

Biddy v Vanmaltke

2007 NY Slip Op 34229(U)

December 12, 2007

Supreme Court, Nassau County

Docket Number: 2556-06/

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

_____^x
LEON BIDDY and LISA MARIE BIDDY,

Plaintiff,

Action No. 1
Index No. 002556/06

-against-

DOMINIQUE LAWRENCE E. VANMALTKE,
ALAMO FINANCING, LP, ALEXANDER D. JERBO,
WERNER ENTERPRISES, INC., JULIAN A.
SCHWARTZ and ELLEN SCHWARTZ,

Motion Submitted: 09/26/07
Motion Sequence: 002,003,004

Defendants.

_____^x

The following papers read on this motion:

- Notice of Motion/Cross-MotionXX
- Answering Papers.....XX
- Reply.....XX
- Affirmation in Support.....XX

Defendant's Alexander D. Jerbo ("Jerbo") and Werner Enterprises, Inc. ("Werner") move this court under docket number 002556/06 ("Action No. 1") motion sequence two for an order consolidating this matter with a matter pending under Nassau County Supreme Court docket number 004175/07 ("Action No. 2") and captioned Werner Enterprises, Inc., v. Leon Biddy and Lisa Marie Biddy, Dominique Lawrence E. Vanmaltke, Alamo Financing, LP., Alexander D. Jerbo, Julian A. Schwartz and Ellen Schwartz for a

joint trial. Defendant Werner also moves this court under motion sequence three for an order vacating plaintiff's note of issue and compelling the plaintiff to provide all outstanding discovery and extending the time for defendants to file a summary judgment motion. Defendants, Dominique Lawrence E. Vanmaltke and Alamo Financing L.P., have filed an affirmation in support of defendants Jerbo and Werner's motion under motion sequence three. Defendants, Julian A. Schwartz and Ellen Schwartz, separately move this court for an order striking the Notice of Trial, vacating the Certificate of Readiness, striking this case from the trial calendar, and extending defendant's time to move for summary judgement until 90 days from the date of completion of all outstanding discovery.

Both actions arise out of an automobile accident that allegedly occurred on May 1, 2004. According to defendant Werner and Jerbo, that accident occurred when the vehicle owned by Alamo Financing, L.P. ("Alamo") and driven by Dominique Lawrence E. Vanmaltke ("Vanmaltke"), moved lanes and struck a tractor trailer driven by Leon Bidy ("Bidy") and owned by Braun's Express. Bidy then moved into the left lane striking a vehicle driven by Julian A. Schwartz ("Schwartz") and owned by Ellen Schwartz ("E. Schwartz"). The Schwartz vehicle then slid across the road back in front of the tractor trailer driven by Bidy. Bidy moved lanes and was forced to brake suddenly, and as a result, Jerbo, driving a tractor trailer owned by Werner hit the Bidy tractor trailer.

On May 7, 2005, Bidy commenced the instant action, Action No. 1, to recover for personal injuries arising out of the May 1, 2004 accident against Vanmaltke, Alamo, Jerbo, Werner, Schwartz, and E. Schwartz in the Bronx County Supreme Court. By order dated

November 9, 2005, the matter was transferred to Nassau County based on the parties stipulation. The issue was joined by service of the verified answers of all parties by November 10, 2005.

On April 18, 2007, first action defendant Werner commenced an action for property damage arising out of the May 1, 2004 motor vehicle accident, Action No. 2, in Nassau County Supreme Court. The defendants in Action No. 2 are Bidy, Lisa Marie Bidy ("L. Bidy"), Vanmaltke, Alamo, Brauns Express ("Brauns"), Schwartz and E. Schwartz. By May 21, 2007 defendants Schwartz, E. Schwartz, Alamo, and Vanmaltke had interposed an answer. Counsel for Bidy and Brauns communicated with Werner's counsel that they are in the process of preparing an answer in Action No. 2. With the exception of the plaintiffs in Action No. 1, all parties to both actions agreed to consolidate the matter in a stipulation that had been circulated in June of 2007.

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."

The instant matter involves a common question of law or fact in that both actions are based upon the same occurrence and require determination of the same issues. A joint trial is preferred when consolidation might result in jurors' confusion because one (1) party

has a dual role of plaintiff and defendant. (*Padilla v. Greyhound, Inc.*, 29 AD2d 495 [1st Dept 1968].) In the instant matter, Werner is both a defendant in Action No. 1 and a plaintiff in Action No. 2, thus consolidating Action No. 1 and Action No. 2 for a joint trial would conserve judicial resources. Since both actions involve the same parties, the same facts for both the personal injury and property damage in the motor vehicle accident that occurred on May 1, 2004 and involve common questions of law and fact, an order to consolidate the two actions for joint trial is appropriate CPLR § 602(a). Although plaintiffs oppose the defendant's application, they have been unconvincing in attempting to demonstrate that they will be substantially prejudiced by a joint trial. *Mascioni v Consolidated R.R. Corp.*, 94 A.D.2d 738 (1983). If the court does not consolidate the two matters for purposes of a joint trial, the liability for the bodily injury action and property damage action for the same May 1, 2004 accident will be tried twice with the potential for inconsistent verdicts. Since the discovery is nearing completion in the bodily injury action and the discovery is proceeding in the property damage action, the matters will likely be ready for trial at or around the same time. In fact, the discovery which has been exchanged on the bodily injury action overlaps with the discovery necessary for the property damage action and consolidation for purposes of a joint trial will likely result in the need for less duplicitous discovery.

In light of the courts decision regarding the consolidation for purposes of a joint trial. The defendants' motions in Action No. 1 vacating the note of issue, certificate of readiness, and removing the case from the trial calendar are all granted. As a result the time to move for summary judgement is extended by virtue of the fact that the note of issue

is vacated and the time to file for summary judgement will commence once the note of issue is re-filed in the future.

As for the outstanding discovery requests made by defendant Werner in Action No. 1 under motion sequence 3 for the authorizations for Dr. Thomas Branch; Northlake Hospital; Benchmark Physical Therapy; Lookout Mountain Services; Dr. Peterson; Dr. Michael Free; Tri County Hospital; Dr. Robert Sendell, Workers' Compensation records and employment records from Turnbull Ice Cream. The court notes that the plaintiff, as part of the affirmation in opposition, appears to have provided all of the authorizations requested with the exception of the authorization of Dr. Robert Sendell. To the extent the authorizations have been provided as Exhibit "A" to the affirmation in opposition, the application by defendant Werner is granted. Counsel for plaintiff in the affirmation in opposition states the plaintiff has no recollection of the address of Dr. Sendell's office and upon information and belief, Dr. Sendell is no longer in practice. Plaintiff's counsel in Action No. 1, is directed to provide an affidavit to that effect signed by the plaintiff within 45 days of this order. Failure to do so may result in the court striking the pleadings of the parties.

It is further,

ORDERED, the caption of this action upon joinder shall be:

LEON BIDDY and LISA MARIE BIDDY, x

Plaintiff,

-against-

DOMINIQUE LAWRENCE E. VANMALTKE, ALAMO
FINANCING, LP, ALEXANDER D. JERBO, WERNER
ENTERPRISES, INC., JULIAN A. SCHWARTZ and
ELLEN SCHWARTZ,

Defendants.

x

WERNER ENTERPRISES, INC.

Plaintiff,

-against-

LEON BIDDY and LISA MARIE BIDDY DOMINIQUE
LAWRENCE E. VANMALTKE, ALAMO FINANCING,
L.P.; BRAUNA EXPRESS, INC. JULIAN A, SCHWARTZ
and ELLEN SCHWARTZ,

Defendants.

x

Action No. 1

Index No. 002556/06

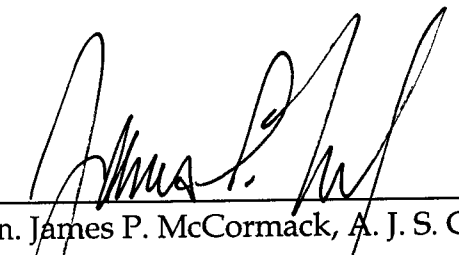
Action No. 2

Index No. 004175/07

ORDERED, that a preliminary conference on these actions upon joinder shall be held
before this Court on January 30, 2008 and, it is further,

The foregoing constitutes the decision and order of this court.

Dated: December 12, 2007
Mineola, N. Y.



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

ENTERED

DEC 20 2007

**INASSAU COUNTY
COUNTY CLERK'S OFFICE**