

Gabrielli v Dobson and Pinci

2006 NY Slip Op 30391(U)

February 28, 2006

Supreme Court, New York County

Docket Number: 0107333/2003

Judge: Carol R. Edmead

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Frank Gabrielli

INDEX NO. 107333/03

MOTION DATE 2/28/06

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

- v -

Dobson and Pinci, et al.

The following papers, numbered 1 to _____ were read on this motion to/for consolidation

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

MAR 08 2006

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby ORDERED that the motion by plaintiffs for consolidation is granted, to the extent that this action and the action entitled *Frank Gabrielli and Union Turnpike Mgt. Corp. v Jerry Lefkowitz* Index No. 107203/2005 for all purposes; and it is further

ORDERED the above-captioned action is consolidated in this Court with *Frank Gabrielli and Union Turnpike Mgt. Corp. v Jerry Lefkowitz* under the instant Index No. 107333-2003 and the consolidated action shall bear the following caption:

Frank Gabrielli and Union Turnpike Management Corp.,

Plaintiffs,

-vs-

Dobson and Pinci, its Heirs, Successors and Assigns, Hereinafter Referred to as Law Firms Doing Business as "A-x", and Frank Ferrante, Individually and on Behalf of Dobson and Pinci, Marc Antonio Pinci, Individually, and Pinci and Associates, and Jerry Lefkowitz,

Defendants.

Dated: _____

Page 1 of 2

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon all parties, the Trial Support Office (Room 158), and the County Clerk, who shall consolidate the papers in the actions hereby consolidated and shall mark the records to reflect the consolidation; and it is further

ORDERED that plaintiffs shall provide all documents requested at the deposition of plaintiff by Dobson and Pinci defendants within 10 days of the date of this order; and it is further

ORDERED that plaintiffs shall provide defendant Lefkowitz with copies of all pleadings and deposition transcripts within 10 days of the date of this order; and it is further

ORDERED that all additional discovery shall be completed by April 14, 2006; and it is further

ORDERED that plaintiffs shall file the note of issue by May 1, 2006; and it is further

ORDERED that the parties shall appear in Part 40 for trial on June 6, 2006, 9:30 a.m.

This constitutes the decision and order of the Court.

FILED
MAR 08 2006
NEW YORK
COUNTY CLERK'S OFFICE

Page 2 of 2

Dated 2/28/06

ENTER:  J.S.C.
HON. CAROL EDMOAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35**

FRANK GABRIELLI and UNION TURNPIKE)
MANAGEMENT CORP.,)

Plaintiffs,)

vs.)

**MEMORANDUM
DECISION**

Index No.: 107333-2003

DOBSON AND PINCI, ITS HEIRS, SUCCESSORS)
AND ASSIGNS, HERINAFTER REFERRED TO AS)
LAW FIRMS DOING BUSINESS AS "A-X", AND)
FRANK FERRANTE, INDIVIDUALLY AND ON)
BEHALF OF DOBSON AND PINCI, MARC ANTONIO)
PINCI, INDIVIDUALLY, AND PINCI AND)
ASSOCIATES,)

Defendants.)

FILED
MAR 08 2006
NEW YORK
COUNTY CLERK'S OFFICE

CAROL R. EDMEAD, J.S.C:

MEMORANDUM DECISION

Plaintiff moves to consolidate the within action with an action entitled *Frank Gabrielli and Union Turnpike Mgt. Corp. vs. Jerry Lefkowitz* Index No. 107203/2005.

Plaintiff Frank Gabrielli, the principal and stockholder of plaintiff Union Turnpike Management Corp., commenced this action against defendants Dobson and Pinci, it heirs, successors and assigns, and Frank Ferrante, individually and on behalf of Dobson and Pinci, Marc Antonio Pinci, individually, and Pinci and Associates, for legal malpractice. Recently, plaintiffs commenced an action against Jerry Lefkowitz for legal malpractice.

In support of consolidation, plaintiff contends the following:

The plaintiff, Mr. Gabrielli, built a home for an individual (the "Owner") and was fired

after the work was substantially completed. The terms of the agreement between the Owner and Mr. Gabrielli were governed by an AIA Construction Contract. Plaintiff then retained the law firm of Dobson and Pinci and/or Frank Ferrante, Esq. to recover damages from the individual who refused to pay plaintiff for the work and materials provided. It is alleged that the defendants who were retained to pursue plaintiff's recovery of damages failed to comply with precatory notices contained in the AIA Construction Contract that triggered plaintiff's right to have the dispute arbitrated before the American Arbitrator's Association. In any event, defendants filed for Arbitration, which was stayed upon an application by Owner's attorney. The motion was relitigated by Jerry Lefkowitz, a defendant in a separate action recently commenced by plaintiffs, who substituted as counsel for plaintiff. By order dated January 21, 2000, the plaintiff was permanently stayed from arbitrating the claim in the demand for arbitration, without prejudice to plaintiff's right to arbitrate the claims pursuant to Article 14.2 of the AIA Contract.

Pursuant thereto, Lefkowitz filed to proceed to arbitration on behalf of the plaintiff, and engaged in motion practice, relitigating the issues as to the right to arbitrate. The Owner then appealed and Lefkowitz filed a respondent's brief on behalf of the plaintiff.

The Second Department determined that plaintiff was not entitled to pursuant to his claims, stating, *inter alia*, that the terms of arbitration were governed by the AIA Contract. The Second Department held that plaintiff failed to properly serve the precatory notices upon the Owner's Architect and take certain steps within a specified period of time from the issuance of the Certificate of Occupancy.

Thus, plaintiff filed the instant legal malpractice action against defendants. During discovery, certain demands were sent to Lefkowitz and claimed to have turned over all the

records he had. Defendants claimed that the proper precatory notices were sent and that Lefkowitz failed to obtain copies of them or submit them to court. Defendants contend that Lefkowitz was responsible to some degree for plaintiff's inability to recover for the work and materials provided.

Plaintiffs then commenced an action against Lefkowitz, who served an untimely answer with notice to change venue. This was followed by a motion to change venue and for summary judgment filed in Supreme Court, Nassau County. The Nassau County Supreme Court issued a date for a preliminary conference, where Lefkowitz failed to appear.

At least one of the defendants is responsible for not properly sending the appropriate precatory notices to the Owner's Architect to enable plaintiff to arbitrate the claims or submitting them to court when the underlying action was being litigated. Lefkowitz represented plaintiffs at the time that the Certificate of Occupancy was issued. It was incumbent upon Lefkowitz to take such appropriate steps as necessary to arbitrate claims that were triggered by the issuance of the Certificate of Occupancy. The defendants were engaged to provide legal services to plaintiff.

Plaintiff argues that the issues relating to the culpability of Lefkowitz must be resolved before the case can be placed on the trial calendar in this part. Plaintiff contends that it is necessary to consolidate the actions in the interest of judicial economy, to avoid duplicity of trials and the possibility of inconsistent verdicts.

In response, Dobson and Pinci, Marc Antonio Pinci, and Pinci and Associates (the "Pinci Defendants") argue that this action should be stricken from the Court's calendar for plaintiffs' failure to comply with discovery demanded in connection with the depositions of plaintiff Frank Gabrielli. Further, the Pinci Defendants oppose consolidation for discovery purposes, and argue

that the cases should be consolidated for joint trial only. These defendants have already engaged in lengthy party depositions, and plaintiffs should not be permitted to again seek disclosure in replicate in their second action.

Lefkowitz opposes consolidation, arguing that he filed a motion to change venue and to dismiss plaintiff's action in Nassau County, which if granted, would render the instant motion moot. Lefkowitz argues that he would be severely prejudiced if consolidation is granted because of the disparity in the stages of litigation. Discovery and depositions have been completed in the first action, and in the action against him, party depositions and depositions of the Owners have not commenced. Lefkowitz contends that the action against him lacks merit, given that the first demand for arbitration filed by Dobson and Pinci was stayed by Justice Segal because that firm failed to comply with the condition precedent of first notifying the architect before an arbitration demand could be filed. Also, plaintiffs' failure to succeed in the second arbitration filed by Lefkowitz also rests solely with Dobson and Pinci and Ferrante, because plaintiffs were still represented by Dobson and Pinci and Ferrante when construction on the Owner's house was completed and a certificate of occupancy was issued. Thus, within 21 days of construction being completed, Dobson and Pinci and Ferrante again failed to comply with the condition precedent and Lefkowitz was simply trying to revive the arbitration on plaintiffs' behalf.

In reply, plaintiffs contend that the motion by Lefkowitz to change venue was denied, and the case was marked disposed.

In a separate reply, Frank Ferrante supports consolidation. Frank Ferrante contends that the documents establish that plaintiffs' underlying arbitration proceeding against the Owner was permanently stayed by the Second Department, upon the sole grounds that following the issuance

of the certificate of occupancy for the Owner's house, plaintiff's failed to submit their claim against the Owner to an architect prior to commencing arbitration proceedings against him, as required by the AIA Contract. Frank Ferrante points out that he and Dobson and Pinci had timely submitted such claim to the architect by letters dated June 20, 2000 and subsequent follow up correspondence with the architect. When Lefkowitz was retained, he continued such correspondence with the architect. Lefkowitz failed to establish that consolidation would prejudice a "substantial right" which he may have, and the mere fact that discovery is at different stages is insufficient to establish prejudice. Further, even if transfer of venue of the second action were granted, this Court could still consolidate the two actions and place venue of both action back in New York County.

Analysis

"When an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court" (CPLR 602(b)). "Consolidation is generally favored in the interest of judicial economy and ease of decision-making where cases present common questions of law and fact, 'unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right'" (*Firequench, Inc. v Kaplan*, 256 AD2d 213 [1st Dept 1998] citing *Raboy v McCrory Corp.*, 210 AD2d 145, 147 [1st Dept 1994]; *Amtorg Trading v Broadway and 56th Street*, 191 AD2d 212, 594 NYS2d 204 [1st Dept 1993]). The threshold question in considering any motion to consolidate is whether there exists "a common question of law or fact" between the causes of action that are to be consolidated (CPLR § 602(a)). The burden of showing prejudice to a substantial right rests upon the party opposing a motion for consolidation (*Maigur v Saratogian*,

Inc., 47 AD2d 982 [4th Dept 1975]; see *Fisher 40th & 3rd Co. v Welsbach Elec. Corp.*, 266 AD2d 169 [1st Dept 1999]).

It is uncontested that both actions share common questions of law and fact. The issue therefore is whether consolidation would prejudice a substantial right of any of the parties.

The note of issue in the first action is scheduled to be filed by May 1, 2006. All discovery already exchanged in the first action shall be provided to Lefkowitz forthwith, and demands by Lefkowitz and responses thereto be served forthwith. Accordingly, depositions of Jerry Lefkowitz by plaintiffs and co-defendants, and depositions of co-defendants by Jerry Lefkowitz only, may be concluded before the time to file the note of issue. Since the Court directs that all discovery shall be completed by April 14, 2006, any alleged prejudice purportedly stemming from the absence of any discovery in the second action will be obviated under such a discovery schedule, and will not unduly delay the litigation of the first action.

Based on the foregoing, it is hereby

ORDERED that the motion by plaintiffs for consolidation is granted, to the extent that this action and the action entitled *Frank Gabrielli and Union Turnpike Mgt. Corp. v Jerry Lefkowitz* Index No. 107203/2005 for all purposes; and it is further

ORDERED the above-captioned action is consolidated in this Court with *Frank Gabrielli and Union Turnpike Mgt. Corp. v Jerry Lefkowitz* under the instant Index No. 107333-2003 and the consolidated action shall bear the following caption:

FRANK GABRIELLI and UNION TURNPIKE
MANAGEMENT CORP.,

Plaintiffs,

vs.

DOBSON AND PINCI, ITS HEIRS, SUCCESSORS
AND ASSIGNS, HEREINAFTER REFERRED TO AS
LAW FIRMS DOING BUSINESS AS "A-X", AND
FRANK FERRANTE, INDIVIDUALLY AND ON
BEHALF OF DOBSON AND PINCI, MARC ANTONIO
PINCI, INDIVIDUALLY, AND PINCI AND
ASSOCIATES, AND JERRY LEFKOWITZ,

Defendants.

And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon all parties, the Trial Support Office (Room 158), and the County Clerk, who shall consolidate the papers in the actions hereby consolidated and shall mark the records to reflect the consolidation; and it is further

ORDERED that plaintiffs shall provide all documents requested at the deposition of plaintiff by Dobson and Pinci defendants within 10 days of the date of this order; and it is further

ORDERED that plaintiffs shall provide defendant Lefkowitz with copies of all pleadings and deposition transcripts within 10 days of the date of this order; and it is further

ORDERED that all additional discovery shall be completed by April 14, 2006; and it is

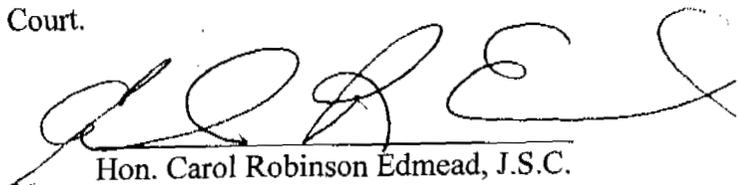
further

ORDERED that plaintiffs shall file the note of issue by May 1, 2006; and it is further

ORDERED that the parties shall appear in Part 40 for trial on June 6, 2006, 9:30 a.m.

This constitutes the decision and order of the Court.

Dated: February 28, 2006



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
MAR 08 2006
NEW YORK
COUNTY CLERK'S OFFICE