

Sotelo v TRM Contr. LP

2024 NY Slip Op 32883(U)

August 12, 2024

Supreme Court, New York County

Docket Number: Index No. 150865/2016

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER PART 08

Justice

-----X

CRISTIAN SOTELO,

Plaintiff,

- v -

TRM CONTRACTING LP, BRIGHTON 50, LLC D/B/A MUSS
DEVELOPMENT, LLC,

Defendants.

INDEX NO. 150865/2016

03/07/2023,
03/15/2023,
03/17/2023,
03/30/2023,
03/20/2023

MOTION DATE

MOTION SEQ. NO. 008 009 010
012 013

DECISION + ORDER ON
MOTION seq 12

INTERIM ORDER ON
Motion seqs 8, 9, 10 and 13

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 008) 296, 297, 298, 299,
404, 410, 416, 420, 427, 437, 443, 461, 465, 470, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485,
486, 511

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 009) 300, 301, 302, 411,
417, 421, 428, 438, 444, 464, 466, 471, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 512

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 010) 303, 304, 403, 412,
418, 422, 429, 434, 439, 445, 462, 467, 472, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510,
513

were read on this motion to/for

SEVER ACTION

The following e-filed documents, listed by NYSCEF document number (Motion 012) 367, 368, 369, 370,
371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391,
392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 408, 414, 424, 431, 440, 446, 448, 463, 468, 473,
514, 520

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 013) 352, 353, 354, 355,
356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 409, 415, 425, 426, 432, 435, 441, 447, 449, 450,
451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 469, 474, 515

were read on this motion to/for

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

This is an action for personal injuries at a construction site arising from violations of the Labor Law. Previously, the court denied plaintiff's motion for partial summary judgment on liability and the First Department reversed and granted plaintiff summary judgment on liability on his Labor Law § 240(1) claim (212 AD3d 488 [1st Dept 2023]).

Now, there are three motions to vacate note of issue, a motion to sever and/or vacate note of issue and a motion for summary judgment. These five motions are hereby consolidated for the court's consideration in this single decision/order. Since the summary judgment motion necessarily impacts the remainder of the motions, the court will consider it first.

Varanos' motion for summary judgment (sequence 12)

In motion sequence 12, defendant/third-party defendant Varanos Group Inc. ("Varanos") moves for summary judgment dismissing the third-party action against it as well as any and all cross claims and/or counterclaims. Varanos, which employed plaintiff at the time plaintiff was injured, maintains that the third-party claims by TRM Contracting LP ("TRM") and Brighton 50, LLC d/b/a Muss Development ("Brighton") should be dismissed because neither are entitled to contractual indemnity under the Capital/Varanos Agreement. Specifically, Varanos contends "[t]he agreement does not reference the project, location scope of work or the names of any parties that would be intended beneficiaries" and "[a]t the time V[aranos] executed the February 22, 2013 Capital Agreement, Capital had not yet entered into its Subcontract with TRM to perform Carpentry/Drywall work at the 50 Oceana Drive Project as that contract was not executed until February 26, 2013." Varanos further argues that even if the subject contract is applicable, neither TRM nor Brighton can prove a lack of negligence, that Varanos or its employees were negligent, and that absent a contractual duty to indemnify, neither the third-

party action nor any cross claims and or counterclaims for common law indemnification/contribution/contractual indemnification can survive as these claims are statutorily barred pursuant to §11 of the Workers Compensation Law because plaintiff did not sustain a grave injury.

TRM and Brighton oppose Varanos' motion, arguing that the latter did not meet its burden on the motion because Varanos controlled the work that caused plaintiff's injury and Varanos failed to prove that plaintiff did not suffer a grave injury.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

At the outset, the crossclaims and/or counterclaims asserted by defendants MTEK Contracting LLC, Fort-Cica Roofing & General Contractors, Inc. and Catalyst Construction against Varanos are severed and dismissed on default since none of these parties submitted opposition to Varanos' motion for summary judgment.

Catalyst's motion to sever

In motion sequence 10, defendant/third-party plaintiff Catalyst Construction, LLC ("Catalyst") moves to sever the fourth third-party complaint from the remainder of the action or alternatively to vacate plaintiff's note of issue and compel outstanding discovery. TRM/Brighton and plaintiff oppose severance. For the reasons that follow, the motion to sever is denied at this juncture.

A third-party action may be severed from the main action as an exercise of the trial court's discretion. Severance is appropriate when a party's substantial rights will be prejudiced otherwise (*Rothstein v. Milleridge Inn, Inc.*, 251 AD2d 154 [1st Dept 2018] citing *Andresakis v. Lynn*, 236 AD2d 252 [1st Dept 1997]). Inordinate delay to the plaintiff in a trial-ready action because discovery is still outstanding in the third-party action constitutes prejudice sufficient to warrant severance (*Rothstein, supra*).

The delay in this case is not one-sided. There are a number of reasons why this case has languished, and while no one party is to blame, this factor militates against severance. Further, the facts are inextricably intertwined and it would be a waste of judicial resources to try any of the third party actions separate from the main action. Finally, the court notes that the bulk of discovery has been exchanged and there are just several remaining depositions outstanding as the parties explained at oral argument on these motions. On these facts, the court denies the motion to sever at this juncture without prejudice to renewal at a later date.

Remainder of the motions

The parties dispute what discovery has taken place and what remains outstanding. These motions were filed more than a year ago, and the court believes it would benefit from a conference with the parties to determine what discovery remains outstanding as well as whether

Catalyst's motion to sever

In motion sequence 10, defendant/third-party plaintiff Catalyst Construction, LLC ("Catalyst") moves to sever the fourth third-party complaint from the remainder of the action or alternatively to vacate plaintiff's note of issue and compel outstanding discovery. TRM/Brighton and plaintiff oppose severance. For the reasons that follow, the motion to sever is denied at this juncture.

A third-party action may be severed from the main action as an exercise of the trial court's discretion. Severance is appropriate when a party's substantial rights will be prejudiced otherwise (*Rothstein v. Milleridge Inn, Inc.*, 251 AD2d 154 [1st Dept 2018] citing *Andresakis v. Lynn*, 236 AD2d 252 [1st Dept 1997]). Inordinate delay to the plaintiff in a trial-ready action because discovery is still outstanding in the third-party action constitutes prejudice sufficient to warrant severance (*Rothstein, supra*).

The delay in this case is not one-sided. There are a number of reasons why this case has languished, and while no one party is to blame, this factor militates against severance. Further, the facts are inextricably intertwined and it would be a waste of judicial resources to try any of the third party actions separate from the main action. Finally, the court notes that the bulk of discovery has been exchanged and there are just several remaining depositions outstanding as the parties explained at oral argument on these motions. On these facts, the court denies the motion to sever at this juncture without prejudice to renewal at a later date.

Remainder of the motions

The parties dispute what discovery has taken place and what remains outstanding. These motions were filed more than a year ago, and the court believes it would benefit from a conference with the parties to determine what discovery remains outstanding as well as whether

there is agreement to a consent adjournment of the summary judgment deadline. Accordingly, the remainder of motion sequences 8, 9, 10 and 13 are adjourned to September 4, 2024 at 11:30am via Microsoft Teams.

Conclusion

In accordance herewith, it is hereby

ORDERED that motion sequence 12 is granted to the extent that all claims and crossclaims against defendant/third-party plaintiff Varanos are severed and dismissed; and it is further

ORDERED that motion sequence 10 to sever is denied at this juncture without prejudice to renewal; and it is further

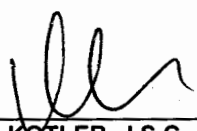
ORDERED that the remainder of motion sequences 8, 9, 10 and 13 are adjourned to adjourned to September 4, 2024 at 11:30am via Microsoft Teams. All parties are directed to appear at that time.

Invitations to the Microsoft Teams meeting will be sent to counsel of record on NSYCEF. Any party that needs an invitation to the meeting should contact Eric Wursthorn, Esq., Principal Court Attorney, at EWURSTHO@nycourts.gov.

Please be advised that "each attorney who receives notification of an appearance on a specific date and time **is responsible for notifying all other parties by email that the matter is scheduled to be heard on that assigned date and time**" (Uniform Civil Rules for the Supreme Court and the County Court § 202.23[c]).

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the decision and order of the court.

8/12/2024
DATE


LYNN R. KOTLER, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	