

**Smith v Metropolitan Transp. Auth.**

2013 NY Slip Op 32392(U)

October 3, 2013

Sup Ct, New York County

Docket Number: 101887/2011

Judge: Michael D. Stallman

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN  
*Justice*

PART 21

Index Number : 101887/2011  
SMITH, DENISE  
vs.  
METROPOLITAN TRANSPORTATION  
SEQUENCE NUMBER : 003  
VACATE NOTE OF ISSUE/READINESS

INDEX NO. 101887/11  
MOTION DATE 4/4/13  
MOTION SEQ. NO. 003

The following papers, numbered 1 to 7 were read on this motion to vacate note of issue and to compel

Notice of Motion— Affirmation— Affidavit of Service; Exhibits A-Q \_\_\_\_\_ | No(s). 1-3  
Affirmation in Opposition — Exhibits A-H—Affirmation of Service \_\_\_\_\_ | No(s). 4-5  
Reply Affirmation — Exhibits A-B —Affidavit of Service \_\_\_\_\_ | No(s). 6-7

Upon the foregoing papers, this motion to strike the note of issue and certificate of readiness and other relief by defendants 288 St. Nick LLC and ABECO Management LLC is decided in accordance with the annexed memorandum decision and order.

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

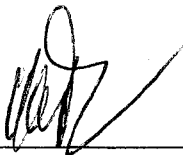
# FILED

OCT 08 2013

NEW YORK  
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: 10/3/13  
New York, New York

  
\_\_\_\_\_, J.S.C.

1. Check one: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. Check if appropriate:.....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 21**

-----X  
DENISE SMITH,

Plaintiff,

Index No. 101887/2011

- against -

METROPOLITAN TRANSPORTATION AUTHORITY, NEW  
YORK CITY TRANSIT AUTHORITY, 288 ST. NICK, LLC,  
ABECO MANAGEMENT, LLC, J DIAMOND LEATHER  
CORP., KDJ BUILDERS, INC., VINCENT RUSCIANO  
CONSTRUCTION CO., INC. and MRC II CONTRACTING,  
INC.,

**Decision and Order**

**FILED**

Defendants.

OCT 08 2013

-----X  
**HON. MICHAEL D. STALLMAN, J.:**

NEW YORK  
COUNTY CLERK'S OFFICE

In this sidewalk trip and fall action, defendants 288 St. Nick LLC and ABECO Management, LLC move for an order striking the note of issue and compelling plaintiff and co-defendant Vincent Rusciano Construction Co. Inc. to provide additional discovery (Motion Seq. No. 003). Defendants Metropolitan Transportation Authority and New York City Transit Authority also move to strike the note of issue (Motion Seq. No. 004).

Pursuant to CPLR 3211 and 3212, plaintiff seeks dismissing her own claims and defendants' cross claims against defendants Vincent Rusciano Construction Co. Inc. and J Diamond Leather Corp. (Motion Seq. No. 005). If the branches of plaintiff's motion to dismiss or for summary judgment are denied, plaintiff requests

that her claims be discontinued against Rusciano Construction Co. Inc. and J Diamond Leather Corp., “on condition that any cross claims be severed and litigated independently as a third-party action.”

This decision address all three motions.

### **BACKGROUND**

The complaint alleges that, on September 13, 2010, plaintiff tripped and fell on a cracked, uneven section of sidewalk that was in severe disrepair and at a different elevation from the surrounding area. Plaintiff was allegedly walking on the sidewalk just south of West 125th Street in Manhattan at the southeast corner of the intersection, adjacent to premises located at 288 St. Nicholas Avenue and to the subway entrance to the 125th Street subway station for the A, B, C, and D lines. Defendant 288 St. Nick LLC is the alleged abutting property owner.

According to the verified bill of particulars, plaintiff suffered numerous injuries to her left wrist and left shoulder. (Antanesian Affirm., Ex D.) Plaintiff allegedly experienced “carpal tunnel symptoms as well as numbness and tingling in the affected areas.” (*Id.* ¶¶ 8-9.) In a supplemental bill of particulars, plaintiff alleged that she suffered, among other things, a scapholunate ligament tear in her left wrist, and that she was diagnosed with “a widening of the scapholunate interval and a DISI (dorsal intercalated segment instability) deformity.” (Antanesian Affirm. Ex F.)

On April 13, 2012, 288 St. Nick and ABECO commenced a third-party action against third-party defendant J Diamond Leather Corp. (J Diamond). On July 19, 2012, plaintiff filed a third amended verified complaint adding J Diamond Leather Corp. (J Diamond) and Vincent Rusciano Construction Co. Inc. (Rusciano) as defendants. 288 St Nick and ABECO and the Authorities asserted cross claims against Rusciano and J Diamond. (Dinnocenzo Affirm., Ex B.)

According to the third amended verified complaint, J Diamond was a commercial tenant that occupied the first floor of the building at St. Nicholas Avenue. (Third Amended Verified Complaint ¶ 24.) Plaintiff alleges that Rusciano and other defendants negligently performed construction or excavation work on the sidewalk area adjacent to 288 St. Nicholas Avenue, including concrete patching that cause or created the defect that cause plaintiff to trip and fall. (*Id.* ¶ 28.)

Plaintiff filed the note of issue and certificate of readiness for trial on October 24, 2012. On or about the time that plaintiff filed the note of issue, plaintiff served an amended verified bill of particulars, alleging, among other things, that she had EMG tests that have shown left carpal tunnel syndrome, and that plaintiff underwent carpal tunnel release surgery on March 12, 2012. (Antanesian Affirm., Ex P [Amended Verified Bill of Particulars ] ¶¶ 8-9.)

Defendants 288 St. Nick LLC (288 St. Nick) and ABECO Management, LLC

(ABECO) moved for an order striking the note of issue and compelling plaintiff and Rusciano to provide discovery. 288 St. Nick and ABECEO seek a further deposition and further medical examination of plaintiff concerning her left wrist, and authorizations for prior treatment for plaintiff's left wrist and for plaintiff's diabetes. 288 St. Nick and ABECEO also seek to compel Rusciano's deposition.

Defendants Metropolitan Transportation Authority and New York City Transit Authority (collectively, the Authorities) moved to strike the note of issue because plaintiff did not appear for new neurological and orthopedic medical examinations. According to the Authorities, plaintiff alleged new injuries in the amended verified bill of particulars.

On April 4, 2013, the Court held a conference to resolve the motions to vacate the note of issue. J Diamond attended the conference. J Diamond indicated that it had apparently served an answer to the third amended verified complaint dated January 2, 2013, after plaintiff had already filed the note of issue. Plaintiff, the Authorities, and 288 St. Nick and ABECEO apparently signed a stipulation of discontinuance as against Rusciano, but J Diamond's counsel declined to sign the stipulation of discontinuance.

After the conference, plaintiff moved for summary judgment dismissing not only her own claims but also all cross claims against Rusciano and J Diamond.

Plaintiff believes that “the only potential grounds for vacating the Note of Issue is the presence of the two ‘new’ defendants, J Diamond and Rusicano . . . However, as this motion will make clear, there are absolutely no viable claims against these two defendants.” (Dinnocenzo Affirm. ¶¶ 2-3.)

## DISCUSSION

### 288 St. Nick and ABECO’s motion to vacate the note of issue; the Authorities’ motion to vacate the note of issue

At a court conference on April 4, 2013, the parties’ counsel informed the Court that a further deposition of plaintiff was held and that the authorizations sought were provided. Thus, that branch of 288 St. Nick and ABECO’s motion for an order compelling discovery from plaintiff is now moot.

Plaintiff’s counsel also apparently agreed to further neurological and orthopedic examinations of plaintiff, on condition that the Court set a deadline for defendants to exchange their reports. Therefore, 288 St. Nick and ABECO and the Authorities must conduct their neurological and orthopedic examinations of plaintiff within 60 days, and must exchange each report within 45 days after each examination is held.

Both 288 St. Nick and ABECO and the Authorities may conduct their own neurological and orthopedic examinations of plaintiff, unless they agree otherwise.

Because discovery has not been completed in this action, the note of issue is vacated.

Plaintiff's motion to dismiss or summary judgment dismissing plaintiff's own claims against J Diamond and Rusciano,<sup>1</sup> or in the alternative, for discontinuance and severance

The branch of plaintiff's motion to dismiss or summary judgment dismissing the complaint as against Rusciano is denied as academic. Plaintiff's claims and certain cross claims were discontinued against Rusciano by virtue of the stipulation of discontinuance dated April 4, 2013. (*See* Dinnocenzo Affirm., Ex C.) J Diamond's consent to the discontinuance was not required because J Diamond had no interest in the subject matter of plaintiff's claims or co-defendants' cross claims against Rusciano. (*See Gonzalez v U.P.S.*, 272 AD2d 129, 130 [1st Dept 2000].)

The branch of plaintiff's motion which purports to seek dismissal of the complaint and cross claims against J Diamond pursuant to CPLR 3211 is denied. Plaintiff's argument that J Diamond cannot be held legally responsible for plaintiff's accident is based, in part, on evidence beyond the pleadings, i.e., the deposition of Abe Betesh, a member of ABECO, which may not be considered on a motion to

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<sup>1</sup> “[I]t is unconventional for a party in a lawsuit to request judgment in favor of an adversary . . . that in and of itself should not preclude the granting of such relief where adequate proof is presented.” (*Rauch v Rauch*, 91 AD2d 407, 410 [2d Dept 1983].)

dismiss pursuant to CPLR 3211.

Turning to the branch of plaintiff's motion which seeks summary judgment, the Authorities and 288 St. Nick and ABECO argue that plaintiff's motion should be denied as untimely, because more than 120 days has passed since plaintiff filed the note of issue. Meanwhile, plaintiff asserts that J Diamond did not timely answer the complaint. Plaintiff asserts that the parties who appeared in this action did not execute any stipulation to extend J Diamond's time to answer, and J Diamond did not move a court order extending its time to answer. (*See* CPLR 3012 [d].)

"A motion for summary judgment may not be made before issue is joined (CPLR 3212[a] ) and the requirement is strictly adhered to." (*City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985].) Issue is joined when the defendant has answered the complaint. (*See e.g. Schoenborn v Kinderhill Corp.*, 98 AD2d 831, 832 [1983].) Thus, "[i]f a defendant fails to respond with the deadline for answering, plaintiff's remedy is to move for *default judgment* under CPLR 3215, not to move for summary judgment." (Michael H. Barr et al., *New York Civil Practice Before Trial* § 37:381 at 37-37 [2011].)

Here, it is undisputed that J Diamond did not timely answer the complaint, and plaintiff is apparently not waiving her objections to the late service of the answer. Therefore, the branch of plaintiff's motion for summary judgment dismissing

plaintiff's own claims and defendants' cross claims against J Diamond is denied, with leave to renew if issue is joined.

The remaining branch of plaintiff's motion seeks to discontinue plaintiff's claims as against J Diamond, on condition that co-defendants' cross claims against J Diamond are severed and litigated independently as a third-party action. There is no opposition to the discontinuance of plaintiff's claims against J Diamond, and plaintiff asserts that "J Diamond cannot be held legally responsible for the accident . . ." (Dinnocenzo Affirm. ¶ 11.)<sup>2</sup> Therefore, pursuant to CPLR 3217 (b), plaintiff's claims against J Diamond are discontinued with prejudice.

Severance of the co-defendants' cross claims and third-party claims against J Diamond is denied.

"Severance of a third-party action is within the discretion of the trial court. However, severance is inappropriate absent a showing that a party's substantial rights would otherwise be prejudiced. 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."

(*Rothstein v Milleridge Inn, Inc.*, 251 AD2d 154, 155 [1st Dept 1998].) "Where two actions arise from a common nucleus of facts, a trial court should only sever the

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<sup>2</sup> The Appellate Division, First Department ruled in *Collado v Cruz* (81 AD3d 542 [1st Dept 2011]) that "Provisions of a lease obligating a tenant to repair the sidewalk do not impose on the tenant a duty to a third party, such as plaintiff."

actions to prevent prejudice or substantial delay to one of the parties.” (*Sichel v Community Synagogue*, 256 AD2d 276, 276 [1st Dept 1998].)

Here, the co-defendants allege that plaintiff’s injuries were caused as a result of J Diamond’s acts, conduct or omissions (*See Dinnocenzo Affirm.*, Ex B), which would appear to indicate that cross claims and third-party claims might arise from a common nucleus of facts of plaintiff’s claims. Because plaintiff must submit to further medical examinations, this is not a situation where the main action was trial-ready but still-outstanding discovery on the third-party action would unreasonably delay bringing the plaintiff’s case to trial. (*See Rothstein*, 251 AD2d at 155.)

Finally, the Court has not considered the supplemental affirmation submitted by J Diamond. J Diamond did not timely answer the complaint, and plaintiff apparently has not waived any objections to the late service of its answer.

### **CONCLUSION**

Accordingly, it is hereby

ORDERED that the motion to vacate the note of issue and to compel by defendants 288 St. Nick LLC and ABECO Management LLC (Motion Seq. No. 003) and the motion to vacate the note of issue and to compel discovery by defendants Metropolitan Transportation Authority and New York City Transit Authority (Motion

Seq. No. 004) are granted in part as follows:

(1) Plaintiff shall appear for a further neurological examination and orthopedic examination within 60 days, and defendants must exchange the physicians' reports within 45 days after each examination is held.

Both 288 St. Nick and ABECO and the Authorities may conduct their own neurological and orthopedic examinations of plaintiff, unless they agree otherwise.

(2) the note of issue is vacated and the case is stricken from the trial calendar;

(3) within 15 days from the entry of this order, movant shall serve a copy of this order with notice of entry on all parties and upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to strike the case from the trial calendar and make all required notations thereof in the records of the court;

and the motions are otherwise denied; and it is further

ORDERED that the parties shall appear for a status conference in Room 278, 80 Centre Street, on November 14, 2013 at 11 A.M.; and it is further

ORDERED that plaintiff's motion (Motion Seq. No. 005) is granted only to the extent that, pursuant to CPLR 3217, plaintiff's claims against defendant J Diamond Leather Corp. are discontinued with prejudice, and the remainder of plaintiff's motion is denied.

Copies to counsel.

Dated: October 3, 2013  
New York, New York

ENTER:

  
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J.S.C.

HON. MICHAEL D. STALLMAN

**FILED**  
OCT 08 2013  
NEW YORK  
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