

Marin v Beggars Capital LLC

2021 NY Slip Op 33079(U)

November 8, 2021

Supreme Court, Queens County

Docket Number: Index No. 701062/16

Judge: Timothy J. Dufficy

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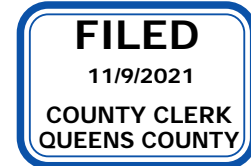
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35



-----X
HENRY MARIN,
Plaintiff,

- against -

Index No.: 701062/16
Motion Date: 7/31/21
Mot. Seq. 7

BEGGARS CAPITAL LLC,
Defendants.

-----X
BEGGARS CAPITAL LLC,

Third-Party Plaintiff,

- against -

THE PALOMBO GROUP, INC.,

Third-Party Defendant.

-----X

The following papers were read on this motion by third-party defendant seeking dismissal of the third-party complaint, pursuant to CPLR 3211(a)(4), or for a severance, pursuant to CPLR 1010.

PAPERS
NUMBERED

Notice of Motion - Affirmation - Exhibits.....	EF 96-105
Answering Affirmation - Exhibits	EF107-116

Upon the foregoing papers, it is ordered that the instant motion by third-party defendant to dismiss the complaint, pursuant to CPLR 3211(a)(4), or for a severance, pursuant to CPLR 1010, is denied.

Plaintiff commenced a lawsuit alleging causes of action for negligence and for violations of Labor Law §§ 200, 240 (1) and 241 (6) against defendants Ironclad Artists,

Inc. (Ironclad) and Dermer Management, Inc. (Dermer), on October 14, 2014, under Index No. 14986/14. Plaintiff seeks to recover damages for personal injuries, allegedly sustained on April 7, 2014, during the course of his employment as a laborer for The Palombo Group, Inc. (Palombo), at a construction site, located at 134 Grand Street, New York, New York. Defendant Ironclad, is the owner of the subject property. Defendant Dermer is Ironclad's managing agent.

Beggars Capital, LLC (Beggars) is the proprietor lessee of Unit 1W at the premises. Beggars entered into a written contract with Polombo to perform alterations and renovations at Beggars' leased space. In September, 2015, Dermer and Ironclad impleaded Beggars and Palombo into the 2014 action. In January, 2016, plaintiff Marin, commenced the instant lawsuit alleging causes of action for negligence and the same violations of Labor Law, as in the 2014 action, against Beggars, under the above Index Number. Beggars then impleaded Palombo into this action.

In June, 2016, the 2014 action was ordered to be jointly tried with the 2016 action. On June 29, 2020, in the 2014 action, the plaintiff was granted summary judgment, on Labor Law § 240(1), against Ironclad and Dermer. On December 23, 2020, the plaintiff was granted the same relief against Beggars in this action.

Third-party defendant Palombo now seeks dismissal of the third-party complaint, brought by Beggars, pursuant to CPLR 3211 (a)(4), on the basis of "another action pending," or pursuant to CPLR 1010, for a severance.

CPLR 3211 (a)(4) provides that a court may dismiss an action where "there is another action pending between the same parties for the same cause of action." Such section "vests the court with broad discretion in considering whether to dismiss an action" on that ground (*Whitney v Whitney*, 57 NY2d 731, 732 [1982]; see *HSBC Bank USA, N.A. v Pena*, 187 AD3d 724 [2d Dept 2020]; *Board of Mgrs. of the 1835 E. 14th St. Condominium v Singer*, 186 AD3d 1477 [2d Dept 2020]; *Mason ESC, LLC v Michael Anthony Contr. Corp.*, 172 AD3d 1195 [2d Dept 2019]; *State Farm Fire & Cas. Co. v Jewsbury*, 169 AD3d 949 [2d Dept 2019]). A "complete identity of parties is not a necessity for dismissal ... there must at least be a 'substantial' identity of parties, 'which generally is present when at least one plaintiff and one defendant is common in each action' " (*JPMorgan Chase Bank, N. A. v Luxama*, 172 AD3d 1341, 1341-1342 [2d Dept

2019], quoting *Morgulas v Yudell Realty, Inc.*, 161 AD2d 211, 213 [1st Dept 1990]). Additionally, “[i]t is not necessary that the precise legal theories presented in the first action also be presented in the second action [so] long as the relief ... is the same or substantially the same’ ” (*JPMorgan Chase Bank, N. A. v Luxama*, 172 AD3d at 1342, quoting *Dec v BFM Realty, LLC*, 153 AD3d 497, 497 [2d Dept 2017]).

Here, the 2016 action and the 2014 action contained the same plaintiff and the same causes of action. While the defendants in the 2014 complaint were not defendants in the 2016 complaint, the 2016 defendant was a third-party defendant in the 2014 action, having been brought into that action prior to the service of the later, current action. Thus, while the parties are substantially the same in both actions, the causes of action in the 2016 third-party complaint differ substantially from those in the original complaint, *i.e.*, the third-party complaint alleges only that Palombo is liable to Beggars both for its negligence, and, contractually, for indemnification. As such, there is not “another action pending” herein. Further, CPLR 3211 (a)(4) states that “the court need not dismiss upon this ground but may make such order as justice requires.” The earlier granting of a joint trial between the two actions has accomplished this objective. Consequently, this branch of Palombo’s motion is denied.

Alternatively, Palombo moves to sever the third-party action, pursuant to CPLR 1010. “Although it is within a trial court’s discretion to grant a severance, this discretion should be exercised sparingly” (*Shanley v Callahan Indus.*, 54 NY2d 52, 57 [1981]; *see Zili v City of New York*, 105 AD3d 949 [2013]). Severance is inappropriate where there are common factual and legal issues involved in the action and the third-party action, and the interests of judicial economy and consistency of verdicts will be served by having a single trial (*see New York Schools Ins. Reciprocal v Milburn Sales Co., Inc.*, 138 AD3d 940 [2016]; *Sumi Chuang Yeh v Leonardo*, 134 AD3d 695 [2015]). Where, as here, the third-party action shares a common core of law and fact with the main action, severance is proper only where the main action would be unduly delayed or a substantial right of a party would be prejudiced (*see Mejia v Doe*, 186 AD3d 1356 [2d Dept 2020]; *Zili v City of New York*, 105 AD3d 949; *Chiarello v Rio*, 101 AD3d 793 [2012]). In this matter, Palombo has failed to establish that a single trial would result in its suffering

prejudice to a substantial right, as it cites only a possible prejudice occasioned by delay, and plaintiff, the party most likely to be prejudiced by delay, has failed to raise such issue.

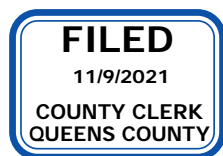
Also, Palombo has failed to demonstrate that Beggars “deliberately and intentionally delayed commencing the third-party action” (*Soto v CBS Corporation*, 157 AD3d 740, 741 [2d Dept 2018]), and said third-party action was not commenced subsequent to the filing of a Note of Issue herein (*see Marbilla, LLC v 143/145 Lexington LLC*, 116 AD3d 544 [1st Dept 2014]; *Calcanes v City of New York*, 154 AD2d 327 [2d Dept 1989]; *Rago v Nationwide Ins. Co.*, 110 AD2d 831 [2d Dept 1985]). As such, any potential prejudice resulting from delay is outweighed by the interests of judicial economy that would be served by having a single trial (*see New York Schools Ins. Reciprocal v Milburn Sales Co., Inc.*, 138 AD3d 940; *Zili v City of New York*, 105 AD3d 949). Thus, Palombo’s alternative application for severance is denied.

Accordingly, it is

ORDERED that third-party defendant Palombo’s motion is denied.

The foregoing constitutes the decision and order of this Court.

Dated: November 8, 2021



A handwritten signature in black ink, appearing to read "T. Dufficy".

TIMOTHY J. DUFFICY, J.S.C.