

<b>Berkovich v Judlau Contr., Inc.</b>
2022 NY Slip Op 33907(U)
November 21, 2022
Supreme Court, New York County
Docket Number: Index No. 151498/2019
Judge: Frank P. Nervo
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. FRANK P. NERVO PART 04**

*Justice*

-----X

ALBERT BERKOVICH,

Plaintiff,

- v -

JUDLAU CONTRACTING, INC.,KONE, INC.,KONE  
ELEVATORS & ESCALATORS OF NEW YORK CITY, AB  
CONSULTANTS, INC.,

Defendant.

-----X

KONE, INC.

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY

Defendant.

-----X

INDEX NO. 151498/2019

MOTION DATE 10/19/2022,  
10/07/2022

MOTION SEQ. NO. 003 004

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595334/2022

The following e-filed documents, listed by NYSCEF document number (Motion 003) 103, 104, 105, 106  
were read on this motion to/for EXTEND - ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 84, 85, 86, 87, 88,  
89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 107, 108, 109, 110, 111  
were read on this motion to/for SEVER ACTION.

Under motion sequence 003, Plaintiff, on behalf of all parties, moves, for  
a second time, to extend the deadline to file a note of issue. An extension is  
sought based upon the recently filed third-party action against New York City  
Transit Authority. The motion is unopposed.

Under motion sequence 004, third-party defendant New York City Transit Authority (hereinafter “Transit” or “Transit Authority”) seeks to sever the third-party action pursuant to CPLR §§ 603 and 1010. Transit Authority seeks severance on the basis that defendant Kone needlessly delayed commencement of a third-party action while discovery progressed for some years. Consequently, Transit contends that severance is required less plaintiff or Transit be prejudiced by either (1) delaying trial in this matter to allow third-party discovery to progress or (2) requiring trial before the third-party defendant has had a meaningful opportunity to engage in discovery.

CPLR §§ 603 and 1010 provide the Court discretionary authority to sever third-party claims where, inter alia, the third-party claim may otherwise unduly delay the determination of the main party action or otherwise prejudice the rights of any party. Such discretion is afforded notwithstanding the desirability of single-forum adjudication of the main and third-party actions (see e.g. *Pena v. City of New York*, 222 AD2d 233 [1st Dept 1995]). Where a third-party plaintiff has delayed commencing an action against the third-party defendant, and such delay is inexcusable, severance of the third-party action is the proper remedy (*Ambriano v. Bowman*, 245 AD2d 404 [2d Dept 1997]).

Here, there can be no dispute that defendant Kone was advised of the inevitability of commencing a third-party action against Transit Authority from the outset of the main party litigation and concedes same in its January 18, 2022, letter to Transit Authority, “Since the Lawsuit’s inception, Plaintiff’s counsel has repeatedly advised KONE to initiate a third-party action against NYCTA” (NYSCEF Doc. No. 93). Notwithstanding Kone’s knowledge that a third-party action against Transit was necessary, Kone waited more than three years to commence same, when the main party action was nearly trial ready.

Turning to motion sequence 003, plaintiff seeks to extend the time to file the note of issue as “any ‘necessary’ discovery (not duplicative of what has been undertaken to date)” can be completed within 90-day (NYSCEF Doc. No. 104 at ¶ 5). As plaintiff has not identified what constitutes “necessary discovery,” the Court is left to surmise that this discovery relates to the third-party action; plaintiff’s motion does not discuss any main-party discovery (*see generally, id.*). Given that the Court has severed the third-party action, there exists no basis to extend the note of issue in the main party action beyond a brief extension necessary to avoid retroactive enforcement of the expired note of issue deadline.

Accordingly, it is

ORDERED that motion sequence 004 is granted and the third-party action is severed; and it is further

ORDERED that Kone, Inc. shall serve a copy of this order severing the third-party action, index number 595334/2022, from the main party action, index number 151498/2019, upon the Clerk's Office no later than December 5, 2022; and it is further

ORDERED that counsel for third-parties Kone Inc. and New York City Transit Authority shall confer regarding all known outstanding discovery and submit a proposed order, via NYSCEF with courtesy copy to chambers (80 Centre Street Courtroom 327 New York, NY 10013 / [SFC-Part4-Clerk@nycourts.gov](mailto:SFC-Part4-Clerk@nycourts.gov)) no later than December 19, 2022. To the extent that agreement cannot be reached regarding outstanding discovery and the proposed discovery order, counsel shall, contemporaneously with the proposed order, submit a single joint-letter outlining the disputed discovery and the parties' positions regarding same; such letter shall not exceed five pages in length; and it is further

ORDERED that should third-parties Kone Inc. and New York City Transit Authority fail to timely file a proposed discovery order and/or joint-letter, third-party discovery shall be deemed waived and the Court may impose sanctions, including but not limited to dismissal of the third-party action with prejudice; and it is further

ORDERED that motion sequence 003 is granted solely to the extent of directing plaintiff to file a proper note of issue without reservation as to discovery, in compliance with the Uniform Rules, no later than December 30, 2022.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

11/21/2022  
DATE

CHECK ONE:

CASE DISPOSED  
 GRANTED  DENIED


APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
 GRANTED IN PART  
 SUBMIT ORDER  
 FIDUCIARY APPOINTMENT

  
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 HON. FRANK P. NERVO

J.S.C.  
 OTHER  
 REFERENCE