

<b>Kissel v Royal Charter Props., Inc.</b>
2019 NY Slip Op 31089(U)
April 15, 2019
Supreme Court, New York County
Docket Number: 152390/2016
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

*Justice*

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INDEX NO. 152390/2016

BEVERLY KISSEL,

Plaintiff,

MOTION SEQ. NO. 001

- v -

ROYAL CHARTER PROPERTIES, INC., ROYAL CHARTER  
PROPERTIES-EAST, INC., and CUSHMAN & WAKEFIELD, INC.,

**DECISION AND ORDER**

Defendants.

-----X

CUSHMAN & WAKEFIELD, INC.

Third-Party Plaintiff,

-V-

M. OBRADOVIC CONTRACTING CORP.,

Third-Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is decided as follows.

In this premises liability action commenced by plaintiff Beverly Kissel, third-party defendant M. Obradovic Contracting Corp. ("MOCC") moves: 1) pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint; 2) pursuant to CPLR 3211(a)(7), dismissing the complaint for failure to state a claim; and 3) for such other relief as this Court deems just and proper. Plaintiff and defendants Cushman & Wakefield, Inc., Royal Charter Properties, Inc., and Royal Charter Properties-East, Inc. oppose the motion. Plaintiff also cross-moves to

consolidate the captioned action with the action styled *Beverly Kissel v M. Obradovic Corporation*, pending in this Court under Index Number 150230/18. After oral argument, and after a review of the parties' motion papers and the relevant statutes and case law, the motions are decided as follows.

#### **FACTUAL AND PROCEDURAL BACKGROUND:**

Plaintiff was allegedly injured on November 22, 2015 when she tripped and fell at the rear of the building located at 435 East 70<sup>th</sup> Street, New York, New York ("the premises"). Doc. 1.<sup>1</sup> In her complaint, she claimed that defendants Royal Charter Properties, Inc. ("RCP") and Royal Charter Properties-East, Inc. ("RCPE") were negligent in their ownership, maintenance and/or control of the premises. Doc. 1.

RCP and RCPE joined issue by their verified answer filed July 7, 2016. Doc. 6.

In an order entered January 18, 2017, this Court noted that, at a preliminary conference conducted on January 17, 2017, the parties had stipulated to consolidate plaintiff's action against RCP and RCPE with a separate negligence action by plaintiff against Cushman & Wakefield, Inc. ("C&W"), pending in this Court under Index Number 152322/16. Doc. 11.<sup>2</sup> The said order consolidated the actions under Index Number 152390/16. Doc. 11.

On June 26, 2017, C&W commenced a third-party action against M. Obradovic Contracting Corp. ("MOCC"). Doc. 15. C&W's third-party complaint against MOCC contained a cause of action for common-law indemnification. Doc. 15.

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<sup>1</sup> Although plaintiff alleges in her bill of particulars that she fell on steps located at the rear of the premises (Doc. 29 at par. 2), she testified at her deposition that she fell on an uneven sidewalk at the rear of the premises. Doc. 31 at 53-54.

<sup>2</sup> The allegations in plaintiff's complaint in her action against C&W were virtually identical to those which plaintiff asserted in her complaint against RCP and RCPE. Doc. 16. C&W joined issue in the action against it by service of its answer dated October 27, 2016. Doc. 17.

Plaintiff commenced an action directly against MOCC under Index Number 150230/18 on January 9, 2018 (“the direct action”). Doc. 48. In the direct action, plaintiff alleged that RCP and/or RCPE hired MOCC to perform work on the sidewalk at the premises and that MOCC did so negligently, thereby causing her injuries. Doc. 48. MOCC joined issue in the direct action by service of its verified answer filed April 6, 2018. Doc. 48.

MOCC joined issue by service of its verified answer to the third-party complaint, filed February 12, 2018, in which it denied all substantive allegations of wrongdoing; asserted several affirmative defenses; cross-claimed against RCP and RCPE for contribution; and counterclaimed against C&W for contribution, common-law indemnification, and contractual indemnification. Doc. 21.

On or about March 2, 2018, C&W cross-claimed against RCP and RCPE for contribution, contractual indemnification, and breach of contract to procure insurance. Doc. 34.

On March 29, 2018, MOCC filed the instant motion, pursuant to CPLR 3212, seeking summary judgment dismissing the third-party complaint or, in the alternative, for dismissal of the complaint pursuant to CPLR 3211(a)(7) for failure to state a claim, along with such other relief as this Court considers just and proper. Doc. 25. In support of the motion, MOCC submits the pleadings, bill of particulars, plaintiff’s deposition transcript, an attorney affirmation, and the affidavit of Milorad Obradovic, President of MOCC. Docs. 26-35.

MOCC’s attorney argues in his affirmation that the company is entitled to dismissal of the third-party complaint because it did not do any work at the premises until two days after the alleged incident occurred and, thus, could not have created, or have had actual or constructive notice of, any dangerous condition at the premises. Doc. 26. Counsel further asserts that C&W’s common-

law indemnification claim must be dismissed since C&W was not vicariously liable for MOCC's acts.

Obradovic states in his affidavit that, on October 28, 2015, he sent C&W a proposal to perform sidewalk flag and concrete repair at the premises. Doc. 35 at par. 5. A copy of the proposal is annexed to Obradovic's affidavit as Exhibit A. On November 10, 2015, Obradovic emailed Michael Hess, C&W's property manager, to advise him that MOCC would perform its work at the premises on Tuesday or Wednesday of the following week. Doc. 35 at par. 6. When MOCC was unable to perform its work the following week, Obradovic emailed Hess on November 17, 2015 to reschedule the work for November 24, 2015. Doc. 35 at par. 6. Hess replied: "Ok – this job will be done Tuesday Nov 24<sup>th</sup>." Doc. 35. A copy of the foregoing email exchange is annexed to Obradovic's affidavit as Exhibit B. Obradovic avers that "[a]ll of the work that MOCC performed [at] the [p]remises was performed on November 24, 2015" and that it "did not perform any work at [the premises] on or prior to November 22, 2015." Doc. 35 at par. 9.

The deposition transcript submitted by MOCC reveals, inter alia, that although the front entrance to the premises was located on East 70<sup>th</sup> Street, plaintiff fell on an uneven part of the sidewalk at the rear of the premises, which was on East 71<sup>st</sup> Street. Doc. 31, at p. 52, 54, 71.

In opposition to the motion, C&W submits an attorney affirmation, proposals and invoices relating to sidewalk work performed by MOCC at the premises in 2013 and 2014, and the affidavit of Scott Severs, a General Manager employed by C&W. Docs. 40-42. C&W's attorney argues that MOCC's motion must be denied because the proposals and invoices raise an issue of fact regarding whether work performed by MOCC at the premises prior to the date of the accident caused or contributed to plaintiff's fall. Counsel further asserts, inter alia, that the motion is premature because discovery and depositions are required to explore the discrepancies between

Obradovic's claim that MOCC did no work at the premises prior to the accident and the documents submitted in opposition to MOCC's motion which prove otherwise. He further asserts that MOCC's delay, until November 24, 2015, in performing its work may have caused or contributed to the accident.

Severs states in his affidavit that the proposals and invoices submitted in opposition to the motion: 1) were kept in the ordinary course of C&W's business; 2) pertained to work performed by MOCC on the sidewalk adjacent to the premises; and 3) reflect that MOCC was paid for this work in 2013 and 2014. Doc. 42.

On May 4, 2018, plaintiff cross-moved to consolidate the captioned action with the direct action. In support of the cross motion, plaintiff argues that "judicial economy dictates that the [captioned action and the direct action] be consolidated for all purposes pursuant to CPLR 602(a)" since they "arise out of the same facts and circumstances and present common questions of law and fact." Doc. 44 at par. 26.<sup>3</sup>

Plaintiff also opposes MOCC's motion for summary judgment, principally by reiterating C&W's argument that the proposals and invoices submitted by C&W raise an issue of fact regarding whether MOCC's work caused and/or contributed to the alleged incident. Doc. 44. RCP and RCPE adopt this argument in opposition to MOCC's motion as well. Doc. 54. Plaintiff also argues that MOCC's delay in performing its work may have caused or contributed to the accident.

In reply, MOCC argues that its motion should be granted because the opposition papers do not refute the fact that the third-party complaint fails to state a cause of action for common-law

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<sup>3</sup> This Court notes that, elsewhere in his affirmation, plaintiff's counsel argues that the captioned action and the direct action should be "consolidated for the purposes of discovery and joint trial." Doc. 44 at par. 29. However, given that the notice of cross motion and the "wherefore" clause of counsel's affirmation (Docs. 43 and 44) seek "consolidation", without any qualification, this Court will treat the motion as one for consolidation for all purposes.

indemnification. Doc. 55 at par. 3. MOCC further asserts that the opposition papers fail to raise an issue of fact sufficient to defeat its entitlement to summary judgment since it did not perform any work on East 70<sup>th</sup> Street, where the alleged incident occurred, until two days after the incident. Doc. 55 at par. 3. Rather, urges MOCC, the documents submitted by C&W only reflect that it did work on East 71<sup>st</sup> Street in 2013 and 2014. Doc. 55 at par. 11. Further, MOCC urges that the motion is not premature since further discovery will not alter the fact that it did no work at the premises until two days after the incident.

### LEGAL CONCLUSIONS:

#### **MOCC's Motion for Summary Judgment Dismissing the Third-Party Complaint**

As noted previously, MOCC moves, pursuant to CPLR 3212, for summary judgment dismissing C&W's third-party complaint. It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Matter of New York City Asbestos Litig.*, -- NY3d --, 2019 NY Slip Op 01259, \*3 (2019), quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). If such a showing is made, the burden then shifts to the party opposing the motion to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v. Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006).

MOCC established its prima facie entitlement to summary judgment by submitting the affidavit of Obradovic, who attests to the fact that MOCC did no work at the premises until two days after plaintiff's accident. However, C&W raised a triable issue of fact regarding whether MOCC caused or contributed to the accident by submitting Severs' affidavit, accompanied by

2013 and 2014 proposals and invoices for work performed at the premises by MOCC prior to the accident. Although MOCC maintains that the proposals and invoices pertain to work performed by the company on East 71<sup>st</sup> Street, and not East 70<sup>th</sup> Street, this contention disregards plaintiff's deposition testimony that the rear of the premises, where she allegedly fell, was located on East 71<sup>st</sup> Street. Thus, MOCC's motion for summary judgment dismissing the third-party complaint is denied.

Additionally, the motion for summary judgment is premature, since the parties have not had the opportunity to conduct discovery addressing the discrepancies regarding whether MOCC performed work at the premises prior to the date of the alleged accident and, if so, where and when. *See Han v Gladyshev*, 153 AD3d 762 (2d Dept 2017); *Bond v DeMasco*, 84 AD3d 1292 (2d Dept 2011).

### **MOCC's Motion to Dismiss the Third-Party Complaint**

In deciding a motion to dismiss a pleading pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. *See Leon v Martinez*, 84 NY2d 83, 87 (1994). Additionally, the allegations of both the main complaint and third-party complaint must be read together and accepted as true. *See Musco v Conte*, 22 AD2d 121 (2d Dept 1964). The court must only determine whether the alleged facts fit within any cognizable legal theory (*see Harris v IG Greenpoint Corp.*, 72 AD3d 608 [1st Dept 2010]), and the third-party plaintiff's potential success on its claim is not determinative. *See AG Cap. Funding Partners, L.P. v State St. Bank and Trust Co.*, 5 NY3d 582 (2005). The court is



also permitted to consider any affidavits submitted by the non-moving party to remedy defects in the complaint. *Leon*, 84 NY2d at 88.

Pursuant to New York City Administrative Code § 7-210, the owner of real property abutting a sidewalk has the duty of maintaining it in a reasonably safe condition, and is liable for any personal or property injury proximately caused by its failure to so maintain the sidewalk, unless the property is exempt. Thus, a premises owner has a statutory nondelegable duty to maintain the sidewalk abutting its premises. (*Cook v Consolidated Edison Co. of New York, Inc.*, 51 AD3d 447 [1st Dept 2010]).

Nevertheless, a contractor may be held liable for an affirmative act of negligence that causes or creates a dangerous condition on a public sidewalk. (*Fernandez v 707, Inc.*, 85 A.D.3d 539 [1st Dept 2011]). Moreover, a contractor may owe a non-contracting third party a duty of care if, as pertinent here, in failing to exercise reasonable care in the performance of its duties, it "launche[s] a force or instrument of harm." (*Espinal v Melville Snow Contractors*, 98 NY2d 136 [2002]).

*Dollard v WB/Stellar IP Owner, LLC*, 2011 NY Slip Op 32921(U) (Sup Ct, NY County 2011) *aff'd*  
*Dollard v WB/Stellar IP Owner, LLC*, 96 AD3d 533 (1<sup>st</sup> Dept 2012).

Therefore, regardless of C&W's duty to maintain the sidewalk pursuant to the Administrative Code, MOCC may also owe plaintiff a duty of care based on the scope and nature of its work on the sidewalk, and may thus be liable to C&W on a claim for common-law indemnification. Since C&W claims in its third-party complaint that MOCC performed work on the sidewalk where plaintiff fell, and since plaintiff alleges in her complaint that she was injured due to a defective sidewalk, C&W has stated a claim for common law indemnification against MOCC. *See Dollard*, 2011 NY Slip Op 32921(U), *supra*, citing *Soussi v Gobin*, 87 AD3d 580 (2d Dept 2011); *Harakidas v City of New York*, 86 AD3d 624 (2d Dept 2011).

### Plaintiff's Cross Motion to Consolidate

CPLR 602(a) provides as follows:

- (a) Generally. When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

The decision whether to consolidate is one to be made in the Court's discretion. *See Murphy v 317-319 Second Realty LLC*, 95 AD3d 443, 445 (1st Dept 2012). Absent a showing of prejudice, a court may grant consolidation where the separate actions "involve the same parties, and essentially the same questions of law and fact." *43d St. Deli v. Paramount Leasehold, L.P.*, 89 AD3d 573, 573-74 (1st Dept 2011). The party opposing a motion to consolidate must show that it would be prejudiced if the motion were granted. *See Vigo S. S. Corp. v Marship Corp. of Monrovia*, 26 NY2d 157, 161 (1970).

This Court determines, in its discretion, that it is in the interest of judicial economy to consolidate the captioned action with the direct action since both actions involve the same issues of fact and law. Specifically, both plaintiff and C&W allege that MOCC's negligence caused and/or contributed to the alleged accident. Additionally, if the actions are not consolidated, inconsistent verdicts could result from separate trials. *See Morell v Basa*, 300 AD2d 134 (1st Dept 2002) (citations omitted). Moreover, in opposing the cross motion, MOCC is silent regarding any prejudice it may incur as a result of consolidation.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by third-party defendant M. Obradovic Contracting Corp. seeking summary judgment dismissing the third-party complaint pursuant to CPLR 3212 is denied with leave to renew at the completion of discovery; and it is further

ORDERED that the motion by third-party defendant M. Obradovic Contracting Corp. seeking dismissal of the third-party complaint pursuant to CPLR 3211(a)(7) is denied; and it is further

ORDERED that the cross motion by plaintiff Beverly Kissel, seeking to consolidate the captioned action with the matter of *Beverly Kissel v M. Obradovic Contracting Corp.*, which action is pending in this Court under New York County Index Number 150230/18, is granted; and it is further

ORDERED that the actions will be consolidated under Index Number 152390/16; and it is further

ORDERED that the caption of the consolidated action will read as follows:

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**BEVERLY KISSEL,**

**Plaintiff,**

**Index Number 152390/16**

**-against-**

**ROYAL CHARTER PROPERTIES, INC.,  
ROYAL CHARTER PROPERTIES-EAST, INC.,  
CUSHMAN & WAKEFIELD, INC., and  
M OBRADOVIC CONTRACTING CORP.,**

**Defendants,**

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**CUSHMAN & WAKEFIELD, INC.,**

**Third-Party Plaintiff,**

**-against-**

**M OBRADOVIC CONTRACTING CORP.,**

**Third-Party Defendant.**  
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And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, plaintiff shall serve a copy of this order, with notice of entry, on the Clerk of the Court (60 Centre Street, Room 141 B), who shall consolidate the documents in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that service of this order upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that, within 30 days from entry of this order, plaintiff shall serve a copy of this order, with notice of entry, on the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is hereby directed to reflect the consolidation by appropriately marking the court's records; and it is further

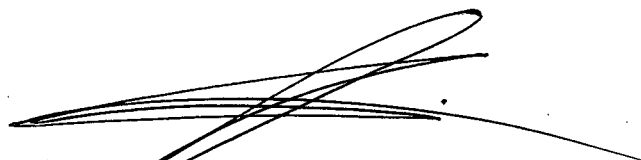
ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the aforesaid *Protocol*; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in the consolidated action on July 23, 2019 at 2:30 p.m. in Room 280, 80 Centre Street, New York, New York; and it is further

ORDERED that this constitutes the decision and order of the court.

4/15/2019

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE