

Rosenblum v PVP Mgt. Corp.
2018 NY Slip Op 30614(U)
March 26, 2018
Supreme Court, New York County
Docket Number: 151200/17
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COURTY OF NEW YORK

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HAROLD ROSENBLUM and EILENE ROSENBLUM,

Plaintiffs,

-against-

PVP MANAGEMENT CORP.

Defendant.

-----X
PVP MANAGEMENT CORP.,

Third-Party Plaintiff,

-against-

LITTLE HANDS PLAY CAFÉ' d/b/a DEATH & CO.,

Third-Party Defendant.

-----X
HON. SHERRY KLEIN HEITLER

In this personal injury action, plaintiffs Harold and Eilene Rosenblum (Plaintiffs) move by order to show cause for an order severing the third-party action from the main action. The motion is opposed by defendant PVP Management Corp. (PVP or Defendant) and supported by third-party defendant Little Hands Play Café d/b/a Death & Co. (Little Hands or Third-Party Defendant).

Plaintiffs allege that Mr. Rosenblum was injured on January 29, 2016 when he slipped and fell on a broken sidewalk in front of the premises located at 433 East 6th Street in Manhattan. It is undisputed on this motion that the building is managed and/or controlled by PVP. The summons and complaint were filed on February 3, 2017 and a preliminary conference was held before me on August 7, 2017. At that conference I advised the parties that discovery would be expedited after learning that Mr. Rosenblum was entitled to a trial preference due to his age (see CPLR 3403). All

depositions were completed by December of 2017 and the note of issue was filed on December 8, 2017. I then scheduled jury selection in this case to commence on April 9, 2018.

PVP E-filed the third-party summons and complaint in this case on January 12, 2018. It alleges that Little Hands entered into a lease agreement with PVP to rent space at the premises, and, pursuant to that lease agreement, that Little Hands was required to maintain the sidewalks in good condition. PVP alleges that the lease contains an indemnification clause which requires Little Hands to indemnify it against any claims arising from injuries that occurred on the demised premises.

Plaintiffs filed the instant order to show cause on February 7, 2018. On the February 22, 2018 return date, I was advised that Little Hands would be appearing and responding to the motion. I then adjourned the order to show cause to give Little Hands an opportunity to do so. Little Hands then filed a notice of appearance and responsive papers.

CPLR 603 provides that, “[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.” CPLR 1010, which applies specifically to third-party actions, provides that “[t]he court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim... [and] in exercising such discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party.” In determining whether to sever a third-party action the court must not only consider issues of judicial economy and prejudice to the third-party plaintiff, (*see Vasquez v G.A.P.L.W. Realty, Inc.*, 254 AD2d 232, 233 [1st Dept 1998]), but also whether the main action will be delayed because of undue or inexcusable delay in prosecuting the third-party claims (*see Garcia v Gesher Realty Corp.*, 280 AD2d 440, 440-41 [1st Dept 2001]; *Blechman v I.J. Peiser’s*

and Sons, Inc., 186 AD2d 50, 52 [1st Dept 1992]). The decision to sever or not sever rests with the sound discretion of the court. *Escourse v City of New York*, 27 AD3d 319, 320 (1st Dept 2006); *Zawadzki v 903 E. 51st St., LLC*, 80 AD3d 606, 608 (2d Dept 2011).

With these standards in mind, and under the facts and circumstances of this case, I find that severing the third-party action from the main action is warranted. First, Plaintiffs have a trial preference. Were the court to deny Plaintiffs' motion, the trial would very likely be delayed due to motion practice, further discovery, and an additional medical examination. This would cause Plaintiffs substantial prejudice. Second, the basis for PVP's third-party action, namely the lease agreement with Little Hands, has been in PVP's possession and control since before this action even started. But more importantly, the lease itself is dated November 18, 2016, which is 10 months after the accident, and photos of the alleged defect appear to be adjacent to a door that leads to the building's residential units, not the demised premises. Third, PVP claims that it could not show that it relied so heavily on Little Hands to maintain the sidewalk until depositions were completed. This is belied by PVP's non-delegable duty to maintain the sidewalk pursuant to section 7-210 of the New York City Administrative Code.

The court recognizes that severing the third-party action may not promote judicial economy because both actions involve the same nucleus of facts. However, the main action, which involves negligence, and the third-party action, which involves contractual indemnification, turn on different issues of law. Recent caselaw from the Appellate Division, First Department is clear that the third-party action should be severed under these circumstances. *See Torres v Visto Realty Corp.*, 106 AD3d 645, 645 (1st Dept 2013) ("Since the main action involves the factual issue whether there was a defect in the sidewalk that contributed to plaintiff's injury, and the third-party action involves lease contract issues such as indemnification, and plaintiff, who has filed a note of issue, would be prejudiced by the delay caused by the need for discovery in the third-party action, severance of the

third-party action was appropriate"); *see also Admiral Indem. Co. v Popular Plumbing & Heating Corp.*, 127 AD3d 419, 419 (1st Dept 2015).

Accordingly, it is hereby

ORDERED that Plaintiffs' motion is granted; and it is further

ORDERED that the third-party action is hereby severed from the main action; and it is further

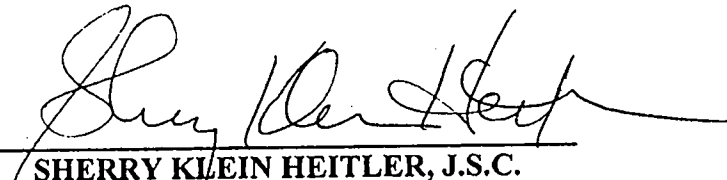
ORDERED that counsel in the main action shall appear in Part 40 (60 Centre Street, Room 300) for jury selection on April 9, 2018 at 9:30AM; and it is further

ORDERED that counsel in the third-party action shall appear in Part 30 (60 Centre Street, Room 412) for a preliminary conference on April 23, 2018 at 9:30AM.

The Clerk of the Court is directed to mark his records accordingly.

This constitutes the decision and order of the court.

DATED: 3-26-18


SHERRY KLEIN HEITLER, J.S.C.