

Miller v City of New York
2020 NY Slip Op 30950(U)
April 15, 2020
Supreme Court, New York County
Docket Number: 153195/2013
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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TRENT MILLER and DAVID VARNEY,

Plaintiffs,

Index No.: 153195/2013

-against-

THE CITY OF NEW YORK, METROPOLITAN TRANSIT AUTHORITY, KMART CORPORATION, P.O., "JOHN" CONCILLA, individually and in his official capacity as a MTA police officer, P.P. "JOHN" LOVERDI, individually and in his official capacity as a MTA police officer, P.O. "JOHN" DIETRICH, individually and in his official Capacity as a MTA police officer, and "JOHN and JANE DOES," first names being fictitious and presently unknown, believed to be police officers of the MTA, as well as employees of KMART CORPORATION,

Defendants.

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LISA A. SOKOLOFF, J.:

This action arises out of damages sustained by plaintiffs Trent Miller (Miller) and David Varney (Varney) when they were allegedly, among other things, falsely accused of theft and assaulted, after shopping at a Kmart store located in New York, New York. Plaintiffs now move, pursuant to CPLR 603, for an order severing the claims against defendant Sears Holding Corporation d/b/a Kmart (Sears). Defendants Metropolitan Transit Authority (MTA), P.O. "John" Concilla, individually and in his official capacity as a MTA police officer, P.O. "John" Loverdi, individually and in his official capacity as a MTA police officer, P.O. John Dietrich, individually and in his official capacity as a MTA police officer, and "John and Jane Does," first names being fictitious and presently unknown, believed to be police officers of the MTA

(collectively, MTA defendants) oppose plaintiffs' motion. The City of New York did not submit opposition papers. For the reasons set forth below, plaintiffs' motion to sever is granted.

BACKGROUND AND FACTUAL ALLEGATIONS

The relevant facts and procedural history of the underlying action are as follows:

On June 27, 2012, plaintiffs purchased a pair of diamond earrings at the Kmart Store, located in Penn Station, New York, New York. Kmart officials prevented plaintiffs from exiting the store. According to plaintiffs, shortly thereafter, MTA police officers arrived and, among other things, brutally assaulted plaintiffs despite the fact that plaintiffs were complying with the officers' directives. Miller was held in custody by the New York Police Department (NYPD) for at least a day, when he was released without charges being filed. Charges processed against Varney were subsequently dismissed.

In August 2012, plaintiffs filed a notice of claim against the City of New York, which included the individual NYPD officers, and the MTA and its employees. In 2013, after the charges were dismissed, Varney amended his notice of claim to include a claim for malicious prosecution.

In April 2013, plaintiffs commenced this action by filing a summons and complaint against defendants asserting claims for, among other things, civil rights violations pursuant to 42 U.S.C. 1983, wrongful arrest and excessive force, and violations under the New York City Human Rights Law. Plaintiffs summarize that they were "falsely accused of theft, assaulted, and subjected to homophobic and racist abuse, beginning inside of a Kmart store located in Penn Station" NYSCEF Doc. No. 123, Klein affirmation in support, ¶ 3.

On October 15, 2018, Sears filed a bankruptcy petition under chapter 11 of the United States Bankruptcy Code. In November 2018, plaintiffs were formally notified that Sears had

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filed a “Notice of Bankruptcy Filing and Imposition of Automatic Stay” and that the instant action was automatically stayed pursuant to section 362(a) of the Bankruptcy Code. *See* NYSCEF Doc. No. 126. Plaintiffs were advised that the filing of a bankruptcy petition “operates as a stay, applicable to all entities” *Id.* at 1. (internal quotation marks omitted). As a result, all cases involving Sears, and by extension Kmart, are subject to an automatic stay.

Plaintiffs now seek to sever their claims against Sears, the bankrupt defendant, so that their action may proceed against the remainder of the non-bankrupt defendants. Plaintiffs have been in litigation for six years. They argue that the Sears bankruptcy proceeding is a complicated and consolidated action. According to plaintiffs, their claims “are one of, upon information and belief, tens of thousands of creditor claims against the debtors” Klein affirmation in support, ¶ 7. As a result, plaintiffs believe they will suffer prejudice if the action is stayed against all defendants during the pendency of the Sears bankruptcy proceeding. This prejudice of having to wait until the conclusion of the bankruptcy proceedings outweighs any inconvenience to the other defendants.

Plaintiffs further argue that Sears is not indispensable to the action. According to plaintiffs, Sears “is a joint tortfeasor, severally and jointly liable for plaintiffs’ claim of, *inter alia*, false arrest, insofar as it was employees of Kmart that initiated the false complaint that led to the plaintiffs’ false arrest.” *Id.*, ¶ 8.

The MTA defendants oppose the motion for severance. They argue that, as the Kmart employees initially “initiated the false complaint that led to the plaintiffs’ false arrest . . . all of the MTA’s actions are intertwined with the actions of the Kmart employees.” NYSCEF Doc. No. 128, Preston affirmation in opposition, ¶ 7. As a result, they argue that these common issues of law and fact should preclude granting the motion to sever. Further, fragmentation of trials

increases the burden on the court system and could lead to inconsistent verdicts. Finally, MTA defendants argue that the motion should be denied as discovery is not yet complete.

DISCUSSION

Motion to Sever

“In furtherance of convenience or to avoid prejudice the court may order a severance of claims” CPLR 603. After Sears filed for bankruptcy in federal court, plaintiffs were notified that their action was subject to an automatic stay. “Where, [like here], a defendant in an action files for chapter 11 bankruptcy relief, the automatic stay provisions of 11 USC § 362 (a) do not extend to the nonbankrupt defendants.” *Katz v Mount Vernon Dialysis, LLC*, 121 AD3d 856, 857 (2d Dept 2014). It is within the court’s discretion whether to sever the action against the bankrupt defendant. *Id.* In general, “the balance of the equities lies with plaintiffs when severance is sought because the case against one defendant is stayed pursuant to 11 USC § 362 (a).” *Id.*

In opposition to plaintiffs’ motion, MTA defendants cite to cases where severance was denied due to common issues of law and fact. *See e.g. Williams v Property Servs.*, 6 AD3d 255, 256 (1st Dept 2004). However, none of the cases are applicable to the present situation as they did not involve an automatic stay on a bankrupt defendant. It is well settled that courts have routinely applied CPLR 603 where bankruptcy stays are applicable to only some defendants. *See e.g. Kharmah v Metropolitan Chiropractic, Ctr.*, 288 AD2d 94, 94 (1st Dept 2001) (internal citation omitted) (“This was a proper exercise of discretion. Granting a severance pursuant to CPLR 603 will prevent any prejudice to plaintiff stemming from delay preceding termination of the chiropractic defendants’ bankruptcy proceedings”).

Here, in its discretion, the court grants plaintiffs' motion to sever the action against Sears. Kmart employees were initially involved in preventing plaintiffs from leaving the store. While these actions could possibly relate to MTA defendants' probable cause or lack thereof, the majority of the allegations stem from what subsequently occurred. More importantly, while there may be common issues of law and fact, plaintiffs have already been in litigation for six years. If the action is stayed against the nonbankrupt defendants, plaintiffs will suffer prejudice caused by the inevitable delay due to the pending bankruptcy proceedings. In balancing the equities, requiring plaintiffs to wait for the conclusion of the bankruptcy proceedings to obtain any remedy outweighs any of MTA defendants' arguments.

In their opposition, in one sentence, MTA defendants claim that equity provides they have the benefit of their rights under CPLR article 16. *See Kharmah v Metropolitan Chiropractic Ctr.*, 288 AD2d at 94-95 (1st Dept 2001) (citation omitted) (“[W]hile the bankrupt defendants will not participate in the trial, equity requires that defendants-appellants have the benefit of CPLR article 16 rights, even though there is an automatic stay by virtue of the bankruptcy”). Plaintiffs pled that such apportionment is not applicable here because of various exemptions found in CPLR 1602. *See e.g. Concepcion v New York City Health & Hosps. Corp.*, 284 AD2d 37, 39 (1st Dept 2001) (Pursuant to CPLR 1602 (5), “[i]n actions requiring proof of intent, there is no apportionment of liability”). Nonetheless, these arguments are premature, as the trial court will address apportionment charges.

CONCLUSION

Accordingly, it is

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ORDERED that plaintiffs' motion for an order severing the action against Sears Holding Corporation d/b/a Kmart is granted, and the action is continued as to the remaining defendants; and it is further

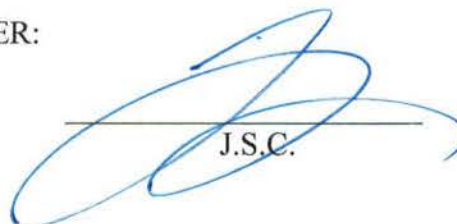
ORDERED that further proceedings in this action are stayed as to defendant Sears Holding Corporation d/b/a Kmart, except for an application to vacate or modify said stay; and it is further

ORDERED that plaintiffs are 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 Sears Holding Corporation d/b/a Kmart, 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).

Dated: April 15, 2020

ENTER:



J.S.C.

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