Frontier Ins. Group, Inc. v Ernst & Young LLP
2005 NY Slip Op 30571(U)
March 2, 2005
Supreme Court, New York County
Docket Number: 601461/03
Judge: Charles E. Ramos
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[* 1]

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

PRESENT: **Charles Edward Ramos** PART **53**

Justice

0601461/2003

FRONTIER INS. GROUP, INC.
VS
ERNST & YOUNG LLP

SEQ 4

CONSOLIDATION/JOINT TRIAL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

As per attached memo

FILED

MAR - 4 2005

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/2/05

_____
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

CHARLES E. RAMOS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION

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FRONTIER INSURANCE GROUP, INC.,

Plaintiff,

-against- Index No.: 601461/03

ERNST & YOUNG LLP,

Defendant.

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Charles Edward Ramos, J.S.C.:

Defendant Ernst & Young LLP (E&Y) moves, pursuant to CPLR 602(a), to consolidate this action with an action entitled Gregory V. Serio, Superintendent of Insurance of the State of New York as Rehabilitator of Frontier Insurance Company v Ernst & Young LLP, Index No. 1060/03, currently pending in the Supreme Court of Sullivan County.

In this action, plaintiff Frontier Insurance Group, Inc. (FIGI) asserts negligence and gross negligence claims against E&Y arising out of actuarial, audit and rate-making services it performed for FIGI's main subsidiary, Frontier Insurance Company, Inc. (Frontier). FIGI claims that E&Y's actuaries failed to properly review Frontier's reserves for losses and loss adjustment expenses and failed to properly determine the true extent by which Frontier's reserves were inadequate. FIGI argues that it was directly harmed, because it made capital contributions to Frontier, totaling $140 million, based upon E&Y's representations that Frontier's loss reserves needed strengthening. Despite these cash infusions, Frontier was declared insolvent in 2001, and ordered into rehabilitation

administered by the Superintendent of Insurance of the State of New York.

In this court's decision and order dated July 9, 2004, partially granting E&Y's motion to dismiss, consolidation of these two actions was suggested as a way of avoiding a double recovery against E&Y by a parent corporation, the plaintiff in this action, and its subsidiary, Frontier, the plaintiff in the Sullivan County action. This court ruled that consolidation of the two actions, however, could not be granted sua sponte, and this motion ensued. The Superintendent of Insurance, who is prosecuting the Sullivan County action on behalf of Frontier, was given notice of the motion. By letter to the court dated October 27, 2004, his counsel advises that the Superintendent does not oppose consolidation of the two actions "for purposes of discovery." Only FIGI opposes this relief, claiming that consolidation is both unnecessary and prejudicial.

Consolidation or joint trial of cases involving common questions of law and fact is "proper to avoid unnecessary duplication of trials, save unnecessary costs, and prevent the possibility of injustice arising from divergent decisions based on the same facts." Phoenix Garden Restaurant, Inc. v Chu, 202 AD2d 180, 180-81 (1st Dept 1994). Where common questions of law and fact exist, consolidation is generally favored unless the party opposing the motion demonstrates that it will prejudice a substantial right. Progressive Ins. Co. v Vasquez, 10 AD3d 518, 519 (1st Dept 2004); Amtorg Trading Corp. v Broadway & 56th Street

Associates, 191 AD2d 212, 213 (1st Dept 1993). Where cases are at "markedly different procedural stages and consolidation would result in undue delay in the resolution of either matter," (Abrams v Port Authority Trans-Hudson, Corp., 1 AD3d 118, 119 [1st Dept 2003]), the motion will be denied. However, "[t]he mere fact that a case may be somewhat delayed" is not enough to prevent consolidation. Amtorg Trading Corp., supra.

FIGI basically concedes that the two actions share commons questions of law and fact, and acknowledges, as it must, that the Superintendent of Insurance "borrowed heavily" from the original and amended complaints filed by FIGI in New York County. Indeed, E&Y's primary defense in both actions is that the management of Frontier and FIGI are the same, and these individuals are the ones responsible for any losses sustained by Frontier. Since E&Y's defense will involve the same witnesses and documents, it would be far more efficient to have one resolution in one action. FIGI claims that E&Y's concern about the risk of a double recovery is exaggerated. However, whether the Superintendent of Insurance has standing to recover on behalf of Frontier, or on behalf of FIGI, any portion of the $140 million in capital contributions made by FIGI to Frontier based on any malfeasance committed by E&Y is an issue that has not yet been addressed in the Sullivan County action, and thus the potential for double recovery still exists.

FIGI has failed to demonstrate any real prejudice if forced to litigate its claims together with the Superintendent's action

of behalf of its subsidiary. The two actions are not at markedly different procedural stages. In the Sullivan County action, E&Y's motion to dismiss based on a Statute of Limitations defense[1] and failure to state a claim appears to have been fully briefed as of December 20, 2004. Issue was only joined in this action on September 27, 2004, and discovery was just getting underway when this motion was filed. Neither case is on the trial calendar. The fact that FIGI's case against E&Y may be somewhat held up until the resolution of E&Y's motion to dismiss is not enough to defeat combining these cases. Amtorg, supra.

FIGI argues that New York County in a more appropriate venue than Sullivan County. When ordering consolidation of two action pending in different counties, a venue change is, of course, going to occur with respect to one of the actions. Kiamesha Concord, Inc. v Greenman, 29 AD2d 904 (3d Dept 1968). The general rule is that where actions commenced in different counties have been joined for purposes of trial pursuant to CPLR 602, the venue should be placed in the county where the first action was commenced, unless special circumstances are present. Teitelbaum v PTR Co., 6 AD3d 254, 255 (1st Dept 2004), citing Mattia v Food Emporium, Inc., 259 AD2d 527 (2d Dept 1999); see also Deutsch v Wegh, 269 AD2d 487 (2d Dept 2000).

This lawsuit was commenced by FIGI on June 24, 2003, approximately three months before the Frontier action was

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[1]E&Y's answer filed in this action, also raises the Statute of Limitations as an affirmative defense.

commenced in Sullivan County. However, there exist compelling circumstances that warrant placing venue of these actions in Sullivan County. Sullivan County has already been determined to be the most appropriate locale to address issues relating to Frontier's rehabilitation and the recovery and distribution of any of its assets. Actions by the Superintendent on behalf of Frontier against its officers and directions and against FIGI have been filed in the rehabilitation proceeding. In addition, Sullivan County is the location of FIGI and Frontier's principal places of business. While both parties make factual claims in their memoranda of law about the present location of former directors, officers and employees of FIGI as well as the relative calendar congestion in both counties, none of these claims are properly supported by testimonial or documentary evidence. What is clear, however, is that the bulk of documentary evidence relating to Frontier's business and its internal calculation of its reserve estimates, is in the possession and control of the Superintendent in Sullivan County.

E&Y asks for full consolidation, where the two actions are fused into one, with one caption, and culminating in one judgment. See Siegel, NY Prac § 127, at 211 (3rd ed.). As noted above the Superintendent of Insurance has consented to joinder for discovery purposes, but does not address why full consolidation is not appropriate. Since FIGI's claim for the recovery of its capital contributions is a subset of Frontier's larger damage claims against E&Y, full consolidation is warranted

in order to have the plaintiffs' competing claims against E&Y resolved in one action.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion is granted and the above-captioned action is consolidated in the Supreme Court of Sullivan County with Gregory V. Serio, Superintendent of Insurance of the State of New York as Rehabilitator of Frontier Insurance Company v Ernst & Young LLP, Index No. 1060/03, and the consolidated action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SULLIVAN

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Gregory V. Serio, Superintendent of Insurance of the State of New York, as Rehabilitator of FRONTIER INSURANCE COMPANY, and FRONTIER INSURANCE GROUP, INC.,

Plaintiffs,

-against- Index No.: 1060/03

ERNST & YOUNG LLP,

Defendant.

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And it is further

ORDERED that the County Clerk shall transfer the papers on file under Index No. 601461/03, together with certified copies of all minutes and entries relating to this action, to the Clerk of the Supreme Court, Sullivan County, upon service of a copy of this order with notice of entry; 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 a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation and transfer.

Dated: March 2, 2005

J.S.C.

CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.