Swain v Cromarty
2020 NY Slip Op 33140(U)
September 24, 2020
Supreme Court, New York County
Docket Number: 162186/2018
Judge: Margaret A. Chan

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN **PART** IAS MOTION 33EFM

Justice

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INDEX NO. 162186/2018

STEVEN SWAIN, KARIN SWAIN,

Plaintiff,

MOTION DATE 04/01/2020, 07/29/2020

- v -

MOTION SEQ. NO. (MS) 002; 003

PETER CROMARTY, ALICE CROMARTY, ROSS CROMARTY, A.D. CUSTOM INTERIORS, INC.,SAL-TECH PLUMBING & HEATING, INC.,SUPERIOR PLUMBING & HEATING OF NYC INC.,SAAB ENVIRONMENTAL SERVICES, VAK ENVIRONMENTAL INC.,ELLIOT VILKAS, JOHN DOES 1-20,

DECISION + ORDER ON MOTION

Defendant.

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PETER CROMARTY, ALICE CROMARTY, ROSS CROMARTY

Third-Party
Index No. 595009/2020

Plaintiff,

-against-

HOWARD HOUSE OWNER'S CORP., HALSTEAD MANAGEMENT COMPANY, LLC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 56

were read on this motion to/for JUDGMENT - DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105

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

In this property damage action, plaintiffs Steven Swain and Karin Swain seek damages in connection with the alleged asbestos contamination of their cooperative apartment from the renovation of defendants/third-party plaintiffs Peter Cromarty, Alice Cromarty, and Ross Cromarty's three cooperative apartments. The parties' respective apartments are located at 246 West End Avenue in the city, state, and county of New York. Plaintiffs allege causes of action sounding in breach of contract, negligence, gross negligence, and nuisance.

This Order addresses two motions, MS2 and MS3. In MS2, plaintiffs move for default judgment against A.D. Custom Interiors, Inc. (AD), Superior Plumbing & Heating of NYC Inc. (Superior), SAAB Environmental Services (SAAB), and VAK Environmental Inc. (VAK) (collectively, the defaulting defendants) pursuant to CPLR 3125 and for an inquest as to damages to be held after final disposition of this matter. The motion is unopposed.

In MS3, third-party defendants Howard House Owner's Corp. (Howard House) and Halstead Management Company, LLC (Halstead) (collectively third-party defendants) move to consolidate this matter (the first action) and a related subrogation action captioned *Pacific Indemnity Company a/s/o Steven J. Swain and Karin E. Swain v Peter Cromarty, A.D. Custom Interiors, Inc., and Sal-Tech Plumbing & Heating, Inc.*, index no. 151053/2019 (the second action) pursuant to CPLR § 602(a). The Cromartys, defendants/third-party plaintiffs oppose the motion.

The Decision and Order for both motions (one paper) is as follows:

FACTS

Plaintiffs are the proprietary lessees of apartment 12C (NYSCEF # 54 – Steven Swain aff, ¶ 3). According to plaintiff Steven Swain, in January 2016 the Cromarty defendants commenced extensive construction and demolition work to combine three units (apartments 12A, 12B, and 12H) that are adjacent to the Swains' apartment 12C (*id.*, ¶ 5). This renovation work included demolishing walls and pipes within and between the Cromarty apartments (*id.*).

On January 9, 2016, plaintiffs observed loose-fitting plastic tarps hung in the common hallway (*id.*, ¶ 6). Plaintiffs allege that once construction and demolition work commenced, dust and debris would blow under the door of their apartment, even when it was shut (*id.*, ¶ 7). Plaintiffs were told by a building handyman of his suspicion that asbestos-containing material (ACM) had been disturbed by the work, as the building was constructed in 1913 (*id.*, ¶¶ 13-14). Plaintiffs claim that neither the Cromartys nor AD, the Cromartys' contractor, informed them of the asbestos being disturbed by the work (*id.*,¶ 15).

Plaintiffs claim that they removed parts of the plastic tarps in the common hallway for testing and filed an asbestos complaint with the New York City Department of Environmental Protection (DEP) on February 10, 2016 (*id.*, ¶¶ 16-17). A DEP inspector reported 60 feet of presumed ACM, in the form of exposed pipe wrapping, in apartment 12B (*id.*, ¶ 18). The DEP issued a violation to VAK for not reporting that ACM was present in the Cromarty apartments and for not properly testing the construction area during the initial inspection which was conducted on May 12, 2015 (*id.*, ¶ 20).

On February 11, 2016, the coop owner, Howard House, directed the Cromartys to stop the demolition work (*id.*, ¶ 21). VAK performed another inspection of the Cromarty apartments on February 12, 2016, and issued a report stating there was approximately 60 feet of pipe insulation containing ACM (*id.*).

Plaintiffs retained a building inspection firm to test for asbestos. Plaintiffs' inspector took samples from plaintiffs' apartment, the common hallway, and the hallway tarp on February 17 and February 23, 2016 (*id.*, ¶ 24). Plaintiffs' insurer, Chubb, retained an additional inspection firm that collected dust samples on February 16, 2016 (*id.*, ¶ 27). The tests all came back positive for asbestos; plaintiffs moved out of their apartment and have yet to move back (*id.*, ¶ 28). Subsequently, Chubb deemed the apartment uninhabitable and declared virtually all of the personal property in the apartment a total loss (*id.*, ¶ 29).

Plaintiffs aver that AD, Superior, and/or another contractor removed the majority of the ACM-containing pipe insulation between February 12 to February 28, 2016, without taking any abatement measures or other precautions to prevent the spread of asbestos and ACM to other parts of the building (*id.*, ¶ 31). Indeed, plaintiffs and the building handyman observed fourteen garbage bags in the building's back courtyard containing material removed from the Cromarty apartments on March 4, 2016 (*id.*, ¶ 32). Plaintiffs' attorney notified the Cromartys of the presence of asbestos on March 7, 2016 but the Cromartys and their contractors did nothing to abate the spread of asbestos or ACM (*id.*, ¶¶ 34-35).

In June 2016, the Cromartys hired SAAB to test plaintiffs' apartment for asbestos contamination; the test came back negative on August 1, 2016 (*id.*, ¶ 36). Plaintiffs claim that the testing was improper for failure to maintain a chain of custody over the samples (*id.*). Plaintiffs aver that several subsequent samples taken from their apartment and the common hallway tested positive for asbestos (*id.*, ¶ 37).

Plaintiffs claim that the Cromartys and their contractors resumed work on the apartments in mid-October 2017 without taking any abatement measures or precautions to prevent the spread of asbestos or ACM (*id.*, ¶ 38). Indeed, Environmental Building Solutions (EBS) took samples from the common hallway in November 2017 that came back positive for asbestos (*id.*, ¶ 39).

Plaintiffs also claim that the defaulting defendants were retained to perform construction work in connection with the renovation of the Cromarty apartments, including the testing and monitoring for asbestos and ACM. Plaintiffs posit that AD and Superior did not perform these services in a good and workmanlike manner or in accordance with industry standards in that they failed to take proper steps to abate, remediate, or prevent the spread of asbestos and ACM to other parts of the building, including the Swains' apartment. Because of the defaulting defendants'

failure to adequately test for asbestos and to take steps to ensure the abatement of the asbestos, plaintiffs conclude that the defaulting defendants caused asbestos and ACM to enter and contaminate the Swains' apartment.

Plaintiffs further claim that VAK and SAAB negligently failed to properly test the Cromarty apartments for asbestos and ACM in accordance with industry standards and failed to take steps to ensure that the material was properly abated. Plaintiffs allege that VAK's May 12, 2015 inspection was negligent and that their improper certification led to the failure of the other contractors to properly abate or remediate the asbestos prior to construction. And because of the improper testing, VAK's false report caused the construction project to be improperly classified as a non-asbestos project. If it had been properly categorized as an asbestos project, it would have been subjected to more stringent safety standards.

DISCUSSION

MS2: Default Judgment Motion

Plaintiffs initiated this lawsuit on December 28, 2018, and served the summons with notice upon AD, Superior, and VAK via the New York Secretary of State on February 15, 2019 (NYSCEF ## 48-49). Plaintiffs followed up their service by mailing the complaint via first-class mail upon those same parties on March 22, 2019 (NYSCEF # 51). Plaintiffs served the summons and complaint on April 27, 2019, upon SAAB by personal service at 2866 Marion Avenue, Suite 5G, Bronx, NY 10456 upon Aston Pinnock, who stated that he was SAAB owner Antoine Pinnock's father (NYSCEF # 52).

The defaulting defendants all failed to answer or appear in this matter. The time to answer or appear has not been extended. As such, on March 12, 2020, plaintiffs mailed additional copies of the summons and complaint to the defaulting defendants at their last known addresses in accordance with CPLR 3215(g)(3) and (4) in conjunction with filing of the instant for entry of default judgment (NYSCEF ## 53, 56). Plaintiffs' motion is timely.

CPLR 3215(f) requires a movant seeking default judgment to submit the following proofs: (1) proof of service of the summons and complaint or summons with notice; (2) an affidavit of the facts constituting the claim and the amount due, where a verified complaint has been served, it may be used as the affidavit of the facts constituting the claim and the amount due; and (3) an affidavit showing the default in answering or appearing.

Here, plaintiffs submit proof of service of the summons and complaint, an affidavit of the facts constituting the claims, and proof of the default (NYSCEF ## 47, 49, 51-52, 54). Plaintiffs also submit proof of additional service as required by

CPLR 3125(g) (NYSCEF ## 53, 56). As such, a default judgment against the defaulting defendants AD, Superior, SAAB, and VAK is warranted. Accordingly, plaintiffs' motion for default judgment is granted. However, as the total amount of plaintiffs' damages is unknown at this time, an inquest following the final disposition of this matter is required.

MS3: Consolidation Motion

In MS3, the third-party defendants Howard House and Halstead move to consolidate this matter (action 1) and a second subrogation matter (action 2) pursuant to CPLR § 602. The Cromartys, who are the defendants/third-party plaintiffs, oppose the motion.

A court may exercise its discretion granting a motion to consolidate in the interest of judicial economy where there are common questions of law or fact in the absence of any showing that consolidation would result in substantial prejudice to the party opposing such relief (*see Matter of Progressive Ins. Co. v Vasquez-Countrywide Ins. Co.*, 10 AD3d 518, 519 [1st Dept 2004]). "Consolidation is appropriate where it will avoid unnecessary duplication of trials, save unnecessary costs and expense and prevent the injustice which would result from divergent decisions based on the same facts" (*Chinatown Apts., Inc. v New York City Tr. Auth.*, 100 AD2d 824, 825 [1st Dept 1984]). However, "[t]he identity of facts is insufficient to merit consolidation of the actions" if both actions, though arising out of the same transaction, do not require a showing of proof that overlaps (*Beerman v Moorhaim*, 17 AD3d 302, 302 [2d Dept 2005]).

Third-party defendants argue that the two actions arise out of the same property damage claim regarding asbestos infiltration due to construction and demolition work at the Cromartys' apartments. In action 1, the Swain plaintiffs seek money damages based on causes of action sounding in breach of contract, negligence, and gross negligence. In action 2, plaintiff Pacific Indemnity Company a/s/o Steven J. Swain and Karin E. Swain seek to recoup money damages paid to the Swain plaintiffs from defendants Peter Cromarty, AD, and Sal-Tech Plumbing & Heating, Inc. Third-party defendants argue that the two actions arise out of the same occurrence and involve common questions of law and fact. Third-party defendants additionally argue that the two actions are at substantially the same point in discovery (pre-depositions) and that consolidation would increase judicial economy.

Third-party defendants are correct. The parties in the two actions are virtually identical, and the central issue – whether the Cromartys' renovation project caused asbestos exposure – is common to both actions. As such, third-party defendants have met their burden on the motion to consolidate.

The Cromarty (third-party plaintiffs) counter that the actions should not be joined for trial and discovery because plaintiff in the second action is an insurance company, which would result in prejudice. The Cromartys cite to *McGinty v Structure Tone* (140 AD3d 465 [1st Dept 2016]) along with Second and Third Department cases for the proposition that there is inherent prejudice to insurers when issues of insurance coverage are tried before a jury that also considers the underlying liability claims, even where common questions of law and fact exists.

However, the First Department in *Lema v 1148 Corporation* (176 AD3d 653 [1st Dept 2019]) upheld the trial court's exercise of discretion to consolidate three personal injury actions and a subrogation action stating that the consolidation does not cause substantial prejudice (*id.* at 654). As in *Lema*, the case at hand is a subrogation action. *McGinty* (140 AD3d 465), relied upon by the Cromartys, is an insurance coverage claim action. In a subrogation case, the insurance company stands in the shoes of its subrogor to recoup previously paid claims from a third-party, whereas an insurance coverage action is a dispute over whether the insurance company is responsible for paying a claim. The risk that a jury would issue an unreasonable award is not present when a subrogation action is consolidated with the underlying claims. As such, there is no risk of prejudice to the insurance company or other parties.

Even so, full consolidation of the two matters is inappropriate as there are distinct plaintiffs in the two actions, and there is not perfect congruity in defendants (*see Perini Corp. v WDF, Inc.*, 33 AD3d 605, 606-607 [2d Dept 2006] ["Although the appellants moved... to consolidate the actions, the more appropriate method of achieving that purpose is a joint trial, particularly since the two actions involve different plaintiffs"]). As such, while these two matters shall retain separate index numbers, they shall be joined for purposes of discovery and trial pursuant to CPLR § 602.

Therefore, third-party defendants' motion is granted to the extent that the two actions are joined for joint discovery and trial.

Accordingly, it is ORDERED that plaintiffs Steven Swain and Karin Swain's motion for entry of default judgment (MS2) against A.D. Custom Interiors, Inc., Superior Plumbing & Heating of NYC Inc., SAAB Environmental Services, and VAK Environmental Inc. is granted; it is further

ORDERED that plaintiffs Steven Swain and Karin Swain are entitled to an inquest for damages against the defaulting defendants following the disposition of this matter; it is further

ORDERED that plaintiffs Steven Swain and Karin Swain shall a serve copy of this order by first-class mail with notice of entry upon the defaulting defendants

at their last known addresses within seven (7) days of entry and proof of service to be filed with the New York County Clerk within fifteen (15) days of said service; it is further

ORDERED that third-party defendants, Howard House Owner's Corp and Halstead Management Co., LLC's motion for joint discovery and trial (MS3) is granted, and the above-captioned action and *Pacific Indemnity Company a/s/o Steven J. Swain and Karin E. Swain v Peter Cromarty, A.D. Custom Interiors, Inc., and Sal-Tech Plumbing & Heating, Inc.*, Index No. 151053/2019 shall be jointly tried in this court; it is further

ORDERED that, within seven (7) days from entry of this order, counsel for plaintiff in *Pacific Indemnity Company a/s/o Steven J. Swain and Karin E. Swain v Peter Cromarty, A.D. Custom Interiors, Inc., and Sal-Tech Plumbing & Heating, Inc.*, Index No. 151053/2019, shall file with the General Clerk's Office (60 Centre Street, Room 119) a copy of this order with notice of entry, together with, if a Request for Judicial Intervention ("RJI") has not yet been filed in that action, an RJI and shall pay the fee therefor, and the Clerk of the General Clerk's Office shall assign said action to the undersigned or reassign such action to the undersigned, as the case may be; and it is further

ORDERED that, upon payment of the appropriate calendar fees and the filing of notes of issue and certificates of readiness with the General Clerk's Office in each of the above actions, the Clerk of the General Clerk's Office shall place the aforesaid actions upon the trial calendar for a joint trial before the undersigned or other Justice of this court; and it is further

ORDERED that in both actions such filing with the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

This constitutes the Decision and Order of the court.

9/24/2020
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE