

**Cooper v Metropolitan Transp. Auth.**

2020 NY Slip Op 32400(U)

July 22, 2020

Supreme Court, New York County

Docket Number: 451882/2014

Judge: Carol R. Edmead

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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. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

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CAROLYN COOPER,

Plaintiff,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, CBT PARA TRANSIT, INC., FREEDMAN SEATING COMPANY, AMSAFE COMMERCIAL PRODUCTS INC. N/K/A SHIELD RESTRAINT SYSTEMS,

Defendant.

-----X

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, CBT PARA TRANSIT, INC.

Plaintiff,

-against-

FREEDMAN SEATING COMPANY

Defendant.

-----X

FREEDMAN SEATING COMPANY, FREEDMAN SEATING COMPANY

Plaintiff,

-against-

AMSAFE COMMERCIAL PRODUCTS, INC., N/K/A SHIELD RESTRAINT SYSTEMS

Defendant.

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INDEX NO. 451882/2014
MOTION DATE 7/22/2020
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

Third-Party
Index No. 595466/2015

Second Third-Party
Index No. 595878/2015

The following e-filed documents, listed by NYSCEF document number (Motion 003) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 150, 151, 152, 153, 154

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

It is hereby

ORDERED that the motion for summary judgment, by Order to Show Cause, by third-party defendant/fourth-party plaintiff Freedman Seating Company (Motion Seq. 003) is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for Third-Party Plaintiffs Metropolitan Transportation Authority, New York City Transit Authority and CBT Para Transit Inc. shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties.

NON FINAL DISPOSITION

### **MEMORANDUM DECISION**

In this personal injury action, third-party defendant/fourth-party plaintiff Freedman Seating Company (Freedman) seeks, by Order to Show Cause, to dismiss the cross-claims and third-party complaint of Metropolitan Transportation Authority (MTA), New York City Transit Authority (NYCTA) and CBT Para Transit Inc. (CBT) (collectively, Third-Party Plaintiffs) pursuant to CPLR § 3212 (Motion Seq. 003). Third-Party Plaintiffs oppose the motion. For the reasons set forth below, the Court denies Freedman's motion.

### **BACKGROUND FACTS**

Plaintiff Carolyn Cooper was a user of the MTA's New York City Transit "Access-A-Ride" Paratransit Service which provides public transportation for eligible customers with disabilities that prevent them from using the public buses and subways. The paratransit vehicle involved in this case is owned by the NYCTA, an affiliate of MTA, and leased to CBT (NYSCEF doc No. 136, ¶ 9).

Plaintiff alleges that around noon on the day of the incident, a paratransit bus picked her up from her doctor's office (NYSCEF doc No. 131, pp. 34, 36). After getting on the bus through

a wheelchair lift, she sat on a seat behind the driver (*Id.*, pp. 37-38). The driver then buckled up Plaintiff with the seatbelt and started the trip (*Id.*, p. 43). According to Plaintiff, as they were traversing the road of Major Deegan, the roadway at the end of the bridge that took them from Manhattan to her home in the Bronx, a car suddenly jumped in front of the bus, causing the driver to stop the vehicle abruptly (*Id.*, p. 51). The stop threw Plaintiff to the front of the bus as her seatbelt allegedly “popped” (*Id.*). Plaintiff claims that she suffered various injuries as a result (*Id.*, p. 60).

On February 21, 2014, Plaintiff commenced this action against MTA, NYCTA and CBT seeking damages on the basis of Third-Party Plaintiffs’ supposed negligence. Third-Party Plaintiffs, in turn, impleaded Freedman as the seller and distributor of the seatbelts used in the paratransit vehicles. Freedman, as fourth-party plaintiff, impleaded Amsafe Commercial Products Inc. (Amsafe). Plaintiff later amended her complaint to implead Freedman and Amsafe as direct defendants and to add causes of action sounding in product liability and breach of warranty (NYSCEF doc No. 17).

In 2018, Plaintiff settled her claims with Freedman and Amsafe. Thus, in accordance with a Stipulation of Partial Discontinuance dated September 17, 2018 (NYSCEF doc Nos. 93 and 94), the Court dismissed with prejudice Plaintiff’s claims against Freedman and Amsafe on December 10, 2018 (NYSCEF doc No. 96).

On January 15, 2019, a conference was held before this Court. At this conference, the Court scheduled then outstanding discovery in this matter, which included setting timelines regarding pending discovery responses and scheduling the deposition of Third-Party Plaintiffs’ witness. Freedman did not appear at the conference. The deposition was initially scheduled for February

27, 2019 and then rescheduled to March 21, but Third-Party Plaintiffs never appeared (NYSCEF doc No. 102).

On September 19, 2020, Plaintiff moved to strike Third-Party Plaintiffs' answer on the ground that Third-Party Plaintiffs failed to appear for deposition as ordered by the Court (*Id.*). In opposition, Third-Party Plaintiffs insisted that Plaintiff was guilty of laches and should be deemed to have waived discovery (NYSCEF doc No. 108). At the October 15, 2019 oral argument on Plaintiff's motion to strike, Third-Party Plaintiffs explained that they did not produce their witnesses for deposition since Freedman, which stopped appearing for the case after its settlement with Plaintiff, would not be there to depose the witness. Third-Party Plaintiffs maintained that all parties should be present for the deposition of their clients. The Court rejected this argument and granted Plaintiff's motion.<sup>1</sup>

Freedman now moves, pursuant to CPLR 3212, for dismissal of Third-Party Plaintiffs' cross-claims and third-party complaint for contribution and indemnification. Third-Party Plaintiffs oppose the motion as untimely and improper on the merits. On February 25, 2020, the parties appeared before the Court for oral argument on the issue of timeliness. The Court directed Freedman to address the issue of its delayed submission in its reply pursuant to the requirements of *Brill v City of New York* (2 NY3d 648 [2004]), and for Third-Party Plaintiffs to respond thereafter.

## DISCUSSION

CPLR 3212(a) provides that:

“any party may move for summary judgment after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than 30 days after the filing of the Note of Issue. If no such date is set by

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<sup>1</sup> The Court's order granting Plaintiff's motion is pending appeal before the First Department (NYSCEF doc No. 117).

the court, such motion shall be made no later than 120 days after the filing of the note of issue, except with leave of court on good cause shown.”

Pursuant to this provision, this Court maintains a deadline for dispositive motions that is shorter than the 120-day limit. This Court requires that all dispositive motions be filed 60 days after the note of issue is filed, unless otherwise directed (Part 35 Part Rules). Thus, Freedman should have filed its motion within 60 days from January 16, 2019. Freedman admits that it failed to comply with this timeline, and its motion is therefore especially untimely.

The merits of an untimely motion for summary judgment may be considered by the court only if the movant demonstrates "good cause". In the case of *Brill*, the Court of Appeals explained that "good cause" “requires a showing of good cause for the delay in making the motion--a satisfactory explanation for the untimeliness--rather than simply permitting meritorious, nonprejudicial filings, however tardy. That reading is supported by the language of the statute--only the movant can show good cause--as well as by the purpose of the amendment, to end the practice of eleventh-hour summary judgment motions. No excuse at all, or a perfunctory excuse, cannot be ‘good cause.’” (2 NY3d 648 at 652).

In its Reply, Freedman argues that the untimeliness of its motion was due to “the disruptive conduct” of Third-Party Plaintiffs “in failing to appear for their Court Ordered deposition” (NYSCEF doc No. 150, ¶ 9) and “by not including [Freedman] in discussions to reschedule the same” (*Id.*, ¶ 16). Freedman claims that it was only “after 9 months following the expiration of the 120 day statutory deadline, by letter dated October 8, 2019, that [Freedman] learned for the first time that, the Note of Issue had been filed, that [Third-Party Plaintiffs] had failed to appear for their deposition, that their answer had been stricken by this Court and that this matter was now on the trial calendar” (*Id.*, ¶ 15).

The Court finds that Freedman's reason for failing to file a timely motion does not constitute "good cause". It is true that good cause for a late summary judgment motion can be established where a discovery request relevant to the motion was outstanding until shortly before the motion was made (*Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280 [1st Dept 2006] citing *Gonzalez v. 98 Mag Leasing Corp.*, 95 N.Y.2d 124 [2000]; *Cooper v. Hodge*, 13 A.D.3d 1111 [2004]; *see also 247 Kunz v. Gleeson*, 9 A.D.3d 480, [2004]). However, here Freedman has failed to show how the outstanding deposition was essential to its motion for summary judgment. *First*, the contentions made by Freedman in support of its motion to summarily dismiss Third-Party Plaintiffs' claims for contribution are entirely based on the settlement agreement Freedman entered into with Plaintiff in 2018. *Second*, with respect to Third-Party Plaintiffs' claims for common law and contractual indemnification, Freedman failed to show how the deposition would have yielded evidence material and relevant to Freedman's motion. The Court highlights that Freedman claims to have not been made aware of this deposition and would not have been present for the deposition.

The Court also cannot see how Plaintiff's examination of Third-Party Plaintiffs' witness could have revealed information relevant to Freedman's motion since: (i) Plaintiff already settled its claims against Freedman; and (ii) Freedman itself argues that "Plaintiff's claim for liability against [the Third-Party Plaintiffs] is founded upon a separate and distinct legal theory which in no way involves any duty owned and/or assumed by [Freedman]" (NYSCEF doc No. 119, ¶ 32). Indeed, Freedman failed to show how the discovery, outstanding at the time of filing of the Note of Issue, was essential to its motion (*see Caiola v Allcity Ins. Co.*, 277 AD 273 [2d Dept 2000] ["While the defendant claimed that the plaintiff's delay in complying with discovery demands necessitated its belated motion, that discovery was not, in fact, essential to the motion. Certain of

the contentions made by the defendant in support of its motion were based on previously-known facts and not on information revealed in the belated discovery provided by the plaintiff.”)].

The Court also rejects Freedman’s argument that Third-Party Plaintiffs’ cross-claims for common law indemnification and contribution were, by operation of law, dismissed when their answer was stricken. Freedman relies heavily on the case of *Boorman v. City of New York, et al.* (34 Msc.3d 435 [NY Sup Ct, 2011]) where the Court ruled that the earlier order striking defendant NYCTA’s answer was intended to strike its cross-claims as well since NYCTA’s failure to appear for deposition also prejudiced its co-defendant Tishman’s defense against these cross-claims. Freedman maintains that similarly to *Boorman*, Third-Party Plaintiffs’ failure to appear for deposition “effectively precluded their ability to defend against [the cross-]claims, including the newly raised defense of “quasi contract” seeking contractual indemnity under their product liability claims” (NYSCEF doc No. 119, ¶ 39).

Contrary to Freedman’s assertion, the Court finds that Freedman’s defense to Third-Party Plaintiff’s cross-claims was not prejudiced as it appears that Freedman would not have participated in Third-Party Plaintiffs’ deposition anyway. The Court notes that at the oral argument on Plaintiff’s motion to strike, Third-Party Plaintiffs’ reasoning for failing to appear for their deposition was Freedman’s and Amsafe’s anticipated absence in the deposition. Freedman does not deny this factual allegation and instead takes the position that “[a]ny party may waive any deposition it wants (at its own risk)” (NYSCEF doc No. 150, ¶ 45). Indeed, Freedman cannot dispute this factual allegation in view of its own assertion that it was not even aware of Plaintiff’s pending discovery demands to Third-Party Plaintiffs until October 2019. Thus, it would not have been present for Third-Party Plaintiffs’ deposition either on the Court-ordered date on February 28, 2019 or the rescheduled date on March 21, 2019. Therefore, the Court cannot see how

Freedman can logically assert prejudice to its defense by reason of Third-Party Plaintiffs' non-appearance in a deposition Freedman was not aware of or did not intend to participate in anyway.

Finally, the Court rejects Freedman's argument that its late motion was due to no fault of its own as it was not made aware of the status of this case by the other parties subsequent to the discontinuance of Plaintiff's claims against it (NYSCEF doc No. 150, ¶ 45). It is Freedman's duty to update itself as to the status of this case considering that the Court's December 10, 2018 order of dismissal was limited to Plaintiff's claims against Freedman. Freedman is well aware that Third-Party Plaintiffs' cross-claims and third-party complaint against it have remained active since the Court's December 2018 order. Therefore, Freedman cannot blame Third-Party Plaintiffs for its ignorance and this motion for summary judgment is denied as untimely.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion for summary judgment, by Order to Show Cause, by third-party defendant/fourth-party plaintiff Freedman Seating Company (Motion Seq. 003) is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for Third-Party Plaintiffs Metropolitan Transportation Authority, New York City Transit Authority and CBT Para Transit Inc. shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties.

*Carol R. Edmead*  
HON. CAROL R. EDMOND, J.S.C.  
J.S.C.

7/22/2020  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input 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