

BBH Solutions, Inc. v S. DiGiacomo & Son Inc.

2013 NY Slip Op 33117(U)

December 10, 2013

Supreme Court, New York County

Docket Number: 650131/2013

Judge: O. Peter Sherwood

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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: O. PETER SHERWOOD
Justice

PART 49

BBH SOLUTIONS, INC.

Plaintiff,

-against-

S. DIGIACOMO & SON INC, et al.,

Defendants.

INDEX NO. 650131/2013

MOTION DATE Oct. 4, 2013

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to consolidate.

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

Answering Affidavits — Exhibits _____


Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion to consolidate is decided in accordance with the accompanying decision and order.

Dated: December 10, 2013


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

-----X

BBH SOLUTIONS, INC.,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 650131/2013
Mot. Seq. No. 001

S. DIGIACOMO & SON INC. a/k/a BOLAND LLC,
CONSOLIDATED GAS COMPANY OF NEW YORK
a/k/a CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC. a/k/a CONSOLIDATED EDISON
COMPANY, INC., MDB DEVELOPMENT CORP.,
WELDING WORKS, INC., O'LEARY
CONSTRUCTION, INC., PINNACLE
ENVIRONMENTAL CORP., JP MORGAN CHASE &
CO. a/k/a JPMORGAN CHASE BANK, N.A., SAFETY
DYNAMICS, LLC, E)(TECH BUILDING MATERIALS,
INC., YORK SCAFFOLD EQUIPMENT CORP.,
INTERSTATE DRYWALL CORP., SPRINGFIELD
SHEET METAL WORKS, INC., PARK A VENUE
BUILDING & ROOFING SUPPLIES, LLC, PRECISION
CABINETS, INC., MATRI(MECHANICAL CORP.,
CORPORATE ELECTRIC GROUP INC. and TM & M
MECHANICAL CORP.,

Defendants.

-----X

O. PETER SHERWOOD, J.:

Defendant Consolidated Edison of New York (“Con-Ed”) moves, pursuant to CPLR 602 to consolidate this action with *Spieler & Ricca Electrical Co. v Consolidated Edison Company of New York, et al*, Index No. 654404/2012, before Hon. Justice Charles E. Ramos (the “Spieler & Ricca action”). Plaintiff BBH Solutions, Inc. (“BBH”) opposes the motion. Defendant S. DiGiacomo & Son, Inc. (“DiGiacomo”) does not oppose the motion. For the following reasons, the motion is GRANTED.

Con-Ed is the owner of a property located at 4 Irving Place, New York, New York (the “Property”). In March 2011, Con-Ed entered into a construction contract with DiGiacomo, a general contractor, to perform a project (the “Project”) at the Property. The Spieler & Ricca Action and the instant action both arise out of mechanic’s liens related to the Project.

The Spieler & Ricca Action was commenced on December 18, 2012, and a Request for Judicial Intervention was filed on February 19, 2013. Plaintiff in that action (and non party in this action), Spieler & Ricca (“S&R”) was a subcontractor on the Project. According to the Complaint in that action, S&R was not paid for its services on the Project and filed a Notice of Mechanic’s Lien with the Clerk of County of New York on July 25, 2012. In that action, S&R seeks to foreclose on the Mechanic’s Lien. Non-parties King Freeze and John Does 1 through 10 are defendants in the Spieler and Ricca Action, who have the purported status of lien or mortgage holders with an alleged interest in the Property.

The instant action was commenced on January 14, 2013 and a Request for Judicial Intervention was filed on March 15, 2013. BBH was, like S&R, a subcontractor on the Project who alleges it was not paid for its work. On September 26, 2012, BBH filed a Notice of Mechanic’s Lien with the Clerk of County of New York. Con-Ed, as owner of the Property and DiGiacomo, as general contractor, are named as defendants. Also named as defendants are fifteen other entities who have also filed and recorded mechanic’s liens on the Property. S&R and King Freeze are not named as defendants in this action.

CPLR 602 provides that “[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion . . . may order the actions consolidated.” “Consolidation is generally favored in the interest of judicial economy and ease of decisionmaking where cases present common questions of law and fact, ‘unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right’” (*Raboy v McCrory Corp.*, 210 AD2d 145, 147 [1st Dept 1994], quoting *Amtorg Trading Corp. v Broadway & 56th St. Assocs.*, 191 AD2d 212, 213 [1st Dept 1993]). The determination of motion to consolidate within “the sound discretion of the court, and the court is given wide latitude the exercise thereof” *Inspiration Enters. v Inland Credit Corp.*, 54 AD2d 839, 840 [1st Dept 1976].

The common issues of law and fact in the Spieler and Ricca Action and the instant action weigh heavily in favor of consolidation. Both cases are currently in discovery. Con-Ed, the property

owner and DiGiacomo, are defendants in both actions. It is in the interest of judicial economy for these actions to be decided together.

BBH's objection to consolidation rests on the assertion that the mechanics liens at issue in the Spieler & Ricca action are invalid. To accept this argument would require the Court to determine the legal issues at the core of another action. This argument weighs for consolidation rather than against it.

BBH also argues that consolidation would unduly complicate the issues, substantially delay the progress of the instant action, and disserve the goal of CPLR 602. This argument is without merit. According to BBH, while disclosure in this action is proceeding apace, the earlier filed Spieler and Ricca Action is substantially behind the instant action. On the contrary, a preliminary conference order was issued on August 27, 2013 in the Spieler and Ricca Action setting an original Note of Issue deadline of November 15, 2013. The preliminary conference order in this case, issued on May 1, 2013 set an original Note of Issue deadline of October 25, 2013, since extended to March 31, 2014. The benefits of consolidation outweigh any minimal disruption that will result.

Con-Ed requested that the Spieler & Ricca Action be consolidated with the instant action under Index Number 650131/2013. However, the Spieler & Ricca Action was first filed. While the motion to consolidate is granted, this action will be consolidated with the Spieler & Ricca Action, under Index Number 654404/2012.

ORDERED that plaintiff's motion to consolidate is GRANTED and *Spieler & Ricca Electrical Co. v Consolidated Edison Company of New York, et al*, Index No. 654404/2012 is consolidated in Part 53 with the above-captioned action under Index No. 654404/2012, and the consolidated action shall bear the following caption:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

-----X
SPIELER & RICCA ELECTRICAL CO.,

Plaintiff,

-against-

Index No. 654404/2012

**CONSOLIDATED EDISON COMPANY OF NEW YORK,
S. DIGIACOMO & SON INC., KING FREEZE
MECHANICAL CORPORATION, ANY OTHER
LIENHOLDERS, JOHN DOES 1-10,**

Defendants.

-----X
BBH SOLUTIONS, INC.,

Plaintiff,

-against-

**S. DIGIACOMO & SON INC. a/k/a BOLAND LLC,
CONSOLIDATED GAS COMPANY OF NEW YORK
a/k/a CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC. a/k/a CONSOLIDATED EDISON
COMPANY, INC., MDB DEVELOPMENT CORP.,
WELDING WORKS, INC., O'LEARY
CONSTRUCTION, INC., PINNACLE
ENVIRONMENTAL CORP., JP MORGAN CHASE &
CO. a/k/a JPMORGAN CHASE BANK, N.A., SAFETY
DYNAMICS, LLC, E)(TECH BUILDING MATERIALS,
INC., YORK SCAFFOLD EQUIPMENT CORP.,
INTERSTATE DRYWALL CORP., SPRINGFIELD
SHEET METAL WORKS, INC., PARK A VENUE
BUILDING & ROOFING SUPPLIES, LLC, PRECISION
CABINETS, INC., MATRI)(MECHANICAL CORP.,
CORPORATE ELECTRIC GROUP INC. and TM & M
MECHANICAL CORP.,**

Defendants.

-----X

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 movant is directed to serve a copy of this order with notice of entry on the County Clerk (Room 141 B), who shall consolidate the papers in the actions hereby.

This constitutes the decision and order of the Court.

DATED: December 10, 2013

ENTER,


O. PETER SHERWOOD
J.S.C.