Zakarin v City of New York
2021 NY Slip Op 31339(U)
April 20, 2021
Supreme Court, New York County
Docket Number: 152949/2017
Judge: Dakota D. Ramseur

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** IAS MOTION 5

Justice

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JESSE ZAKARIN,

Plaintiff,

- v -

THE CITY OF NEW YORK, TROCOM CONSTRUCTION CORP., TROCOM CONSTRUCTION OF NEW YORK LLC, CROWN CASTLE NG EAST, LLC, CROWN CASTLE NG NETWORKS LLC,

Defendant.

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INDEX NO. 152949/2017

MOTION DATE 09/17/2020, 12/07/2020

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

TROCOM CONSTRUCTION CORP., TROCOM CONSTRUCTION OF NEW YORK LLC

Plaintiff,

-against-

HYLAN DATACOM AND ELECTRIC

Defendant.

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Third-Party
Index No. 595661/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 65, 66, 68, 69, 70, 71, 72, 85, 86, 87, 88, 89, 90, 91, 92,101, 102, 103

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 65, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 87, 92, 93, 94, 95, 96, 97, 98, 99, 100, 104

were read on this motion to/for JUDGMENT - SUMMARY.

Plaintiff, Jesse Zakarin, commenced this action for damages related to personal injuries stemming from an October 24, 2016 fall on defective roadway while operating his motorbike on South Street and Maiden Lane, in the County, City, and State of New York. In motion sequence 001, plaintiff now moves pursuant to CPLR 603 and 1010 to dismiss the third-party complaint by defendants Trocom Construction Corp., Trocom Construction of New York LLC (together, Trocom), against third-party defendant, Hylan Datacom & Electrical LLC (Hylan), or in the alternative, severing the third-party action and allowing the plaintiff to file a note of issue. In motion sequence 002, Hylan, mow moves pre-answer pursuant to CPLR 3211(a)(1) and (7) to

dismiss the third-party complaint against it. Trocom, opposes both motions. For the foregoing reasons, and after oral argument on April 20, 2021, both motions are denied.

This action arises out of plaintiff's fall from his Vespa motorbike on October 24, 2016, while plaintiff was riding his two-wheeled vehicle. Crown was hired by non-party Verizon to perform work at the subject intersection. Crown, in turn, sub-contracted with Trocom and Hylan to perform work in the area where plaintiff's accident occurred. The parties disagree as to which party ultimately performed the work.

Plaintiff commenced this action by filing the summons and complaint against defendant, the City of New York (City) in February 2017. On August 21, 2017, plaintiff filed the supplemental summons and amended complaint naming Trocom and defendants, Crown Castle Ng East, LLC and Crown Castle Ng Networks, LLC as additional defendants. Crown Castle filed their answer to the amended complaint on October 3, 2017, Trocom filed their answer on October 27, 2017, and the City filed its answer on April 19, 2019.

The preliminary conference was held on August 8, 2017, at which time the court ordered that third-party actions/impleader be completed within forty-five days of the final examination before trial. Since then, the parties entered nine "So-Ordered" stipulations addressing the exchange of discovery, the final of which is dated March 3, 2020.

An issue in dispute is whether depositions are complete. According to plaintiff, all depositions were completed as of December 9, 2019, whereas Trocom argues that it is entitled to a deposition of the New York City Economic Development Corporation (EDC). According to the September 24, 2019 stipulation, the "City represents DDC [New York City Department of Design and Construction] is not the property entity after review of their files. City to provide documents w/in 30 days indicating [that EDC] is the proper entity (NYSCEF # 41). Both the December 23, 2019 and March 3, 2020 orders contains a nearly identical provision and provide for the City to furnish documents concerning EDC's role in the project (NYSCEF # 42, 43). The City has yet to furnish the documents ordered.

On August 14, 2020, approximately eight months after the most recent deposition, Trocom filed the third-party summons and complaint against Hylan alleging claims for contribution and indemnification. The third-party complaint alleges that Hylan performed the roadway work that created the condition that caused plaintiff's alleged accident.

In support of his motion to dismiss or sever the third-party action, plaintiff argues: 1) the third-party action was added at a late stage in the primary litigation and would delay the action and unduly prejudice plaintiff; 2) that Trocom was aware of Hylan's work on the roadway prior to the filing of the primary action, and delayed filing the third-party action until discovery was nearly complete; and 3) that the time for Trocom to commence a third-party action has expired. In opposition, Trocom argues: 1) that discovery is incomplete, including the deposition of EDC; and 2) that plaintiff has failed to demonstrate he will be prejudiced by not dismissing or severing the third-party action.

As for Hylan's motion to dismiss, Hylan contends that it did not perform work on the roadway where plaintiff's injury occurred. In support of their motion, Hylan submits the affidavit of John Gambino, director of field operations for Hylan, wherein he states that Hylan did not perform any work on the subject roadway prior to plaintiff's accident, and the "As Built." In opposition, Trocom argues: 1) that an issue of fact exists as to whether Hylan performed the work, and the extent of any work performed; and 2) that Hylan's motion is premature since no discovery in the third-party has occurred.

1. Plaintiff's motion to dismiss/sever

CPLR 603 authorizes courts to sever claims "in furtherance of convenience or to avoid prejudice." Pursuant to CPLR 1010, the court may make any order with respect to the third-party action "as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party."

"Severance is inappropriate where . . . , there are common factual and legal issues involved in two causes of action, and the interests of judicial economy and consistency of verdicts will be served by having a single trial" (*Naylor v Knoll Farms of Suffolk Cty., Inc.*, 31 AD3d 726, 727 [2d Dept 2006]). Indeed, "[i]t is preferable to try related actions together, to avoid a waste of judicial resources and the risk of inconsistent verdicts" (*Williams v Property Servs.*, 6 AD3d 255, 256 [1st Dept 2004]). "The grant or denial of a request for severance is a matter of judicial discretion, which should not be disturbed on appeal absent a showing of prejudice to a substantial right of the party seeking severance" (*Zili v City of New York*, 105 AD3d 949, 950 [2d Dept 2013]; *Rothstein v Milleridge Inn*, 251 AD2d 154, 155 [1st Dept 1998] ["severance is inappropriate absent a showing that a party's substantial rights would otherwise be prejudiced"]).

Here, plaintiff failed to demonstrate substantial prejudice resulting from permitting the third-party action to continue. Importantly, discovery in the primary action is incomplete and the note of issue has not been filed. While discovery not has commenced in the third-party action, this matter will be placed on an expediated discovery schedule. Further, while the court notes that Trocom was aware that Hylan was permitted to perform work at the subject intersection, there is no proof Trocom intentionally delayed filing the third-party complaint.

2. Hylan's motion to dismiss

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, " 'factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . , are not entitled to such consideration' " (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267, [1st Dept 2006], *affd* 9 NY3d 836, [2007], *cert denied* 552 US 1257 [2008]). "Whether the plaintiff will ultimately be successful in establishing those allegations is

not part of the calculus" (*Landon v Kroll Lab. Specialists*, Inc., 22 NY3d 1, 6 [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

"When evidentiary material is considered [on a CPLR 3211(a)(7) motion to dismiss], the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one, and, unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, again dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Dismissal is warranted pursuant to CPLR 3211(a)(1) where the documentary evidence "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted]).

At the outset, the branch Hylan's pre-answer motion to dismiss pursuant to CPLR 3211(a)(1) is denied as untimely. A motion to dismiss pursuant to CPLR 3211(a)(1) must be made before service of the responsive pleading or raised in the pleading (CPLR 3211[e]). Hylan filed its motion to dismiss on December 7, 2020, nearly four months after Trocom filed the third-party complaint, and there is no evidence of an extension for the time to answer (*see Portilla v. L. Offs. of Arcia & Flanagan*, 125 AD3d 956, 957 [2d Dept 2015] [denying the branch of defendant's motion to dismiss pursuant to CPLR 3211(a)(1) where it was not made within the time period in which the appellants were required to serve an answer and no extension of time to make the motion was requested by the appellants or granted by the court]).

In any event, the affidavit and documents submitted by Hylan do not meet the standard for documentary evidence, and thus not considered by the court for the purpose of the branch of its motion under CPLR 3211(a)(1) (*see e.g. Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010] ["it is clear that affidavits and deposition testimony are not 'documentary evidence' within the intendment of a CPLR 3211(a)(1) motion to dismiss"]).

The branch of Hylan's motion pursuant to CPLR 3211(a)(7) is also denied. While Hylan's director of field operations states that Hylan did not perform any work on the subject roadway before plaintiff's accident, in opposition, Trocom submits the work permits issued to Hylan on behalf of Crown to perform construction work at the subject roadway, and proof that Hylan performed some work, albeit not roadway work. While Crown's witness testified that Hylan did not perform the work due to a work-stop order, the work-stop order is not submitted as part of the record. Accordingly, neither the proof submitted in support of Hylan's motion, nor the testimony by Crown's employee, utterly refutes Trocom's allegation that Hylan performed work at the subject roadway.

Accordingly, it is hereby

ORDERED that plaintiff's motion pursuant to CPLR § 603 and 1010 to dismiss the third-party complaint is denied; and it is further

ORDERED that Hylan' pre-answer motion pursuant to CPLR 3211(a)(1) and (7) is denied. Hylan shall serve and file an answer to the third-party complaint within twenty-one days; it is further

ORDERED that within five (5) days, the parties shall contact David Solomkin (dsolomki@nycourts.gov) to schedule a status conference for May 18, 2021, or another day he determines, in order to schedule the exchange of discovery on an expedited basis. The parties shall attach a copy of this order to the aforesaid email; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon all parties, within fourteen (14) days of entry.

This constitutes the decision and order of the Court.

4/20/2021
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE