

<b>Hayne v Collister LLC</b>
2016 NY Slip Op 30212(U)
February 8, 2016
Supreme Court, New York County
Docket Number: 159394/13
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
PATRICK HAYNE, BARRIE SCHWARTZ, 1A-60,  
COLLISTER STREET LLC, and 1-B-60 COLLISTER  
STREET LLC,

Index No. 159394/13

Plaintiffs,  
-against-

Mot. seq. no. 03

COLLISTER LLC, AARON STONE, and INTERIOR  
MANAGEMENT, INC.,

**DECISION AND ORDER**

Defendants.

-----X  
INTERIOR MANAGEMENT, INC.,

Third Party  
Index No. 590293/14

Third-Party Plaintiff,  
-against-

ROSE DEMOLITION & CARTING, INC.,

Third-Party Defendant.

-----X  
INTERIOR MANAGEMENT, INC.,

Third Party  
Index No. 595148/14

Second Third-Party Plaintiff,  
-against-

157 HUDSON, LLC, 157 HUDSON STREET CONDOMINIUM,  
and CAMELOT REALTY GROUP LLC,

Second Third-Party Defendants.

-----X  
COLLISTER LLC and AARON STONE,

Third Party  
Index No. 595772/15

Third Third-Party Plaintiffs,  
-against-

ROSE DEMOLITION & CARTING, INC.,

Third Third-Party Defendant.

-----X  
BARBARA JAFFE, J.:

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By notice of motion, third-party defendant Rose Demolition & Carting, Inc. (Rose), moves pursuant to CPLR 602(a) for an order consolidating this action with *Great Northern Ins. Co. a/s/o Cousin Entertainment Inc. et al. v Interior Mgt. Inc. et al.*, Index No. 153603/15 for the purpose of holding a joint trial. Plaintiffs oppose. Defendants Collister LLC and Aaron Stone join.

This action arises from the alleged flooding of plaintiffs' condominium unit resulting from renovation work undertaken by defendants in the unit above. On October 11, 2013, plaintiffs commenced this action alleging, *inter alia*, negligence based defendants' failure to exercise reasonable care in performing the renovations, and for a breach of contract based on an alteration agreement wherein defendants agreed to indemnify plaintiffs and other condominium owners for harm arising from the renovation work. (NYSCEF 1). Defendants thereafter commenced third-party actions advancing claims of indemnification and contribution. (NYSCEF 12, 23, 75). The parties have exchanged document discovery, but have conducted no depositions, although depositions have been scheduled for April 2016. (NYSCEF 71, 83).

On April 10, 2015, plaintiffs' subrogee, Great Northern Insurance Company, commenced an action against defendants and Rose under Index No. 153603/15 based on its reimbursement of plaintiffs' claims, advancing claims of negligence and breach of contract premised on facts substantially similar to those set forth in this action. On January 29, 2016, the parties appeared for a preliminary conference, and agreed to exchange discovery and conduct depositions between April and July 2016. (NYSCEF 67).

In support of consolidation, Rose argues that both actions arise from the same incident, present identical issues, and will necessitate the same witnesses and proof at trial, and thus

seeks to avoid duplication. (NYSCEF 64). In support, Collister and Stone contend that the question of defendants' liability is central to both actions, and counsel affirms that he spoke to counsel for plaintiffs in the second action and that plaintiffs' counsel has no opposition to consolidation. (NYSCEF 74). In response, plaintiffs maintain they will suffer prejudice by virtue of the delay pending further discovery in the subrogation action. (NYSCEF 70).

In reply, Rose notes that no depositions have been held in either action and discovery is still in its initial stage, and maintains that absent consolidation, it will have to respond to identical demands and produce witnesses for successive depositions, and that plaintiffs' claim of prejudice is conclusory and self-serving. (NYSCEF 71).

Pursuant to CPLR 602(a), a motion for a joint trial rests in the discretion of the trial court. (*Matter of New York City Asbestos Litig. [Dummit]*, 121 AD3d 230, 242 [1st Dept 2014]; *JP Foodservice Distribs., Inc. v PricewaterhouseCoopers LLP*, 291 AD2d 323, 324 [1st Dept 2002]; *Rodgers v Worrell*, 214 AD2d 553, 554 [2d Dept 1995]).

Generally, in order to join actions for trial, there must be a "plain identity between the issues involved in the two controversies." (*Matter of Viggo S. S. Corp. (Marship Corp. of Monrovia)*, 26 NY2d 157, 161 [1970]; *Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 334-335 [1st Dept 2005]). A joint trial should be ordered unless the opposing party demonstrates prejudice to a substantial right (*Matter of New York City Asbestos Litig. [Bernard]*, 99 AD3d 410 [1st Dept 2012]), and allegations of prejudice must be specific and non-conclusory (*Dummitt*, 121 AD3d at 245). However, a joint trial should not be granted if individual issues predominate over common ones. (*Id.*).

In *Hanover Ins. Group v Mezansky*, plaintiff/subrogee sought consolidation of its

subrogation action with the subrogor's action. Notwithstanding the prejudice alleged by defendants, consolidation was appropriate given the risk of "inconsistent verdicts if separate trials ensue," and prejudice may be diminished with a proper jury instruction. (105 AD3d 1000, 1001 [2d Dept 2013]).

Here too, given the identity of issues relating to liability in both actions, the possibility of inconsistent verdicts outweighs plaintiffs' conclusory claims that it will be prejudiced by a delay in commencing trial. (*Cf. Coakley v Africano*, 181 AD2d 1071, 1072 [4<sup>th</sup> Dept 1992] [conclusory assertion that joint trial would confuse fact finder unsupported and insufficient to demonstrate prejudice]). In any event, mere delay constitutes an insufficient ground to deny consolidation. (*See Plot Realty LLC v DeSilva*, 45 AD3d 312, 313 [1<sup>st</sup> Dept 2007] [given common questions of law and fact, "any delay caused by consolidation is not sufficient reason to bar it"]).

Accordingly, it is hereby

ORDERED, that third-party defendant Rose Demolition & Carting, Inc.'s motion to consolidate is granted and the above-captioned action shall be jointly tried with *Great Northern Ins. Co. a/s/o Cousin Entertainment Inc. et al. v Interior Mgt. Inc. et al.*, Index No. 153603/15, pending in this court; it is further

ORDERED, that within 30 days from the entry of this order, counsel for the movant shall serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation for purposes of discovery and trial; it is further

ORDERED, that upon payment of the appropriate calendar fees and the filing of notes of issue and statements of readiness in each of the above actions, the Clerk of the Trial Support

Office shall place the aforesaid actions upon the trial calendar for a joint trial; it is further

ORDERED, that at said joint trial plaintiffs in the Hayne *et al.* v Collister LLC *et al.* action shall have the right to open and close before the jury; and it is further

ORDERED, that parties in the consolidated action shall appear for a compliance conference on March 2, 2016 at 2:15 pm at 80 Centre Street, Room 279, New York, New York 10013.

ENTER:

  
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Barbara Jaffe, JSC

DATED: February 8, 2016  
New York, New York