

16 W. 12 Holding, LLC v 18 W. 12th St. Apt. Corp.

2023 NY Slip Op 30642(U)

March 6, 2023

Supreme Court, New York County

Docket Number: Index No. 159274/2017

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. NANCY M. BANNON PART 42

Justice

-----X

16 WEST 12 HOLDING, LLC,

Plaintiff,

INDEX NO. 159274/2017

MOTION DATE 2-28-23

MOTION SEQ. NO. 005

- v -

18 WEST 12TH STREET APT. CORP.,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

16 WEST 12 HOLDING, LLC

Plaintiff,

Third-Party
Index No. 595563/2018

-against-

XHEMA of N.Y., INC.

Defendant.

-----X

XHEMA of N.Y., LLC

Plaintiff

Second Third-Party

-against-

M&A PROJECTS RESTORATION, INC., et al
_____X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 188, 190, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 238, 239, 240, 241

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR.

This matter was commenced in 2017 by 16 West 12 Holding, LLC (16 West 12 Holding), as a petition pursuant to RPAPL § 881 for a license to gain access to an adjacent property in order to complete renovations on a townhouse. The adjacent property is owned by 18 West 12th Street Apt. Corp. (18 West 12 Street), which answered the petition and asserted counterclaims

for breach of the parties' construction agreement and sought money damages for damage allegedly caused to the façade roof and clear of its property. By an order dated July 21, 2018, the court granted leave to 16 West 12 Holding to commence a third-party action against Xhema of N.Y., Inc., (Xhema) its general contractor (MOT SEQ 003). The third-party complaint was filed July 11, 2018, and includes causes of action for indemnification, contribution and breach of contract for failure to procure insurance. As third-party plaintiff, 16 West 12th Holding moved for partial summary judgment against third-party defendant Xhema, which cross-moved to compel discovery. By order dated March 4, 2022, the court denied the motion of 16 West 12 Holding without prejudice and granted the cross-motion to the extent of directing 16 West 12th Holding to fully respond to outstanding demands within 30 days, and scheduled a preliminary conference for May 12, 2022.

In the preliminary conference order dated May 12, 2022, the court set a deadline for depositions as September 23, 2022, and the Note of Issue filing deadline as December 31, 2022. A compliance conference order dated September 29, 2022, notes that depositions were not conducted because Xhema did not receive document discovery. The court set new deposition deadlines, all to be completed by October 28, 2022, and directed that any deposition not conducted was to be deemed waived. The court also noted that the dates were final, that no extensions would be granted and that the parties provided no reasonable excuse for the delays in commencing and completing discovery in this 2017 case. The court scheduled a final discovery conference for November 17, 2022.

A status conference order dated November 17, 2022, notes that depositions were completed and most document discovery was done, Xhema had served a post-deposition demand late without reasonable excuse and 18 West 12 Street failed to respond to a post-deposition demand of 16 West 12 Holding without reasonable excuse. The court directed 18 West 12 Street to respond by November 30, 2022. In the order, the court noted that a second third-party action had been commenced by Xhema against seven defendants two weeks earlier on November 2, 2022, and that the second third-party action was subject to being severed as this is a 2017 case. The court granted one final extension of the Note of Issue deadline to December 10, 2022. A Note of Issue was filed on December 12, 2022, by counsel for 16 West 12 Holding, representing in the Certificate of Readiness that all discovery was complete.

The second third-party complaint filed by Xhema alleges causes of action for indemnification, contribution and breach of contract for failure to procure insurance against these additional defendants, subcontractors of Xhema who entered into agreements with Xhema prior to 2017. Several answers, some with counterclaims and discovery demands, were recently filed in the second third-party action.

On January 3, 2023, Xhema filed the instant motion to vacate the Note of Issue on the grounds that there is discovery outstanding from 16 West 12th Street or, in the alternative, to sever the second third-party action. 16 West 12 Street, the party which filed the Note of Issue, supports the motion to strike it. 18 West 12th Street opposes the motion. In view of the aforementioned history of this case, the branch of the motion seeking to strike the Note of Issue is denied and the branch of the motion seeking to sever is granted.

A court may vacate a Note of Issue only where it appears that a material fact set forth therein, *i.e.*, the representation that discovery is complete, is incorrect. See 22 NYCRR 202.21(e); Rivers v Birnbaum, 102 AD3d 26 (2nd Dept. 2012); Gomes v Valentine Realty LLC, 32 AD3d 699 (1st Dept. 2006). That is not the case here as the court had found in prior orders that all discovery was completed or waived, and the parties had ample time to complete all necessary discovery. Thus, there was no misrepresentation in the Certificate of Readiness. Since the Note of Issue remains in place, there can be no further discovery in the main action since there has been no demonstration of unusual or unanticipated circumstances to warrant any post-note discovery. See 22 NYCRR 202.21(d). The belated commencement of this second third-party action does not constitute unusual or unanticipated circumstances. Indeed, Xhema did not recently become aware of these additional defendants but had contracted with them prior to commencement of this matter in 2017. Xhema, which unjustifiably contributed to the many delays in this case, had ample time to join any party, particularly its own subcontractors. The discovery process is meant to promote “both the ascertainment of the truth at trial and the prompt disposition of actions” (Matter of M. Farbman & Sons v New York City Health & Hosps. Corp., 62 NY2d 75, 80 [1984]), and the gamesmanship of the parties relating to their conduct on discovery will not be entertained. See Caplin v Ranhofer, 112 AD2d 821 (1st Dept. 1985). However, under these circumstances, severance of the second third-party action is warranted.

CPLR 603 provides that “[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims.” Similarly, CPLR 1010 provides that, “[t]he court may...order a separate trial of the third-party claim or of any separate issue thereof... 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.” In a case such as this one, where the main action is trial-ready but still-outstanding discovery on the second third-party action would unreasonably delay bringing the plaintiff's case to trial, failure to sever results in prejudice to the plaintiff. See Pena v City of NY, 222 AD2d 233 (1st Dept. 1995); see also Rothstein v Milleridge Inn, Inc., 251 AD2d 154 (1st Dept. 1998). Moreover, denial of severance would prejudice the second third-party defendants since they would “be precluded from conducting meaningful discovery or from making dispositive motions.” See Admiral Indemn. Co. v Popular Plumbing & Heating Corp., 127 AD2d at 419 (1st Dept. 2015). Although the third-party action and the second third-party action both present issues of indemnification, contribution and failure to procure insurance, the second-third party action is limited to the terms of the subcontracts between Xhema and its own subcontractors, which can be litigated separately without prejudicing 16 West 12 Holding or 18 West 12 Street and without causing further delay in resolving their dispute.

Accordingly, upon the papers submitted and this court’s prior orders, it is ORDERED that the motion of third-party defendant/second third-party plaintiff Xhema of N.Y., Inc., to strike the Note of Issue or sever the second third-party action is granted to the extent that severance is granted, and the motion is otherwise denied, and it is further

ORDERED that, upon service of a copy of this order, the Clerk of the Court shall mark the file accordingly to reflect the severance of the second third-party action.

This constitutes the Decision and Order of the court.



 NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

3/6/2023

 DATE

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART