

Cruz v. Taino Const. Corp.

N.Y.A.D. 1 Dept. 2007.

Supreme Court, Appellate Division, First Department,  
New York.

Jesus CRUZ, et al., Plaintiffs-Respondents,

v.

TAINO CONSTRUCTION CORP., et al., Defendants/  
Third-Party Plaintiffs-Appellants-Respondents,

v.

Hermitage Insurance Company, Third-Party Defendant-  
Respondent-Appellant.

March 22, 2007.

R. Kenneth Jewell, New York, for appellants-respondents.

Mirman, Markovits & Landau, P.C., New York (Scott Wunderlich of counsel), for respondents.

\*903 Gold, Stewart, Kravatz, Benes & Stone, LLP, Westbury ([Jeffrey B. Gold](#) of counsel), for respondent-appellant.

Order, Supreme Court, Bronx County (Sallie Manzanet, J.), entered on or about December 2, 2005, which granted the motion by third-party defendant Hermitage Insurance Company (Hermitage) for severance of the third-party action and denied its motion for a change of venue in the same action, unanimously modified, on the law, the motion granted to the extent of directing that the venue of the severed third-party action be transferred to Suffolk County, and otherwise affirmed, without costs.

The motion court properly severed the main and third-party actions, since those actions do not involve common questions of law or fact. The issue in the third-party action is whether Hermitage received contractually timely notice of the claim, while the main action involves questions of negligence (*see [Dreizen v. Morris I. Stoler, Inc.](#), 98 A.D.2d 759, 469 N.Y.S.2d 471 [1983]*). Further, “[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” (*Medick v. Millers Live-*

*stock Mkt.*, 248 A.D.2d 864, 865, 669 N.Y.S.2d 776 [1998] [internal quotation marks and citation omitted]; *Kelly v. Yannotti*, 4 N.Y.2d 603, 607, 176 N.Y.S.2d 637, 152 N.E.2d 69 [1958]).

Hermitage's motion should have been granted to the further extent of changing the venue of the severed third-party action to Suffolk County. The venue change was timely sought by Hermitage based on improper designation of venue. Inasmuch as neither Hermitage nor its insured, the third-party plaintiff, had its principal place of business in the Bronx, venue was not properly placed in Bronx County (*see [Kearns v. Johnson](#), 238 A.D.2d 121, 655 N.Y.S.2d 498 [1997]*), and should have been transferred in accordance with Hermitage's request to Suffolk County, where Hermitage has its principal place of business. We note in this connection that the insured never cross-moved to retain venue in Bronx County or to transfer venue to an alternative county (*see e.g. [Herrera v. A. Pegasus Limousine Corp.](#), 34 A.D.3d 267, 825 N.Y.S.2d 183 [2006]; [Montilla v. River Park Assoc.](#), 282 A.D.2d 389, 723 N.Y.S.2d 670 [2001]*).

[TOM](#), J.P., [ANDRIAS](#), [SULLIVAN](#), [WILLIAMS](#), [GONZALEZ](#), JJ., concur.

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830 N.Y.S.2d 902, 2007 N.Y. Slip Op. 02482

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