

Magee v Pane

2006 NY Slip Op 30698(U)

August 7, 2006

Sup Ct, Suffolk County

Docket Number: 2006-439

Judge: Jeffrey Arlen Spinner

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER
 Justice of the Supreme Court

<p>JAIMIE MAGEE,</p> <p style="text-align:right">Plaintiff,</p> <p style="text-align:center">- against -</p> <p>SALVATORE PANE and PETER PISILLO,</p> <p style="text-align:right">Defendants.</p>	<p>ORIG. MOTION DATE: 05/10/06 FINAL SUBMIT DATE: 05/31/06</p> <p>ACTION SEQ. NO.: 001 - MG</p> <p style="text-align:center"><u>Action No. I</u></p> <p>INDEX NO.:2006-439</p>
<p>JAIMIE MAGEE,</p> <p style="text-align:right">Plaintiff,</p> <p style="text-align:center">- against -</p> <p>COUNTY OF SUFFOLK, TOWN OF BROOKHAVEN, SUFFOLK COUNTY WATER AUTHORITY, HOMELINES HOLDING CORP. and KRISTOPHER F. RENE,</p> <p style="text-align:right">Defendants.</p>	<p style="text-align:center"><u>Action No. II</u></p> <p>INDEX NO.:2004-4751</p>

UPON the following papers numbered 1 to 6 read on this Motion:

- Plaintiff's Notice of Motion & Supporting Papers 1-13, & Exhibits A-H;
- it is,

ORDERED, that this unopposed application of Plaintiff is hereby granted in all respects.

Plaintiff moves this Court for an Order:

1. Pursuant to CPLR 602(a), consolidating the above entitled actions;
2. Directing default judgment be issued against Defendant PISILLO, for his failure to appear and/or answer the Summons and Complaint of Plaintiff heretofore served in this matter;
3. Staying the inquest on assessment of damages as against Defendant PISILLO until such time as trial of the remaining action;
4. Permitting Plaintiff to amend the Complaint in these actions to add SUFFOLK PROPERTY MANAGEMENT CORP. OF MASTIC as a Defendant.

These actions arise out of the same incident, which occurred on February 28, 2003, and involve causes of action seeking to recover damages by reason of serious injuries sustained in a motor vehicle accident allegedly caused by the draining and pooling of water onto a public roadway from a house located at 233 Orchard Avenue, Patchogue, in the Town of Brookhaven and County of Suffolk, which froze, allegedly causing Defendant RENE to lose control of his vehicle, which rolled over, causing said injuries to Plaintiff, a passenger in his vehicle.

First, the Court notes that the captions used herein are incorrect, same having been modified by Order of this Court, dated April 12, 2006, granting summary judgment to the County of Suffolk and Suffolk County Water Authority, which will once again be addressed in the further amendment of the caption herein, as directed below.

CONSOLIDATION

Since the actions arise from the same incident and involve common questions of fact, consolidation is appropriate to avoid inconsistent verdicts (*see Orkin v. White Plains Hospital*, 97 AD2d 399, 467 NYS2d 225 [2d Dept 1983]). Moreover, it would be a waste of judicial resources and duplicitous to require two separate trials with the concomitant costs and expenses (*see Wieder v. Skala*, 218 AD2d 507, 630 NYS2d 308 [1st Dept 1995]).

Furthermore, in *Barbilex Associates v. Pesaitis*, 113 Misc.2d 436, 449 N.Y.S.2d 387, the Court stated that:

“Consolidation or joinder of trials are procedural devices to promote the economic resolution of similar actions, irrespective of the number of parties involved. (See *Tone and Stifler, Joinder of Parties and Consolidation of Multiparty Actions*, 1967 *Univ. of Illinois Law Forum* 209, 221). A court considering consolidation is required to render a pragmatic judgment as to the feasibility of fusing two or more separately filed complaints and it must weigh this judgment against the possibility of an unwieldy trial. *Id.* at 222.”

The Court is persuaded that the best interests of all parties to these actions, as well as expense of judicial resources, would best be served by joinder of these matters for trial. That being said, the Court reminds all parties of the distinctions set forth in *Mars Associates, Inc. v. New York City Educational*, 126 A.D.2d 178, 513 N.Y.S.2d 125 [N.Y.A.D. 1 Dept., 1987], wherein the Court recited the following:

“Although there are similarities between consolidating an action and ordering a joint trial of an action, there are also significant differences. On the one hand, with consolidation there is a total merger of the separate actions into one action. However, with the joinder of trials, each action remains independent of the other. In other words, as we stated in *Pigott v. Field*, 10 AD2d 99, 101, 197 NYS2d 648 (1st Dept. 1960), “consolidation gives rise to a new action displacing the actions affected thereby, whereas a joint trial preserves the integrity of each of the actions ...”. Thus, “[i]n consolidated actions only one judgment is entered, while in joint trials separate verdicts and judgments are entered and each may be appealed from ...” (2 *Weinstein-Korn-Miller, N.Y. Civ. Prac.*, paragraph 602.02, page 6-11).”

DEFAULT JUDGMENT

Jurisdiction over Defendant PISILLO was obtained on January 26, 2006, by service of the underlying Summons and Complaint upon him, personally. On March 13, 2006, Plaintiff's Counsel sent a letter and copy of the Summons and Complaint to Defendant PISILLO, certified mail/return receipt requested, requesting an answer and/or appearance in the within action. The return receipt was executed by Defendant PISILLO and return to Plaintiff's Counsel, but said Defendant has failed, refused and neglected to answer

and/or appear in the within action, and his time to do so has expired.

STAY OF INQUEST

In as much as the default by Defendant results in a determination of liability against him, that Court agrees that the inquest requisite to establish the extent of damages to be assessed against him must be stayed until such time as the trial of the remaining action, in order to properly apportion responsibility, should there be any such need as to the other Defendants in the within action.

AMENDMENT OF COMPLAINT - ADDITIONAL DEFENDANT

At a Compliance Conference before this Court on April 12, 2006, Defendant HOMELINES informed Plaintiff's Counsel that Defendant PISILLO worked for Suffolk Property Management Corp. Of Mastic (hereinafter SUFFOLK PROPERTY), which managed the subject property that allegedly was the source of the water causing the motor vehicle accident. Plaintiff's Counsel further learned from the New York State Department of State that Defendant PISILLO was the Chief Executive Officer of SUFFOLK PROPERTY. While the Statute of Limitations within which to begin an action against SUFFOLK PROPERTY has expired, CPLR 203(c) states that in an action which is commenced by filing, "...a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced.

Furthermore, the Appellate Division, 2nd Department, in *Desiderio v. Rubin* (234 AD2d 581, 652 NYS2d 68 [1996]) held that the long standing rule allowing relation back to the original date of filing requires that the original named Defendant and the latter named Defendant be united in interest, and requires Plaintiff to establish both claims arose out of the same conduct, transaction or occurrence, and the new party is united in interest with original defendant, and by means of said relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement. "In short, 'interests will be united, only where one is vicariously liable for the acts of the other'" (ID, citing *Cornell v. Hayden*, 83 AD2d 30, 443 NYS2d 383).

As properly suggested by Plaintiff's Counsel, the first prong of the above test is established by the unquestionable fact that the claims herein against Defendant PISILLO and proposed Defendant SUFFOLK PROPERTY arose out of the same conduct and/or occurrence, which allegedly resulted in serious injuries to Plaintiff, and the second prong of the test is established by the unquestionable fact that the records of the New York State Department of State demonstrate Defendant PISILLO was Chief Executive Officer of, and an individual designated to receive service of process for, SUFFOLK PROPERTY, therefore uniting them *in interest*, as SUFFOLK PROPERTY would be vicariously liable for the conduct of their employee and Chief Executive Officer, and said relationship, together with service of process upon Defendant PISILLO, charges SUFFOLK PROPERTY with notice of the institution of the action back to the original date of filing, disposing of any prejudice it could have suffered in maintaining its defense on the merits, as to their delayed inclusion in the within action.

For all the reasons stated herein above, it is, therefore,

ORDERED, that this unopposed application of Plaintiff for an Order:

1. Pursuant to CPLR 602(a), consolidating the above entitled actions;
 2. Directing default judgment be issued against Defendant PISILLO, for his failure to appear and/or answer the Summons and Complaint of Plaintiff heretofore served in this matter;
 3. Staying the inquest on assessment of damages as against Defendant PISILLO until such time as trial of the remaining action;
 4. Permitting Plaintiff to amend the Complaint in these actions to add SUFFOLK PROPERTY MANAGEMENT CORP. OF MASTIC as a Defendant;
- is hereby granted in all respects; and it is further

ORDERED, that the caption of this action is hereby directed to read as follows, pursuant to this Order and the prior Order of the Court, date April 12, 2006:

JAIMIE MAGEE,	Plaintiff,
- against -	
TOWN OF BROOKHAVEN, HOMELINES HOLDING CORP., KRISTOPHER F. RENE, SALVATORE PANE, PETER PISILLO and SUFFOLK PROPERTY MANAGEMENT CORP. OF MASTIC,	Defendants.

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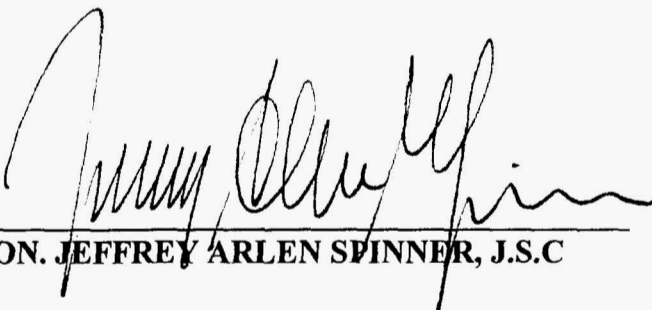
and it is further

ORDERED, that, the papers submitted in support of this Motion failing to demonstrate service upon Defendant PANE, or Counsel for Defendant PANE, if this cannot be sufficiently explained in the Settled Order directed below, then said name should be removed from the caption and this action should be discontinued as against said party; and it is further

ORDERED, that Counsel for Plaintiff herein is hereby directed to serve a copy of this the Settled Order, required below, with Notice of Entry, upon Counsel for all the remaining parties, and upon the Calendar Clerk of this Court, within twenty (20) days of the date said Settled Order is filed.

Settle order on 10 days notice, including scheduling of a new preliminary conference date, mutually convenient to all parties, to set forth a new disclosure, discovery and inspection schedule to deal with the inclusion of an additional Defendant, SUFFOLK PROPERTY.

Dated: Riverhead, New York
August 7, 2006



HON. JEFFREY ARLEN SPINNER, J.S.C

FINAL DISPOSITION

NON-FINAL DISPOSITION

SCAN

DO NOT SCAN

TO:

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NO LONGER PARTIES TO THESE PROCEEDINGS

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