

Aji v City of New York
2010 NY Slip Op 31146(U)
May 10, 2010
Supreme Court, New York County
Docket Number: 105214/2008
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 61

IMAMU AJI

Plaintiff,

-against-

THE CITY OF NEW YORK and GENERAL,
GROWTH PROPERTIES, INC.,

Defendants.

INDEX NO. 105214/08

MOTION DATE March 30, 2010

MOTION SEQ. NO. 001

MOTION CAL. NO. 1

The following papers, numbered 1 to 4 were read on this motion to sever

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, plaintiff's motion for an order pursuant to CPLR § 603 severing the action as against defendant General Growth Properties, Inc. is decided in accordance with the accompanying decision and order.

FILED
MAY 13 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/10/10

O. P. Sherwood
O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61**

-----X
IMAMU AJI,

Plaintiff,

-against-

**THE CITY OF NEW YORK and GENERAL
GROWTH PROPERTIES, INC.,**

Defendants.

-----X
O. PETER SHERWOOD, J.:

DECISION AND ORDER

Index No. 105214/2008

FILED
MAY 13 2010
NEW YORK
COUNTY CLERKS OFFICE

This is an action to recover damages for personal injuries plaintiff allegedly sustained as a result of a trip and fall accident. Plaintiff's move for an order pursuant to CPLR § 603 severing the action as against defendant General Growth Properties, Inc. ("General Growth") and continuing the action as against defendant the City of New York ("the City"). The City opposes the motion. For the reasons that follow, plaintiff's motion is granted.

Plaintiff initially commenced this personal injury action sounding in negligence against the City only by filing the summons and complaint on April 10, 2008. Thereafter, on or about December 1, 2008, General Growth was added to the action as a party defendant by "so-ordered" stipulation and the summons and complaint were amended accordingly. Thereafter, on April 16, 2009, General Growth filed for Chapter 11 bankruptcy protection which triggered the automatic stay of all judicial proceedings against it (*see*, 11 USC § 362 [a]). Because the case was automatically stayed against General Growth only, plaintiff and the City appeared for a compliance conference on May 7, 2009, and entered into a discovery schedule which was reduced to writing in a compliance order. According to the Court's Case Management System, the case was marked stayed that same date and, therefore, discovery as between plaintiff and the City has not proceeded.¹

¹This action was previously assigned to IAS Part 62, a dedicated City Part. However, by order dated April 26, 2010, this action was referred to Motion Support for re-assignment to a non-City Part as the City is now represented by outside counsel. On April 28, 2010, the case was randomly reassigned to this IAS Part 61 together with the instant motion.

Plaintiff now moves to sever General Growth from the action claiming that given his age (71 years old) and the length and complexity of the bankruptcy proceedings, he will suffer prejudice if he is required to wait until the bankruptcy proceedings are concluded before discovery may proceed and he may recover for the injuries he sustained. Plaintiff notes that the accident occurred on February 3, 2007. Two years have elapsed since commencement of the action and a year since General Growth filed for bankruptcy. Plaintiff also notes that not only are the bankruptcy proceedings lengthy, but General Growth may also emerge insolvent leaving him with an insufficient remedy or no remedy at all.

The City opposes the motion claiming that it would be suffer hardship and be severely prejudiced if the action is severed against General Growth and it is required to defend the action without General Growth as an active party defendant. The complaint alleges that the plaintiff's accident occurred on February 3, 2007, at about 9:00 a.m., at the South Street Seaport in Manhattan, when plaintiff tripped and fell as a result of a raised cement circle which was all that remained of a bicycle ring where bicyclists used to chain their bicycles. The City's attorney Gregory E. Walthall, Esq., an associate of the law firm Hoey, King, Toker & Epstein, claims that the City and General Growth are parties to a lease agreement ("the Lease"), permitting General Growth to use and maintain certain portions of the South Street Seaport, and that "it is unclear whether plaintiff's accident occurred in a portion of the premises that General Growth was responsible for" (Affirmation in Opposition of Gregory E. Walthall, Esq. [Walthall Affirm.] ¶ 4, Exhibit "B"). Mr. Walthall also contends that the Lease contains language requiring General Growth to defend and indemnify the City under certain circumstances and that without General Growth in the action it would be nearly impossible for the City to enforce its right to defense and indemnity in relation to plaintiff's accident. Mr. Walthall avers that plaintiff has not specifically identified any prejudice it would suffer as a result of having to await the disposition of the bankruptcy action and notes that plaintiff has not demonstrated that it has investigated the possibility of insurance coverage as to General Growth. If General Growth has liability insurance coverage, plaintiff could petition the Bankruptcy Court to lift the stay to the extent of the insurance coverage (*id.* ¶¶ 4-6).

In reply, plaintiff's counsel contends that the City has not been sufficiently specific as to whether the Lease renders General Growth responsible for the particular location where the accident

occurred even though it has such knowledge based upon plaintiff's deposition testimony and his response to General Growth's Notice to Admit (Reply Affirmation of Jeremy Schiowitz [Schiowitz Affirm.] ¶ 3). Thus, the City's claim of prejudice lacks a sufficient basis since the City's arguments do not clarify whether General Growth even belongs in the action. In addition, plaintiff avers that severing the claim against General Growth will in no way preclude the City from seeking indemnification if it is so entitled. Plaintiff argues that the prejudice he will suffer by having to await the conclusion of lengthy bankruptcy proceedings before obtaining a remedy far outweighs any potential inconvenience to the City in having to proceed without General Growth.

Pursuant to CPLR § 603, a court may order a severance of claims in order to avoid confusion, delay or prejudice (*see generally*, Alexander, Practice Commentaries, McKinneys Cons Laws of NY, Book 7B, CPLR 603). With respect to the circumstances of the matter before the Court, New York appellate courts have repeatedly held that the automatic stay provisions of the Federal bankruptcy laws do not prevent a plaintiff from proceeding on causes of action against non-debtors which do not involve the debtor's property (*see e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Oxford Venture Partners, LLC*, 13 AD3d 89 [1st Dept 2004], quoting *Maynard v George A. Fuller Co.*, 236 AD2d 300 [1st Dept 1997]; *see also*, *Golden v Moskowitz*, 194 AD2d 385 [1st Dept 1993]). An exception to this general rule has been held to exist allowing the automatic stay to be extended to non-debtor defendants in limited "unusual circumstances" such as "when a claim against a non-debtor will have an immediate adverse economic consequence for the debtor's estate" (*Queenie Ltd. v Nygard Intl.*, 321 F3d 282, 287-288[2d Cir 2003]), or "where there is such identity between the debtor and [non-debtor] that the debtor may be said to be the real party defendant and that a judgment against the [non-debtor] will in effect be a judgment . . . against the debtor" (*Gray v Hirsch*, 230 B.R. 239, 242 [S.D.N.Y. 1999]). However, under such circumstances courts will stay an action against a non-debtor only where the stayed action poses a serious threat to the debtor's reorganization efforts (*Gray*, 230 B.R. at 242; *see*, *SCR Joint Venture, LP v 309 Realty, LLC*, 2008 WL 3886929 [Sup Ct. N. Y. Co. 2008]). Unusual circumstances have also been found to exist where a bankrupt debtor is obligated to indemnify a non-debtor defendant (*see e.g.*, *Ryder v Knopick*, 251 AD2d 732 [3d Dept 1998]; *Central Buffalo Project Corp. v Edison Brothers Stores, Inc.*, 205 AD2d

295 [4th Dept 1994]; *A.H. Robins Co. v Piccinin*, 788 F2d 994, 999 [4th Cir 1986], *cert denied* 479 US 876 [1986]).

Here, severance of the claim against General Growth is warranted. As plaintiff correctly observes, the location of the accident has been identified sufficiently for the City to have determined and to have advised the Court whether the Lease applies to the particular accident site. On this basis, the City's claimed prejudice if severance is granted is unconvincing. The record is simply devoid of any evidence to suggest that unusual circumstances exist so as to require the imposition of a stay until the bankruptcy proceeding is concluded.

Wherefore, it is hereby

ORDERED that plaintiff's motion to sever the claims against defendant General Growth Properties, Inc. is granted; and it is further

ORDERED that the stay in this action insofar as the claim against the City of New York is lifted and the action shall continue as against defendant the City of New York; and it is further


ORDERED that the remaining parties are directed to appear for a status conference on June 16, 2010, at 9:30 a.m., in Part 61, Room 341, 60 Centre Street; and it is further

ORDERED that plaintiff is directed to serve a copy of this decision and order with Notice of Entry upon defendants and the Clerk of the Motion Support Office within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 5/10/10

ENTER,



O. PETER SHERWOOD

J.S.C.

FILED
MAY 13 2010
NEW YORK
COUNTY CLERK'S OFFICE