SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** 35
Justice

Index Number : 116156/2007
YENEM
vs.
281 BROADWAY HOLDINGS
SEQUENCE NUMBER : 012
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE 4/6/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

In this property damage action, Hunter-Atlantic Inc. ("Hunter-Atlantic") moves to renew and reargue this Court's January 19, 2012 order (contained in a so-ordered Transcript) which severed the main (Yenem/Guaman) action from the third-party actions.

Factual Background

During the proceedings on January 19, 2012, the Court severed the main action and set the main action for trial on June 4, 2012. According to Hunter-Atlantic, the reason for the severance was that the delay occasioned by the inability of Hunter-Atlantic's foreman, Thomas Frangipane ("Frangipane"), to appear for a deposition as a result of his criminal indictment, would unduly delay the trial of this action. Frangipane asserted his constitutional privilege pursuant to the Fifth Amendment of the U.S. Constitution during his depositions by DeSimone Engineering, SLCE Architects, Fehringer Surveying, and Geotechnical Engineering Options, but is available immediately if such parties still request his deposition.

However, since Frangipane has entered a plea on March 5, 2012, and is now available for a deposition, delay is no longer an issue and the entire action may be tried jointly.

In support of reargument, Hunter-Atlantic contends that neither parties nor the Court knew on January 19, 2012 that Frangipane would be available to appear for a deposition. Therefore, the delay caused by his inability to testify no longer exists.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: _____ _____, **J.S.C.**

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

[redacted]

In support of renewal, Hunter-Atlantic argues that the new evidence was not available or known on January 19, 2012 is a reasonable justification for failing to produce such evidence.

Courts favor joint trials, there is no prejudice to the third-party defendants, and all parties in the Yenem action and the third party action were deposed and had an opportunity to question and cross-examine plaintiff, defendants, third-party plaintiffs, and third-party defendants. All initial third-party defendants had a fair opportunity to question and cross-examine Frangipane. And Frangipane's criminal indictment and plea do not entitle the initial third-party defendants to a further deposition. Further, nonparty depositions of Jeff Clark and Mary Ellen Vatalaro are scheduled and will not delay the trial.

A reconsideration of severance is warranted to avoid unnecessary costs and delays, duplication of proof and damage awards, as both actions involve common questions of law and fact arising from the same occurrence, and there is no outstanding discovery. In the event the actions are not rejoined, each case would reach differing and conflicting determinations on the same facts, to the prejudice of the parties.

Yenem, third party defendants Langan Engineering and Environmental Services, Inc. ("Langan"), SLCE Architects, LLP ("SLCE"), Geotechnical Engineering Options, P.C. ("Geotech"), Pavarini McGovern, LLC ("Pavarini") and DeSimone Consulting Engineers, LLC ("DeSimone") oppose the motion on the following grounds. There will not be any inconsistent verdicts because the trial is on damages as to Yenem only, and the damage award is unique to Yenem. Once the damages are fixed, the defendants can dispute among themselves as to how damages should be divided among them. Also, Frangipane may exercise his Fifth Amendment privilege until after sentencing, and the motion does not state when Frangipane is scheduled to be sentenced or whether sentencing will be adjourned past June 4, 2012.[1] There is no prejudice to allowing the trial to go forward as scheduled. Further, an additional reason for the severance was because the trial in Yenem will be solely on damages, while the trial in the remaining actions will include liability. Langan also argues that since Frangipane refused to answer questions related to the project, citing his Fifth Amendment rights, and therefore, Langan and the other third-party defendants, would be prejudiced if they did not have an opportunity, along with the second third-party defendants, to question Frangipane regarding the criminal investigation and Hunter-Atlantic's involvement with the project. And, depositions of five key witnesses (including the two mentioned above) on the question of liability are still outstanding, and thus, the third-party actions are not ready for trial. DiSimone points out that it was impleaded after Frangipane's deposition commenced, and DeSimone was then prevented from questioning him when he asserted his rights. Further, Hunter-Atlantic's motion is untimely, in that the motion was made after the time to file summary judgment in the main action had passed and the Court directed that all such motions be made returnable no later than April 4, 2012.

Pavarini adds that rejoining the actions will place it in a position to defend Hunter-Atlantic's claims without the benefit of the outstanding discovery related to the nonparty depositions that impact Pavarini's defense. And, Pavarini will potentially be responsible for actions by other parties not before the Court, and the only recourse Pavarini would have would

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[1] Yenem supplemented its opposition, adding that its records from the United States District Court revealed that Frangipane's sentencing is scheduled for August 6, 2012.

be to participate in a second liability trail where the remaining defendants' liability will be addressed, causing a waste of judicial resources.

DeSimone requests that the Court award costs and attorneys' fees against Hunter-Atlantic in accordance with this Court's previous ruling to grant costs in connection with a motion to resolve discovery "against the non-prevailing party." The motion is frivolous, in that Hunter-Atlantic only disclosed the date of the plea, but not the date of the sentencing.

SLCE adds that its time to file dispositive motions expired, it has not participated in any discovery in the main action since severance was granted, and if the motion were granted, it would only have two months to prepare for trial while simultaneously having to move for leave to make a dispositive motion. And, the motion directs the filing of opposition papers within less time that is afforded by the CPLR, and the motion is not expressly identified as one to reargue, as required by CPLR 2221(e).

Reargument should be denied because Hunter-Atlantic failed to identify any law or fact this Court overlooked or misapprehended. Renewal should likewise be denied because Hunter-Atlantic failed to submit any evidence that Frangipane will waive his rights at any deposition, or that severance does not serve the interest of judicial economy and convenience of the litigants.

Geotechnical also takes issue with the factual record stated by Hunter-Atlantic.

Analysis

At the outset, Hunter-Atlantic's motion was not served in accordance with the time frame provided by CPLR 2214(b), which provides, in relevant part:

> . . . A notice of motion . . . shall be served at least eight days before the time at which the motion is noticed to be heard. Answering affidavits shall be served at least two days before such time. *Answering affidavits . . . shall be served at least seven days before such time if a notice of motion served at least sixteen days before such time so demands*; whereupon any reply or responding affidavits shall be served at least one day before such time. (Emphasis added).

It is uncontested that Hunter-Atlantic's motion was served, by regular mail, on March 19, 2012, and was made returnable 21 days later on April 9, 2012, and demands that answering (opposition) papers be served 10 days before the return date (*i.e.*, by March 30, 2012). Yet, opposition papers need only be served within seven days before the return date (*i.e.*, April 2, 2012). Thus, Hunter-Atlantic did not adhere to the time constraints outlined in CPLR 2214(b).[2] However, in the interest of resolving motions on their merits, and given that the parties had the opportunity to submit their opposition papers for the Court's review, the Court proceeds to determine the motion on the merits.

The motion to renew, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v Wolf*, 194 Misc. 2d 126, 133, 751 N.Y.S.2d 707; D. Siegel New York Practice § 254 [3rd ed.1999]). A motion to renew, "is intended to draw the

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[2] The "Notice of Motion" does not state that it is one to reargue and renew, the body of the Notice of Motion clearly states that the motion is one to reargue and renew.

court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention." (*Beiny v. Wynyard*, 132 A.D.2d 190, 522 N.Y.S.2d 511, lv. dismissed 71 N.Y.2d 994, 529 N.Y.S.2d 277, 524 N.E.2d 879)."

A motion for leave to reargue, on the other hand, under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept] *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588 [lst Dept 1979] ("A party cannot raise questions, advance new arguments, or assume a position inconsistent with that taken on the original motion"); *William P. Pahl Equipment Corp. v Kassis, supra*). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

Here, Hunter-Atlantic's motion to renew and reargue is essentially a motion to renew since it failed to point out any fact or law the Court overlooked or misapprehended, and is essentially based on the fact that Frangipane entered a plea. Therefore, the branch of Hunter-Atlantic's motion to renew is warranted. However, upon renewal, the Court adheres to its earlier determination.

As pointed out by the defendants, severance under the circumstances promotes judicial economy. Discovery in Yenem's main action is complete, and more importantly, liability of the defendants in relation to Yenem has already been established and the sole remaining issue to be tried is that of damages claimed by Yenem. However, in the remaining third-party actions, liability of and among the defendants remains an issue. Therefore, to rejoin Yenem's main action with the remaining third-party actions would unduly delay the damages only trial in Yenem, resulting in prejudice to Yenem. It is noted that discovery in the remaining third-party actions is incomplete, thereby increasing the delay of the trial on damages in Yenem. This reason was an additional basis for severing Yenem's action from the remaining third-party actions, and the fact that Frangipane entered a plea, does not alter this basis. Under such circumstances, the prejudice to plaintiff in being required to await the conclusion of lengthy and complex liability proceedings before obtaining any remedy outweighs any potential inconvenience to the defendants (*Golden v Moscowitz*, 194 AD2d 385 [1st Dept1993]). Therefore, since granting the severance pursuant to CPLR 603 prevents any prejudice to plaintiff stemming from the delay occasioned by the further discovery proceedings and liability trial of the third-party actions, severance of the third-party action remains warranted. In any event, that Frangipane entered a plea, in and of itself, is no basis to disturb this Court's ruling to sever Yenem's action, as the record indicates that Frangipane's sentencing is scheduled to occur after the June 4, 2012 trial, and there is no indication that he will not reassert his Fifth Amendment rights at any deposition prior to sentencing.

And, given that Hunter-Atlantic's instant motion is for severance, and is not based on

discovery, DeSimone's request for costs and attorneys' fees against Hunter-Atlantic pursuant to this Court's previous ruling to grant costs in connection with a motion to resolve discovery is unwarranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by Hunter-Atlantic Inc. to renew and reargue this Court's January 19, 2012 order (contained in a so-ordered Transcript) which severed the main (Yenem/Guaman) action from the third-party actions, is granted solely as to renewal; however, upon renewal, the Court adheres to said order; and it is further

ORDERED that DeSimone's request that the Court award costs and attorneys' fees against Hunter-Atlantic in accordance with this Court's previous ruling to grant costs in connection with a motion to resolve discovery "against the non-prevailing party" is denied; and it is further

ORDERED that Hunter-Atlantic shall serve a copy of this Order with notice of entry upon all parties within five days of entry.

This constitutes the decision and order of the Court.

Dated 5.11.2012 **ENTER:** _____, J.S.C.

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**