

**Haber v Cohen**

Supreme Court of New York, Appellate Division, Second Department

June 29, 2010, Decided

2009-07508

**Reporter**

74 A.D.3d 1281; 904 N.Y.S.2d 479; 2010 N.Y. App. Div. LEXIS 5608; 2010 NY Slip Op 5729

Ray Haber et al., Plaintiffs/Counterclaim Defendants/Third-Party

Plaintiffs-Appellants, v Betty Cohen et al., Defendants/Counterclaim

Plaintiffs-Respondents. MRC II, Inc., et al., Third-Party Defendants-Respondents. (Index No. 1033/05)

Weg & Meyers, P.C., New York, N.Y. (Dennis T. D’Antonio, Joshua Mallin, and Jonathan C. Corbett of counsel), for defendants/counterclaim plaintiffs-respondents.

Anderson & Ochs, LLP, New York, N.Y. (Mitchel H. Ochs of counsel), for third-party defendants-respondents H. S. Jessup Architecture and Henry S. Jessup, P.C.

**Prior History:** [Haber v. Cohen, 74 AD3d 1282, 903 NYS2d 242, 2010 N.Y. App. Div. LEXIS 5670 \(N.Y. App. Div. 2d Dep’t, June 29, 2010\)](#)

**Judges:** WILLIAM F. MASTRO, J.P., THOMAS A. DICKERSON, ARIEL E. BELEN, CHERYL E. CHAMBERS, JJ. MASTRO, J.P., DICKERSON, BELEN and CHAMBERS, JJ., concur.

**Core Terms**

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third-party, counterclaim, trespass, plaintiffs’, recover damages, main action, sever, inter alia, new home

**Opinion**

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[\*1281] [\*\*480] In an action, inter alia, to recover damages for negligence and trespass and a third-party action for indemnity and contribution, the plaintiffs/counterclaim defendants appeal from an order of the Supreme Court, Kings County (Schack, J.), entered August 10, 2009, which granted the motion of the defendants/counterclaim plaintiffs pursuant to [CPLR 603](#) and [1010](#) to sever the third-party action.

**Headnotes/Syllabus**

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**Headnotes**

Actions--Consolidation and Severance

**Counsel:** [\*\*\*1] Seyfarth Shaw, LLP, New York, N.Y. (Richard M. Resnik and Eddy Salcedo of counsel), for plaintiffs/counterclaim defendants third-party plaintiffs-appellants.

Ordered that the order is affirmed, with one bill of costs to the respondents appearing separately and filing separate briefs.

The plaintiffs commenced this action against the [\*\*\*2] defendant prospective neighbors, inter alia, to recover damages for negligence and trespass, and to enjoin them from trespassing and unlawfully interfering with the construction of the plaintiffs' new home and to remove a conceded encroachment on the plaintiffs' property.

The defendants counterclaimed to impose strict liability for the plaintiffs' alleged violation of the New York City Administrative Code, recover damages for negligence and trespass, and obtain a permanent [\*\*481] injunction precluding the plaintiffs from trespassing on the defendants' property.

The plaintiffs, in their capacity as counterclaim defendants, [\*1282] subsequently commenced a third-party action against their architect, the foundation

contractor, and two other entities who performed work in connection with the design and construction of their new home. The plaintiffs sought full or partial indemnification and contribution from the third-party defendants in the event that the plaintiffs were held liable on the counterclaims. The defendants moved pursuant to [CPLR 603](#) and [1010](#) to sever the third-party action from the main action.

The Supreme Court providently exercised its discretion in severing the third-party action from [\*\*\*3] the main action, as the main action and the third-party action do not contain common factual and legal issues (*see generally* [CPLR 603](#), [1010](#); *Emmetsberger v Mitchell*, 7 AD3d 483, 775 NYS2d 876 [2004]; *Gardner v City of New York*, 102 AD2d 800, 477 NYS2d 159 [1984]).

The plaintiffs' remaining contention regarding the Supreme Court's review of their motion is not properly before this Court. Mastro, J.P., Dickerson, Belen and Chambers, JJ., concur.