

Vargas v 207 Sherman Assoc., L.L.C.

2018 NY Slip Op 30880(U)

May 7, 2018

Supreme Court, New York County

Docket Number: 162842/15

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

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

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AURELIANA VARGAS,

Plaintiff,

Index No. 162842/15
Motion Seq. No. 002

-against-

DECISION AND ORDER

207 SHERMAN ASSOCIATES, L.L.C., and SDG
MANAGEMENT CORP. and 24 HOUR FAST
CASH PAWN SHOP INC.,

Defendants.

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207 SHERMAN ASSOCIATES, L.L.C. and SDG
MANAGEMENT CORP.,

Third-party Plaintiff,

-against-

UNITED STATES LIABILITY INSURANCE
COMPANY,

Third-party Defendants.

-----X
CAROL R. EDMEAD, J.S.C.:

In this personal injury action, third-party defendant United States Liability Insurance Company (USLIC) moves, pursuant to CPLR 603, for an order directing that the third-action shall be severed and tried separately from the main action. Defendants/third-party plaintiffs 207 Sherman Associates, L.L.C. and SDG Management Corp. (together, 207 Sherman) oppose the motion.

BACKGROUND

Plaintiff Aureliana Vargas (Vargas), who does not take a position on this motion to sever, alleges that defendants are liable in negligence for injuries she allegedly sustained, on Valentine's Day, 2014, after slipping on snow and ice outside a pawn shop. The pawnshop,

defendant 24 Hour Fast Cash Pawn Shop Inc. (24 Hour Pawn), leased the space from 207 Sherman.

The subject lease contains an indemnity provision as well as a provision requiring 24 Hour Pawn to procure commercial general liability insurance (207 Sherman/24 Hour Pawn Lease, ¶ 9-10). 207 Sherman sent a tender letter, dated July 13, 2016 to 24 Hour Pawn, demanding that 24 Hour Pawn “and/or its carrier assume co-defendants’ defense of this action and fully indemnify and hold [207 Sherman] harmless from and in connection with this claim.” On August 5, 2016, 207 Sherman wrote a tender letter to USLIC, which demands a defense in the action and full indemnification.

USLIC has not accepted or denied 207 Sherman’s tender. 207 Sherman’s third-party complaint seeks a declaration that USLIC owes it defense and indemnification. In its third-party answer, USLIC seeks a declaration that it has no obligation to defend or indemnify. Here, USLIC argues that courts routinely sever negligence actions from third-party actions seeking declaratory relief against an insurer. 207 Sherman argues that the motion is premature, as it would be more efficient for the main action and the third-party action to go through discovery together.

DISCUSSION

CPLR 603, entitled “Severance and separate trials” provides: “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 Court of Appeals held long ago, in *Kelly v Yannotti*, that an insurer disclaiming coverage as a third-party defendant in a negligence case is entitled to severance, as it would “be subjected to *some* prejudice if both the main and third-party actions [were] to be tried before the

same jury” (4 NY2d 603, 608 [emphasis in original]). *Kelly’s* holding is still black-letter law (see e.g. *Cruz v Taino Constr. Corp.*, 38 AD3d 391, 391 [1st Dept 2007] [holding that “even where common facts exist, it is prejudicial to insurers to have the issue of insurance coverage tried before a jury that considers the underlying liability claims]). Prejudice would arise, in the absence of severance, from allowing the jury to become aware “the existence of liability coverage” (*Transamerica Ins. Co. v Tolis Inn*, 129 AD2d 512, 513 [1st Dept 1987]).

USLIC argues that, in these circumstances, severance and a separate trial of the third-party action should be ordered to prevent prejudice that it would suffer if the main and third-party action were tried before the same jury.

In opposition, 207 Sherman argues that severance should not be ordered before discovery is complete. 207 Sherman notes that all of USLIC’s cases stand for the proposition that negligence and coverage actions should be tried separately to avoid prejudice. Without citing any cases to support its position, 207 Sherman argues that it should not be forced to face the risks and costs associated with engaging in discovery separately for the main and third-party actions. 207 Sherman also argues that there is a potential prejudice arising from potential witness availability issues, potential conflicting testimony from witnesses, as well as potential inconsistent judicial determinations.

In reply, USLIC maintains that a motion to sever is not premature simply because it brought before the completion of discovery. USLIC cites to several cases such as *Torres v Visto Realty Corp.* (106 AD3d 645 [1st Dept 2013]) and *Gardner v City of New York* (102 AD2d 800 [1st Dept 1984]). However, in both *Torres* and *Gardner*, severance took place after the respective plaintiffs had filed the note of issue and statement of readiness. Moreover, in both cases the First Department found that plaintiff would be prejudiced by a delay caused by holding

trial off until third-party discovery was complete (*see also Lorne v. 50 Madison Ave. LLC*, 73 AD3d 621 [1st Dept 2010] [finding delay caused by third-party discovery would prejudice plaintiff]; *Blechman v Peiser's & Sons*, 186 AD2d 50 [1st Dept 1992] [finding that not severing would prejudice plaintiff by delay caused by third-party discovery]). USLIC argues that, in the absence of severance, the plaintiff in the main action, Vargas, would be prejudiced by a delay caused by third-party discovery. Although Vargas does not make this argument herself, neither does she oppose USLIC's motion.

Here, USLIC is clearly entitled to severance under *Kelly* and its progeny. 207 Sherman fails to make a showing that inconsistent judgments are likely to arise from severance, as the main action concerns negligence and the third-party action concerns coverage. Moreover, 207 Sherman fails to provide any case law showing that any inconvenience to it caused by severance warrants the delay of an order of severance. Thus, USLIC's motion to sever is granted.

CONCLUSION

Accordingly, it is

ORDERED that third-party defendant United States Liability Insurance Company (USLIC) motion to sever, pursuant to CPLR 603, is granted; it is further

ORDERED that upon receipt of this Order, the Trial Support Office shall sever the third-party action; and it is further

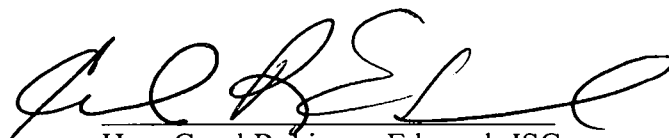
ORDERED that counsel for USLIC shall file an RJI with Trial Support Office within 10 days; and it is further

ORDERED that counsel for USLIC shall serve a copy of this Order upon the County Clerk within 10 days, and upon receipt of this Order, the County Clerk shall issue a no-fee RJI for the severed action.

ORDERED that counsel for USLIC shall serve a copy of this order along with notice of entry on all parties within 10 days of entry.

Dated: May 7, 2018

ENTER:

A handwritten signature in black ink, appearing to read 'C.R. Edmead', written over a horizontal line.

Hon. Carol Robinson Edmead, JSC

HON. CAROL R. EDMEAD
J.S.C.