

**Sergeants Benevolent Association Annuity Fund v
Renck**

2004 NY Slip Op 30037(U)

November 9, 2004

Supreme Court, New York County

Docket Number: _300601/7352

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn
Justice

PART 49m

See segments 33-40 of transcript

INDEX NO. 600733/03

MOTION DATE 10/25/04

- v -

MOTION SEQ. NO. 007

John T. March

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED

FILED

NOV 15 2004

NEW YORK COUNTY CLERK'S OFFICE

MOTION TO DISMISS TO BE DENIED
WITH AFFIDAVITS AND MEMORANDUM
DECISION IN MOTION SEQUENCE

Dated: 11/9/04 [Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : LAS PART 49

-----X
SERGEANTS BENEVOLENT ASSOCIATION :
ANNUITY FUND, :

Plaintiff, :

- against - :

JOHN T. RENCK, in his individual capacity, :
JOHN J. RENCK, in his individual capacity, :
MONITORING AND EVALUATION SERVICES, INC., :
and TRAINER WORTHAM & COMPANY, INC., :

Defendants. :
-----X

Index No. 601735/03

FILED
NOV 10 2004
NEW YORK
COUNTY CLERKS OFFICE

Herman Cahn, J.

Plaintiff, Sergeants' Benevolent Association Annuity Fund (the "SBA Fund"),
moves (seq. no. 007) to consolidate a later filed action (*Renck v Sergeants Benevolent Assn., Inc.*,
index No. 7512/04 [Sup Ct, Nassau County]) with this action, or, alternatively, to have them tried
jointly before this court, CPLR 602 (a).

The facts underlying this action are fully set forth in the court's decision and
order, dated March 31, 2004.

Background:

This action asserts claims for breach of contract and fiduciary duty, negligent
misrepresentation, unjust enrichment, and an accounting.

Defendant Monitoring and Evaluation Services, Inc. ("MES") was the SBA
Fund's investment consultant from September 1, 1994 through December 31, 2002. Defendant
Trainer Wortham & Company was one of the portfolio managers supervising a portion of the
SBA Funds investments. Defendants John T. Renck and John J. Renck are the principals of

MES. The complaint alleged that defendants failed to provide adequate investment advice to the SBA Fund, causing it to suffer substantial losses.

The March 31, 2004 decision granted the Rencks' motion to dismiss the claims asserted against them in their individual capacities.

On June 2, 2004, the Rencks and MES commenced the Nassau County action against the Sergeants' Benevolent Association, Inc. ("SBA") and its president, Edward Mullins, alleging libel arising from a sequence of publications in *The Chief*, a weekly publication serving the civil service community. The action relates to a sequence of responses to a June 13, 2003 article reporting the commencement of the instant, New York County, action. The Nassau County action alleges that the Rencks forwarded a letter to the editor, published June 20, 2003, referring to the allegations in this action as "spurious" and "totally inaccurate." SBA, in turn, replied by publication on July 4, 2003, defending its allegations in this lawsuit. The Nassau County action challenges that reply, as libelous.

Defendants' counsel do not dispute that disposition of the allegations in this action bears directly on the validity of SBA's defense of truth asserted in the Nassau County action (Minkoff Aff. ¶ 13; Powell Aff. ¶ 15; *see*, Luers Aff. ¶ 25).

Discussion:

Actions involving common questions of fact should generally be heard together as a matter of judicial economy.

Venue of related actions should generally be vested in the county where the earlier filed action is pending (*Brooks v Lefrak*, 188 AD2d 360 [1st Dept 1992]; *Padilla v Greyhound Lines, Inc.*, 29 AD2d 495 [1st Dept 1968]).

The two actions clearly share common questions of law and fact. The allegations of wrongdoing against MES, forming the basis of the within action, are substantially the same statements which MES and its principals, the Rencks, are suing SBA for in the Nassau County action. A vindication of those allegations herein would dispose of the libel action, because of the fundamental rule that truth is an absolute defense (*e.g.*, *Hirschfeld v Daily News, L.P.*, 269 AD2d 248, *lv denied* 271 AD2d 386 [1st Dept 2000]). A failure to prove the truth of the allegations, would also strongly affect the Nassau County action.

Defendants exaggerate when they claim that the two actions involve distinctly different parties, stating that this action involves the SBA Fund, not SBA *per se*, or its president, Edward Mullins. Counsel for defendants have not disputed that Mullins is the ranking officer of both SBA and the SBA Fund, and a likely witness for both (Younger Aff. ¶ 7). Similarly, SBA's officers contemporaneously serve as the SBA Fund's trustees (*id.*). In addition, although the claims against the Rencks, individually, were dismissed herein, they remain principals of MES, a party herein. The Rencks are, therefore, likely witnesses in both actions.

Complete consolidation of the two actions, whereby all the parties are merged into one caption, would create jury confusion, as that would result in the same party - MES - being on both sides of the caption as a defendant in this action and a plaintiff vis-a-vis the claims asserted in the Nassau County action (*M&K Computers Corp. v MBS Indus., Inc.*, 271 AD2d 660 [1st Dept 2000]).¹ However, plaintiff's submissions make clear that its request is for joint trial of

¹ The First Department defines "consolidation" as follows:

By the terms thereof the . . . pending actions are merged into a single action to be disposed of by a single decision or verdict, in the case of a jury trial, and a single judgment with one bill of costs; the new title is one which merges all the litigants

the two, related, actions (Luers Aff. ¶ 28, Ex. 6). “A joint trial preserves the integrity of the several actions, requires a separate decision or verdict, as the case may be, and several judgments, with the costs of the particular action in each case” (*Padilla, supra*, at 497). The ordering of a joint trial of two cases with common issues of law and fact, is the appropriate means of addressing the conflicting concerns of judicial economy and jury confusion inherent in the present circumstances (*Bass v France*, 70 AD2d 849 [1st Dept 1979]; *Padilla, supra*, at 498).

A joint trial would not create prejudice. Discovery issues are more easily managed under the supervision of one court – specifically, the court of first jurisdiction (*Brooks, supra*) – rather than under the diffuse management of two separate courts (*see, Progressive Ins. Co. v Vasquez*, 10 AD3d 518 [1st Dept 2004]).

Consolidation for trial of actions involving common questions of law and fact is preferred “unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right” (*Progressive, supra*). Defendants have cited no authority recognizing that their election to retain Nassau County counsel to file the Nassau County action, or the additional presence of defendant Trainer in this action, rises to the level of “prejudice [of] a substantial right” (*id.*).

Hon. Beverly Cohen has been appointed Referee to Supervise Disclosure in the within action. She is requested to also supervise disclosure in the Nassau County action. To that end, counsel are to contact Justice Cohen, expeditiously to arrange a further discovery conference with her.

into one group of plaintiffs and one group of defendants.

(*Padilla v Greyhound Lines, Inc.*, 29 AD2d 495, 497 [1st Dept 1968]).

Accordingly, it is

ORDERED that the motion is granted to the extent of consolidating, for joint trial, the action entitled *Renck v Sergeants Benevolent Assn., Inc.* (index No. 7512/04 [Sup Ct, Nassau County]) with this action; and it is further

ORDERED that all papers filed in the two actions shall bear the index number hereof only, and the following double caption:

“SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

-----X
SERGEANTS BENEVOLENT ASSOCIATION :
ANNUITY FUND, :
 : Index No. 601735/03
 :
 Plaintiff, :
 : (Action No. 1)

- against -

JOHN T. RENCK, in his individual capacity, :
JOHN J. RENCK, in his individual capacity, :
MONITORING AND EVALUATION SERVICES, INC., :
and TRAINER WORTHAM & COMPANY, INC., :

Defendants. :

-----X
JOHN T. RENCK, JOHN J. RENCK and :
MONITORING AND EVALUATION SERVICES, INC., :

Plaintiffs, :

(Action No. 2)

- against -

SERGEANTS BENEVOLENT ASSOCIATION, INC., :
and EDWARD MULLINS, in his individual :
capacity and in his capacity as President of the :
Sergeants Benevolent Association, :

Defendants. :

-----X”;

and it is further

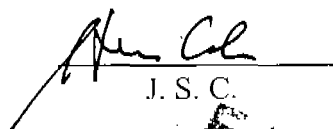
ORDERED that plaintiff shall serve a copy of this decision and order on the Office of the Clerk of the County of Nassau, and the Office of the Clerk of the County of New York, within ten days of notice of entry hereof upon defendants' attorneys; and it is further

ORDERED that, within twenty days from said service, the Office of the Clerk of the County of Nassau shall transmit the files in the action entitled *Renck v Sergeants Benevolent Assn., Inc.* (index No. 7512/04 [Sup Ct, Nassau County]) to the Office of the Clerk of the County of New York; and it is further

ORDERED that counsel for the parties shall appear before this court for a case management conference, on January 20, 2005, at 9:30 a.m, as previously scheduled.

Dated: November 9, 2004

ENTER:


 J. S. C.
FILED
 NOV 10 2004
 COUNTY CLERK'S OFFICE