

**Leyro v Gospel Spreading Assn.**

2023 NY Slip Op 32758(U)

August 8, 2023

Supreme Court, New York County

Docket Number: Index No. 150682/2020

Judge: J. Mabelle Sweeting

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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. J. MACHELLE SWEETING PART 62**

*Justice*

-----X

INEZ LEYRO,

Plaintiff,

- v -

GOSPEL SPREADING ASSOCIATION, GOSPEL  
SPREADING CHURCH, INC.,

Defendants.

-----X

GOSPEL SPREADING ASSOCIATION, GOSPEL  
SPREADING CHURCH, INC.

Plaintiffs,

-against-

THE CITY OF NEW YORK

Defendant.

-----X

INDEX NO. 150682/2020

MOTION DATE 11/03/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595564/2021

The following e-filed documents, listed by NYSCEF document number (Motion 002) 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83 were read on this motion to/for SEVER ACTION.

In the underlying action, plaintiff seeks to recover monetary damages as a result of personal injuries she allegedly sustained when she tripped and fell on the sidewalk abutting 210-220 West 145th Street, in the City of New York on October 17, 2019.

Pending before the court is a motion in which third-party defendant THE CITY OF NEW YORK (the "City") seeks an order (i) pursuant to Civil Practice Law and Rules ("CPLR") 601 and 1010 severing the third-party complaint on the grounds that the trial status of this action will

substantially prejudice the third-party defendant, or (ii) in the alternative, pursuant to CPLR 3124, compel all parties to provide and proceed with discovery.

### Arguments Made by the Parties

The City argues that plaintiff's alleged accident occurred on October 17, 2019, but the City was not served with the third-party complaint by defendants/third-party plaintiffs, Gospel Spreading Association and Gospel Spreading Church (collectively, the "Church"), until 20 months later, on June 15, 2021. The City argues that this case was not even transferred to a City Part until September 14, 2022 (transfer order at NYSCEF Doc. Nos. 50-51), and that although the Note of Issue ("NOI") was already filed by the plaintiff, the City would be severely prejudiced if it was forced to proceed in a trial of this action, as it has received virtually no substantive discovery in this case to date.

Specifically, the City argues that to date, no preliminary conference order or case scheduling order has been uploaded, and that despite the fact that the City served its discovery demands on September 22, 2021, the City is not in possession of any discovery items, including the Church's or plaintiff's bill of particulars, medicals, or photographs of the alleged condition. The City also argues that it must be afforded the opportunity to review the voluminous discovery record, including plaintiff's deposition, and that it "cannot meaningfully participate in any upcoming trial conferences prior to trial by reason of its total unfamiliarity as to the underlying facts of the causes of action asserted by plaintiff/third-party plaintiff."

Plaintiff did not oppose this motion, and the only opposition papers were filed by the Church, which argues that severance would be a wasteful and inefficient fragmentation of these proceedings and could result in inconsistent verdicts. The Church argues that the City chose voluntarily not to participate in discovery proceedings, as the City had failed to appear at the Preliminary Conference held on August 10, 2022. Subsequently, the Church uploaded to NYSCEF a letter (NYSCEF Doc. No. 49) advising the City as to the dates of future depositions, but still, the City failed to appear at plaintiff's deposition, which was held on September 21, 2022. The Church argues that the City "has been a party to the present action for over Five-Hundred and Seventeen days. Third-Party Defendant cannot willfully fail to engage in discovery and then claim to be substantially prejudiced by lack of discovery thereby requiring severance."

#### Analysis and Conclusions of Law

The First Department has made clear that related actions should be tried together when possible, and the presumption is one against severance. *See Sichel v. Cmty. Synagogue*, 256 A.D.2d 276 (Sup. Ct. App. Div. 1<sup>st</sup> Dept. 1998) ("Where two actions arise from a common nucleus of facts, a trial court should only sever the actions to prevent prejudice or substantial delay to one of the parties [...] To 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 where the issue is the respective liability of the defendant and the third-party defendant for the plaintiff's injury"); *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"); *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”).

Here, the third-party complaint filed by the Church against the City states, in part:

6. In the event that the plaintiff, INEZ LEYRO sustained injuries and/or damages at the time and place alleged in the Complaint, then such injuries were caused in whole or in part by the negligence, carelessness and recklessness of the Third-Party defendant, CITY OF NEW YORK in the ownership, occupancy, and/or maintenance of the alleged sidewalk adjacent to the premises located at 210-220 West 145th Street in The City of New York.

7. If there is a recovery against the Defendant/Third-Party Plaintiffs for the alleged damages, then the Third-Party Plaintiffs will seek recovery from the Third-Party defendant, CITY OF NEW YORK in whole or in part to the alleged accident or damages sued upon herein and are to be deemed reasonable and whole or in part of the Defendant/Third-Party Plaintiffs as a result of the negligence of the Third-Party defendant, CITY OF NEW YORK.

It is clear from the record in this case, including the content of the third-party complaint, that plaintiff’s causes of action as against the Church, and the Church’s causes of action against the City, both stem from the same incident. Accordingly, the court credits the Church’s arguments with respect to possible fragmentation of these proceedings and potential inconsistent verdicts, and denies the City’s request to sever these proceedings.

However, the following is also undisputed on this record: A Preliminary Conference was held on August 10, 2022, prior to this case being transferred to a City Part, but no preliminary conference order or case scheduling order was ever uploaded to the electronic record. The date chosen for the plaintiff’s deposition was chosen at the conference on August 10, 2022, before this case was transferred to a City Part on September 14, 2022, and the City was not present when the deposition date was chosen. The City was not present at the deposition of plaintiff, held on

September 21, 2022. The City served discovery demands on September 22, 2021, but the Church did not produce discovery responsive to the City's demands until after the City filed the instant motion on November 3, 2022. Given these facts, the court finds that it would be prejudicial to the City to be forced to proceed to a trial at this time. (*See Giraldo Valencia v City of New York*, 188 AD3d 549 [Sup. Ct. App. Div. 1st Dept 2020] ["The IAS court properly exercised its discretion in granting defendants' motion to compel, despite the note of issue having been filed nearly two years prior [...] Trial courts are authorized to permit post-note of issue discovery without vacating the note of issue".])

Accordingly, and because there is no application to vacate the NOI, the court GRANTS the alternative relief sought by the City compelling all parties to provide and proceed with discovery before commencement of trial. Finally, the court notes that this alternate form of relief was not opposed by the Church in its papers.

Conclusion

It is hereby:

**ORDERED** that the branch of the City’s motion seeking to sever the third-party complaint is **DENIED**; and it is further

**ORDERED** that the branch of the City’s motion seeking to compel all parties to provide and proceed with discovery prior to the commencement of trial is **GRANTED**; and it is further

**ORDERED** that the parties shall forthwith contact the “City DCM Part” at: SFC-CITY-DCM@nycourts.gov to schedule a discovery conference.

8/8/2023  
DATE

  
J. MACHELLE SWEETING, 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