

**Whippoorwill Hills Homeowners Assoc., Inc. v Toll  
at Whippoorwill, L.P.**

2011 NY Slip Op 34242(U)

January 13, 2011

Supreme Court, Westchester County

Docket Number: 24785/07

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

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

FILED  
AND  
ENTERED  
ON 1-14 2011  
WESTCHESTER  
COUNTY CLERK

WHIPPOORWILL HILLS HOMEOWNERS ASSOCIATION, INC., on its own behalf, and on behalf of individual owners of all homes located within and comprising the Whippoorwill Hills Homeowners Association, Inc., and as subrogee of individual homeowners of all homes located within and comprising the Whippoorwill Hills Homeowners Association, Inc.,

Plaintiff,

-against-

TOLL AT WHIPPOORWILL, L.P., TOLL PEPPERTREE, INC., TOLL HOLDINGS, INC., TOLL BROTHERS, INC. and WHIPPOORWILL HILLS ASSOCIATES, LLC,

Defendants.

DECISION & ORDER

Index No.: 24785/07  
Motion Date: Nov. 15, 2010

Seq. No. 12

TOLL AT WHIPPOORWILL, L.P., TOLL PEPPERTREE, INC., TOLL HOLDINGS, INC., and TOLL BROTHERS, INC.,

Third-Party Plaintiffs,

-against-

MM CONSTRUCTION and A.P. ROOFING & SIDING, INC.,

Third-Party Defendants.

FILED  
JAN 14 2011  
TIMOTHY C. IDONI  
COUNTY CLERK  
COUNTY OF WESTCHESTER

-----X  
A.P. ROOFING & SIDING, INC.,

Second Third-Party Plaintiff,

-against-

Index No.: T24785/07

AXE SIDING COMPANY, INC., JOSE  
ABELEIRA, individually and d/b/a U.T.P.L.  
CONSTRUCTION, INC., and U.T.P.L.  
CONSTRUCTION, INC.,

Second Third-Party Defendants.

-----X  
A.P. ROOFING & SIDING, INC.,

Third Third-Party Plaintiff,

-against-

Index No.: T24785/07

P & R UNIVERSAL PAINTING and PIOTR  
ANDROSZ, individually and d/b/a P & R  
UNIVERSAL PAINTING,

Third Third-Party Defendants.

-----X  
A.P. ROOFING & SIDING, INC.,

Fourth Third-Party Plaintiff,

-against-

Index No.: T24785/07

LUIS BASTOS CONSTRUCTION, INC., LMB  
CONSTRUCTION, INC. and GONZANAMA  
CONSTRUCTION, INC.,

Fourth Third-Party Defendants.

-----X  
LEFKOWITZ, J.,

The following papers numbered 1 to 18 were read on this motion by defendants/third-party plaintiffs Toll at Whipoorwill, L.P., Toll Peppertree, Inc., Toll Holdings, Inc. and Toll Brothers, Inc. (hereinafter "Toll defendants") for an order (1) granting it leave to reargue that branch of the motion of third-party defendants/plaintiffs A.P. Roofing and Siding and MM

Construction (hereinafter “third-party defendants”), which sought a severance of the third-party actions from the main action, and (2) upon reargument, denying that portion of the third-party defendants’ motion seeking severance, or, alternatively, for an order, pursuant to CPLR 2201, staying the matter pending determination of the Toll defendant’s appeal of the Court’s Decision and Order dated September 13, 2010.

Order to Show Cause-Affirmation-Affidavit of Service-Exhibits	1-10
Memorandum in Support	11
Memorandum in Opposition-Affirmation of Service	12-13
Affirmation in Opposition-Affidavit of Service	17-18
Replying Memorandum-Affidavit of Service-Exhibit	14-16

Upon the foregoing papers, it is ORDERED that the branch of the motion seeking reargument of that branch of third-party defendants’ motions seeking severance is granted, and, upon reargument, the branch of the motions of the third-party defendants seeking severance of the third-party actions from the main action is granted; and it is further

ORDERED that the branch of the motion seeking a stay pending determination of the Toll defendants’ appeal of this Court’s prior Decision and Order severing the main action from the third-party actions is denied without prejudice to seek a stay from the Appellate Division, Second Department.

By Summons with Notice dated November 15, 2007 and filed December, 2007, plaintiff Whippoorwill Hills Homeowners Association, Inc. commenced the main action against the Toll defendants to recover property damage sustained by the residential units in a development allegedly due to construction defects. The Toll defendants were the owner/seller, selling agent, builders, and general contractors of the development. The Toll defendants commenced the third-party action by third-party complaint dated July 1, 2009. Thereafter, third-party defendant A.P. Roofing & Siding (hereinafter “A.P.”) commenced the second third-party action and third third-party action in March and April, 2010, respectively. On June 18, 2010, this Court issued a Trial Readiness Order and directed plaintiff to file a note of issue within 90 days. On August 4, 2010, A.P. commenced the fourth third-party action. In August, 2010, by Orders to Show Cause, third-party defendants and third-third party defendant P.R. Universal Painting (hereinafter P.R.) moved for, *inter alia*, an order severing the main action from the third-party actions. The Toll defendants also moved for an order vacating the Note of issue and Certificate of Readiness on the ground that discovery was not completed and no depositions had been taken. In support of the Toll defendants’ motion, counsel stated that the failure to conduct depositions was “partly due to plaintiff’s position that it preferred not to sit for a deposition until all parties had appeared in the various actions” (Affirmation of Matthew J. Rice, Esq. dated July 12, 2010 at 3). The Toll defendants, however, never sought an order compelling plaintiff’s deposition.

By Decision and Order dated September 13, 2010, this Court denied the Toll defendants’ motion and granted, *inter alia*, that branch of the motion of third-party defendants and P.R. which sought severance of the third-party actions from the main action insofar as the main action was ready to proceed to trial and discovery in the third-party actions was incomplete due to a

delay in the commencement of the third-party action. This Court noted that defendants failed to offer any reasonable justification for their substantial delay in commencing the third-party action until July, 2009, and any prejudice they would suffer from severance was outweighed by the prejudice which plaintiffs would suffer if the main action, which has been pending since 2007, was delayed so that discovery can be completed in the third-party actions.

The Toll defendants now seek leave to reargue the branch of the prior motion which severed the main action from the third-party actions and, upon reargument, seek an order denying severance or granting a stay pending determination of their appeal of this Court's order granting, *inter alia*, severance. The Toll defendants contend that this Court misapprehended the facts when it determined that the Toll defendants had substantially delayed in commencing the third-party action. The Toll defendants noted that although plaintiff commenced the main action by service of the Summons with Notice in 2007, plaintiff failed to serve a complaint until February 26, 2009.<sup>1</sup> The Toll defendants contend that they, thereafter, served an answer on or about May 8, 2009 and commenced the third-party action on July 1, 2009, less than two months after serving their answer. The Toll defendants further contend that this Court misapprehended the facts when it concluded that plaintiff would be prejudiced if the main action was not severed since plaintiff never claimed any prejudice in response to the motion and only requested that any remaining discovery be closely supervised by the Court and discovery deadlines strictly enforced. Finally, the Toll defendants assert that the fact that insofar as plaintiff waited approximately 15 months to file and serve a complaint after serving the Summons with Notice, plaintiff will not be prejudiced if the main action is not severed from the third-party actions. In the event that this Court does not grant reargument, the Toll defendants seek a stay pending determination of their appeal of the prior Decision and Order on the ground that compelling them to proceed to trial without the third-party defendants, some of whom performed the actual work complained of by plaintiff, would severely prejudice the Toll defendants.

Third-party defendant/plaintiff A.P. opposes the motion. A.P. contends that this Court previously considered the relevant facts and the contentions raised by the Toll defendants in its Decision and Order. Moreover, A.P. notes that the severed third-party actions are already subject to a Preliminary Conference Stipulation filed on October 13, 2010, and asserts that more delay and expense would occur if reargument is granted and the actions are not severed. Accordingly, A.P. contends that the branch of the present motion seeking leave to reargue should be denied. A.P. takes no position with respect to that branch of the motion which seeks a stay pending determination of the Toll defendants' appeal.

Third-party defendant M.M. Construction also opposes the motion. M.M. Construction notes that the Toll defendants omit from their history of this action the fact that during the period between plaintiff's filing of the Summons with Notice and the complaint, plaintiff and the Toll defendants were engaged in settlement negotiations. Therefore, M.M. Construction asserts that plaintiff and the Toll defendants undertook a calculated risk to negotiate after the standards and

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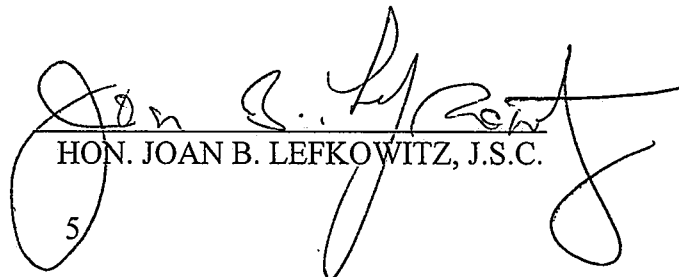
<sup>1</sup> Counsel for the Toll defendants failed to include the date plaintiff filed and served the complaint in the procedural history of the case provided in his Affirmation in Support of the Toll defendants' motion to vacate the note of issue.

goals time limits were triggered. Further, M.M. Construction contends that the third-party defendants will be prejudiced if the Court's prior Decision and Order is vacated since additional actions have been commenced against subcontractors of the third-party defendants and discovery is outstanding in those actions. M.M. Construction notes that a Preliminary Conference Order was entered in the severed actions which provides for discovery to be completed by December, 2011. M.M. also asserts that the Toll defendants have failed to demonstrate that they will suffer any prejudice if the actions remain severed. M.M. also opposes a stay of the main action pending determination of the Toll defendants' appeal since discovery in the severed third-party actions would continue.

The branch of the motion seeking leave to reargue is granted. However, upon reargument, the branch of the third-party defendants' motion seeking severance of the third-party actions from the main action is granted. The Toll defendants correctly contend that, in view of the fact that plaintiff failed to file and serve a complaint until February, 2009, they were not responsible for the delay in commencing the third-party action. Severance is, nonetheless, warranted in the present action. When discovery in the main action is completed, or should have been completed pursuant to previous court orders directing discovery, and discovery remains outstanding in the third-party actions which cannot be completed in a reasonable period of time, it is appropriate to sever the third-party actions from the main action so that the main action may proceed to trial without delay. The court, thereby, avoids prejudice to plaintiff, which necessarily would arise from a delay of the trial pending completion of discovery in the third-party action, and also facilitates the court's control of its own calendar. Parties in a main action are obligated to abide by court ordered discovery deadlines and are not, as appears to have happened in the present case, to rely on the fact that discovery is ongoing in the third-party actions and ignore the court ordered discovery deadlines in the main action. Notably, when the third-party defendants brought their motions seeking, *inter alia*, severance in August, 2010, neither plaintiff nor defendants had appeared for depositions despite a court order directing said depositions be completed on or before May 14, 2010 and June 18, 2010, respectively. The fact that third-party actions are commenced does not serve to stay or extend discovery in the main action in the absence of an explicit prior court order. Counsel for defendants were on notice of the foregoing since this issue was discussed during a compliance conference in this action and counsel, nevertheless, failed to pursue completion of the court ordered discovery in the main action. Accordingly, the commencement of the third-party action does not serve as a valid excuse for the parties' willful failure to abide by court ordered discovery deadlines. Finally, insofar as the Toll defendants have not refuted the third-party defendants' allegations that, at the time they made their motions, the Toll defendants had failed to provide requested discovery in the third-party action, the Toll defendants cannot now complain that the third-party action was severed from the main action because discovery was not complete in the third-party action.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York  
January 13, 2011

  
HON. JOAN B. LEFKOWITZ, J.S.C.