

Fein v City of New York
2022 NY Slip Op 32117(U)
June 29, 2022
Supreme Court, New York County
Docket Number: Index No. 160415/2017
Judge: Leslie Stroth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE STROTH PART 52

Justice

-----X

ELIZABETH FEIN,

Plaintiff,

- v -

THE CITY OF NEW YORK, CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC.,

Defendant.

-----X

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Plaintiff,

-against-

CLEAN UP SERVICE INC

Defendant.

-----X

INDEX NO. 160415/2017
MOTION DATE 03/15/2022
MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

Third-Party
Index No. 595962/2021

The following e-filed documents, listed by NYSCEF document number (Motion 005) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99

were read on this motion to/for SEVER

This action was brought by plaintiff Elizabeth Fein for personal injuries allegedly sustained in a slip/trip and fall accident on March 31, 2017. The action was commenced by a summons and complaint filed on November 22, 2017. (See NYSCEF doc. no. 1). Defendant the City of New York (the City) joined by filing an answer on November 13, 2020. (See NYSCEF doc. no. 38). Defendant/third-party plaintiff Consolidated Edison of New York (Con Ed) filed its answer on January 16, 2018. (See NYSCEF doc. no. 3).

Over three years after commencement of the first-party action, Defendant/third plaintiff Con Ed filed a third-party summons and complaint naming Clean Up Service Inc. (Clean Up) as

the third-party defendant on October 22, 2021. (*See* NYSCEF doc. no. 54). Clean Up joined issue by the filing of an answer on January 21, 2022. (*See* NYSCEF doc. no. 70). Plaintiff filed the Note of Issue on December 3, 2021, prior to the filing of Clean Up's answer. Plaintiff also moved for a special preference pursuant to CPLR 3403 due to her age, which the Court granted, moving the case up on the trial calendar. (*See* NYSCEF doc. no. 1).

However, Clean Up notes that it has requested but not received any discovery in the third-party action and has not deposed any parties. In light of plaintiff's special trial preference and early phase of discovery in the third-party action, Clean Up argues that it would be unduly prejudicial for the third-party action to proceed to trial. Clean Up maintains that allowing two actions in stages of discovery to be tried together would severely prejudice Clean Up, especially here when the Note of Issue has been filed. Therefore, Clean Up moves for an order pursuant to CPLR 603 and 1010 severing the third-party action and providing for a separate trial, or, in the alternative for an order vacating the Note of Issue and Certificate of Readiness pursuant to 22 NYCRR §202.21(e) and granting third-party defendant, Clean Up, expedited discovery.

Plaintiff partially supports Clean Up's motion and submits that the third-party action should be severed to avoid undue delay and resulting prejudice to plaintiffs. However, plaintiff argues that the Note of Issue should not be vacated, because Clean Up did not demonstrate unusual or unanticipated circumstances that would have led to *vacatur*. Given the trial preference and long duration of this case, plaintiff seeks to move the case to trial as soon as possible, and endorses severing the third-party complaint to ensure an expeditious trial.

Con Ed opposes Clean Up's motion to sever and advocates that the case remain on the trial calendar. Con Ed argues that severing the third-party action will cause severe prejudice to Con Ed, because the first-party action and the third-party action have common legal and factual issues that

are inextricably intertwined, and by severing the actions Con Ed will incur the cost and effort of trying the same issues twice.

Con Ed further contends that the case should remain on the trial calendar. Con Ed points out that Clean Up can conduct supplemental depositions and/or medical examinations of plaintiff and that the remaining discovery can be completed while the case is on the calendar, even with given plaintiff's preference. Moreover, during the pendency of this motion, discovery has been exchanged between Con Ed and Clean Up, in the form of responses to discovery demands (*see* NYSCEF doc. no. 87, 88) and a bill of particulars (*see* NYSCEF doc. no. 89).

In the interest of judicial economy, the Court declines to sever the two actions at this juncture. Notably, it does not appear that a trial date has yet been selected on this matter or that the matter will be tried within the next 90 days. Given the representations by Con Ed that outstanding discovery can be completed within one month, the Court grants Clean Up's motion to the extent of ordering expedited discovery in the third-party action, as detailed below. Accordingly, it is

ORDERED that: (1) Con Ed is to provide all previously exchanged paper discovery to Clean Up within 30 days of the date of this order; (2) Any additional depositions shall be noticed and held within 45 days of the date of this order, (3) Within 60 days of the date of this order, the parties shall confer to resolve any remaining issues and are to detail in writing any outstanding discovery, to be supplied at a conference with this Court's DCM Part, and it is further


ORDERED that Clean Up's motion is granted to the extent that discovery shall be completed expeditiously, as outlined above, and it is further

ORDERED that the part of Clean Up's motion seeking severance is denied, without prejudice. Clean Up may re-file a motion to sever if, upon review of all of the discovery provided, proceeding to trial would still be unduly prejudicial,¹ and it is further

ORDERED that counsel are directed to appear for a status conference to be held via Microsoft Teams on August 3, 2022 at 4:00 p.m. regarding any outstanding discovery with respect to the third-party complaint.

The foregoing constitutes the Decision and Order of the Court.

6/29/2022
DATE


LESLIE STROTH, 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
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE

¹ Any subsequent motion for severance shall be supported by a detailed affirmation by moving counsel as to the particular outstanding discovery and his/her attempts to resolve the outstanding discovery issues, in accordance with 22 NYCRR 202.7 (a) and (c).