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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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NEIL LACCONE and CONSTANCE LACCONE,

Plaintiffs,

-against-

THE ROSLYN CHALET a/k/a CHALET RESTAURANT & TAP ROOM and SALATA REST. CORP.,

Defendants.

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TRIAL/IAS PART 20
Index No.: 020685/08
Motion Date: 01/09/12
Motion Sequence: 007

AMENDED DECISION & ORDER

Papers Numbered

Sequence #007
Notice of Motion of Consolidation, Affidavit, Affirmation & Exhibits 1
Affirmation in Opposition to Consolidate 2
Reply Affirmation 3

Upon the foregoing papers, the Defendant's motion for an order directing that Action No. 1 and Action No. 2 be consolidated on the ground that the two (2) actions arise from the same accident and amending the caption pursuant to CPLR § 602 (a) is granted for the purpose of a join trial.

This is an action to recover damages for injuries sustained by plaintiff, Neil Laccone, as a result of an accident which occurred on October 26, 2006 at The Roslyn Chalet restaurant, County of Nassau, Roslyn, New York. In November 2008, plaintiffs commenced an action for personal injuries against The Roslyn Chalet, the restaurant where the alleged accident took place and Salta Restaurant Corp., the owner of said restaurant (hereinafter "Action No. 1"). Thereafter, on October 20, 2009, plaintiffs commenced another action for the same injuries resulting from the same accident against Ber Dur Realty Corporation, the owner of the property where the restaurant is located (hereinafter "Action No. 2").

In the instant application, defendants move to consolidate Action No. 1 with Action No. 2 pursuant to CPLR §602. It is uncontroverted that both actions arise from the same accident. It is also uncontroverted that the owner of the Roslyn Chalet as well as Ber Dur Realty have the

same principal, Kevin Dursun. Defendants contend that discovery is complete in Action No. 1[1] and discovery is Action No. 2 is unnecessary. As such, Defendants maintain that the Court should consolidate both matters in the interests of judicial economy.

In opposition, plaintiffs claim that the outstanding discovery in Action No. 2 is not the same as the discovery already completed in Action No. 1. Plaintiffs argue that the defendants are separate corporations and the theories of liability against the defendant in Action No. 1 are different from the theories of liability against the defendant in Action No. 2. Plaintiffs also contend that they would suffer substantial prejudice if both actions were consolidated at this time as a result of defendants' delay (approximately one year) in bringing the instant application. The first action is ready for trial while the second action is "still in the early stages of discovery". Further, plaintiffs acknowledge that the Court issued an Order in Action No. 1 precluding plaintiffs from offering the testimony of an expert engineer because said expert would assert theories of liability that were not disclosed pre note of issue. Plaintiffs assert if the actions are consolidated then defendant may request that this expert be precluded from testifying against Ber Dur Realty thereby further prejudicing the rights of plaintiffs.

A motion to consolidate actions involving common questions of law or fact pursuant to CPLR §602 rests within the sound discretion of the trial court. *Zupich v. Flushing Hosp. & Med. Ctr.*, 156 A.D.2d 677. The motion to consolidate should be granted unless the opposing party succeeds in demonstrating prejudice to a substantial right. *Zupich,* supra. Although the delay of trial may be sufficient reason to deny consolidation (*F&K Supply, Inc. v. Johnson*, 197 A.D.2d 814; *Cronin v. Sordoni Skanska Constr. Corp.*, 36 A.D.3d 448), any prejudice may be cured by expeditious completion of discovery. *Callazo v. City of New York*, 213 A.D.2d 270; *Zupich v. Flushing Hospital & Med. Ctr.*, 156 A.D.2d 677.

Here, there is no argument that both actions commenced by plaintiffs seek to recover damages for injuries sustained in an accident that occurred at The Roslyn Chalet restaurant. Plaintiffs contention that there are different theories of liability against the restaurant owner and the landowner thus precluding consolidation is ineffective. In addition, plaintiffs contention that the different procedural stages of both actions prevent consolidation is equally unavailing. Plaintiffs have not propounded any discovery demands in Action No. 2 nor have they set forth in their opposition papers what discovery is needed. Plaintiffs also failed to offer this court an explanation for their two (2) year delay in demanding discovery in Action No. 2. Moreover, defendants admit in their Reply that, "...defendants certainly do not require any discovery from plaintiff given the fact they have already questioned the plaintiff and a non-party witness about the accident and plaintiff's injuries, and already have plaintiff's original discovery responses and medical records pursuant to authorizations provided by the plaintiff." As such, there cannot be a substantial prejudice caused by defendant's delay as defendants agree to waive discovery in

[1] The Note of Issue was filed on October 27, 2010.

Action No. 2.

In light of the foregoing and to avoid any injustice which would result from inconsistent verdicts if separate trials were held, the motion for consolidation of Action No. 1 and Action No. 2 is granted for the purposes of a joint trial. The court will provide plaintiffs an opportunity to complete discovery on an expedited basis. Therefore, the court directs that the matter be vacated from the trial calendar for a period of forty-five (45) days, during which time plaintiffs shall complete discovery in Action No. 2 and the matter may be restored to the trial calendar upon ten (10) days notice.

Accordingly, the two actions are joined for trial, and each action shall retain its own Index Number, and the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
PRESENT: HON. ROBERT A. BRUNO, J.S.C.

----------x

NEIL LACCONE and CONSTANCE LACCONE,

Plaintiffs,

-against-

THE ROSLYN CHALET a/k/a CHALET RESTAURANT & TAP ROOM and SALATA REST. CORP.,

Action No.: 1
Index No.: 020685/08

Defendants.

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NEIL LACCONE and CONSTANCE LACCONE,

Plaintiffs,

-against-

BER DUR REALTY CORPORATION,

Action No.: 2
Index No.: 21445/09

Defendant.

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Laccone v. Roslyn Chalet
Index No.: 020685/08

All parties shall serve upon any party so demanding copies of disclosure documents heretofore obtained in the other action, and it is further, ordered that

The joined actions shall bear the combined caption as set forth above and all matters of trial practice, including the right to open and close, are reserved to the Justice presiding at the joint trial, and it is further, ordered that

All papers shall reflect the joint caption of these actions, and upon completion of discovery, the parties shall file **separate** Notes of Issue and Certificates of Readiness, as to each action and its further, ordered that

Each party shall be entitled to enter separate Judgements and Bills of Costs and Disbursements in each action respectively, if costs are allowed.

Plaintiff shall file a Request for Judicial Intervention in Action No. 2 forthwith and all counsel shall appear at the Supreme Court, Nassau County at IAS Part 20 thereof located at 100 Supreme Court Drive, Mineola New York 11501 on **MAY 3, 2012 at 9:30 a.m.**, for a **PRELIMINARY CONFERENCE**, which date shall ***not*** be adjourned.

The defendant shall serve a copy of this Order upon all parties to both Actions and upon the Clerk of the Supreme Court of Nassau County within fifteen (15) days. Upon receipt of this Order, the Nassau County Clerk is directed to join the files for trial and amend the caption as directed above.

All matters not decided herein are DENIED.

This constitutes the decision and order of this Court.

Dated: March 7, 2012 - Amended March 16, 2012
Mineola, New York

ENTER:

Hon. Robert A. Bruno, J.S.C.