SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------x

FEDERAL INSURANCE COMPANY as subrogee of, CENTRE MANHASSET, LLC, MIRACLE GATE LLC And MIRACLE MILE LLC,

Plaintiffs,

-against-

MILESTONE CONSTRUCTION MANAGEMENT SERVICE, INC.,

Defendant.

----------x

MILESTONE CONSTRUCTION MANAGEMENT SERVICE, INC.,

Third-Party Plaintiff,

-against-

JF, INC., RESCO ELECTRIC, and LIBERTY MUTUAL INSURANCE COMPANY, STATEWIDE ELECTRIC & COMMMUNICATIONS, INC.

Third-Party Defendants.

----------x

Michele M. Woodard
J.S.C
TRIAL/IAS Part 8
Index No. 008054/11
Motion Seq. No.: 02

DECISION AND ORDER

Third-Party Index No.: 008054/11

Papers Read on this Decision:

Third-Party Defendant Liberty Mutual's Notice of Motion to Sever	02
Defendant/Third-Party Plaintiff's Affirmation in Opposition	xx
Third-Party Defendant Liberty Mutual's Reply Memorandum of Law	xx
Third-Party Defendant Resco Electric's Affirmation in Support of Liberty Mutual's Motion to Sever	xx
Defendant/Third-Party Plaintiff's Affirmation in Opposition to Resco Electric's Affirmation in Support	xx

In motion sequence number two, the third-party defendant, Liberty Mutual Insurance Company (hereinafter "Liberty") moves by Notice of Motion for an order, pursuant to NY CPLR § 603, to sever the third-party insurance coverage claim against it asserted by the defendant/third-party plaintiff, Milestone Construction Management Service, Inc. (hereinafter "Milestone") from the underlying, first-party causes of action (negligence and breach of implied warranty). Milestone opposes the motion. Third-party codefendant, Resco Electric (hereinafter "Resco"), supports Milestone's motion to sever. Milestone objects to the court's consideration of Resco's affirmation in support.

FACTS

The plaintiff, Federal Insurance Company, as subrogee of Centre Manhasset, LLC, Miracle Gate LLC, and Miracle Mile LLC, claims that on April 26, 2010, an electrical fire started in the decorative canopy above an entrance to a store called Daffy's. Milestone, the sole defendant, is the contractor that was performing the construction work at Daffy's. On January 6, 2012, Milestone commenced a third-party action against electrical subcontractors JF, Inc., Resco, and Resco's general liability insurance carrier Liberty. On March 8, 2012, Milestone amended its third-party complaint to add Statewide Electric & Communications, Inc. as an additional third-party defendant.

On March 30, 2012, Liberty moved to sever, pursuant to CPLR § 603, the third-party action against it on ground that trying the issues of insurance coverage and the underlying liability before the same jury would prejudice Liberty. Milestone opposes the motion, arguing that: the insurance claim is entirely derivative of and related to the underlying claims; the third-party and first-party claims involve identical issues of law and fact; tort and insurance coverage

causes of action can be tried together; and judicial economy would be compromised. Resco supports the motion, arguing: a lack of prejudice; that no common issues of law or fact with the underlying claim exist; and that juror confusion would result from trying the two actions together. *See Haber v. Cohen*, 74 AD3d 1281 (2d Dept 2010) (holding that severing the third-party indemnification and contribution action from the main negligence and trespass actions was proper based on the absence of common factual and legal issues). Milestone requests that the Court not consider Resco's affirmation in support because it was filed after the time allotted by CPLR § 2214(b) expired. In the alternative, Milestone opposes Resco's affirmation in support on the merits.

Resco's Affirmation in Support

Milestone requests that the Court disregard Resco's affirmation in support of Liberty's motion to sever for being untimely under NY CPLR § 2214(b). The Court has an interest in considering the parties' submitted affirmations in order to rule on the merits. Second, the Court may accept and consider untimely opposition papers when doing so would not be prejudicial. Furthermore, Milestone's opposition to Resco's affirmation in support fails to show prejudice. *See Dinnocenzo v. Jordache Enters.*, 213 AD2d 219, 219-20 (1st Dept 1995) (citing *Pallette Stone Corp. v. Guyer Bldrs.*, 194 AD2d 1019, 1020 (3d Dept 1993)). Finally, a finding of prejudice is belied by the facts that (1) Milestone had the opportunity to and did oppose Resco's affirmation in support, and (2) Liberty's grounds to support its motion are stronger than the additional grounds that Resco provided in support. Therefore, the Court has considered Resco's Affirmation in Support.

Liberty's Motion to Sever the First- and Third-Party Causes of Action

The court has discretion in ruling on motions to sever. *See* NY 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. The court *may* order the trial of any claim or issue prior to the trial of the others.") (emphasis added); *see also Rosenbaum v. Dane & Murphy, Inc.*, 189 AD2d 760, 761 (2d Dept 1993) ("[I]t is in the discretion of the court to grant a severance . . . ."); *Raiport v. Gowanda Electronics Corp.*, 190 Misc.2d 353 (Sup. Ct., Cattaraugus County, 2001) ("Severance is subject to the sound discretion of the trial judge and should be used to facilitate the speedy and unprejudiced disposition of cases.") (citing *Cross v. Cross*, 112 AD2d 62, 64 (1st Dept 1985)). This discretion also pertains to severing third-party claims:

> The court may . . . order a separate trial of the third-party claim or of any separate issue thereof . . . . In exercising its discretion, the court shall consider whether the [third-party] controversy . . . w[ould] unduly delay the determination of the main action or prejudice the substantial rights of any party.

NY CPLR § 1010; *accord Kelly v. Yannotti*, 4 NY2d 603 (NY 1958).

The general rule is that severance is proper if it would not injure any party. *Bonavita v. Enright*, 46 Misc.2d 913 (Sup. Ct., Special Term, Ulster County, 1965); *accord County of Chenango Indus. Dev. Agency v. Lockwood Greene Eng'rs*, 111 AD2d 508, 509 (3d Dept 1985). Prejudice is particularly noted in third-party actions against insurers regarding insurance coverage for an underlying negligence action. *See Kelly*, 4 NY2d 603 (finding that the lower court abused its discretion by denying third-party insurer's motion to sever the claim against it regarding insurance coverage from the underlying liability claim); *see also DeLuca v.*

Schlesinger, 39 AD2d 566, 566 (2d Dept 1972) (finding that trying the first-party negligence and third-party insurance coverage claims together "before the same jury would subject the third-party defendant to some prejudice."); *Krieger v. Ins. Co. of N. Am.*, 66 AD2d 1025, 1026 (4th Dept 1978) ("The injection of the issue of insurance in the negligence case . . . is inherently prejudicial and should be avoided."). Milestone attempts to distinguish these cases by arguing that the holdings pertain to trying, not litigating, a lawsuit; however, Milestone fails to explain why the Court should allow the cases to be litigated together until trial.

Liberty contends that it would be prejudiced by having to participate in an expensive, fact-intensive discovery for the underlying negligence claim which has no bearing on the issue of whether Liberty is liable to indemnify. The Court agrees. Since the negligence issue must be tried before the insurance coverage issue, anyway, *see Chunn v. New York City Hous. Auth.*, 55 AD3d 437, 438 (1st Dept 2008) ("[I]ssues of fact as to liability in the underlying personal injury action render premature the conclusion that the insurers have a duty to indemnify . . . ."), no added convenience would result from consolidating the first- and third-party claims because, any convenience that could be realized from maintaining the conjoined action would be dwarfed by the prejudice claimed by Liberty and established in case law pertaining to third-party defendant insurers. *See Eugene J. Busher Co. v. Galbreath-Ruffin Realty Co.*, 16 AD2d 750, 750 (1st Dept 1962) ("A severance . . . will not be granted where the convenience of disposing of all issues in one trial clearly outweighs any possible prejudice to the plaintiff."). Furthermore, Miracle denies that prejudice would result from denying severance but offers no substantiating facts. Therefore, Liberty's motion to sever avoids prejudice.

Additionally, the insurance coverage action is independent and distinct from the

underlying cause of action because the former could arise even in the absence of a viable personal injury action. In this sense, the third-party cause of action is not derivative of the first, and "claims should be severed where they are so unrelated that a single trial would result in undue prejudice to a party." *Krieger*, 66 AD2d at 1026 (unanimously reversing an order denying third-party insurer's motion to sever). Besides, Milestone argues that the insurance coverage issue is derivative of the liability issue but fails to explain why.

Milestone's contention that the "complex issues are intertwined," *Shanley v. Callanan Industries, Inc.*, 54 NY2d 52, 57 (NY 1981), thereby warranting a denial of the severance motion, is inapplicable here. Similarly, Milestone's argument that the same issues of fact and law pertain to both causes of action is also incorrect. The underlying liability issue is fact-intensive and based on the elements of negligence whereas the insurance coverage issue involves judicial construction of an insurance policy.

> [C]ommon principles of negligence law permeate[d] both [negligence and insurance coverage] actions" but only because "the third-party suit involve[d] an insurance agency, *not an insurance company, and at issue is not the construction of an insurance policy or the extent of its coverage*, as is true in so many instances, but simply whether the agency negligently failed to procure liability insurance for defendants.

Harris v. Manos, 181 AD2d 967, 967-68 (3d Dept 1992) (affirming the order that denied third-party insurer's motion to sever) (emphasis added). The very reasons that the *Harris* court noted that would support a motion to sever are present here.

Based on the foregoing, Third-party Defendant Liberty's motion to sever the third-party cause of action is hereby ***granted***. It is hereby

ORDERED, that all parties are directed to appear for a compliance conference on July

18, 2012 at 9:30 am.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: July 3, 2012
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

F:\DECISION - SEVERANCE\Federal Insurance Company.wpd