

**Arasim v 38 Company LLC**

2016 NY Slip Op 30221(U)

February 9, 2016

Supreme Court, New York County

Docket Number: 108427/10

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS Part 11

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KEVIN ARASIM and SANDRA ARASIM,

Plaintiffs,

**Index No.: 108427/10**

-against-

38 COMPANY LLC, CB RICHARD ELLIS REAL  
ESTATE LLC, VII 444 MADISON LESSEE LLC  
AND ALL-SAFE, LLC,

Defendants.

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38 COMPANY LLC, CB RICHARD ELLIS REAL  
ESTATE LLC, VII 444 MADISON LESSEE LLC  
AND ALL-SAFE, LLC,

**Index No. 595373/15**

Third-party plaintiffs,

-against-

DAL ELECTRIC CORP,

Third-party defendant

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JOAN MADDEN, J.:

Third-party defendant Dal Electric Corp (“DAL”) moves for an order pursuant to CPLR 1010 dismissing the third party claims against it and staying discovery. Plaintiffs support the motion to the extent Dal seeks dismissal but opposes the request to stay discovery.

Defendants/third-party plaintiffs 38 Company LLC, CB Richard Ellis Real Estate, LLC, VII, 444 Madison Lessee, LLC (together “the third party plaintiffs”) oppose the motion, as does defendant All-Safe LLC (“All-Safe”).

This action arises from an accident that occurred on July 13, 2009, when plaintiff Kevin Arasim (“Arasim”) was injured when he fell from a platform on the second floor exterior scaffolding while working on a construction site at 444 Madison Avenue, New York, New York.

Plaintiffs allege that as a direct result of the fall, Arasim sustained injuries to his right ankle and lumbar spine, both which required surgery. Dal was an electrical subcontractor at the worksite, and the third-party defendants point to Arasim's deposition testimony that at the time of his accident the lack of lighting in the area was a factor in his fall. The third-party complaint, which was filed on May 29, 2015, asserts claims for contractual and common law indemnification and contribution and breach of insurance contract. On September 17, 2015, DAL interposed an answer to the third-party complaint and asserted a counterclaim for common law indemnification and contribution.

By decision and order dated March 9, 2015, this action was consolidated for joint trial and discovery with Arasim v. Residential Management Group, LLC; Index No. 450863/15 ("the Residential action"), which was transferred from the Supreme Court, Westchester County where it was commenced in 2012. The Residential action arose out of an incident that occurred on January 28, 2011, when Arasim was struck by snow and ice, while he was standing on the sidewalk in front of the parking garage located at 400/404 East 67<sup>th</sup> Street, New York, New York ("the Building").

DAL argues that the action should be "dismissed" pursuant to CPLR 1010 and discovery stayed in light of the delay in commencing the third-party action, noting that the third party complaint was not served until June 17, 2015, and that it has been served with a disc containing over 3,600 pages of materials comprises of pleadings, discovery responses, bills and particulars and that these materials do not contain Arasim's medical records or discovery exchanged in the Residential action. Moreover, DAL asserts that plaintiffs' counsel went forward with Arasim's deposition on October 23, 2015, despite DAL's request that it be adjourned so its counsel could

have an opportunity to review the litigation materials. DAL argues that it will be prejudiced by the delay in commencing the third-party action as it no longer maintains records relating to the project other than accounting records. Moreover, DAL argues that due to his brain injury, Arasim's ability to recall the relevant events had deteriorated since his first deposition was taken in 2011.

Plaintiffs support DAL's motion to the extent they argue that they will also be prejudiced as discovery in the third-party action will delay the trial of the main action. However, plaintiffs also argue that a stay of discovery is inappropriate since DAL has been provided with the discovery in the action, and plaintiffs have given their permission to exchange of medical records which will, in turn, be provided to DAL.

In their opposition, which is joined by Safe-House, the third-party plaintiffs argue that it would be a waste of judicial resources to sever the actions, as they arise out of a common nucleus of facts. In addition, they assert that discovery in connection with the third party action will not unduly delay the resolution of the main action, noting that the deposition of plaintiff Sandra Arasim has not yet been completed, and that DAL will not be prejudiced as it has had the litigation file since October 1, 2015. Moreover, third-party plaintiffs argue that they have a reasonable excuse for the delay in commencing the third-party action, asserting that they initially believed that All-Safe was responsible for the lighting in the area of the accident, but that All-Safe's witness testified at his July 24, 2013 deposition that while All-Safe installed lighting for the sidewalk bridge below the scaffold, it was not obligated to install lighting on the scaffold itself. Thereafter, the third-party plaintiffs assert that since the accident occurred four years earlier, they had difficulty identifying the proper lighting contractor and only identified DAL

after finding DAL's proposal which contained a handwritten notation that DAL provided temporary lighting on the second floor.

CPLR 603 permits a court to sever a claim or action for trial "[i]n furtherance of convenience or to avoid prejudice." CPLR 1010 which applies specifically third party actions, provides that "[t]he court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim...[and that] in exercising such discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party."

Although in determining whether to sever a third party action the court considers issues of judicial economy and prejudice to the third-party plaintiff (Vasquez v. G.A.P.L.W. Realty, Inc., 254 AD2d 232 [1<sup>st</sup> Dept 1998]), it also takes into account whether the main action will be delayed as a result of the third-party action, particularly where there has been undue or inexcusable delay in prosecuting the third party claims. Blechman v. I.J. Peiser's and Sons, Inc., 186 AD2d 50 (1<sup>st</sup> Dept 1992); Pena v. City of New York, 222 AD2d 233 (1<sup>st</sup> Dept 1995).

Under this standard, the motion to sever should be denied. First, discovery in the main action is ongoing and DAL was provided with discovery in October 2015, shortly after DAL interposed an answer. As for prejudice to DAL, while DAL argues that it will be prejudiced by the lack of its own records, such prejudice would not be cured by severing the action and ordering a separate trial, nor does such lack of records warrant outright dismissal of the action. Nor has DAL demonstrated prejudice based on Arasim's alleged memory loss since his deposition was initially taken in 2011, particularly, as third-party plaintiffs point out, Arasim

testified about the lack of lighting in the area at his August 11, 2015 deposition. In addition, it cannot be said that the delay in joining DAL is inexcusable, since third-party plaintiffs have shown that such delay was the result of their difficulty in identifying DAL as the relevant lighting contractor. Furthermore, while the main action may be delayed as a result of the joinder of the third-party action, such delay can be reduced by the court ordering that the remaining discovery be conducted on an expedited basis.

Under these circumstances, and as the third-party claims are related to those in the main action, and in view of the interests in judicial economy advanced by trying the third-party claims with the main action, the motion to sever is denied. See e.g., Nielson v. New York State Dormitory Authority, 84 AD3d 519 (1<sup>st</sup> Dept 2011)(trial court properly exercised its discretion in denying motion to sever notwithstanding delay in commencing fourth-party action, where delay of main action will not prejudice plaintiffs, the fourth-party defendants discovery rights can be accommodated, and common questions of law and fact are present).

Finally, DAL's motion to stay discovery is denied; however, the issue of outstanding discovery shall be addressed at the status conference directed below.

Accordingly, it is

ORDERED that DAL's motion is denied; and it is further

ORDERED that the parties shall appear for a status conference on March 3, 2016, at 9:30

am.

DATED: February 9, 2016

  
HON. JOAN A. MADDEN  
J.S.C.