Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 22**
Justice

ALAN VAN DUZAR and SANDRA VAN DUZAR, Plaintiffs, -against- THE METROPOLITAN TRANSPORTATION AUTHORITY, THE NEW YORK CITY TRANSIT AUTHORITY and MEGA CONTRACTING, INC., Defendants.	Index No. 10237/06 Motion Date January 8, 2008 Motions Cal. No. 3, 4, 5 Motions Seq. No. C003, C004, C005
THE METROPOLITAN TRANSPORTATION AUTHORITY, THE NEW YORK CITY TRANSIT AUTHORITY and MEGA CONTRACTING, INC., Third-Party Plaintiffs, -against- PRO SAFETY SERVICES, LLC, Third-Party Defendant.	

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Upon the foregoing papers it is ordered that these motions are determined as follows:

Defendants/third-party plaintiffs', The Metropolitan Transportation Authority, The New York City Transit Authority and Mega Contracting Inc.'s motion for an Order scheduling an

immediate discovery conference and compelling the plaintiffs, Alan Van Duzar and Sandra Van Duzar, and third-party defendant, Pro Safety Services, LLC ("Pro"), to enter into an expedited discovery schedule pursuant to the Court's previous directive to resolve all outstanding discovery issues while this case remains on the trial calendar, extending defendants' time to file any dispositive motions, and staying the trial and granting a temporary restraining order of jury selection until such time that all dispositive motions have been determined by the Court. Third-party defendant, Pro Safety Services, LLC's ("Pro") and plaintiffs', Alan Van Duzar and Sandra Van Duzars' respective motions pursuant to CPLR 603 and 1010 for dismissal or severance of the third-party action are joined solely for the purposes of disposition of the motions and decided as follows:

This action, which was commenced on or about May 4, 2005, arises out of plaintiffs' claim that Alan Van Duzar, a union dock builder, was seriously injured as a result of an accident that occurred on July 13, 2005, while performing work at a construction site located at Roosevelt Avenue and Junction Boulevard in Queens, New York, which site was allegedly owned, operated, managed, and controlled by defendants/third-party plaintiffs. On September 17, 2007, plaintiffs filed the Note of Issue. Thereafter, on October 2, 2007, defendants/third-party plaintiffs impleaded third-party defendant, Pro, alleging that Pro breached its contract to defendants to provide proper safety services and exercise proper safety supervision over the activities performed by employees and contractors working at the subject premises. Defendants then brought the within motion seeking an order directing an expedited discovery schedule, which motion was followed on November 7, 2007 by Pro's instant motion to sever the third-party action asserted against it, and on November 15, 2007 by plaintiffs' motion to sever the third-party action.

Defendants assert that severance is unwarranted and that the courts have held that a single trial is appropriate to further the interests of judicial economy. Defendants maintain that they could not have brought the third-party action any earlier because the merit of the same did not come to light until the non-party EBT of Matthew Frebesh on September 10, 2007. They argue that even where there has been a considerable delay in the progress of an action, severance is not warranted where there is no evidence that a brief additional delay to permit discovery would cause substantial prejudice to the plaintiff in the main action, and that any alleged prejudice to adverse parties can be cured by the direction that discovery be completed expeditiously within a time frame imposed by the Court. Defendants assert that it would be

inappropriate to sever the third-party action since there has been no significant delay in the commencement of the third-party action that would warrant such severance, and there would be no substantial prejudice to plaintiffs. Defendants also assert that a delay alone, without a showing of prejudice, is insufficient to require severance. Defendants cite to a Court of Appeals case which held the Court's discretion to grant a severance should be exercised "sparingly" and that it is better practice to have one comprehensive hearing and determination of all the issues involved between the parties at the same time (see Shanley v. Callanan Indus. Inc., 444 NYS2d 585 [1981]).

Plaintiffs state that they filed a note of issue on September 14, 2007 after an enormous amount of pre-trial discovery was completed, and without any mention of a third-party action from the defendants. Plaintiffs then state that thereafter, they were served with an Answer to the Third-Party Complaint, despite the court ordered deadlines pertaining to impleader actions and despite the fact that the note of issue had already been filed. It is alleged that defendants knew of any possible rights against Pro well before the Note of Issue was filed in that on November 30, 2006, at plaintiff's deposition, plaintiff provided defense counsel with accident reports filled out by Pro which linked Pro to the accident site; and in March 2007, accident reports were exchanged among the defendants which stated that no tag lines were provided for the plaintiff and the deposition of the defendant MTA was held, wherein the MTA's witness stated that workers should have been using tag lines. Additionally, plaintiffs argue that defendants have not asserted which specific facts came to light at the non-party deposition of Matthew Frebesh on September 10, 2007, which prevented defendants from bringing the third-party action any earlier. Also, plaintiffs maintain that plaintiff himself is totally disabled and suffering from many injuries and so an extended delay may result in grave consequences; and they maintain that they have a right to prepare for trial without being burdened with the enormous time and expense of additional voluminous discovery and repetitive depositions and independent medical examinations by third-party defendant. Plaintiffs further assert that they were served on December 28, 2007 with a fourth-party action against plaintiff's employer, and so now all parties will have to wait for this new party to serve and perform discovery, which will take an enormous amount of time and will result in unnecessary expense to plaintiffs, causing undue prejudice to the plaintiffs. Lastly, plaintiffs' counsel states that he did indeed return defense counsel's phone calls regarding the expedited discovery schedule.

Third-party defendant states that it was impleaded after discovery was completed in the main action and after the case was placed on the trial calendar, and that it would be fundamentally unfair to force Pro to go to trial without giving it an opportunity to conduct its own discovery and to rush it to catch up in a complex case such as this one with a trial date looming. Pro also states that it had a contract with another party, Moretrench American, which contract had an indemnity clause running in favor of Pro, and so it will be moving promptly to implead all proper parties and so it is far from ready for trial. Also, Pro states that it cannot be ready for trial anytime soon. Finally, Pro asserts that defendants have dumped a large box of documents upon it which contain copies of all the discovery documents in the main action, and so it needs time to review the massive amount of documents. Additionally, Pro maintains that severance is appropriate since the third-party plaintiff offers no reasonable justification for its delay in commencing the third-party action, and the maintenance of the third-party action will prejudice it.

The Court finds that the third-party action shall not be severed. CPLR 1010 gives the Court the authority to dismiss a third-party Complaint or order a separate trial of the third-party claim and states that "[i]n 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." CPLR 603 allows for severance or separate trials "in furtherance of convenience or to avoid prejudice." Pursuant to case law, the Court is given broad discretion in determining which claims should be tried together and which should be severed, but as a general rule, all instances where there are common questions of law or fact should be tried together." (Axelrod & Co. v. Benson Telsey, 353 NYS2d 596 [Sup. Ct., NY Cty 1973]; see also Pescatore v. American Export Lines, Inc., 131 AD2d 739 [2d Dept 1987]) (holding that where there are common factual and legal questions, a single trial is proper in the interest of judicial economy). However, it is well-established law that "[i]ssues which might prejudice the proper consideration of other issues or which by their very nature will inconvenience the court and the principal litigation should be severed." (See Axelrod supra at 599). In order for there to be severance, the party moving for such must demonstrate that the prejudice in delay outweighs the convenience of trying both cases together (Coppola v. Robb, 55 AD2d 634 [2d Dept 1976]).

The Court finds that neither plaintiffs nor third-party defendants have demonstrated that they would be unduly prejudiced

by a denial of severance as long as sufficient time is provided for them to perform and complete discovery (Fries v. Sid Tool Co., Inc. v. Alpine Trance Air Conditioning Co., Inc., 90 AD2d 512 [2d Dept 1982]). The main action and the third-party action have common questions of law and fact. Under the circumstances, and in the interest of judicial economy, one trial is more appropriate than severed actions. Id. Accordingly, leave is granted to the third-party defendant and third-party plaintiffs to conduct such discovery as ordered hereinafter. Id. This action shall remain on the Trial Calendar pending completion of all discovery.

Further, defendants'/third-party plaintiffs' motion to extend its' time to make any dispositive motions is granted solely to the extent that defendants/third-party plaintiffs and third-party defendant shall be granted sixty (60) days from the completion of all outstanding discovery in the third-party action in which to file any dispositive motions relating to the third-party action only.

Additionally, defendants'/third-party plaintiffs' motion seeking a stay of the trial until such time that all dispositive motions have been determined by the Court is hereby granted.

IT IS HEREBY ORDERED that the following items of discovery and inspection shall be supplied within twenty [20] days from the date of this Order, unless specified otherwise:

[i] Defendants shall respond to third-party defendant's discovery demand dated October 25, 2007 and provide copies of file materials to third-party defendant within ten [10] days from the date of this Order.

[ii] Plaintiff shall provide HIPAA-compliant authorizations to third-party defendant for the same providers as previously provided to defendants in underlying action.

[iii] Plaintiff shall also provide all defendants with authorizations for: plaintiff's tax returns; employment records and social security records for a period of 3 years prior to the date of the action up to the present time.

[iv] Defendants to exchange all IME reports within ten [10] days from the date of this Order, and it is further

ORDERED that depositions of all parties shall commence on April 1, 2008 and shall continue to be conducted day to day until completion. The depositions may not be adjourned without consent of the Court. The parties shall not be precluded from further demands for disclosure following the depositions of the parties. Such demands shall be served within ten [10] days of the deposition of the party upon whom the demand is made, and shall be responded to within twenty [20] days of the service of the demand; and it is further

ORDERED that physical examinations shall be held as follows: third-party defendant shall designate a physician or physicians to conduct the physical examination and/or vocational rehabilitation examination within twenty [20] days of the date of this Order. The physical examinations shall be completed within thirty [30] days thereafter, but not later than May 1, 2008; and it is further

ORDERED that all proceedings directed herein shall be completed on or before the dates set forth. No adjournments are to be had without the court's written approval, and adjournments **MAY NOT** be had upon the stipulation of the parties alone, and it is further

ORDERED that any failure to comply strictly with the terms of this Order shall be grounds for the striking of pleadings or other relief pursuant to CPLR 3126, and it is further

ORDERED that parties aggrieved by failure to disclose must move promptly for relief or be deemed to have waived the outstanding items.

This constitutes the Decision and Order of the Court.

A courtesy copy of this Order is being mailed to counsel for the respective parties.

Dated: February 29, 2008 .....

HOWARD G. LANE, J.S.C.