05

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part __
Justice

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JOSE PEREZ,

Plaintiff(s),

Index No.:7947/09

Motion Date:2/17/17

- and -

Motion Cal. No.:
100,101
Motion Seq. No: 7,8

ARGO CORPORATON and PS MARCATO ELEVATOR CO., INC.,

Defendant(s).

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ARGO CORPORATION,

Third-party Plaintiff(s),

- and -

ARGO CORPORATON and PS MARCATO ELEVATOR CO., INC.,

Thirty-party Defendant(s).

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FILED
JAN 08 2018
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1 - 42 read on this motion by the third-party defendant for an order dismissing the third-party complaint for its failure to state a cause of action; a separate motion by the third-party defendant for an order dismissing the third-party complaint for defendant/third-party plaintiff's failure to comply with outstanding discovery demands; and a cross-motion by plaintiff for an order severing the third-party action; and a separate cross-motion by defendant/third-party plaintiff for an order striking the third-party defendant's answer.

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Upon the foregoing papers it is **ORDERED** that the motions and cross-motions are considered together and decided as follows:

This is an action for personal injuries allegedly sustained by the plaintiff on March 15, 2008 when he was injured while working at the premises located at 300 West 108th Street, in the County, City and State of New York. This action was commenced on February 19, 2009 by the filing of a summons and complaint. Plaintiff filed his Note of Issue on September 3, 2010. On September 8, 2011, the filed Note of Issue was vacated by the Justice presiding over this court's Trial Scheduling Part. To date, no new Note of Issue has been filed. On or about December 4, 2015, defendant Argo Corporation ("Argo") commenced a third-party action against Sierra Consulting Group ("Sierra").

Motion to Dismiss the Complaint

First, this court will consider the motion by third-party defendant Sierra which seeks to dismiss the third-party complaint against it, pursuant to CPLR §3211(a)(7) for the third-party plaintiff's failure to state a cause of action. It is well-settled that a motion made pursuant to CPLR §3211(a)(7) can only be granted if, from the pleadings' four corners, factual allegations are not discerned which manifest any cause of action cognizable at law. In furtherance of this task, the court liberally construes the complaint, accepts as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion, and accords the plaintiff the benefit of every possible favorable inference (*see, 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 [2002]). It is also well-settled that in deciding a motion made pursuant to CPLR §3211(a)(7), a court will decide whether a complaint makes out any cognizable cause of action, not whether a plaintiff will ultimately win on the merits of the allegations contained therein (see, *Stukuls v. State of New York*, 42 NY2d 272 [1977]; *Jacobs v. Macy's East*, 262 AD2d 607 [2d Dept. 1999]).

With this motion, third-party defendant Sierra asserts that, as the Note of Issue was vacated on September 8, 2011 and not restored to the court's active calendar within one year, the

complaint in this action was deemed automatically dismissed, pursuant to CPLR §3404, in September, 2012. Thus, third-party defendant Sierra asserts that, as there was no active action in December, 2015, the third-party complaint served on it is a legal nullity.

CPLR §3404, authorizes the dismissal of an action that is not restored to the court's calendar within one year of being stricken. However, in the instant action, the action was never stricken from the court's calendar, nor was the complaint dismissed. The vacatur of the filed Note of Issue simply removed the action from the court's trial calendar and placed it back into pre-note status. Consequently, where the Note of Issue is vacated, the situation herein, the one (1) year period in which to seek restoration under CPLR §3404 is inapplicable. Consequently, third-party defendant Sierra's argument that the third-party complaint is a nullity which must be dismissed is erroneous. Accordingly, third-party defendant Sierra's motion to dismiss the third-party complaint, pursuant to CPLR §3211(a)(7), is hereby denied.

Cross-Motion to Sever

This court will now consider plaintiff's motion to sever the third-party action from the main action. In support of its motion, plaintiff's counsel asserts that discovery is complete in the main action, that discovery is not complete in the third-party action and that the plaintiff will be harmed by any further delay in prosecution of his claim. Thus, plaintiff seeks an order severing the third-party action from the main action. Under CPLR §603, the court may order a severance of claims for convenience or to avoid prejudice.

This court hereby rules that severance of the third-party action is unwarranted. The questions of law and fact involved in the main action and the third-party actions are inextricably interwoven. Therefore, a single trial is appropriate in furtherance of the interests of judicial economy and to prevent inconsistent results (*see, e.g., Shanley v. Callanan Indus.*, 54 N.Y.2d 52, 57 [1981]; *Pescatore v. American Export Lines*, 131 A.D.2d 739 [2d Dept. 1987]; *Power Test Petroleum Distribs. v. Northville Indus. Corp.*, 114 A.D.2d 405, 407 [2d Dept. 1985]; *Baker v. Wight*, 158 A.D.2d 293 [1st Dept. 1990]; *Guilford v. Netter*, 179 A.D.2d 801 [2d Dept. 1992]; *Klein v. City of Long Beach*, 154 A.D.2d 346 [2d Dept. 346 [2d Dept. 1989]; *Jones-Ledbetter v. Biltmore Auto Sales, Inc.*, 239 A.D.2d 390 [2d Dept. 1997]).

Although there has already been considerable delay in the progress of this action, there has been no demonstration that a brief additional delay to permit discovery in the third-party action will cause substantial prejudice to the plaintiff in the

main action (*see*, CPLR. §603, *Ambriano v. Bowman*, 245 A.D.2d 404 [2d Dept. 1997]; *Wassel v. Niagra Mohawk Power Corp.*, 307 A.D.2d 752 [4th Dept. 2003]; *Pescatore v. American Export Lines, supra*). Any alleged prejudice to the adverse parties may be cured by the court's direction that discovery in the third-party action be completed expeditiously within the time frame imposed herein (*see, e.g., Zaveta v. Portelli*, 127 A.D.2d 760 [2d Dept. 1987]; *Fries v. Sid Tool Co.*, 90 A.D.2d 512 [2d Dept. 1982]; *Johnston Prods. Corp. v. ATI, Inc.*, 87 A.D.2d 604 [2d Dept. 1982]; *Klein v. Long Beach, supra; Jones-Ledbetter v. Biltmore Auto Sales, Inc., supra*). To insure that none of the parties is prejudiced by undue delay, the third-party defendant will be afforded an adequate opportunity to conduct its discovery in an expeditious manner.

Discovery Related Motion and Cross-motion

Third-party defendant Sierra also moves, pursuant to CPLR §§3126, to dismiss the third-party complaint, and defendant PS Marcato Elevator Co., Inc.'s cross-claims against Argo, or to compel these parties to respond to outstanding discovery demands. A review of the responsive papers from defendant/third-party defendant Argo reveals that Argo has now responded to the outstanding discovery demands. Thus, that portion of the instant motion which seeks dismissal of the third-party complaint is denied. A review of the response served by defendant PS Marcato Elevator Co. reveals that this defendant did not supply substantive answers to the discovery demand. Instead, defendant PS Mercato simply stated that they would respond upon the close of discovery. This response is unacceptable to this court. Thus, that portion of the instant motion which seeks an order compelling defendant PS Mercato to respond to outstanding discovery demands served by the third-party defendant is granted.

Finally, third-party plaintiff Argo's cross-motion to strike the third-party answer due to third-party defendant's failure to respond to outstanding discovery demands is denied. In order to prevail on discovery-related applications, an affirmation of good faith specifically delineating the conversations between counsel in an attempt to comply with the above directive is required. The affirmation must indicate the time, place and nature of the consultations between attorneys, the issues discussed, and what resolutions, if any, were made (*see*, 22 N.Y.C.R.R. §202.7 [a],[c]). No such affirmation is annexed to the instant application. As a result, it is, third-party defendant Argo's cross-motion is hereby denied. Accordingly, it is,

ORDERED, third-party defendant Sierra is directed to serve a copy of this order with notice of entry upon all parties on or before January 31, 2018. It is further,

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ORDERED, that defendant PS Mercato Elevator Co., Inc. will serve a substantive response to third-party defendant Sierra's Demand for a Bill of Particulars dated July 12, 2016 within thirty (30) days of the date of service of this order with notice of entry. It is further,

ORDERED, that all discovery in this action shall be completed within ninety (90) days of the date of service of this order with notice of entry. Plaintiff is directed to file his Note of Issue on or before May 15, 2018.

Any further requests not specifically addressed by this court are hereby denied. This constitutes the order and decision of this court.

Dated: December 22, 2017

JANICE A. TAYLOR, J.S.C.

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