

Morris v City of New York

2018 NY Slip Op 32858(U)

November 7, 2018

Supreme Court, New York County

Docket Number: 154594/2017

Judge: Robert D. Kalish

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM
Justice

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ORVILLE MORRIS,

Plaintiff,

- v -

THE CITY OF NEW YORK et al.,
Defendants.

(and a third-party action)

INDEX NO. 154594/2017
MOTION DATE 10/25/2018
MOTION SEQ. NO. 001

DECISION AND ORDER

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NYSCEF Doc Nos. 21–36 were read on this motion to sever.
Motion by Plaintiff Orville Morris pursuant to CPLR 603 and 1010 for an order severing the third-party action is denied.

BACKGROUND

Plaintiff filed the instant personal injury action on May 18, 2017, by e-filing a summons and complaint. The complaint alleges, in sum and substance, that Plaintiff stepped through a board covering a hole in the floor and was injured as a result due to the negligence of Defendants The City of New York (the “City”), H.E.L.P. USA, Inc. and H.E.L.P. USA LLC (collectively, “HELP”). On October 3, 2017, this Court signed a preliminary conference order in this matter indicating that “[i]mpleader[] [s]hall be completed within 30 days of the last EBT.” (NYSCEF Doc No. 11.) The order also scheduled Plaintiff’s EBT for on or before December 19, 2017, and Defendants’ EBTs for on or before December 21, 2017. The order also indicated that an inspection of the accident location was to be held within 90 days. The order indicated in two places that EBTs were not to be adjourned without Court approval. The order also indicated that post-EBT demands are to be served within 10 days of completion of the EBT, with responses due within 30 days of receipt of the notice.

On January 9, 2018, the Court issued a compliance conference order indicated that its preliminary conference order had not been complied with in that party EBTs and the inspection had not occurred. The Court ordered Plaintiff’s EBT be held on or before March 16, 2018, Defendants’ EBTs be held on or before March 23, 2018, a physical examination of Plaintiff be held within 60 days after the completion of Plaintiff’s EBT, and an onsite inspection be completed within 30 days. The Court also ordered responses to certain discovery demands.

On April 17, 2018, the Court issued a conference order indicating that Defendant was to produce its witness on or before April 30, 2018, and updating the schedule for Plaintiff’s IME and post-EBT demands. The Court indicated that the note of issue filing date was to be given at a later time.

On July 10, 2018, the Court issued a conference order indicating that HELP was to produce an additional witness for deposition on July 24, 2018. The order further indicated that the parties were to call the Court to obtain a date for filing the note of issue after discovery is complete.

On August 10, 2018, Defendants, as Third-Party Plaintiffs, commenced a third-party action against Third-Party Defendant Express Plumbing Sewer and Water Main Corp. (“Express”), allegedly a vendor responsible for placing and securing the wood covering where Plaintiff’s alleged incident occurred, by e-filing a third-party summons and complaint. Express interposed its answer to the third-party complaint on September 20, 2018.

On October 9, 2018, Plaintiff filed the instant motion pursuant to CPLR 603 and 1010 to sever the third-party action. Plaintiff argues, in sum and substance, that Defendants delayed discovery in this matter by producing a witness without sufficient knowledge, on April 30, 2018, and by taking nearly three months to produce a second witness, on July 24, 2018. Plaintiff further argues that discovery in the main action has been completed since August 2, 2018. Plaintiff argues that the parties stated in a conference call with the Court in August that all discovery was completed but Defendants announced that they wanted to commence a third-party action.

Defendants/Third-Party Plaintiffs argue in opposition that the actions should not be severed. Defendants/Third-Party Plaintiffs argue that the third-party action presents questions of law and fact in common with the main action, Plaintiff’s rights will not be substantially prejudiced, the third-party action will not unduly delay the determination of the main action, and there is a reasonable justification for the delay in the commencement of the third-party action.

Defendants/Third-Party Plaintiffs admit that their first witness “lacked sufficient knowledge regarding the salient facts concerning the alleged incident, including that H.E.L.P. U.S.A. had retained an outside vendor at th[e] time [of the alleged incident] to clean out the grease trap at their premises[] where plaintiff alleges the incident to have occurred.” (Affirmation of Packer ¶ 5.) Defendants/Third-Party Plaintiffs argue that they learned of this vendor for the first time at the July 24, 2018 deposition of Ms. Andrea Harris, the Executive Director managing the premises at the time the alleged incident occurred. Defendants/Third-Party Plaintiffs then argue that they ascertained and verified the full corporate name of the vendor and commenced the third-party action within 30 days of Ms. Harris’s EBT, and thus, the action is timely.

Plaintiff argues in reply that Defendants/Third-Party Plaintiffs had notice of the site of the alleged accident from the December 19, 2016 notice of claim filed in this action and attended a site inspection on February 16, 2018. Plaintiff further argues that any argument by Defendants/Third-Party Plaintiffs that they only learned about the condition at Ms. Harris’s deposition seems disingenuous. Plaintiff argues, in sum and substance, that Defendants/Third-Party Plaintiffs have unfairly delayed the resolution of this action by failing to investigate and defend the claims at issue in a timely manner. Plaintiff also argues that any action for indemnification and/or contribution by Defendants/Third-Party Plaintiffs against Express could be commenced after the resolution of the main action.

On October 30, 2018, with the instant motion sub judice, the Court conducted a discovery conference in this matter with all parties, including Express. The Court did not consider the motion at the time of the conference. The Court issued an order at this conference directing Express to provide certain discovery within 30 days. The Court then ordered Express's EBT on December 4, 2018, Plaintiff's deposition on December 5, 2018, and Defendants' EBTs on December 6, 2018. The Court further ordered Plaintiff to provide certain authorizations and Defendants/Third-Party Plaintiffs to respond to certain demands by Express. The Court then set this matter down for a further discovery conference to be held on February 5, 2019.

DISCUSSION

CPLR 1010 provides that "[t]he court may . . . order a separate trial of the third-party claim." The statute further provides that "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 *Marbilla, LLC v 143/145 Lexington LLC* (116 AD3d 544, 544 [1st Dept 2014]), the Appellate Division, First Department held that the motion court properly denied motions to sever where "the third-party actions will not unduly delay the determination of the main action or prejudice the substantial rights of [movant] or any other party, and [movant's] discovery rights have been accommodated" and where "[t]he third-party actions present questions of law and fact in common with the main action, and thus a joint trial is preferable." The third-party actions in *Marbilla* were brought more than six years after the initial action was filed, but the *Marbilla* Court found that this was reasonably justified where the revealing of a third-party defendant's liability occurred upon the taking of a deposition of a witness who had previously been unavailable.

In the instant action, the note of issue has not yet been filed. Further, the Court finds that Defendants/Third-Party Plaintiffs have provided a reasonable justification for commencing the third-party action on August 10, 2018—the information revealed at Ms. Harris's EBT. The Court finds further that the third-party action was commenced within 30 days of Ms. Harris's EBT and that this was in accordance with the preliminary conference order. As such, discovery was not completed in this action, and no order of the Court had indicated that discovery was complete or had directed Plaintiff to file the note of issue.

As in *Marbilla*, in the instant action, Defendants/Third-Party Plaintiffs have shown for the purposes of opposing the instant motion that they were unaware of Express's potential liability until Ms. Harris's deposition, who had previously unavailable for reasons addressed adequately in the opposition papers. The Court finds that common questions of law and fact exist between the main action and the third-party action. The Court finds further that the three-month delay from Defendants' first deposition was not willful or contumacious and that this delay was of the type that commonly occurs in the discovery process. The Court notes it has previously found that both sides failed to comply with the Court's preliminary conference order, which resulted in other delays. Moreover, the Court has already ordered certain additional discovery from Plaintiff—authorizations and an EBT to be taken by Express—in its October 30, 2018 order.

CONCLUSION

Accordingly, it is

ORDERED that the motion by Plaintiff Orville Morris pursuant to CPLR 603 and 1010 for an order severing the third-party action is denied; and it is further

ORDERED that all parties are directed to appear in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821, on Tuesday, February 5, 2019, at 9:15 a.m., for a status conference.

The foregoing constitutes the decision and order of the Court.

11/7/2018
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE:

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

HON. ROBERT D. RALISH
J.S.C.