

Rubin v City of New York
2022 NY Slip Op 34196(U)
December 8, 2022
Supreme Court, New York County
Docket Number: Index No. 160347/2015
Judge: Leslie A. Stroth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LESLIE A. STROTH

PART 52

Justice

-----X

INDEX NO. 160347/2015

MARILYN RUBIN,

MOTION DATE 02/24/2022

Plaintiff,

MOTION SEQ. NO. 002

- v. -

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

DECISION + ORDER ON
MOTION

Defendant.

-----X

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Third-Party
Index No. 595007/2022

Plaintiff,

-against-

SAFEWAY CONSTRUCTION ENTERPRISES INC.,
CITYWIDE PAVING INC.

Defendant.

-----X

THE CITY OF NEW YORK

Second Third-Party
Index No. 595088/2022

Plaintiff,

-against-

CARLO LIZZA & SONS PAVING, INC

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 75, 76, 77, 78, 79, 80, 81, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107

were read on this motion to/for

SEVER ACTION

This is an action to recover monetary damages for personal injuries sustained on May 31, 2015, when plaintiff Marilyn Rubin (plaintiff) stepped into a puddle that allegedly concealed a large hole in the roadway on West 43rd Street in New York, NY. Plaintiff commenced this action against the City of New

York (the City) and Consolidated Edison Company of New York, Inc. (Con Ed) on October 8, 2015. Con Ed commenced a third-party action against Safeway Construction Enterprise, Inc. (Safeway) and Citywide Paving, Inc. (Citywide) on January 4, 2022, over seven years after commencement of initial action. The City filed a second third-party action against Carlo Lizza & Sons Paving, Inc. (Carlo Lizza Paving) on February 2, 2022, also over seven years following initial action commencement.

Plaintiff now moves to sever the third-party actions by both defendants, the City and Con Ed, pursuant to CPLR 1010.¹ Defendants the City, Con Ed, Citywide, and Safeway oppose the motion.

I. Arguments

Plaintiff argues that this negligence case is unrelated to defendants' contractual claims and, therefore, the Court should sever both third-party actions. Plaintiff asserts that this case is predicated on tort liability, and the third-party actions are solely based on complex contractual indemnity and contribution claims. Plaintiff notes that the statute of limitations on negligence claims has long since expired. She further argues that the third-party actions will substantially delay the trial and prejudice her case, that these actions could have been commenced years ago, and that there has not been any discovery or disclosures on either third-party action yet. In fact, plaintiff asserts that the City and Con Ed knew of the third-party defendants from the case's inception.

Plaintiff emphasizes that this case has been litigated for approximately seven years and, if the third-party actions are not severed, she will be extremely delayed in completing discovery and scheduling a trial date before she can file her note of issue.

¹ Plaintiff's motion also seeks an order to compel the City and Con Ed to produce their last witnesses, direct Con Ed to provide all outstanding discovery or, alternatively, strike their answers for failure to fully comply with the Court's order, and permit plaintiff to file her note of issue. *See* NYSCEF doc. no. 109. The parties resolved these issues by stipulation.

Plaintiff contends that the third-party indemnity and contribution claims should be addressed after the jury determines liability, causation, and damages. She maintains that a trial on this matter would require trying unrelated issues if the third-party claims are not severed.

The City opposes plaintiff's motion, arguing that such severance would risk creating inconsistent verdicts and waste judicial resources. The City asserts that the New York City Department of Transportation (DOT) and Department of Design and Construction (DDC) records demonstrate that third-party defendant Carlo Lizza Paving had active permits to mill and pave the roadway at or near the subject location at least 18 days prior to plaintiff's alleged incident. Therefore, the City argues that plaintiff's incident is potentially related to Carlo Lizza Paving's roadway work and that it should be able to litigate the case with a potentially liable party.

Con Ed also opposes plaintiff's motion, because its third cause of action sounds in negligence against both Citywide and Safeway, and therefore it is related to the first-party action. Furthermore, Con Ed asserts that the ultimate issue in the case is which entity, if any, was at fault for plaintiff's incident. Therefore, Con Ed argues that the claims against both defendants and third-party defendants involve common factual and legal issues. Con Ed further argues that it is named in this action because plaintiff's accident is potentially related to the third-party defendants' work on the subject roadway. Therefore, Con Ed maintains that severing the third-party actions would be highly prejudicial.

Additionally, Con Ed argues that severing plaintiff's action will cause confusion, as liability cannot be determined in the absence of the third-party defendants, who Con Ed alleges actually performed the work. Con Ed maintains that the issues of negligence relate to all of the defendants and, in the interests of judicial economy and consistency of verdicts, the Court should deny plaintiff's motion to sever the third-party actions.

In regard to plaintiff's allegations of delay in bringing the third-party action, Con Ed argues that plaintiff filed the complaint six months after the incident and subsequently did not prosecute the case expeditiously. Con Ed notes that plaintiff acknowledged that part of the delay was due to the COVID-19 pandemic and, had its office not closed, Con Ed would have commenced its third-party action sooner.

Additionally, Citywide and Safeway oppose plaintiff's motion to sever both of the third-party actions, adopting portions of the City's and Con Ed's arguments in opposition.

In her reply, plaintiff asserts that defendants the City and Con Ed failed to offer a reasonable excuse for their delay in commencing the third-party actions. She argues that the delay prejudices her, because the statute of limitations for negligence claims involving personal injury expired four years ago. As such, plaintiff asserts that she is precluded from asserting any direct negligence claims against the third-party defendants here. She also notes that Con Ed's negligence claims are also time-barred. Further, she argues that the case should be transferred to a judge in the Commercial Division for the resolution of the third-parties' commercial and contractual matters and that Safeway's opposition papers were untimely filed.

A. Analysis

CPLR 1010 provides that

The Court 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.

The Court of Appeals has held that, while granting severance is within a trial court's discretion, such discretion should be used sparingly, especially where complex issues are intertwined. *See Shanley v Callanan Indus.*, 54 NY2d 52 (1981). Rather than fragmenting trials, it is preferable to facilitate one complete and comprehensive trial to determine all the issues involved between all the parties at the same time before a jury. *Id.* The Appellate Division, First Department has stated that, "[t]o 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 whether the issue is the respective liability of the defendant and the third-party defendant for the plaintiff's injury." *Rothstein v Milleridge Inn*, 251 AD2d 154, 155 (1st Dept 1998) (internal citations omitted).

Although the City and Con Ed do not offer a reasonable excuse for the delay in commencing the third-party actions, the direct and third-party claims pertain to the same incident and potential negligence involved. Plaintiff's claims of defendants' negligence are clearly and substantially intertwined with defendants' claims against the third-party defendants. A jury would not be able to draw conclusions regarding defendants' negligence without understanding the third-parties' involvement and potential negligence allegedly resulting in plaintiff's injuries. While the third-party claims may indeed involve substantial litigation concerning contractual indemnity and contribution amongst the parties, such claims are directly tied to whether any or all of the parties acted negligently.

A trier of fact cannot properly determine whether a defendant acted negligently without considering whether the third-party defendant acted negligently. *See Rothstein*, 251 AD2d 154. Were the Court to allow severance, the jury would improperly be precluded from considering the third-parties' negligence. As Safeway, Citywide, and Carlo Lizza Paving were all potentially involved in the defect which allegedly caused plaintiff's injuries, the Court finds that it would be improper to sever those parties from the first-party action here. The City and Con Ed's liability is directly tied to the alleged involvement of the third-party defendants, making severance of the third-party actions significantly prejudicial to the defendants. As many factual and legal issues exist that are common to both the first- and third-party actions, to warrant severance, would not serve judicial economy.

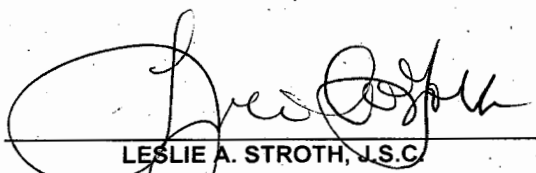
Accordingly, it is hereby

ORDERED that plaintiff Marilyn Rubin's motion for severance of the third-party actions commenced by defendants The City of New York and Consolidated Edison Company of New York, Inc. is denied; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.


LESLIE A. STROTH, J.S.C.

12/8/2022
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE