

Middleton v New York City Tr. Auth.
2021 NY Slip Op 30670(U)
March 8, 2021
Supreme Court, New York County
Docket Number: 155003/2015
Judge: J. Machelles Sweeting
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART IAS 62

Justice

-----X

HOPE MIDDLETON,

Plaintiff,

INDEX NO. 155003/2015

MOTION DATE 02/19/2020,
12/24/2020

- v -

MOTION SEQ. NO. 003 004

NEW YORK CITY TRANSIT AUTHORITY,

Defendant.

**DECISION + ORDER ON
MOTION**

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NEW YORK CITY TRANSIT AUTHORITY

Plaintiff,

Third-Party
Index No. 595798/2017

-against-

CITY OF NEW YORK

Defendant.

-----X

NEW YORK CITY TRANSIT AUTHORITY

Plaintiff,

Second Third-Party
Index No. 595951/2019

-against-

THE VERNEER OWNERS INC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86

were read on this motion to/for SEVER.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106

were read on this motion to/for DISMISSAL.

In the underlying action plaintiff Hope Middleton (“plaintiff”) seeks to recover monetary damages for injuries she allegedly sustained on December 3, 2014, when she allegedly slipped and fell on pooled water on the second step from the top of a certain subway stairwell leading to the platform of the uptown 2 train located at the 14th Street subway station at 7th Avenue and West 14th Street, in the County, City and State of New York.

Approximately six months after the incident, on May 19, 2015, plaintiff commenced this action with the filing of a Summons and Verified Complaint against the New York City Transit Authority (“NYCTA”). More than two years later, on or around October 2, 2017, defendant NYCTA commenced a third-party action against The City of New York (the “City”). On or around November 4, 2019, almost five years after the incident, NYCTA commenced a second third-party action (the “Verneer action”) against defendant The Verneer Owners Inc. (“Verneer”).

Now pending before the court are two motions, both filed by Verneer. In the first, Motion #003, Verneer seeks an order, pursuant to CPLR §1010, to dismiss or sever the Verneer action from the main action because of the extreme delay on the part of NYCTA in filing the action. In the second, Motion #004, Verneer seeks an order pursuant to CPLR §3126 to dismiss the Verneer action based on NYCTA’s alleged failure to respond to movant’s demand for a verified bill of particulars and combined demands dated December 24, 2019 and Verneer’s good faith letter dated December 18, 2020.

With respect to Motion #003, Verneer argues that it is severely prejudiced by NYCTA’s delay because Verneer is now facing the prospect of being forced to trial “without any discovery whatsoever in its favor;” that Verneer should not be required to defend a claim six years after it accrued “when memory has faded and evidence and witnesses are no longer available;” and that

Verneer is subject to the prejudice of being deprived of the ability to move for summary judgment, because the Note of Issue was filed over a year before Verneer was impleaded.

In opposition, plaintiff and NYCTA argue that neither of them were aware of Verneer's potential role in causing or creating the subject condition that caused plaintiff's fall until the deposition of JOHN MANNA, a witness produced by the City on July 11, 2019. They argue that Mr. Manna testified that he performed a dye test and determined that the water that was leaking into the subway station was coming from the basement of the building 77 Seventh Avenue, that is controlled by Verneer. That was the first time that plaintiff and NYCTA became aware that the condition may have been caused by Verneer. Plaintiff avers that had the information in Mr. Manna's deposition been held prior to the running of the statute of limitations, plaintiff would have brought direct claims against Verneer.

The First Department has made clear that related actions should be tried together when possible, and that, as plaintiff argues, the presumption is one against severance, unless there is some clear utility to doing so. *See Sichel v. Cmty. Synagogue*, 256 A.D.2d 276 (Sup. Ct. App. Div. 1st Dept. 1998) ("Where two actions arise from a common nucleus of facts, a trial court should only sever the actions to prevent prejudice or substantial delay to one of the parties [...] To avoid the waste of judicial resources and the risk of inconsistent verdicts, it is preferable for related actions to be tried together such as in a tort case where the issue is the respective liability of the defendant and the third-party defendant for the plaintiff's injury; *and Range v. Trustees of Columbia Univ. in City of New York*, 150 A.D.3d 515 (Sup. Ct. App. Div. 1st Dept. 2017) ("The note of issue was filed April 23, 2015. The second third-party complaint was filed September 22, 2015, after it 'became evident' to defendants' counsel, on September 9, 2015, when they received expert disclosure from plaintiffs' counsel, that they had a cause of action against City Safety. Even

if there was a delay, it did not rise to the level of the knowing and deliberate delay by the defendants. Moreover, the issues of law and fact involved in the main and second third-party actions are intertwined, since the inspection of the job site by second third-party defendants was integral to plaintiffs' liability claims. It is also likely that almost all the same witnesses will be required").

Here, the issues of law and fact involved in the main action and the Verneer action are clearly intertwined, as they address the central question of which defendant, if any, is liable for plaintiff's accident. Further, plaintiff here prefers that the actions be tried together.

Verneer does not dispute the arguments made by plaintiff and NYCTA that they were unaware of Verneer's potential culpability until the EBT of Mr. Manna was held on July 11, 2019. The Verneer action was commenced four months later, on November 4, 2019, which this court finds to be a reasonable amount of time, and there is no showing that NYCTA knowingly and deliberately delayed the commencement of the Verneer action. *See Marbilla, LLC v. 143/145 Lexington LLC*, 116 A.D.3d 544 (Sup. Ct. App. Div. 1st Dept. 2014) ("Defendant M&R European Construction Corp. provided a reasonable justification for bringing the third-party actions more than six years after the initial action was filed, i.e. that it was unaware of Skyscraper's potential liability until the deposition of a previously unavailable witness was taken."); *contrast with Skolnick v. Max Connor, LLC*, 89 A.D.3d 443 (Sup. Ct. App. Div. 1st Dept. 2011) ("The record establishes that dismissal of the third-party complaint under CPLR 1010 was a provident exercise of the court's discretion. Defendants/third-party plaintiffs delayed in bringing the third-party action until almost a year after the main action for personal injuries was commenced and months after the filing of the note of issue, despite being aware of a potential contractual indemnification claim against third-party defendant. The record supports the court's finding that the defendants

‘knowingly and deliberately delayed the commencement of the third-party action.’ Third-party defendant was also prejudiced by the filing of the third-party complaint months after third-party defendant had dissolved its business and thus, as stated by counsel, no longer had access to employees or records. This would put third-party defendant at a severe disadvantage in gathering evidence to defend itself”). Further, Verneer is still in business and other than vague allegations that “memory has faded and evidence and witnesses are no longer available,” Verneer makes no specific arguments as to any specific employees or records that it is unable to access due to the delay.

With respect to Verneer’s argument that they face the prospect of being forced to trial without any discovery whatsoever in its favor, this can be addressed by accommodating Verneer’s discovery rights (see details below, with respect to Motion #004). With respect to Verneer’s argument that they are subject to the prejudice of being deprived of the ability to move for summary judgment, this court grants leave to Verneer to file a summary judgment motion, at its election, within 60 days from the issuance of this decision¹.


For the reasons stated above, Motion #003 by Verneer seeking to dismiss or sever the Verneer action from the main action, is DENIED.

Finally, with respect to Verneer’s concerns about being able to conduct discovery, and with respect to Motion #004, wherein Verneer seeks an order pursuant to CPLR §3126, dismissing the Verneer action based on NYCTA’s alleged failure to respond to movant’s demand for a verified bill of particulars and combined demands dated December 24, 2019 and including Verneer’s good faith letter dated December 18, 2020: IT IS HEREBY ORDERED that this case shall be conferenced with the court.

¹ To the extent that Verneer argues in its reply to motion #003 that Verneer should be exonerated on the merits, these arguments must be made in a separate motion for summary judgment on those grounds.

Upon the forgoing papers and for the reasons stated above, Motion #003 is DENIED and Motion #004 is GRANTED to extent that the parties are directed to appear for a conference, on a date and time set by the court, to address any outstanding discovery issues. Further, Verneer is GRANTED leave to file a summary judgment motion, at their election, within 60 days from the issuance of this decision.

This is the order of the court.

<u>3/8/2021</u> DATE		 Hon. J.MACHELLE SWEETING, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <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