SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

FRASSINELLI et al.

-v-

INDEX NO. 118093/09

MOTION DATE

MOTION SEQ. NO. 004

120 EAST 73rd ST Corp., et al.

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 accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiffs' orders to show cause bearing sequence nos. 004 and 005 are consolidated for joint disposition, and decided herein; and it is further

ORDERED that the motions by plaintiffs (sequence nos. 004 and 005) pursuant to CPLR 603, CPLR 407, and CPLR 1010 for severance of the Second Third-Party Action is denied, at this juncture; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision of the Court.

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

Dated: 01.16.2014

C. E. Edmead, J.S.C.

HON. CAROL EDMEAD

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MARZIA FRASSINELLI and ALBERTO CONTI.,

Plaintiffs,

-against-

120 EAST 73RD STREET CORP, OCRAM INC., OCRAM HOLDING, INC., RAGNO BOILER MAINTENANCE, INC. and TIFFANY HEATING SERVICES, INC.,

Defendants.

Index No. 118093/09

Motion Seq. Nos.004-005

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120 EAST 73RD STREET CORP., OCRAM INC., and OCRAM HOLDING, INC.,

Third-Party Plaintiffs,

-against-

RAGNO BOILER MAINTENANCE, INC. and TIFFANY HEATING SERVICES, INC.,

Third-Party Defendants.

Third Party Index No.: 590777/10

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120 EAST 73RD STREET CORP., OCRAM INC., and OCRAM HOLDING, INC.,

Second Third-Party Plaintiffs,

-against-

E. ROGER HOTTE and HARLINGEN CORPORATION a/k/a HARLINGEN MANAGEMENT CO..,

Second Third-Party Defendants.

Third Party Index No.: 590101/13

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action for personal injuries, plaintiffs Marzia Frassinelli ("Frassinelli") and Alberto Conti ("Conti") (collectively, "plaintiffs") move by Order to Show Cause (sequence nos. 004-005) pursuant to CPLR 603, CPLR 407, and CPLR 1010 for an order severing the Second Third Party Action of *120 East 73rd Street Corp., Ocram, Inc. and Ocram Holding Inc. v. E. Roger Hotte and Harlingen Corporation a/k/a Harlingen Management Co.*, Index No. 590101/13, and allowing plaintiffs to file a note of issue.[1]

Factual Background

On December 8, 2009, Frassinelli allegedly sustained burns from hot water while taking a shower at the premises located at 120 East 73rd Street, Apartment C2, New York, New York (the "Premises"). Frasinelli and her husband, Conti, who were visiting New York with their daughter, Elena Conti ("Elena"), and her boyfriend, Fabio Zerbino ("Fabio") at the time of the incident, reside in Florence, Italy (Plaintiff EBT, pp. 12, 48-51). Elena and Fabio also reside in Italy.

Plaintiffs commenced this action on or about December 24, 2009, asserting negligence claims against the Ocram Defendants, the current owners of the Premises,[2] for failing to "keep and maintain . . . the boiler, shower, and bath in a safe and proper condition." (Complaint, ¶¶16-17). The Ocram Defendants had assumed ownership and management of the Premises on October 13, 1993 from E. Roger Hotte ("Hotte"), who owned same from 1992 until October 13,

[1] Plaintiffs' motion by order to show cause filed August 2013 (seq. 004) was rejected by defendants/third party plaintiffs 120 East 73rd Street Corp, Ocram Inc., Ocram Holding, Inc. (the "Ocram Defendants") for improper service of same. Thereafter, plaintiffs filed an identical order to show cause (seq. 005) based on the supporting papers filed under sequence 004. Both motions are consolidated for joint disposition herein.

[2] Conti brings a claim for loss of services.

1993. Prior to that, Harlingen Corporation a/k/a Harlingen Management Co. ("Harlingen") owned the Premises from 1986 through 1992.

After the Ocram Defendants interposed their answer, plaintiffs served a bill of particulars alleging that the incident was caused by, *inter alia*, the Ocram Defendants' negligent installation, maintenance and/or inspection of a boiler and/or boiler valve, and the mixing valve in the shower/bathtub (Verified Bill of Particulars dated June 10, 2010, ¶9).

In September 2010, the Ocram Defendants commenced a third-party action against Tiffany Heating Services, Inc. ("Tiffany Heating") and Ragno Boiler Maintenance, Inc. ("Ragno Boiler") for indemnity and contribution based on allegations that they were responsible for the installation and maintenance of the subject boiler and/or boiler valve, and/or mixing valve.

Thereafter, on or about December 28, 2010, plaintiffs amended their summons and complaint to add both Tiffany Heating and Ragno Boiler as direct defendants to the action, and to add Ocram Holding, Inc. (the proper name of Ocram Inc.) as a defendant. The Ocram Defendants and Tiffany Heating answered the amended complaint. However, Ragno Boiler failed to move or appear in the action, and on motion by the parties, the court granted a default judgment against Ragno Boiler.

Plaintiffs' depositions were held in New York on June 2-3, 2011. Plaintiff Frassinelli testified that as she was finishing her shower at the Premises, she "turned off the one for the hot water," and the water that then came out of the faucet rapidly became scalding hot (EBT, pp. 92-93). She "tried to get out . . . but the water - - the bathtub was - - it went down. It had like a slope . . . down. And I wasn't able to . . . . (EBT, p. 94). She then slipped and fell in the tub,

into the hot water. Elena then allegedly pulled her out of the bathtub.[3]

According to the deposition testimony of Marco Walker, on behalf of the Ocram Defendants, the bathroom tub and shower were installed before the Ocram Defendants assumed ownership and management of the property.

On or about November 19, 2012, after all party depositions had been completed, plaintiffs amended their bill of particulars, alleging, for the first time, that their damages were caused by, among other things, the improper design, construction, and/or installation of the bathroom and/or bathtub and shower.

Consequently, less than two months later, in January 2013, the Ocram Defendants filed the Second Third-Party Action for indemnification and contribution alleging that the previous owners of the Premises, Hotte and/or Harlingen, were responsible for the design, construction and/or installation of the bathroom and/or bathtub and shower.[4]

After several unsuccessful attempts at mediation before Miles Vigilante, Esq. and at his suggestion, plaintiffs now move to sever the Second Third-Party Action.

Plaintiffs argue that the Second Third-Party Action should be severed on the grounds that proceeding forward with the united actions will cause prejudice to plaintiffs. Without severance, discovery would have to start from the beginning, as Hotte would be entitled to depose all parties

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[3] Following plaintiffs' depositions, the Ocram Defendants advised all parties of their intent to depose non-parties Elena and Fabio. However, those witnesses have not yet been deposed, and the Ocram Defendants have maintained their desire to pursue depositions of them.

[4] Hotte was served with the Second Third Party Action, but has not yet officially answered the Second Third-Party Action.. According to plaintiffs, Hotte's counsel has advised the parties that Hotte's insurer has declined defense coverage (Affirmation, ¶18). According to the Ocram Defendants, Hotte is still trying to locate insurance coverage for this matter. The Ocram Defendants have not served the Second Third-Party Complaint upon Harlingen, as they have been unable to locate Harlingen.

again and subject plaintiff to a further medical examination. Additionally, plaintiffs live in Italy and have already traveled to the United States once to undergo depositions and medical examinations.

Moreover, allowing discovery to proceed in the Second Third-Party Action would delay the main causes of action brought by plaintiffs. There is no evidence that Hotte or Harlingen designed or constructed the bathroom. Plaintiffs also argue that the dispute between the Ocram Defendants and Hotte/Harlingen as to which of them are liable is not the concern of the plaintiffs. Further, the purchase agreements detailing the sale in 1993 to the Ocram Defendants, and tenuous claims in the Second Third Party Action, would only confuse the jury. All written discovery, examinations, and party depositions in the primary action and First Third-Party Action (except discovery relating to Ragno Boiler, which remains in default) have been completed, and that the only outstanding discovery in these actions pertains to the Ocram Defendants' intention to depose non-party witnesses Conti and Zerbino.

No discovery has occurred in the Second Third-Party Action, as Hotte has not answered the Second Third-Party Complaint, and Harlingen has not been served with same.

Plaintiffs contend that if the note of issue is filed soon, a trial could take place within a few months. If severance does not occur, the case could be delayed another two years while the second third-party defendants conduct discovery.

In opposition, the Ocram Defendants argue that severance of the Second Third-Party Action is unwarranted as plaintiffs failed to establish that any of their "substantial rights" will be prejudiced without severance. The Ocram Defendants note that discovery in the primary action is incomplete, the note of issue has not yet been filed (and was not filed during the period

between when party discovery had been completed and before the second third-party action was commenced), and additional time is necessary to litigate the Second Third-Party Action.

It is plaintiffs who brought new, late claims, despite clear testimony contradicting those claims, which forced the Ocram Defendants to bring the Second Third-Party Action. Plaintiffs opened the door to the new discovery at such a late stage by filing an amended pleading alleging an entirely new theory of negligence three years after the date of loss, and 15 months after plaintiffs' depositions. The Ocram Defendants commenced the Second Third-Party Action within just 47 days of receiving the amended bill of particulars, which provided the basis for the Second Third-Party Action.

Thus, the Ocram Defendants did not delay in commencing the Second Third-Party Action. Had plaintiffs asserted their additional claims earlier, the Ocram Defendants could have commenced the Second Third-Party Action earlier, prior to plaintiffs' depositions. However, due to plaintiffs' late amendment, they created the scenario in which they may need to be produced again. Further, plaintiffs, who claim to be prejudiced, waited over nine months after the Second Third-Party Action was filed to move to sever same.

Additionally, there is still discovery to be completed in the primary action (depositions of non-party witnesses), and it would make no sense to duplicate this discovery in the Second-Third Party Action. Thus, severance would not be in the interests of judicial economy or in the parties' economic interests.

Moreover, the factual and legal issues are inextricably intertwined, because there are liability issues affecting all parties. The interests of judicial economy and consistency will be served by having a single trial, and severance would thus serve only to increase the likelihood of

inconsistent jury verdicts on these issues.

Lastly, the Ocram Defendants argue that plaintiffs have not established prejudice of any substantial rights, as plaintiffs do not state why their prior travel to New York for depositions and medical examinations is relevant for purposes of this motion.

In reply, plaintiffs argue that the reason they did not file the instant motion for several months after the Second Third-Party Action was filed or the note of issue, was that they were lenient in allowing the Ocram Defendants to work out all issues relating to services of Hotte/Harlingen and Hotte's insurance coverage. It is unlikely that Hotte will obtain insurance coverage for this matter and has still not answered the third-party complaint, and the Ocram Defendants have not indicated how the prior owners bear any liability for plaintiff's accident, almost 20 years later. The Ocram Defendants owned the property for more nearly 20 years and had enough time to cure any defects on the premises.

Plaintiffs further argue that if Hotte and/or Harlingen have any liability in the matter, that issue should be dealt with in a completely separate action between the Ocram Defendants and Hotte/Harlingen. Plaintiffs reiterate their arguments that the jury would be confused by hearing testimony regarding the issues, transactions and communications between the Ocram Defendants and Hotte/Harlingen.

Discussion

CPLR 603 authorizes courts to sever claims "in furtherance of convenience or to avoid prejudice." CPLR 1010 authorizes a separate trial of a third-party claim, and permits the court to consider whether the controversy between the third-party plaintiff and third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party

(*Gomez v. City of New York*, 78 AD3d 482, 911 NYS2d 45 [1st Dept 2010]).[5]

Severance of claims is subject to the sound discretion of the trial judge and may be used to facilitate the speedy disposition of cases (*see Cross v. Cross*, 112 AD2d 62, 491 NYS2d 393 [1st Dept 1985]). However, where complex issues of law and fact are inextricably interwoven and intertwined, courts typically order a single trial (*Shanley v. Callahan Indus.*, 54 NY2d 52, 57 [1981] ("[I]t would be better not to fragment trials, but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time"); *Neckles v. VW Credit, Inc.*, 23 AD3d 191, 803 NYS2d 531 [1st Dept 2005]; *Sichel v. Community Synagogue*, 256 AD2d 276, 682 NYS2d 382 [1st Dept 1998] (where two actions arise from common nucleus of facts, court should only sever actions to prevent prejudice or substantial delay to party)). In tort cases in particular, where the issue is the respective liability of the defendant and the third-party defendant for the plaintiff's injury, it is preferable for related actions to be tried together (*Sichel*, 256 AD2d at 276, *supra*; *Dolce v. Jones*, 145 AD2d 594, 595, 536 NYS2d 134 [2d Dept 1988]).

Rogers v. U-Haul Co. (161 AD2d 214, 554 NYS2d 600 [1st Dept 1990]) is instructive. In *Rogers*, the plaintiff filed the note of issue and statement of readiness, averring that discovery was complete. In response to the third-party defendant's motion to change venue, plaintiffs cross-moved to sever the third-party action pursuant to CPLR 1010 on the ground that without severance, they would encounter unreasonable delay in the pursuit of their claims in the primary action. Thereafter, defendants/third-party plaintiffs cross-moved to strike the note of issue to allow completion of discovery in the third-party action.

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[5] CPLR 407, which applies in special proceedings, is irrelevant here.

The motion court denied the motion to sever, but granted the motion to strike the note of issue to the extent of directing all discovery to be completed within 90 days. The Appellate Division, First Department, affirmed this decision and ruled that the Supreme Court exercised its discretion properly by preventing contradictory results and furthering the interests of judicial economy (*Rogers*, 161 AD2d 214, *supra*).

Thus, courts have the discretion to: (a) deny severance motions when discovery is incomplete in the third-party action; and (b) and simultaneously create expedited discovery schedules to complete the outstanding third-party discovery (*see Rogers v. U-Haul Co.*, 161 AD2d 214, *supra*; *Power Test Petroleum Distributors, Inc. v. Northville Indus. Corp.*, 114 AD2d 405, 494 NYS2d 129 [1st Dept 1985] (motion to sever denied when questions of law and fact were intertwined with those in primary action, despite incomplete discovery in third-party action; court set 90 day deadline to complete outstanding discovery)).

Severance is generally not warranted when the third-party action at issue was timely commenced (*see New York State Workers Compensation Bd. v. Classic Insurance Agency*, 2011 WL 758370 [Sup. Ct. New York Cty. 2011]; *Duzar v. Metropolitan Transportation Authority*, 2008 WL 3819721 [Sup. Ct. Queens Cty. 2008]).

The court declines to sever the actions in the case at bar, as plaintiffs fail to demonstrate prejudice and the possibility of unreasonable delay absent severance. Plaintiffs' arguments that: (a) the case could be delayed "another two years" while the Second-Third Party Defendants conduct discovery; and (b) plaintiffs, who reside in Italy, may be burdened by unfair travel expenses if they are required to appear for an additional deposition, are unpersuasive.

There is no showing that discovery, if any, among the parties will unduly delay the trial of

this action. For one, there is no indication that the presence of Harlingen in the caption will delay discovery. The Ocram Defendants have been unable to locate, and therefore serve, Harlingen for over one year, and thus, it appears that Harlingen has not been properly joined in the action. Therefore, Harlingen is effectively not, and may never be, a party to this litigation.

Further, it appears that Hotte, who has apparently been attempting to resolve issues related to insurance coverage for his defense, has yet to appear or otherwise move in this action thus far. Therefore likewise, Hotte is effectively not, and may never be, an active party to this litigation. It is noted that a default judgment has not been sought against Hotte.

Plaintiffs have failed to demonstrate, at this juncture, why the mere presence of a party in default and a party who has yet to be located for service, would cause unreasonable delay in prosecuting their case. Plaintiffs do not claim that Ragno Boiler's default has impeded this matter, and there is no indication why the default of Hotte would create a different result.

Thus, for all practical purposes, the litigation may proceed without the Second Third-Party Defendants, and the Ocram Defendants may proceed against Hotte pursuant to the CPLR without unduly delaying the trial of this action.[6]

Moreover, more than 15 months after their depositions were held, plaintiffs amended their bill of particulars and added new theories of liability. It was this action that triggered the Ocram Defendants to file the Second-Third Party Action, which, the court finds, was filed in a timely manner. Plaintiffs thus should have expected that adding new theories of liability would extend the life of their case and create the possibility that additional parties may be added to the

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[6] The Court notes that should Hotte appear in this action, the Court would direct expedited discovery, and the court would entertain a request for video depositions. And, any desired non-party discovery would be conducted pursuant to the CPLR.

caption, who, in turn, would be entitled to discovery, including depositions.

Furthermore, the parties' claims are inextricably intertwined, as they all concern liability allegedly arising from the negligent maintenance and *installation* of the shower and appurtenances related thereto, *i.e.*, the boiler, boiler valve, and/or the mixing valve. Plaintiffs assert various theories of liability grounded in negligence against the Ocram Defendants and Tiffany Heating. In the same vein, the Ocram Defendants believe that plaintiffs' allegations would more accurately be targeted at Hotte/Harlingen. The issues between the Ocram Defendants and Hotte/Harlingen will not, as plaintiffs suggest, confuse the jury. If anything, the jury can evaluate the actions of all parties as to which party or parties was responsible for installing and maintaining the shower and related parts. To the degree plaintiff's negligent design/construction/installation claims remain in their action, the Ocram Defendants are entitled to protect their interests and maintain their claims against Hotte and Harlingen for their alleged role in the negligent design/construction/installation of the shower and related parts.

Indeed, severing the actions would result in an unnecessary waste of judicial resources.

Because the claims are inextricably intertwined, and plaintiffs fail to provide adequate justification for severance, the actions will remain united and, in respect of plaintiffs' concerns, move forward in an expeditious fashion.

Although the court is sympathetic to plaintiffs' concerns, their request for severance is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiffs (sequence nos. 004 and 005) pursuant to CPLR

603, CPLR 407, and CPLR 1010 for severance of the Second Third-Party Action is denied, at this juncture; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry within 20 days of entry.

This constitutes the decision of the Court.

Dated: January 16, 2014

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD