

Mishael v Food Emporium
2018 NY Slip Op 31312(U)
January 12, 2018
Supreme Court, New York County
Docket Number: 155989/2012
Judge: Kelly A. O'Neill Levy
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KELLY O'NEILL LEVY

Justice

PART 19

-----X
CINDY MISHAEL,

Plaintiff,

- v -

FOOD EMPORIUM, WB/STELLAR IP OWNER LLC, STELLAR
IP, LLC/INDEPENDENCE PLAZA ASSOCIATES LLC, ICON
PATRIOT PARKING, LLC C/O MALLAH MANAGEMENT LLC,
PATRIOT PARKING SERVICES INC., PATRIOT PARKING LLC,

Defendant.

INDEX NO. 155989/2012

MOTION DATE _____

MOTION SEQ. NO. 004

DECISION AND ORDER

-----X
PATRIOT PARKING LLC d.b/a ICON, s/h/a PATRIOT PARKING, LLC.,
d/b/a ICON PARKING SYSTEMS, LLC,

Third-Party Plaintiff,

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Defendant.
-----X

The following e-filed documents, listed by NYSCEF document number 88-98, 100, 101

were read on this application to/for _____
discontinue

Upon the foregoing documents, it is

Plaintiff seeks to discontinue this personal injury action against defendant Food
Emporium (who is subject to bankruptcy)¹ and sever any cross-claims made by co-defendants
against Food Emporium and after the discontinuance and severance of the cross-claims, restoring
the case to the "active status" so this action can be litigated. The defendants, Patriot Parking

¹ *Matter of The Great Atlantic & Pacific Tea Company, Inc., et al.*, pending in the U.S. Bankruptcy Court for the
Southern District of New York [Case No. 15-23007 (RDD)].

LLC d/b/a ICON s/h/a Patriot Parking, LLC., d/b/a ICON Parking Systems, LLC herein after (Patriot Parking) oppose this application. WB/Stellar LP Owner LLC and Stellar IP LLC/ Independence Plaza Associates LLC, (Stellar) partially oppose this application. Former counsel for Food Emporium filed a letter dated August 30, 2017 notifying the court that the bankruptcy stay against Food Emporium is continued, and that accordingly, counsel had no authority to act on Food Emporium's behalf.

The plaintiff contends that based on the discovery that has been completed, Food Emporium did not control, maintain, or have responsibility for the defect that caused the plaintiff's injuries. Defendant Patriot Parking argues that the bankruptcy stay bars this application, that Food Emporium may be liable for this accident, and that there is outstanding discovery that is required. Stellar requests that if the court grants the plaintiff's application, that all the cross claims be converted into third-party claims.

Although defendant Patriot Parking argues that this motion violates the bankruptcy stay, a bankruptcy stay does not prevent a plaintiff from proceeding on causes of action against non-bankrupt defendants, which do not involve the property of the entity that has filed for bankruptcy protection. *See Golden v. Moscovitz*, 194 AD2d 385 (1st Dep't 1993) and *Posada v. Pelaez, et al.*, 2006 WL 6867614 (N.Y. Sup. 2006).

In this case, not only is the bankruptcy stay delaying plaintiff's action, but plaintiff asserts that this defendant is not liable for this accident. Therefore, the court grants the plaintiff's motion to discontinue this matter against Food Emporium and accordingly, Stellar's request that all cross claims be converted into third-party claims is also granted and a second-third party action is added to the caption as set forth below. However, as Food Emporium is subject to an

automatic stay pursuant to the Bankruptcy Code, the second third-party action is also stayed. The third-party plaintiffs shall notify the court when the bankruptcy stay is lifted.

Based on the foregoing, it is hereby

ORDERED that the plaintiff's motion is granted and this action is discontinued as against Food Emporium and it is further

ORDERED that defendants' cross-claims against Food Emporium are converted into second third-party action; and it is further

ORDERED, that the caption is hereby amended as follows:

-----X

CINDY MISHAEL,

Plaintiff,

- v -

WB/STELLAR IP OWNER LLC, STELLAR IP, LLC/INDEPENDENCE
PLAZA ASSOCIATES LLC, ICON PATRIOT PARKING, LLC C/O
MALLAH MANAGEMENT LLC, PATRIOT PARKING SERVICES INC.,
PATRIOT PARKING LLC,

Defendants.

-----X

PATRIOT PARKING LLC d.b/a ICON, s/h/a PATRIOT PARKING, LLC.,
d/b/a ICON PARKING SYSTEMS, LLC,

Third-Party Plaintiff,

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Defendant.

-----X

WB/STELLAR IP OWNER LLC, STELLAR IP,
LLC/INDEPENDENCE PLAZA ASSOCIATES LLC, ICON
PATRIOT PARKING, LLC C/O MALLAH MANAGEMENT LLC,
PATRIOT PARKING SERVICES INC., PATRIOT PARKING LLC,

Second Third-Party Plaintiffs,

- v -

FOOD EMPORIUM,

Second Third-Party Defendant.

-----X

And it is further ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the changes to the caption reflected above; and it is further

ORDERED that counsel are to appear before the court on January 31, 2018 at 9:30 am at 60 Centre Street, Room 218 (Part 19), for a status conference.

This constitutes the decision and order of the court.

January 12, 2018

DATE

Kelly O'Neill Levy

KELLY O'NEILL LEVY, J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

DO NOT POST

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE