SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

CAROLEE LIEBERMAN and SEYMOUR LIEBERMAN,

Plaintiffs,

- against -

Index No.: 6042/10
Motion Seq. No.: 01
Motion Date: 10/12/11

LINDA J. GUERRA,

Defendant.

LINDA J. GUERRA,

Third-Party Plaintiff,

- against -

TREECO CENTERS LIMITED PARTNERSHIP and TREECO/SPE CTR INC.,

Third-Party Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Support and Exhibit	2
Affirmation in Opposition and Exhibits	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Third-party defendants move, pursuant to CPLR § 603, for an order granting them severance of defendant/third-party plaintiff Linda J. Guerra's ("Guerra") Third-Party Complaint. Plaintiffs submitted an Affirmation in Support of said motion. Defendant/third-party plaintiff

Guerra opposes the motion.

This action arises from a motor vehicle accident which occurred on December 23, 2009, at approximately 5:15 p.m., in the parking lot of the Plainview/Promenade Shops, in front of the Rite-Aid Store located at 391 South Oyster Bay Road, at or near its intersection with Woodbury Road in Woodbury, County of Nassau, State of New York. Plaintiffs have alleged that the accident was caused by the negligence of defendant/third-party plaintiff Guerra.

Plaintiffs commenced the action by service of a Summons and Verified Complaint on or about March 17, 2010. *See* Third-party Defendants' Affirmation in Support Exhibit A. On October 7, 2010, a Preliminary Conference was held at which a Preliminary Conference Order was issued. *See* Third-party Defendants' Affirmation in Support Exhibit B. Pursuant to the Preliminary Conference Order, all discovery was to be completed by May 30, 2011. On February 8, 2011, a Certification Conference was held and a Certification Order was issued. *See* Third-party Defendants' Affirmation in Support Exhibit C. On August 10, 2011, defendant/third-party plaintiff Guerra instituted the within third-party action against the third-party defendants through the service of a Third-Party Summons and Third-Party Complaint. *See* Third-party Defendants' Affirmation in Support Exhibit D. In the Third-Party Complaint, defendant/third-party plaintiff Guerra asserts that third-party defendants owned and/or controlled the subject parking lot premises and are guilty of culpable conduct, specifically that they failed to maintain the parking lot in a reasonably safe condition in that they failed to properly clear, plow and sand and/or salt the premises and parking lot. Third-party defendants joined issue on or about August 22, 2011. *See* Third-party Defendants' Affirmation in Support Exhibit E.

Third-party defendants argue that, if the third-party action is not severed, then either they

or plaintiff will "sustain manifest prejudice." Third-party defendants submit that they are entitled to severance since the discovery in the third-party action is in its infancy while the main action is currently on the trial calendar. Third-party defendants contend that if they are made to go to trial at this juncture there is not a sufficient period of time within which it could possibly conduct all necessary discovery such as to become "trial ready." Third-party defendants further argue that it is settled law that severance of a third-party action is an appropriate remedy to avoid "prejudice [to] the substantial rights of any party." *See Singh v. City of New York*, 294 A.D.2d 422, 741 N.Y.S.2d 915 (2d Dept. 2002) *citing* CPLR § 1010 and CPLR § 603.

Plaintiffs filed an Affirmation in Support of third-party defendants' motion to sever. Plaintiffs adopted the arguments set forth by third-party defendants in said motion. Plaintiffs submit that "the third-party complaint is untimely, there is no reason or basis for the delay in bringing the action and not severing the action will prejudice the plaintiff as the case is ready for trial and the plaintiff is ready, willing and wishes to proceed forthwith...Moreover, defendant has offered no basis or reason for bringing the third-party action in the eve of trial. Why? Because there is no basis."

In opposition to third-party defendants' motion, defendant/third-party plaintiff Guerra argues that, in the interest of justice, said motion must be denied in all respects. She submits that there are genuine issues of fact as to the negligence of all of the parties, including, but not limited to whether the condition and maintenance of the parking lot was a substantial factor in causing the accident. Therefore, "[i]n order to eliminate the possibility of inconsistent verdicts, one jury should hear all of the evidence an (*sic*) apportion liability."

Defendant/third-party plaintiff Guerra's counsel contends that "[t]he third Party

Defendant interposed an Answer on August 22, 2011. With said Answer the Third Party Defendant requested, from Defendants/third Party Plaintiffs, 'a copy of your entire medical file for plaintiffs, as well as copies of all pleadings and discovery exchanged to date.' Within 2 weeks of said request your affirmant forwarded to counsel for the Third Party Defendants all discovery in our possession, including, but not limited to medical reports, photos, examinations before trial, independent medical examinations. To date, your affirmant is not aware of any demands outstanding from the Third party defendants."

To avoid waste of judicial resources and risk inconsistent verdicts, it is preferable for related cases to be tried together such as in tort cases where the issue is the respective liability of the defendant and the third-party defendant for the plaintiff's injuries. *See Rothstein v. Milleridge Inn*, 251 A.D.2d 154, 674 N.Y.S.2d 346 (1st Dept. 1998). In *Rothstein v. Milleridge Inn*, plaintiff filed a slip and fall negligence action against a parking lot owner and the owner filed a third-party action against the snow and ice removal contractor. The Court found that the trial court abused its discretion by severing the third-party action from the main action, as the defendant parking lot owner would be prejudiced. The trier of fact could not properly determine whether the owner had negligently maintained the parking lot without considering whether the contractor used due care in removing the snow and ice. *See id.* In the instant action, defendant/third-party plaintiff Guerra asserts that third-party defendants owned and/or controlled the subject parking lot premises where the motor vehicle accident with plaintiffs occurred and are guilty of culpable conduct, specifically that they (third-party defendants) failed to maintain the parking lot in a reasonably safe condition in that they failed to properly clear, plow and sand and/or salt the premises and parking lot.

Defendant/third-party plaintiff Guerra instituted the third-party action on August 10,

2011, with third-party defendants joining issue on August 22, 2011. That has given third-party defendants almost four months during which to conduct discovery. Additionally, the instant matter is now scheduled for trial on January 30, 2012, providing third-party defendants with even more time. Furthermore, defendant/third-party plaintiff Guerra claims that, two weeks after third-party defendants joined issue, she provided them with "all discovery in our possession, including, but not limited to medical reports, photos, examinations before trial, independent medical examinations."

The case of *Singh v. City of New York, supra*, cited by third-party defendants in support of their motion, differs from the case at bar in that the *Singh* matter was going to trial on the sole issue of damages. Liability was not at issue as it is in the present case. Furthermore, in *Cusano by Cusano v. Sankyo Seiki Mfg. Co., Ltd.*, 184 A.D.2d 489, 584 N.Y.S.2d 324 (2d Dept. 1992), also cited by third-party defendants, the impleader of the third-party defendant was eight years after the main action was filed and two years after a stay of discovery was lifted. In the instant action, the third-party defendant was added only two months after discovery was to be completed. The Court finds that there has been no excessive or inexcusable procrastination in the assertion of prosecution of this instant matter.

The Court additionally finds that there is potential prejudice to defendant/third-party plaintiff Guerra if the third-party action is not tried with the main action. Common factual and legal issues are involved and the interests of judicial economy and consistency of verdicts will be served by having a single trial. *See Curreri v. Heritage Prop. Inv. Trust, Inc.*, 48 A.D.3d 505, 852 N.Y.S.2d 278 (2d Dept. 2008).

Accordingly, third-party defendants' motion, pursuant to CPLR § 603, for an order granting them severance of defendant/third-party plaintiff's Third-Party Complaint is hereby **DENIED**.

All parties shall appear for Trial in Nassau County Supreme Court, Central Jury Part at 100 Supreme Court Drive, Mineola, New York, on January 30, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
December 13, 2011