

**Qui v Morningside Heights Hous. Corp.**

2013 NY Slip Op 31868(U)

August 9, 2013

Sup Ct, New York County

Docket Number: 153059/2012

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: Hon. EILEEN A. RAKOWER *Justice*  
PART 15

MIAO QUI AND XINGING ZHU,

Plaintiff,

- v -

MORNINGSIDE HEIGHTS HOUSING CORP.,

Defendants.

INDEX NO. 153059/2012

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 4

MOTION CAL. NO. \_\_\_\_\_

MORNINGSIDE HEIGHTS HOUSING CORP.,

Third Party Plaintiff,

-v-

BREND RENOVATION CORP.,

Third Party Defendant.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for/to

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2

Answer — Affidavits — Exhibits \_\_\_\_\_

3, 4

Replying Affidavits \_\_\_\_\_

5

Cross-Motion: Yes  No

Plaintiff brings this action to recover for injuries allegedly sustained on August 28, 2011 at 100 Lasalle Street, New York, New York, (“the premises”) when she slipped and fell in her apartment as a result of a water leak coming from the roof. Plaintiff alleges that the roof of her apartment building was in a defective condition due to improper repairs. Plaintiff now bring this motion to: (1) sever the third party action; (2) to compel the deposition of the Defendant by a certain date, and; (3) to permit this matter to be placed on the trial calendar during

the pendency of said deposition pursuant to Uniform Rules 202.21(d), or in the alternative, extending the time to file a note of issue. Defendant Morningside Heights Housing Corp. (“Morningside”) and Third-Party Defendant Brend Renovation Corp. (“Brend”) oppose.

This action was commenced on May 23, 2012 against Morningside, who owns and operates the premises. On April 30, 2013, Morningside, served a Third Party Summons and Complaint upon Brend, the contractor hired to repair a leak coming from the roof of the premises. On May 16, 2013, Brend interposed the third-party answer.

Plaintiff now asserts that the third-party action should be severed on the grounds that the newly commenced third-party action “is a non-meritorious delaying tactic, intended to stall the resolution of the case”.

CPLR §603, provides:

In 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.

CPLR §1010 states:

The Court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In 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 fo the main action or prejudice the substantial rights of any party.

A court’s discretion to grant severance should be exercised sparingly. (*Shanley v. Callanan Industries, Inc.*, 54 NY2d 52, 429 NE2d 104, 444 NYS2d 585 [1981]). Where two actions arise from a common nucleus of facts, severance is warranted only upon a showing that a party’s substantial rights would otherwise be prejudiced or substantial delay to one of the parties in keeping the actions together. (*See, Rothstein,*

251 AD2d 154 [1<sup>st</sup> Dept 1998]). Furthermore, to avoid the waste of judicial resources and the risk of inconsistent verdicts, it is preferable for related actions to be tried together, such as in a tort case where the issue is the respective liability of the defendant and the third-party defendant for the plaintiff's injury. (*See, Rothstein*, 251 A.D.2d 154 [1<sup>st</sup> Dept 1998]).

In the instant action, Plaintiff's tort case is based on the allegations that she sustained personal injuries as a result of Morningside negligently maintaining the subject building, in that it allowed water to leak from the roof into her apartment. The third party complaint alleges that Brend failed to or improperly rendered roof repair services, and that any active and affirmative wrongdoing was the result of Brend's work.

Thus, the main action and the third party action have a common nucleus of facts. The main action was commenced approximately one year before the third party action was brought, and less than twenty days after plaintiff's deposition was taken. There is still outstanding discovery in the main action and the case is not yet on the trial calendar. Accordingly, there will be no prejudice to a substantial right or a significant delay that requires severing the third-party action.

Wherefore, it is hereby,

ORDERED that Plaintiffs' motion is denied; and it is further,

ORDERED that third-party defendant Brend Renovation Corp.'s deposition of plaintiff shall take place within 20 days of service of this Order with notice of entry; and it is further,

ORDERED that the deposition of defendant Morningside Heights Housing Corp. shall take place within 20 days of Brend Renovation Corp.'s deposition; and it is further,

ORDERED that all parties appear for a compliance conference on October 1, 2013; and it is further,

ORDERED that the time to file the Note of Issue is extended until November 1, 2013.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: August 9, 2013

  
\_\_\_\_\_  
**HON. EILEEN A. RAKOWER** J.S.C.

Check one:      FINAL DISPOSITION      X      NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST     REFERENCE