

Gkoros v Lithos Constr. Solutions Inc.

2021 NY Slip Op 34181(U)

April 30, 2021

Supreme Court, Queens County

Docket Number: Index No. 703131/2018

Judge: Maurice Muir

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

FILED

Present: HONORABLE MAURICE E. MUIR
Justice

**5/3/2021
9:46 AM**

**COUNTY CLERK
QUEENS COUNTY**

LEONIDAS GKOROS,

IAS Part - 42

Plaintiff,

Index No.: 703131/2018

-against-

Motion Date: 4/15/21

LITHOS CONSTRUCTION SOLUTIONS INC.
L&M 825 LLC, K&K GROUP INC. and
ICS BUILDERS INC.

Motion Ca1. No. 18

Motion Seq. No. 2

Defendants.

LITHOS CONSTRUCTION SOLUTIONS INC.,

Third Party Plaintiff,

-against-

WATER DYNAMIC PLUMBING & HEATING
CORP.,

Third Party Defendant.

The following electronically filed documents read on this motion by Lithos Construction Solutions Inc. (“Lithos” or “movant”) for an order pursuant to 22 NYCRR § 202.21(e), vacating plaintiff’s Note of Issue and Certificate of Readiness, and striking this action from the trial calendar; and pursuant to CPLR § 3212(a), extending the time to move for summary judgment until (60) days from the date of the completion of all outstanding discovery inclusive of the discovery in the third-party action. Moreover, Leonidas Gkoros (“Mr. Gkoros” or “plaintiff”) cross-moves for order pursuant to CPLR § 603(a), severing the Third-Party action.

	Papers
	<u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	EF 47 - 59
Notice of Cross Motion-Affirmation-Exhibits-Service.....	EF 87 - 94

L&M Answering Affirmation to Cross-Motion.....	EF 115 - 116
Lithos Answering Affirmation to Cross-Motion.....	EF 148 - 153
Plaintiff Reply Affirmation In Support of Cross-Motion	EF 154 - 155

Upon the foregoing papers, it is ordered that the motion and cross-motion are combined herein for disposition, and determined as follows:

BACKGROUND

This is Labor Law action to recover damages for personal injuries allegedly sustained by Mr. Gkoros. The plaintiff alleges that on August 25, 2015, he was involved in a work-related accident inside a building located at 817-819 Madison Avenue, New York, New York (the “subject premises”) while employed by Water Dynamic Plumbing & Heating Corp. (“Water Dynamic”). In particular, the plaintiff alleges in his verified bill of particulars that he fell from an exposed floor joist on the fourth floor down to the third floor, thus, sustaining serious injuries. On March 1, 2018, the plaintiff commenced the instant action against L&M, Lithos, K&K Group Inc. (“K&K”) and ICS Builders, Inc. (“ICS”), who are the owner, general contractor and subcontractors, respectively. On April 12, 2018, issue was joined, wherein ICS interposed an answer. On July 24, 2018, the plaintiff filed an amended complaint. On December 19, 2018, the court issued a Preliminary Conference Order (“PCO”). Thereafter, on October 25, 2019, Lithos commenced a Third-Party action against Water Dynamic wherein, it alleges common law indemnification. On May 13, 2020, the court issued a third compliance conference order (“CCO”); and in accordance with the same, on August 26, 2020, the plaintiff filed the note of issue and certificate of readiness for trial (“Note of Issue”). On October 13, 2020, Water Dynamic interposed an answer to the third-party complaint. Now, the plaintiff and Lithos seek the above-described relief.

APPLICABLE LAW

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] citing *Shanley v. Callanan Indus.*, 54 NY2d 52, 57 [1981]; see also *HSBC Bank USA, N.A. v. Simms*, 163 AD3d 930 [2d Dept 2018]; *Barrett v. New York City Health and Hospital Corp.*, 150 AD3d 949 [2d Dept 2017]; *New York Schools Ins. Reciprocal v. Milburn Sales Co. Inc.*, 138 AD3d 940 [2d Dept 2016]). Moreover, 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, 508 [2d Dept 2008]; *Lelekakis v. Kamamis*, 41 AD3d 662 [2d Dept 2007]; *Naylor v. Knoll Farms of Suffolk County, Inc.*, 31 AD3d 726, 727 [2d Dept 2006]; *New York Schools Ins. Reciprocal v. Milburn sales Co., Inc.*, 138 AD3d 940 [2d Dept 2016]).

Furthermore, pursuant to the Uniform Rules for Trial Courts, “[w]ithin 20 days after service of a note of issue and certificate of readiness, any party to the action . . . may move to vacate the note of issue, upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect” (Uniform Rules for Trial Courts § 202.21[e]). A statement in a certificate of readiness to the effect that all pretrial discovery has been completed is a material fact, and where that statement is incorrect, the note of issue should be vacated (*see Cioffi v. S.M. Foods, Inc.*, 178 AD3d 1003 [2d Dept 2019]; *citing Barrett v. New York City Health & Hosps. Corp.*, 150 AD3d 949 [2d Dept 2017]; *cf. Slovney v. Nasso*, 153 AD3d 962 [2d Dept 2017]; *Rizzo v. Balish & Friedman*, 153 AD3d 869 [2d Dept 2017]; *see also Bundhoo v. Wendy’s*, 152 AD3d 734 [2d Dept 2017]).

DISCUSSION

Here, the court does not find that severing the Third-Party action from the underlying action is not warranted. In fact, counsel for L&M made many salient points against severing the third-party action, which the plaintiff failed to address. Moreover, there are common factual and legal issues involved in the main action and the third-party action. Moreover, the interests of judicial economy and consistency of verdicts will be served by having a single trial; and any potential for prejudice is outweighed by the possibility of inconsistent verdicts in the event that the causes of action against those entities were tried separately. (*Bennett v State Farm Fire and Casualty Company*, 181AD3d 774 [2d Dept 2020]; *see Barrett v. New York City Health and Hospitals Corp.*, 150 AD3d 318 [2d Dept 2017]). It should be noted that the plaintiff waited almost three (3) years, after the accident, to commence the instant action. Notwithstanding the same, the parties in the third-party action should be able to complete discovery before the main action is scheduled for a jury trial -- if they abide by the court’s order.

Additionally, in light of the age of the case, the number of years that have lapsed since the accident, and the increasing number of cases on the trial calendar occasioned by the COVID-

19 pandemic, the court declines to vacate the note of issue and certificate of readiness (see 22 NYCRR 202.21[e]). Rather, the court, in its discretion (*see Valencia v. City of New York*, 188 AD3d 549 [1st Dept 2020]; *Lopez v Hicks*, 178 AD3d 620 [1st Dept 2019]; *Cuprill v Citywide Towing and Auto Repair Services*, 149 AD3d 442 [1st Dept 2017]), will permit the discovery to occur while the case is on the trial calendar. The parties are to confer and agree on the dates and times of the remote depositions, and the logistics of them (e.g., the remote on-line and mobile platform(s) on which the depositions are to take place).

Accordingly, it is hereby

ORDERED that branch of Lithos Construction Solutions Inc.'s motion to vacate the Notice of Issue and Certificate of Readiness for Trial is denied; and it is further,

ORDERED that Water Dynamic Plumbing & Heating Corp. shall appear for an examination before trial on or before June 30, 2021 either by Skype for Business, Zoom, Skype, Microsoft Teams, in person, or its equal; and it is further,

ORDERED that the physician(s) to take the physical examination of plaintiff shall be designated by Water Dynamic Plumbing & Heating Corp. on or before July 15, 2021; and it is further,

ORDERED that the physical examination of plaintiff shall be conducted by Water Dynamic Plumbing & Heating Corp. within 30 days of designation, and the IME report(s) shall be exchanged within 45 days upon completion of the IME; and it is further,

ORDERED that Lithos Construction Solutions Inc. shall exchange deposition transcripts with Water Dynamic Plumbing & Heating Corp. on or before May 30, 2021; and it is further,

ORDERED that should Water Dynamic Plumbing & Heating Corp. fail to comply with any part this order, Lithos Construction Solutions Inc. may renew this motion, and this court may impose sanctions against Water Dynamic Plumbing & Heating Corp. including, but not limited to, waiver of discovery, preclusion, strike answer, costs, and attorney's fees; and it is further,

ORDERED that Lithos Construction Solutions Inc. and Water Dynamic Plumbing & Heating Corp. shall file any and all dispositive motions on or before September 30, 2021; and it is further,

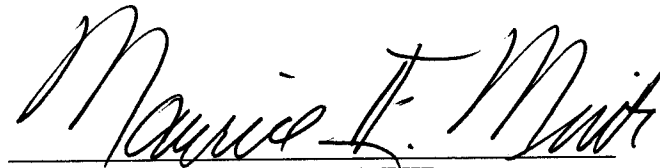
ORDERED that plaintiff's cross-motion to sever the Third-Party action, pursuant to CPLR § 603(a) is denied; and it is further,

ORDERED that the parties shall appear for a status conference before the undersigned, via a Microsoft Teams on-line conference, on July 20, 2021 at 12:00 p.m.; and it is further,

ORDERED that Lithos Construction Solutions Inc. shall serve a copy of this decision and order with notice of entry upon all parties, via certified mail and NYSCEF, on or before May 30, 2021.

The foregoing constitutes the Decision and Order of the court.

Dated: April 30, 2021



MAURICE E. MUIR
J.S.C.

FILED

5/3/2021

9:46 AM

**COUNTY CLERK
QUEENS COUNTY**