timeframe set forth in the preliminary conference order, which states that impleader actions are to be commenced within 60 days of the completion of examinations before trial, because depositions still had not yet been completed. *See* NYSCEF Doc. No. 297. WFP/Holt also notes that the Note of Issue in this matter was extended to May 5, 2022 by the order of the Hon. Lawrence Knipel dated October 6, 2021. WFP/Holt argues that the viability of the claim against Xethalis was not actually determined until plaintiff testified about his damages, and also relies upon the executive orders of former New York Gov. Andrew Cuomo that tolled any specific time limit for “the commencement, filing, or service of any legal action, notice, motion or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to... the civil practice law and rules.” *See* NYSCEF Doc. No. 456. WFP/Holt also argues that Dr. Xethalis was delinquent in serving his answer and that he should not be able to rely upon the alleged delay in this action to which he helped contribute.

With respect to Dr. Xethalis’ cross motion, WFP/Holt asserts that the stipulation of discontinuance signed in the medical malpractice action does not satisfy the requirements of GOL § 15-108(d), namely because the plaintiff did not receive monetary consideration for the release upon which Dr. Xethalis relies. WFP/Holt further notes that Dr. Xethalis did not plead the affirmative defense of GOL § 15-108 in his answer to the second third-party complaint and therefore cannot raise the defense now. WFP/Holt further argues that its claims are not barred by collateral estoppel because the issue at bar in the related action was whether the actions could be joined for the purposes of trial and discovery. WFP/Holt also contends that its claim for common law indemnification should not be dismissed because there has been no determination as to liability.

Pursuant to CPLR § 603:

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.

Furthermore, pursuant to CPLR § 1010:

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.

The determination to either dismiss or sever a third-party action under CPLR § 1010 is discretionary, and entirely within the authority of the trial court. See *Meczkowski v E.W. Howell Co., Inc.*, 63 AD3d 803 (2d Dept 2009). A trial court's discretion to direct severance of claims should be exercised sparingly, and “[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.” *M.V.B. Collision, Inc. v Allstate Insurance Company*, 187 AD3d 883, 883 (2d Dept 2020), quoting *New York Cent. Mut. Ins. Co. v McGee*, 87 AD3d 622, 624 (2d Dept 2011).

Here, the movants have failed to establish an entitlement to dismissal of the second third-party action pursuant to CPLR § 1010 or severance of said action pursuant to § 603, as the movants have failed to demonstrate how severance of the third-party action would be in “furtherance of convenience.” See CPLR § 603. To the contrary, the claims here involve common issues, specifically with regard to damages, and judicial economy and the consistency of verdicts would best be served by having a single trial. See *M.V.B. Collision* at 883. There is overlap in that the plaintiff’s injuries may have resulted both from the accident on the construction site and, as WFP/Holt allege, from Dr. Xethalis’ alleged negligence in treating plaintiff. The movants have further failed to establish how and to what extent a substantial right of theirs would be prejudiced. See *Sumi Chuang Yeh v Leonardo*, 134 AD3d 695 (2d Dept 2015). Also unavailing is the argument that the denial of a motion to consolidate in a separate action should be binding “law of the case” in the instant action, or that a stipulation of discontinuance in that action bars WFP/Holt from asserting causes of action for contribution and common law indemnification against Dr. Xethalis. Notably, WFP/Holt was not a party to the related action and was not a signatory to the stipulation of discontinuance. Dr. Xethalis has likewise failed to establish that WFP/Holt’s claims for common-law indemnification should be dismissed, since questions of fact regarding the fault of the parties remain. See *Buffardi v. BJ's Wholesale Club, Inc.*, 191 AD3d 833 (2d Dept 2021).

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that Motion 09 is marked withdrawn by the movant; and it is further

ORDERED, that Motion 10 is marked withdrawn by the movant; and it is further

ORDERED, that the motion by plaintiff Alphonse Fargiano for an order (Motion 13) severing the second third-party action against John L. Xethalis, M.D. is DENIED; and it is further

ORDERED, that the motion by second third-party defendant Dr. Xethalis for an order (Motion 14) pursuant to CPLR § 1010, dismissing the second third-party complaint against second third-party defendant John L. Xethalis, M.D. or, in the alternative, pursuant to CPLR §§ 603 and 1010, severing the second third-party action against Dr. Xethalis is DENIED.

This constitutes the decision and order of the Court.

DATED: January 27, 2022



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.