SHORT FORM ORDER

ORIGINAL

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

MURRAY WALTER BLATT, a/k/a MARTIN BLATT, individually and on behalf of the joint venture/partnership consisting of MARTIN BLATT and HERTZL MOEZINIA,

Plaintiffs,

-against-

ALEXANDER ASHKENAZI,

Defendant.

INDEX No. 9556/07

MOTION DATE: Dec. 13, 2007
Motion Sequence # 002

The following papers read on this motion:

Notice of Motion..... X
Affirmation in Opposition..... XX
Memorandum of Law..... X
Reply Memorandum of Law..... X

This motion, by plaintiff-intervenor Hertzl Moezinia, for an order (1) permitting Moezinia to intervene in this action pursuant to CPLR §§1012 and 1013; (2) consolidating the action in Supreme Court, Kings County captioned **Hertzl Moezinia v Alexander Ashkenazi and ABS Flushing Development, LLC**, Index no. 30099/07 into this action pursuant to CPLR §602, and (3) awarding such other and further relief as the Court deems just and proper, is determined as hereinafter set forth.

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FACTS

This action arises from the brokerage and sale of certain real property in Flushing, New York, known as the Flushing Promenade (the "Promenade"). Prior to the sale of the property, Blatt referred Moezinia to a bank which held the defaulted note for the Promenade, for which service Moezinia claims to have paid Blatt $160,000.00 as a finder's fee. On February 16, 2006, Moezinia and Ashkenazi entered into a brokerage agreement where Moezinia would receive $1,500,000.00 upon closing of the sale of the Promenade to Ashkenazi. Later, on or about June 29, 2006, the Promenade was sold to ABS Flushing Development, LLC ("ABS"). In June 2007, Blatt commenced an action in Supreme Court, Nassau County against Ashkenazi for payment of the obligation to the alleged partnership. In August of 2007, Moezinia commenced a separate action against Ashkenazi in Supreme Court, Kings County. A default judgment was entered in Supreme Court, Nassau County against Ashkenazi on behalf of Blatt on November 7, 2007. On February 06, 2008, the order granting a default judgment against Ashkenazi was vacated

The movant argues that he meets the test for intervention as of right and by permission under CPLR§§1011 and 1012 because, among other things, (1) neither Blatt nor Ashkenazi will adequately represent his interests in this action, (2) the two actions have common questions of law or fact, and (3) he possesses a substantial interest in the outcome of this action. In addition, movant argues that he meets "the common questions of law and fact" test for consolidation of this action and the Moezinia action under CPLR §602(b).

In opposition to Moezinia's motion to intervene in this action and to consolidate this action with one pending in Supreme Court, Kings County, Blatt directs the court attention to a judgment entered on November 7, 2007 and concludes that this judgment disposes of all claims, therefore there is no remaining action in which Moezinia may intervene or consolidated.

In opposing the motion, Ashkenazi claims that (1) Nassau County Court lacks personal jurisdiction over the defendants since the Summons and Complaint in this action were never properly served upon him, and his co-defendant in the Kings County action, (2) an answer has been served and issue joined in the Kings County action, and (3) the Kings County forum is more convenient for Ashkenazi and other proposed parties, anticipated witnesses and the attorneys who reside in Kings and New York Counties.

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DISCUSSION

A person may intervene in an action as of right "when the representation of that person's interest by the parties is or may be inadequate and that person is or may be bound by the judgment " (CPLR 1012(a)(2); **Plantech Hous., Inc. v Conlan**, 74 AD2d 920, 2nd Dept., 1980, appeal denied, 51 NY2d 878, 1980). Additionally, it is within the court's discretion to grant a person permission to intervene in an action "when that person's claim or defense and the main action have common question of law or fact" (CPLR 1013; **Plantech Hous., Inc., v Conlan**, **supra**). Nevertheless, the distinctions between these two forms of intervention are immaterial under the liberal rules of construction (**Plantech Hous., Inc., v Conlan, supra**). As long as the person has a real and substantial interest in the outcome of the proceeding and the intervention will not unduly delay a determination or prejudice a substantial right of a party, intervention should be permitted (CPLR 1013; **County of Westchester v Dep't of Health**, 229 AD2d 460, 2nd Dept. 1996; **Osman v Sternberg**, 168 AD2d 490, 2nd Dept. 1990; **Plantech Hous., Inc., v Conlan**, **supra**).

On the merits, Moezinia has demonstrated a real and substantial interest in the outcome of the proceeding and intervention will be permitted under CPLR 1012 and CPLR 1013. Here, plaintiff Blatt contends that he and Moezinia entered into a joint venture and any damages collected from defendant belong to the partnership and should be divided equally among the partners. Moezinia claims that he, Moezinia, has the sole right to collect any and all damages from defendant and denies entering into a partnership with Blatt. Should Moezinia' s allegations bear fruit, Moezinia's interest will be inadequately represented by Blatt because a question arises whether Blatt was a party to the transaction or a signatory to the contract. Additionally, a judgment in this action would contemplate complete adjudication of the parties' rights and could preclude Moezinia from any further recovery. Moezinia undoubtedly may be "bound by the judgment" in this action (CPLR 1012(a)(2)). Furthermore, plaintiff's action and Moezinia's claims also share common questions of law and fact (CPLR 1013). Here, both actions involve the same parties, stem from the same transaction and share witnesses and evidence. Since this action was commenced less than eight months ago and defendant has not yet answered, intervention should not cause any undue delay. Moreover, the parties in opposition to this motion, failed to establish that intervention would prejudice a substantial right. Intervention is granted, Moezinia has a real and substantial interest in the outcome of this proceeding and the intervention will not cause undue delay or prejudice a substantial right of a party.

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A motion to consolidate should be granted where common questions of law and fact exist absent a showing of prejudice to a substantial right by the party opposing the motion (CPLR 602(a); **Flaherty v RCP Assocs**., 208 AD2d 496, 2nd Dept., 1994; **Stephens v Allstate Ins. Co.**, 185 A.D.2d 338, 2nd Dept., 1992).

On this application the interests of judicial economy and justice would be well served by the consolidation of this action with the action captioned **Hertzl Moezinia v. Alexander Ashkenazi and ABS Flushing Development, LLC**, pending in the Supreme Court, Kings County, under Index No. 30099/07. Here, both actions involve common questions of law and fact and consolidation will avoid the unnecessary duplication of proceedings, save unnecessary costs and expenses and prevent the injustice that would necessarily result from divergent decisions based on the same facts (**Gutman v Klein**, 26 AD3d 464, 2nd Dept., 2006). These actions concern the same parties, the claims arise out of the same transaction, and the proof with respect to each action will overlap and turn on credibility determinations of the relationship between the parties. Moreover, the parties, in opposition to this motion, failed to establish that consolidation would prejudice a substantial right.

Furthermore, where two actions commenced in different counties are consolidated venue will be placed in the county where the first action was commenced absent special circumstances (**Mas-Edwards v Ultimate Services, Inc**., 45 AD3d 540, 2nd Dept., 2007; **Mattia v Food Emporium**, 259 AD2d 527, 2nd Dept., 1999). In view of the fact that the opposing parties failed to sustain their burden and establish the existence of any special circumstances which could warrant placement of venue elsewhere and as Nassau County was the county of first commencement, Nassau County shall be the county of venue.

Accordingly, upon service of a copy of this order, with any fees required, upon the Clerk of the County of Kings, he is ordered to transfer and/or transmit the file under Index no. 30099/07 to the County Clerk of Nassau County.

A Preliminary Conference has been scheduled for May 12, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated FEB 29 2008 ENTERED