

Moore v DMD Contr. NY LLC

2024 NY Slip Op 32053(U)

June 13, 2024

Supreme Court, New York County

Docket Number: Index No. 158337/2020

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33M

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HOWARD MOORE,

Plaintiff,

- v -

DMD CONTRACTING NY LLC A/K/A DMD
CONTRACTING LLC, STV CONSTRUCTION, INC., NEW
YORK CITY HOUSING AUTHORITY,

Defendant.

INDEX NO. 158337/2020

MOTION DATE 01/13/2024

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

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DMD CONTRACTING NY LLC A/K/A DMD CONTRACTING
LLC, STV CONSTRUCTION, INC., NEW YORK CITY
HOUSING AUTHORITY

Plaintiff,

-against-

SAFETY DYNAMICS, LLC

Defendant.

Third-Party
Index No. 595125/2022

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DMD CONTRACTING NY LLC A/K/A DMD CONTRACTING
LLC, STV CONSTRUCTION, INC., NEW YORK CITY
HOUSING AUTHORITY

Plaintiff,

-against-

MEDCO ELECTRIC INC.

Defendant.

Second Third-Party
Index No. 595252/2023

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HON. MARY V. ROSADO:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 86, 87, 88, 89, 90,
91, 92, 93, 94, 95, 101, 102, 103, 113, 161, 169

were read on this motion to/for

SEVER ACTION

Upon the foregoing documents, and after oral argument, which took place on October 24, 2023 with Jesse M. Minc, Esq. appearing for Plaintiff Howard Moore (“Plaintiff”), Kelly A. McGee, Esq. appearing for Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs DMD Contracting NY LLC a/k/a DMD Contracting LLC (“DMD”), STV Construction, Inc. (“STV”) and New York City Housing Authority (“NYCHA”), Eduardo Maffia, Esq. appearing for Third-Party Defendant Safety Dynamics, LLC (“Safety Dynamics”), and Brian F. Mark, Esq. appearing for second third-party defendant Medco Electric Inc. (“Medco”), Medco’s motion to sever is granted.

A. Factual and Procedural Background

For a more thorough recitation of the facts giving rise to this claim, the reader is directed to the Court’s Decision and Order on Motion Sequence 002. For the purposes of this motion, the following procedural history is relevant. This case was commenced on October 8, 2020 (NYSCEF Doc. 1). The Court’s April 26, 2021 Preliminary Conference Order required impleader to be completed within 60 days of the completion of party depositions (NYSCEF Doc. 9). The Note of Issue was originally filed on February 16, 2023 (NYSCEF Doc. 28). Medco was not impleaded via Third-Party Complaint until March 20, 2023 (NYSCEF Doc. 74). The Third-Party Action was filed by DMD, STV and NYCHA and asserted claims for contribution, common law indemnification, contractual indemnification, and failure to procure insurance coverage.

Medco argues severance is appropriate here as discovery is largely complete, impleader took place in contravention of the Court’s case management orders, and the Defendants provided no excuse as to why they waited so long to file the third-party complaint given they were in possession of sufficient information to implead Medco from the time they were served with Plaintiff’s Complaint. Plaintiff joins in support of Medco’s motion.

Third-Party Defendant Safety Dynamics opposes and argues that because the third-party action arises from the same nucleus of facts as the main action, the two should be tried together. The opposition is joined by DMD, STV, and NYCHA. These defendants point out that while the NYSCEF record reflects the Third-Party Complaint was filed post note of issue, an affidavit of service indicates the Third-Party Complaint was served prior to the note of issue on December 5, 2022 (NYSCEF Doc. 76). They argue that Medco is not prejudiced because they have been provided all discovery exchanged to date.

On reply, Medco argues that DMD, STV, and NYCHA have failed to provide any justification for waiting years to implead Medco despite knowing of its existence. Medco also argues that because service occurred prior to the filing of the Third-Party Complaint, the second third-party action against Medco was not properly commenced at the time of service.

B. Discussion

The Court finds Medco's motion meritorious and will grant severance. Pursuant to CPLR § 603, the court may order severance to avoid prejudice to a party. CPLR § 1010 likewise allows the Court, in an exercise of its discretion, to order a separate trial or dismiss a third-party complaint without prejudice if the third-party action will unduly delay the determination of the main action or prejudice the substantial rights of any party.

Here, the preliminary conference order clearly stated that impleader must take place within 60 days of party depositions. Moreover, all parties knew of Medco's existence and potential claims against Medco as Medco was identified as Plaintiff's employer in both his complaint which was filed on October 8, 2020, and 50-h hearing, which took place on September 11, 2020. Nonetheless, the third-party complaint was not filed until March 20, 2023, over a month after the note of issue was filed. The record is devoid of any reasonable justification for this delay and Medco is

substantially prejudiced as it was not a party at the numerous fact depositions. This inexplicable delay, violation of Court orders, and prejudice to Medco warrants severance (*Admiral Indemn. Co. v Popular Plumbing & Heating Corp.*, 127 AD3d 419 [1st Dept 2015]; *Freeland v New York Communications Center Associates*, 193 AD2d 511 [1st Dept 1993]).

The Court is also bound by on point precedent, which has held that severance is appropriate in a labor law action where a third-party action against the plaintiff's employer was brought (a) after the note of issue had been filed, and (b) more than two years after the defendants learned who the employer was (*Lopez v Halletts Astoria, LLC*, 205 AD3d 573 [1st Dept 2022]). Moreover, there is no possibility of inconsistent verdicts since Medco's liability for common law indemnification and contribution in the third-party action is contingent upon a finding that NYCHA and DMD are liable in the main action (*Torres v Visto Realty Corp.*, 106 AD3d 645 [1st Dept 2013]).

The Court has considered the opposition and finds it to be without merit, in particular NYCHA and DMD's conclusory assertion that Medco faces no prejudice when it was absent from all depositions. Likewise, the opposition is devoid of any reasonable excuse for NYCHA and DMD's extensive delay in bringing their claims against Medco.

Accordingly, it is hereby,

ORDERED that Medco Electric, Inc.'s motion seeking a severance of the second third-party claims against it is granted; and it is further

ORDERED that the second-third party action bearing index number 595252/2023 action is severed from *Moore v DMD Contracting NY LLC*, Index No. 158337/2020; and it is further

ORDERED that within ten days of entry, movant is directed to serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office within ten days from entry and the

Clerk shall mark the action severed as to second-third party defendant Medco Electric, Inc.; and it is further

ORDERED that such service upon 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); and it is further

ORDERED that the Clerk of this Court, upon service of a copy of this order with notice of entry, shall sever the actions and record such action in the Clerk’s records; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

6/13/2024
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: