

City of New York v American Home Assur. Co.

2009 NY Slip Op 32998(U)

December 15, 2009

Supreme Court, New York County

Docket Number: 401753/07

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD

PART 35

Justice

Index Number : 401753/2007
CITY OF NEW YORK
vs.
AMERICAN HOME ASSURANCE CO.
SEQUENCE NUMBER : 001
CONSOLIDATION/JOINT TRIAL

INDEX NO. _____
MOTION DATE 10/30/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

_____ this motion to/for _____

PAPERS NUMBERED _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

DEC 23 2009

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by plaintiff for an order transferring venue of *The City of New York v. American Home Assurance Co. and Illinois National Ins. Co.*, Index No. 26325/08 and *The City of New York v. Petrocelli Electric Co., Inc.*, Index No. 13218/09 from Kings County to New York County, and upon such transfer, consolidating the instant action with *The City of New York v. American Home Assurance Co. and Illinois National Ins. Co.*, Index No. 401150/08 in New York County, *The City of New York v. American Home Assurance Co. and Illinois National Ins. Co.*, Index No. 26325/08 in Kings County, and *The City of New York v. Petrocelli Electric Co., Inc.*, Index No. 13218/09 in Kings County is granted; and it is further

ORDERED that the following actions: *The City of New York v. American Home Assurance Co. and Illinois National Ins. Co.*, Index No. 401150/08 in New York County ("Action 2"), *The City of New York v. American Home Assurance Co. and Illinois National Ins. Co.*, Index No. 26325/08 in Kings County ("Action 3"), and *The City of New York v. Petrocelli Electric Co., Inc.*, Index No. 13218/09 in Kings County ("Action 4") are consolidated with the instant action for discovery and joint trial; and it is further

(Page 1 of 2)

Dated: 12/15/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

ORDERED that the Clerk of the Supreme Court, Kings County is directed to transfer the papers on files in *The City of New York v. American Home Assurance Co. and Illinois National Ins. Co.*, Index No. 26325/08 and *The City of New York v. Petrocelli Electric Co., Inc.*, Index No. 13218/09, to the Clerk of the Supreme Court, New York County upon service of a copy of this order with notice of entry and payment of appropriate fees, if any; and it is further

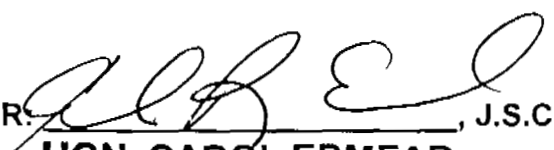
ORDERED that all parties in all of the four subject actions appear for a preliminary conference on January 19, 2010, 2:15 p.m. in Part 35; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties in all actions, the Clerk of the Supreme Court, Kings County, and the Clerk of the Supreme Court, New York County, within 20 days of entry.

This constitutes the decision and order of the Court.

(Page 2 of 2)

Dated: December 15, 2009

ENTER:  J.S.C.
HON. CAROL EDMEAD

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
THE CITY OF NEW YORK,

Index No. 401753/07

Plaintiff,

-against-

AMERICAN HOME ASSURANCE COMPANY and
ILLINOIS NATIONAL INSURANCE COMPANY,

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION¹

Plaintiff, The City of New York (the "City") commenced this action against defendants, American Home Assurance Company ("American Home") and Illinois National Insurance Company ("Illinois National") seeking a declaratory judgment that American Home has a duty to defend the City, as an additional insured, in 16 underlying personal injury actions, and to provide reimbursement of defense costs and indemnification of any settlement payments.

After the commencement of this action ("Action 1"), the City commenced three other related actions: The City of New York v. American Home Assurance Co. and Illinois National Ins. Co., Index No. 401150/08 in New York County ("Action 2"), The City of New York v. American Home Assurance Co. and Illinois National Ins. Co., Index No. 26325/08 in Kings County ("Action 3"), and The City of New York v. Petrocelli Electric Co., Inc., Index No. 13218/09 in Kings County ("Action 4").

¹The Court wishes to thank Irena Mykyta, from the New York County Chambers Volunteer Attorney Program, for her assistance with this decision, and wishes to thank all of those participating in this Program.

Instant Motion

Plaintiff in the above-captioned action now moves pursuant to CPLR 602(a) for an order transferring venue of Action 3 and Action 4 from Kings County to New York County, upon such transfer, consolidating the instant action with the Actions 2, 3 and 4 for all purposes, and changing the caption to this action, such that it would include Petrocelli Electric Co., Inc., ("Petrocelli") as an additional defendant.

Background

Pursuant to various contracts with the City's Department of Transportation (the "Contracts"), Petrocelli was responsible for the operation and maintenance of each traffic signal, pole, or streetlight involved in the Actions ("Contracts"). Each of the Contracts required Petrocelli to obtain a commercial general liability policy, naming the City as an additional insured, covering liability arising out of Petrocelli's operations. The Contracts require Petrocelli to be "solely responsible for the payment of all premiums and all deductibles to which such policies are subject," and that the policies provide for the defense and indemnification of the City from all claims or judgments against the City arising out of Petrocelli's operations. Additionally, the Contracts obligate Petrocelli to defend the City from all claims "arising out of or in connection" with Petrocelli's operations.

Pursuant to the Contracts, Petrocelli obtained from American Home two commercial general liability policies covering the periods from June 1, 2003 through June 1, 2004 and from June 1, 2004 to June 1, 2005 (the "Policies") and provided the City certificates of insurance showing that Petrocelli was the named insured and the City, an additional insured. However, the Policies contain a "Self-Insured Retention Endorsement," requiring that Petrocelli pay \$200,000

before the insurer must consider providing coverage to an additional insured. Moreover, even after the deductible is paid, the Self-Insured Retention Endorsement specifies that American Home has "the right but not the duty to defend" an insured against any suit.

Prior to obtaining copies of the Policies, the City filed Actions 1- 3 against American Home, each seeking a declaratory judgment that American Home has a duty to defend the City, as an additional insured, in 16 underlying personal injury actions, and to provide reimbursement of defense costs and indemnification of any settlement payments. Actions 1-3 involve the same Policies and raise identical legal issues. In its answers to each complaint, American Home interposed as an affirmative defense the insured's failure to exhaust applicable deductibles. Upon review of the Policies, the City commenced Action 4 against Petrocelli asserting that to the extent American Home is declared to have no duty to defend the City in the underlying actions by operation of the Self-Insured Retention Endorsement, Petrocelli is contractually liable to the City for all resulting damages. (See Policies, Exhibits 7 and 8 annexed to plaintiff's moving papers).

Plaintiff's Motion

Plaintiff contends that the four actions (the "Actions") should be consolidated because each of the actions arises out of the same nexus of facts - whether or not Petrocelli, defendant in Action 4, obtained adequate insurance coverage for the City as mandated by the Contracts, and whether American Home, defendant in Actions 1, 2 and 3, has a duty to defend the City in 16 underlying personal injury actions emanating out of work performed by Petrocelli. Therefore, the Actions should be consolidated for discovery and joint trial because they all involve common questions of both fact and law, require testimony by virtually the same witnesses, presentation of

substantially identical evidence and evaluation by the jury of essentially the same set of circumstances.

Plaintiff further contends that the Self-Insured Retention Endorsement will be a central issue of dispute in all four actions: whether it operates to relieve American Home of any obligation to defend the City in the underlying personal injury actions, and if so, whether Petrocelli breached its obligations under the Contracts as to the nature of the required insurance coverage. (Plaintiff's Affirmation, 11, 12 and 17).

Furthermore, plaintiff points out that, consolidation of these actions for discovery and joint trial will effectuate judicial economy, ensure consistent determinations and conserve the time of witnesses, the parties and their attorneys. Additionally, consolidation will ensure that consistent determinations are made based on the same facts.

Plaintiff also argues that since the Actions are in the preliminary stages of discovery, consolidation will not prejudice a substantial right of either defendant. Only limited discovery in two of the actions and no discovery in the remaining two actions was conducted. Although the parties in Action 1 and Action 2 exchanged document demands and production, no preliminary conference has been held in any of the 4 actions. Similarly, no Requests for Judicial Intervention were filed in any of the four actions.

Finally, plaintiff contends that, pursuant to CPLR 602, since Action 1 was the first-filed of these four actions, and no special circumstances are present requiring a different result, Actions 3 and 4 should be transferred from Kings County to New York County.

Defendant Petrocelli's Opposition

In opposition, Petrocelli contends that plaintiff's motion is defective and should be denied

because plaintiff (1) did not supply the full captions of each of the actions it seeks to consolidate, and (2) did not annex the contract or the insurance policies referenced in the motion.

Further, the parties are not the same in all four actions: Petrocelli is not a named party in three of the four actions, and defendants American Home Assurance and Illinois National Insurance are not parties to Action 4 (Opp. 9, 10).

Petrocelli further contends that no common issue of law or fact exists because in Action 4 (against Petrocelli) plaintiff seeks money damages due to a breach of contract, while in the remaining three actions (against American Home Assurance) plaintiff seeks a declaratory relief pertaining to insurance issues against insurance companies.

Petrocelli argues that although some of the facts are the same in all four actions (Id. 11), if all of the facts and issues of law in these cases were sufficiently common, then plaintiff would have commenced all four cases at the same time under the same index number. (Defendant's Affirmation In Opposition, 11 and 12). After several years have passed since the commencement of the initial action, nothing has changed.

Furthermore, Petrocelli contends that consolidation would prejudice a substantial right by depriving Petrocelli of the reasonable opportunity to conduct discovery. Since Petrocelli is not a named party in three of the four actions, its counsel has not participated in discovery in those actions. As plaintiff chose to bring all these actions separately, at different times: the instant action was commenced in 2007, Action 2 and 3 in 2008, and Action 4 in 2009, the cases should be on different discovery tracks. There was no discovery in the Petrocelli case, but because other cases were commenced years before the Petrocelli case, their discovery should be completed by now. (Petrocelli's Affirm. In Opposition, 3, 4 and 5).

Additionally, defendant contends that because he would be forced into accelerated discovery, consolidation would increase his costs of litigating this matter. (Id. 7, 15.) Finally, Petrocelli argues that plaintiff should not be allowed, in its Reply Papers, to furnish additional evidence to cure its motion.

Plaintiff's Reply

Plaintiff points out that American Home, defendant in Actions 1 - 3, has not opposed the City's motion. Further, plaintiff supplied the full captions for the actions to be consolidated in its initial motion papers which include copies of the complaints and answers from all four actions (see Exhibits 1-8 to the City's Motion). The proposed caption for the consolidated action is also supplied in Exhibit 9.

Further, plaintiff reiterates that only a limited document discovery was exchanged in Actions 1 and 2, no discovery in Actions 3 and 4, and no preliminary conferences were held in any of the actions.

Because all the Actions are in virtually the same procedural posture, consolidation will neither impose additional burden on Petrocelli, nor prejudice a substantial right. Petrocelli fails to show how consolidation would impose any hardships or additional costs since Petrocelli will have the same opportunity as other litigants to serve and respond to discovery demands. Furthermore, that the City's claims against American Home and Petrocelli are based on the same facts but different causes of action does not preclude consolidation because the Court need not find all questions of fact or law to be identical and, all four claims arose out of the same transactions or series of transactions. The actual issue in all four actions is whether the Self-Insured Retention Endorsement, if given effect, results in American Home having no duty to

defend the City in the underlying personal injury actions.

The City is not requesting that its claims against American Home and Petrocelli be consolidated with 16 underlying personal injury actions.

Discussion

According to CPLR § 602(a), 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." (CPLR 602(a)).

Consolidations are favored by the courts in the interest of judicial economy and ease of decision making where there are common questions of law and fact, unless the party opposing the motion demonstrates that joining the actions will prejudice a substantial right (*Amcan Holdings, Inc. v. Torys LLP*, 32 A.D.3d 337, 340 [1st Dept 2006]; *Amtorg Trading Corp. v. Broadway & 56th St. Assoc.*, 191 A.D.2d 212, 213 [1st Dept 1993]). The burden of demonstrating prejudice to a substantial right is on the party opposing consolidation (*Progressive Ins. Co. v. Vasquez*, 10 A.D.3d 518, 519 [1st Dept 2004]; *Geneva Temps Inc. v. New World Communities, Inc.*, 24 A.D.3d 332, 334 [1st Dept 2005]).

A. Common Questions of Law and Fact

In *Amcan*, the court held that consolidation of legal malpractice actions brought against a law firm in two different counties by a client and his corporations was warranted. The parties to each action possessed knowledge and information, including documents, relevant to the claims in the other, potential witnesses and evidence would be similar in both actions, and there were questions of law and fact common to both actions, including issue of whether the client received

undivided loyalty and best legal representation as a result of the firm's alleged conflict of interest.

In *Amtorg*, a subtenant brought an action against the landlord for conversion for improperly drawing on a letter of credit and for breach of contract against the tenant. The subtenant then moved for removal and consolidation of the related summary holdover proceeding pending in Civil Court. The Court held that denial by the lower court of the subtenant's motion for consolidation was inappropriate because the summary holdover proceeding and civil action by subtenant for conversion presented common questions of law and fact.

Here, plaintiff established that there are questions of law and fact common to all the Actions. The parties and issues in Actions 1-3 are identical. On the defendants' side, there is certainly an interrelationship between American Home and Petrocelli. Further, the parties to each of the four actions possess knowledge and information, including documents, relevant to the claims in the other. Potential witnesses and evidence will also be similar in all four actions.

Indeed, all four complaints allege that the Contracts required Petrocelli to maintain insurance policies, naming the City as an additional insured, without deductibles imposed on the City. Based on these Policies, the City claims that either American Home or Petrocelli has a duty to defend and/or indemnify the City in the underlying personal injury actions. It appears therefore, that the resolution of all four actions depends on a determination of the common issue: whether the Self-Insured Retention Endorsement in the Policies relieve American Home from its duty to defend the City, thus, vesting such duty in Petrocelli.

B. Prejudice To A Substantial Right

Defendant Petrocelli failed to establish the requisite prejudice to a substantial right. First, there is no merit in the Petrocelli 's claim that its failure to participate in Actions 1-3 would

prejudice Petrocelli if those actions were consolidated with Petrocelli's case; notably, nothing significant has transpired in those actions since 2007 and no objections to consolidation were made on the part of defendant American Home.

Second, despite its contention that Petrocelli would be deprived of reasonable discovery in its case, any prejudice attributable to the different procedural stages to which these actions have progressed may be avoided by the court setting the dates for discovery at the preliminary conference (*Progressive Ins. Co. v. Vasquez*, 10 A.D.3d at 519 [stating that any prejudice attributable to the different procedural stages to which the two actions have progressed may be avoided by affording an opportunity to complete disclosure on an expedited basis]).

Petrocelli's reliance on *Abrams v. Port Authority Trans-Hudson Corp.* (1 A.D.3d 118 [1st Dept 2003]) is misplaced. In *Abrams*, where a Civil Court action, sought to be consolidated, has been placed on the trial calendar whereas a Supreme Court action has barely advanced to the discovery phase, the Court stated that consolidation would delay both the resolution of the Civil Court action and the trial of the consolidated action.

Similarly, *Lichtenstein v. Lapadula & Villani Trucking Corp.* (283 A.D. 721 [2d Dept 1954]) and *Richman v. Felmus* (20 Misc.2d 46 [Supreme Court Kings County 1959]), relied on by Petrocelli, are equally distinguishable from the facts before this Court. In *Lichtenstein*, Action No. 1 was on the nonjury calendar and trial was imminent, while considerable time had to elapse before Action No. 2, on the jury calendar, could be reached for trial. In *Richman*, there was a stay of proceedings in one of the pending actions, and consolidation, if granted, would operate to make such a stay applicable to the second action causing an undue delay.

None of these circumstances are present here. Unlike in *Abrams*, *Lichtenshtein* or

Richman, the four actions are not at so "markedly different procedural stages" that consolidation would result in "undue delay in the resolution of either matter" (*Abrams*, at 119). Only limited discovery in two of the actions and no discovery in the remaining two actions was conducted. Further, no court-ordered discovery has been ordered. Although the parties in Action 1 and Action 2 exchanged document demands and production, no preliminary conferences have been held in any of the four actions and none of the Actions have been placed on trial calendar.

C. Transfer of Venue

Furthermore, where actions are commenced in different counties, absent exceptional circumstances involving the convenience of material witnesses, the venue of a consolidated action should be the county in which the first action was commenced (*Amcan; Teitelbaum v. PTR Co.*, 6 A.D.3d 254 [1st Dept 2004]). Since here, Petrocelli has not demonstrated any exceptional circumstances as to evidence or witnesses, Actions 3 and 4 should be transferred from Kings County to New York County.

It is noted that the pleadings sufficiently amplify the underlying claims raised in each of the actions. As such, plaintiff's failure to annex the relevant Contracts and Policies to the moving papers is not fatally defective.

Conclusion

In the Court's view of the record, plaintiff has sustained its burden of demonstrating that the four cases contain common issues of fact and law, making consolidation appropriate, and Petrocelli has failed to demonstrate prejudice to a substantial right sufficient to defeat consolidation. Consequently, it is hereby

ORDERED that the motion by plaintiff for an order transferring venue of *The City of New*

York v. American Home Assurance Co. and Illinois National Ins. Co., Index No. 26325/08 and *The City of New York v. Petrocelli Electric Co., Inc.*, Index No. 13218/09 from Kings County to New York County, and upon such transfer, consolidating the instant action with *The City of New York v. American Home Assurance Co. and Illinois National Ins. Co.*, Index No. 401150/08 in New York County, *The City of New York v. American Home Assurance Co. and Illinois National Ins. Co.*, Index No. 26325/08 in Kings County, and *The City of New York v. Petrocelli Electric Co., Inc.*, Index No. 13218/09 in Kings County is granted; and it is further

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ORDERED that the Clerk of the Supreme Court, Kings County is directed to transfer the papers on files in *The City of New York v. American Home Assurance Co. and Illinois National Ins. Co.*, Index No. 26325/08 and *The City of New York v. Petrocelli Electric Co., Inc.*, Index No. 13218/09, to the Clerk of the Supreme Court, New York County upon service of a copy of this order with notice of entry and payment of appropriate fees, if any; and it is further


ORDERED that all parties in all of the four subject actions appear for a preliminary conference on January 19, 2010, 2:15 p.m. in Part 35; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties in

all actions, the Clerk of the Supreme Court, Kings County, and the Clerk of the Supreme Court, New York County, within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 15, 2009



Hon. Carol Robinson Edmead

HON. CAROL EDMEAD

FILED
DEC 23 2009
CLERK OF THE COURT