

Sibrian v 244 Madison Realty Corp.
2019 NY Slip Op 33726(U)
November 15, 2019
Supreme Court, Queens County
Docket Number: 708235/2014
Judge: Pam Jackman Brown
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NEW YORK SUPREME COURT - COUNTY OF QUEENS

IAS PART 19

SHORT FORM ORDER

Present: Hon. Pam Jackman Brown, JSC

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JOVITA SIBRIAN,

Plaintiff,

-against-

244 MADISON REALTY CORP. and
MAXWELL-KATES, INC.,

Defendants.

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244 MADISON REALTY CORP. and
MAXWELL-KATES, INC.,

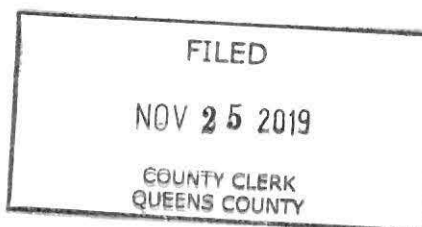
Third-Party Plaintiffs,

-against-

JOHN KAPETANOS and PIRGOS FOOD CORP.
d/b/a MOONSTRUCK DINER,

Third-Party Defendants.

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Index No. 708235/2014

Motion Date: 3/4/19

Cal. No. 52

Mot. Seq. No.: 1

Recitation, as required by CPLR § 2219(a), of the following papers e-file numbered 43 to 58 read on the motion by Third-Party Defendants for an Order: (1) pursuant to Worker’s Compensation Law §11 dismissing the first, second, fifth, sixth and seventh counts of the Third-Party Complaint; (2) pursuant to CPLR §3211(a)(5) and the doctrine of laches, dismissing the Third-Party Complaint; (3) pursuant to CPLR §3211(a)(7) dismissing the seventh cause of action for failure to state a cause of action; or in the alternative, (4) pursuant to CPLR §1010 severing the third-party action and the Third-Party Summons and Complaint, and granting the third-party defendants an extension of time to Answer the Third-Party Complaint upon resolution of the within motion; and (5) extending the time for the third-party defendant

to move for summary judgment until 120 days following the completion of all discovery in the third-party action, together with such other and further relief as this Court deems just, proper and equitable.

	PAPERS E-FILE NUMBERED	
	Papers	Exhibits
Notice of Motion- Affirmation and Exhibits Annexed	43-44	45-54
Affirmation in Opposition- Exhibits annexed	55	56-58

Upon the papers listed above, this Notice of Motion is hereby decided in accordance with this Decision/Order.

This is an action by Plaintiff to recover damages for personal injuries alleged sustained by Plaintiff on May 9, 2012. Plaintiff alleges that she was caused to slip and fall on a liquid while working in a diner located at 244 Madison Avenue, New York, New York. Said premises is owned by Defendant 244 Madison Realty Corp., and is managed by Defendant Maxwell-Kates, Inc.

Plaintiff commenced the instant proceeding with the filing of a summons and complaint on November 5, 2014. Although a copy of Defendants' answer is annexed to the instant motions, it has not been filed with the Court. Defendants filed a Third-Party Summons and Complaint against Third-Party Defendant John Kapetanios on August 1, 2018. Plaintiff filed a Note of Issue and Certificate of Readiness on August 22, 2018. Said Note of Issue and Certificate of Readiness indicated that discovery was incomplete. On August 29, 2018, Defendant/Third-Party Plaintiff filed a Second Third-Party Summons and Complaint, adding Third-Party Defendant Pirogos Food Corp., as a named Third-Party Defendant. Subsequently, on October 12, 2018, Defendants/Third-Party Plaintiff filed another Third-Party Summons and Complaint.

Now, upon motion, Third-Party Defendants seek an Order: (1) pursuant to Worker's Compensation Law §11 dismissing the first, second, fifth, sixth and seventh counts of the Third-Party Complaint; (2) pursuant to CPLR §3211(a)(5) and the doctrine of laches, dismissing the Third-Party Complaint; (3) pursuant to CPLR §3211(a)(7) dismissing the seventh cause of action for failure to state a cause of action; or in the alternative, (4) pursuant to CPLR §1010 severing the third-party action and the Third-Party Summons and Complaint, and granting the third-party defendants an extension of time to Answer the Third-Party Complaint upon resolution of the within motion; and (5) extending the time for the third-party defendant to move for summary judgment until 120 days following the completion of all discovery in the third-party action, together with

such other and further relief as this Court deems just, proper and equitable. Defendants/Third-Party Plaintiffs oppose the application.

The Court first turns to the branch of Third-Party Defendants' motion seeking to dismiss the first, second, fifth, sixth and seventh causes of action of the Third-Party Complaint, pursuant to Worker's Compensation Law (hereinafter "WCL") §11. Third-Party Defendants argue that the first and second causes of action for contribution and indemnification must be dismissed because Third-Party Plaintiffs failed to allege a "grave injury," and that the fifth, sixth and seventh causes of action for contractual indemnity, assignee liability, and alter ego/corporate veil liability must be dismissed because the lease agreement does not require indemnity for the Third-Party Plaintiffs' own negligence. Third-Party Plaintiffs argue that Third-Party Defendants have not made a showing that as Plaintiff's employer, it paid Worker's Compensation benefits.

WCL §11 "prohibits third-party claims for indemnification against an employer unless the employee has sustained a 'grave injury' or there is a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the third-party claimant" (*Cassese v SVJ Joralemon, LLC*, 168 AD3d 667, 679 [2d dept 2019]). Here, although the Third-Party Complaint does not allege a "grave injury" the Third-Party Complaint alleges that the parties entered into a written contract prior to the accident by which Third-Party Defendants agreed to contribution to or indemnification of Defendants/Third-Party Plaintiffs. Notably, Third-Party Defendants failed to establish that they secured Workers' Compensation benefits for Plaintiff. Thus, Third-Party Defendants failed to demonstrate an entitlement to the protections of WCL §11. (See, generally *Boles v Dormer Giant, Inc.*, 4 NY3d 235 [Ct App 2005]). Accordingly, the branch of the motion seeking dismissal of the first and second causes of action pursuant to WCL §11 is denied.

The Court now turns to the branch of the motion seeking dismissal of the fifth, sixth, and seventh causes of action. Third-Party Defendants argue that the lease agreement does not require indemnity for Third-Party Plaintiffs' negligence. Upon review of the parties' submissions, the application is denied. Issues of fact exist regarding the cause of Plaintiff's fall. Plaintiff's Bill of Particulars, verified on April 28, 2017, indicates that Plaintiff was caused to fall on a slippery liquid substance which leaked from the pipes on to the floor. However, Plaintiff's deposition testimony indicates that Plaintiff was caused to slip and fall on a liquid which leaked from the soda machine. Accordingly, the application for dismissal of the fifth, sixth and seventh causes of action are denied.

The Court now considers Third-Party Defendants' application for an order dismissing the third-Party Complaint in accordance with the doctrine of laches. To

establish laches, the party must demonstrate: “(1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting the claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant” (*Kverel v Silverman*, 172 AD3d 1345, 1348 [2d Dept 2019] quoting *Stevin v Doukas*, 98 AD3d 1026, 1028 [2d Dept 2012] quoting *Cohen v. Krantz*, 227 AD2d 581, 582 [2d Dept 1996]). Here, Third-Party Defendants failed to demonstrate any injury or prejudice. Accordingly, the application is denied.

Third-Party Defendants argue that the causes of action for breach of contract, failure to procure insurance, assignee liability and alter ego/corporate veil liability is dismissed, pursuant to CPLR §3211(a)(5), since the statute of limitations expired on May 9, 2018. Accordingly, the causes of action for breach of contract, failure to procure insurance, assignee liability and alter ego/corporate veil liability are dismissed.

Third-Party Defendants’ application to sever this action from the main action denied. The Court notes that the matter is currently stayed and the parties are currently engaged in discovery process. Thus, the application to sever the instant third-party action from the main action is denied.

Third-Party Defendants’ application to extend the time for the Third-Party Defendants’ to answer the Third-Party Complaint is granted. Third-Party Defendants are directed to file and serve an answer to the Third-Party Complaint within thirty (30) days of the date of this Order with Notice of Entry.

The application to extend the time to move for summary judgment is resolved in accordance with the So-Ordered Stipulation, dated October 22, 2019.

All relief not specifically granted or denied is deemed denied.

Dated: November 15, 2019
Jamaica, NY

HON. PAM JACKMAN BROWN, J.S.C.

