

<b>Gamarra v MTA Capital Constr. Co.</b>
2018 NY Slip Op 32452(U)
September 28, 2018
Supreme Court, New York County
Docket Number: 159118/2013
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHRYN E. FREED** PART IAS MOTION 2

*Justice*

-----X INDEX NO. 159118/2013

MARIA GAMARRA,

Plaintiff,

MOTION SEQ. NO. 003

- v -

MTA CAPITAL CONSTRUCTION COMPANY, METROPOLITAN  
TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT  
AUTHORITY, ATC GROUP SERVICES, INC. D/B/A ATC  
ASSOCIATES A/K/A CARDNO ATC,

**DECISION AND ORDER**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 136, 149, 150, 151, 152, 153, 154, 155, 156, 157

were read on this motion to/for SEVER ACTION

Upon the foregoing documents, it is ordered that the motion is decided as follows.

This is a Labor Law action commenced by plaintiff Maria Gamarra against defendants MTA Capital Construction Company, Metropolitan Transportation Authority, New York City Transit Authority, and defendant/third-party plaintiff ATC Group Services Inc. d/b/a ATC Associates a/k/a Cardno ("ATC"). Plaintiff moves, pursuant to CPLR 603 and 1010, to dismiss the third-party complaint served by ATC against third-party defendant Trio Asbestos Removal Corp. ("Trio"). In the alternative, plaintiff seeks to sever the third-party action. Trio cross-moves for the same relief and ATC opposes the motion and cross motion. After oral argument, and after a review of the parties' motion papers and the relevant statutes and case law, the motion is decided as follows.

**FACTUAL BACKGROUND:**

The captioned action arises from an incident on April 27, 2013, in which plaintiff, an asbestos handler employed by Trio, was allegedly injured while performing asbestos abatement work in a subway tunnel in Manhattan. Plaintiff commenced this action against MTACC, MTA, and NYCTA by filing a summons and verified complaint on October 4, 2013. Doc. 1.<sup>1</sup> Defendants joined issue by service of their verified answer filed November 21, 2013. Doc. 9. On July 30, 2015, plaintiff amended the complaint to name ATC as a defendant. Doc. 53. MTACC, MTA, and NYCTA filed an answer to the amended complaint on August 11, 2015. Doc. 57. ATC joined issue by filing its verified answer to the amended complaint on September 24, 2015. Doc. 59.

Party depositions were conducted from February 2016 until January 2017. Docs. 104-108. Trio was deposed on February 27, 2017, at which time it was a nonparty. Doc. 109. The note of issue was filed on March 21, 2017. Doc. 85.

Plaintiff filed a motion for partial summary judgment on liability on May 22, 2017. Doc. 89. ATC cross-moved for summary judgment dismissing the complaint on July 7, 2017. Doc. 101. MTACC, MTA, and NYCTA filed a cross motion for summary judgment on July 12, 2017. Doc. 112.<sup>2</sup>

On July 20, 2017, after the motion and cross motions for summary judgment were filed, ATC commenced a third-party action against Trio setting forth claims for contribution, contractual and common-law indemnification, as well as breach of contract to procure insurance. Doc. 114.<sup>3</sup> Trio filed a verified answer to the third-party complaint on November 10, 2017. Doc. 140.

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<sup>1</sup> All references are to the documents filed with NYSCEF in this matter.

<sup>2</sup> The motions were decided by order dated and entered May 17 and 29, 2018, respectively. Doc. 159.

<sup>3</sup> Although the motion papers do not reflect that a third-party Index Number was assigned to the third-party action, the Clerk's notes filed under NYSCEF Document Number 114 reflect that ATC paid a fee to commence the third-party action and that the said third-party action was assigned Index Number 595557/2017.

On August 17, 2017, plaintiff filed the instant motion, pursuant to CPLR 603 and 1010, seeking dismissal of the third-party complaint served by ATC against third-party defendant Trio. In the alternative, ATC seeks to sever the third-party action. Doc. 122.

In support of its motion, plaintiff argues, inter alia, that the third-party action must be dismissed without prejudice or severed given ATC's delay in commencing the same. Plaintiff maintains that, although ATC knew of Trio's involvement at the site as early as July 30, 2015, when ATC was served with the amended complaint, ATC waited almost two years to implead Trio. Plaintiff maintains that, given ATC's delay, as well as the fact that all discovery in the main action has been completed, it would be unduly prejudicial to delay the prosecution of her action to allow for discovery to proceed in the third-party action.

Trio cross-moved for the same relief, adopting the same arguments as plaintiff. Docs. 150, 151.

ATC opposes plaintiff's motion and Trio's cross motion, arguing, inter alia, that plaintiff has failed to demonstrate any tangible evidence that it would be delayed if the third-party action were to proceed, and that any prejudice could be avoided by expediting discovery in the third-party action. Docs. 135, 156. It also asserts that severance would result in wasted judicial resources and could lead to inconsistent verdicts.

#### **LEGAL CONCLUSIONS:**

CPLR 603 provides that claims may be severed "[i]n furtherance of convenience or to avoid prejudice." A court may order a separate trial or dismissal of a third-party claim where the resolution of the third-party action would "unduly delay the determination of the main action or

prejudice the substantial rights of any party." CPLR 1010; *Skolnick v Max Connor, LLC*, 89 AD3d 443 (1st Dept 2011); *Gomez v City of New York*, 78 AD3d 482 (1st Dept 2010). Whether to dismiss or sever an action is a matter within the discretion of the court. *Skolnick*, 89 AD3d at 444.

The severance of third-party claims for indemnification and contribution, while based on common operative facts, does not pose a risk of inconsistent verdicts because the claims are based on legal questions that differ from those advanced in the main action. (See *Admiral Indemn. Co. v Popular Plumbing & Heating Corp.*, 127 AD3d 419 [1st Dept 2015] [no possibility of inconsistent verdicts where indemnification and contribution claims premised on defendant's liability in main action, and thus third-party action and main action involved "disparate issues of law"]).

Where [as here] the main action is ready for trial but discovery is incomplete or ongoing in the third-party action, a single trial may prejudice the plaintiff, as the outstanding discovery would unreasonably delay the main action from proceeding to trial. (*Rothstein v Milleridge Inn, Inc.*, 251 AD2d 154, 155 [1st Dept 1998]; *Pena v City of New York*, 222 AD2d 233 [1st Dept 1995]).

*Wavertree Corp. v Bellet Constr. Co., Inc.*, 2015 NY Slip Op 30949[U], \*4-5 (Sup Ct, NY County 2015).

Here, ATC did not implead Trio until: 1) nearly four years after plaintiff's commencement of the main action; 2) approximately 2 years after ATC was served with an amended complaint apprising it of the fact that Trio was plaintiff's employer; 3) approximately four months after the filing of the note of issue; and 4) after all summary judgment motions were filed in the main action. Given how far the main action has progressed, this Court, in its discretion, finds that severance of the third-party claim is warranted under the circumstances in order to avoid undue prejudice to plaintiff, the party claiming injury. See *Vitiello v Mayrich Constr. Corp.*, 255 AD2d 182, 188 (1<sup>st</sup>

Dept 1998) (third-party action filed nearly three years after commencement of main action severed to avoid delay of plaintiff's claim).

Therefore, in light of the foregoing, it is hereby:

**ORDERED** that the branches of the motions by plaintiff Maria Gamarra and third-party defendant Trio Asbestos Removal Corp. seeking to dismiss the third-party action are denied; and it is further

**ORDERED** that the branches of the motions by plaintiff Maria Gamarra and third-party defendant Trio Asbestos Removal Corp. seeking to sever the third-party action are granted; and it is further

**ORDERED** that, within 20 days from the date hereof, plaintiff shall serve a copy of this order with notice of entry on all parties by E-file; and it is further

**ORDERED** that within 20 days from the date hereof, counsel for plaintiff is directed to e-file a completed Notice to County Clerk (Form EF-22), with a copy of this order attached thereto; and it is further

ORDERED that, within 20 days from the date hereof, counsel for plaintiff is directed to email a copy of this order, with notice of entry, to [genclerk-ords-non-mot@nycourts.gov](mailto:genclerk-ords-non-mot@nycourts.gov); and it is further

ORDERED that the County Clerk is directed to sever the third-party action, bearing Index Number 595557/2017, from the underlying action bearing Index No. 159118/2013; and it is further

ORDERED that this constitutes the decision and order of the court.

9/28/2018  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: