

State of New York v Grecco

2007 NY Slip Op 31913(U)

June 27, 2007

Supreme Court, Suffolk County

Docket Number: 0009384/2002

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

P R E S E N T :

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 2/9/07
ADJ. DATES 2/16/07
Mot. Seq. # 007 - MG

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THE STATE OF NEW YORK and THE PEOPLE	:	ANDREW CUOMO
OF THE STATE OF NEW YORK by ELIOT	:	NYS Attorney General
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Upon the following papers numbered 1 to 18 read on these motions for joint trial
_____ : Notices of Motion/Order to Show Cause and supporting papers 1 - 3; 4-5 ; Notice of Cross
Motion and supporting papers _____ ; Answering Affidavits and supporting papers 6-7; 8-9; 10-11 ;
Replying Affidavits and supporting papers _____ ; Other 12-13 (memorandum); 14-15 (memorandum); 16-
17 (memorandum); 18 (memorandum) ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by the defendants, Robert Toussie and Chandler Property Inc., for an Order pursuant to CPLR 602(a) consolidating for discovery and joint trial the above action with an action entitled *Prand Corp. formerly known as Chandler Property, Inc. and formerly known as Toussie Family Enterprises, Ltd. v County of Suffolk and Town of Brookhaven*, bearing Suffolk County Index No. 25310/2006, is granted; and it is further

ORDERED that the movant shall serve a copy of the Order with Notice of Entry upon all of the respective counsel in the two actions within thirty (30) days of the date herein pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that the joined actions shall bear the caption of the two actions and all future court documents shall so indicate the two captions; and it is further

ORDERED that all matters of trial practice are reserved to the Justice presiding at the Trial of these consolidated actions; and it is further

ORDERED that all parties shall serve upon any party so demanding copies of all disclosure documents heretofore obtained in the other action(s); and it is further

ORDERED that the pleadings in each of the actions consolidated herein for joint trial shall stand as the pleadings in the consolidated actions and each action shall keep its separate identity; and it is further

ORDERED that upon completion of discovery, the parties shall serve and file separate Notes of Issue and Certificates of Readiness as to each action and each party shall be entitled to enter separate Judgments and Bills of Costs and Disbursements in each action respectively, if costs are allowed; and it is further

ORDERED that movant is directed to serve a copy of this Order with upon the Calendar Clerk of this Court IAS Part 33 within ten (10) days of the date hereof; and it is further

ORDERED that a preliminary conference of this consolidated for joint trial action is scheduled for **July 31, 2007**, at 9:30 a.m., in the DCM Part located at 1 Court Street, Riverhead, New York, at which time the parties shall agree on a discovery schedule and the next compliance conference date.

Familiarity with this matter is presumed and only relevant facts will be restated where necessary. This matter has a long and contentious existence. Defendants, Robert Toussie and Chandler Property Inc. (hereinafter jointly "Toussie") move pursuant to CPLR602(a) to consolidate for joint trial the above action

with the action entitled *Prand Corp., formerly known as Chandler Property, Inc. and formerly known as Toussie Family Enterprises, Ltd. v County of Suffolk and Town of Brookhaven*, bearing Suffolk County Index No. 25310/2006 (hereinafter “Prand action”). The motion is supported the defendant, Allan Grecco (hereinafter “Grecco”) and opposed by plaintiff, the State of New York (hereinafter “State”) and defendants in the second action, County of Suffolk (hereinafter “Suffolk”) and Town of Brookhaven (hereinafter “Brookhaven”) essentially on the grounds of prejudice. The opposition claims that the motion for consolidation is premature and would cause difficulties with discovery based upon the relative age of the actions.

The gravamen of the complaint in the Prand action is that if the plaintiff, State, in the above action is successful in proving that Toussie induced Grecco to breach his fiduciary duty to Suffolk, and that as a result of that fiduciary breach, Suffolk paid an inflated price for the property, then Toussie would be entitled to the equitable relief of having the subject property returned to him based upon the grounds of mutual mistake, failure of proper consideration and fraudulent inducement. Movant further contends there is a legal issue common to both actions which arise out of the sale of the subject property involving the same parties to both actions except the State.

CPLR 602 (a) provides:

[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 and delays.

A motion pursuant to CPLR 602(a) is directed to the sound discretion of the court (*see Dias v Berman*, 188 AD2d 331, 591 NYS2d 165 [1st Dept 1991]). Generally, a joint trial is favored where the actions share common questions of fact and law (*see McDutchess Bldrs., Inc. v Dutchess Knolls, Inc.* 244 AD2d 534, 665 NYS2d 579 [2d Dept 1997]; *cf. RCN Constr. Corp. v Fleet Bank, N.A.*, 34 AD2d 776, 825 NYS2d 140 [2d Dept 2006]), absent prejudice to a substantial right of the opposing party (*see D’Abreau v American Bankers Inc. Co. of Florida*, 261 AD2d 501, 690 NYS2d 655 [2d Dept 1999]).

“It is well settled that consolidation is generally favored by the courts in the interest of judicial economy and the 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” (*Amotog Trading Corp. v Broadway & 56th St. Assocs.*, 191 AD2d 212, 594 NYS2d 204 [1st Dept 1993]) in order avoid “the risk of inconsistent verdicts” (*Williams v Property Serv., LLC*, 6 AD3d 255, 774 NYS2d 698 [1st Dept 2004] *citation omitted*); *see also Fransen v Maniscalco*, 256 AD2d 305, 681 NYS2d 310 [2d Dept 1998]; *Zupich v Flushing Hosp. and Med. Ctr.*, 156 AD2d 677, 549 AD2d 441 [2d Dept 1989]; *Megyesi v Automotive Rentals, Inc.*, 115 AD2d 596, 496 NYS2d 473 [2d Dept 1985]; *Mideal Homes Corp. v L&C Concrete Work*, 90 AD2d 789, 455 NYS2d 394 [2d Dept 1982]). The fact that a case may be delayed by such consolidation is not a sufficient reason to deny the motion (*see Raboy v McCory Corp.*, 210 AD2d 145, 621 NYS2d 14 [1st Dept 1994]).

While consolidation should not be granted where it would cause complications, delay or prejudice

the rights of a party (*see Cohen v Goldfein*, 100 AD2d 795, 474 NYS2d 519 [1st Dept 1984]), as where it would cut off or restrict different parties, defenses, rights or issues (*see Wood v Metropolitan Hotel Indus. Stabilization Assn.*, 112 Misc2d 601, 447 NYS2d 813 [Sup Ct New York County 1982]; *rev'd on other grounds*, 95 AD 2d 560, 467 374 [1st Dept 1983]) or where the resolution of one action will be determinative of another (*see Sokolow, Dunand, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64, 747 NYS2d 441 [1st Dept 2002]) and the viability of one action depends upon the resolution of another action consolidation, is inappropriate (*see Charles B. DeThan Group v Richmond* 176 AD2d 509, 574 NYS2d 703 [1st Dept 1991]). The Court does not find the foregoing to applicable herein.

Furthermore, although there has been no discovery in either action to date, it is not a ground sufficient to withstand consolidation (*see Chinatown Apts., Inc. v New York City Tr. Auth.*, 100 AD2d 824, 474 NYS2d 763 [1st Dept 1984]). The argument that delay will result due to additional discovery is overcome by the Court's direction that parties complete discovery expeditiously. Both actions are in the discovery stage and neither case is on the trial calendar. The actions are not at markedly different regarding procedural stages where consolidation would result in undue delay and resolution of either action (*see F&K Supply v Johnson*, 197 AD2d 814, 602 NYS2d 970 [3d Dept 1993]; *Steurman v Broughton*, 123 AD2d 681, 507 NYS2d 50 [2d Dept 1986]; *Bender v Underwood*, 93 AD2d 747, 461 NYS2d 301 [1st Dept 1983]; *see also Abrams v Port Auth. Trans-Hudson Corp.*, 1 AD3d 118, 766 NYS2d 429 [1st Dept 2003]).

While the State, Suffolk and Town have stated in their opposition papers that consolidation is improper and would result in prejudice to them, none of the parties have articulated or suggested how they would be prejudiced or adversely affected (*see Business Council of New York, Inc. v Cooney*, 102 AD2d 1001, 478 NYS2d 94 [3d Dept 1984]), other than generalized statements, to indicate that consolidation of the actions would not be warranted (*see Moor v Moor*, 39 AD3d 507, 835 NYS2d 593 [2d Dept 2007]; *Geneva Temps, Inc. v World Communities, Inc.*, 24 AD3d 332, 806 NYS2d 519 [1st Dept 2005]; *Gadelov v Shure*, 274 AD2d 375, 711 NYS2d 896 [2d Dept 2000]; *cf. Kramer Bros. Frgt. Lines, Inc. v M&C Transfer Co.*, 15 AD2d 646, 223 NYS2d 608 [1st Dept 1962]).

On the contrary, the record indicates that in the interests of justice and judicial economy, the actions should be consolidated since both actions concern the circumstances of the sale of the subject property, thereby involving common questions of law and fact and "the proof with respect to each action will overlap and turn on credibility determinations of the nature and relationship of the parties" (*Nigro v Pickett*, 39 AD2d 720, 833 NYS2d 655 [2d Dept 2007]).

Although, as noted, the decision to consolidate actions is one that lies with the discretion of the court (*see Business Council of New York, Inc. v Cooney*, 102 AD2d 1001, *supra*), it is an abuse of discretion to refuse to consolidate where common legal or factual questions warrant it and no substantial prejudice has been demonstrated (*see Page v Lar Lakeshore Corp.*, 138 AD2d 970, 526 NYS2d 302 [4th Dept 1988]; *Marshall v Monegro Inv.*, 132 AD2d 651, 518 NYS2d 23 [Sup Ct Queens County 1987]).

If the cases were to proceed separately, it could cause confusing and disparate results. In the *State* action, the Court could conclude that there was fraud and a breach of fiduciary duty. In the *Prand* action, the Court could conclude that there was a mutual mistake and fraudulent inducement. In that event, the State in the first action would not know whether fraud and a breach of fiduciary duty was committed by

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the defendants. This is one of the very situations where consolidation exists to prevent unnecessary duplication and possible injustice resulting from divergent decisions (*see Karasik v Karasik*, 172 AD2d 294, 568 NYS2d 384 [1st Dept 1991]).

While the issues in the two actions are not the same and some legal and/or factual issues differ, this is not a bar to consolidation (*see Gibbons v Groat*, 22 AD2d 996, 254 NYS2d 843 [3d Dept 1964]; *Cohen v Greely Sq. Bldg. Corp.*, 15 Misc2d 42, 179 NYS2d 867 [Sup Ct Kings County 1958] *modified* 8 AD2d 741, 188 NYS2d 296 [2d Dept 1959]) where some important rules of law and some substantial issues of fact to be determined are common to both actions (*see Siegal v Greenberg*, 85 AD2d 516, 444 NYS2d 622 [1st Dept 1981]; *Gibbons v Groat*, 22 AD2d 996, *supra*) and is appropriate where case resolution involves different factual issues and legal claims (*see Pau v Bellavia*, 145 AD2d 609, 536 NYS2d 472 [2d Dept 1988]; *Jacobson v Hills*, 101 AD2d 980, 477 NYS2d 720 [3d Dept 1984]).

The Court finds that the issues in both actions are sufficient under the broad parameters enunciated in CPLR 602(a) and the caselaw therein to consolidate the actions (*see Mideal Homes Corp. v L&C Concrete Work, Inc.*, 90 AD2d 789, *supra*) “and should not be limited by strict or literal construction or by reason of mechanical difficulties”(1 N.Y. Jur. 2d Actions § 58). The above entitled actions share common questions of fact and law and a joint trial will serve the interests of the court, the parties, and the witnesses (*see Import Alley of Mid-Island, Inc. v Mid-Island Shopping Plaza, Inc.*, 103 AD2d 797, 477 NYS2d 675 [2d Dept 1984]). These actions arise out of the sale of the subject property and except for the State involvement, the same parties or their successors in interest and the facts and arguments overlap and consolidation is appropriate.

Accordingly, the motion is granted as indicated herein. This constitutes the Order and decision of the Court.

DATED: 6/27/07



THOMAS F. WHELAN, J.S.C.