

**Gilbane Bldg. Co. v Travelers Prop.
Cas. Co. of Am.**

2007 NY Slip Op 30259(U)

March 8, 2007

Supreme Court, New York County

Docket Number: 0109872

Judge: Jane S. Solomon

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publication.

PRESENT: JANE S. SOLOMON
Justice

PART 55

Hilbanc Building

INDEX NO. 109872/06

MOTION DATE 12/12/06

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

Travelers

The following papers, numbered 1 to 7 were read on this motion to/for dismiss

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-5

6-7

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided in

accordance with the annexed memorandum decision and order.

NB: Preliminary conference scheduled for April 19th at 12:00 noon.

FILED
MAR 19 2007
NEW YORK COUNTY CLERK'S OFFICE

By their courtesy copies hereof the parties submitting on this motion are directed to notify all others of the 4/19/07 conference 60 Centre St, am 432, Port 50, New NY

Dated: 3/8/07

JANE S. SOLOMON

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
GILBANE BUILDING COMPANY, GILBANE,
INC., U.W. MARX/GILBANE BUILDING
COMPANY, a Joint Venture, THE
UNIVERSITY AT ALBANY FOUNDATION,
THE STATE UNIVERSITY OF NEW YORK
and STATE OF NEW YORK

Plaintiffs,

-against-

TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA, STONE BRIDGE
IRON AND STEEL, INC., ILLINOIS
UNION INSURANCE COMPANY, and
FAST TREK STEEL, INC.

Defendants.

-----X
JANE S. SOLOMON, J.

INDEX NO. 109872/06

DECISION and ORDER

FILED
MAR 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

In this action relating to insurance for underlying personal injury actions, defendant Fast Trek Steel, Inc. ("Fast Trek") moves to dismiss the Complaint against it on the grounds that an identical action is pending against it in another court. For the reasons described herein, the motion is denied.

Prior to January 22, 2004, plaintiff U.W. Marx/Gilbane Building Company, a Joint Venture ("Joint Venture"), entered into a contract with plaintiff the University at Albany Foundation ("Albany Foundation") pursuant to which Joint Venture was hired as construction manager for a cancer research center in East Greenbush, New York (the "Project"). Joint Venture subcontracted certain work on the Project to defendant Stone Bridge Iron and

Steel, Inc. ("Stone Bridge"), which in turn subcontracted certain of the work to Fast Trek. According to Plaintiffs, under Stone Bridge's contract with Fast Trek, Fast Trek agreed to name them as additional insureds on Fast Trek's general liability insurance policy issued by defendant Illinois Union Insurance Company ("Illinois Union").

On January 22, 2004, three individuals allegedly were injured while working at the Project's construction site when a steel beam struck or brushed against a steel column. Two of the individuals commenced personal injury actions (which were later consolidated into one action) in the New York County Supreme Court; the third individual commenced an action in Albany County. Numerous third-party actions were brought by the defendants, including a third-party complaint against Fast Trek brought there by Joint Venture and Albany Foundation for breach of contract for failure to procure insurance.¹ The Albany County Supreme Court consolidated the New York and Albany County actions on October 18, 2005, and the case is currently pending in Albany County (Index No. 7320-04). Fast Trek asserts that one of the factors

¹Fast Trek was also named as a defendant in the Albany County action by one of the injured individuals, and as a third-party defendant in another third-party action by U.W. Marx, Inc. (not a party to the instant action) for failure to procure insurance.

in the Albany consolidation was its lack of a relationship to New York County.

On July 17, 2006, Plaintiffs Gilbane Building Company, Gilbane, Inc. ("Gilbane"), Joint Venture, Albany Foundation, State University of New York ("SUNY") and the State of New York commenced this declaratory judgment action, seeking coverage for the underlying personal injury actions under (1) Stone Bridge's policy with defendant Travelers Property Casualty Company of America ("Travelers") and (2) Fast Trek's policy with Illinois Union. Alternatively, Plaintiffs seek to recover against Stone Bridge and Fast Trek for their failures to procure insurance coverage. Travelers has filed a cross-claim against Illinois Union. Fast Trek now moves under CPLR § 3211 to dismiss the Complaint against it, arguing that an identical action is pending in Albany. Defendants Travelers, Stone Bridge and Illinois Union have not filed any papers in connection with this motion.

Plaintiffs argue that Fast Trek's motion to dismiss should be denied as untimely under CPLR § 3211(e). They allege that Fast Trek moved 7 days after its time to answer the Complaint had expired, and that this was after Plaintiffs had previously granted it a 30 day extension to answer. Given the recent filing of the action, the fact that related claims are

pending in Albany, and that the motion was filed only a few days late, Plaintiffs are not prejudiced.

Plaintiffs also argue that dismissal is not warranted. While they concede that some portion of their claims is coextensive with claims against Fast Trek made in the earlier filed Second Third-party Complaint in Albany, they contend the claims for failure to procure insurance coverage there were asserted against Fast Trek only by Albany Foundation and Joint Venture. No failure to procure insurance claims are pending on behalf of Gilbane, Gilbane Building Company, SUNY or the State of New York. In addition, the claims relate to two of the underlying individual plaintiffs, and no claim for failure to procure insurance is pending in connection with the third individual. Moreover, Plaintiffs argue, the claims against Fast Trek and Stone Bridge for breach of contract for failure to procure insurance coverage will be directly determined by the outcome of this declaratory action.

A determination in the Albany case might not dispose of all issues in this action. See Guilden v. Baldwin Sec. Corp., 189 A.D.2d 716 (1st Dep't 1993); Mt. McKinley Ins. Co. v. Corning Inc., 33 A.D.3d 51 (1st Dep't 2006). Accordingly, while this Court has substantial discretion under CPLR § 3211(a)(4) to dismiss an action where another action or proceeding is pending

between the same parties on the same cause of action (Brooklyn Union Gas Co. v. State Bd. of Real Prop. Servs., 246 A.D.2d 898 [3d Dep't 1998]), it seems more appropriate to have all of the related and dispositive insurance issues pending before this Court.

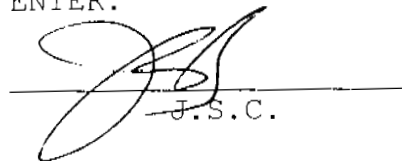
Accordingly, it hereby is

ORDERED that Fast Trek's motion to dismiss the Complaint against it is denied; and it further is

ORDERED that counsel for all parties shall appear for a preliminary conference in Part 55 on April 9, 2007 at 12:00 noon. One of the issues to be discussed is a transfer to this action of the duplicative claims pending in Albany.

Dated: March 8, 2007

ENTER:


J.S.C.

JANE S. SOLOMON

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MAR 19 2007
NEW YORK
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