

Dasilva v CNY Constr. CJS LLC

2023 NY Slip Op 31814(U)

May 25, 2023

Supreme Court, New York County

Docket Number: Index No. 156486/2019

Judge: Sabrina Kraus

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS

PART

57TR

Justice

-----X

INDEX NO. 156486/2019

JARDEL PEDRA DASILVA,

MOTION DATE 5/17/2023

Plaintiff,

MOTION SEQ. NO. 002 003 004

- v -

CNY CONSTRUCTION CJS LLC, BRP JAMSTA TC
OWNER LLC, CJ PLAZA ONE LLC, KINGDOM
ASSOCIATES INC.,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

CNY CONSTRUCTION CJS LLC, BRP JAMSTA TC OWNER
LLC, CJ PLAZA ONE LLC

Third Party Plaintiff,

-against-

KINGDOM ASSOCIATES, INC.

Third Party Defendant.

-----X

KINGDOM ASSOCITATES, INC.

Second Third-Party Plaintiff,

-against-

COASTAL DRILLING EAST, LLC

Second Third-Party Defendant

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 71, 72, 74, 75, 76, 92, 104, 107

were read on this motion to/for

VACATE/STRIKE - NOTE OF ISSUE/JURY
DEMAND/FROM TRIAL CALENDAR

The following e-filed documents, listed by NYSCEF document number (Motion 003) 82, 83, 84, 85, 94, 98, 99, 100

were read on this motion to/for

SEVER

The following e-filed documents, listed by NYSCEF document number (Motion 004) 86, 87, 88, 89, 90, 91, 95, 101, 102, 103, 105, 106

were read on this motion to/for

DISMISS

BACKGROUND

Plaintiff commenced this action against CNY Construction LLC, BRP Jamsta Two TC Owner LLC and CJ Plaza Two LLC on July 1, 2019, alleging he was injured on August 22, 2017, while changing a drill piece at the jobsite located at 147-40 Archer Avenue, Queens, New York (the Project). Plaintiff alleges a negligence cause of action and violations of Labor Law Sections 200, 240(1) and 241(6).

On November 21, 2019, Defendants/Third-Party Plaintiffs commenced a third-party action against, Kingdom Associates Inc. (Kingdom). On December 17, 2019, Plaintiff served a Supplemental Summons and Amended Verified Complaint (the Amended Verified Complaint) naming Kingdom as a defendant in the main action.

On November 8, 2022, during the deposition of, Cyril Kearney, it was revealed through that witness' testimony that plaintiff was working as a helper for Coastal Drilling East, LLC (Coastal) in the operation of one of Coastal's drill rigs when he was allegedly injured. Kingdom argues that the testimony further raised factual issues regarding Coastal's involvement in the work and their direction and control of plaintiff that potentially implicates Coastal on theories of contribution and/or indemnification and thus render that entity as a necessary party to this action.

As a result, Kingdom commenced a Second Third-Party Action, naming Coastal as a defendant, on December 15, 2022.

Plaintiff filed a Note of Issue on January 9, 2023. Coastal appeared by counsel on January 23, 2023 and filed an answer.

PENDING MOTIONS

On February 10, 2023, Kingdom moved pursuant to 22 NYCRR 202.21(e), to vacate plaintiff's Note of Issue and strike this matter from the trial calendar.

On February 17, 2023, Plaintiff moved to sever the Second Third-Party action from Plaintiff's action and allowing Plaintiff to proceed to trial against Defendants in its action, separate and apart from any claim Defendants/Second Third-party Plaintiff Kingdom Associates INC. may have against the Second Third-party Defendant Coastal Drilling East, LLC.

On February 17, 2023, Coastal moved to dismiss the third third-party complaint pursuant to CPLR §1010; or, in the alternative, to sever the third third-party complaint pursuant to CPLR §603 and/or CPLR §1010; or, pursuant to 22 NYCRR 202.21(e), to vacate Plaintiff's Note of Issue and strike this matter from the Court's trial calendar on the basis that discovery is not complete.

On May 17, 2023, the motions were fully briefed, and the court heard oral argument and reserved decision. For the reasons stated below, the motions to vacate the Note of Issue are granted and the motions to sever the Second Third Party complaint are denied.

DISCUSSION

Motions Seq 002 and 004 to strike the Note of Issue are granted

Where a party timely moves to vacate a note of issue, it need show only that "a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of ... section [202.21] in some material respect" *Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389 (1st Dept. 2006), citing (22 NYCRR § 202.21[e]; *Shoop v. Augst*, 305 A.D.2d 1016, 1017, 758 N.Y.S.2d 747 [2003]; *Aviles v. 938 SCY Ltd.*, 283 A.D.2d 935, 936, 725 N.Y.S.2d 256 [2001]; *Audiovox Corp. v. Benyamini*, 265 A.D.2d 135, 138, 707

N.Y.S.2d 137 [2000]; *see also Ortiz v. Arias*, 285 A.D.2d 390, 727 N.Y.S.2d 879 [2001]; *Cromer v. Yellen*, 268 A.D.2d 381, 702 N.Y.S.2d 277 [2000]).

Kingdom argues that the certificate of readiness is incorrect as discovery is not yet complete. Specifically, discovery in the Second Third Party action as against Coastal is still outstanding. In opposition, Plaintiff argues there are no issues of discovery to resolve, because as of the date of the opposition was filed, no answer had yet been filed on behalf of Coastal. However, the Second Third Party action as against Coastal was filed prior to the Note of Issue being filed and Coastal has since appeared by counsel and filed an answer. It is undisputed that discovery as it pertains to Coastal has not commenced. Kingdom is entitled to complete discovery as to the claims in the Second Third Party action against Coastal, before the action is certified ready for trial. As the Note of Issue erroneously stated discovery was complete, the same should be vacated, *Ruiz v. Park Gramercy Owners Corp.*, 182 A.D.3d 471, 119 N.Y.S.3d 865 [1st Dept. 2020]).

Plaintiff's argument that Kingdom's motion should be denied for failure to submit an Affirmation of Good Faith. Kingdom asserts that "any effort to resolve the dispute would have been futile given the plaintiff's emphatic insistence that no discovery remains outstanding." *Perez v. Kone*, 166 A.D.3d 555, 86 N.Y.S.3d 726 (1st Dept. 2018); *Carrasquillo v. Netsloh Realty Corp.*, 279 A.D.2d 334, 719 N.Y.S.2d 57 (1st Dept. 2001). The court agrees with Kingdom, the failure to submit an Affirmation of Good Faith is de minimis as the parties' positions are so adverse.

Motions Seq 003 and 004 to sever the Second Third Party action against Coastal are denied

CPLR §603 provides: "[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 any separate issue. The Court may order the trial of any claim or issue prior to the trial of the others."

Neither dismissal nor severance of a third-party action is warranted where: (1) the third-party action presents questions of law and fact common with the main action making a joint trial preferable; (2) the third-party action will not unduly delay the determination of the main action or prejudice the rights of any party to discovery; and (3) there is reasonable justification for bringing the third-party action. *Marbilla, LLC v. 143/145 Lexington LLC*, 116 A.D.3d 544, 984 N.Y.S.2d 317 (1st Dept. 2014); *Nielsen v. New York State Dormitory Authority*, 84 A.D.3d 519, 923 N.Y.S.2d 66 (1st Dept. 2011).

Plaintiff and Coast both move to sever the Second Third Party action against Coastal. Plaintiff argues the Second Third Party complaint presents different questions of fact and law. Plaintiff asserts the only questions that the trier of fact must answer regard indemnity, contractual indemnity and contractual indemnity between Defendant/Second Third-party Plaintiff and Second Third-party Defendant, and that these issues are wholly independent from the Plaintiffs negligence claim.

However, Kingdom argues in opposition that although Plaintiff is claiming that he was injured while repairing a component of a drill rig owned by Coastal, while working under the direction of his supervisor, an employee of Kingdom, there is testimony that Plaintiff was being directed and instructed in the repair work by an employee of Coastal. As such, Kingdom argues there are questions of fact as to who Plaintiff was being supervised and directed by, which is the

essence of Plaintiff's liability claims as well as the respective claims of Kingdom against Coastal.

Defendants/Third-Party Plaintiffs, CNY Construction CJS LLC, BRP Jamsta TC Owner LLC, CJ Plaza One LLC also oppose severance of the Second Third Party action, asserting Plaintiff has failed to meet his burden on his motion because he has failed to establish any prejudice if severance is not granted and that there are common issues of fact and law in the main action and Second-Third Party action warranting a consolidated trial.

Plaintiff fails to argue any prejudice if severance is not granted. Coastal, however, asserts that the Second Third Party Action as against them should be severed as the other parties have substantially completed their discovery. Coastal argues that failure to sever the action will prejudice them in not providing an adequate opportunity to complete discovery.

In opposition Kingdom asserts there is no prejudice to Coastal as Coastal's counsel is already in possession of every deposition transcript, as well as the pleadings, discovery exchanges, expert disclosures and document productions that were previously served in the main and third-party actions, prior to Coastal's impleader and that Kingdom has accelerated completion of the discovery process by exchanging prior pleadings, discovery exchanges and deposition transcripts in order to bring Coastal's counsel up to speed as expeditiously as possible.

"It is well settled that consolidation is generally favored by the courts in the interest of judicial economy and ease of decision making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right. The mere fact that a case may be somewhat delayed by such consolidation will

not suffice to bar it” *Amtorg Trading Co. v Broadway & 56th Street Associates*, 191 AD2d212 (1st Dept 1993).

Kingdom has established there are common questions of law and fact, the Second Third Party action against Coastal is inextricably linked and intertwined with plaintiff’s action and the third-party action, as the common-law and contractual claims asserted in all three actions invariably arise out of the same transaction and occurrence, severance of which would be a waste of judicial time and resources. Plaintiff and Coastal have failed to establish prejudice to a substantial right in denying severance of the Second Third Party Action.

Motion Seq 003 to dismiss the Second Third Party Action is denied

Coastal seeks to dismiss the Second Third Party complaint pursuant to CPLR § 1010, which provides,

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.

Coastal argues that Kingdom knowingly and deliberately delayed in commencing the Second Third Party action, waiting two and a half years to implead Coastal. In opposition, Kingdom asserts the Second Third Party action was commenced less than thirty (30) days after the deposition of a Kingdom witness, whose testimony established viable causes of action against Coastal as a potential tortfeasor. As stated above, Coastal has failed to establish prejudice of a substantial right in denying severance, as they are already in possession of a substantial amount of discovery and that the Note of Issue has been stricken to allow for Coastal and Kingdom to complete discovery in the Second Third Party action.

Whereas, it is hereby

ORDERED the motion to strike the Note of Issue, sequence 002 and 004 are granted and the action is stricken from the trial calendar; and it is further

ORDERED the motion to sever the Second Third Party Action, motion sequence 003 and 004, are denied; and it is further

ORDERED motion to dismiss the Second Third Party action is denied; and it is further

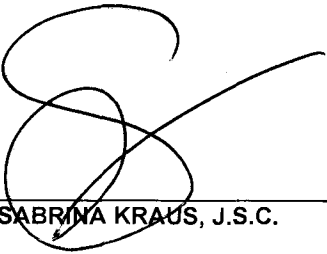
ORDERED any relief not expressly granted herein, has been considered and is denied; and it is further

ORDERED the parties are to appear for a status confer on June 30, 2023 at 11 am, via MS Teams; and it is further

ORDERED that, within 20 days from entry of this order, movant shall serve a copy of this order with notice of entry on all parties and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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).

This constitutes the decision and order of the court.



SABRINA KRAUS, J.S.C.

5/25/2023

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"/>	GRANTED IN PART	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE