

Soutar v City of New York

2025 NY Slip Op 33708(U)

September 25, 2025

Supreme Court, Kings County

Docket Number: Index No. 511089/2019

Judge: Anne J. Swern

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At an IAS Trial Term, Part 75 of the Supreme Court of the State of New York, Kings County, at the Courthouse located at 360 Adams Street, Brooklyn, New York on the 25th day of September 2025.

P R E S E N T: HON. ANNE J. SWERN, J.S.C.

JOHN SOUTAR,

Plaintiff(s),

-against-

THE CITY OF NEW YORK AND THE
NEW YORK CITY FIRE DEPARTMENT,

Defendant(s).

THE CITY OF NEW YORK AND THE
NEW YORK CITY FIRE DEPARTMENT,

Third-Party Plaintiffs,

-against-

SIENIA CONSTRUCTION LLC,

Third-Party Defendant.

THE CITY OF NEW YORK AND THE
NEW YORK CITY FIRE DEPARTMENT,

Second Third-Party Plaintiffs,

-against-

ASTRO AIR CORPORATION
and PIONEER PIPING CORP.,

Second Third-Party Defendants.

Recitation of the following papers as required by CPLR 2219(a):

**Papers
Numbered**

Second Third-Party Plaintiff’s Notice of Motion and Supporting Documents (NYSCEF 104-115).....	1, 2
Plaintiff’s Affirmation in Support (NYSCEF 116)	3

Second Third-Party Plaintiffs’ Affirmation
in Opposition and Supporting Documents (NYSCEF 118-125).....4

Reply Memorandum of Law (NYSCEF 126).....5

*Upon the foregoing papers and after oral argument, the decision and order of the Court
is as follows:*

The second third-party defendant, ASTRO AIR CORPORATION (“Astro”), has moved this Court for an order dismissing the complaint of second third-party plaintiff, THE CITY OF NEW YORK AND THE NEW YORK CITY FIRE DEPARTMENT (“the City”), per CPLR § 1010, or in the alternative, severing the second third-party action per CPLR § 603. The motion to dismiss this action pursuant to CPLR § 1010 is granted due to the City’s failure to comply with CPLR 3402 and the undue delay in commencing the second third-party action.

PROCEDURAL HISTORY

Plaintiff commenced this action on 5/17/2019 to recover damages for personal injuries under Labor Law §§ 200, 240 [1], 241[6], and common law negligence. The City filed an answer on 8/13/2019 (NYSCEF 14). The City then filed a third-party action against Sienia Construction on 4/1/2022. The Note of Issue was filed on 12/15/2023.

Plaintiff moved for summary judgment on 2/12/2024 (NYSCEF 45-58) and the City moved for summary judgment on 2/13/2024 (NYSCEF 59-76). Submitted in support of both motions were, *inter alia*, plaintiff’s deposition transcript dated 3/8/2023 and the transcript from his hearing conducted by the City before the commencement of this action pursuant to General Municipal Law § 50-h on 11/27/2018 (NYSCEF 52) and his verified bill of particulars (NYSCEF 49 and 67). In both transcripts and plaintiff’s verified bill of particulars, plaintiff states that he was an employee of Astro.

By an order dated 11/7/2024, the Court granted plaintiff summary judgment on his Labor Law § 240 [1] cause of action. The Court denied the City summary judgment as to plaintiff's causes of action per Labor Law §§ 200, 240 [1], and 241[6] based on Industrial Code violations of 23 NYCRR 23-1.21 [b] [1] and [3]. The Court dismissed plaintiff's remaining Industrial Code violations (NYSCEF 98).

While the motions were pending, the City filed a Second Third-Party action against Astro and Pioneer Piping Corp. on 6/21/2024. Attached to the pleadings were the contract, plaintiff's summons and complaint, and the City's answer. (*see* NYSCEF 83-86). The City served the second third-party pleadings on Astro and Pioneer through the Secretary of State and an untimely Statement Pursuant to CPLR 3402 on 7/9/2024 (NYSCEF 87 and 88). The City did not serve either second third-party defendant with an additional copy of the third-party pleadings per CPLR § 3215 [4] [i] and [ii] and Business Corporation Law § 306.

The City's counsel and Astro's claims examiner were engaging in email discussions starting on or about 2/28/2025 (NYSCEF 122 and 123). On 6/5/2025, Astro's claim examiner requested 30 days to serve an answer. The City granted an extension until 7/11/2025 (NYSCEF 124). On 7/9/2025, Astro served this motion to dismiss per CPLR § 1010, or in the alternative, severing the second third-party action per CPLR § 603. More than one year after service, the City has not cross-moved for a default judgment against Astro despite not receiving an answer once Astro's time to answer the second third-party complaint expired.

LAW & ANALYSIS

CPLR 3402 [b] states in pertinent part as follows:

New parties. A party who brings in a new party *shall within five days thereafter serve him with the note of issue and file a statement with the clerk... proof of service of the note of issue upon the new party*, and of such statement upon all parties who have

appeared in the action. The case shall retain its place upon the calendar unless the court otherwise directs. (*italics added*).

CPLR 3402 is designed as a “safety valve” to prevent undue delay in the prosecution of the main action or prejudice the parties’ rights. Therefore, where a third-party plaintiff “knowingly and deliberately delay[s] in commencing the third-party action, the Supreme Court acts within its discretion to dismiss the third-party complaint.” (*Soto v CBS Corp.*, 157 AD3d 740, 741 [2d Dept 2015] [internal citations omitted]).

Here, it is undisputed that the City failed to comply with CPLR 3402 as it did not file the Note of Issue or serve it as an attachment to the second third-party complaint. A review of the emails also demonstrates that at no time did the City advise the claims examiner that the Note of Issue was served or provide her with a copy of it.

Next, the City knew as early as 11/27/2018 that Astro was plaintiff’s employer (NYSCEF 52) and even commenced the first third-party action in 2022 after service of the bill of particulars but before plaintiff’s deposition in 2023. More importantly, the City filed a motion for summary judgment two months before filing its complaint against Astro, fully aware that the second third-party complaint would necessitate additional discovery, as well as motions to strike this five-year-old case from the trial calendar and a second round of motions for summary judgment. These events would result in undue prejudice to the substantial rights of plaintiff and the third-party defendant Sienia. Further, this Court finds that the City delayed commencing the second third-party action and exercises its discretion to dismiss the second third-party complaint against Astro pursuant to CPLR § 1010. (*Id.*).

The argument that the City only granted an extension of time to answer the complaint is unavailing since it did not cross-move for a default judgment based on Astro’s failure to serve an answer on or before 7/11/2025.

The Court has considered the parties' remaining arguments and finds them to be either academic or without merit.

Accordingly, it is hereby

ORDERED that second third-party defendant ASTRO AIR CORPORATION's motion to dismiss the second third-party complaint against it per CPLR § 1010 is GRANTED, and it is further

ORDERED that the second third-party complaint is dismissed in its entirety only against second third-party defendant ASTRO AIR CORPORATION, and it is further

ORDERED that the portion of second third-party defendant ASTRO AIR CORPORATION's motion to sever the second third-party complaint per CPLR § 603 is denied as moot, and it is further

ORDERED that the Clerk shall enter judgment dismissing the second third-party complaint against second third-party defendant ASTRO AIR CORPORATION and amend their records accordingly.

This constitutes the decision and order of the Court.

E N T E R:



Hon. Anne J. Swern, J.S.C.
Dated: 9/25/2025

For Clerks use only:
MG _____
MD _____
Motion seq. # _____