Ferrigno v City of New York
2013 NY Slip Op 30516(U)
March 18, 2013
Supreme Court, Richmond County
Docket Number: 102170/12
Judge: Thomas P. Aliotta
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

---------------------------------------X

MARY FERRIGNO, as Administratrix of the Estate of AUDREY BURGER and MARY FERRIGNO, Individually,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION, KARL R. EMIGHOLZ, JR., and DONNA CASHMAN,

Defendants.

Part C-2

Present:

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No. 102170/12

Motion No. 3183-001

Action No. 1

---------------------------------------X

DONNA CASHMAN,

Plaintiff,

-against-

KARL EMIGHOLZ, JR., THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION and STEVEN BROCATO,

Defendants.

Index No. 102388/12

Motion No. 3494-001

Action No. 2

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KARL EMIGHOLZ, JR.,

Plaintiff,

-against-

DONNA C. CASHMAN,

Defendant.

Index No. 101986/12

Action No. 3

---------------------------------------X

The following papers numbered 1 to 9 were marked fully submitted on the 16th day of January, 2013:

[* 2]

FERRIGNO v THE CITY OF NEW YORK, et al.

Motion No. 3183

Papers Numbered

Notice of Motion to Consolidate for Joint Trial by Defendant City of New York, with Supporting Papers and Exhibits..........................1
Affirmation in Partial Opposition of Defendant in Action Nos. 1 and 2/Plaintiff in Action No. 3 Karl Emigholz, Jr......................................2
Affirmation in Opposition of Steven Brocato, with Supporting Papers and Exhibits.....................3
Affirmation in Further Opposition of Steven Brocato, with Supporting Papers and Exhibits.....................4
Affirmation in Reply and in Further Support of Motion........5

Motion No. 3494[1]

Notice of Motion to Sever of Defendant Steven Brocato, with Supporting Papers and Exhibits.....................6
Affirmation in Opposition of Defendant the City of New York.......................................7
Affirmation in Opposition of Defendant in Action Nos. 1 and 3/Plaintiff in Action No. 2 Donna Cashman..........8
Reply Affirmation..9

Upon the foregoing papers, the motion to consolidate (No. 3183) "for purposes of joint discovery and joint trial" of defendant the City of New York (hereinafter the "City") is granted; the motion for a severance (No. 3494) of defendant Steven Brocato is denied.

In the above-entitled actions for personal injuries and wrongful death, the plaintiffs in each action claim to have sustained serious personal injuries and/or the death of a loved on as the result of an intersection collision that occurred in

[1]This motion has been consolidated with Motion No. 3183 for purposes of disposition.

Richmond County on July 23, 2011 between vehicles owned and operated by Karl Emigholz, Jr. and Donna Cashman, in which both drivers were allegedly injured and Audrey Burger, a passenger in the Cashman vehicle and the mother of Administratrix Mary Ferrigno, died. Defendant in Action No. 2, Steven Brocato, was not a party to this accident, but was involved in a subsequent collision on September 11, 2011 (some 50 days later), in which he purportedly rear-ended a livery cab in which the plaintiff in that action, Donna Cashman, was riding as a passenger. To the extent relevant, Mr. Brocato has denied responsibility for the September collision, and cross-claimed against his co-defendants in Action No. 2 for indemnification and/or contribution towards the alleged exacerbation of Ms. Cashman's injuries sustained in the accident of July 23, 2011.

As applicable, CPLR 602 and 603 provide as follows:

602. Consolidation

(a) Generally. When actions involving a common question of law or fact are pending before a court, the court, upon motion , may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

* * *

603. Severance and separate trials

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.

In support of its motion, in effect, for a joint trial, the City erroneously claims that all three cause of action arise out of the same July 23, 2011 collision. Nevertheless, the motion is unopposed by the plaintiffs in all three actions except to the extent that the plaintiff in Action No. 3 (Karl Emigholz, Jr.) requests that since his action was the first commenced, he should "be given the right of first opening and last closing arguments" at any trial (Affirmation in Partial Opposition of Helen M. Rosenblatt, Esq. on behalf of Karl Emigholz, Jr., p 2). However, this is a matter best addressed in a motion *in limine* before the trial court, to which the matter is respectfully referred.

In his opposition papers and in support of his motion to sever (Motion No. 3494), defendant Steven Brocato, a party to only one of the actions (Action No. 2), claims that there are no common questions of law and only a minor question of fact insofar as Ms. Cashman's cause of action against him is concerned, since the accident underlying this claim was subsequent to and entirely separate from that which occurred at a wholly different location on July 23, 2011[2]. More particularly, he alleges that the only commonality lies in the fact that the claim against him in Action No. 2 is for the exacerbation of the injuries allegedly sustained by Ms. Cashman in the earlier collision.

Although factually correct, this Court cannot ascribe to Mr. Brocato's conclusion that the City's motion should be denied.

It is well established that a joint trial is appropriate where the several lawsuits present common questions of fact or law and the interests of judicial economy and the consistency of verdicts will best be served by having a single trial (*see* Herskovitz v Klein, 91 AD3d 598). As the Second Department stated some 35 years ago:

> Although the discretion of the trial court is undeniably wide in assessing the propriety of a motion for a joint trial pursuant to CPLR

[2]The July accident occurred on Staten Island, while the September accident occurred in Brooklyn.

> 602(a), "the interests of justice and judicial economy are better served by joint trials whenever possible". Indeed, we have held that [even a] "single common issue" will suffice to warrant a joint trial. Further, "it is the burden of the opponent of the motion to demonstrate that prejudice to a substantial right would result from ... a joint trial (Heck v Waldbaum's Supermarkets, 134 AD2d 568, 569 [citations omitted]).

A case in point is Dolce v Jones (145 AD2d 594), wherein the Second Department held that a severance had been *im*properly granted in a case involving a plaintiff's claim for damages for personal injuries suffered in three separate automobile accidents which occurred over a period of 18 months, and where, as here, a plaintiff was claiming in the subsequent actions for the aggravation of certain injuries allegedly sustained in the first. On these facts, the Appellate Division concluded that all three actions "share[d] the common [factual] issue of which injuries were caused by the defendants involved in each accident" (*id.* at 595). Hence, this factor alone has been deemed sufficient to warrant a joint trial (*see also* McIver v Canning, 204 AD2d 698).

The case at bar is virtually indistinguishable from Dolce and McIver except to the extent that neither of those cases involved a wrongful death action. Additionally, this case presents a further common issue, inasmuch as Brocato has cross-claimed against the

other named defendants in Action No. 2 for contribution and/or indemnification based on the injuries, if any, inflicted upon plaintiff in the July collision (*see* Exhibit "D" annexed to Brocato's motion to sever). In this regard, the Second Department has recently held (*see* Zawadzki v 903 E 51st St LLC, 80 AD3d 606), that the refusal to sever a fourth-party action for indemnification was proper where the effect was to join for trial the issue of damages in the main action (for personal injuries arising under alleged violations of the Labor Law) with a fourth-party claim for contractual indemnification. Somewhat similarly, in Golden Eagle Capital Corp. v Paramount Mgt. Corp. (88 AD3d 646, 648-640), the same Appellate Division held that it was error to sever a cross claim which, as pleaded, "share[d] common issues of law and fact with the ... affirmative defenses and counterclaims [asserted] against [the plaintiff]".

Contrariwise, Brocato has failed to demonstrate any substantial prejudice stemming from the proposed joinder (*see* CPLR 603; Heck v Waldbaum's Supermarkets, 134 AD2d at 569). On the present papers, his claim that it would be "highly prejudicial" for the case against him to be joined for trial with a wrongful death action involving a different plaintiff is wholly speculative, while his further claim of inconvenience "pales" in comparison to the

savings of judicial time and effort, as well as the assurance of consistent verdicts to be achieved in a joint trial.

Noonan v Long Is. Home Found. (2010 NY Slip Op 30873U [Sup Ct Suffolk Co]) is readily distinguishable on its facts and does not represent controlling authority to the contrary.

Accordingly, it is

ORDERED that the motion for consolidation by defendant the City of New York (Motion No. 3183) is granted to the extent of directing joint discovery and a joint trial; and it is further

ORDERED that the motion to sever of defendant Steven Brocato (Motion No. 3494) is denied.

E N T E R,

/s/

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Hon. Thomas P. Aliotta

J.S.C.

Dated: March 18, 2013
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