

Vicial v 153 W. 48th St., LLC

2024 NY Slip Op 30140(U)

January 12, 2024

Supreme Court, New York County

Docket Number: Index No. 155165/2020

Judge: Leslie A. Stroth

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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. LESLIE A. STROTH

PART **12**

Justice

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ROBERT VICITAL,

Plaintiff,

- v -

153 WEST 48TH STREET, LLC, TISHMAN
CONSTRUCTION CORP., TISHMAN CONSTRUCTION
CORPORATION OF NEW YORK, EXTELL DEVELOPMENT
COMPANY, EXG L59W48 LLC,

Defendant.

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153 WEST 48TH STREET, LLC, TISHMAN CONSTRUCTION
CORP., TISHMAN CONSTRUCTION CORPORATION OF
NEW YORK, EXTELL DEVELOPMENT COMPANY, EXG
L59W48 LLC

Plaintiff,

-against-

DESLAURIERS, INC., REINFORCING SUPPLY, LLC

Defendant.

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INDEX NO. 155165/2020

MOTION DATE 10/24/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595754/2022

The following e-filed documents, listed by NYSCEF document number (Motion 001) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89 were read on this motion to/for SEVER

This Labor Law action arises out of injuries allegedly sustained at a construction site where Robert Vicital (plaintiff) was injured while directing cement into a stairwell. Plaintiff moves pursuant to CPLR 603 and CPLR 1010 seeking an order severing the third-party action to allow the first-party action to timely proceed to trial. Third-party defendant Deslauriers, Inc. a/k/a Deslauriers Deslinc (Deslauriers) cross-moves for the same relief.

Defendants/third-party plaintiffs 135 West 48th Street, LLC; Tishman Construction Corp.; Tieshman Construction Corporation of New York; Extell Development Company; and EXG 1569W48 LLC (collectively, defendants) oppose both plaintiff's motion and Deslauriers' cross-motion. Third-party defendant Reinforcing Supply, LLC takes no position on either motion.

I. Alleged Facts

This action arises out of an accident which occurred on June 5, 2020 on a construction site located at the Hard Rock Hotel at 153 West 48th Street. At that time, plaintiff, a cement worker was in the course of his employment while directing cement into the stairwell between the 22 and 21st floor of the building under construction. Plaintiff was holding the bottom end of rubber tubing which was connected to a hopper receiving wet cement four stories above him. The tubing where it connected to the hopper tore away from the base of the hopper and wet cement and rubber tubing fell onto plaintiff below.

The tubing hit Plaintiff and caused him to be thrown down the stairs toward the 21st floor, whereupon plaintiff's foot became caught on the landing where he had been standing, preventing him from falling down the stairs or otherwise escaping from the cascading cement. Plaintiff suffered injuries to his right knee which required significant surgical intervention and hospitalization, later necessitating a total knee replacement. Plaintiff alleges that he presently remains disabled.

II. Procedural History

Plaintiff commenced this action by the filing of a summons and complaint on July 8, 2020, asserting causes of action for violations of Labor Law §§ 200, 240(1), 241(6). Defendants joined issue by filing a verified answer to the amended complaint on September 16, 2020.¹

¹ Pursuant to a so-ordered stipulation, plaintiff filed a supplemental summons and verified complaint on March 2, 2022, which amended the caption to add defendants Extell Development Company and EXG 159W48 LLC. *See* NYSCEF doc. nos. 27, 28. Defendants filed a verified answer on March 31, 2022. *See* NYSCEF doc. no. 30.

Plaintiff served a verified bill of particulars upon defendants on December 22, 2020. The verified bill of particulars detailed the manner in which the accident occurred and included photographs of the torn tubing. A preliminary conference order was held on March 29, 2021, which directed that all third-party actions are to be commenced “per CPLR.” NYSCEF doc. no 13 at ¶ 10. All parties continued to conduct discovery, including depositions, and the matter continued to be conferenced with the Court. In the Summer of 2022, the parties discussed potential mediation and settlement. As of August 29, 2022, plaintiff maintains that all discovery was complete.

On September 20, 2022, defendants commenced a third-party action against Deslauriers, Inc. a/k/a Deslauriers Deslinc, the concrete chute manufacturer, and Reinforcing Supply, LLC, the concrete chute re-seller (together, third-party defendants) for claims of strict products liability, design defect, failure to warn, and breach of warranty, common-law indemnification, and common-law contribution. In their third-party complaint, defendants admit that the concrete chute broke and seek indemnification and contribution from the third-party defendants.

Counsel for plaintiff contacted counsel for defendants to obtain consent to sever the third-party action. Such consent was not forthcoming. On January 5, 2023, defendants disclosed additional witnesses to plaintiff, one of which needed to be deposed. As no answer had yet been filed by third-party defendants, plaintiff was unable to schedule the deposition. Third-party defendants filed answers on February 15, 2023. Plaintiff then renewed its request for all parties consent to sever the third-party action, which consent was again denied. The instant motion to sever ensues.

III. Analysis

Pursuant to CPLR 603, “[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. The court may order the trial of any claim or issue prior to the trial of others.” Further, 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.

Based upon these statutes, New York Courts have routinely determined that first-party actions that are essentially ready to proceed to trial may be severed from third-party actions that are commenced after delay. *See e.g. South v Metro. Transp. Auth.*, 176 AD3d 447, 448, (1st Dept 2019); *Dorador v Trump Palace Condominium*, 126 AD3d 603, 604 (1st Dept 2015); *Maron v Magnetic Constr. Group Corp.*, 128 AD3d 426, 427 (1st Dept 2015); *Tomes v Visto Realty Corp.*, 106 AD3d 645, 645 (1st Dept 2013).

The ability to sever an action or a claim within an action is within “the trial court’s discretionary power.” *George Cohen Agency, Inc. v Donald S. Penman Agency, Inc.*, 51 NY2d 358, 365 (1980). Further, when “a modicum of diligence” would have unveiled the third-party action, “together with the delays that will necessarily attend prosecution of the third-party action, including third-party defendants’ own need for disclosure,” severance of the third-party action is warranted in order to avoid prejudice to plaintiff. *Garcia v Geshner Realty Corp.*, 280 AD2d 440 (1st Dept 2001).

Plaintiff argues that he will be severely prejudiced should the Court decline to sever the delayed third-party claims. At the outset, he notes that his injuries have prevented him from returning to work and that he has been completely disabled from the date of the accident to the present. Further, plaintiff maintains that, except for a belatedly disclosed one witness deposition, the matter is ready to proceed to trial. Defendants commenced a products liability action at the eve of the conclusion of discovery in the first party action. Plaintiff asserts that if the third-party action is permitted to continue without a severance, resolution on plaintiff’s case and any resolution for that matter would be extremely delayed. Further, plaintiff maintains that defendant unnecessarily delayed commencing the third-party action for two years, as defendants were well-aware of the product involved (the cement chute) and had such information in their possession from the early stages of this litigation.

In its cross-motion, which requests the same relief as plaintiff's motion in chief, Deslauriers contends that defendants' theory of recovery against third-party defendants is completely separate from plaintiff's theory of recovery, necessitating extensive additional discovery. Deslauriers argues that there is no overlap between the elements of Labor Law violations and the products liability causes of action. As such, third-party defendants will need to fully to re-depose all parties in this action, including plaintiff, to obtain necessary product and product use information for the allegedly defective product. Deslauriers specifically notes that defendants have yet to make the subject product available for inspection or to even identify the product in any meaningful manner (i.e., product brand name, description, serial number or other identifying information).

Deslauriers argues that it should not be prejudiced by having to conduct potentially expedited discovery, despite the third-party action being in the early stages of a products liability matter, because of third-party plaintiff's late filing of the third-party complaint. In fact, Deslauriers argues that defendants should have been aware of the need for an impleader action after plaintiff's initial deposition on September 24, 2021, which was over two years prior to the commencement of the third-party action. Deslauriers will thus be prejudiced if the third-party action is not severed, as plaintiff has nearly completed discovery in the underlying action, and discovery will essentially need to re-start to commence discovery in a product liability action.

Defendants oppose the motion and cross-motion. Specifically, defendants emphasize that no note of issue has been filed and the action is not yet on the trial calendar. Defendants note that plaintiff concedes that outstanding discovery remains in the main action, specifically a deposition of a witness. Defendants argue that any delay has been solely caused by third-party defendants' failure to appear. Additionally, defendants contend that the actions have common facts and legal issues, which pertain to the same incident in which plaintiff used chute equipment, making severance inappropriate. Moreover, defendants argue

that their third-party strict products liability claims for failure to warn and design defect are inextricably intertwined with the issues in the main action. Defendants warn that the opportunity for conflicting verdicts may rise should this matter be adjudicated separately, which warrants denial of the instant applications to sever the main action from the third-party action.

Plaintiff and Deslauriers are entitled to severance of the delayed third-party action from the main action. The First Department has squarely held that it is not necessary that discovery be complete in the underlying action to direct severance, as here. Where a defendant unduly delays bringing a third-party action, discovery is substantially complete in the main action, and the third-party defendant is prevented from conducting its own meaningful discovery, severance is warranted. *See Ramos v City of New York*, 30 A.D.3d 201, 816 N.Y.S.2d 454 (1st Dept 2006). The main action has been pending since June 2020, with the parties conducting discovery over the course of two years to near completion. Defendants commenced the third-party products liability action at this juncture. Most notably, defendants' theory of recovery against third-party defendants is completely separate from plaintiff's theory of recovery, alleviating the potential of conflicting verdicts. Defendants do not assert an excuse for their failure to commence the third-party action earlier, but, rather, attempt to shift the blame for the delay onto the third-party defendants herein.

In fact, with respect to the non-products liability causes of action in the third-party complaint, New York Courts have determined that issues of common law contribution and/or indemnification are not required to be tried with a Labor Law action. *See e.g., Imnbriale v. Richter & Ratner Contr. Corp.*, 103 AD3d 478, 479-80 (1st Dept 2013); *see also Admiral Indemn. Co. v Popular Plumbing & Heating Corp.*, 127 AD3d 419, 419 (1st Dept 2015) (“...there is no possibility of inconsistent verdicts since...liability for common-law indemnification and contribution in the third-party action is contingent upon a finding [of liability] in the main action”)

In addition, both plaintiff and Deslauriers have articulated severe prejudice that will result if the actions are not severed. Plaintiff, who remains unable to work due to his injuries, has now waited over three years for his day in court, despite actively prosecuting his case. Deslauriers' need for its own extensive disclosure, which essentially requires commencing the first stages of a product liability case, necessitates severance to avoid a truncated discovery process that would be necessary to minimize prejudice to plaintiff should the actions remain together. Plainly, adjudicating the controversy between the defendants and third-party defendants will unduly delay the determination of the main action, which will substantially prejudice the disabled plaintiff. *See* CPLR 1010.

Therefore, for the reasons stated herein and in the Court's discretion, plaintiff and Deslauriers are entitled to severance of the third-party action so as to avoid undue delay of the main action.

IV. Conclusion

Accordingly, it is

ORDERED that the motion of plaintiff Robert Vicital for severance of the third-party action is granted; and it is further

ORDERED that the cross-motion of third-party defendant Deslauriers, Inc. a/k/a Deslauriers Desline for severance of the third-party action is granted; and it is further

ORDERED that the third-party action is severed from the main action; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) 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 of the Court and the Clerk of the General Clerk's Office 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); and it is further

ORDERED, that upon receipt of a copy of this decision with written notice of its entry, the Clerk of the Court is directed to assign a new index number to and create a separate file for the following caption, and that all papers filed in said action shall bear the following caption and the index number as assigned in accordance with the foregoing:

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153 WEST 48TH STREET, LLC, TISHMAN CONSTRUCTION CORP., TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, EXTELL DEVELOPMENT COMPANY, EXG L59W48 LLC

Third-Party
Index No. 595754/2022

Plaintiff,

-against-

DESLAURIERS, INC., REINFORCING SUPPLY, LLC

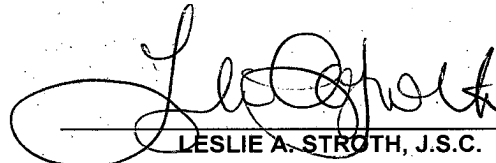
Defendant.

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This constitutes the decision and order of the Court.

1/12/2024

DATE


LESLIE A. STROTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE