

Bubul v Port Parties, Ltd.

2011 NY Slip Op 32705(U)

September 30, 2011

Supreme Court, New York County

Docket Number: 103407/2007

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

HELEN BUBUL,
Plaintiff,

INDEX NO. 103407/2007

-against-

MOTION DATE _____

MOTION SEQ. NO. 005

PORT PARTIES, LTD., THE UNCONVENTION
CENTER, MERCHANDISE MART PROPERTIES
INC., and VORNADO, REALTY TRUST INC.,

Defendants.

The following papers numbered 1 to 3 were read on this motion by defendant to consolidate two New York County actions and the cross-motion by plaintiff.

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

Answering Affidavits — Exhibits (Memo)

Replying Affidavits (Reply Memo)

PAPERS NUMBERED	
FILED	1
	2
	3
OCT 20 2011	

Cross-Motion: Yes No

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Defendant Port Parties, Ltd. ("Port Parties") moves to consolidate this action ("action I"), for joint trial, with a New York County action entitled, *Port Parties, Ltd. v. Merchandise Mart Properties, Inc.*, pending in the Supreme Court, New York County under Index No. 113117/2010 ("action II"). Plaintiff opposes the defendant's motion and cross-moves for a protective order striking the notice for discovery and inspection served by defendant, to sever plaintiff's action against defendant from plaintiff's actions against all other defendants, and to remand the action against defendant to the trial court for an immediate damages inquest.

BACKGROUND

Plaintiff, who was then 74 years old, allegedly slipped and fell on a puddle of soap and water on a bathroom floor at the Architectural Digest Home Show in New York City in 2004. She commenced this action by the filing of a Summons and Verified Complaint on March 13,

2007 against defendants Port Parties, the UnConvention Center ("UC"), Vornado Realty Trust Inc. ("Vornado"), and Merchandise Mart Properties, Inc. ("MMPI"). Subsequently, defendants UC, Vornado, and MMPI interposed an answer. Port Parties, however, never interposed an answer or made an appearance. Consequently, plaintiff moved, on November 7, 2008, for a default judgment against Port Parties. By an Order and Decision, dated December 2, 2008, plaintiff was granted a default judgment against Port Parties as to liability.

On October 8, 2009, Port Parties moved to vacate the default judgment claiming it had not been properly served. A traverse hearing was conducted by Special Referee Sue Anne Hoahng of the Supreme Court, New York County, and in a decision and order dated August 31, 2010, Port Parties' motion to vacate the default judgment was denied. In a decision and order dated April 14, 2011, the First Department affirmed Special Referee Hoahng's order (*see Bubul v Port Parties, Ltd.*, 83 AD3d 517 [1st Dept 2011]).

On October 6, 2010, Port Parties commenced an action (action II) against co-defendants MMPI and UC seeking a judgment against MMPI for, *inter alia*, indemnification, contribution, and breach of contract and against UC for common-law indemnification and contribution.

Port Parties now moves by order to show cause for consolidation of action I, involving the plaintiff, with action II involving MMPI and UC. Plaintiff opposes defendant's motion and cross-moves for a protective order striking the notice for discovery and inspection served by defendant, to sever plaintiff's action against defendant from plaintiff's actions against all other defendants, and to remand the action against defendant to the trial court for an immediate damages inquest. Co-defendants MMPI and UC submitted affirmations in opposition to Port Parties' motion for consolidation.

Port Parties contends that the Court should grant consolidation of this action with the action involving MMPI because both actions concern the same factual and legal issues, namely, the responsibility of the respective parties regarding plaintiff's alleged injuries. Port Parties

asserts that failure to consolidate the actions would result in a waste of judicial resources and the possibility of inconsistent verdicts (reply affirmation in support of motion at 2). Moreover, Port Parties states that the plaintiff will not be prejudiced by consolidation.

Plaintiff in opposition argues that there are no common questions of law or fact, and that consolidation would unfairly delay this action. Defendants UC and MMPI similarly assert, among other things, that there are no common questions of law or fact and that the recently commenced action involves different theories of law (see affidavits in opposition to defendants motion to consolidate).

DISCUSSION

Motion to Consolidate

“CPLR §602 (a) gives the trial court discretion to consolidate actions involving common questions of law or fact” (*Progressive Ins. Co. v. Vasquez*, 10 AD3d 518, 519 [1st Dept 2004]). Though there is a preference for consolidation, consolidation would not be proper if “the party opposing the motion demonstrates that consolidation will prejudice a substantial right” (*Progressive*, 10 AD3d at 519).

Here, the two actions pose different questions of law. While both actions arise out of the incident that occurred at the Architectural Digest Home Show in New York City in 2004, action I involving plaintiff and Port Parties is based upon negligence, while the action that Port Parties commenced against defendants UC and MMPI is based on indemnification and contribution, to which plaintiff is not involved. In addition, the arguments to be presented by the co-defendants at the trial involving plaintiff differ. Defendants MMPI and UC will seek to argue about the plaintiff's comparative negligence, which Port Parties, a defaulting party, cannot.

Moreover, if the Court was to consolidate the actions, the rights of the plaintiff would be prejudiced. Port Parties' default and the subsequent traverse hearing delayed the case for almost an year. Consolidation would further delay resolution of this matter. Accordingly, Port Parties motion to consolidate this action with its action pending against MMPI and UC is denied.

[* 4]
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Plaintiff's Cross-Motion

A. Protective Order Striking Port Parties' Discovery Demands

In her cross-motion, plaintiff seeks a protective order striking defendant's discovery demands. In doing so she contends that defendant as a defaulting party is not entitled to discovery from the plaintiff. Plaintiff asserts that defendant's reliance upon an order of this Court dated October 7, 2010, which stated that "all parties to respond to all discovery demands within 25 days" is misguided (*see* reply affirmation in support of motion to consolidate, Exhibit A). Plaintiff contends that this order does not give Port Parties, a defaulting party, the right for de novo discovery demands. Defendant on the other hand, asserts, that it is entitled to a response to its discovery demand served on plaintiff to the extent that it complied with this Court's order.

It is well settled in New York, that a defaulting party "forfeits" his right to discovery as a result of its default in answering a complaint (*Minicozzi v Gerbino*, 301 AD2d 580, 581 [2d Dept 2003]; *see Santiago v Siega*, 255 Ad2d 307, 307-308 [2d Dept 1998]). It is error "to permit a defaulting defendant to conduct discovery of the plaintiff in preparation for an appearance at inquest" (*Yeboah v Gaines Serv. Leasing*, 250 AD2d 453, 454 [1st Dept 1998]).

Here, Port Parties failed to answer or appear in response to plaintiff's complaint, and as a result a default judgment against Port Parties was granted. As a result of its default, Port Parties is not entitled to discovery from plaintiff at this time. At an inquest of damages, Port Parties will be entitled to only introduce evidence in relation to plaintiff's damages, but cannot introduce evidence tending to defeat plaintiff's cause of action for negligence (*see Rokina Opt. Co., Inc. v Camera King*, 63 NY2d 728 [1984]; *Toure v Harrison*, 6 Ad3d 270 [1st Dept 2004]). It is error for Port Parties to try to receive de novo discovery at this stage of the action, and this Court's order did not intend to permit Port Parties to do so. Thus, a protective order striking defendants notice and inspection demands shall be granted.

B. Severance of the action against Port Parties and Inquest for Damages

Plaintiff also requests severance of its action against Port Parties from its action against the other defendants. Plaintiff alleges that this would afford her the opportunity for an immediate trial against Port Parties because as a result of plaintiff's default judgment against Port Parties there are no triable issues of liability. Additionally, severance would allow the trial against the remaining defendants to proceed more expeditiously because the arguments about plaintiff's comparative negligence, which Port Parties cannot assert, would cause less confusion if Port Parties was absent. In opposition, Port Parties argues that plaintiff's claims against it should not be severed from her claims against the other defendants because the claims concern common legal and factual issues and severance would be a waste of judicial resources and could possibly result in inconsistent verdicts.

Pursuant to CPLR § 603, "in furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others" (see CPLR § 603). "Where it will facilitate the speedy, unprejudiced disposition of a case, severance is appropriate in the sound exercise of discretion" (*Cross v Cross*, 112 AD2d 62, 64 [1st Dept 1985] [internal citation omitted]). The Court's exercise of that discretion "will not be disturbed absent [an] abuse of discretion or prejudice to a party's substantial right" (*Caruana v Padmanabha*, 77 AD3d 1307, 1307 [4th Dept 2010] quoting *Matter of Green Harbour Homeowners' Assn v Town of Lake George Planning Board*, 1 AD3d 744, 746 [3d Dept 2003]).

Severance of the action against Port Parties from the remaining defendants is appropriate here given the different arguments to be interposed by the co-defendants and in light of Port Parties default. Severing the action would grant the plaintiff the convenience to proceed to an immediate trial against Port Parties regarding damages.

Additionally, Port Parties would not be prejudiced by severance of the case from the other defendants for an immediate inquest for damages. The claims by Port Parties against its co-defendants in action II, entitled *Port Parties, Ltd. v. Merchandise Mart Properties, Inc. and*

the Unconvention Center, Inc., are those for contractual and common-law indemnification and contribution or breach of contract, to which plaintiff is not directly involved. These issues need not be resolved prior to an inquest for damages between plaintiff and Port Parties. Accordingly, the action against Port Parties should be severed (see CPLR §603; CPLR §3215 [a]).

CONCLUSION

Accordingly, and upon the foregoing papers, it is

ORDERED that defendant Port Parties, Ltd's motion for consolidation of this action with a New York County action entitled, *Port Parties, Ltd. v. Merchandise Mart Properties, Inc. and the Unconvention Center, Inc.*, pending in the Supreme Court, New York County under Index No. 113117/2010 is denied; and it is further,

ORDERED that plaintiff's cross-motion for a protective order striking defendant's notice for discovery and inspection is granted; and it is further,

ORDERED that plaintiff's cross-motion for a severance of its claims against Port Parties from its claims against other defendants is granted and the action is severed as to defendant Port Parties, Ltd., only and is continued as to the remaining defendants; and it is further,

ORDERED that the severed portion of this action is referred to a Special Referee for an inquest and assessment of damages; and it is further,

ORDERED that within 30 days of the date of this order plaintiff shall serve a copy of this Order with Notice of Entry and Notice of Inquest on the Special Referee Clerk of the Motion Support Office who shall set this matter down for an inquest.

This constitutes the Decision and Order of the Court

Dated: 9-30-11 **FILED** Enter:

OCT 20 2011

PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE