

<b>Maldonado v Liberty El. Corp.</b>
2020 NY Slip Op 33957(U)
November 30, 2020
Supreme Court, New York County
Docket Number: 152395/2017
Judge: Robert R. Reed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ROBERT R. REED PART 43**

*Justice*

-----X

LUCY MALDONADO, ANGEL LUIS,  
Plaintiff,

- v -

LIBERTY ELEVATOR CORPORATION, LIBERTY  
ELEVATOR OF NY,  
Defendant.

-----X

LIBERTY ELEVATOR CORPORATION  
Plaintiff,

-against-

ZECKENDORF TOWERS  
Defendant.

-----X

LIBERTY ELEVATOR CORPORATION  
Plaintiff,

-against-

EMPIRE STATE REALTY TRUST  
Defendant.

-----X

LIBERTY ELEVATOR CORPORATION  
Plaintiff,

-against-

ESRT 10 UNION EMPIRE STATE REALTY TRUST  
Defendant.

-----X

INDEX NO. 152395/2017  
MOTION DATE 08/20/2020,  
08/10/2020  
MOTION SEQ. NO. 002 003

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595773/2017

Second Third-Party  
Index No. 595370/2018

Third Third-Party  
Index No. 595300/2020

The following e-filed documents, listed by NYSCEF document number (Motion 002) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 79

were read on this motion to

VACATE/STRIKE - NOTE OF ISSUE

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 80, 81, 82, 83

were read on this motion to

VACATE/STRIKE - NOTE OF ISSUE

**ROBERT R. REED, J.:**

Motion sequence numbers 002 and 003 are consolidated herein for disposition and are disposed of in accordance with the following decision and order.

On July 14, 2015, plaintiff Lucy Maldonado was working at a grocery store located at 10 Union Square in Manhattan (the Premises), when the freight elevator she was riding in dropped and came to a sudden stop. On March 14, 2017, Maldonado and her husband, suing derivatively, commenced this action against, among others, Liberty Elevator Corporation (Liberty), the company that allegedly installed and serviced the elevator (NYSCEF Doc. No. 1). On May 10, 2018, plaintiffs commenced a separate action against Empire State Realty Trust Inc. (Empire), alleging that Empire owned the Premises (NYSCEF Doc. No. 60). The two actions were consolidated by a so-ordered stipulation on August 16, 2018 (NYSCEF Doc. No. 35).

In the interim, on September 20, 2017, Liberty commenced a third-party action against Zeckendorf Towers, One Union East Condominium, and East Union Square, alleging that they owned and maintained the Premises (NYSCEF Doc. No. 9), which plaintiffs later withdrew by stipulation of discontinuance on April 19, 2018 (NYSCEF Doc. No. 31). Liberty commenced a second third-party action against Empire on May 10, 2018, alleging that Empire owned and maintained the Premises (NYSCEF Doc. No. 26), and a third third-party action against ESRT 10 Union Square, LLC (ESRT) on May 26, 2020, alleging that it owned and maintained the Premises (NYSCEF Doc. No. 49).

On July 13, 2020, plaintiffs filed a note of issue and certificate of readiness (NYSCEF Doc. No. 53). The certificate of readiness indicated that “[p]hysical examinations scheduled for July and August” and “discovery proceedings now known to be necessary [were] completed,” and that the action was “ready for trial” (NYSCEF Doc. No. 53).

Now, in motion sequence number 002, Empire and ESRT move for an order (1) vacating the note of issue on the ground that the case is not ready for trial and discovery was not complete, (2) compelling Liberty to respond to their respective demands for a verified bill of particulars in the second and third third-party actions, and (3) extending their time to file dispositive motions 60 days from Liberty’s response to those demands.

In motion sequence number 003, Liberty moves to vacate the note of issue and to remove the action from the trial calendar in order to allow for the completion of discovery, specifically ESRT’s deposition and Maldonado’s vocational rehabilitation assessment. Additionally, Liberty seeks an order extending its time to move for summary judgment until at least 60 days from the completion of ESRT’s deposition.

### DISCUSSION

Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (e) allows a party to move to vacate a note of issue,

"[w]ithin 20 days after service of a note of issue and certificate of readiness upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect."

“Where a party timely moves to vacate a note of issue, it need show only that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of . . . section [202.21] in some material respect” (*Vargas v Villa Josefa*

*Realty Corp.*, 28 AD3d 389, 390 [1st Dept 2006] [internal quotation marks and citation omitted]). “[A] note of issue should be vacated when [it] is based upon a certificate of readiness which contains an erroneous fact, such as that discovery has been completed” (*Ruiz v Park Gramercy Owners Corp.*, 182 AD3d 471, 471 [1st Dept 2020][quotation marks and citations omitted]; see *Matos v City of New York*, 154 AD3d 532 [1st Dept 2017][same]).

Here, the subject motions were timely made within 20 days of service of the note of issue. Liberty also demonstrated, and plaintiffs do not dispute, that discovery remained outstanding at the time the note of issue was filed. Specifically, at the time plaintiffs filed the note of issue, Liberty had not had the opportunity to obtain pertinent discovery from ESRT in the third third-party action, which Liberty initiated before the note of issue was filed, and Maldonado's vocational assessment had yet to be conducted. Since plaintiffs' certificate of readiness erroneously indicated that discovery was complete and that the case was ready for trial, the note of issue should be vacated.

Plaintiffs ask the court not to vacate the note of issue, asserting that Liberty unduly delayed in bringing the third third-party action and it should, therefore, be severed in order to avoid further delay and prejudice to plaintiffs. However, a delay in commencing a third-party action, by itself, does not necessarily warrant severance (see *Nielsen v New York State Dormitory Auth.*, 84 AD3d 519, 520 [1st Dept 2011]; *Escourse v City of New York*, 27 AD3d 319, 320 [1st Dept 2006]). While plaintiffs suggest that Liberty intentionally delayed in bringing the third third-party action, Liberty explains that it did not become aware of the possibility that ESRT owned the Premises until Empire's employee testified during a deposition on December 3, 2019 that Empire simply managed the Premises, which was owned by ESRT (NYSCEF Doc. No. 81, at ¶ 14; NYSCEF Doc. No. 98, at 25:21). Liberty asserts that it thereafter served Empire with a

notice to admit in order to ensure that it did not inadvertently pursue the wrong entity. Liberty did not receive a response until on or about March 2, 2020, admitting ESRT's ownership of the Premises (NYSCEF Doc. No. 81, at ¶¶ 4, 14; NYSCEF Doc. No. 122). Liberty further explains that, within two weeks thereafter, the Covid-19 pandemic proliferated, delaying its ability to file for an index number and effectuate service on ESRT (NYSCEF Doc. No. 81, at ¶ 5).

Thus, the record does not support plaintiffs' contention that Liberty's delay in bringing the third third-party action was intentional. Since "it is preferable for related actions to be tried together" (*Rothstein v Milleridge Inn*, 251 AD2d 154, 155 [1st Dept 1998]; see *Shanley v Callanan Indus.*, 54 NY2d 52, 57 [1981]), plaintiffs' request to sever the third-third party action is denied.

In light of the foregoing, the note of issue is vacated and Liberty is granted a 90-day discovery extension -- beginning on the date this decision and order is e-filed with the NYSCEF system -- in order to complete discovery in the third third-party action, including taking ESRT's deposition and the completion of a vocational assessment. Another extension will not be permitted absent a development warranting additional discovery pursuant to 22 NYCRR 202.21 (d). Plaintiffs are instructed to file a note of issue and certificate of readiness within 15 days after the expiration of the extended discovery period. Additional summary judgment motions, if any, are to be served and filed within 60 days of the expiration of the extended discovery period.

Lastly, that branch of Empire and ESRT's motion which seeks to compel Liberty to respond to their respective demands for a verified bill of particulars in the second and third third-party actions is denied (NYSCEF Doc. Nos. 34 & 65). Pursuant to 22 NYCRR § 202.7 (a) and (c), a motion relating to disclosure or to a bill of particulars, must be accompanied by an

affirmation from the moving party's counsel that he or she made a good faith effort to resolve the issues raised by the motion, "including the time, place and nature of the consultation as well as the issues discussed" (*Bronstein v Charm City Hous., LLC*, 175 AD3d 454, 455 [2d Dept 2019]; see *Cashbamba v 1056 Bedford LLC*, 172 AD3d 415, 416 [1st Dept 2019]). Here, the affirmation of good faith submitted by Empire and ESRT does not include the required details (NYSCEF Doc. No. 69).

### CONCLUSION

For the foregoing reasons, it is hereby

**ORDERED** that those branches of the motions of Empire State Realty Trust Inc. and ESRT 10 Union Square, LLC (motion sequence no. 002) and Liberty Elevator Corporation (motion sequence no. 003), which seek to vacate the note of issue are granted, and the note of issue is vacated; and it is further

**ORDERED** that Liberty Elevator Corporation is granted a 90-day discovery extension beginning on the date this decision and order is e-filed with the NYSCEF System in order to complete discovery in the third third-party action, including the deposition of ESRT 10 Union Square, LLC and a vocational assessment of plaintiff Lucy Maldonado; and it is further

**ORDERED** that the motion of Empire State Realty Trust Inc. and ESRT 10 Union Square, LLC (motion sequence no. 002) is otherwise denied; and it is further

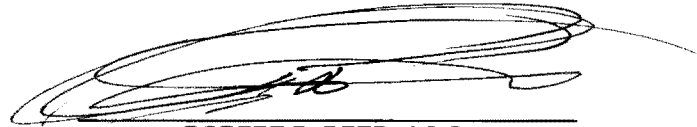
**ORDERED** that, within 15 days after the expiration of the extended discovery period, plaintiffs shall cause the action to be placed upon the trial calendar by the filing of a new note of issue and certificate of readiness, to which shall be attached a copy of this order; and it is further

**ORDERED** that additional summary judgment motions, if any, are to be served and filed within 60 days of the expiration of the extended discovery period.

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

11/30/2020

DATE



ROBERT R. REED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: