

11 Essex Street Corp. v 7 Essex Street, LLC
2005 NY Slip Op 30067(U)
August 15, 2005
Supreme Court, New York County
Docket Number: 0600176/1762
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

11 Essex St. Corp

- v -

Power Bros. Co. of NY

INDEX NO.

600176/04

MOTION DATE

MOTION SEQ. NO.

001

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 _____

PAPERS NUMBERED

Cross-Motion: Yes No

and cross motion

Upon the foregoing papers, It is ordered that this motion

is decided in accordance

with the attached

FILED

AUG 18 2005

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 8/15/05

[Signature]
EMILY JANE GOODMAN S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
11 ESSEX STREET CORP.,

Plaintiff,

-against-

Index No. 600176/2004

Action No. 1

TOWER INSURANCE COMPANY OF NEW YORK,

Defendant.

-----X
11 ESSEX STREET CORP.,

Plaintiff,

-against-

Index No. 110019/2004

Action No. 2

7 ESSEX STREET, LLC, c/o VESTA DEVELOPMENT
GROUP, DeSIMONE CONSULTING ENGINEERS,
JEFFERY M. BROWN ASSOCIATES, INC.,
BERZAK GOLD, P.C., and BIG APPLE WRECKING
AND CONSTRUCTION CORP.,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

Pursuant to CPLR 602 (a), plaintiff 11 Essex Street Corp. moves to consolidate this action (Action No. 1) with *11 Essex St. Corp. v 7 Essex St, LLC et al.*, Index No. 110019/2004 (Action No. 2), and seeks to amend the complaint in the consolidated actions. DeSimone Consulting Engineers, PLLC (DCE), a defendant in Action No. 2, cross-moves here for summary judgment dismissing it from Action No. 2.

BACKGROUND

Plaintiff is the owner of a building located at 11 Essex Street, New York, New York. On February 12, 2002, plaintiff's building allegedly suffered extensive physical damage as a result of

excavation and demolition at an adjacent construction project at 7-9 Essex Street. Plaintiff alleges that large amounts of earth and bedrock were removed from the adjacent property without taking sufficient precautionary measures to prevent damage to neighboring land and structures.

In Action No. 1, which is before this court, plaintiff seeks to recover for the property damage to its building and for loss of business income, pursuant to a policy with its insurer, defendant Tower Insurance Company of New York (Tower). In Action No. 2, plaintiff alleges the negligence of the owner of the adjacent property at 7-9 Essex Street, and several entities that the owner hired for the construction project: a general contractor, two professional engineering firms, and a contractor who performed demolition work. Plaintiff seeks money damages for property damage and lost rental income.

At the time this motion and cross motion were submitted, Action No. 2 was not yet assigned to a judge.

DISCUSSION

Plaintiff's Motion to Consolidate and Amend the Complaint

“CPLR 602 (a) gives the trial court discretion to consolidate actions involving common questions of law or fact. Although great deference is to be accorded to the motion court's discretion, there is a preference for consolidation in the interest of judicial economy and ease of decision-making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right”

(Matter of Progressive Ins. Co. [Vasquez], 10 AD3d 518, 519 [1st Dept 2004][citations omitted]). Here, it is undisputed that both Actions No. 1 and No. 2 involve common questions of law and fact as to the cause and extent of the damage to plaintiff's building. However, Berzak Gold, PC and Jeffrey M. Brown Associates, Inc., defendants in Action No. 2, oppose consolidation because the insurance coverage issues in Action No. 1 would prejudice the

defendants in Action No. 2.

“[I]t is generally recognized that, even where common facts exist, it is prejudicial to insurers ‘to have the issue of insurance coverage tried before the jury that considers the underlying liability claims’” (*Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235, 242 [1st Dept 2002][citation omitted]; *Redanz v Kuntz*, 99 AD2d 654 [4th Dept 1984]). “The specific knowledge of the dispute over insurance coverage would of necessity temper the thinking of the jury and unduly influence their verdict” (*Transamerica Ins. Co. v Tolis Inn*, 129 AD2d 512, 513 [1st Dept 1987][internal citations omitted]). In this case, however, Tower has waived any argument as to prejudice with the consolidation of the two actions, pursuant to a stipulation dated July 15, 2005. Aside from potential prejudice to Tower, Berzak Gold, PC and Jeffrey M. Brown Associates, Inc. have offered no argument that they will suffer any prejudice.

Therefore, the court grants plaintiff’s motion to the extent that Action No. 1 and Action No. 2 will be joined for trial and discovery. Joint trial is preferable to consolidation in this case because true consolidation would result in a single judgment, whereas joint trials result in separate verdicts and judgments, each which may be appealed separately (*see Weinstein-Korn-Miller*, NY Civ Prac ¶ 602.02). Separate judgments in these two cases are preferable because Action No. 1 is for a declaratory judgment as to insurance coverage, the appeal of which could be delayed by a trial as to liability of the defendants in Action No. 2.

As to the branch of plaintiff’s motion for leave to amend the complaint, the court notes that plaintiff is seeking leave in the wrong action. Because the court is not granting consolidation, plaintiff should have brought a motion for leave to amend in Action No. 2. However, because all the defendants in Action No. 2 were served with this motion, the court will

deem this branch of plaintiff's motion as properly brought.

"Leave to amend a pleading should be 'freely given' 'as a matter of discretion in the absence of prejudice or surprise', although to conserve judicial resources, examination of the underlying merit of the proposed amendment is mandated. Therefore, a motion for leave to amend a pleading 'must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment'"

(*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 354-355 [1st Dept 2005])[internal citations omitted]). Here, the proposed complaint alleges that defendants in Action No. 2 failed to comply with various provisions of the building code of the City of New York. However, plaintiff has not submitted an affidavit of merit or included any evidentiary submissions in its moving papers. Therefore, leave to amend is denied, without prejudice to renewing the motion in Action No. 2.

DCE's Cross Motion for Summary Judgment

Because the actions are not consolidated, DCE's cross motion is also brought improperly. However, the court will deem this cross motion as having being made in Action No. 2.

DCE argues that it should be dismissed from the complaint in Action No. 2 because it had no role in the activities that allegedly resulted in damage to plaintiff's property. DCE contends that only excavation work was going on prior to February 12, 2002, the date that plaintiff's building suffered damage. Plaintiff's insurance carrier opined that damage to the building may have been due to a failure of underpinning in the adjacent building (*see DeSimone Aff.*, Ex K). However, DCE maintains that it had no role in either excavation or underpinning. It submits its agreement with an architectural firm, as well as plans and specifications for the base building structural work at the construction project (*see DeSimone Aff.*, Exs A & B). DCE points out that the General Notes to the plans and specifications state, in pertinent part:

“CONTRACTOR SHALL RETAIN THE SERVICE OF A PROFESSIONAL ENGINEER REGISTERED IN THE STATE OF NEW YORK TO PREPARE SIGNED AND SEALED DESIGN DRAWINGS AND CALCULATIONS FOR ALL REQ'D UNDERPINNING OF ADJACENT STRUCTURES

* * *

UNDERPINNING NOTES OR OTHER INFORMATION GIVEN ON THESE DRAWINGS ARE SUGGESTIONS ONLY. THE CONTRACTOR IS TO PREPARE HIS OWN UNDERPINNING DETAILS. THE CONTRACTOR IS SOLELY RESPONSIBLE FOR THE SAFETY OF ALL EXISTING BUILDING[S] DURING UNDERPINNING OPERATIONS.”

(*id.*, Ex B).

However, plaintiff raises an issue of fact as to whether DCE had responsibility for underpinning operations. DCE filed a “Technical Report: Statement of Responsibility” with the Department of Buildings (TR-1), which apparently indicates that DCE had responsibility for piling, subgrade, underpinning, and shoring as of August 8, 2001 (Zola Affirm., Ex D).

In reply, DCE argues that plaintiff has interpreted the TR-1 out of context. According to DCE, it is common industry practice for one of the original design professionals to indicate on the TR-1 that it will be the professional of record even for aspects of work that will actually be designed by a different engineer retained by one of contractors (Estevez Aff. ¶ 5). DCE claims that the designation is “made solely as an accommodation to the project owner, to facilitate the approval process” (*id.* ¶ 6).

This argument is unavailing. Plaintiff’s evidence is sufficient to raise an issue of fact, and DCE’s argument only raises an issue of credibility. Although DCE objects to plaintiff’s affirmation as lacking personal knowledge, it concedes that “[t]he affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide ‘evidentiary proof in admissible form’” (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). In addition, DCE admits

that it is also industry practice that the engineer who is eventually retained by the contractor must file a superseding TR-1. However, DCE submits no copy of an amended TR-1 listing any other engineer with the responsibility for underpinning operations that occurred prior to February 12, 2002. The TR-1 filed by Berzak Gold, P.C. apparently indicates that its responsibilities for underpinning, shoring, and structural stability began as of February 14, 2002 (*see DeSimone Aff., Ex J*).

Contrary to DCE's argument, there is no telling admission to be drawn from the fact that Berzak Gold, P.C. has not submitted any affidavits confirming or denying its role in underpinning operations.

Finally, DCE contends that plaintiff cannot assert a negligence claim against it for purely economic loss in absence of privity. Under a theory of negligence, DCE's duty of care does not extend to those individuals who suffer only economic losses (*see 532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 290-292 [2001]; *Roundabout Theatre Co. v Tishman Realty & Constr. Co.*, 302 AD2d 272, 273 [1st Dept 2003]). As DCE points out, courts have also held that a plaintiff cannot recover solely for economic loss arising out of negligent construction, in the absence of a contractual relationship (*Residential Bd. of Managers of Zeckendorf Towers v. Union Square-14th St. Assoc.*, 190 AD2d 636 [1st Dept 1993]; *Key Intl. Mfg. v Morse/Diesel, Inc.*, 142 AD2d 448 [2d Dept 1988]; *Lake Placid Club Attached Lodges v Elizabethtown Bldrs.*, 131 AD2d 159 [3d Dept 1987]).¹ However, DCE's reliance on these cases

¹If the pecuniary loss arises from negligent misrepresentations, recovery is also possible if the relationship is so close as to approach that of privity (*see Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417 [1989]). This does not apply here, because the complaint alleges DCE's negligent supervision and negligent retention (*see Zola Affirm., Ex E* [Complaint ¶ 25]).

is misplaced. Plaintiff is not seeking to recover purely economic losses, but also has claims for property damage. The economic loss here—the lost rental income of the building—is itself a consequence of the property damage.

Therefore, DCE's cross motion for summary judgment is denied.

Accordingly, it is

ORDERED that the plaintiff's motion for consolidation and for leave to amend the complaint is granted to the extent that this action is joined for trial and for discovery with *11 Essex St. Corp. v 7 Essex St, LCC et al.*, Index No. 110019/2004, and the motion is otherwise denied; and it is further

ORDERED that the cross motion for summary judgment by DeSimone Consulting Engineers is denied; and it is further

ORDERED that copies of this decision and order shall be filed with the County Clerk under this index no. and under *11 Essex St. Corp. v 7 Essex St, LCC et al.*, Index No. 110019/2004.

Dated: August 15, 2005

FILED

AUG 18 2005

ENTER:

NEW YORK
COUNTY CLERK'S OFFICE



EMILY JANE GOODMAN