

Nesbitt v Town of Carmel

2014 NY Slip Op 33165(U)

December 8, 2014

Supreme Court, Putnam County

Docket Number: 2561/12

Judge: Lewis J. Lubell

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

2561/12 - Seq #2
2562/12 - Seq #1
SC 1/26/15 @ 9:30 AM

To commence the 30 day statutory
time period for appeals as of right
(CPLR 5513[a]), you are advised to
serve a copy of this order, with
notice of entry, upon all parties

**SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF PUTNAM**

-----X
MELISSA NESBITT,

Plaintiff,

-against -

TOWN OF CARMEL, TOWN OF CARMEL FOR
THE HAMLET OF MAHOPAC, PUTNAM COUNTY
and MICHAEL L. SHAW,

Defendants.

-----X
LUBELL, J.

DECISION & ORDER

Index No. 2561/12

Sequence No. 2

Motion Date: 10/6/14

The following papers were considered in connection with this **motion** by non-party IDS Property Casualty Insurance Company for an Order permitting it to intervene in the within personal injury action on the ground that it is subrogated to the rights of plaintiff, Melissa Nesbitt, to the extent it has paid to or on behalf of plaintiff economic loss benefits in excess of basic economic loss benefits in the amount of \$100,000.00, and its **motion** (incorrectly made under Index No. 2562-2012) for an Order consolidating this action with an action entitled IDS Property Casualty Insurance Company on its own behalf and a subrogee and insurer of Melissa Nesbitt v. Michael Shaw et al. (Putnam County Index No. 1060-2014; the "Equitable Subrogation Action"):

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIDAVIT/AFFIRMATION/EXHIBITS A-C	1
AFFIRMATION IN OPPOSITION/EXHIBIT A	2
AFFIRMATION IN PARTIAL OPPOSITION	3
AFFIRMATION IN OPPOSITION/EXHIBIT A	4
AFFIRMATION IN SUPPORT/EXHIBIT A	5
FURTHER AFFIRMATION IN PARTIAL OPPOSITION	6
REPLY AFFIRMATION	7
NOTICE OF MOTION (2562/12)/AFFIRMATION/EXHIBITS A-D	8
AFFIRMATION IN PARTIAL OPPOSITION	9

Plaintiff, Melissa Nesbitt, commenced two separate actions in connection with personal injuries she allegedly sustained when she was struck on June 15, 2011, by an automobile owned and operated by defendant, Michael L. Shaw ("Shaw"), as she was crossing Union Valley Road, in the Town of Carmel, County of Putnam, State of New York. Notices of claim were served upon defendants Town of Carmel and Putnam County in 2011. The first of the two actions was commenced against the municipal defendants on September 11, 2012 under Putnam County Index No. 2561-2012. The second action was commenced on same date against Shaw under Putnam County Index No. 2562-2012.

By Decision & Order of December 4, 2012, the Court denied Carmel's motion to consolidate the two actions for want of an RJI in the Shaw action (Index No. 2562-2012). The Court properly noted that, absent an RJI, the matter was not before the Court. The actions were eventually consolidated under the earlier of the two actions, the municipal action Index No. 2561-2012, by SO ORDERED Stipulation dated January 7, 2013.

IDS commenced an equitable subrogation action against all of the defendants hereinabove named upon the June 9, 2014 filing of a summons and complaint.¹ It is captioned IDS Property Casualty Insurance Company on its own behalf and a subrogee and insurer of Melissa Nesbitt v. Michael Shaw, et al. (Putnam County Index No. 1060-2014; the "Equitable Subrogation Action"). An RJI has yet to be filed in that action. As such, it is not before the Court.

In the Equitable Subrogation Action, IDS seeks to recover economic loss benefits paid to its insured, plaintiff herein, in excess of basic economic loss benefits in the sum of \$100,000.

In addition to commencing the Equitable Subrogation Action, IDS seeks to intervene in this action.

At the outset, the Court notes that IDS's moving papers do not contain a proposed pleading in this personal injury action as is required by CPLR §1014. What IDS does attach is a copy of a complaint in the Equitable Subrogation Action. That complaint, however, does not constitute a proposed pleading in this action. As such, the motion is denied (Zehnder v. State, 266 AD2d 224, 224 25 [2d Dept 1999]).

¹See Humbach v. Goldstein, 229 AD2d 64, 66 67 (2d Dept 1997) for a general discussion about equitable subrogation actions.

Even if the Court were to accept the complaint in the Equitable Subrogation Action as the IDS's proposed complaint in this action, the motion would be denied. The presence of common questions of law and fact open the door to discretionary intervention under CPLR 1013. The inquiry does not end there, however. Upon exercising its discretion, "the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party" (Wells Fargo Bank, N.A. Assn. v. McLean, 70 A.D.3d 676, 677 [2d Dept 2010]; see CPLR 1013).

Here, the Court is not persuaded from the generalized assertions made by IDS that intervention by plaintiff's insurer, more than two years after the commencement of the personal injury action, would not unduly delay the personal injury action or prejudice any party, especially since nearly all discovery, including party depositions, has been completed.

In addition to having to catch up with the discovery stage of this action, the Court can very well anticipate that there will motions addressing notice of claim issues (as is suggested in the papers currently before the Court; see County Law §52; General Municipal Law §50-e), among other delays.

Moreover, as the Court of Appeals has recognized:

Clearly, intervention can create an adversarial posture between a plaintiff/insured and its insurer because neither has an incentive to consider the interests of the other, especially where the potential damages exceed the available sources of recovery (see generally Siegel, N.Y. Prac. §180, at 309-310 [4th ed.]).

(Fasso v. Doerr, 12 NY3d 80, 89 90 [2009]).

CONSOLIDATION

Although made under the caption of this action, IDE's motion to consolidate is incorrectly made under Putnam County Index No. 2562-2012 which has since been extinguished upon consolidation of Index Nos. 2561-2012 and 2562-2012. In any event, the motion to consolidate IDE's Equitable Subrogation Action with this action (as properly indexed) is denied for want of a Request for Judicial Intervention in the Equitable Subrogation Action. Absent an RJI,

the matter is not before the Court for consideration.²

Based upon the foregoing, it is hereby

ORDERED, that the motion by IDE for permissive intervention is denied as is its motion to consolidate.

The parties are directed to appear before the Court at 9:30 AM on January 26, 2015, for a Status Conference in this action.

Upon the filing of an RJI in the Equitable Subrogation Action, the Court will schedule the matter for a Preliminary Conference and/or will take whatever appropriate action may be warranted under the circumstances surrounding the filing of an RJI.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
December 8 , 2014

S/

HON. LEWIS J. LUBELL, J.S.C.

Clark, Gagliardi & Miller PC
Attorneys for Plaintiff
99 Court Street
White Plains, New York 10601

Henderson & Brennan, Esqs.
Attorneys for Def. Town
222 Mamaroneck Avenue, Suite 307
White Plains, New York 10605

Gaines, Novick, Ponzini Cossu
Attorneys for Def. County
11 Martine Avenue, 8th Floor
White Plains, New York 10605

Craig P. Curcio, Esq.
Attorney for Def. Shaw

² As to the potential merits of any such proper re-application, IDE should be guided by the determination herein made with respect to intervention.

384 Crystal Run Road, Suite 202
Middletown, New York 10941

Bruce Somerstein & Associates, PC
By: Christopher A. Wong, Esq.
Attorneys for IDS Property Casualty Insurance Company
Seven Penn Plaza, Suite 420
New York, New York 10001