SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYNN R. KOTLER** **PART** **08**

Justice

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INDEX NO. 159841/2018

CONRAD POWELL,

Plaintiff,

MOTION DATE 06/28/2024, 09/11/2024

- v -

MOTION SEQ. NO. 003 004

THE CITY OF NEW YORK,

DECISION + ORDER ON MOTION

Defendant.

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THE CITY OF NEW YORK,

Third-Party
Index No. 595431/2024

Plaintiff,

-against-

EMPIRE CITY SUBWAY COMPANY, EMPIRE CITY SUBWAY COMPANY (LIMITED)

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80, 81, 82, 83, 84, 89, 91, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 115, 116, 120, 121, 122, 123

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 118, 119

were read on this motion to/for SEVER ACTION.

Upon the foregoing documents, it is **ORDERED** that these two motions are consolidated for the Court's consideration and disposition in this single decision and order.

This is an action to recover for injuries plaintiff sustained on December 9, 2017 while in the course of plaintiff's employment with Empire, as subsidiary of Verizon. There has never been any confusion that plaintiff was actually employed by a nonparty to this action, up until the third-

party action was commenced this year. The City moved for summary judgment dismissing plaintiff's complaint, arguing that it lacks the requisite nexus to Verizon's work and points to the fact that Verizon did not have a valid permit for the subject work. In a decision/order dated July 26, 2022, this Court granted the City's motion for summary judgment. Thereafter, the First Department reversed, holding that "the City failed to demonstrate that there was no nexus between it and plaintiff's work" and even if the City had, "there remain triable issues of fact as to whether there existed a nexus between plaintiff and the City" (decision/order entered July 13, 2023).

In motion sequence 3, third party defendants Empire City Subway Company and Empire City Subway Company (Limited) (collectively "Empire") move preanswer to dismiss the amended third-party complaint with prejudice on the grounds that the amended third-party complaint was filed late and without leave of court or alternatively to vacate the note of issue filed January 6, 2022 and reopen discovery. Plaintiff opposes Empire's motion to the extent that Empire seeks to vacate plaintiff's note of issue and reopen discovery. Defendant/third-party plaintiff The City of New York (the "City") also opposes Empire's motion.

In motion sequence 4, plaintiff moves to sever the third-party action (CPLR § 603). Empire opposes plaintiff's motion, arguing that if the amended third-party complaint is not dismissed and is instead severed, Empire "will be prejudiced and punished by the City[]'s delay in bringing the third-party action".

This action was commenced October 24, 2018. The City answered on or about November 13, 2018. The Case Scheduling Order dated January 2, 2019 required third-party actions and impleader to be completed within 45 days of the last Examination before Trial ("EBT"). The City's EBT was completed December 16, 2020 and no other EBTs were conducted during discovery. Plaintiff filed note of issue on January 6, 2022. Nonetheless, the City filed the third-party summons and complaint against Empire on April 24, 2024 without leave of court. The City then filed an amended third-party summons and complaint against Empire on April 25, 2024, again without leave of court.

The City now argues that there is no prejudice to Empire and that the City did not unreasonably delay. The City points to the fact that plaintiff's opposition to the City's prior summary judgment motion was based upon a 2008 franchise agreement with Empire which "plaintiff introduced… after having filed a note of issue certifying that discovery is closed." This argument does not account for the fact, however, that the Case Scheduling Order precluded third-party actions and impleader after 45 days post-depositions, the City did not properly move for leave to commence a late third-party action, the City delayed nine months in bringing the third-party action and most importantly, the identity of plaintiff's employer in this Labor Law action has never been a secret and was certainly known to the City long before the third-party action was brought.

CPLR Rule 1010 permits dismissal of a third-party complaint without prejudice or severance. This Rule cautions that "[i]n 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." Certainly,

Empire is entitled to discovery in this action if it is made to defend against the City's third-party claims for contractual indemnification and common law indemnification/contribution. Empire's right to discovery would warrant reopening discovery which would greatly prejudice plaintiff. While the case may have been dormant and plaintiff does not yet have a trial date, court deadlines are not meant to be ignored, and note of issue means that a case is ready for trial. To allow the third-party action to proceed would result in inordinate delay in the trial of the main action. Thus, in this rare case, severance is warranted.

The court is not convinced by Empire's argument that Empire would "be left without any opportunity to defend plaintiff's claims which form the basis of the [City's] allegations." Empire can certainly notice plaintiff's depositions and seek written discovery from plaintiff, even if in the form of nonparty subpoenas. Severance will not otherwise prejudice Empire's ability to present a defense on the merits on the issues of contribution and indemnification. Otherwise, a dismissal with prejudice, which is not authorized by CPLR 1010, would go against public policy in this state which favors deciding cases on the merits, and is not otherwise warranted on this record, insofar as Empire does not come to this case as a complete stranger since it was plaintiff's employer and/or a subsidiary of plaintiff's employer.

For at least these reasons, it is hereby **ORDERED** that motion sequence numbers 2 and 3 are granted only to the extent that the third-party action is severed from the main action; and it is further

ORDERED that motion sequence numbers 2 and 3 are otherwise denied; and it is further

ORDERED that defendant The City of New York shall purchase an index number for the severed third-party action, which shall proceed under the index number assigned therein under the same caption and that all papers in the third-party action shall be filed under such index number.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby denied and this constitutes the Decision and Order of the Court.

12/18/2024
DATE

LYNN R. KOTLER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE