

Steven Stile Farmers Mkt. LLC v 350 W. 52 LLC

2021 NY Slip Op 32203(U)

November 8, 2021

Supreme Court, New York County

Docket Number: Index No. 160588/2019

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART 12

Justice

-----X **INDEX NO.** 160588/2019

STEVEN STILE FARMERS MARKET LLC,
STEVEN STILE,

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO. 001

- v -

350 WEST 52 LLC,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 18-28 were read on this motion to consolidate/join for trial.

By order to show cause, defendant 350 West 52, LLC (movant) moves pursuant to CPLR 602 for an order consolidating this action (New York action) in New York County with 352-52 *Realty LLC v 350 West 52 LLC and Alba Services Inc., a/k/a Alba*, which pends in Nassau County Supreme Court under the index number 606135/2020 (Nassau action). Plaintiff in the Nassau action, 352-52 Realty LLC (Nassau plaintiff) opposes. Plaintiffs in the New York action (New York plaintiffs) oppose to the extent that it prejudices them with respect to discovery.

I. PERTINENT BACKGROUND

Both actions arise from the collapse of a building on June 9, 2019, on premises owned by movant at 350 West 52nd Street in Manhattan. Nassau plaintiff owns the adjoining property, 352 West 52nd Street; New York plaintiffs are Nassau plaintiff's commercial tenants at the property, which was damaged by the collapse of movant's building.

On October 30, 2019, New York plaintiffs commenced the instant action against movant,

asserting causes of action for negligence and intentional wrongdoing. (NYSCEF 1). Movant subsequently filed a third-party complaint against Alba Services, Inc., a/k/a Alba (Alba). (NYSCEF 5). On June 22, 2020, Nassau plaintiff commenced the Nassau action against movant and Alba, asserting causes of action for negligence, nuisance, and negligence *per se*. (Nassau action, NYCEF 2). While the New York action was commenced first, the parties agree that significantly more discovery was accomplished in the Nassau action.

On August 26, 2020, movant sought, pursuant to CPLR 507, 510, and 511, to change the venue of the Nassau action to New York County (Nassau action, NYSCEF 8); Alba cross-moved for the same relief (Nassau action, NYSCEF 26). By order dated June 14, 2021, both motions were denied as Nassau plaintiff is incorporated there, it was not seeking relief that affects the use of, or title to, real property, and there is no potential for witnesses being inconvenienced by having to travel from New York City to Nassau County. (Nassau action, NYSCEF 46). On August 2, 2021, movant filed the instant motion. (NYSCEF 18).

II. CONTENTIONS

Movant asserts that consolidation is appropriate as the two actions involve common questions of law and fact, arise from the same event, contain similar causes of action, share as parties movant and Alba, and the witnesses and documentary evidence will be virtually the same. Additionally, movant claims that both actions are in the early stages of discovery, and that if Nassau plaintiff's pending motion to amend its complaint is granted, discovery would continue, and the possibility of inconsistent results could be prejudicial. Absent exceptional circumstances, the venue of the consolidated action should be in New York County, movant argues, where the first action was commenced. (NYSCEF 19).

In opposition, Nassau plaintiff contends that movant attempts a "second bite at the

apple,” indirectly seeking to accomplish what it failed to accomplish directly, and that in lieu of seeking a consolidation when it moved for a change of venue, it waited until after the motion was decided against it to seek substantially the same relief. It maintains that the Nassau court’s decision that venue is proper in Nassau County constitutes the law of the case and that this motion should be deemed as an untimely and defective motion to reargue. Moreover, discovery is nearly complete in the Nassau action, whereas in the New York action, discovery has barely begun, and its motion seeking to add a cause of action for strict liability, requires no additional discovery. Nassau plaintiff asks that, to prevent movant from circumventing the Nassau court’s order, the cases should be consolidated in Nassau County. (NYSCEF 25).

New York plaintiffs oppose consolidation to the extent that it prejudices them in discovery, claiming that the two actions are at different stages of litigation, that they would be prejudiced if the actions were consolidated without allowing them the opportunity to obtain discovery, and that they should not have to bear additional costs or legal fees. In the event of a consolidation, New York plaintiffs ask to be allowed to conduct discovery and that all discovery in the Nassau action regarding movant be made available to them. (NYSCEF 24).

III. DISCUSSION

a. Governing law

Pursuant to CPLR 602(a),

[w]hen 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.

“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 questions of law and fact.”

(*Lema v 1148 Corp.*, 176 AD3d 653, 654 [1st Dept 2019]). Deference is thus accorded to the

court's discretion to join actions, and the burden is on the non-movant to show that consolidation will "prejudice a substantial right." (*Id.*).

b. Analysis

The two actions arise from the same underlying incident, advance similar claims, parties, and witnesses, and share common questions of law and fact (*Amcan Holdings, Inc. v Torys LLP*, 32 AD3d 337, 339-40 [1st Dept 2006] [common questions of law and fact existed where parties in each action had similar claims and possessed knowledge and information relevant to claims in other]; *Teitelbaum v PTR Co.*, 6 AD3d 254 [1st Dept 2004] [consolidation mandated by judicial economy where actions arose out of the same agreement, parties possessed knowledge and information relevant to the claims of the other, and potential witnesses were virtually identical]) and the parties do not allege that consolidation will prejudice a substantial right that cannot be remedied by the court presiding over the consolidated action.

While there is a presumption that actions be consolidated in the county where the first action was filed, the court may, for the convenience of witnesses or to promote the ends of justice, decide otherwise. (*Ressler & Ressler v Friedman*, 128 AD3d 447 [1st Dept 2017]). Here, consonant with the law of this case, the two actions should be consolidated in Nassau County. Given this result there is no need to address the other arguments.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion of 350 West 52, LLC is granted in part and denied in part, and the action *Steven Stile Farmers Market LLC et al v 350 West 52 LLC*, Index No. 160588/2019, pending in this court, be consolidated in the Supreme Court, Nassau County, with *352-52 Realty LLC v 350 West 52 LLC and Alba Services, Inc. a/k/a Alba*, Index No.

606135/2020; it is further

ORDERED, that the consolidation take place under Nassau County Index No.

606135/2020 and the consolidated action bear the following caption:

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 352-52 REALTY LLC, STEVEN STILE,
 and STEVEN STILE FARMERS
 MARKET LLC,

Plaintiffs,

-against-

350 WEST 52, LLC and ALBA SERVICES,
 INC., a/k/a ALBA

Defendants.
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It is further

ORDERED, that the Clerk of this Court transfer the file in this action to the Clerk of the Supreme Court, County of Nassau and mark his records to reflect such transfer; it is further

ORDERED, that within 30 days from entry of this order, counsel for movant serve a copy of this order with notice of entry upon the Clerk of this Court, pay the appropriate transfer fee, if any, and contact the staff of the Clerk of this Court and cooperate in effectuating the transfer; it is further

ORDERED, that the Clerk of the Court coordinate the transfer of the file in this action with the Clerk of the Supreme Court, Nassau County, so as to ensure an efficient transfer and minimize insofar as practical the reproduction of documents, including with regard to any documents that may be in digital format; and it is further

ORDERED, that such service upon the Clerk of this Court 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).

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11/8/2021
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE