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

PRESENT: CAROL EDMEAD J.S.C. PART 35

Justice

Index Number : 110026/2006

HARRIS, TYHIEM

VS

353-365 HOUSING DEVELOPMENT

Sequence Number : 002

OTHER RELIEFS

INDEX NO. _____

MOTION DATE 8/7/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

s motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
AUG 29 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by plaintiffs for an order transferring this action to the Bronx for purposes of joining this action with a pending action in the Bronx for a joint trial is denied; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/28/07

CAROL EDMEAD J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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TYHIEM HARRIS, an Infant Under the Age of Seven (7) Years, by his Mother and Natural Guardian, DIANA HARRIS, and DIANA HARRIS, Individually,

Index No. 110026/06

Plaintiffs,

-against-

353-365 HOUSING DEVELOPMENT FUND COMPANY, INC., and U.H.O. MANAGEMENT CORP.,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiffs, Tyhiem Harris ("Harris"), an infant, and his mother Diana Harris (collectively "plaintiffs") commenced this action against defendants, 353-365 Housing Development Fund Company, Inc. ("353") and U.H.O. Management Corporation (collectively "defendants") as a result of water burn injuries Harris sustained while being given a bath in his apartment located in 353's apartment building.

Prior to the commencement of this action, a separate pair of plaintiffs, Claudyjah Hampton ("Hampton"), an infant, and her mother, Crystal Hampton, commenced an action in the Bronx against, *inter alia*, 353 and Urban Home Ownership Corporation (the "Bronx County action"), as a result of water burn injuries Hampton allegedly sustained while being bathed in the

kitchen sink of her apartment in the same apartment building.[1] Both actions allege that defendants failed to properly maintain the hot water system in the building.

Instant Motion

Plaintiffs in this action now move pursuant to CPLR 602(a) and section 19 of the New York State Constitution for an order transferring this action to the Bronx County, and upon such transfer, joining this action with the Bronx County action. Plaintiffs contend that the two actions should be joined for trial purposes since the same owner, 353 and management company, U.H.O. Management Corp. were both sued in each action for similar accidents occurring in the same building.

Plaintiffs contend that claims brought on behalf of plaintiffs because of burns caused by excessively hot water usually relate to defects in either the boiler or mixing valve of the building. Furthermore, plaintiffs point out that the prior Hampton accident provided the owner and managing agent with both actual and constructive notice of the hot water problems in the building. Similarly, plaintiffs in the Bronx County action may use the instant action as proof of a continuing hot water system problem that was not rectified.

Plaintiffs also argue that since both actions are in preliminary stages of discovery, the information gathered will be the same for both cases. In addition, none of the defendants have been deposed and they should not be deposed twice for two separate actions.

Plaintiffs also claim that the Court has inherent power under section 19 (g) of the New York State Constitution to transfer this case to Bronx County. Plaintiffs emphasize that under section19(g), the Supreme Court "shall transfer any action or proceeding to any other Court having jurisdiction of the subject matter in any other judicial district or County provided that

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[1] The remaining defendants in the Bronx County action are: A.L. Eastmond & Sons, Inc., A.L.E. Inc., 1416 Franklin Ave Realty, LLC, A.L. Eastmond Inc., Easco Boiler Corp. Eastmond & Sons of N.J. LLC, Eastmond Realty, LLC, Eastmond & Sons Boiler Repair & Welding Service, Inc., and Eastmond Contracting Company, Inc.

such other Court has jurisdiction over the classes of persons named as parties." As both actions arose from incidents occurring within New York State, involve New York State domiciled defendants, and seek money damages, New York County and Bronx County have jurisdiction over the subject matter.

In opposition, defendants contend that plaintiff's motion is so lacking in legal and factual support that sanctions should issue. Furthermore, the parties are not the same in both actions, and the fact that two plaintiffs may have been burned by hot water is insufficient to warrant joining both actions. Although the incidents occurred within the same residential building, these isolated accidents happened two years apart, in different apartments, and involve two separate plaintiffs. And, the attorneys' speculation lacks probative value.

Further, because the action is in its early stage of litigation and no depositions have been conducted, there is no evidence of significant issues of law or fact common to both cases. The First Department has consistently recognized that cases should not be joined if there are no common issues of law and fact. Other than the fact that the incidents occurred in the same building, the plaintiffs failed to identify significant common legal or factual issues and failed to provide case law to support their argument.

In addition, the defendants contend that joining the actions would prejudice the substantial rights of the defendant. Presenting two unrelated, yet potentially emotional claims involving infant plaintiffs to a single jury would prejudicially bolster each set of claims against the defendants.

Further, all incidents arose in New York County, all of the parties to both actions except for one defendant, reside in New York County, and non party witnesses will be located in New York County.

In reply, plaintiffs contend that they recently commenced a separate lawsuit on June 5, 2007 against the defendants named in the Bronx County action not previously named in

plaintiffs' instant action. To grant joint trials, the Court need not find all questions of fact or law to be common to the various actions. The actual issue in both actions is whether there was a defect in the boiler and/or mixing valve and other equipment comprising the hot water system.

In the interest of justice and judicial economy, joint trials are warranted. Both actions arise from the same dangerous condition in the boiler and mixing valve, and in the same building. Upon removal of this action, plaintiffs will seek to consolidate both actions. If the Court does not join both actions, there is a possibility of inconsistent verdicts with regard to whether there was a defect with the boiler and/or mixing valve. And, joining both actions will eliminate repetition of discovery. Any claim that consolidation would be prejudicial since each claim would bolster the other is without merit. Finally, 353 and U.H.O. should be sanctioned for failing to provide discovery.

Analysis

According to CPLR § 602(a), when 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. . . . (CPLR 602 (a)). Section 602 (a) gives the Court the discretion to choose between an order of consolidation and a joint trial (*Commentary, McKinney s CPLR Rule 602, Vincent C. Alexander*). The difference between the two procedures are such that consolidation completely merges the two separate actions, whereas, a joint trial keeps the individual actions in one venue for simultaneous pretrial and trial proceedings (*id*). Joint trials and consolidations are favored by the courts 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 joining both actions will prejudice a substantial right (*Amcan Holdings, Inc. v. Torys LLP*, 32 A.D.3d 337, 340 [1st Dept 2006]; *Amtorg Trading Corp. v. Broadway & 56th St. Assoc.*, 191 A.D.2d 212, 213 [1st Dept 1993]). Though Harris moves to join both actions, rather than consolidate the actions, under CPLR

602(a), the standard for uniting separate actions is the same, regardless of whether the court orders consolidation or joint trial (McKinney's CPLR 602.1, Vincent Alexander).

Plaintiffs failed to establish that there are common questions of law and fact. In *Scheff v. 230 East 73rd Owners Corp.* (203 AD2d 151 [1st Dept 1994]), the tenants therein commenced a tort action against their landlord. Among their tort claims was a defense based upon a breach of the statutory warranty of habitability to the landlord's summary nonpayment proceeding pending in Civil Court. The Court found that consolidation was inappropriate as there were no common questions or law and fact since the property damage tort claim involved a time period prior to that for which rent arrears were sought.

Although Harris and Hampton each sustained similar injuries, the injuries occurred at different times and at different apartments under different circumstances. Here, both actions were not brought by the same plaintiff, did not arise out of the exact same incident, and even though both actions allege a defect in the water boiler system, any defective or dangerous condition of the water system existed to conditions of the boiler and/or water system at different times (*cf. Williams v. Rockefeller Center Properties*, 282 A.D.2d 285, 286). The condition of the boiler may have been different from the condition of the boiler existing at the time of Hampton's accident. Such differences between both actions may give rise to conflicting comparative negligence issues that could prove confusing to a jury (*see Cronin v. Sordoni Skanska Constr. Corp.*, 36 A.D.3d 448, 829 N.Y.S.2d 26 [1st Dept 2007]). Thus, transferring this action to the Bronx for joint trials is unwarranted at this juncture.

Plaintiffs' reliance on section 19(g) of the New York State Constitution is misplaced. Although section 19(g) of the New York State Constitution permits the Supreme Court to transfer any action or proceeding to any other Court having jurisdiction of the subject matter in any other judicial district, such transfer is permitted as "provided by law." Since the transfer plaintiffs seek is not warranted under CPLR 602(a), transfer under section 19(g) would not be

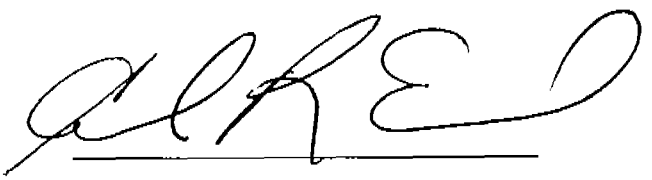
permitted as "provided by law." That defendants are domiciles of New York State, the incidents occurred in New York State, and both New York and Bronx counties have jurisdiction over the subject matter do not warrant joining both actions for trial.

Conclusion

In light of the absence of sufficient common issues of law and fact between the instant action and the Bronx County action, the motion by plaintiffs for an order transferring this action to the Bronx for purposes of joining this action with a pending action in the Bronx for a joint trial is denied.

This constitutes the decision and order of the Court.

Dated: August 28, 2007



Hon. Carol Robinson Edmead