

221 W. 17th St., LLC v OTL Enters., LLC

2020 NY Slip Op 31861(U)

June 15, 2020

Supreme Court, New York County

Docket Number: 654525/2017

Judge: Saliann Scarpulla

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 39EFM

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221 W. 17TH STREET, LLC,	INDEX NO. <u>654525/2017</u>
Plaintiff,	MOTION DATE <u>N/A</u>
- v -	MOTION SEQ. NO. <u>001</u>
OTL ENTERPRISES, LLC, SECURITY USA, INC., CONTACT PLUS ELECTRICAL CORP.,	DECISION + ORDER ON MOTION
Defendant.	
-----X	

HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 48, 49, 50

were read on this motion to/for CONSOLIDATE/JOIN FOR DISCOVERY.

Upon the foregoing documents, it is

In this action for, inter alia, breach of contract, defendant Contact Plus Electrical Corporation (“Contact”) moves for an order, pursuant to CPLR 602, consolidating this action (“Action 1”) with the following matters: 1) *Privilege Underwriters Reciprocal Exchange, as subrogee of Marc Sherman, et. al. v. OTL Enterprises, LLC, et. al.*, Index no. 157281/2018 (“Action 2”); 2) *Lexington Insurance Company as subrogee of American Realty Capital, LLC, et. al. v. OTL Enterprises, LLC, et. al.*, Index no. 158955/2018 (“Action 3”); 3) *HDI Global Insurance Company, formerly known as HDI-Gerling America Insurance Company as subrogee of Red Bull North America, Inc. v. OTL Enterprises, LLC, et. al.*, Index no. 159207/2018 (“Action 4”); and 4) *Pacific Indemnity Company a/s/o Even Hurwitz, et. al. v. OTL Enterprises, LLC, et. al.*, Index no. 159232/2018 (“Action 5”), for the purposes of joint discovery only.

On October 30, 2014, plaintiff 221 W.17th Street, LLC (“221 LLC”)¹ entered into a contract with defendant OTL Enterprises, LLC (“OTL”) in which the latter agreed to serve as a construction manager at 221 West 17th Street (the “Premises”) and to “furnish labor, materials, equipment and services to convert and alter” the existing building at the Premises into “a mixed use condominium complex with residential units and a retail unit.” OTL, in turn, hired defendant Contact as a subcontractor to perform certain electrical work at the Premises. OTL also hired defendant Security USA, Inc. (“Security”) to provide a Fire Guard at the Premises.

On October 20, 2015, a fire occurred at the Premises causing damage. All of the aforementioned Actions arose from this incident. The complaint in Action 1, filed on June 27, 2017, asserted causes of action for breach of contract, negligence and gross negligence. Issue was joined by service of an Answer by Security on August 2, 2017, by OTL on September 1, 2017, and by Contact on September 18, 2017.

Actions 2-5²

In Privilege Underwriters Reciprocal Exchange, as subrogee of Marc Sherman, et. al. v. OTL Enterprises, LLC, et. al., Index no. 157281/2018 (“Action 2”), the plaintiffs are Privilege Underwriter Reciprocal Exchange (“PURE”), as subrogee of Marc Sherman, New York Marine and General Insurance Company (“NY Marine”), as

¹ 221 LLC is a plaintiff in Action 1 but is a defendant in all of the other actions.

² In addition to the defendants named in Action 1, Actions 2-5 include Delshah Capital Management (“Delshah”) as a defendant. Delshah is an owner, lessor and manager of real estate, including the building located at 221 West 17th Street.

subrogee of 227 West 17th Street Corp. (the “227 Premises”) and Continental Casualty Company (“Continental”), as subrogee of SYP Corporation (“SYP”) (collectively, the “Action 2 Plaintiffs”).

Each of the Action 2 Plaintiffs had insurance contracts with their respective subrogees.³ The Action 2 Plaintiffs allege that the fire at 221 “directly and proximately caused an extensive amount of smoke and soot to travel to the areas near and around the 221 premises, including the 227 premises, the Sherman premises and the SYP premises.”

The Action 2 Plaintiffs filed a summons and complaint on August 3, 2018 seeking to recover the amounts they paid out. Issue was joined by service of an Answer by 221 LLC on August 30, 2018 and by Contact on October 8, 2018. Plaintiffs in Action 2 then filed an amended complaint on October 19, 2018, asserting a claim for negligence and issue was joined by service of an Answer by Security on November 20, 2018 and by Delshah on December 4, 2018.

In Lexington Insurance Company as subrogee of American Realty Capital, LLC, et. al. v. OTL Enterprises, LLC, et. al., Index no. 158955/2018 (“Action 3”), the Plaintiffs are Lexington Insurance Company (“Lexington”) as subrogee for American Realty Capital LLC (“AR”), AIG Europe Limited (“AIG Europe”) as subrogee of MacAndrews & Forbes Holdings Inc. (“M&F”), Zurich Insurance PLC UK Branch (“Zurich”) as

³ Marc Sherman (“Sherman”) resided on the 8th floor (the “Sherman Premises”) of the 227 Premises. SYP leased commercial space on the 9th and 10th floors of a building located at 218 West 18th Street (the “SYP Premises”). The Action 2 Plaintiffs allege that as a result of the fire at 221, there was substantial real and personal property damage to the Sherman Premises and property damage to the 227 Premises and SYP Premises.

subrogee of M & F⁴, and AIG Property Casualty Company (“AIG”) as subrogee of Lisa Leder (“Leder”).

The Action 3 Plaintiffs each had insurance contracts with their respective subrogees.⁵ The Action 3 Plaintiffs allege that the fire at 221 “directly and proximately caused an extensive amount of smoke and soot to travel to the areas near and around the 221 premises, including the AR, M&F and Leder premises.”

The Action 3 Plaintiffs brought a claim for negligence against Defendants seeking to recover the amounts they paid out. Issue was joined by service of an Answer by OTL on October 30, 2018, by Security on November 30, 2018, by 221 LLC and Delshah on December 4, 2018 and by Contact on January 16, 2019.

In *HDI Global Insurance Company, formerly known as HDI-Gerling America Insurance Company as subrogee of Red Bull North America, Inc. v. OTL Enterprises, LLC, et. al.*, Index no. 159207/2018 (“Action 4”), the plaintiff is HDI Global Insurance Company (“HDI” and “Action 4 Plaintiff”) as subrogee of Red Bull North America, Inc. (“Red Bull”).⁶ The complaint, filed on October 4, 2018, alleges that the “smoke and soot from the subject fire directly and proximately caused severe and substantial damage to

⁴ Zurich was removed as plaintiff from Action 3 by Stipulation on April 24, 2019.

⁵ AR owns the building located at 216-218 West 18th Street (the “AR premises”). M&F was the tenant of the 11th, 12th and 13th floors of the building located at 218 West 18th Street (the “M&F Premises”). Leder owns Unit 11CD in the building located at 212 West 18th Street (the “Leder premises”).

⁶ Red Bull was a tenant on the basement, ground, 7th and 8th floors of the building located at 218 West 18th Street (the “Red Bull premises”).

the Red Bull premises.” The complaint contains one cause of action for negligence.

Issue was joined by service of an Answer by OTL on October 25, 2018, by Security on November 30, 2018, by 221 LLC and Delshah on December 11, 2018 and by Contact on January 24, 2019.

In *Pacific Indemnity Company a/s/o Even Hurwitz, et. al. v. OTL Enterprises, LLC, et. al.*, Index no. 159232/2018 (“Action 5”), the plaintiffs are Pacific Indemnity Company (“Pacific”) as subrogee of Even Hurwitz (“Hurwitz”), Pacific Indemnity Insurance Company (“Pacific”) as subrogee of John and Kathryn Anderson (the “Andersons”), Susheel Kirpalani (“Kirpalani”), Robert Silverstein (“Silverstein”) and Wanda Olson (“Olson”), Vigilant Insurance Company (“Vigilant”) as subrogee of Dennis Adler (“Adler”), Executive Risk Indemnity Inc. (“Executive”) as subrogee of Eric Steel (“Steel”), Federal Insurance Company (“Federal”) as subrogee of Navitas USA Holdings LLC (“Navitas”) and Great Northern Insurance Company (“Great Northern”) as subrogee of Bernard Tschumi (“Tschumi”) and Kate Linker (“Linker”) (collectively the “Action 5 Plaintiffs”). The Action 5 Plaintiffs each had insurance contracts with their respective subrogees.⁷

⁷ Hurwitz was the owner of property located at 212 West 18th Street, 12B (the “Hurwitz Premises”). The Andersons owned property located at 212 West 18th Street, 9D (the “Anderson premises”). Silverstein and Olson owned the property at 227 West 17th Street, Apt. 4 (the Silverstein/Olson premises”). Kirpalani owned property located at 212 West 18th Street, Apt. 9B (the “Kirpalani premises”). Adler was the owner of property located at 227 West 17th Street, Apartment 7th Floor (“Adler premises”). Steel owned the property located at 227 West 17th Street, Apartment 7 (“Steel premises”). Navitas owned property located at 218 West 18th Street, 4th and 5th floors (the “Navitas premises”). Tschumi and Linger owned property located at 227 West 17th Street, 6th floor (the “Tschumi/Linker Premises”).

The complaint, filed on October 4, 2018, asserts a claim for negligence against Defendants, alleging that the 221 fire caused “extensive smoke and soot infiltration into areas around the 221 Premises, including: the Hurwitz Premises, the Anderson Premises, the Silverstein/Olson Premises, the Kirpalani Premises, the Adler Premises, the Steel Premises, the Navitas Premises and the Tschumi/Linker Premises.” Issue was joined by service of an Answer by Security on December 10, 2018, by OTL on December 14, 2018, by 221 LLC on January 14, 2019, by Delshah on January 17, 2019 and by Contact on January 17, 2019.

Contact now moves to consolidate the five actions for discovery purposes only. 221 LLC opposes consolidation. In addition, a partial opposition was filed by one of the Action 3 plaintiffs, Lexington, stating that it “is not opposed to the consolidation of the aforementioned matters for the purposes of joint discovery” but objects to Contact’s proposed caption for the consolidated action which should have removed Zurich as a plaintiff in Action 3.

Discussion

CPLR 602 states that

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 other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Consolidation is within the court’s discretion. *See Geneva Temps, Inc. v. New World Communities, Inc.*, 24 A.D.3d 332, 334 (1st Dept. 2005). “There is a preference to join cases for discovery and trial in the interests of judicial economy and ease of

decision-making where there are common question of law and fact, unless the party opposing the motion demonstrates that joint trial will prejudice a substantial right.” *Lema v. 1148 Corp.*, 176 A.D.3d 653, 654 (1st Dept. 2019) (citations omitted).

In support of its motion, Contact argues that because all of the actions arise from the same incident and contain common questions of law and fact, consolidation is warranted. Contact points out that all actions are in the preliminary stages of discovery, no depositions have yet been conducted and substantially the same witnesses will be produced for depositions. Finally, Contact states that consolidation for discovery purposes will avoid a “multiplicity of litigation” and save time and expense for the Court.

Security submitted an attorney affirmation in support of Contact’s motion arguing that the actions should be consolidated because they arise out of a common set of operative facts and raise common questions of law and fact.

In opposition, 221 LLC, argues that there is insufficient commonality to grant consolidation. Although 22 LLC concedes the existence of “single common issue” between Action 1 and Actions 2-5 – namely that various alleged damages were all the result of the fire – it contends that because Action 1 seeks recovery for property damages and is not a subrogation action, like Actions 2-5, the damages are “completely different” and preclude consolidation.

Although the actions involve different plaintiffs, a review of the complaints, which are all premised on damages due to the fire, reveals that the underlying facts in Action 1 are not dissimilar from those in Actions 2-5. Indeed, issues regarding contracts, property

damage and negligence will be relevant in each action. Thus, in light of the common questions of law and fact, consolidation is appropriate. *See Plot Realty LLC v. DeSilva*, 45 A.D.3d 312, 313 (1st Dept. 2007) (finding consolidation of two actions for discovery to be appropriate “since there were common question of law and fact”).

221 LLC also argues that consolidation would cause delay, thereby prejudicing it. However, given the facts and issues in common, consolidation of the five actions would actually avoid unnecessary costs and delays. Moreover, even if some delay results from consolidation, that is not a sufficient reason, by itself, to deny consolidation. *Plot Realty LLC*, 45 A.D.3d at 313 (“any delay caused by the consolidation is not sufficient reason to bar it”).

Finally, 221 LLC cites several cases regarding prejudice resulting from consolidation where a party would be identified as both a plaintiff and a defendant in a jury trial. These cases, however, are inapposite, as the motion before me is for consolidation for discovery only and not for trial.

I have considered 221 LLC’s remaining arguments and find them unavailing. For the foregoing reasons I grant Contact’s motion for consolidation for the purposes of discovery. *See DeSilva v. Plot Realty, LLC*, 85 A.D.3d 422, 423 (1st Dept. 2011).

In accordance with the foregoing, it is

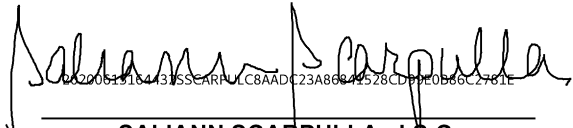
ORDERED that Contact Plus Electrical Corporation’s motion for consolidation for discovery purposes only is granted; and it is further

ORDERED that the matter of *221 W.17th Street v. OTL Enterprises, LLC, Security USA, Unc., and Contact Plus Electrical Corp.*, Index No. 654525/2017, is hereby

consolidated with the cases of *Privilege Underwriters Reciprocal Exchange, as subrogee of Marc Sherman, et. al. v. OTL Enterprises, LLC, et. al.*, Index No. 157281/2018 (“Action 2”); *Lexington Insurance Company as subrogee of American Realty Capital, LLC, et. al. v. OTL Enterprises, LLC, et. al.*, Index No. 158955/2018 (“Action 3”); *HDI Global Insurance Company, formerly known as HDI-Gerling America Insurance Company as subrogee of Red Bull North America, Inc. v. OTL Enterprises, LLC, et. al.*, Index No. 159207/2018 (“Action 4”); and *Pacific Indemnity Company a/s/o Even Hurwitz, et. al. v. OTL Enterprises, LLC, et. al.*, Index No. 159232/2018 (“Action 5”); for discovery purposes only, without prejudice; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on all parties to Actions 1-5; and it is further

ORDERED that counsel are directed to participate in a compliance teleconference on July 1, 2020 at 2:15.

<u>6/15/2020</u> DATE		 SALIANN SCARPULLA, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED <input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> OTHER <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE