

**Board of Educ., Farmington Union Free School Dist.
v John A. Grillo, Architect P.C.**

2007 NY Slip Op 33023(U)

September 14, 2007

Supreme Court, Nassau County

Docket Number: 2947-06/

Judge: James P. McCormack

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 51 NASSAU COUNTY**

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

**BOARD OF EDUCATION, FARMINGDALE
UNION FREE SCHOOL DISTRICT,**

Plaintiffs,

-against-

**JOHN A. GRILLO, ARCHITECT P.C., JOHN A.
GRILLO, Individually, CHRISTOPHER HUNT,
Individually, GREYHAWK NORTH AMERICA,
LLC., IRWIN CONTRACTING, INC., JOHN C.
IRWIN, Individually, and KIRCO INDUSTRIES
CORP.**

Defendants.

**SUPREME COURT OF THE STATE OF NEW
YORK, COUNTY OF NASSAU**

**BOARD OF EDUCATION, FARMINGDALE
UNION FREE SCHOOL DISTRICT,**

Plaintiffs,

-against-

**JOHN A. GRILLO, ARCHITECT P.C., JOHN A.
GRILLO, Individually, CHRISTOPHER HUNT,
Individually, GREYHAWK NORTH AMERICA,
LLC., STALCO CONSTRUCTION, INC., ALAN
NAHMIA, ACL CONSTRUCTION CORP.,
CARLO LUCARELLI, ANIANO MASONRY, INC.,
and C.G. MASONRY CONTRACTORS, INC.,**

Defendants.

**Action No. 1
Index No. 002947/06**

**Motion Submitted: 7/6/07
Motion Sequence: 002**

**Action No. 2
Index No. 003369/06**

The following papers read on this motion:

Notice of Motion.....XX
 Answering Papers.....XX
 Reply.....XX
 Briefs: Plaintiff's/Petitioner's.....
 Defendant's/Respondent's.....

Plaintiff, Board of Education, Farmingdale Union Free School District, (hereinafter "Farmingdale") move for an order consolidating the above actions pursuant to CPLR § 602 (a). Plaintiffs argue that consolidation is proper since both actions involve several of the same parties and also involve "identical factual questions and legal issues". Each of the thirteen defendants in the two actions have submitted opposition to the consolidation with the exception of Aniano Masonry, Inc. a defendant in Action No. 2.¹

Action No. 1 currently pending before this court (McCormack, J.) was brought by plaintiff, Farmingdale, against defendants John A. Grillo, Architect, P.C. (hereinafter "Grillo Architect"), John A. Grillo, Individually, (hereinafter "Grillo"), Christopher Hunt, Individually, (hereinafter "Hunt"), Greyhawk North America, L.L.C. (hereinafter "Greyhawk"), Irwin Contracting, Inc. (hereinafter "Irwin Con."), John C. Irwin,

¹ A default judgment was previously entered against Aniano Masonry, Inc. on April 2, 2007 (Buccaria, J.). To this date they have not moved to vacate the default judgment.

Individually, (hereinafter "Irwin") and Kirco Industries Corp. (hereinafter "Kirco"), to recover damages allegedly sustained as a result of the improper design and/or construction of the exterior walls of the Weldon E. Howitt Middle School (hereinafter "Howitt"), a school building within the Farmingdale school district. This action was commenced by the filing of a Summons and Verified Complaint on February 17, 2006 in the Nassau County Clerk's office. By April 21, 2006 all defendants, including the individually named defendants, had filed their answer and the issue was joined.

Action No. 2 currently pending before this court (Buccaria, J.) was brought by plaintiff, Farmingdale, against defendants Grillo Architect, Grillo, Hunt, Greyhawk, Stalco Construction, Inc. (hereinafter "Stalco"), Alan Nahmias (hereinafter "Nahmias"), ACL Construction Corp. (hereinafter "ACL"), Carlo Lucarelli (hereinafter "Lucarelli"), Aniano Masonry, Inc. (hereinafter "Aniano"), C.G. Masonry Contractors, Inc. (hereinafter "C.G. Masonry") for damages allegedly sustained as a result of the improper design and/or construction of the exterior walls of the Woodward Parkway Elementary School (hereinafter "Woodward"), a school building within the Farmingdale school district. This action was commenced by the filing of a Summons and Verified Complaint on February 27, 2006 in the Nassau County Clerk's office. By September 18, 2006 all defendants, with the exception of Aniano, had filed their answer and the issue was joined. On April 3, 2007, defendants C.G. Masonry Contractors, Inc. filed a Third Party Summons and Complaint against Carvalho Concrete Corp. and Triple M. Roofing Corp.. To date, the Third Party defendants have not filed an answer.

Defendant's motion for consolidation is denied to the extent the cases will not be joined as one, and will not be tried jointly. However, the matter before Justice Buccaria will be moved to Part 51, Hon. James P. McCormack for purposes of consolidating discovery and minimizing duplicitous court appearances in order to encourage judicial economy.

CPLR § 602 (a) provides:

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, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

"A motion to consolidate actions or for a joint trial pursuant to CPLR 602(a) rests in the sound discretion of the trial court. Absent a showing of prejudice to a substantial right by a party opposing the motion, consolidation should be granted where common questions of law or fact exist." (*Mattia v. Food Emporium, Inc.*, 259 AD2d 527 [2nd Dept 1999].) The instant matter involves similar questions of law and possibly even similar facts in that both actions are based upon leaking walls and involve some similar claims, parties and witnesses. The cases are not sufficiently related to support either true consolidation or consolidation for purposes of a joint trial. (*Padilla v. Greyhound, Inc.*, 29 AD2d 495, 497-98 [1st Dept 1968].)

Plaintiff claims Action No. 1 and Action No. 2 should be consolidated because "Both actions arise from the very same set of facts, namely, the improper design and/or

construction of the exterior walls of two school buildings, the Howitt and Woodward buildings, within the Famingdale Union Free School District". In addition, the plaintiff argues, "both construction projects were part of the same bond project, both construction projects involved a number of the same parties, namely the same Architects, Defendants John A. Grillo, Architect, P.C., John A. Grillo, and Christopher Hunt, and the same Construction manager, Defendant Greyhawk North America, L.L.C., [and] consolidation is necessary to avoid unnecessary replication of discovery and the potential of inconsistent verdicts at trial". The court disagrees.

Although plaintiff is correct in pointing out that both cases involve the "improper design and/or construction of the exterior walls" it is the allegations regarding "and/or construction of the exterior walls" that makes this case improper for any type of consolidation. If this case were a case that simply dealt with improper design it would be more appropriate for consolidation, but these cases involve two separate buildings and walls that were constructed by two separate sets of sub-contractors. If it is the plaintiff's contention that it was merely an improper design by the architects and or improper supervision of the workers by the construction manager, the plaintiff would have only named the architects and the construction manager. The fact that the plaintiff also named each of the subcontractors makes this case about design, construction supervision and actual construction. Since none of the actual construction contractors and masons are the same in each of these actions it is the construction portion of the case that makes each action distinguishable. Although

Farmingdale, Grillo, and Greyhawk are parties to both actions, there are seven additional defendants who actually performed the work on the project who are not the same in both actions.

These cases although similar at first blush, are actually quite distinct and it is clear that their consolidation will result in juror confusion and would prejudice the substantial rights of nearly all of the defendants. The pending actions started by plaintiff merely 10 days apart, involve two separate construction projects, based on two separate sets of designs and specifications, at two different locations, completed over a year apart with different contractors engaging in the work. In fact, at no time did the construction of these projects even overlap. The designs, specifications, contracts and project records for these actions are separate and distinct and appear unrelated to each other except for the fact that the buildings fall within the same district. The Howitt construction and the Woodward construction do not involve common questions of law or fact. The facts and testimony concerning each of these actions do not overlap and the only similarities appear to be that they are both construction projects contracted by Farmingdale, that now leak.

As for plaintiff's claims that without consolidation their would be unnecessary replication of discovery and the potential for inconsistent verdicts, again the court must disagree. The discovery involved in these two matters has been ongoing, albeit slowly, since the beginning of 2007. The discovery will not be "replicated" because the cases deal with two separate contracts, for two construction projects, which were completed at

two separate schools during two separate time periods. Although the discovery will consist of some similar documents and will involve some of the same people, the discovery is not sufficiently the same to warrant consolidation. As for inconsistent verdicts. The plaintiff, appears to believe that a finding against any of the parties on one of the matters and not the other would be inconsistent. Such an assertion does not comport with the reality of the situation. It is certainly conceivable that a jury could find against Grillo Architect on Action No. 1 and not on Action No. 2, or that a jury could find for Greyhawk on Action No. 1 and not on Action No. 2. Such findings would not necessarily be inconsistent depending on the facts elicited at trial. These buildings are separate and distinct and the construction of the walls was done by different contractors. A jury certainly could find that one wall was poorly constructed or designed and the other wall was just fine. This inconsistent verdict argument is essentially an argument that the cases are stronger when presented together. This argument must fail. If the court allows consolidation, it will create a situation where the issues surrounding the Howitt property will be imputed on the Woodward property and vice versa. Such a scenario makes consolidation even more inappropriate in this matter, where the alleged leak at one of the properties is arguably much more severe than the alleged leak at the other property.

Finally, counsel for Irwin Con. and Irwin has raised an additional compelling reason why consolidation should be denied. If consolidation were granted, it appears a conflict of interest would be created because counsel for Irwin Con. and Irwin also has a

relationship with Stalco as their counsel on a matter that is on appeal in the Appellate Division Second Department. It would be necessary for counsel for Irwin Con. and Irwin to be relieved given their current representation of Stalco. The court finds this prospect to be entirely unacceptable given the "snails pace" of the discovery process throughout this year. Even more importantly it would be an abuse of discretion for the court to force Irwin Con. and Irwin to retain new counsel at this juncture due to the conflict of interest this court would potentially create if it were to grant consolidation. This potential conflict clearly establishes that the consolidation of this matter will prejudice a substantial right of defendants Irwin Con. and Irwin

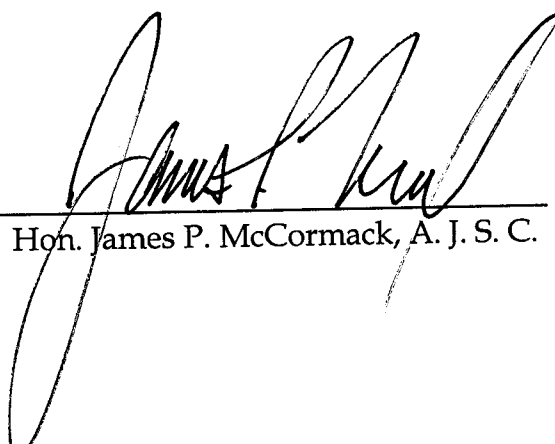
It is further,

ORDERED, that a discovery conference on these actions shall be held before this court on October 15, 2007 at 10:00 a.m. all parties to each action are directed to appear and, it is further,

ORDERED, that the depositions are to continue as scheduled and that there should be no adjournment of a scheduled deposition without the permission of the court.

The foregoing constitutes the Decision and Order of this Court.

Dated: September 14, 2007
Mineola, N. Y.



Hon. James P. McCormack, A. J. S. C.