Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

MARIA HERNANDEZ-PANELL,

Plaintiff,

-against-

CHRISTOS ROZEAS,

Defendant.

CHRISTOS ROZEAS,

Third-Party Plaintiff,

-against-

SAN CELILIO RESTAURANT INC. and UTICA FIRST INSURANCE COMPANY,

Third-Party Defendants.

IAS Part - 42

Index No.: 702343/2019

Motion Date: 7/23/20

Motion Cal. No. 1

Motion Seq. No. 1

The following electronically filed documents read on this motion by Utica First Insurance Company ("Utica" or "third-party defendant") for an order pursuant to CPLR § 3211(a)(7) dismissing the third-party complaint and pursuant to CPLR §§ 603 and 1010 severing the third-party action against Utica from the remainder of the litigation.

	Papers Numbered
Notice of Motion - Affirmation- Exhibits - Service.....	EF 9 - 15

Upon the foregoing papers, it is ordered that this motion is determined as follows:

BACKGROUND

This is an action to recover damages for personal injuries Maria Hernandez-Panell ("Ms. Penell" or "plaintiff") allegedly sustained. Specifically, the plaintiff alleges that, on April 5, 2016 she was caused to trip and fall on the sidewalk adjacent to the property known as 853 Wyckoff Avenue, Ridgewood, New York (the "subject premises"), which was uneven, unleveled, dangerous, and defective. As a result, on February 8, 2019, the plaintiff commenced the instant action against Christos Rozeas ("Mr. Rozeas" or "third-party plaintiff"), who owns the subject premises. On June 21, 2019, issue was joined, wherein the latter interposed an answer.

Thereafter, on February 25, 2020, Mr. Rozeas commenced a third-party action against his commercial tenant, San Celilio Restaurant, Inc. ("San Celilio"), and Utica; and on May 8, 2020, Utica interposed an answer. The third-party complaint alleges four causes of action: (1) negligence and breach of contract for failing to repair the sidewalk against San Cecilio; (2) breach of contract by San Cecilio to Rozeas for contribution and indemnification; (3) improper denial of Rozeas' request for a defense and indemnification in bad faith by Utica First and for a Court Declaration that Utica owes contribution and indemnification to Rozeas; and (4) for past and ongoing attorney's fees Rozeas incurred in defending the underlying action. According to the third-party complaint, on or about December 4, 2014, Mr. Rozeas, as landlord, entered into a written ten-year Lease (the "Lease") with San Cecilio, as tenant, to lease the subject premises. Moreover, pursuant to the Lease, San Cecilio covenanted and agreed, at its own cost and expense, to perform all maintenance to the sidewalk adjacent to the subject premises; and ". . . pursuant to the lease . . . San Cecilio . . . agreed to procure and maintain a premises liability policy, naming [Mr. Rozeas] . . . as an additional insured."

Now, Utica seeks an order pursuant to CPLR § 3211(a)(7) dismissing so much of the third-party complaint as alleges that Utica acted in bad faith and/or otherwise seeks extracontractual damages and/or damages not otherwise allowable under the applicable policy from Utica because Mr. Rozeas failed to state a viable cause of action. Furthermore, Utica seeks an order, pursuant to CPLR §§ 603 and 1010, severing the third-party action against Utica from the remainder of the litigation. In reliance upon *Royal Indemnity Co. v. Soloman Smith Barney, Inc.*, 308 AD2d 349 [1st Dept 2003], Utica argues that ". . . it is well settled that an allegation that an insurer acted in "bad faith" in reaching its coverage determination is "redundant" to a cause of action for breach of contract based upon this same denial of coverage and does not give rise to an

independent tort cause of action." Further, in reliance upon *Lang v. Hanover Insurance Company*, 3 NY3d 350 [2004], Utica argues that ". . . the party [Mr. Rozeas] claiming entitlement to such recovery is not even an insured under the policy and, as such, lacks the necessary standing to even bring such a claim in the first instance." Lastly, Utica argues that ". . . severance is warranted due to the prejudice that will undoubtedly impact Utica First as the tort claims in the Main Action and in the Third-Party Action against San Cecilio are factually and legally unrelated to the claims for insurance coverage against Utica First in the Third-Party Action."

APPLICABLE LAW

It is well settled law that, pursuant to CPLR § 3211(a)(7), on a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in the light most favorable to plaintiff, and plaintiff must be given the benefit of all reasonable inferences (*see Maddicks v. Big City Property, LLC,* 34 NY3d 116 [2019]; *Patel v. Gardens at Forest Hills Owners Corp.,* 181 AD3d 611 [2d Dept 2020]; *Hampshire Props. v. BTA Bldg. & Developing, Inc.*, 122 AD3d 573 [2d Dept 2014]; *Chanko v. American Broadcasting Cos.,* 27 NY3d 46 [2016]). The court determines only whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). Furthermore, the court must deny a motion to dismiss, "if, from the pleading's four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law." (*511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]).

Furthermore, pursuant to CPLR § 603, it states, in relevant part, that "[i]n 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. Although it is within a trial court's discretion to grant a severance, this discretion should be exercised sparingly" (*New York Central Mutual Insurance Co. v. McGee*, 87 AD3d 622 [2d Dept 2012]; *New York Schools Ins. Reciprocal v. Milburn Sales Co. Inc.*, 138 AD3d 940 [2d Dept 2016]). However, severance is inappropriate where the claims against the defendants involve common factual and legal issues, and the interests of judicial economy and consistency of verdicts will be served by having a single trial (see *Curreri v. Heritage Property Investment Trust, Inc.*, 48 AD3d 505 [2d Dept 2008]; *Lelekakis v. Kamamis*, 41 AD3d 666 [2d Dept 2007]; *Naylor v. Knoll Farms of Suffolk County, Inc.*, 31 AD3d 726, 727

[2d Dept 2006]). Notwithstanding the same, "[i]t is generally recognized that, even where common facts exist, it is prejudicial to insurers to have the issue of insurance coverage tried before the jury that considers the underlying liability claims" (*Schorr Bros. Dev. Corp. v. Continental Ins. Co.*, 174 AD2d 722 [2d Dept 1991]; *Medick v. Millers Livestock Mkt.*, 248 AD2d 864 [3d Dept 1998]; *see also Schwartz v. Woodner and Co.*, 40 AD2d 1027 [2d Dept 1972]; *Christensen v. Weeks*, 15 AD3d 330 [2d Dept 2005]; *Poalacin v. Mall Properties, Inc.*, 155 AD3d 900 [2d Dept 2017]).

DISCUSSION

Here, the court finds that the facts as alleged in the third-party complaint manifest causes of action cognizable at law. In particular, the third-party complaint states "[t]hat pursuant to the lease . . . San Cecilio Restaurant Inc., as tenant, agreed to procure and maintain a premises liability policy, naming Defendant and Third Party Plaintiff, as landlord, as an additional insured." If, in fact, Mr. Rozeas is an additional insured under San Cecilio's insurance policy, then Utica may have a legal obligation to not only defend but also indemnify Mr. Rozeas. (*see AVR-Powell C Development Corp v. Utica First Insurance Company*, 174 AD3d 772 [2d Dept 2019]). However, this court was not furnished with either the insurance policy or the certificate of insurance that was issued to San Cecilio to determine the parties respective, much less any privity. Moreover, counsel for Utica failed to provide an affidavit from someone with personal knowledge about the case at bar; and his affirmation in support of the instant motion has very little probative value, if any. (*Nerayoff v. Khorshad*, 168 AD3d 866 [2d Dept 2019]; *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 455 [2d Dept 2006]; *Amato v. Fast Repair, Inc.*, 15 AD3d 429 [2d Dept 2005]).

Notwithstanding the same, the court agrees with counsel that it may be inherently prejudicial to Utica to allow that tort case and coverage case to be tried together. It is well settled that where there is a third-party action seeking resolution of questions of insurance coverage for a party in an underlying tort action, the third-party action must be severed to avoid undue prejudice to the third-party defendant from whom insurance coverage is sought. (*see Christensen v. Weeks*, 15 AD3d 330 [2d Dept 2005]; *Schorr Bros. Dev. Corp. v. Continental Ins. Co.*, 174 AD2d 722 [2d Dept 1991]; *Poalacin v. Mall Properties, Inc.*, 155 AD3d 900 [2d Dept 2017]).

Accordingly, it is hereby

ORDERED that third-party defendant's motion to dismiss, pursuant to CPLR § 3211(a)(7), is denied; and it is further,

ORDERED that third-party defendant's motion for severance, pursuant to CPLR §§ 603 and 1010, is granted, without opposition; and it is further,

ORDERED that the third-party defendant shall serve a copy of this Order with Notice of Entry upon all parties on or before November 30, 2020.

The foregoing constitutes the decision and order of the court.

Dated: October 5, 2020
Long Island City, NY

MAURICE E. MUIR, J.S.C.

FILED
10/6/2020
COUNTY CLERK
QUEENS COUNTY

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