

Lam v 993 60th St. Realty Inc.
2020 NY Slip Op 33267(U)
October 5, 2020
Supreme Court, Kings County
Docket Number: 514453/2018
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

**REBECCA CHI WAI LAM, XUE MING PAN, CUI MEI LI,
HUA HUI LIN and KIT LAI LIN CHEE,**

DECISION/ORDER

Plaintiffs,

Index No. 514453/2018

-against-

Motion Seq. No. 5

Date Submitted: 9/23/2020

**993 60TH STREET REALTY INC., XIN LONG DAI,
GROUND TO SKY CITY BUILDERS CORP., S M TAM
ARCHITECT, PLLC, WSC GROUP LLC, "JOHN AND
JANE DOES 1-10" and "XYZ CORPORATIONS 1-10",**

Defendants.

X

***Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants
GTS and WSC's motion for a stay of this action.***

Papers	NYSCEF Doc.
Order to Show Cause, Affirmation and Exhibits Annexed.....	<u>135-148</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>157-160</u>
Reply Affirmation.....	<u>161-162</u>

**Upon the foregoing cited papers, the Decision/Order on this application is
as follows:**

Defendants Ground to Sky City Builders Corp. (GTS) and WSC Group LLC (WSC) move, pursuant to CPLR 2201, for an order to stay this action, including a stay of discovery. Defendants claim that the principals of each entity, as well as WSC itself, were indicted by a grand jury empaneled at the request of the Kings County District Attorney's Office, Indictment 7019/18 [E-File Doc 162], on November 15, 2019. The motion was brought by Order to Show Cause submitted on February 13, 2020, but due to the Covid-19 Pandemic, was not heard until September 23, 2020. They indicate in the motion

papers that these two men are the only people with knowledge of the facts and circumstances who can be produced for a deposition or to testify at trial, and that each of them intends to invoke his Fifth Amendment right against self-incrimination at both the deposition and at the trial of this action. Consequently, they have moved to stay the action insofar as asserted against their two businesses pending resolution of the criminal proceeding.

This is an action brought by the individuals who own three adjacent homes on 74th Street in Brooklyn (Block 6215, Lots 30, 31, and 33) for damages to their homes arising from excavation work which was allegedly performed by movants for defendant property owner (Block 6215, Lot 58) for a project at the rear of plaintiffs' homes, on the other side of the block, known as 1757-1759 Bay Ridge Parkway. Since movants were indicted, the defendant property owner has retained new contractors to continue the work. The indictment involves contracting work at this site (referred to as the Bay Ridge site), as well as one other site (referred to as the 39th Street site). At the 39th Street site, a worker was killed when a masonry wall collapsed on top of him.

A motion pursuant to CPLR 2201 to stay a civil action pending resolution of a related criminal action is directed to the sound discretion of the trial court (see *Mook v Homesafe Am., Inc.*, 144 AD3d 1116, 1117, 41 NYS3d 759 [2d Dept 2016]; *Burgdorf v Kasper*, 83 AD3d 1553, 1556, 91 NYS2d 769 [4th Dept 2011]; *Matter of Astor*, 62 AD3d 867, 868-869, 879 NYS2d 560 [2d Dept 2009]; *Britt v International Bus Servs.*, 255 AD2d 143, 144, 679 NYS2d 616 [1st Dept 1998]). "Factors to consider include avoiding the risk of inconsistent adjudications, [duplication] of proof and potential waste of judicial resources. A compelling factor is a situation where a defendant will invoke his or her constitutional right against self-incrimination" (*Britt v International Bus Servs.*, 255 AD2d

at 144; *Zonghetti v Jeromack*, 150 AD2d 561, 563, 541 NYS2d 235 [2d Dept 1989]; *DeSiervi v Liverzani*, 136 AD2d 527, 528, 523 NYS2d 147 [2d Dept 1988]). “Although the pendency of a criminal proceeding does not give rise to an absolute right under the United States or New York State Constitutions to a stay of a related civil proceeding . . . there is no question but that the court may exercise its discretion to stay proceedings in a civil action until a related criminal dispute is resolved” (*Matter of Astor*, 62 AD3d at 868-869 [internal quotation marks omitted]).

The Appellate Division has stated that “while the stay of the instant action pending the resolution of the criminal prosecution may cause inconvenience and delay to the plaintiff, the protection of [the defendant’s] constitutional right against self-incrimination is the more important consideration” (*De Siervi*, 136 AD2d at 528, citing *Dienstag v Bronsen*, 49 FRD 327 [SD NY 1970]). “Moreover, a prior determination of the criminal action could possibly have collateral estoppel effect in the subsequent civil case and could well serve to reduce the scope of discovery and to simplify the issues therein” (*De Siervi*, 136 AD2d at 528, citing *Merchants Mut. Ins. Co. v Arzillo*, 98 AD2d 495, 472 NYS2d 97 [2d Dept 1984]; *Texaco, Inc. v Borda*, 383 F2d 607 [3d Cir 1967]; *Clark v United States*, 481 F Supp 1086 [SD NY 1979], appeal dismissed 624 F2d 3 [2d Cir 1980], abrogated on other grounds *Barbera v Smith*, 654 F Supp 386, 394 [SDNY 1987]).

The homeowners are not wealthy, their counsel claimed at oral argument, and their homeowners’ insurance refused to pay their claims. They want the cracks and damage to their homes repaired, and they claim they would be prejudiced if they have to wait until the criminal proceeding is over, particularly as we are in the midst of the Covid-19 pandemic and jury trials are backlogged. The movants have posted bail, their counsel

stated, so their trials will not have priority over those of defendants who are incarcerated awaiting their trials.

Defendant WSC is named in the indictment, as well as its principals, Jiayi "Jimmy" Liu, and his brother, Jia Rong "Tommy" Liu. One of its foremen, Wilson Garcia, was also indicted. Defendant GTS was not indicted, nor were any of its principals or employees, but this motion claims that its principal, Jorge Espejo, also intends to assert his Fifth Amendment right against self-incrimination in this case. There are nine criminal defendants who were indicted. Mr. Espejo is described in the indictment as having "pulled permits" from the Department of Buildings for WSC, but "had no role in either construction project." Thus, the motion is denied with regard to GTS, as there is no pending criminal proceeding against it or its principals or employees. It is noted that some of the charges against WSC and its principals are for filing documents with the Department of Buildings that had what is described in the indictment as Mr. Espejo's "forged signature" on them.

WSC and its two principals (as well as six other named defendants, which include Wilson Garcia, a foreman who worked for WSC) were indicted for the following crimes, but not all of them were indicted for each of the crimes:

- Manslaughter in the Second Degree, PL § 125.15
- Criminally Negligent Homicide, PL § 125.10
- Reckless Endangerment in the Second Degree, PL § 120.20
- Criminal Mischief in the Fourth Degree, PL § 145.00(3)
- Offering a False Instrument for Filing in the First Degree, PL § 175.35 (1)
- Insurance Fraud in the Third Degree, PL § 176.25
- Fraudulent Practices, Workers' Compensation Law § 114 (3)
- Fraudulent Practices, Workers' Compensation Law § 96
- Grand Larceny in the Third Degree, PL § 155.35
- NYC AC § 11-4003 City Criminal Tax Fraud in the 5th Degree
- NYC AC § 11-4004 City Criminal Tax Fraud in the 4th Degree
- NYC AC § 11-4005 City Criminal Tax Fraud in the 3rd Degree
- Criminal Possession of a Forged Instrument in the 2nd Degree, PL § 170.25

Criminal Possession of a Forged Instrument in the 3rd Degree, PL § 170.20

Here, the court finds that this action and the criminal proceeding, with regard to this “Bay Ridge” construction project, but not the 39th Street one in the indictment, do arise from the same facts. However, the “victims” of the crimes charged in the indictment are, with one exception discussed below, not the plaintiffs, but are the workers who were not given a safe place to work, particularly the worker who was killed at the other construction site, the City of New York, the New York State Insurance Fund, and the State of New York.

With regard to the Bay Ridge construction site, the one which plaintiffs’ homes are adjacent to, the indictment states, in the description of the Bay Ridge construction site in the preamble to the charges (NYSCEF Doc 162 at 11): “From the commencement of work at the Bay Ridge Construction Site in late 2017 until August 2018, NYC DOB received numerous complaints from neighboring property owners and residents about unsafe construction and excavation practices at the site; neighboring properties being exposed to damage and shaking; and that the construction work was encroaching onto the neighboring properties. When NYC DOB inspectors responded to the complaints by visiting the site, they found numerous violations of NYC DOB regulations,” involving site safety for the workers at the site, and “damage to adjacent buildings from the construction operations; failure to designate and/or have a construction superintendent present at the site when required; and doing excavation work without following the approved excavation plans or amendments to those plans.”

The one crime that can be said to “overlap” with this action, however, where one of the plaintiffs is the alleged victim, is the Sixth Count, for criminal mischief, Penal Law § 145.00 (3) (a misdemeanor). For this crime, the indictment is against Jiayi "Jimmy" Liu,

Wilson Garcia, and WSC Group LLC, and states that “[t]he defendants, acting in concert . . . as part of an ongoing course of conduct, recklessly damaged property of another person, namely the rear yard and property of 1758 74th Street, Kings County; Hua Hui Lin as custodian for such property.” Mr. Lin is one of the five plaintiffs in this action. Criminal mischief is usually charged for offenses such as “keying” the car of a former friend, throwing a brick through a window, etc. It is not ordinarily used for construction work.

While there are multiple charges of offering a false instrument for filing with respect to the Bay Ridge project, Penal Law § 175.35 (1) (a Class E felony), they do not directly relate to this lawsuit. These charges relate to filing false certificates of correction after violations were issued, and concern worker safety, such as falsely certifying that there was a fire guard, a construction superintendent present, proper fencing, and the safeguarding persons and property at the worksite.

The court concludes that the one count applicable to (one of) the plaintiffs, criminal mischief, a misdemeanor, is not enough of an “overlap” to stay this action. The primary reason for this is that the plaintiffs’ cause of action here does not require movants’ testimony as it is a strict liability tort. The architect has already been dismissed, any claims against the John and Jane Does have been abandoned, and the only defendants who remain here are the property owner, who did not put in any papers in connection with this motion, and the movants. The two movants are represented by the same attorney, and so presumably they have an indemnification agreement between them. Further, they apparently agree that GTS did not actually do any of the excavation work. Therefore, the owner may be vicariously liable, but WSC is the only defendant that performed the excavation work at the site who is named in the caption.

As the Appellate Division states in *Reiss v Professional Grade Constr. Group, Inc.*

(172 AD3d 1121 [2d Dept 2019]):

New York City Building Code (Administrative Code of City of NY, tit 28, ch 7) § BC 3309.4 imposes **strict or absolute liability** upon a "person who causes an excavation to be made" (*American Sec. Ins. Co. v Church of God of St. Albans*, 131 AD3d 903, 905, 16 NYS3d 247 [2015], quoting NY City Building Code [Administrative Code of City of NY, tit 28, ch 7] § BC 3309.4; see *Yenem Corp. v 281 Broadway Holdings*, 18 NY3d 481, 964 NE2d 391, 941 NYS2d 20 [2012]; *Chan v Begum*, 153 AD3d 1223, 1225, 61 NYS3d 128 [2017]). . . . The plaintiffs demonstrated, prima facie, that A&A and PGCG caused soil or foundation work to be made, pursuant to a license granted under New York City Building Code § BC 3309.4, and that the work proximately caused damage to their building (see NY City Building Code § BC 309.4; *87 Chambers, LLC v 77 Reade, LLC*, 122 AD3d 540, 998 NYS2d 15 [2014]). . . . The allegedly poor preexisting condition of the plaintiffs' building does not factor into a proximate cause analysis under New York City Building Code § BC 3309.4, but merely raises an issue of fact as to damages (see *Yenem Corp. v 281 Broadway Holdings*, 18 NY3d at 491).

(172 AD3d at 1123 [emphasis added]).

In contrast, the jury instruction for the criminal charge against WSC and its principals for criminal mischief makes it clear that the conduct must be proven to have been reckless. This is different than the analysis for the tort here. Specifically, the jury charge states:

"Under our law, a person is guilty of Criminal Mischief in the Fourth Degree when that person, having no right to do so nor any reasonable ground to believe that he or she has such right, recklessly damages property of another in an amount exceeding two hundred fifty dollars (\$250.00). . . . The term 'recklessly' as used in this definition has its own special meaning in our law. I will now give you the meaning of that term. A person RECKLESSLY damages property of another in an amount exceeding two hundred fifty dollars when that person does so by engaging in conduct which creates or contributes to a substantial and unjustifiable risk

that such damage will occur, **and when he or she is aware of and consciously disregards that risk**, and when the risk is of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation”

(CJI2d[NY] Penal Law § 145.00 [3] [emphasis added]).

Thus, while a stay would cause inconvenience and delay to the plaintiffs, the failure to grant the stay would not cause the defendant WSC to “suffer the severe prejudice of being deprived of a defense” (*Matter of Astor*, 62 AD3d at 869; see *Britt*, 255 AD2d at 144). This is because there is no defense to the liability portion of plaintiffs’ claim, other than, for example, that the wrong defendant was named, as the defendant did not do the excavation work. Here, that is not in dispute. Moreover, a prior determination in the criminal proceeding would not have collateral estoppel effect in this action and would not simplify the issues to be proved at trial (see *DeSiervi*, 136 AD2d at 528).

Accordingly, the motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: October 5, 2020

ENTER:



Hon. Debra Silber, J.S.C.