

**Yocum v United States Tennis Assn. Inc.**

2023 NY Slip Op 30834(U)

March 14, 2023

Supreme Court, New York County

Docket Number: Index No. 156636/2016

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 41

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MICHAEL YOCUM and BOBBIE YOCUM,

Index No. 156636/2016

Plaintiffs

- against -

DECISION AND ORDER

UNITED STATES TENNIS ASSOCIATION  
INCORPORATED, USTA NATIONAL TENNIS  
CENTER INCORPORATED, and HUNT  
CONSTRUCTION GROUP, INC.,

Defendants

-----x  
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UNITED STATES TENNIS ASSOCIATION  
INCORPORATED, USTA NATIONAL TENNIS  
CENTER INCORPORATED, and HUNT  
CONSTRUCTION GROUP, INC.,

Third Party Plaintiffs

- against -

BIRDAIR, INC., and HY-SAFE TECHNOLOGY,

Third Party Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Defendant Hunt Construction Group, Inc., was the general contractor for a construction project at Arthur Ashe Stadium owned by defendants United States Tennis Association (USTA) Incorporated and USTA National Tennis Center Incorporated. The

project involved installation of a fall protection system on the stadium roof. The USTA defendants hired plaintiff Michael Yocum's employer Birdair, Inc., to design and install the system. Birdair in turn hired third party defendant Hy-Safe Technology to procure the material for the system, supervise its installation, and train Birdair on use of the system. After Birdair installed the system, plaintiff was installing a banner on the roof in the rain, slipped, and slid off the roof.

The court previously granted plaintiffs summary judgment on defendants' liability under New York Labor Law § 240(1).

Therefore the main action is proceeding to a trial on plaintiffs' damages from the fall. Defendants' only remaining claim in their third party action is against Hy-Safe Technology for breach of a contract to procure insurance covering defendants.

## II. SEVERANCE

Hy-Safe Technology moves to sever the trial on defendants' third party breach of contract claim from the trial on plaintiffs' damages in the main action. C.P.L.R. §§ 603, 1010. There are no factual or legal questions in common between the third party action and the main action. High Definition MRI, P.C. v. Liberty Mut. Holding Co., Inc., 148 A.D.3d 470, 471 (1st Dep't 2017). See Simens v. Darwish, 105 A.D.3d 686, 687 (1st Dep't 2013). If the court orders separate trials, defendants will be involved in both, but will not be subject to any

duplicative litigation. If the claims are tried together, plaintiffs may be prejudiced by the jury's distraction to evidence about insurance coverage that necessarily will be the third party action's focus. Similarly, Hy-Safe Technology may be prejudiced by the jury's distraction to evidence about plaintiff's life-changing injuries that necessarily will be the main action's focus. Imbriale v. Richter & Radner Contracting Corp., 103 A.D.3d 478, 479 (1st Dep't 2013); Smith v. McClier Corp., 38 A.D.3d 322, 323 (1st Dep't 2007); Garcia v. Gesher Realty Corp., 280 A.D.2d 440, 440-41 (1st Dep't 2001). See McGinty v. Structure-Tone, 140 A.D.3d 465, 466 (1st Dep't 2016); Suckishvili v. Visiting Nurse Serv. of N.Y., 74 A.D.3d 433, 433 (1st Dep't 2010).

Defendants nevertheless oppose Hy-safe Technology's motion, insisting that a severance will delay the trial of defendants' third party claim, but do not explain why a delay will ensue or, even if it does, how the delay will prejudice them, other than postponing any recovery from Hy-Safe Technology. In fact, the court offered defendants an immediate nonjury trial on their claim, to be held in advance of the trial in the main action, but defendants opted to wait for a jury trial. Defendants certainly are entitled to preserve their right to a jury trial, but still suggest no reason why a jury trial on their claim will be delayed until after the jury trial on plaintiffs' claims. Therefore the

court grants third party defendant Hy-Safe Technology's motion to sever the trial of the third party action from the trial of the main action. C.P.L.R. §§ 603, 1010.

### III. PRECLUSION OF EVIDENCE

Hy-safe Technology also moves to preclude defendants-third party plaintiffs from introducing evidence of their damages due to Hy-Safe Technology's alleged failure to procure insurance, because defendants-third party plaintiffs never responded to Hy-Safe Technology's demands for this disclosure. C.P.L.R. § 3126(2). Since Hy-Safe Technology's demands for this disclosure post-date the note of issue, and Hy-Safe Technology fails to indicate any unusual or unanticipated circumstances justifying these late demands, defendants owed no obligation to respond to the demands. 22 N.Y.C.R.R. § 202.21(d); Arons v. Jutkowitz, 9 N.Y.3d 393, 411 (2007); Palmiero v. 417 E. 9th St. Assoc., LLC, 167 A.D.3d 472, 472 (1st Dep't 2018); Prevost v. One City Block LLC, 155 A.D.3d 531, 537 (1st Dep't 2017); Allen v. Hiraldo, 144 A.D.3d 434, 435 (1st Dep't 2016). Therefore the court denies Hy-Safe Technology's motion to preclude evidence. C.P.L.R. § 3126(2); 22 N.Y.C.R.R. § 202.21(d).

### IV. CONCLUSION

In sum, for the reasons explained above, the court denies Hy-Safe Technology's motion to preclude evidence, C.P.L.R. § 3126(2); 22 N.Y.C.R.R. § 202.21(d), but grants its motion to

sever the trial of the third party action from the trial of the main action. C.P.L.R. §§ 603, 1010. Since both the main action and the third party action are ready for trial, the court severs the third party action from the main action. The Clerk shall assign a separate Index Number to the third party action, which shall maintain its current place on the trial calendar with the main action. Within 10 days after entry of this order, Hy-Safe Technology shall serve the order with notice of entry on the Clerk of the General Clerk's Office in Room 119, 60 Centre Street, New York County, according to the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases, accessible at the "E-Filing" page at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh).

DATED: March 14, 2023



LUCY BILLINGS, J.S.C.

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