

**Aponte v 44-45 Broadway Realty Co.**

2019 NY Slip Op 32661(U)

September 9, 2019

Supreme Court, New York County

Docket Number: 154723/2015

Judge: Barbara Jaffe

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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. BARBARA JAFFE PART IAS MOTION 12EFM

*Justice*

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JUANITA APONTE,

Plaintiff,

- v -

INDEX NO. 154723/2015

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 002

44-45 BROADWAY REALTY CO. and TOYS “R”  
US, INC.,

Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 50-69  
were read on this motion to sever action.

Plaintiff moves pursuant to CPLR 603 for an order severing her claims against defendant Toys “R” Us, Inc. (Toys), amending the caption, vacating the stay on this action, and restoring the case to the active trial calendar. Defendants do not oppose.

Defendant 44-45 Broadway Realty Co.’s (44-45 Broadway) counsel cross-move for an order relieving it as counsel. Plaintiff does not oppose.

I. BACKGROUND

By summons and complaint dated May 11, 2015, plaintiff alleges that on January 5, 2015, she was injured while working at a Toys location, owned by 44-45 Broadway. (NYSCEF 57).

On August 3, 2017, plaintiff filed her note of issue and certificate of readiness for trial. (NYSCEF 63).

On September 22, 2017, defendants filed a notice of suggestion of pendency of

bankruptcy, reflecting that on September 18, 2017, Toys had filed for bankruptcy. (NYSCEF 65). Thereafter, this action was automatically stayed.

By letter dated April 16, 2019, defendants' counsel informed plaintiff's counsel that "the automatic stay has recently been replaced with a permanent injunction issued by the Bankruptcy Court which permanently enjoins parties from proceedings to collect claims against" Toys. (NYSCEF 66).

By letter dated that same day, defendants' counsel informed 44-45 Broadway, its insurer, and former counsel that in light of the bankruptcy proceeding, Toys no longer existed, and thus could not defend and indemnify 44-45 Broadway. (NYSCEF 67).

By affidavit dated May 17, 2019, plaintiff states that on January 4, 2015, she was injured when a soap dispenser fell and struck her in the head. She claims that 44-45 Broadway is the owner of the premises, was negligent in the maintenance thereof, and had notice of the dangerous condition. (NYSCEF 53).

## II. MOTION TO SEVER

Plaintiff contends that as she is permanently enjoined from seeking damages against Toys, she will not be able to pursue an action against 44-45 Broadway without a severance. She maintains that 44-45 Broadway will not suffer prejudice because she can only recover damages if 44-45 Broadway was negligent, and Toys is not prejudiced because the permanent injunction remains in place. (NYSCEF 51).

Defendants maintain that they do not oppose plaintiff's motion to sever the action against Toys, but assert that the action against Toys should be dismissed in light of the permanent injunction issued by the Bankruptcy Court. (NYSCEF 56).

Pursuant to CPLR 603, claims may be severed "[i]n furtherance of convenience and in

order to avoid prejudice.” An automatic stay imposed by a defendant’s filing for bankruptcy does not extend to nonbankrupt defendants, and the court has discretion to sever the action against the bankrupt defendant. (*Katz v Mount Vernon Dialysis, LLC*, 121 AD3d 856, 857 [2d Dept 2014]; *Centrust Servs., Inc. v Guterma*n, 160 AD2d 416, 418 [1st Dept 1990] [“a bankruptcy stay does not prevent a plaintiff from proceeding on causes of action against nonbankrupt defendants, which do not involve the bankrupt’s property”]).

Where, as here, there is a permanent injunction barring plaintiff from proceeding against Toys, plaintiff is sufficiently prejudiced, warranting severance of the claims against Toys. (*See Vogric v Pathmark Stores, Inc.*, 169 AD3d 1096, 1098 [2d Dept 2019] [severance of claims against bankrupt defendant warranted where lifting of the bankruptcy stay was unlikely]; *Rapini v New Plan Excel Realty Tr., Inc.*, 8 AD3d 1013, 1014 [4th Dept 2004] [severance is warranted where action is stayed against one bankrupt defendant, especially in personal injury actions]).

Absent a motion to dismiss, the action cannot be dismissed as against Toys.

### III. MOTION TO WITHDRAW

Defendants’ counsel seeks to be relieved from representing 44-45 Broadway because Toys provided defense and indemnification to 44-45 Broadway using its self-insured retention, and as Toys is no longer a viable entity, there is no longer a self-insured retention to pay for 44-45 Broadway’s defense in this action. As compensation is longer viable due to bankruptcy, it argues that it should be relieved from defending this action. (NYSCEF 56).

As Toys’ duty to defend 44-45 Broadway is suspended due to the bankruptcy proceedings, defendants’ counsel has established meritorious grounds to withdraw.

### IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the action is severed as to defendant Toys “R” Us, Inc., and is continued as to the remaining defendant; it is further

ORDERED, that further proceedings in this severed action are stayed as to defendant Toys “R” Us, Inc., except for an application to vacate or modify said stay; it is further


ORDERED, that the cross-motion by McAndrew, Conboy & Prisco, LLP to be relieved as attorneys for defendant 44-45 Broadway Realty Co. in the herein action is granted upon the filing of proof of said attorneys having served, within 30 days of today, a copy of this order with notice of entry upon the former client at the former client’s last known address, which is: 44-45 Broadway Realty Co., 1530 Broadway, 4<sup>th</sup> Floor, New York, New York 10036, by regular and certified mail, return receipt requested, and upon the attorneys for all other parties appearing herein by regular mail, proof of service to be filed with the Clerk of the Court, County Clerk’s Office (60 Centre Street); it is further

ORDERED, that said attorneys serve upon the former client, together with the above-mentioned copy of this order with notice of entry upon the former client, a notice directing the former client to appoint a substitute attorney within 30 days from the date of mailing the notice; proof of service to be filed with the Clerk of the Court, County Clerk’s Office (60 Centre Street); it is further

ORDERED, that no further proceedings may be taken against the former client without leave of this Court for a period of 60 days after the entry of this order; it is further

ORDERED, that plaintiff is directed to serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119) within ten days from entry and the Clerk shall mark the action severed as to defendant Toys “R” Us, Inc. and stayed as provided herein; and it is further

ORDERED, that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

  
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**BARBARA JAFFE, J.S.C.**

9/9/2019  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	<input type="checkbox"/> DENIED	<input type="checkbox"/>	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE