Tank v Westchester County Health Care Corp.
2018 NY Slip Op 34447(U)
September 26, 2018
Supreme Court, Westchester County
Docket Number: Index No. 67582/2014
Judge: Terry Jane Ruderman

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER-COMPLIANCE PART

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MAUREEN TANK, as Guardian Ad Litem of ZACHARY TANK and MAUREEN TANK, Individually,

Plaintiffs,

-against-

WESTCHESTER COUNTY HEALTH CARE CORPORATION, MARK GOLDSTEIN, M.D., HASIT MEHTA, M.D., VLADIMIR PRYJDUN, M.D., RICHARD MAGILL, M.D., and IRLNA TANTCHOU, M.D.,

Defendants.

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WESTCHESTER COUNTY HEALTH CARE CORPORATION,

Third-Party Plaintiff,

-against-

NORTH AMERICAN PARTNERS IN ANESTHESIA, L.L.P.,

Third-Party Defendant.

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DECISION AND ORDER
Sequence No. 5
Index No. 67582/2014

RUDERMAN, J.

The following papers were considered in connection with third-party defendant's motion for an order pursuant to CPLR 603 and 1010, severing or dismissing without prejudice the third-party action from the underlying action, and for such other and further relief as this Court may deem just and proper.

Papers	Numbered
Order to Show Cause, Affirmation in Support, Exhibits A - K	1
Affirmation in Opposition of Defendant/Third-Party Plaintiff, Exhibits A - P[1]	2
Reply Affirmation	3
Affirmation in Opposition of Plaintiff	4

This action to recover damages for personal injuries allegedly sustained by Zachary Tank during the course of his treatment at Westchester County Health Care Corporation (WCHCC) was commenced in October 2014. WCHCC answered the complaint in November 2014. WCHCC's co-defendants, including Dr. Vladimir Pryjdun, a physician employed by North American Partners in Anesthesia LLP (NAPA), interposed answers between December 2014 and February 2015. Following numerous compliance conferences, the Court issued a trial readiness order on July 24, 2017, and plaintiffs filed a note of issue on August 1, 2017. On April 16, 2018, WCHCC commenced a third-party action against NAPA seeking, among other things, contractual indemnification. NAPA now moves for an order pursuant to CPLR 603 and 1010 severing or dismissing without prejudice the third-party action, and for such other and further relief as this Court may deem just and proper.

NAPA contends that severance or dismissal of the third-party action is warranted because WCHCC waited until 2018 to commence the third-party action, even though the basis for WCHCC's suit against NAPA is an Anesthesia Services Contract between WCHCC and NAPA that has been in effect since November 2011. NAPA argues that WCHCC knew as early as 2013 (when plaintiffs served a notice of claim on WCHCC) that the Anesthesia Services Contract was potentially implicated, and that WCHCC has no valid excuse for failing to commence the third-

[1] Under the guise of requesting leave to file a surreply, defendant/third-party plaintiff essentially filed a surreply in the form of a lengthy letter addressed to the Court. The unauthorized surreply has not been considered.

party action in a timely manner. It asserts that by the time WCHCC filed the third-party complaint, extensive discovery had been conducted, a note of issue attesting to the completion of all discovery had been filed and no party had moved to vacate the note of issue, numerous defendants had moved for summary judgment post-note of issue and those motions had been decided,[2] and trial was about to begin.

NAPA next contends that it requires substantial discovery and is in no position to proceed to trial at this time. It posits that because the third-party action includes a counterclaim for cross-indemnification, if the third-party action is not severed, NAPA will be obligated to not only defend any claims against its employees, but to also demonstrate that any wrongdoing that may have occurred was the result of WCHCC's employees and staff. NAPA acknowledges that WCHCC has provided it with numerous discs allegedly containing copies of pleadings and medical records, but asserts that "this is of no help to NAPA since review of that material will take years as it did with WCHCC and a significant amount of time for new discovery will have to be undertaken with a focus on WCHCC's potential liability" (NAPA Aff. ¶26). Accordingly, NAPA claims that it will suffer substantial prejudice if its motion is denied, as it has not had an adequate opportunity to conduct discovery.

NAPA opines that by contrast, WCHCC will suffer no prejudice if the third-party action is severed, because a liability finding against WCHCC in the main action will not prevent WCHCC from potentially recovering against NAPA in the severed third-party action. It also

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[2] With respect to the summary judgment motions, NAPA further complains that "two named parties have been dismissed from the case due to the fact that no opposition was submitted to their motions for summary judgment. NAPA had no opportunity to review the details of the case before these defendants were essentially voluntarily discontinued. If the claims between NAPA and WCHCC must be tried together, the discovery in this action must be completely re-done and NAPA given an opportunity to explore each and every facet of the liability, causation and damages in this complicated matter" (NAPA Aff. ¶21).

argues that if severance is granted, there will be no duplication of efforts because any dispute between NAPA and WCHCC will be limited to the issues involving NAPA and WCHCC employees, and will not relate to any issues involving WCHCC's co-defendants.

WCHCC opposes the motion, arguing that the main action and the third-party action have "common, intertwined issues of law and fact" (WCHCC Aff. ¶20), that severance of the third-party action would raise the specter of inconsistent verdicts, and that conducting two trials on this matter would be burdensome for the Court. It asserts that NAPA's interests are identical to those of NAPA's employee, Dr. Pryjdun, and notes that Dr. Pryjdun has been a defendant in the main action since its inception. More specifically, WCHCC claims that "[s]ince [NAPA's] own liability is contingent upon Dr. Pryjdun being found liable to the plaintiff, NAPA cannot credibly take the position that the defense mounted on behalf of Dr. Pryjdun in the main action is somehow insufficient to protect its interests in the third-party action" (WCHCC Aff. ¶25). WCHCC also disputes NAPA's assertion that NAPA's counterclaim for cross-indemnification in the third-party action would require NAPA to present proof that WCHCC had committed medical malpractice, and vice versa, arguing that "WCHCC and NAPA are united in their efforts to establish that there were no departures from accepted practice by Dr. Pryjdun, and that any negligence on his part was not a substantial factor in causing injury to Zachary Tank" (WCHCC Aff. ¶27).

WCHCC next posits that it acted promptly in that it commenced the third-party action within two months of receipt of this Court's Decision and Order denying WCHCC's motion for summary judgment dismissing the complaint insofar as asserted against it. It further claims that upon contacting NAPA by telephone on April 13, 2018, its counsel "came to understand that NAPA had been closely following this case since its inception on behalf of its employee, Dr.

Pryjdun" (WCHCC Aff. ¶23). WCHCC concludes that because NAPA allegedly followed the main action, NAPA can claim neither prejudice nor surprise regarding WCHCC's commencement of the third-party action on April 16, 2018.

WCHCC further argues that not only has NAPA received all discovery exchanged in the main action, but NAPA has also received responses to discovery demands served in the third-party action. According to WCHCC, there is no need for NAPA to receive a bill of particulars, to depose the defendants in the main action, to review medical records, or to retain new experts. WCHCC deems it "entirely speculative to suggest that NAPA, by conducting additional depositions, could fortuitously unearth some shred of relevant evidence that the combined efforts of plaintiffs' and defendants' counsel failed to elicit" (WCHCC Aff. ¶29). It rejects NAPA's contention that a review of the medical records in this matter would take years, and represents that NAPA has in fact already reviewed all pertinent medical records.[3]

NAPA's position on reply can be summarized as follows: "[WCHCC] maneuvered the case to dispose of any direct claims against itself and then, four years later, commenced a third-party action against NAPA so as to box NAPA into having no opportunity to complete discovery on the eve of trial and now claims that NAPA does not need any discovery because [WCHCC], who seeks total indemnification against NAPA, is somehow going to protect Dr. Pryjdun's defense" (Reply Aff. ¶14). NAPA opines that WCHCC's telephone call on April 13, 2018 – three days prior to filing the third-party complaint – in no way excuses WCHCC's four year delay in commencing the third-party action, and urges this Court to reject WCHCC's claim that based on WCHCC's counsel's purported "understanding," NAPA had been following the main action. With respect to WCHCC's contention that NAPA does not need to conduct discovery in

[3] Plaintiff also opposes the motion, relying primarily on WCHCC's arguments.

light of the extensive discovery already exchanged, NAPA reasons that if the discovery conducted to date was in fact sufficient, both Dr. Pryjdun's and WCHCC's motions for summary judgment dismissing the complaint insofar as asserted against each of them would have been granted. Therefore, it argues, "obviously the discovery offered by [WCHCC] is of no use to NAPA" (Reply Aff. ¶13). NAPA also finds unpersuasive WCHCC's contention that inconsistent verdicts may be issued in the case of severance, asserting that "any further proceedings after a potential liability finding against [WCHCC] would only involve what aspect of that liability NAPA should bear" (Reply Aff. ¶18). Lastly, NAPA argues that the cases cited by WCHCC in opposition to NAPA's motion are distinguishable.

CPLR 603 provides that the court may order a severance of claims or a separate trial of any claim or issue in furtherance of convenience or to avoid prejudice. Pursuant to CPLR 1010, the court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its 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 (*see* CPLR 1010). Even where the main action and the third-party action share common questions of law and fact, severance may be appropriate when the main action is ready to proceed to trial, discovery in the third-party action is incomplete due to a delay in the commencement of the third-party action, and the third-party defendant has not had an adequate opportunity to conduct discovery (*see Singh v. Piccolo*, 161 AD2d 698 [2d Dept 1990]; *Zuckerman v La Guardia Hospital*, 125 AD2d 304 [2d Dept 1986]).

In the case at bar, the main action was commenced more than three and a half years before WCHCC commenced the third-party action. In addition, a note of issue stating that the

case was ready for trial[4] was filed in the main action nearly nine months before WCHCC commenced the third-party action. Furthermore, the record indicates that although WCHCC knew, or should have known, of the Anesthesia Services Contract between WCHCC and NAPA, it nevertheless delayed commencing the third-party action. WCHCC has failed to provide a satisfactory explanation for the delay.

The Court finds without merit WCHCC's argument that NAPA, which did not participate in any of the numerous depositions conducted in this matter, does not need to conduct discovery because other parties have already conducted discovery and because WCHCC's interests are allegedly aligned with NAPA's. The Court is similarly unpersuaded by WCHCC's assertion that NAPA cannot claim surprise because NAPA, according to WCHCC's counsel, was purportedly following the main action closely, and because WCHCC gave NAPA three days' notice prior to filing the third-party action. NAPA, which has not had an adequate opportunity to conduct its own discovery, would suffer substantial prejudice in the event that the third-party action is not severed.

Under these circumstances, even taking at face value WCHCC's assertion that the main action and the third-party action share common questions of law and fact, severance of the third-party action from the main action is appropriate (*see Whippoorwill Hills Homeowners Assn., Inc. v Toll at Whippoorwill, L.P.*, 91 AD3d 864 [2d Dept 2012] [severance warranted where main action was commenced more than four years before the third-party action, the main action had been certified for trial, and third-party defendants did not have "an adequate opportunity to complete discovery"]; *Abreo v Baez*, 29 AD3d 833 [2d Dept 2006] [severance warranted given,

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[4] The Court notes that while the record reflects that the main action was trial ready when the third-party action was commenced, there is no indication in the exhibits appended to the parties' motion papers that a trial date had in fact been set as of April 16, 2018.

among other things, "the completion of discovery in the main action" and "the inordinate and inexcusable delay by the defendants third-party plaintiffs in commencing the third-party action"]; *Garcia v Gesher Realty Corp.*, 280 AD2d 440 [1st Dept 2001] [severance warranted where defendants delayed commencement of the third-party action until after the note of issue had been filed, and third-party defendants needed to conduct discovery]; *Cusano v Sankyo Seiki Mfg. Co.*, 184 AD2d 489 [2d Dept 1992] [severance warranted where there was an unjustifiable delay in filing a second third-party action, the matter was "about to proceed to trial," and second third-party defendants had not had an opportunity to conduct discovery]; *see also Soto v CBS Corp.*, 157 AD3d 740 [2d Dept 2018] [dismissing third-party complaint where third-party plaintiff "deliberately and intentionally delayed commencing the third-party action for more than four years"]).[5]

All other arguments raised and evidence submitted by the parties have been considered by this Court notwithstanding any specific absence of reference thereto.

Accordingly, it is:

ORDERED that the branch of third-party defendant's motion which is for an order severing the third-party action against it is granted; and it is further,

ORDERED that the branch of third-party defendant's motion which is for dismissal of the third-party action against it is denied; and it is further,

ORDERED that counsel for third-party plaintiff is directed to file an RJI and to pay the

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[5] The Court agrees with NAPA that the cases cited by WCHCC for the contrary view are distinguishable from this matter (*see e.g. New York Schools Ins. Reciprocal v Milburn Sales Co., Inc.*, 138 AD3d 940 [2d Dept 2016] [motion to sever third-party action should have been denied, where defendant/third-party plaintiff "was not responsible for much of the 15-month delay in commencing the third-party action" and "at the time of the plaintiff's motion to sever, discovery was only partially complete"]).

RJI fee in the third-party action, and the County Clerk is directed to issue a new index number in the severed third-party action. Counsel for third-party plaintiff is directed to provide the County Clerk's Office with a copy of this order, and to file an RJI, within ten days of the date of entry of this order; and it is further,

ORDERED that the parties in the severed third-party action are directed to appear in the Preliminary Conference Part on October 29, 2018 at 9:30 a.m. at the Westchester County Courthouse, Courtroom 800, 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York 10601; and it is further,

ORDERED that the parties in the main action are directed to appear in the Trial Ready Part on November 5, 2018 at 9:30 a.m. at the Westchester County Courthouse, Courtroom 1200, 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York 10601, as previously directed.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
September 26, 2018

HON. TERRY JANE RUDERMAN, J.S.C.