

Dorritie v Buoscio

2008 NY Slip Op 32578(U)

September 24, 2008

Supreme Court, Greene County

Docket Number: 0002008/2021

Judge: Joseph C. Teresi

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SATE OF NEW YORK
SUPREME COURT
JOHN DORRITIE and DANIELLE DORRITIE

COUNTY OF GREENE

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 08-202
RJI NO. 19-08-3457

NICOLINO BUOSCIO, MARIA BUOSCIO,
LAWYER'S TITLE INSURANCE CORPORATION,
SANTO ASSOCIATES LAND SURVEYING AND
ENGINEERING, P.C., LAKE AND MOUNTAIN
REALTY, LLC and CENTURY 21 HEARTLAND
REALTY,

Action #1

Defendants.

HARRY PILOSSOPH and CONSTANCE PILOSSOPH,

Plaintiffs,

-against-

INDEX NO. 99-155

BRADFORD HEDGES, NICOLINO BUOSCIO, and
THE ASSOCIATION OF PROPERTY OWNERS OF
SLEEPY HOLLOW LAKE, INC.,

Action #2

Defendants.

Supreme Court Greene County All Purpose Term, September 9, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Philips & Millman, LLP
Frank J. Phillips, Esq.
Attorneys for Plaintiffs in Action #1
50 Route 9W
Stony Point, New York 10980

Rapport, Meyers, Whitbeck, Shaw & Rodenhausen, LLP
Jason L. Shaw, Esq.
Attorneys for Defendants Buoscio in Action #1
436 Union Street

Hudson, New York 12828

Kaplan & Brennan, PLLC
Edward I Kaplan, Esq.
Attorneys for Defendant Nicolino Buoscio in Action #2
7759 Main Street
PO Box 155
Hunter, New York 12442

John Connor, Esq.
Attorney For Defendant Lawyer's Title
Insurance Corporation in Action #1
76 Green Street
Hudson, New York 12534

Stephen G. Levy, Esq.
Attorney for Plaintiffs Pilossoph in Action #2
21 Everett Road Ext.
Albany, New York 12205

Boggeman, George & Corde, PC
Paul Hurley, Esq.
Attorney for Defendant Hedges in Action #2
39 North Pearl Street, Suite 501
Albany, New York 12207

Dreyer Boyajian, LLP
John Casey, Esq.
Attorneys for The Association of Property Owners
of Sleepy Hollow Lake, Inc. In Action #2
75 Columbia Street
Albany, New York 12210

TERESI, J.:

Plaintiffs in Action #1, John & Danielle Dorritie (hereinafter "Dorritie Plaintiffs"), bring this motion to consolidate their action with that of, or intervene in, an action settled by an open court stipulation on January 24, 2005 (hereinafter "Action #2"). Each Action #2 party has opposed the Dorritie Plaintiffs' motion in its entirety. The only Action #1 defendant to submit

opposition papers on this motion, Lawyers Title Insurance Corporation, does not oppose the consolidation but opposes the request to intervene unless they too are allowed to intervene. Because the Dorritie Plaintiffs have not demonstrated an identity of issues between the two actions, their motion for consolidation is denied, and because the Dorritie Plaintiff's have not complied with CPLR §1014, their motion for intervention is also denied.

CPLR §602(a) states: “[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 or delay.”

The Action #2 parties each oppose the Dorritie Plaintiffs' motion for consolidation claiming, in essence, that because Action #2 is settled it is not “pending” and cannot be consolidated with Action #1. Such assertion, however, has not been sufficiently demonstrated. “A settlement agreement entered into by parties to a lawsuit does not terminate the action unless there has been an express stipulation of discontinuance... Absent such termination, the court retains its supervisory power over the action...” (Teitelbaum Holdings, Ltd. v. Gold, 48 NY2d 51, 53 [1979]). Here, the record demonstrates the monetary portion of the Action #1 settlement was terminated by a “stipulation to discontinue”. However, the settlement agreement specifically states that “the Court will retain jurisdiction of the injunction actions”. No proof was submitted to show that such reservation of jurisdiction was specifically terminated. Accordingly, the injunction portion of Action #2 is still “pending” for purposes of this motion.

Considering two “pending” actions, “[t]he threshold requirement for consolidation is a plain identity between the issues involved in the controversies.” (Bradford v. John A. Coleman

Catholic High School, 110 AD2d 965, 966 [3d Dept. 1985] quoting City of Cohoes v. Cohoes Police Benev. and Protective Ass'n, 63 AD2d 793 3d Dept. 1978][emphasis added]).

Action #1 stems from the purchase and sale of real property in Athens, New York (hereinafter “the property”). For a full recitation of Action #1's facts see this Court’s Decision and Order, dated June 12, 2008. The Dorritie Plaintiffs, in Action #1, purchased the property from the Buoscio defendants and, in this action, are seeking to rescind their purchase of the property, injunctive relief and breach of contract damages. The Dorritie Plaintiffs’ claim the Action #1 defendants defrauded and/or negligently misrepresented the property’s “waterfront rights” when they purchased it in 2006.

Action #2 involved a trespass and property damage claim, that arose in 1998, between neighboring property owners. Nicolino Buoscio was one of the neighboring property owners and his property (“the property” above) was adjacent to the Action #2 plaintiffs’ property. In Action #2, Defendant Buoscio was alleged to have dredged and excavated his neighbor’s shoreline without their consent. On January 24, 2005, Action #2 was settled by stipulation, which required the defendants to pay certain sums of money to those plaintiffs and allowed those plaintiffs to restore the shoreline to its pre-1998 condition. The reconfiguration of the property’s shoreline to its pre-1998 condition has not yet occurred although it appears the monetary portion of the settlement was finalized.

Here, there is no “plain identity” of issues. (Bradford, supra). The facts supporting Action #1 are allegations of fraud and misrepresentation and the facts supporting Action #2 are claims of trespass and property damage. Both arise from occurrences separated by approximately eight years time. Similarly, the laws involved in the prosecution and defense of both actions are

wholly different. The similarities noted above simply fail to demonstrate a sufficient identity between the issues involved in Action #1 and Action #2 to justify consolidation.

Moreover, "consolidation is properly denied if the actions are at markedly different procedural stages". (Abrams v. Port Authority Trans-Hudson Corp., 1 AD3d 118 [1st Dept. 2003]). Action #1 is still in the discovery phase, whereas Action #2 has been settled, and is merely awaiting implementation of the settlement. Undeniably different procedural stages.

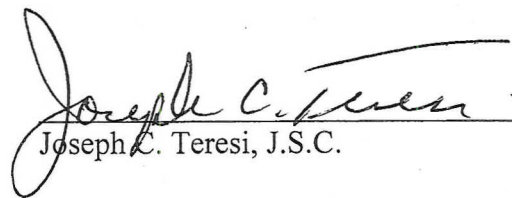
Turning next to the Dorritie Plaintiffs' motion to intervene pursuant to CPLR §1012(a)(3), because they failed to comply with CPLR §1014 their motion is denied. CPLR §1014 states: "[a] motion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought." (See generally Farfan v. Rivera, 33 AD3d 755 [2d Dept.2006]). The Dorritie Plaintiffs' motion fails to set forth the mandatory proposed pleading, and as such is denied.

Accordingly, the Dorritie Plaintiffs' motion to consolidate and/ or to intervene is denied.

All papers, including this Decision and Order are being returned to the attorneys for the Action #1 Buoscio defendants. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
September 24, 2008


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause dated August 8, 2008;
2. Affirmation in Support of Motion to Consolidate and/or Intervene of Frank J. Phillips, Esq. dated August 8, 2008 with attached exhibits A-F;
3. Affirmation of Edward Kaplan, Esq. dated August 25, 2008 with attached exhibits A-H;
4. Affirmation in Opposition to Motion to Consolidate of Jason L. Shaw, Esq. dated September 2, 2008 with attached exhibits A-C;
5. Affidavit of John Connor, Jr. Esq. dated August 26, 2008 with attached exhibit A;
6. Attorney's Affirmation of Stephen G. Levy, Esq. dated September 2, 2008;
7. Affirmation in Opposition of Paul Hurley, Esq. dated August 25, 2008 with attached exhibit A;
8. Attorney's Affirmation of John B. Casey, Esq. dated August 25, 2008;
9. Affirmation in Reply to Opposition to Motion to Consolidate and/or Intervene of Frank J. Phillips, Esq. dated September 5, 2008 with attached exhibits 1-8.