

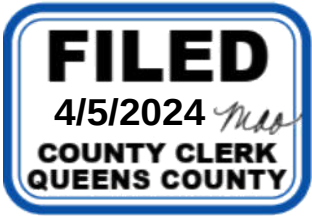
Cox v Forest Hills MHA Hous.
2024 NY Slip Op 35484(U)
April 2, 2024
Supreme Court, Queens County
Docket Number: Index No. 723471/20
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35



-----X

EARL COX,

Plaintiff,

Index No.: 723471/20

-against-

Mot. Date: 2/13/24

Mot. Seq. 3

FOREST HILLS MHA HOUSING
DEVELOPMENT FUND CORPORATION,

Defendants.

-----X

FOREST HILLS MHA HOUSING
DEVELOPMENT FUND CORPORATION,

Third-Party Plaintiff,

-against-

ATLAS WELDING & BOILER REPAIR, INC.,

Third-Party Defendant.

-----X

The following numbered papers were read on this motion by plaintiff for an order, *inter alia*, (1) severing the third-party action, pursuant to CPLR 603; or (2) in the alternative, directing that all discovery in the third-party action be conducted, while the main action is on the trial calendar, and granting plaintiff leave to file a Note of Issue.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits	EF 75-91
Answering Affidavits-Exhibits.....	EF 92-93
Replying Affidavit	EF 94

Upon the foregoing papers, it is ordered that the motion by plaintiff is granted in part and denied in part. The branch of the motion to sever is denied, without prejudice; and the branch of the motion for leave to file the Note of Issue is granted.

This is an action for personal injuries arising from a workplace accident, that occurred, on August 18, 2020. Plaintiff, an employee of third-party defendant Atlas Welding & Boiler Repair, Inc (Atlas), alleges that he was injured on that date when he fell while descending an oil tank ladder at premises owned by defendant/third-party plaintiff Forest Hills MHA Housing Development Fund Corporation (Forest Hills).

The court record reflects that the action was commenced, on December 4, 2020, and issue was joined, on January 5, 2021. Plaintiff appeared for an examination before trial (EBT), on September 30, 2021. Forest Hills appeared for an EBT by a witness, Gary Thomas, on November 19, 2021. During discovery, it was established that another witness, Kevin Harris, had knowledge, so this witness was noticed for an EBT. Pursuant to a Compliance Conference Stipulation and Order, dated August 31, 2022 (NYSCEF Doc. No. 53), Forest Hills was to produce Harris for an EBT, within 30 days. When the EBT was not done in that time, a subsequent virtual compliance conference was held, on November 15, 2022, which resulted in an order directing Harris to appear for an EBT, by January 31, 2023 (NYSCEF Doc. No. 54). However, Harris did not appear for the EBT until March 16, 2023.

The record further reflects that, on May 11, 2023, Forest Hills commenced the third-party action against Atlas. The third-party action is for contractual indemnification and failure to procure insurance. Atlas filed an Answer to the Third-Party Complaint, on August 22, 2023. Atlas served initial discovery demands, on August 22, 2023. Plaintiff responded and served discovery demands on Atlas, on September 7, 2023.

Plaintiff and Forest Hills represent that all discovery is complete in the main action. Counsel for Forest Hills represents that all discovery in the main action - documentary discovery and EBT transcripts - has been provided to Atlas and that the only outstanding discovery in the third-party action are depositions.

Plaintiff argues for severance, contending, in sum and substance, that Forest Hills waited too long to commence the third-party action against Atlas. A review of the court

file reveals that the Preliminary Conference Order of February 23, 2021 (NYSCEF Doc. No. 10), directed that: “[a]ll third-party actions shall be commenced within sixty (60) days of the last deposition.” Since the last deposition was on March 16, 2023, and the third-party action commenced, on May 11, 2023 (although it could have been commenced earlier), the third-party action was timely commenced.

CPLR 603 allows for severance or separate trials “in furtherance of convenience or to avoid prejudice.” The Court is given broad discretion in determining which claims should be tried together and which should be severed, but as a general rule, all instances where there are common questions of law or fact should be tried together.” (*Axelrod & Co. v Benson Telsey*, 353 NYS2d 596 [Sup. Ct., NY Cty 1973]; *see also Pescatore v American Export Lines, Inc.*, 131 AD2d 739 [2d Dept 1987]) (holding that where there are common factual and legal questions, a single trial is proper in the interest of judicial economy). However, it is well-established law that “[i]ssues which might prejudice the proper consideration of other issues or which by their very nature will inconvenience the court and the principal litigation should be severed.” (*See Axelrod supra* at 599.)

In order for there to be severance, the party moving for such must demonstrate that the prejudice in delay outweighs the convenience of trying both cases together. (*Coppola v Robb*, 55 AD2d 634 [2d Dept 1976]). The Court of Appeals has held that the court’s discretion to grant a severance should be exercised “sparingly” and that it is better practice to have one comprehensive hearing and determination of all the issues involved between the parties at the same time. (*See Shanley v Callanan Indus. Inc.*, 54 NY2d 52 [1981]).

The Court, in its discretion, finds that the plaintiff has not demonstrated that he would be unduly prejudiced by a denial of severance (*Fries v Sid Tool Co., Inc. v Alpine Trance Air Conditioning Co., Inc.*, 90 AD2d 512 [2d Dept 1982]). This is especially true given the reality that it will probably be at least one year from the time that the Note of Issue is filed until this matter will be scheduled for trial in the Trial Scheduling Part (TSP). Accordingly, the branch of the motion to sever the third-party action is denied.

However, this denial is without prejudice. If this matter appears in TSP and discovery in the third-party action has not been completed, the plaintiff can remake this motion.

The branch of the motion for leave to file a Note of Issue is granted. “[A] trial court is given broad discretion to oversee the discovery process”. *Cioffi v S.M. Foods*, 142 AD3D 520 [2d Dept. 2016]; *Maiorino v City of New York*, 39 AD3d 601 [2d Dept. 2007]. “The supervision of disclosure and the setting of reasonable terms and conditions therefor rests within the sound discretion of the trial court, and, absent an improvident exercise of that discretion, its determination will not be disturbed.” (*Berkowitz v 29 Woodmere Blvd. Owners Corp.*, 135 AD3d 798, 799 [2d Dept 2016]). The Court has the discretion to direct parties to complete outstanding discovery after a note of issue has been filed (see *Encarnacion v Monier*, 81 AD3d 875 [2d Dept 2011]; *Joseph v Propst*, 306 AD2d 246 [2d Dept 2003]).

Here, all parties agree that all discovery is complete in the main action. It appears that any discovery in the third-party action can be completed in the time from which the Note of Issue is filed until the matter is scheduled for trial in TSP. If, as stated above, the matter appears in TSP and discovery in the third-party action has not been completed, the appropriate motion can be made. Thus, the branch of the motion for leave to file Note of Issue is granted.

Accordingly, it is

ORDERED, that plaintiff’s motion is denied, in part, and granted, in part; in that: it is

ORDERED that the branch of plaintiff’s motion for severance is denied, without prejudice; and it is further

ORDERED that the branch of plaintiff’s motion for leave to file a Note of Issue is granted, and it is further

ORDERED that the plaintiff is to file the Note of Issue and Certificate of Readiness, along with a copy of this Order, by May 31, 2024; and it is further

ORDERED that if discovery in the third-party action has not been completed by the filing of the Note of Issue, the parties shall make diligent and good faith efforts to complete discovery in a timely manner, while the matter remains on the trial calendar; and it is further

ORDERED that, in the third-party action, the parties shall make diligent efforts to attempt to resolve any disclosure issues by, *inter alia*, complying with outstanding discovery demands noticed by each side without resort to further motion practice, upon penalty of preclusion and/or striking of pleadings, pursuant to CPLR 3126;, and it is further

ORDERED that any arguments or requests for relief not addressed herein have been considered by the Court and are denied

Dated: April 2, 2024



A handwritten signature in black ink, appearing to read "Timothy J. Dufficy".

TIMOTHY J. DUFFICY, J.S.C.