

Mareneck v Bohemian Brethren Presbyt. Church

2021 NY Slip Op 31572(U)

May 7, 2021

Supreme Court, New York County

Docket Number: 151088/2019

Judge: David Benjamin Cohen

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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. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

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INDEX NO. 151088/2019

AIMEE MARENECK,

Plaintiff,

MOTION SEQ. NO. 002 and 003

- v -

BOHEMIAN BRETHERN PRESBYTERIAN CHURCH d/b/a
JAN HUS PRESBYTERIAN CHURCH,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

BOHEMIAN BRETHERN PRESBYTERIAN CHURCH D/B/A
JAN HUS PRESBYTERIAN CHURCH

Third-Party
Index No. 595701/2020

Third-Party Plaintiff,

-against-

UNIQUE BUILDING MAINTENANCE SERVICES CORP.

Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 67, 68, 69, 70, 71, 73

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 72, 74

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action commenced by plaintiff Aimee Mareneck, defendant/third-party plaintiff Bohemian Brethren Presbyterian Church d/b/a Jan Hus Presbyterian Church (“the Church”) moves (motion sequence 002), pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it. The plaintiff opposes the Church’s motion. Third-party defendant Unique Building Maintenance Services Corp. (“Unique”) moves

(motion sequence 003), pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint or, in the alternative, pursuant to CPLR 603 and 1010, severing the third-party action against it. The Church opposes Unique's motion. After consideration of the parties' contentions, and after a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

On or about August 16, 2018, Unique entered into a contract pursuant to which it agreed to perform cleaning services at the Church on Mondays through Saturdays. Doc. 33.

On November 5, 2018, plaintiff was allegedly injured when she slipped and fell on a wet floor in the vestibule of the Church, which was located at 351 East 74th Street in Manhattan. Doc. 1 at pars. 10, 21. On January 31, 2019, the plaintiff commenced the instant action against the Church, alleging that it was negligent, inter alia, in failing to place mats on the floor, failing to place signs warning that the floor was wet, and failing to rope off the wet area. Doc. 1 at par. 22. The plaintiff also alleged that the Church caused the condition or had actual and/or constructive notice that the floor was wet. Id.

The Church joined issue by service of its answer, filed April 12, 2019, in which it denied all substantive allegations of wrongdoing and asserted various affirmative defenses. Doc. 4.

In her bill of particulars against the Church, dated July 11, 2019, the plaintiff alleged that she was injured on November 15, 2018¹ when she slipped and fell on a wet and slippery floor in the vestibule of the Church. Doc. 47. Her allegations of negligence against the Church substantially reiterated those in her complaint. Id. at par. 4.

¹ This is evidently a typographical error since the complaint and the plaintiff's deposition testimony indicate that the incident occurred on November 5, 2018.

At her deposition in January 2020, the plaintiff testified that, on November 5, 2018, she went to the Church at about 9:50 a.m. to look at a bulletin board where information about upcoming events was posted. Doc. 16 at 13-15, 19. She had been to the Church, which had a community center, on approximately 25 prior occasions for various activities. Id. at 15. On the day of the incident, the plaintiff took a car service to 73rd Street and First Avenue and then walked approximately one half block to the Church in light rain.² Id. at 19-21, 34-35.

To enter the Church, one walked through an outer set of doors into a vestibule, and then through a second set of doors. Id. at 22-23. After the plaintiff entered the first set of doors and was about to open the second, her “leg slipped out, flew out from underneath [her] and [she] fell.” Id. at 23-27. She maintained that she fell due to “a puddle of water on the [marble or granite] floor” which she did not see until after her accident. Id. at 30-33. On a photograph marked as Exhibit B at her deposition, the plaintiff circled the area where the puddle had been. Id. at 84; Doc. 51. There were no cones or caution signs in the area where she fell and she could not recall whether any mats were present. Doc. 16 at 34, 87.³ She did not know how long the puddle was present, whether anyone else ever slipped on water in the vestibule, or whether anyone had complained about water in that location. Id. at 36. Nor was she aware of any witnesses to the accident. Id. at 107.

The deposition of Monica Carson, an administrator for the Church, was conducted on August 3, 2020. Doc. 52 at 1, 5. Carson testified that she was at the Church on the day of the alleged incident and that it was raining that day. Id. at 7, 22. According to Carson, there was always a red carpet in the vestibule and an individual employed by a cleaning service hired by

² The plaintiff clarified that, although it had rained heavily earlier that morning, it was raining lightly at the time of the incident. Doc. 16 at 55.

³ The plaintiff admitted, however, that she did not see whether any cones or warning signs had been placed inside of the Church, i.e., in the area one entered after passing through the second set of doors. Id. at 86.

the Church, the name of whom she could not recall, placed an orange cone and wet floor sign in that area on snowy or rainy days. Id. at 14-17. That same individual routinely swept and mopped the vestibule. Id. at 21.

Following the plaintiff's fall, Carson was told by two co-workers that the plaintiff had fallen in the vestibule and that the cone and wet floor were in that area at the time of the incident. Id. at 24-25. Carson further stated that, although it was the custom and practice of the Church to have Church employee Josephine Wilson or Reverend Jordan Tarwater mop the vestibule with a dry mop on rainy days, she was not certain whether they did so that day prior to the plaintiff's fall. Id. at 23-25. Although Wilson and Rev. Tarwater assisted the plaintiff after the incident, neither of them told Carson whether the floor was dry in the vestibule. Id. at 26. Carson was not aware of any witnesses to the incident. Id. at 27.

In August 2020, the Church commenced a third-party action against Unique asserting claims for contribution, common-law and contractual indemnification, and breach of contract to procure insurance. Doc. 21.

The plaintiff filed a note of issue on December 8, 2020. Doc. 37. The same day, the Church moved for a default judgment against Unique, which, to that point, had failed to answer. Doc. 26. The motion was subsequently withdrawn. Doc. 75.

On January 11, 2021, Unique joined issue by filing an answer to the third-party complaint denying all substantive allegations of wrongdoing, asserting various affirmative defenses, and asserting a counterclaim against the Church for contribution and common-law indemnification. The Church filed its denial of the allegations in the counterclaim on January 14, 2021. Doc. 55.

The Church now moves (motion sequence 002) for summary judgment dismissing the complaint and all cross claims against it pursuant to CPLR 3212, asserting that it did not have

actual or constructive notice of the puddle. Docs. 42-54. In support of the motion, the Church submits, inter alia, the pleadings, bill of particulars, the deposition transcripts, and the photographs marked as exhibits at the depositions.

Additionally, the Church submits an affidavit by Wilson in which she attests that she was responsible, inter alia, for overseeing the maintenance and cleaning of the common areas; she arrived to work at about 9:30 on the day of the incident, at which time the vestibule was dry; that mats and yellow caution signs were placed in the vestibule on the day of the incident because it was raining; the vestibule was routinely cleaned and mopped daily between 7:30 and 8:30 a.m. and then inspected by Church staff to ensure it was done correctly; and that the Church was not aware of any problems with liquids in the vestibule area prior to the incident. Doc. 53.

Jeffrey Schwalje, P.E., a licensed professional engineer, also submits an affidavit in support of the motion in which he represents, inter alia, that the tile in the vestibule was slip-resistant and safe for use in wet or dry conditions and that his inspection of the area revealed no code violations. Doc. 54.

Unique moves (motion sequence 003) for summary judgment dismissing the third-party complaint pursuant to CPLR 3212 or, in the alternative, for severance of the third-party action pursuant to CPLR 603 and 1010, and submits exhibits substantially identical to those submitted by the Church. Docs. 56-66.

In support of its motion, Unique essentially adopts the arguments made by the Church and insists that, since the Church has no liability, the third-party claim against it must fail. Doc. 57. Alternatively, Unique argues that the third-party action must be severed since the Church, which contracted with Unique in August 2018, knew about the said entity since that time and, despite being sued by the plaintiff in January 2019, did not implead Unique until August 2020.

Id. Unique further asserts that severance is warranted since it has not yet had the chance to conduct discovery and it would be prejudiced if forced to proceed to trial without it. Id. Additionally, Unique asserts that the denial of its motion to sever would prejudice the plaintiff by delaying the main action. Id.⁴

In opposition to the Church's motion, the plaintiff argues that Wilson's affidavit should be disregarded as improper since it self-serving and offered by one with exclusive knowledge of the facts. Doc. 67. She further asserts that, since the plaintiff contradicts Wilson's representation that a cone and wet floor sign were present in the vestibule, a question of fact exists warranting the denial of the motion. Id. Further, the plaintiff argues that Schwalje's affidavit should not be considered by this Court since he inspected the premises on June 5, 2019 and yet the Church failed to disclose him as its expert in response to the plaintiff's July 2019 demand for expert information. Id. Alternatively, the plaintiff asserts that, if Schwalje's affidavit is to be considered, then this Court should also consider the affidavit of her newly retained expert engineer, Jeffrey Ketchman, P.E., who opines that Schwalje's conclusions are "incorrect and unreliable" for a number of reasons. Id. at 9.

In opposition to Unique's motion, the Church argues that Unique failed to establish its prima facie entitlement to summary judgment by submitting an affidavit or sworn testimony establishing that it did not cause or have actual or constructive notice of the puddle. Doc. 72. The Church further asserts that the branch of Unique's motion seeking severance must be denied since it failed to establish that it would be prejudiced if it were to proceed to trial. Id. The Church specifies that, although Unique was served with the third-party complaint in September 2020, two months before the note of issue was filed, it did not answer, leading the Church to

⁴ This Court notes that the plaintiff does not take a position with respect to Unique's motion.

move for a default against it in December 2020. *Id.* The Church maintains that, since Unique did not answer until January 2021, approximately four months after it was served with the third-party complaint, it cannot be heard to complain that it is prejudiced because the case is on the trial calendar. Further, stresses the Church, had Unique believed that it would be prejudiced by its inability to obtain discovery, it could have moved to strike the note of issue. *Id.*

In reply, the Church argues, *inter alia*, that the complaint must be dismissed since the plaintiff failed to raise an issue of fact regarding notice. Doc. 73.

In its reply, Unique reiterates its claims that the third-party complaint must be dismissed and that, if it is not, then it must be severed. Doc. 74.

LEGAL CONCLUSIONS

The Church's Motion For Summary Judgment (Motion Sequence 002)

The “proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

This Court finds that the Church failed to establish its *prima facie* entitlement to summary judgment as a matter of law. As the plaintiff asserts, Wilson’s affidavit fails to make this showing since “self-serving statements of an interested party which refer to matters exclusively

within that party's knowledge create an issue of credibility which should not be decided by the court but should be left for the trier of facts" (*Staley El. Co. v Kubacka*, 188 AD2d 252, 253 [1st Dept 1992] [citations omitted]).

This Court further determines that the foregoing conclusion is warranted as a matter of fundamental fairness. Specifically, although the Church had the opportunity to produce for deposition a witness with personal knowledge of the facts giving rise to the claim, it produced Carson, who not only lacked such knowledge, but also based substantial elements of her testimony on hearsay. In its response to the plaintiff's July 2019 demand for notice witnesses and/or witnesses to the occurrence (Doc. 61), the Church represented that it was not aware of any. Doc. 70. Only now, in the Church's motion papers, does it become apparent that Wilson had personal knowledge of the events surrounding the incident, including notice issues, all along, and the fact that the Church did not divulge her identity at the time it was required to produce a witness for deposition should not inure to its benefit (*See generally May v American Multi-Cinema, Inc.*, 191 AD3d 657, 658 [2d Dept 2021] [citations omitted] ["a court determining a motion for summary judgment generally should not consider the affidavit of a notice witness submitted in opposition to the motion where the witness was not previously disclosed"]).

Even assuming, arguendo, that the Church had established its prima facie entitlement to summary judgment, this Court would be constrained to deny its motion given that issues of fact clearly exist regarding notice and whether the vestibule was wet. Specifically, although the plaintiff testified that the vestibule was wet at approximately 9:50 a.m. and that there were no warning signs or cones in the area, Wilson avers in her affidavit that the vestibule was dry at approximately 9:30 a.m. and that there were yellow warning signs in the area.

Unique's Motion For Summary Judgment/Severance (Motion Sequence 003)

Since the branch of Unique's motion seeking summary judgment is based solely on the evidence submitted by the Church, its motion must be denied on the grounds set forth in the analysis of the Church's motion.

The branch of Unique's motion seeking severance is also denied. CPLR 603 provides that "[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue." CPLR 1010 provides that:

The courts may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order 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.

New York courts routinely hold that "[i]t is preferable to try related actions together, in order to avoid a waste of judicial resources and the risk of inconsistent verdicts" (*Williams v Property Servs.*, 6 AD3d 255 [1st Dept 2004]). Courts may grant separate trials if the party seeking them demonstrates "prejudice to a substantial right" in the absence of severance. *Id.* The decision whether to sever is a matter within the sound discretion of the court (*see Escourse v City of New York*, 27 AD3d 319, 320 [1st Dept 2006]).

In tort cases such as this, where the issue is the respective liability of the defendant and the third-party defendant for the plaintiff's injury, it is preferable for related actions to be tried together. (*see Vecciarelli v. King Pharms., Inc.*, 71 AD3d 595 [1st Dept 2010]). Whether or not to grant a motion to sever usually depends on whether the third-party defendant has had an adequate opportunity for discovery (*Compare Solano v Castro*, 72 AD3d 932 [2d Dept 2010] [defendant's motion to sever third-party action denied where it had opportunity to conduct

discovery in third-party action] *with Singh v City of New York*, 294 AD2d 422 [2d Dept 2002] [upholding severance order to avoid prejudice to plaintiff where plaintiff was ready for trial on issue of damages but third-party defendants had not commenced discovery in connection with indemnification claim]; *Cusano v Sankyo Seiki Mfg. Co. Ltd.*, 184 AD2d 489 [2d Dept 1992] [severance appropriate where impleader would either prejudice plaintiffs by delaying trial or prejudice third-party defendants by requiring them to proceed to trial without discovery]).

Here, this Court, in its discretion, denies that branch of Unique's motion seeking severance. Initially, the main action and the third-party action involve common factual and legal issues, specifically whether the Church and/or Unique caused or contributed to the plaintiff's injuries. Although Unique correctly asserts that the Church, which contracted with Unique in 2018, delayed in waiting until August of 2020 to file the third-party complaint, this does not, in and of itself, warrant severance. On the contrary, Unique's contention that it would be prejudiced if severance were denied since it has not had the opportunity to conduct discovery is disingenuous and belied by the fact that it moved for summary judgment based *entirely* on evidence that had already been exchanged in the main action. Had Unique actually needed additional discovery, it could have moved to strike the note of issue but failed to do so.⁵

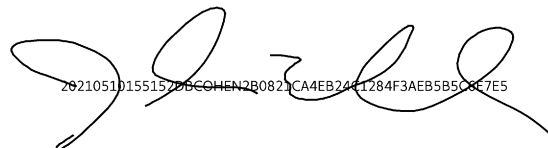
Accordingly, it is hereby:

ORDERED that the motion by defendant/third-party plaintiff Bohemian Brethren Presbyterian Church d/b/a Jan Hus Presbyterian Church for summary judgment dismissing the complaint and all cross claims against it pursuant to CPLR 3212 (motion sequence 002) is denied; and it is further

⁵ Although this Court acknowledges that Unique was in default at the time the note of issue was filed, this would not have prevented it from moving to vacate the same upon a showing of good cause after it appeared (*see* 22 NYCRR 202.21[e]).

ORDERED that the motion by third-party defendant Unique Building Maintenance Services Corp. for summary judgment dismissing the third-party complaint pursuant to CPLR 3212 or, in the alternative, severing the third-party action pursuant to CPLR 603 and 1010 (motion sequence 003), is denied in all respects.

5/7/2021
DATE



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DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE