

People v City of New York
2019 NY Slip Op 30271(U)
February 5, 2019
Supreme Court, New York County
Docket Number: 154594/2017
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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INDEX NO. 154594/2017

ORVILLE MORRIS,

MOTION DATE 02/05/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

THE CITY OF NEW YORK et al.,

Defendants.

DECISION AND ORDER

(and a second third-party action)

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NYSCEF Doc Nos. 43-66 were read on this motion to sever.

Motion by Plaintiff Orville Morris pursuant to CPLR 603 and 1010 for an order severing the Second Third-Party Action is granted to the extent that the second third-party action shall be severed.

BACKGROUND

In this personal injury action, Plaintiff alleges that, on October 26, 2016, he stepped through a board covering a hole in the floor and was injured. On November 7, 2018, this Court issued a decision and order, incorporated herein by reference, denying Plaintiff's motion seq. 001. That motion was to sever the third-party action commenced by Defendants/Third-Party Plaintiffs The City of New York, H.E.L.P. USA, Inc. and H.E.L.P. USA LLC against Third-Party Defendant Express Plumbing Sewer and Water Main Corp. ("Express").

On July 24, 2018, Plaintiff had taken the deposition of Andrea Harris, Executive Director of defendant H.E.L.P. USA. The deposition testimony indicates that Plaintiff allegedly stepped through a wooden covering intended to cover a grease trap. Ms. Harris testified that an "external vendor" empties out the grease trap but stated that she did not recall its name. (NYSCEF Doc No. 28 [Harris tr] at 17, lines 23-24.) Plaintiff's counsel then called for the production of any related records and for Ms. Harris to follow up in writing regarding the name of the external vendor. In the prior motion, Defendants stated in their opposition that they learned from Harris that Express was the external vendor and might have removed the wooden cover when cleaning the grease trap and failed to secure it properly. Defendants then commenced the Third-Party Action. The Court found in its prior order that Defendants had shown a reasonable justification for their delay in impleading Express, and in light of how discovery had proceeded up until that point, and as the note of issue had not yet been filed, declined to exercise its discretion to sever the Third-Party Action at that time.

Discovery then commenced in the Third-Party Action, and a representative from Express was deposed on December 4, 2018. The next day, Third-Party Plaintiffs and Express stipulated

to discontinue the Third-Party Action. In correspondence dated December 5, 2018, with counsel for Plaintiff, counsel for Defendants stated that they

“obtained information and documentation from [thei]r client today, while preparing for the deposition that was to occur tomorrow, that they had erroneously identified Express Plumbing Sewer and Water Main Corp. as the vendor who cleaned out the grease traps at the subject premises, and thus may have been the entity responsible for not properly placing the covering back over the opening where plaintiff allegedly had his incident. Our client further advised, and provided supporting documentation to confirm, that another vendor, The Filta Clean Co., Inc., was the vendor who was responsible for cleaning out the grease traps at or around the time fo the incident. So we are filing a third-party action against that entity. It should go out within the week.”

(NYSCEF Doc No. 48 at 2.) Defendants/Second Third-Party Plaintiffs commenced the Second Third-Party Action against The Filta Clean Co., Inc. (“Filta”) on December 6, 2018, by e-filing a second third-party summons and complaint. Filta interposed its answer on January 17, 2019.

Plaintiff now moves pursuant to CPLR 603 and 1010 to sever the Second Third-Party Action. Plaintiff argues in his moving papers that all discovery has been complete between Plaintiff and Defendants since shortly after Ms. Harris’s July 24, 2018 deposition and would like leave to file a note of issue. Plaintiff further argues that Defendants failed to investigate properly the name of the external vendor, and such failure has unfairly delayed resolution of the main action and prejudiced Plaintiff.

Defendants/Second Third-Party Plaintiffs argue in opposition that the Second Third-Party Action shares common questions of law and fact with the main action. Defendants further argue, in sum and substance, that Plaintiff’s rights will not be substantially prejudiced, the Second Third-Party Action will not unduly delay the determination of this action, the Second Third-Party Action was timely commenced, and there is reasonable justification for Defendants’ delay in commencing the Second Third-Party Action. Defendants argue that they will endeavor to expedite discovery. Defendants argue that the Second Third-Party Action is timely because, in accordance with the preliminary conference order, it was commenced within thirty days of the last deposition, namely, the Express EBT, which had been taken two days prior. Defendants argue that they were unaware of Filta’s existence until December 5, 2018, and their delay in commencing the Second Third-Party Action was reasonable and was not knowing or deliberate.

Plaintiff in its reply papers reiterates the arguments in its moving papers, many of which have carried over from the prior motion.

DISCUSSION

CPLR 1010 provides that “[t]he court may . . . order a separate trial of the third-party claim.” The statute further provides that “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.”

The Court agrees with Plaintiff that Defendants/Second Third-Party Plaintiffs have now unduly delayed the determination of the main action by failing to commence a third-party action against the proper party. Defendant’s counsel’s bare affirmation that her client erroneously identified Express and has now identified Filta is without evidentiary value.

At any rate, the Court finds that, contrary to Defendants’ contentions, Defendants’ counsel’s statements and arguments in opposition do in fact support Plaintiff’s contention that Defendants have failed to investigate the merits of their third-party claims adequately. Defendants should have been aware and arguably have discovered the identity of the external vendor in or around late 2016 and early 2017 at the time Plaintiff filed the notice of claim and appeared for a 50 (h) hearing.

If supporting documentation was obtainable by Defendants after the Express EBT showing that Filta was the external vendor, the burden was on Defendants to show the Court a reasonable justification for why such documentation was not obtained in the first instance. This was not done. As such, the Court, in its discretion, to avoid undue delay of the determination of the main action, and to avoid prejudice to Plaintiff’s substantial right not to be subjected to a long delay if compelled to await completion of disclosure in the Second Third-Party Action, which was commenced nearly two years ago, directs severance. (*See Pena v City of New York*, 222 AD2d 233 [1st Dept 1995]; *Blechman v I.J. Peiser’s and Sons, Inc.*, 186 AD2d 50, 51–52 [1st Dept 1992]; *Santos v Sure Iron Works*, 166 AD2d 571, 573 [2d Dept 1990].)

CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiff Orville Morris pursuant to CPLR 603 and 1010 for an order severing the third-party action is granted to the extent that the Second Third-Party Action shall be severed from the main action; and it is further

ORDERED that the main action shall bear the following caption:

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ORVILLE MORRIS,

Plaintiff, Index No.: 154594/2017

- against -

THE CITY OF NEW YORK, H.E.L.P. USA, INC., and
H.E.L.P. USA, LLC,

Defendants.

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And it is further

ORDERED that Second Third-Party Plaintiffs shall, within 20 days of the date of the decision and order on this motion, file any documents or fees with the clerk to obtain a new index number, and shall file an RJI indicating that the action bearing index no. 154594/2017 is a related case so that the newly severed action is brought before this Court; and it is further

ORDERED that the second third-party summons and complaint and answer in the instant action shall be the pleadings in the newly severed action; and it is further

ORDERED that the former Second Third-Party Action shall bear the following caption:

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 THE CITY OF NEW YORK, H.E.L.P. USA, INC., and
 H.E.L.P. USA, LLC,

 Plaintiffs, Index No.: [TBD]

 - against -

 THE FILTA CLEAN CO. INC.,

 Defendant.
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And it is further

ORDERED that movant shall, within 20 days of the date of the decision and order on this motion, serve a copy of this order with notice of entry on the county clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158M), who shall mark their records to reflect the change in the caption in the main action and who shall assign an index number to the newly severed former Second Third-Party Action, if one is not already assigned, upon the payment of any necessary fee, and who shall assign the new action to this Court; and it is further

ORDERED that the parties are directed to appear in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821, on Tuesday, May 7, 2019, at 9:15 a.m., for a status conference.

The foregoing constitutes the decision and order of the Court.

2/5/2019
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION OTHER

APPLICATION: GRANTED SETTLE ORDER SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE

Robert D. Kalish

 HON. ROBERT D. KALISH, J.S.C.