

<b>Kalnit v Philip House Condominium</b>
2021 NY Slip Op 32262(U)
November 10, 2021
Supreme Court, New York County
Docket Number: Index No. 155832/2018
Judge: J. Mabelle Sweeting
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. J. MACHELLE SWEETING

PART

Justice

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CHARLOTTE KALNIT,

Plaintiff,

- v -

PHILIP HOUSE CONDOMINIUM, ROCK GROUP NY CORP., DJM NYC, LLC,

Defendant.

-----X

DJM NYC, LLC

Plaintiff,

-against-

THE CITY OF NEW YORK, DEPARTMENT OF PARKS AND RECREATION OF THE CITY OF NEW YORK

Defendant.

-----X

ROCK GROUP NY CORP.

Plaintiff,

-against-

MAGA CONTRACTING CORP.

Defendant.

-----X

INDEX NO. 155832/2018

MOTION DATE 05/14/2021 05/21/2021

MOTION SEQ. NO. 011, 012

DECISION + ORDER ON MOTION

third-party Index No. 595014/2020

Second third-party Index No. 595227/2020

The following e-filed documents, listed by NYSCEF document number (Motion 011) 287, 288, 289, 290, 291, 304, 305, 306, 307, 308, 309, 310, 311, 313, 314, 315, 316, 317, 319

were read on this motion to/for SEVER ACTION

The following e-filed documents, listed by NYSCEF document number (Motion 012) 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 312, 318, 320, 321, 322, 323, 324, 325, 326, 327

were read on this motion to/for STRIKE PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 012) 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 312, 318, 320, 321, 322, 323, 324, 325, 326, 327

were read on this motion to/for

VACATE/STRIKE - NOTE OF ISSUE/JURY

In the underlying action, plaintiff Charlotte Kalnit (“plaintiff”) alleges to have sustained injuries in a trip and fall on a sidewalk that was narrowed due to the placement of a sidewalk shed erected outside the premises located at 141 E. 88<sup>th</sup> Street, in the County of New York, City and State of New York.

Plaintiff commenced this action on or about June 21, 2018 against Philip House Condominium (the “Owner”), as the owner of the premises; against 141 East 88<sup>th</sup> Street, LLC (the “Manager”) as the managing agent for the commercial tenants of the premises; and against Rock Group NY Corp. (the “Contractor”), as the entity which erected the scaffold shed. Plaintiff later filed an Amended Summons and Complaint to add as a defendant DJM NYC, LLC (the “General Contractor”), as the general contractor of the construction/repair project taking place at the premises on the date of the accident.

On or around January 3, 2020, the General Contractor commenced a third-party action against the City of New York and the Department of Parks and Recreation of the City of New York (collectively, the “City”) seeking common law indemnification and contribution. On or about March 4, 2020, the Contractor commenced a second third-party action against MAGA Contracting Corp. (the “Subcontractor”) seeking common law indemnification and contribution. Subsequently, on November 1, 2021, the second third-party action was discontinued without prejudice (NYSCEF No. 339).

Pending now before the court are two motions:

Motion #011 wherein plaintiff seeks to sever the third-party action and the second third-party action from the main negligence action.<sup>1</sup>

Motion #012 wherein the General Contractor seeks an order:

- (i) pursuant to Uniform Rule 202.21(e), striking the plaintiff's Note of Issue and Certificate of Readiness;
- (ii) issuing sanctions and awarding costs of drafting and, if applicable, arguing the within motion; and
- (iii) setting a discovery schedule for the General Contractor to obtain discovery from the City, including but not limited to directing the City entities to appear for depositions; and to respond to pre- and post-deposition discovery demands.

These motions were conferenced and argued before the undersigned on October 18, 2021 and November 4, 2021. Pursuant to the same, this court finds as follows:

#### Plaintiff's Motion

Plaintiff seeks an order, pursuant to CPLR §603, severing the third-party action and the second third-party action, and setting the matter down for an immediate trial. Plaintiff argues that she has no direct claims against any third-party defendants; that all discovery is complete on the main action; that a Note of Issue ("NOI") has been filed; and that she had been granted a trial preference on the basis of her age of 81. Plaintiff argues that the third-party actions are unripe at this time, and that the failure to sever would prejudice plaintiff by a further delay of trial. Plaintiff also argues that the third-party and second third-party actions seek common law indemnity and contribution, which are irrelevant to the issues in the main negligence action.

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<sup>1</sup> As stated above, the second third-party action was discontinued, without prejudice on November 1, 2021. Accordingly, this decision addresses only those claims remaining under the main action and the third part action.

The General Contractor, who had filed a third-party action against the City, opposed this motion. They argue that the third-party complaints should not be severed from the main action because (i) they were timely filed; (ii) plaintiff's allegations in the main action directly implicate the third-party defendants, and accordingly, they are essential parties in the main action and therefore need to remain joined to this action; and (iii) plaintiff failed to show any prejudice in her moving papers. The General Contractor argues, with respect to third-party defendant City, that the City owns and was responsible for maintenance of the subject tree well, which is the precise subject of plaintiff's lawsuit. The General Contractor argues, with respect to third-party defendant Subcontractor, that the Subcontractor was responsible for the erection, placement and maintenance of the scaffold.

The Contractor, who had filed a third-party action against the Subcontractor, also opposed this motion. The Contractor argues that the plaintiff's motion to sever should be denied because the actions involve indispensable parties and intertwined issues, as the third-party claims are directly related to the facts and issues in question in the main action. Specifically, the third-party actions involve the City's maintenance of the tree well and the construction of the sidewalk shed. The Contractor further argues that the matter has not been scheduled for trial, and that plaintiff cannot claim that she would be prejudiced if the matters are not severed, as she waited over a year after the third-party actions were first commenced before moving for a severance.

The First Department has made clear that related actions should be tried together when possible, and that the presumption is one against severance. *See Williams v Prop. Services, LLC*, 6 AD3d 255 (Sup. Ct. App. Div. 1st Dept 2004) ("It is preferable to try related actions together, in order to avoid a waste of judicial resources and the risk of inconsistent verdicts [...] These incidents arose from a common nucleus of facts [...], and will require almost the same list of

witnesses [...]. Defendants have failed to demonstrate prejudice to a substantial right in the absence of severance of these claims”); Neckles v VW Credit, Inc., 23 AD3d 191 (1st Dept 2005) (“The motion court erred in granting plaintiff’s motion to sever the main action from the third-party action. The main and third-party actions involve common factual and legal issues which should be tried together [...] Moreover, denial of plaintiff’s motion to sever will allow the third-party defendant, who may be liable for indemnification to appellant, to participate in the damages phase of the first-party action”).

As discussed in detail in the undersigned’s June 22, 2021 decision, the crux of plaintiff’s assertion is that she sustained serious injury when her left foot came into contact with the uneven surface of the sidewalk and the tree well, and that such contact occurred only because defendants had negligently narrowed the passageway on the sidewalk by their placement of a support pole for the scaffolding. In the third-party complaint, defendant General Contractor argues that plaintiff never made any physical contact with the scaffolding, and that plaintiff’s injuries resulted from her contact with the tree well maintained by the third-party defendant City.

Given the above, it is clear that the issues of law and fact involved in the main action and the third-party actions are inextricably intertwined, as they address the central question of which defendant, if any, is liable for plaintiff’s accident. Further, denial of this motion allows the third-party defendants, who may be liable for indemnification or contribution, to participate in the damages phase of the first-party action.

Accordingly this motion is DENIED.

### General Contractor's Motion

The General Contractor seeks an order striking the NOI and Certificate of Readiness and seeks an order awarding sanctions and costs for drafting and, if applicable, arguing the within motion. The General Contractor also seeks an order setting forth a discovery schedule for the General Contractor to obtain discovery from the third-party defendant City. The General Contractor argues that there is still outstanding discovery that needs to be completed, and that the NOI was filed prematurely as there were three summary judgment motions pending at the time the NOI was filed<sup>2</sup>.

The Owner and the Contractor<sup>3</sup> filed papers in support of striking the NOI and Certificate of Readiness. The City also filed papers in support of striking the NOI and Certificate of Readiness. In opposition, plaintiff argues that defendants failed to detail any specific discovery which is material and necessary to the defense of the action to support an order vacating the NOI. Specifically, plaintiff argues that the third-party actions are for common law indemnification, not based on any contractual obligation which could necessitate discovery, and that defendants can seek any discovery they deem necessary within the statute of limitations on an indemnification claim which would only be ripe after such time as a judgment is entered against them.

As discussed above, the issues in the primary action and the third-party actions are intertwined, and plaintiff's motion to sever is denied. With regard to the General Contractor's request that the Court set a discovery schedule for the General Contractor to obtain discovery from the City, this branch of the motion is moot, as this court's order, dated October 18, 2021 directed

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<sup>2</sup> The summary judgment motions (Motions #006, 007 and 008) were decided by the undersigned in an order dated June 22, 2021.

<sup>3</sup> The Contractor, Rock Group had joined the General Contractor in its Motion to Strike the Note of Issue, but had argued that Rock Group was not primarily responsible for maintenance of the sidewalk shed.

the third-party plaintiff General Contractor and the City to submit a proposed case scheduling order, which has been “so ordered” by the court. In reviewing the same, EBT’s are scheduled to be held as early as December 3, 2021, thus, there is no prejudice evidenced on this record.

For all the reasons set forth herein, the NOI and Certificate of Readiness are vacated.


It is hereby:

**ORDERED** that plaintiff’s motion to sever the main action from the third-party action is DENIED; and it is further hereby

**ORDERED** that the Note of Issue and Certificate of Readiness are hereby STRICKEN; and it is further hereby

**ORDERED** that the caption in this case shall be amended, consistent with the decision herein and the filed stipulation of discontinuance, in that the second third-party action has been discontinued.

This is the Decision and Order of this court.

<u>11/10/21</u> DATE					 HON. J. MACHELE 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"/>	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