

Eastside Exhibition Corp. v 210 E. 86th St. Corp.

2018 NY Slip Op 33199(U)

December 11, 2018

Supreme Court, New York County

Docket Number: 118246/2002

Judge: Kathryn E. Freed

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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. KATHRYN E. FREED PART IAS MOTION 2

Justice

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INDEX NO. 118246/2002
MOTION SEQ. NO. 004

EASTSIDE EXHIBITION CORP.,

Plaintiff,

- v -

210 EAST 86TH STREET CORP.,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for CONSOLIDATION

Upon the foregoing documents, it is ordered that the motion is denied.

Plaintiff Eastside Exhibition Corp. ("Eastside Exhibition") moves, pursuant to CPLR 602(b), to remove to this Court and to consolidate with the captioned action a Civil Court non-payment summary proceeding styled 210 E. 86th St. Corp. v Eastside Exhibition Corp., Civil Court, New York County Index Number LT-077623-14/NY. Defendant 210 East 86th Street Corp. ("210 East") opposes the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

The protracted history of this case arises from a landlord-tenant dispute between Eastside Exhibition and 210 East. The two parties entered into a lease on February 20, 1998 (Doc. 17 at 1-2) regarding the manner in which 210 East, as the landlord of the premises located at 210 East

86th Street (“the premises”), was to renovate an existing 2-screen theater known as the “Quad Theatre” into a 4-screen, 2-story theater (Doc. 8 at 3–4). At the time, the building in which the theater was situated was 7 stories tall. (*Id.* at 5.) Pursuant to the lease, any changes in the renovation plans, other than those required by law or government agencies, were subject to tenant Eastside Exhibition’s written approval and consent. (*Id.* at 4.)

During the renovation process, however, 210 East did not seek Eastside Exhibition’s approval for a proposed \$322,000 worth of work. (*Id.*) When Eastside Exhibition objected, 210 East halted its work. (*Id.*) This prevented Eastside Exhibition from operating the Quad Theatre for a short time (*id.*), but because Eastside Exhibition had booked the film “Star Wars Episode I: The Phantom Menace” for its 1999 premiere, it became apparent to both parties that completing the renovations was urgent (*id.*). To allow for this, Eastside Exhibition advanced \$400,000 to 210 East without prejudice to either party’s rights to contest the amount actually due to 210 East for the renovations. (*Id.*)

Also in dispute in the captioned action is Eastside Exhibition’s contention that 210 East’s renovation work failed to comply with the Americans with Disabilities Act (“the ADA”), which resulted in Eastside Exhibition being sued by a class of disabled people. (*Id.*) Furthermore, from 2003–04, 210 East constructed 2 additional floors to the premises, thereby turning the premises from a 7-story building to a 9-story building.¹ (*Id.* at 5.) Eastside Exhibition thus contends that it has been improperly forced to pay for the increased real estate taxes imposed on the building. (*Id.*)

¹ The actual height of the building is unclear from the submitted papers. The 2008 decision rendered by this Court (Stallman, J.) suggests that the current height of the building is 9 stories. (Doc. 8 at 5 (“EastSide alleges that . . . Landlord constructed two additional floors of rental space on top of the previously existing seven-story building . . .”).) 210 East’s affidavit in opposition to plaintiff’s motion to consolidate, however, describes the premises as an 8-story building. (Doc. 17 at 1–2.) Whatever the actual height of the building is, it is sufficient to say for present purposes that there is a dispute between Eastside Exhibition and 210 East as to the amount of real estate taxes that must be paid for the building as a result of the 2 additional stories that 210 East constructed. (Doc. 8 at 5.)

Eastside Exhibition commenced the captioned action in 2002 alleging 6 causes of action against 210 East. (*Id.*) That same year, Eastside Exhibition commenced another action styled *Eastside Exhibition Corp. v 210 E. 86th St. Corp.*, Supreme Court, New York County Index Number 604492/2002 (“the tried action”), in which the parties litigated whether 210 East’s renovation work in the building constituted a partial eviction. (Docs. 10 at 3; 17 at 2.) In that matter, the Court of Appeals determined that Eastside Exhibition’s partial eviction was merely “trivial” and that Eastside Exhibition therefore had failed to demonstrate any actual damages or loss of enjoyment of the premises. (Doc. 12 at 3.)

In view of the tried action, as well as evidence regarding 210 East’s alleged violations of the ADA, Eastside Exhibition moved to amend its complaint in the captioned action. (Doc. 8 at 6.) In a December 1, 2008 decision rendered by this Court (Stallman, J.), Eastside Exhibition was granted leave to amend the complaint. (Doc. 8.) The amended complaint asserts 13 causes of action against 210 East. (Doc. 5.) Among Eastside Exhibition’s causes of action are allegations that it overpaid 210 East for the renovations and that it is entitled to a significant refund of the amount that Eastside Exhibition has already paid to 210 East for those renovations. (Doc. 5 at 11–13.) 210 East filed an amended answer in January of 2009. (Doc. 6.)

Because the parties were litigating the tried action, with the exception of exchanging discovery demands in the interim, the captioned action practically laid dormant from 2002 through 2009, when a dispute arose regarding a leak in the basement of the premises.² (Doc. 17 at 5–6.) Eastside Exhibition continued paying its increased real estate taxes pursuant to the lease through the 2011–12 tax year, but ceased making such payments in the 2012–13 tax year. (*Id.* at 6.) This resulted in 210 East commencing a Civil Court non-payment summary proceeding styled

² The parties resolved this dispute by stipulation before this Court (Stallman, J.) in 2009. (Doc. 17 at 6.)

210 E. 86th St. Corp. v Eastside Exhibition Corp., Civil Court, New York County Index Number LT-077623-14/NY (“the summary proceeding”) in September of 2014. (*Id.*)

210 East’s petition in the summary proceeding seeks a monetary judgment against Eastside Exhibition for \$977,775.49. (Doc. 14 at 6.) This amount includes, *inter alia*, rent, legal fees, real estate taxes, and water charges from July of 2011 to August of 2014. (*Id.*) The petition further seeks a judgment of possession as well as an issuance of a warrant of eviction against Eastside Exhibition for its failure to make these payments under the lease. (*Id.* at 7–8.)

Eastside Exhibition has moved, pursuant to CPLR 602(b), to remove the summary proceeding to this Court and to consolidate it with the captioned action. (*See, e.g.*, Doc. 4.) On November 20, 2017, the parties stipulated to mark the summary proceeding off the Civil Court’s calendar until this Court rendered a decision on the instant motion. (Doc. 22.)

POSITIONS OF THE PARTIES:

In support of its motion to consolidate the summary proceeding with the captioned action, Eastside Exhibition argues that consolidation is appropriate here because doing so will eliminate a multiplicity of actions and thereby avoid the risk of inconsistent determinations (Doc. 16 at 6), and, because the summary proceeding and the captioned action involve the same parties and similar legal issues, consolidation will promote judicial economy (*id.* at 5). Because the claims in the captioned action and the summary proceeding should be determined at the same time, Eastside Exhibition argues that there is no prejudice to 210 East. (*Id.* at 6–7.)

In opposition to the motion, 210 East alleges that Eastside Exhibition made the motion as a pure delay tactic. (Doc. 17 at 8.) In support of that characterization, counsel for 210 East submits e-mails exchanged between the two parties on September 19 and 20, 2017, in which 210

East indicated to Eastside Exhibition that it was ready to proceed to trial in the summary proceeding.³ (Doc. 21.) Eastside Exhibition thereafter filed the motion to consolidate, which 210 East interprets as a “clear attempt to continue to delay things and place obstacles in 210’s path in recovering the amount of rent and real estate tax escalations due from Eastside.” (Doc. 17 at 8.)

Moreover, 210 East argues that the motion should be denied because the two cases are at different stages of litigation. (*Id.*) Whereas 210 East alleges that the summary proceeding is “poised” for trial, there has barely been any discovery in this action. (*Id.* at 8–9.) Because the parties’ contentious dispute regarding the amounts owed over the real estate tax escalations can be resolved with “far greater speed and expediency” in the Civil Court, 210 East maintains that consolidation must be denied. (*Id.* at 9–10.)

In reply, Eastside Exhibitions reiterates its position that consolidation should be granted because the summary proceeding and the captioned action involve identical parties, facts, and legal issues (Doc. 23 at 2), and because consolidation would advance the goals of judicial economy, eliminate needless simultaneous actions, and avoid the potential of inconsistent results (*id.*).

LEGAL CONCLUSIONS:

Motions to consolidate pursuant to CPLR 602(b) are made as a means to further judicial economy. (*See Braun v Fraydun Realty Co.*, 158 AD2d 430, 431 [1st Dept 1990].) Specifically, consolidation avoids “two-track” litigation by having the parties’ claims heard in one action

³ Eastside Exhibition’s counsel sent the following e-mail to 210 East on September 19, 2017: “November currently is fairly open for me other than November 14, 20, 27 and 29. I have not yet checked with our witnesses, but I assume that this should be sufficient lead time for them to adjust their calendars.” (Doc. 21 at 1.) Although neither party explicitly states in the e-mails that the summary proceeding was ripe for trial, the e-mails submitted by counsel for 210 East suggest that both parties were ready to proceed to trial in the summary proceeding in November of 2017. (*See* Doc. 21.)

when those claims are interrelated. (*Id.*) Absent a showing of prejudice, courts may therefore grant consolidation when the separate actions “involve the same parties, and essentially the same questions of law and fact.” (*43d St. Deli v. Paramount Leasehold, L.P.*, 89 AD3d 573, 573–74 [1st Dept 2011].) The party opposing a motion to consolidate must show that granting the motion will cause it prejudice. (*See Vigo S. S. Corp. v Marship Corp. of Monrovia*, 26 NY2d 157, 161 [1970].) The decision whether to consolidate is one to be made in the Court’s discretion. (*See Murphy v 317-319 Second Realty LLC*, 95 AD3d 443, 445 [1st Dept 2012].)

Although courts have at times granted motions to consolidate an action with a summary proceeding, (*see Notarius v Hess Oil & Chem. Corp.*, 30 AD2d 663 [2d Dept 1968]), this Court, in its discretion, denies the motion to consolidate the summary proceeding with the captioned action. It has been held by the First Department that, where the trial of an action is imminent,⁴ a motion for consolidation should be denied. (*See New York Yellow Cab Co. Sales Agency, Inc. v Courtlandt Garage & Realty Corp.*, 208 AD 765, 765–66 [1st Dept 1924] (“In view of the time which must elapse before the action in the Supreme Court can be reached for trial . . . the discretion of the court at Special Term was not properly exercised in ordering the removal of the Municipal Court actions and consolidating them with the action pending in the Supreme Court.”); *see also Abrams v Port Auth. Trans-Hudson Corp.*, 1 AD3d 118, 119 [1st Dept 2003] (“Even where there are common questions of law or fact, consolidation is properly denied if the actions are at markedly different procedural stages and consolidation would result in undue delay in the resolution of either matter.”).)

⁴ Eastside Exhibition does not refute 210 East’s allegation that the summary proceeding is ready for trial. Eastside Exhibition instead argues that the need for an immediate resolution in the summary proceeding is belied by 210 East’s previous adjournments of the summary proceeding. (Doc. 23 at 1–2.)

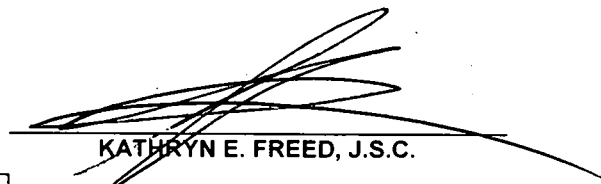
In accordance with the foregoing, it is hereby:

ORDERED that plaintiff Eastside Exhibition Corp.'s motion is denied in its entirety; and it is further

ORDERED that, within 30 days of the uploading of this order to NYSCEF, plaintiff's counsel is directed to serve a copy of this order with notice of entry on defendant 210 East 86th Street Corp.'s counsel and on the Clerk of the Court; and it is further

ORDERED that this constitutes the decision and order of this Court.

12/11/2018
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE