Ransom v City of New York
2021 NY Slip Op 32263(U)
November 12, 2021
Supreme Court, New York County
Docket Number: Index No. 156612/2016
Judge: J. Machelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART 62**

Justice

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CONNIE RANSOM,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF PARKS & RECREATION, 791 EIGHTH AVENUE, LLC, MARIN MANAGEMENT CORP, C.A.P. RESTAURANT CORP,

Defendants.

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INDEX NO. 156612/2016

MOTION DATE 07/02/2020, 07/08/2020, 08/28/2020, 09/04/2020, 08/25/2021

MOTION SEQ. NO. 004 005 006 007 008

DECISION + ORDER ON MOTION

THE CITY OF NEW YORK

Plaintiff,

-against-

DOM'S LAWNMAKER, INC.

Defendant.

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Third-Party
Index No. 595081/2021

The following e-filed documents, listed by NYSCEF document number (Motion 004) 86, 87, 88, 89, 90, 91, 92, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135

were read on this motion to/for SPECIAL PREFERENCE.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 138, 139, 140, 141, 142, 143, 144

were read on this motion to/for VACATE/STRIKE - NOTE OF ISSUE/JURY DEMAND/FROM TRIAL CALENDAR.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 187, 188, 189, 191, 192, 193, 194, 195, 196, 197, 205, 206, 207

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 190, 198, 199, 200, 201, 202, 203, 204, 208, 209, 210, 211, 212, 213, 214, 219

were read on this motion to/for DISMISS .

The following e-filed documents, listed by NYSCEF document number (Motion 008) 225, 226, 227, 228, 229, 230, 231, 232, 233, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 247, 248, 249, 250, 251, 252, 253

were read on this motion to/for SEVER ACTION .

This is an action to recover damages for personal injuries allegedly sustained by plaintiff CONNIE RANSOM on April 17, 2016, at approximately 4:00 p.m., when she was allegedly caused to trip and fall due to an "unleveled/unpaved/depressed/ tree well" in front of the premises known as Sombrero Mexican Restaurant, located at 303 West 48th Street, in the County, City and State of New York.

This action was initially filed on or around August 8, 2016, against THE CITY OF NEW YORK and THE CITY OF NEW YORK S/H/A THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, and THE CITY OF NEW YORK S/H/A NEW YORK CITY DEPARTMENT OF PARKS & RECREATION (collectively, the “City”); 791 EIGHTH AVENUE, LLC and MARIN MANAGEMENT CORP. (collectively, the “Owner”); and C.A.P. Restaurant Corp. d/b/a Sombrero Mexican Restaurant (the “Tenant”).

On or around January 28, 2021, defendant City filed a third-party complaint against DOM'S LAWNMAKER, INC. (the “Contractor”) seeking contractual indemnification, common law indemnification, and/or common law contribution following alleged work completed by the Contractor at the site of plaintiff’s alleged accident.

Pending now before the court are five motion sequences:

- Motion Sequence #004: Plaintiff seeks an order, pursuant to CPLR section 3403(a)4, granting this case a special preference based upon plaintiff's age.
- Motion Sequence #005: Defendant Tenant seeks an order, pursuant to CPLR 3124, CPLR 3126 and 22 NYCRR 202.21(e), vacating plaintiff's Note of Issue/Certificate of Readiness (the "NOI") and striking this action from the trial calendar due to significant discovery that remains outstanding. Tenant also seeks an order compelling plaintiff to appear for medical examinations with physicians designated by the defendants; compelling plaintiff and co-defendants to provide discovery in response to the moving defendant's demands and the prior Orders of this Court; or in the alternative precluding plaintiff and the co-defendants from offering any evidence at the trial of this action on any subject or issue regarding which discovery has not been provided. Further, defendant Tenant seeks an order compelling the City to produce a witness from the Forestry Department for a deposition, and pursuant to CPLR 3212(a) extending defendant's time to move for summary judgment until 60 days after the outstanding discovery has been completed, or a date that this Court deems just and proper.
- Motion Sequence #006: Tenant seeks an order, pursuant to CPLR 3212, granting summary judgment in favor of the Tenant and dismissing plaintiff's Complaint and all cross-claims that have been interposed against the Tenant as a matter of law on the issue of liability. Also pending under this sequence is a cross-motion wherein defendant Owner seeks an order, pursuant to CPLR 3212, granting summary judgment in favor of the Owner, dismissing plaintiff's Complaint and all cross-

claims that have been interposed against the Owner as a matter of law on the issue of liability.

- Motion Sequence #007: Defendant City seeks an order, pursuant to CPLR 3211, dismissing the Complaint as against the City, and an order pursuant to CPLR 3212 granting summary judgment to the City.
- Motion Sequence #008: Third-party defendant Contractor seeks an order, pursuant to CPLR 603, severing the third-party action, or in the alternative, striking the matter from the trial calendar until such time as discovery in the third party action is complete and third-party defendant is allowed to move for summary judgment dismissing the third party action in its entirety.

Upon the foregoing documents, these motions are decided as follows:

FACTS

As indicated above, plaintiff alleges that she was caused to trip and fall, in April 2016, due to an "unleveled/unpaved/depressed/ tree well" in front of Sombrero Mexican Restaurant (i.e., the Tenant). The area where plaintiff allegedly fell will be referenced herein as the “accident site.”

Three years before the accident, in 2013, the City had addressed a complaint about the accident site (NYSCEF Document #193) as:

> DEAD CITY TREE FOR AT LEAST 20 YEARS. MANY COMPLAINST HAVE BEEN FILED, BUT NO ACTION YET. THE CUSTOMER WANTS THE DEAD TREE TO BE REMOVED. BRANCHES ARE FALLING OFTEN.

In addressing this complaint, the City Department of Parks and Recreation (the "Parks Department") "corrected the condition" by removing said tree, leaving a tree stump in its place.

The following year, in 2014, the City addressed another complaint about the accident site. The City records describe the complaint as:

> the customer wanted to have a tree planted where it was removed initially because it was dead. he received a email stating that the dept was going to replace the tree but they didn't […]

In addressing this complaint, the Parks Department evaluated the accident site and noted that:

> THIS LOCATION HAS BEEN INSPECTED AND IS NOT SUITABLE FOR PLANTING […] The agency has declined the new tree request because the suggested location cannot be planted due to infrastructure conflicts

Subsequently, the City hired the Contractor to remove the tree stump, which the Contractor did on April 11, 2016. Six days later, on April 17, 2016, plaintiff's accident occurred.

According to the transcript of the EBT of Michele Palmer, (NYSCEF Document # 153), a New York City Parks Department forester, when the City removes a tree from a tree well and determines that said location "is no longer viable for a tree planting," the City would "concrete over the space." Here, it is undisputed that at the time of the accident, the tree stump had been removed from the accident site, but the accident site had not been filled with concrete, leaving what plaintiff described as a "hole" in the sidewalk.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

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, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

City's Motion for Summary Judgment (Motion Sequence #007)

On February 9, 2021, counsel for the City filed a letter to the court (NYSCEF Document #219) stating that the City was withdrawing their motion. Accordingly, this motion sequence is closed as withdrawn.

Tenant's Motion for Summary Judgment and Owner's Cross-Motion for Summary Judgment (Motion Sequence #006)

The Tenant and Owner argue, *inter alia*, that plaintiff's accident was the result of a tree well, and that the law is clear that tree wells are the responsibility of the City. They argue that plaintiff's accident happened as the result of an "unenclosed and unfilled tree well, from which the City had removed a tree that had died. As the evidence establishes that the accident occurred within a New York City tree well, the [Tenant and Owner] did not owe a duty to the Plaintiff and was not required to maintain the area […]."

Tellingly, the City did not oppose this motion or cross-motion. The only opposition was filed by plaintiff, who argued that tree wells are the responsibility of the City. With regard to the

Tenant and Owner, plaintiff also argues that upon removal of the tree stump, the accident location possibly "reverted to becoming a part of the sidewalk" and, therefore, the Owner and /or Tenant may bear some responsibility for the sidewalk. With respect to this argument, however, the First Department has rejected the idea that a tree well must actually contain a tree in order to be considered a tree well. *See, e.g.* Fernandez v 707, Inc., 85 AD3d 539 (Sup. Ct. App. Div. 1st Dept. 2011) ("The motion court correctly rejected plaintiff's argument that the area where he fell was not a tree well because at the time of the accident the City had yet to 'sign off' on the project and no tree had been planted. These considerations do not bear on the character of the area, which the court described as 'a square or rectangular dirt area surrounded by cement designed to accommodate one or more trees'").

Further, in Vucetovic v Epsom Downs, Inc., 10 NY3d 517 (N.Y. Ct. of Appeals 2008), the New York Court of Appeals held that a "tree well" is not part of the 'sidewalk' for purposes of section 7–210 of the Administrative Code of the City of New York, which imposes tort liability on property owners who fail to maintain city-owned sidewalks in a reasonably safe condition. *See also* Skinner v The City of New York, 2010 N.Y. Slip Op. 31068[U] [N.Y. Sup Ct, New York County 2010] ("Pursuant to Administrative Code § 7-210, a property owner is responsible for the sidewalk abutting its property. In 2008, the Court of Appeals held that for purposes of this provision, a sidewalk does not include tree wells, for which the municipality remains liable.") Here, given the facts of this case, the court finds that the accident site constitutes a tree well as contemplated in Vucetovic. Importantly, and as noted above, the City has not opposed either the Tenant's motion or the Owner's cross-motion.

Accordingly, the motion and cross-motion are each GRANTED, and this action is dismissed, with prejudice, with respect to the Tenant and the Owner.

Tenant's Motion to Vacate the NOI (Motion Sequence #005)

The Tenant moved to vacate the NOI and to compel discovery. In light of this court's finding dismissing the action against the Tenant, this motion, and the relief requested therein, is hereby closed, as the movant is no longer a party to this action.

Plaintiff's Motion for a Trial Preference (Motion Sequence #004)

Plaintiff seeks a special preference based upon her age. The only opposition was filed by the Tenant, who argued that this motion was premature, as discovery was not yet complete. However, as this action has been dismissed against the Tenant, this motion is now unopposed.

Here, it is undisputed that plaintiff CONNIE RANSOM was born on August 1, 1947, making her 74 years old as of today's date. Accordingly, this motion is GRANTED.

The Contractor's Motion to Sever (Motion Sequence #008)

The Contractor argues that the third-party action should be severed from the main action because the third-party action was not commenced until January 28, 2021, more than four years after plaintiff's complaint was filed (on August 8, 2016). The Contractor argues that the delay in filing the third-party action unfairly prejudices the Contractor, as the Contractor has had no discovery in this case, and has not had the opportunity to depose the City witness responsible for the decision to remove the tree pit or the City witness who inspected and approved the work performed by Contractor. The Contractor argues that the City has not even responded to the Contractor's Initial Discovery Demands.

The Contractor further argues that the Case Scheduling Order dated February 21, 2017, (NYSCEF Document #230), specifies in paragraph 8 that "Third-Party Actions/Impleader: Shall be completed within 45 days of the last Examination before Trial." Here, the third-party action was not commenced until January 28, 2021, more than three years later and there is no court order modifying the prior February 21, 2017 Case Scheduling Order. Moreover, the last deposition was of Marin Management and was held on November 5, 2019. Thus, the third-party action against the Contractor was to have been completed by October 25, 2017.

In order to fairly and adequately defend itself, the Contractor argues, it needs responses to its discovery demands, depositions of all parties and the ability to timely move for summary judgment in this matter. If the third-party action is not severed, the Contactor seeks, in the alternative, an order striking the matter from the trial calendar until such time as discovery in the third-party action is complete and the Contractor is allowed to move for summary judgment dismissing the third-party action in its entirety.

The City and the plaintiff each opposed this motion.[1]

The City, in its opposition, does not dispute that the order proving that Third-Party Actions/Impleader were to be completed within 45 days of the last Examination before Trial remains in place; nor does the City provide an explanation as to why it did not implead the Contractor until more than three years after the deadline as provided in the Case Scheduling Order dated February 21, 2017. Instead, the City merely argues that CPLR 1007 provides that “a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant [...],”and that no time limit is set forth to implead pursuant to such CPLR section. The City also argues that given that depositions in this

[1] The Tenant also opposed this motion, but for reasons set forth herein, is no longer a party in this action. Accordingly, the Tenant’s papers are not considered in deciding this branch of the motion.

matter remain outstanding and plaintiff's NOI was filed prematurely, the appropriate remedy here is for the court to strike the NOI, not sever the third-party action.

The plaintiff argues that to vacate the NOI herein under this set of facts would be unjust, as there is no discovery owed by plaintiff and there is a pending motion (addressed herein) for an age preference on the basis that the plaintiff is now 74 years old. The plaintiff argues that the third-party discovery can proceed in a timely fashion, and the case can still be tried together with the main action.

In reply,[2] the Contractor argues that the City's opposition failed to provide responses to the initial discovery demands made by the Contractor, and that the continued failure by the City to provide discovery to the Contractor continues to unfairly prejudice the Contractor in this matter.

The First Department has made clear that related actions should be tried together when possible, and that, as plaintiff argues, the presumption is one against severance, unless there is some clear utility to doing so. *See* Sichel v. Cmty. Synagogue, 256 A.D.2d 276 (Sup. Ct. App. Div. 1st Dept. 1998) ("Where two actions arise from a common nucleus of facts, a trial court should only sever the actions to prevent prejudice or substantial delay to one of the parties […] 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 […] That is exactly the situation here. Significantly, plaintiffs do not oppose consolidation and have not asserted any prejudice resulting from the third-party action."); *and* Range v. Trustees of Columbia Univ. in City of New York, 150 A.D.3d 515 (Sup. Ct. App. Div. 1st Dept. 2017) ("The note of issue was filed April 23, 2015. The second third-party complaint was filed September 22, 2015, after it 'became evident' to

[2] The reply papers filed by the Contractor, (NYSCEF Document # 254), were filed under the incorrect motion sequence number, but were nevertheless considered by this court.

defendants' counsel, on September 9, 2015, when they received expert disclosure from plaintiffs' counsel, that they had a cause of action against City Safety. Even if there was a delay, it did not rise to the level of the knowing and deliberate delay by the defendants in Skolnick v. Max Connor, LLC, 89 A.D.3d 443, 932 N.Y.S.2d 453 (1st Dept. 2011), on which City Safety relies. Moreover, the issues of law and fact involved in the main and second third-party actions are intertwined, since the inspection of the job site by second third-party defendants was integral to plaintiffs' liability claims. It is also likely that almost all the same witnesses will be required.")

Here, as noted above, there is no dispute that the claims alleged in both the main action and the third-party action arose out of a common nucleus of facts, and hence severance is not appropriate.

However, this court credits the Contractor's concerns that the Contractor has not had the opportunity to depose the City witness responsible for the decision to remove the tree pit or the City witness who inspected and approved the work performed by the Contractor. Moreover, there is support on this record that the third-party action may have been made filed in contravention of the Case Scheduling Order dated February 21, 2017. The Contractor requires responses to its discovery demands as well as the opportunity to depose all the parties and to timely move for summary judgment in this matter.

In light of the above, this court grants the Contractor's motion to extent that this case is being referred forthwith for a discovery conference in Part 62-DCM, and the Contractor is given leave to file dispositive motions for summary judgment (or dismissal). The Contractor may also, at its election, raise in said motion the argument that the third-party action was not properly commenced in this case.

Conclusion

It is hereby:

ORDERED that Motion Sequence #004, wherein plaintiff seeks an order granting this case a special preference, is GRANTED; and it is further hereby

ORDERED that Motion Sequence #005, wherein the Tenant seeks an order vacating the NOI and striking this action from the trial calendar, is closed as academic; and it is further hereby

ORDERED that Motion Sequence #006, wherein the Tenant seeks an order granting summary judgment in favor of the Tenant, is GRANTED; and it is further hereby

ORDERED that the cross-motion (Motion Sequence #006), wherein the Owner seeks an order granting summary judgment in favor of the Owner, is GRANTED; and it is further hereby

ORDERED that the complaint and any cross-claims against the Tenant and Owner are dismissed, with prejudice; and it is further hereby

ORDERED that Motion Sequence #007, wherein the City seeks an order dismissing the complaint against the City, is closed as withdrawn; and it is further hereby

ORDERED that Motion Sequence #008, wherein the Contractor seeks an order severing the third-party action, is GRANTED IN PART to the extent that this case is being referred forthwith for a discovery conference in Part 62-DCM, and the Contractor is given leave of court to file a motion for summary judgment or dismissal of the third-party action.

This is the Decision and Order of this court.

11/12/2021
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:		**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[X]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**