

<b>Slack v Stanton Surf Club LLC</b>
2021 NY Slip Op 30311(U)
January 29, 2021
Supreme Court, Kings County
Docket Number: 506235/2017
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29<sup>th</sup> day of JANUARY, 2021

P R E S E N T:  
HON. RICHARD VELASQUEZ  
Justice.

-----X  
KEVIN SLACK,

Plaintiff,  
-against-

Index No.: 506235/2017  
Decision and Order

STANTON SURF CLUB LLC d/b/a THE STANTON SOCIAL, BENJAMIN KRAIEM and RICHARD MANN,

Defendants,  
-----X

STANTON SURF CLUB LLC d/b/a THE STANTON SOCIAL,

Third-Party Plaintiff,  
-against-

BENJAMIN KRAIEM and RICHARD MANN,

Third-Party Defendants,  
-----X

STANTON SURF CLUB LLC d/b/a THE STANTON SOCIAL,

Second Third-Party Plaintiff,  
-against-

ALLSTAR SECURITY AND CONSULTATION INC,

Second Third-Party Defendants,  
-----X

The following papers NYSCEF Doc #'s 173 to 205 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed _____	173-179

Opposing Affidavits (Affirmations)\_\_\_\_\_ 198-203

Reply Affidavits \_\_\_\_\_ 205

After having heard Oral Argument on NOVEMBER 4, 2020 and upon review of the foregoing submissions herein the court finds as follows:

Plaintiff moves pursuant to CPLR 1010 to dismiss the untimely third-party action. (MS#11). Defendant/Third-Party Plaintiff/Second Third-Party Plaintiff, STANTON SURF CLUB LLC opposes the same.

Plaintiff contends the untimely third-party action will prejudice the plaintiff with undue delay. Defendant contends due to the pandemic there will be no undue delay.

**Background**

On May 28, 2020, STANTON filed the second Third-Party Action against ALLSTAR. Sixteen (16) months prior to such impleader, on October 17, 2018, STANTON's prior counsel signed a Preliminary Conference Order (copy annexed as Exhibit "2" to plaintiff's moving papers), which provides **"that no impleader actions could be commenced more than "60 days after completion of EBTS"**. The final depositions in this matter, of nonparty witnesses, were held on June 25, 2019. On November 13, 2019, plaintiff filed his Note of Issue (Exhibit "3" to plaintiff's moving papers). Thereafter, three motions for summary judgment were filed (Motion Sequences 8-10). During the pendency of said motions, in violation of the Preliminary Conference Order, and without leave of Court, STANTON commenced the Second Third-Party Action. In it, STANTON purports to predicate its untimely impleader upon insurance procurement and indemnification clauses in a 2015 contract. Thirty (30) months before STANTON's untimely impleader, STANTON's then counsel filed a CPLR §3402(b)

statement with the Clerk of Court in which counsel named ALLSTAR as third-party defendant. See Exhibit "4" of plaintiff's moving papers. Two months later, on November 3, 2017, counsel filed an "Amended (Corrected) CPLR §3402 Statement" in which it was stated "ALLSTAR is not a party to this lawsuit". See Exhibit "5" to plaintiff's moving papers.

### ANALYSIS

"CPLR 1010 provides a safety valve for cases in which the third-party claim will unduly delay the determination of the main action or prejudice the substantial rights of any party' " (*Annanquartey v Passeser*, 260 AD2d 517, 517 [1999], quoting CPLR 1010 [internal quotation marks omitted]; see *Gomez v City of New York*, 78 AD3d 482, 483-484 [2010]; *Cipollina v Kent*, 52 AD2d 632, 632 [1976]). Where the record indicates that a third-party plaintiff knowingly and deliberately delayed in commencing the third-party action, the Supreme Court acts within its discretion to dismiss the third-party complaint (see *Skolnick v Max Connor, LLC*, 89 AD3d 443, 444 [2011]; *Grant v Wainer*, 179 AD2d 364, 365 [1992]; cf. *Range v Trustees of Columbia Univ. in the City of N.Y.*, 150 AD3d 515, 516 [2017]).

In opposition STANTON contends "the post-Note of Issue commencement of the third-party action at issue should not be viewed in the same light as a pre-COVID third-party action, due to the fact that all discovery required can be completed within the next (6) months and the trial of this action is now likely to be years away, based on current conditions." The court notes, the time to commence the third-party action expired pre-COVID. In its opposition STANON further contends "STANTON is in the process of putting its discovery responses together and intends on serving all discovery exchanged to date including all Bills of Particulars, discovery responses, independent medical

examination reports, Examination Before Trial transcripts and anything else required by ALLSTAR within the next thirty (30) days.” The court notes it has now been over 150 days since the defendants filed this statement in support of denying plaintiff’s motions and to date no discovery demands or responses have been filed by STANTON or ALLSTAR. Further demonstrating the continued delays and prejudice. Additionally, the plaintiff would be subject to further discovery sought by ALLSTAR and would be obligated to take part in depositions and document discovery sought by the newly added party. See, *Gibson v. Transact Intern., Inc.*, 133 AD2d 807 (2d Dep’t 1997). All of which will prejudice plaintiff with further delay.

In the present case, STANTON offers no explanation for the delay in commencing the untimely third-party action when it has known the identity of the third-party defendant and the facts underlying the pled third-party claims since as early as 2017 as evidenced by their previous actions stated above. See *Bevilacqua v. Bloomberg, L.P.*, 70 AD3d 411, 895 NYS2d 347 (1st Dep’t 2010). Moreover, pursuant to the order dated October 17, 2018 and giving defense counsel every benefit of the doubt since the last party deposition was held long before June 25, 2019, the latest and final date to implead additional parties was August 26, 2019, well before the pandemic occurred. Where, as here, defendants “knowingly and deliberately delayed the commencement of the third-party action” until months after the note of issue was filed and failed to diligently pursue their claims against the third-party defendants, the third-party action should not merely be severed but rather dismissed outright.” See *Soto v CBS Corp.*, 157 AD3d 740 (2d Dep’t. 2018).

In *Soto*, just as in the present case, the Kings County Preliminary Conference

Order required "impleader actions to be completed within 60 days after completion of EBTs". In *Soto*, just as in the present case, the defendant willfully delayed in commencing a third-party action 338 days late. As such, the court finds that the delay in this case "rise[s] to the level of...knowing and deliberate delay..." *Range v Trustees of Columbia Univ. in the City of NY*, 150 AD3d 515, 516 (1st Dept. 2016). Moreover, see, *Miceli v. State Farm v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726-727 (2004) ("...court ordered time frames...are not options, they are requirements, to be taken seriously by the parties); *Kihl v. Pfeffer*, 94 NY2d 118, 123 (1999) ("[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity").

Accordingly, plaintiff's motion to dismiss the third-party complaint pursuant to CPLR 1010 is hereby granted, for the reasons stated above. (MS#11).

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York  
January 29, 2021

ENTER FORTHWITH:

  
HON. RICHARD VELASQUEZ