

Alizio v Perpignano

2009 NY Slip Op 32331(U)

September 28, 2009

Supreme Court, Nassau County

Docket Number: 19181/03

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

ANTHONY ALIZIO,

Plaintiff,

TRIAL/IAS, PART 4
NASSAU COUNTY

INDEX No. 19181/03

MOTION DATE: Aug. 3, 2009
Motion Sequence # 019

-against-

PETER ROBERT PERPIGNANO, LILLIAN
EISENBERG, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF IRVING EISENBERG,
BERNICE EISENBERG, AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
LEONARD EISENBERG, JOSEPH ALIZIO,
CHARLES S. TITONE, GREGORY RONAN,
GODDARD, RONAN & DINEEN, LLP, OCEAN
VIEW REALTY COMPANY, OCEAN VIEW
ASSOCIATES, OCEAN VIEW II ASSOCIATES,
HEYSON GARDENS ASSOCIATES, BRIDGEVIEW
II COMPANY, BRIDGEVIEW II ASSOCIATES and
BRIDGEVIEW III ASSOCIATES,

Defendants.

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation/Affidavit in Opposition..... XX
- Affirmation in Support..... X
- Affidavit in Response..... X

Memorandum of Law.....	XX
Reply Memorandum of Law.....	XX

This motion, by plaintiff, for an order pursuant to CPLR §602(b) removing the action now pending in the Supreme Court of the State of New York, County of Queens entitled **Oceanview Realty, LLC, Oceanview II, LLC, Heyson Gardens, LLC, Bridgeview II, LLC, Tim Ziss v Anthony Alizio, Joseph Alizio, Lillian Eisenberg, as Personal Representative of the Estate of Irving Eisenberg, Oceanview Realty Company, a New York General Partnership, Oceanview II Associates, a New York Limited Partnership, Heyson Gardens Associates, a New York Limited Partnership, The Bridgeview II Company, a New York General Partnership, Bridgeview II Associates, Herrick Feinstein, LLP, as Escrowee**, Queens Index #11818/09, consolidating and/or joining that action for discovery and trial with the above captioned actions pursuant to CPLR §602(a) on the grounds, ***inter alia***, that said action arises out of the same transactions, and involves common issues of fact, and substantially the same parties and witnesses as the above captioned actions, and that removal and joinder is in the interest of judicial economy and in order to avoid inconsistent judgments, and directing the Clerk of the County of Queens to deliver the case files to the Clerk of this Court, along with such other and further relief as the Court deems just, proper and equitable, is determined as hereinafter set forth.

The instant action is the “tip of the iceberg” of at least five actions which involve interconnecting partnerships and corporate entities which own, operate and/or manage a number of real properties and apartment buildings. In these actions various acts of breaches of fiduciary relationships and duties, malfeasance, conversion, fraud, accounting and other related causes of action are alleged. This action was commenced in 2003 and the several actions were variously commenced in Nassau, Queens and Suffolk Counties in 2003 and 2004, and consolidated for the purpose of joint trial by a consent order, dated February 3, 2004, of Hon. Leonard B. Austin. This application seeks to add the action entitled **Oceanview Realty, LLC, Oceanview II, LLC, Heyson Gardens, LLC, Bridgeview II, LLC, Tim Ziss v Anthony Alizio, Joseph Alizio, Lillian Eisenberg, As Personal Representative of the Estate of Irving Eisenberg, Ocean View Realty Company, A New York General Partnership, Ocean View II Associates, A New York Limited Partnership, Heyson Gardens Associates, A New York Limited Partnership, the Bridgeview II Company, A New York General Partnership, Bridgeview II Associates, Herrick Feinstein, LLP, As Escrowee**, commenced in Queens County under index no. 11818/09 (“new Queens action”), by service of a

summons dated April 27, 2009, to the actions before this Court.

The plaintiff herein is a defendant in the new Queens action. Counsel asserts that these actions involve the same disputed transactions; that nearly all of the parties in the new Queens action are parties in the consolidated actions at bar; that while the alleged causes of action in the new Queens action are different and alleged against certain parties, this Court has ordered that counsel be engaged to litigate a promissory note which forms an integral part of the transactions and one of the bases of the new Queens action. Counsel argues that there is no basis of venue in Queens County and there is no reason to continue the new Queens action in Queens County and it should be consolidated in Nassau County with the extant consolidated actions.

The attorney for the defendant Joseph Alizio supports the instant motion and notes that he has moved, in Queens County, to transfer venue of that action to this Court.

The attorney for the defendant Eisenberg also supports the instant motion, asserting that all the actions arise out of the same transactions, involve common questions of fact and substantially the same parties and witnesses.

Counsel for the plaintiffs in the new Queens action asserts that her clients “...were never parties to this consolidated action, and never submitted to the jurisdiction of the Court in the partnership disputes”; that there are no common questions of law or fact with respect to the new Queens action; and arises out of misrepresentations by the managing partner. Counsel argues that if this Court were to grant this motion it would be prejudicial, in that a joint trial would be unwieldy. She also argues that there have been several orders in the consolidated actions which have closely affected all the parties in the new Queens action; and contends that there are factual issues previously decided by this Court (Austin, J.) in favor of her client. She further contends that the claims in the new Queens action “all concern the sale of four properties in Queens, and the signing of a note for the shortfall” (Mehlman affirmation, ¶29).

In reply, the plaintiff avers, in his attorney’s memorandum of law, that all actions arise out of the same transaction and involve common questions of fact and law as demonstrated in the affidavit in opposition submitted by a plaintiff in the new Queens action; that there are conflicting opinions and views of the adjustments at the closing of the four properties that lie at the base of all the actions, and these views are reflected in the allegations, to some extent, of the parties in each of the actions, and that resolution of

all these conflicting claims will require the same proof and testimony in both the Nassau actions and the new Queens action. He contends that the opposition has failed to show any substantial right that would be prejudiced by removal and joint trial.

DECISION

“Where common questions of law or fact exist, a motion to consolidate should be granted absent a showing of prejudice to a substantial right by the party opposing the motion (see Nigor v Pickett, 39 AD3d 720, 722; Flaherty v RCP Assoc., 208 AD2d 496, 498; Stephens v Allstate Ins. Co., 185 AD2d 338; Zupich v Flushing Hosp. & Med. Ctr., 156 AD2d 677)”.

(Kally v Mount Sinai Hospital, 44 AD3d 1010, 844 NYS2d 415, 2nd Dept., 2007).

Initially, the Court notes that the sole rationale that the opposition posits as “prejudicial” is that the resultant litigation and trial would be “unwieldy”. Opposing counsel has not substantiated that assertion. While this Court, and counsel, acknowledge that there are a total of six actions in this “iceberg”, counsel’s assertion that there are no common questions of fact is contraindicated by her clear statement that the transaction(s) at issue are the same for all actions, only that each plaintiff in each case has differing theories of law in which they allege a wrongdoing by other parties in that same litigation.

“ “Although a motion pursuant to CPLR 602(a) to consolidate* * * pending actions is addressed to the sound discretion of the trial court* * *consolidation is favored by the courts as serving the interests of justice and judicial economy* * *The motion to consolidate should be granted

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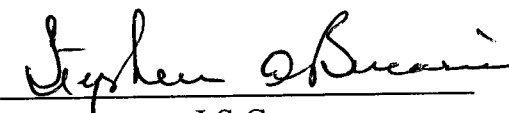
unless the opposing party succeeds in demonstrating prejudice to a substantial right" (Zupich v Flushing Hosp. & Med. Center, 156 AD2d 677; see, Ryckman v Schlessinger-Levi Polatsch-Tydings, 225 AD2d 603).

(Fransen v Maniscalco, 256 AD2d 305, 681 NYS2d 310, 2nd Dept., 1998). Herein, there is a clear need for consistency and judicial economy, and while the captions of the actions and the differing allegations, may be somewhat daunting, at bottom, they all arise out of the same transactions for the four buildings.

Accordingly, the motion is **granted**, and the Clerk of Queens County is directed, upon service upon him of a copy of this order, and payment of any appropriate fees, to transfer or transmit the file under index no. 11818/2009 to the Clerk of Nassau County, and the plaintiff is not mandated to pay an additional fee for an RJI.

All counsel are reminded that a status conference is scheduled for October 6, 2009 at 9:30 a.m. in Chambers of the undersigned.

Dated SEP 28 2009


J.S.C.

ENTERED

OCT 07 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE