

Carchi v Griffon Constr. LLC
2024 NY Slip Op 35493(U)
November 26, 2024
Supreme Court, Westchester County
Docket Number: Index No. 55119/2023
Judge: William J. Giacomo
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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KEVIN F. CUNIN CARCHI,

Plaintiff,

– against –

GRIFFON CONSTRUCTION LLC, WBP
DEVELOPMENT LLC, WILDER BALTER PARTNERS,
INC., L & M DEVELOPMENT PARTNERS LLC, and
WBLM 25 MAPLE OZ OWNER LLC,

Defendants.

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GRIFFON CONSTRUCTION LLC, WBP
DEVELOPMENT LLC, WILDER BALTER PARTNERS,
INC., WBLM 25 MAPLE OZ OWNER LLC,

Third-Party Plaintiff,

– against –

MJL PAINTING CORP.,

Third-Party Defendant.

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GRIFFON CONSTRUCTION LLC, WBP
DEVELOPMENT LLC, WILDER BALTER PARTNERS,
INC., WBLM 25 MAPLE OZ OWNER LLC,

Second Third-Party Plaintiff,

DECISION & ORDER

Index No. 55119/2023

Motion Seq. 1, 2

– against –

PRO SAFETY SERVICES, LLC,

Second Third-Party Defendant.

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The following papers were read on the above referenced motions. Second third-party defendant Pro Safety Services LLC moves (Seq. #1) for an order pursuant to CPLR 603 and 1010 dismissing the second third-party action, or alternatively, severing the second third-party action. Plaintiff moves (Seq. #2) for an order severing the second third-party action against Pro Safety Services, LLC (hereinafter Pro Safety), and for such other and further relief as this Court deems just and proper.

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion (Seq. #1) / Affirmation in Support / Affidavit of Service	1-3
Affirmation in Opposition	4
Affirmation in Reply	5
Notice of Cross Motion (Seq. #2) / Affirmation in Support / Exhibits / Affidavit of Service	6-16
Affirmation in Opposition	17
Affirmation in Reply	18

Plaintiff commenced the present action on January 4, 2023, seeking to recover damages for injuries allegedly sustained on November 4, 2022 when he was working at a construction project located at 25 Maple Avenue, New Rochelle (hereinafter the Project). Plaintiff alleges negligence, and violations of Labor Law 200, 240(1), 241(6) (NYSCEF doc 1). On March 3, 2023, defendants commenced a third-party action against MJL Painting Corp. On June 4, 2024, after a preliminary conference and five compliance conferences were held, defendants commenced a second third-party action against Pro Safety, asserting causes of action for common law indemnification, contribution, contractual indemnification, and breach of agreement to secure liability insurance (NYSCEF doc 51).

Pro Safety moves to dismiss or alternatively, sever the second third-party action, arguing the second third-party action was commenced approximately a year and a half after the main action

was commenced, and after discovery in the main action was nearly complete. Pro Safety references defendants' March 11, 2024 discovery response, in which defendants exchanged the September 15, 2021 contract between defendant/third-party plaintiff WBLM 25 Maple Oz Owner, LLC and Pro Safety for work to be performed at the Project. Exhibit A to the contract, referring to scope of work, states "Provide Site Safety Consulting, Managing and Reporting," as per a July 7, 2020 proposal (NYSCEF doc 44, 48, p. 5). Pro Safety argues that WBLM 25 Maple Oz Owner, LLC has been in possession of the contract since September 15, 2021, the date it was executed, but did not commence a third-party action against Pro Safety until June 4, 2024.

Pro Safety contends that there is no excuse for the delay in bringing the second third-party action, as WBLM 25 Maple Oz Owner, LLC is a signatory to the 2021 contract (NYSCEF doc 48, p. 5). Furthermore, Pro Safety argues that discovery in the main action is almost complete and it is entitled to conduct document discovery and party depositions. It contends that the Court should sever the action against Pro Safety to avoid further delay in the main action proceeding to trial, and to allow Pro Safety an opportunity to obtain discovery.

Plaintiff moves to sever the second third party action, arguing there are no common factual and legal issues that predominate the main action and the second third-party action. Plaintiff argues there is no reasonable excuse for defendants' delay in impleading Pro Safety, as they were aware of the involvement of this entity since the inception of this case, and WBLM 25 Maple Oz Owner, LLC entered into an agreement with Pro Safety on September 15, 2021. Plaintiff contends that discovery is essentially complete and plaintiff would be severely prejudiced by having to repeat discovery with the newly added party.

In opposition, defendants argue that plaintiff's motion should not be considered as it was filed ten days after the deadline set forth in the motion briefing schedule (NYSCEF doc 63). Defendants further contend that the second third-party action should not be severed, as neither plaintiff nor Pro Safety will be prejudiced by denying the motions, and any delays will not outweigh the judicial economy of a joint trial.

Pursuant to CPLR 603, in 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. CPLR 1010 provides that the court may dismiss a third-party complaint without prejudice, order a separate trial of a third-party claim or of any separate issue thereof, or may 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” (CPLR § 1010).

Defendants offer no justification for the delay in commencing the second third-party action. The grounds for a third-party action were known prior to the commencement of the main action and were discussed by counsel at compliance conferences. A March 20, 2024 compliance conference order states that defendants were to implead the site safety contractor within thirty days (NYSCEF doc 49). Defendants opted to delay in impleading Pro Safety until after the Court issued the May 24, 2024 compliance conference order. The May 24, 2024 order states that defendants were to make a decision as to whether to implead Pro Safety and serve the entity by June 14, 2024, otherwise the third-party claim would be deemed waived (NYSCEF doc 50). Defendants waited until more than a year after a preliminary conference order was issued and until most of the discovery was completed before commencing a second third-party action against Pro Safety. Pro Safety argues that it will be prejudiced if it is forced to proceed to trial without being afforded an adequate opportunity to pursue discovery. Plaintiff argues that restarting discovery with Pro Safety will unnecessarily delay the resolution of plaintiff’s action. Severance of the second third-party action is appropriate under the circumstances (CPLR §§ 603, 1010; *Haber v Cohen*, 74 AD3d 1281 [2d Dept 2010]).

Accordingly, it is hereby

ORDERED that the motions are granted to the extent that the second third-party action is severed for the completion of discovery; and it is further

ORDERED that within ten (10) days Pro Safety shall file with the Westchester County Clerk a request for a new index number for the severed second third-party action, and file a Request for Judicial Intervention (RJI) seeking a preliminary conference and noting that a related case is assigned to Hon. William J. Giacomo, J.S.C.; and it is further

ORDERED that the pleadings in this action shall stand as the pleadings under the new index number; and it is further

ORDERED that within ten (10) days plaintiff shall provide to Pro Safety all authorizations previously provided to defendants in the main action; and it is further

ORDERED that within ten (10) days defendants/third-party plaintiffs shall provide Pro Safety with the physical examination reports and all other discovery exchanged in the underlying action; and it is further

ORDERED that all parties to the main action shall appear for an in person appearance on January 13, 2025 at 10 a.m. in Courtroom 102; and it is further

ORDERED that all parties to the second third-party action shall appear for a virtual compliance conference on January 24, 2025 at 2 p.m. Counsel shall be prepared to enter into a discovery schedule for the completion of all remaining discovery at that time; and it is further

ORDERED that should the parties timely complete discovery in the second third-party action, the actions may be tried together; and it is further

ORDERED that Pro Safety shall serve on all parties a copy of this decision and order with notice of entry and file proof of service to NYSCEF within ten (10) days.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
November 26, 2024



HON. WILLIAM J. GIACOMÒ, J.S.C.