SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

JOSEPH BEE and THERESA BEE,
Plaintiffs,

INDEX NO. 115417/08

MOTION SEQ. NO. 007

-against-

HENEGAN CONSTRUCTION CO., INC., FOREST ELECTRIC CORP., EURO-TECH CONSTRUCTION CORP., SKANSKA USA BUILDING, INC., NEW AMSTERDAM DEVELOPMENT CORPORATION, DISNEY WORLDWIDE SERVICE, INC. and DISNEY CORE SERVICES,
Defendants.

HENEGAN GENERAL CONTRACTING CORP.,
Third-Party Plaintiff,

THIRD-PARTY INDEX NO. 590673/2009

-against-

GENERAL GLASS AND METAL, INC.,
Third-Party Defendants.

SKANSKA USA BUILDING, INC., NEW AMSTERDAM DEVELOPMENT CORP., DISNEY WORLDWIDE SERVICES, INC. also incorrectly sued herein as DISNEY CORE SERVICES,
Second Third-Party Plaintiffs,

SECOND THIRD-PARTY INDEX NO. 590614/2012

-against-

GENERAL GLASS AND METAL, INC.,
Second Third-Party Defendant.

The following papers were read on this motion by the plaintiff to sever the second third-party action.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

In this action, Joseph Bee (Bee or plaintiff) seeks to recover damages for personal injuries he allegedly sustained as a result of an accident that occurred in the course of his work at a construction site. Before this Court is a motion by Bee and Theresa Bee (collectively, plaintiffs), brought by Order to Show Cause (OSC) on September 5, 2012, to sever the second

third-party action. On July 20, 2012, defendants/second third-party plaintiffs Skanska USA Building, Inc. (Skanska), New Amsterdam Development Corporation (New Amsterdam) and Disney Worldwide Services, Inc., also incorrectly sued herein as Disney Core Services (Disney), impleaded second third-party defendant General Glass and Metal, Inc. (General Glass). General Glass supports plaintiffs' motion to sever. Defendants/second third-party plaintiffs Skanska, New Amsterdam, and Disney oppose this motion to sever (collectively, opposing defendants).

BACKGROUND

Bee was an employee of General Glass when he was injured on May 20, 2008. The incident occurred at 214 West 42nd Street, New York, New York on the New Amsterdam Theatre/Disney Theatre premises (*see* Verified Bill of Particulars (BP), ¶ 5). The incident, leading to Bee's claimed injuries, occurred when he fell from an elevated gang box onto a pile of materials and debris on an unspecified floor of the premises. In his complaint, Bee asserts causes of action for violations of Labor Law §§ 200, 240 and 241(6), Rule 23 of the Industrial Code, Article 1926 of OSHA, and otherwise negligent, careless and reckless behavior on the part of the defendants. Theresa Bee asserts a derivative claim for loss of consortium.

The original summons and complaint were filed by the plaintiffs on November 17, 2008 against Henegan, Forest, Euro-Tech, and Skanska. The action against Forest and Euro-Tech was later discontinued. A third-party action was commenced by Henegan against General Glass pursuant to CPLR 1007 on July 7, 2009, which was voluntarily discontinued on January 4, 2010. On November 23, 2010, plaintiffs moved pursuant to CPLR 3025(b) to amend the summons and complaint to add New Amsterdam and Disney as defendants which was granted by this Court on February 10, 2011.

On or about July 20, 2012, after discovery of the main action had commenced and depositions of the plaintiffs and Henegan and Skanska had taken place, Skanska, New

Amsterdam, and Disney impleaded General Glass. Defendants/second-third party plaintiffs assert claims against General Glass for contractual indemnification and breach of agreement to procure liability insurance.

Now, plaintiffs move to sever the second third-party action. Plaintiffs argue, *inter alia*, that their motion to sever should be granted because it is improper, prejudicial as a matter of law, and reversible error to try insurance issues in a personal injury trial. Plaintiffs contend that there are no common issues of law and fact uniting these two actions. Further, plaintiffs argue that the late commencement of the second third-party action will result in undue delay and substantial prejudice if severance is not granted. They argue that Skanska did not object to the discontinuation of the first third-party action against General Glass, nor did it choose to join the third-party action against General Glass in 2009. Therefore, plaintiffs maintain that defendants knew of General Glass, and could have started this action at an earlier date. Nonetheless, the late commencement of this second third-party action will require repetitious party depositions and additional discovery, prejudicing the plaintiffs by further delaying the litigation of the main action.

General Glass submits papers in support of plaintiffs' motion to sever and argues that the commencement of the second third-party action is prejudicial. General Glass contends that discovery of the main action is virtually complete and it should not have to rush discovery because of its belated addition as a second third-party defendant. Moreover, General Glass contends that if the second third-party action is left unsevered, it will request to redepose the plaintiff and all defendants.

Skanska, New Amsterdam, and Disney oppose plaintiffs' motion to sever the second third-party action from the main action. They maintain, *inter alia*, that the inclusion of the second third-party action will benefit, not burden, the plaintiff. Opposing defendants argue that third-party actions involving breach of contract to procure insurance and contractual

indemnification claims almost always are included with a main action asserting Labor Law §§ 200, 240 and 241(6) claims. Moreover, opposing defendants argue that the timing of the second third-party action has not caused undue delay since the main action is still conducting discovery as service of a supplemental BP by plaintiffs, responses, and depositions still remain outstanding. Additionally, the Note of Issue has not yet been filed. Furthermore, they point to Justice Michael Stallman's undated preliminary conference order stating that there is no deadline for impleader. Opposing defendants further assert that even if the second third-party action causes undue delay, delay alone is improper grounds to warrant severance of this third-party action since it involves common issues of law and fact with the main action.

DISCUSSION

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. The court may order the trial of any claim or issue prior to the trial of the others." The ordering of a separate trial of a claim or separate issue under CPLR 603 is a discretionary determination (*see Baseball Off. of Commr. v Marsh & McLennan*, 295 AD2d 73 [1st Dept 2002]). "Where it will facilitate the speedy, unprejudiced disposition of a case, severance is appropriate in the sound exercise of discretion" (*Cross v Cross*, 112 AD2d 62, 64 [1st Dept 1985] [internal citation omitted]).

A court may sever related actions with a common nucleus of fact to prevent prejudice or substantial delay to a party (*see Sichel v Community Synagogue*, 256 AD2d 276, 276 [1st Dept 1998]). Plaintiffs may be substantially prejudiced if they must await the completion of disclosure for a third-party action that is not severed from the main action (*see Blechman v Peiser's & Sons*, 186 AD2d 50, 51 [1st Dept 1992] [where second third-party action was initiated more than two years after main action]; *see also Rothstein v Millerridge Inn*, 251 AD2d 154, 155 [1st Dept 1998] ["where the main action was trial-ready but still-outstanding discovery on the third-party

action would unreasonably delay bringing the plaintiff's case to trial, a joint trial of the main and the third-party actions could prejudice the plaintiff"]; *Pena v City of New York*, 222 AD2d 233 [1st Dept 1995]). The Court's exercise of that discretion "will not be disturbed absent [an] abuse of discretion or prejudice to a party's substantial right" (*Caruana v Padmanabha*, 77 AD3d 1307, 1307 [4th Dept 2010], quoting *Matter of Green Harbour Homeowners' Assn v Town of Lake George Planning Board*, 1 AD3d 744, 746 [3d Dept 2003]).

The Court finds that the second third-party action should be severed. Allowing the second-third party action to proceed consolidated with the main action will result in substantial prejudice through undue delay and inconvenience. The original summons and complaint were filed on November 17, 2008 against Henegan and Skanska, and New Amsterdam and Disney were joined by grant of motion on February 10, 2011. Thus, over 3 years and over 16 months, respectively, elapsed before the second third-party action against General Glass was commenced. Moreover, although the main action is not trial ready, substantial discovery has been conducted. Numerous depositions have taken place: plaintiffs were deposed on four separate dates during 2010 and 2011, Henegan and Skanska were deposed in September and October of 2011, and Disney produced non-party witnesses for depositions in November 2011 and April 2012 (plaintiff's affirmation in support, ¶10, 11). If this action is not severed, General Glass, as stated in their affirmation in support, will want to conduct their own depositions of both the plaintiff and defendants, and they would be entitled to do so. The repetition of party depositions is inconvenient, an undue burden on the plaintiffs, and contradictory to a speedy disposition of their case.

Moreover, a third-party action commenced by Henegan in July of 2009 against General Glass was discontinued in January of 2010. Skanska was aware of this action, did not implead General Glass alongside Henegan, and did not protest to the discontinuance of that action. Skanska had knowledge of General Glass and its connection to the plaintiffs, and not only

agreed to discontinue the first third-party action but had the opportunity to commence a second third-party action at an earlier date. New Amsterdam and Disney were aware of the relationship between General Glass and this action, and could also have commenced the second-third party action substantially sooner.

It is well within the discretion of this Court to sever the second third-party action from the main action to alleviate potential undue delay, prejudice, and inconvenience to the plaintiffs in this case. Furthermore, defendants have not shown why they are substantially prejudiced if plaintiffs' motion to sever is granted. The Court has considered the parties remaining arguments and finds them unavailing.

CONCLUSION

Accordingly it is,

ORDERED that plaintiffs Joseph Bee and Theresa Bee's motion for an order severing the second third-party action from the herein action, is granted; and it is further,

ORDERED that the plaintiffs are directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Trial Support Office which is directed to effectuate the severance.

This constitutes the Decision and Order of the Court.

Dated: 8-14-13

FILED
Enter:
AUG 16 2013
COUNTY CLERK'S OFFICE
NEW YORK

PAUL WOOTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

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