SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **18**

Justice

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DIEGO ALVAREZ CUZCO,

Plaintiff,

- v -

BROOME PROPERTY OWNER JV LLC,TRITON CONSTRUCTION COMPANY, LLC,

Defendants.

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INDEX NO. 156994/2017

MOTION DATE N/A

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

BROOME PROPERTY OWNER JV LLC, and TRITON CONSTRUCTION COMPANY, LLC

Third-Party Plaintiffs,

-against-

DOKA USA, LTD.,

Third-Party Defendant.

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DOKA USA, LTD.,

Second Third-Party Plaintiff,

-against-

ACS-NY LLC

Second Third-Party Defendant.

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Third-Party
Index No. 595787/2021

The following e-filed documents, listed by NYSCEF document number (Motion 004) 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204

were read on this motion to/for SEVER.

Defendant Broome Property Owner JV LLC (Broome) owns property located at 100 Varick Street, New York City, New York. Broome hired defendant Triton Construction Company (Triton) as its Construction Manager to construct a residential building on its property. Triton hired ACS-NY, LLC (ACS) to perform certain construction work. Plaintiff Diego Alvarez Cuzco worked for ACS.

Plaintiff Cuzco was injured in a fall at the site and sued Broome and Triton in August of 2017 for negligence and violations of New York Labor Law. Plaintiff filed his Note of Issue on December 9, 2020. In August of 2021, Broome and Triton impleaded DOKA USA, Ltd., asserting a third-party complaint on the ground that Cuzco fell from a platform provided, installed, and maintained by DOKA. Broome and Triton's claims against DOKA sound in contribution, common law indemnification, and breach of contract for failure to obtain insurance. In November of 2021, DOKA impleaded ACS and asserted claims for common law indemnification, contractual indemnification, breach of contract, and contribution.

Now, plaintiff moves to sever the third-party actions pursuant to CPLR § 603, contending that the third-party complaints were filed after the deadline and after the filing of the Note of Issue, and should not delay resolution of the original claims in this action. Broome and Triton object to severing the DOKA third-party complaint and cross-move to strike the Note of Issue to allow additional discovery, including a further deposition and medical examinations of the plaintiff, due to plaintiff having undergone additional medical treatment after the filing of the Note of Issue. DOKA opposes the motion to sever and cross-moves to dismiss the third-party complaint against it.

A. DOKA Cross-Motion to Dismiss Broome and Triton's Third-Party Complaint

DOKA seeks to dismiss the claims against it pursuant to CPLR § 3211(a)(7), for failure to state a claim for which relief can be granted on the grounds that the allegations of Broome and Triton are unsubstantiated and refuted by evidence in the record. DOKA also argues Broome and Triton's breach of contract claim must fail because Broome and Triton were not parties to a contract with DOKA, and they have not alleged facts sufficient to support a claim as a third-party beneficiary.

In deciding a motion to dismiss under CPLR § 3211 (a) (7), the "complaint is to be afforded a liberal construction" (*Goldfarb v Schwartz*, 26 AD3d 462, 463 [2d Dept 2006]). The "allegations are presumed to be true and accorded every favorable inference" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]). "[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Additionally, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). While DOKA relies on *Hendrickson v Philbor Motors, Inc.*, for the premise that DOKA is allowed to submit evidence to support its motion to dismiss pursuant to CPLR § 3211(a)(7), that case notes that "consideration of such evidentiary materials will almost never warrant dismissal under CPLR 3211 (a) (7) unless the materials "establish conclusively that [the plaintiff] has no [claim or] cause of action" (102 AD3d 251, 258 [2d Dept 2012], quoting *Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008], quoting *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

Common Law and Contractual Indemnification and Contribution Claims

DOKA argues the common law contribution and indemnification claims against it should be dismissed because the allegations of DOKA's negligence are refuted by plaintiff's deposition testimony, which shows he was trained and supervised by ACS, not DOKA, and that ACS, not DOKA, installed and maintained the platform system from which the plaintiff fell and because no manufacturing or design defects have been alleged. DOKA also contends the law of the case bars claims against DOKA. Broome and Triton point out that DOKA has not yet provided discovery materials or produced its witness for a deposition, and that there is other deposition testimony which indicated DOKA supervised, approved, and inspected the platform installation, and trained employees on its use. Broome and Triton contend that the earlier decision of this court (NYSCEF Doc. No. 86, Motion Sequence 001) dismissing plaintiff's common law and Labor Law § 200 claims against Broome and Triton is not dispositive here, as DOKA was not a party to the litigation when that motion was briefed, and the court's decision addressed only who was "certified and allowed to work on the elevated platform" (*Id.* at 11).

While the allegations about DOKA in the complaint are bare bones, they are not contradicted by documentary evidence as contemplated by CPLR § 3211(a)(1). DOKA has not provided documentary evidence, which "must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1,* 73 AD3d 78, 86 [2nd Dept 2010] citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable'" (*id.* at 84-85). Further, documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see 511*

W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). DOKA has presented evidence, but has not met this standard.

As far as DOKA argues that the law of the case is that ACS had control over plaintiff, his work, and the platform system, this court's decision on Broome and Triton's motion to dismiss plaintiff's claim is not binding here. A prior decision of the court "operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law" (*Carmona v Mathisson*, 92 AD3d 492, 493 [1st Dept 2012]). The law of the case doctrine precludes parties or those in privity to them from relitigating an issue "where there previously was a full and fair opportunity to address the issue" (*Id.*). Here, DOKA was not a party to the action at the time of the earlier decision and DOKA's involvement has not yet been litigated.

This motion is brought pursuant to CPLR § 3211 (a) (7), and Broome and Triton have made allegations of DOKA's involvement with the installation and inspection of the platforms which could support their claims. According them every favorable inference, the allegations are sufficient to survive. The court denies the portion of DOKA's cross-motion which seeks to dismiss the common law contribution and indemnification claims against it.

Breach of Contract Claim

DOKA argues the breach of contract claim against it fails because it fulfilled its contractual obligations to obtain insurance, because Broome and Triton are not parties to any contract with DOKA, and because they have failed to allege they are third party beneficiaries of DOKA's contract with ACS. There are no allegations of a contract between DOKA and Broome or Triton. Broome and Triton do not address this portion of the motion, apparently waiving opposition to the dismissal of this claim. Accordingly, the portion of DOKA's motion

seeking to dismiss Broome's and Triton's breach of contract claim against it, the third cause of action, is granted.

B. Broome, Triton and ACS's Cross-Motion to Strike Note of Issue and Compel Discovery

Broome, Triton, and ACS cross-move to strike plaintiff's Note of Issue and seek an order compelling Cuzco to provide HIPAA releases for information related to his post- Note of Issue surgeries, as well as to appear for a related deposition and IMEs. Plaintiff does not object to appearing for a post Note of Issue deposition or IMEs related to his recent surgeries. It appears that the HIPAA authorizations have already been provided and the relevant records delivered to Broome, Triton, and ACS. Therefore, this portion of the cross-motion is granted as far as plaintiff will provide any authorizations which have not yet been provided and shall appear for the deposition and IMEs, but the cross-motion is denied as far as cross-movants seek to strike the Note of Issue.

C. Plaintiff's Motion to Sever

In the motion to sever, plaintiff asks that the third-party actions be severed from the main action so that the delayed impleader of DOKA and the delays in discovery in the third-party actions do not cause further delay in the resolution of plaintiff's 2017 claim. Plaintiff notes that he withdrew his prior motion to sever in December of 2022, when the court issued an order setting deadlines for the completion of outstanding discovery (NYSCEF Doc. No. 130). According to the plaintiff, the deadlines set in that stipulation have not been met.

Broome, Triton, and DOKA similarly argue, in their separate opposition papers, that since the main action and the third-party action against DOKA have common factual issues, a single trial would be in the interests of judicial economy. The defendants further contend there is

no prejudice to the plaintiff, since there is no trial date scheduled yet, and note plaintiff has failed to provide post Note of Issue discovery regarding his recent surgeries.

Severance is governed by CPLR § 603, which allows 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." The decision to grant or deny a request for a severance is within the sound discretion of the trial court (*see Herskovitz v Klein*, 91 AD3d 598, 599 [2d Dept 2012]), which discretion should be exercised sparingly (*see Curreri v Heritage Property Inv. Trust, Inc.*, 48 AD3d 505 [2d Dept 2008]). In determining whether to exercise their discretion, courts focus on whether there are common legal and factual issues, with the granting of severance generally depending on the absence of such commonality (*see Herskovitz*, 91 AD3d at 599). Severance may be inappropriate where there are common legal and factual issues involved in two or more causes of action unless the party seeking such severance demonstrates that severance is necessary to prevent prejudice to a substantial right or significant delay in the absence of severance (*see Vecciarelli v King Pharms., Inc.*, 71 AD3d 595, 596 [1st Dept 2010]; *Williams v Property Servs., LLC*, 6 AD3d 255 [1st Dept 2004]; *Sichel v Community Synagogue*, 256 AD2d 276 [1st Dept 1998]).

In the interest of judicial economy, because there are common factual and legal issues, and to prevent conflicting outcomes, the motion to sever the third-party actions from the underlying action is denied. Participants in the third-party actions must complete their discovery promptly, or face being precluded from presenting their evidence.

D. Conclusion

For the reasons discussed above, it is hereby

ORDERED that plaintiff's motion to sever the third-party actions is hereby denied; and it is further

ORDERED that the cross-motion by Broome and Triton to strike the Note of Issue and compel discovery is granted in part and denied in part. As far as the cross-motion seeks to strike the Note of Issue, the cross-motion is denied. As far as the cross-motion seeks to compel plaintiff's further deposition testimony and appearance for IMEs related to his recent surgeries and to provide any outstanding HIPAA authorizations related to those surgeries, the motion is granted; and it is further

ORDERED that the cross-motion by DOKA to dismiss the third-party complaint against it by Broome and Triton is granted in part in that the third cause of action, for breach of contract, is dismissed and the motion is otherwise denied; and it is further

ORDERED that any parties seeking further discovery shall provide deficiency letters on or before March 4, and shall meet and confer regarding a stipulation for the completion of discovery for the third-party actions, with that discovery to be completed on or before May 31, 2024. If counsel are unable to stipulate, they shall inform the court on or before March 15, 2024.

2/28/2024
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE