

<b>Padron v Granite Broadway Dev. LLC</b>
2018 NY Slip Op 33279(U)
December 13, 2018
Supreme Court, New York County
Docket Number: 157049/2013
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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CARLOS PADRON and ESTELLA PADRON,

Index No. 157049/2013

## Plaintiffs

- against -

GRANITE BROADWAY DEVELOPMENT LLC,  
MARRIOTT INTERNATIONAL, INC., CNY  
BUILDERS 1717 LLC, and PARKVIEW  
PLUMBING, INC.,

## Defendants

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GRANITE BROADWAY DEVELOPMENT LLC and CNY  
BUILDERS 1717 LLC,

## Third Party Plaintiffs

- against -

PARKVIEW PLUMBING, INC.,

## Third Party Defendant

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GRANITE BROADWAY DEVELOPMENT LLC and CNY  
BUILDERS 1717 LLC,

## Second Third Party Plaintiffs

- against -

TRANSCONTINENTAL CONTRACTING, INC. d/b/a  
TRANSCONTINENTAL STEEL,

## Second Third Party Defendant

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PARKVIEW PLUMBING, INC.,

## Third Third Party Plaintiff

- against -

PROGRESSIVE FIRE SPRINKLER CORP. f/k/a  
ACTIVE FIRE SPRINKLER CORP., ACTIVE FIRE  
SPRINKLER NYC, LLC, and R & S UNITED  
SERVICES, INC.,

Third Third Party Defendants

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DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

Plaintiffs move for penalties due to defendant-third party defendant-third party plaintiff's nonappearance for its deposition and for a severance of its third third party action from the main action. C.P.L.R. §§ 1010, 3126. Plaintiffs did not sue defendant-third party defendant-third party plaintiff Parkview Plumbing, Inc., originally, but, after co-defendants impleaded it as a third party defendant in June 2015, plaintiffs interposed direct claims against it in January 2016. Six Status Conference Orders since June 2016 have required Parkview Plumbing to appear for its deposition, yet Parkview Plumbing has never complied, has not explained its past nonappearances on repeated scheduled dates, and insists only that now it is ready, willing, and able to comply. In May 2018, Parkview Plumbing impleaded three new parties as third third party defendants.

I. PARKVIEW PLUMBING'S DEPOSITION

Although plaintiffs' motion did not detail the efforts plaintiffs had made to resolve the issue of Parkview Plumbing's nonappearance for its deposition, other than setting forth the

six court orders designed to resolve the issue definitively, those orders are enough. 22 N.Y.C.R.R. § 202.7(a)(2) and (c). Moreover, in reply, plaintiffs' attorney further details the additional unsuccessful steps he took after the sixth order and after Parkview Plumbing retained a new attorney, in the hope that the new attorney finally would assure the client's compliance.

Loeb v. Assara N.Y. I L.P., 118 A.D.3d 457, 458 (1st Dep't 2014); Northern Leasing Sys., Inc. v. Estate of Turner, 82 A.D.3d 490, 490 (1st Dep't 2011); Carrasquillo v. Netsloh Realty Corp., 279 A.D.2d 334, 334 (1st Dep't 2001). The belated recitation of these steps has not perceptibly prejudiced Parkview Plumbing or somehow excused its noncompliance.

One of the penalties plaintiffs seek is to preclude Parkview Plumbing from offering testimony at trial. Rather than immediate preclusion, the court holds Parkview Plumbing to its promise that its witness is ready, willing, and able to proceed with an immediate deposition. If Parkview Plumbing fails to live up to its promise, however, the court imposes a broader preclusion than plaintiffs propose. Therefore Parkview Plumbing shall appear for its deposition January 2, 2019, at 10:00 a.m., at the office of plaintiff's attorney, or at another time or place to which all parties agree. If Parkview Plumbing fails to appear at the specified time and place ready to proceed with the deposition, Parkview Plumbing shall be precluded from presenting an affidavit or testimony in support of or in opposition to summary judgment or at trial. C.P.L.R. §§ 3107, 3126(2); Gibbs v. St. Barnabas

Hosp., 16 N.Y.3d 74, 82-83 (2010); Northway Eng'g v. Felix Indus., 77 N.Y.2d 332, 335 (1991); Garcia v. Defex, 59 A.D.3d 183, 183-84 (1st Dep't 2009); Rosa v. New York City Tr. Auth., 55 A.D.3d 344, 345 (1st Dep't 2008).

## II. PARKVIEW PLUMBING'S THIRD THIRD PARTY ACTION

The Preliminary Conference Order dated May 21, 2014, set the deadline for third party actions as 60 days after the last defendant's deposition. Parkview Plumbing thus has not technically exceeded this deadline, but has instead unilaterally and untenably effected a continual extension of this deadline by continually failing to appear for a deposition. Other than the fact that technically the deadline has not expired, Parkview Plumbing has provided no explanation why it waited until May 2018 to commence the third third party action. Maron v. Magnetic Constr. Group Corp., 128 A.D.3d 426, 427 (1st Dep't 2015). See Marbilla, LLC v. 143/145 Lexington LLC, 116 A.D.3d 544, 544 (1st Dep't 2014).

Nevertheless, Parkview Plumbing's third third party action now has been underway since May 2018. The parties to it may avail themselves of all the disclosure conducted in the main action and prior third party actions, have shown no interest in conducting further disclosure, and have not articulated what further disclosure they need in the third third party action. Maron v. Magnetic Constr. Group Corp., 128 A.D.3d at 427; Global Imports Outlet, Inc. v. Signature Group, LLC, 85 A.D.3d 662, 663 (1st Dep't 2011). Parkview Plumbing only maintains that it needs

to depose witnesses from defendant-third party plaintiff-second third party plaintiff CNY Builders 1717 LLC and a witness from second third party defendant Transcontinental Contracting, Inc., in the main action and prior third party actions: parties already deposed. Parkview Plumbing fails to explain why further depositions of those parties' witnesses are necessary and, if they are, why those depositions were not conducted months ago.

Thus no party has demonstrated why the third third party action may not stay apace with the main action and other third party actions. Marbilla, LLC v. 143/145 Lexington LLC, 116 A.D.3d at 544; Global Imports Outlet.. Inc. v. Signature Group, LLC, 85 A.D.3d at 663. As long as the third third party action does not unduly delay the main action and other third party actions, the third third party action will not prejudice plaintiffs' action or co-defendants' third party actions. C.P.L.R. § 1010; Marbilla, LLC v. 143/145 Lexington LLC, 116 A.D.3d at 544; Cason v. Deutsche Bank Group, 106 A.D.3d 533, 533 (1st Dep't 2013). See Maron v. Magnetic Constr. Group Corp., 128 A.D.3d at 427. The denial of severance will avoid duplicative litigation in which Parkview Plumbing seeks to apportion liability for damages to plaintiff to third third party defendants based on claims of contribution and indemnification that implicate the same evidence and legal theories as the main action and other third party actions. Marbilla, LLC v. 143/145 Lexington LLC, 116 A.D.3d at 544; Cason v. Deutsche Bank Group, 106 A.D.3d at 533.

### III. DISPOSITION

In sum, and for the reasons explained above, the court grants plaintiffs' motion for penalties due to the nonappearance by Parkview Plumbing, Inc., for its deposition to the extent of ordering its deposition on January 2, 2019, at 10:00 a.m., at the office of plaintiff's attorney, or at another agreed time or place, and, upon its failure to appear, precluding its affidavits and testimony. C.P.L.R. §§ 3107, 3126(2). The court denies plaintiffs' motion insofar as it seeks a further penalty and a severance of the third third party action from the main action, unless, given this disposition, all parties in the third third party action agree to its severance. C.P.L.R. §§ 1010, 3126(3). Once Parkview Plumbing has appeared for its deposition or failed to appear at the specified time and place for its deposition, plaintiff may file a note of issue.

DATED: December 13, 2018

*Lucy Billings*

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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C.