

**Alexopoulos v 2 Rector St. (NY), LLC**

2023 NY Slip Op 34126(U)

November 20, 2023

Supreme Court, New York County

Docket Number: Index No. 152402/2018

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M**

*Justice*

-----X

THOMAS ALEXOPOULOS,  
  
Plaintiff,

- v -

2 RECTOR STREET (NY), LLC, SWEET CONSTRUCTION  
CORP., and HENICK LANE HVAC, INC.,  
  
Defendants.

**INDEX NO.** 152402/2018

03/31/2022,  
03/31/2022,  
05/09/2022,  
05/03/2022,  
06/03/2022

**MOTION DATE** \_\_\_\_\_

**MOTION SEQ. NO.** 006 007 008  
009 010

**DECISION + ORDER ON  
MOTION**

-----X

HENICK LANE HVAC, INC.,  
  
Third-Party Plaintiff,

Third-Party  
Index No. 595168/2022

-against-

AJ & SON CONTRACTING, INC.,  
  
Third-Party Defendant.

-----X

HENICK LANE HVAC, INC.,  
  
Second Third-Party Plaintiff,

Second Third-Party  
Index No. 595197/2022

-against-

A. J. & SON MECHANICAL, INC.,  
  
Second Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document numbers (Motion 006) 128, 129, 130, 131, 132, 133, 134, 135, 136, 168, 169, 170, 171, and 354

were read on this motion to VACATE NOTE OF ISSUE.

The following e-filed documents, listed by NYSCEF document numbers (Motion 007) 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 160, 164, 165, 166, 167, 172, and 355

were read on this motion for VACATE NOTE OF ISSUE.

The following e-filed documents, listed by NYSCEF document numbers (Motion 008) 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 234, 235, 236, 237, 238, 239, 240, 241, 242, and 356

were read on this motion to SEVER ACTION.

The following e-filed documents, listed by NYSCEF document numbers (Motion 009) 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 233, 268, 269, 270, 271, 272, 275, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 348, 350, 351, 352, and 357

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document numbers (Motion 010) 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 232, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 276, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 347, 349, and 358

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.S.C.

Plaintiff brings this action for violations of Labor Law §§ 200, 240(1), and 241(6), as well as common law negligence, alleging that he fell from a raised platform on which he was working, and that defendants failed to provide him with appropriate safety devices and otherwise failed to maintain a safe workplace in violation of the Industrial Code of the State of New York. Plaintiff was employed by second third-party defendant A.J. & Son Mechanical, Inc. (“AJ”), who were subcontracted by defendant Henick Lane HVAC, Inc. (“Henick”), to perform pipefitting work at a construction project located at 2 Rector Street, New York, New York. Henick was itself subcontracted by defendant Sweet Construction Corp. (“Sweet”), general contractor for the project. Defendant 2 Rector Street (NY), LLC (“2 Rector,” and collectively with Sweet the “Sweet defendants”) is the owner.

In motion sequences 006 and 007, defendants Henick (Mot. Seq. No. 006) and the Sweet defendants (Mot. Seq. No. 007) move to vacate the note of issue filed by plaintiff, on the ground that necessary discovery remains outstanding. In motion sequence 008, plaintiff moves to sever the second third-party action pursuant to CPLR 603, or dismiss it without prejudice pursuant to

CPLR 1013. Finally, in motion sequences 009 and 010, the Sweet defendants move for summary judgment dismissing the complaint (Mot. Seq. No. 009), and plaintiff moves for partial summary judgment on his claim or violation of Labor Law § 240(1) (Mot. Seq. No. 010). Henick cross-moves for summary judgment dismissing the Labor Law § 240(1) claim. AJ cross-moves to compel discovery and for a stay.

Motion sequences 006 through 010 are consolidated for disposition.

### **Background**

Plaintiff, a pipefitter, was directed to the fourth floor of the building to perform certain work on an exterior platform, which was accessible through a doorway approximately 2-3 feet off of the ground. A temporary set of wooden stairs was used to access similar platforms on other floors of the building. The parties heavily dispute whether a similar set of stairs was or was not available to plaintiff as he walked back and forth through the raised doorway to the exterior platform. Plaintiff ultimately was injured climbing off the platform.

On January 19, 2022, the parties entered into a so-ordered stipulation, requiring defendants to serve post-deposition demands on plaintiff, and designate any supplemental independent medical examinations (“IMEs”) by February 20, 2022 (“stipulation and order, NYSCEF Doc. No. 101). Non-party depositions were to be completed on or before March 30, 2022, and the note of issue was to be filed the following day (*id.*). On February 18, 2022, the Sweet defendants served post-deposition demands on plaintiff in accordance with the stipulation and order (NYSCEF Doc. No. 153).

On February 28, 2022, Henick attempted to implead AJ under the name AJ & Son Contracting, Inc. (NYSCEF Doc. No. 154), which third-party action was later discontinued (NYSCEF Doc. No. 159). On March 11, 2022, Henick commenced a second third-party action

against AJ under its correct name (NYSCEF Doc. No. 157). In between the commencement of the two third-party actions, however, plaintiff filed a fifth supplemental bill of particulars and then, on March 3, 2022, filed the note of issue (NYSCEF Doc. No. 156).

### **Discussion**

#### *Vacating the Note of Issue*

Pursuant to 22 NYCRR 202.21(e), “[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action [] may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect.” When discovery is not completed or waived, the note of issue is properly vacated under 22 NYCRR 202.21 (*Cromer v Yellen*, 268 AD2d 381 [1st Dept 2000]). Moreover, where witness testimony is necessary to the defense of an action, “granting defendant's motion to vacate note of issue and, in effect, to compel deposition of a nonparty witness [is] warranted” (*Jacobs v Johnston*, 97 AD3d 538 [2d Dept 2012]). However, it is also within the court’s discretion to maintain the note of issue while setting a date certain by which all outstanding discovery shall be completed (*Rampersant v Nationwide Mut. Fire Ins. Co.*, 71 AD3d 972, 973 [2d Dept 2010]; *Torres v New York City Tr. Auth.*, 192 AD2d 400, 400 [1st Dept 1993]).

Defendants argue that three items of discovery remain open following the filing of the note of issue: (1) a follow-up IME with defendants’ vocational rehabilitation specialist following plaintiff’s most recent surgeries; (2) the deposition of plaintiff’s work partner Mario Cheberech, who is an employee of AJ; and (3) current and unrestricted authorizations for plaintiff’s medical and other records as set forth in the Sweet defendants’ post deposition discovery demands.

Mr. Cheberech's deposition was originally sought via non-party subpoena before AJ was impleaded, which subpoena is no longer necessary now that AJ is a party to the action. Further, and also with regard to the IME with defendant's vocational rehabilitation expert, plaintiff does not oppose either as irrelevant, citing instead defendants' failure to timely seek them. Other than general delay, however, plaintiff does not allege any specific prejudice that he will suffer if the court allows the requested discovery, even allowing for the delay in specifically noticing, for example, a follow-up examination by the expert (*see Urena v Bruprat Realty Corp.*, 179 AD2d 505, 505 [1st Dept 1992] ["where, as in the instant case, no prejudice would result, a party may be relieved of its waiver" of the right to seek additional discovery post-note of issue"]).

Plaintiff provides no authority for its argument that defendants' expert should be limited to a review of plaintiff's deposition transcripts regarding subsequent surgeries that plaintiff underwent following the expert's first IME. Finally, having reviewed the updated authorizations sought by the Sweet defendants, the court finds that the Sweet defendants have established that the requested authorizations are "material and necessary" to defendants' conduct of the defense of the action (CPLR 3101). Plaintiff's objections to the post-deposition demands being insufficient to bar production, the court will direct that such updated authorizations as have been requested are provided by a date certain set forth below.

Having established that such discovery is necessary, however, the court exercises its discretion to leave the note of issue in place. This adequately balances potential prejudice to defendants in being without necessary information at the summary judgment and trial stages of the action, and plaintiff potentially losing his place in the trial queue. As the court will be setting a date certain by which the remainder of discovery shall be completed, vacatur of the note of issue is not required (*Rampersant*, 71 AD3d at 973).

*Severance*<sup>1</sup>

CPLR 603 provides that “[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 of any separate issue.” “Although it is within a trial court's discretion to grant a severance, this discretion should be exercised sparingly” (*Shanley v Callanan Indus., Inc.*, 54 NY2d 52, 57 [1981]). Where the cases to be severed involve common questions of law and fact, in the absence of a nonspeculative claim of prejudice severance is improper (*Neckles v VW Credit, Inc.*, 23 AD3d 191, 192 [1st Dept 2005]).

Here, plaintiff's claims of prejudice due to delay are general. No trial date has been set following the filing of the note of issue. Denying the motion to sever will allow AJ to participate in the damages phase of the first-party action (*id.*). Moreover, “the evidentiary issues in [plaintiff's] action are not complex, and, further, there is no reason to believe that relevant documents exist other than those that have already been ordered to be produced” (*Matter of Progressive Ins. Co. (Vasquez-Countrywide Ins. Co.)*, 10 AD3d 518, 519 [1st Dept 2004]). The court will therefore order that all discovery previously demanded and exchanged be turned over to AJ so as to avoid any prejudice, and to serve any subsequent demands on an expedited basis. As defendants note in opposition to the motion, personal injury actions such as this one frequently involve third-party indemnification claims tried in conjunction with the first-party action (*e.g. Curreri v Heritage Prop. Inv. Tr., Inc.*, 48 AD3d 505, 507 [2d Dept 2008]). *Zuckerman v La Guardia Hospital*, cited by plaintiff, is unavailing, as in that case the third-party action to be severed was not brought until a year and a half after the note of issue was filed (*Zuckerman v La Guardia Hosp.*, 125 AD2d 304 [2d Dept 1986]). Similarly unavailing is

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<sup>1</sup> Plaintiff also moves to dismiss the third-party action pursuant to CPLR 1010. For the reasons stated with regard to severance, plaintiff has not established entitlement to such relief.

*D'Apice v Tishman 919 Corp.*, as there the court severed the third party action to avoid presenting the jury in the first-party action with an issue related to insurance coverage (*D'Apice v Tishman 919 Corp.*, 43 AD2d 925 [1st Dept 1974]).

The court having ordered the discovery discussed above, summary adjudication would be inappropriate at this juncture. Accordingly, motion sequences 009 and 010 and their attendant cross-motions are denied, without prejudice to renewal following completion of the discovery listed, and in such time and in such a manner as is provided below.

Accordingly, it is hereby

ORDERED that the motions to vacate the note of issue and strike the case from the trial calendar (Mot. Seq. Nos. 006, 007) are denied, but the defendants shall be permitted to conduct the following discovery:

1. Plaintiff shall provide all updated authorizations requested in the Sweet defendants' post-deposition demands (NYSCEF Doc. No. 103), to the extent not already provided, within 14 days of the date of service of a copy of this order with notice of entry,
2. Plaintiff shall appear for a follow-up examination by defendants' vocational rehabilitation expert, Dr. Peter Capotosto, within 60 days of the date of service of a copy of this order with notice of entry; Defendants shall produce Dr. Capotosto's report of the first examination, to the extent not already done so,
3. The parties may take the deposition of the witness Mario Cheberech on behalf of AJ within 60 days of the date of service of a copy of this order with notice of entry, provided that all remaining discovery is completed on or before January 31, 2024; and it is further

ORDERED that these dates shall not be extended save for good cause shown prior to their expiration; and it is further

ORDERED that the motion to sever the second third-party action (Mot. Seq. No. 008) is denied; and it is further

ORDERED that the parties are directed to turn over copies of all documents, deposition transcripts, and other discovery to AJ within 14 days of the date of service of a copy of this order with notice of entry; and it is further

ORDERED that AJ shall make any supplemental demands for further paper discovery within 30 days of receipt of the above, or else waive them; and it is further

ORDERED that the motions and cross-motions for summary judgment and other reliefs (Mot. Seq. Nos. 009, 010) are denied without prejudice to renewal on or before March 29, 2024. Upon such renewal, the parties may make reference to documents previously filed to the docket.

This constitutes the decision and order of the court.

ENTER:



<u>11/20/2023</u> DATE	<u>LOUIS L. NOCK, J.S.C.</u>			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION		
	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE