

Flintlock Constr. Servs., LLC v Tritel Constr. Group, LLC
2009 NY Slip Op 33384(U)
March 31, 2009
Supreme Court, New York County
Docket Number: 117771/06
Judge: Judith J. Gische
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

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Flintlock Construction Services, LLC,

Plaintiff (s),

-against-

Tritel Construction Group, LLC, James Wu,
Sam Change and FSC Construction, LLC,

Defendant (s).
-----X

DECISION/ ORDER
Index No.: 117771/06
Seq. No.: 005

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the paper considered in the review of
this (these) motion(s):

Papers

- Flintlock's n/m (consolidate) w/APD affirm, exhs 1
- Tritel, Wu, Chang opp w/RB affid, exh 2
- Stip adj motion on consent 3

FILED
APR 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

The court has before it a motion by plaintiff Flintlock Construction Services ("Flintlock") to consolidate the within action with another pending action for purposes of discovery and joint trial. The basis for Flintlock's motion for consolidation is that both cases involve common questions of fact or law. The defendants in the Flintlock action are opposed to consolidation. Though due proof of service has been filed none of the other parties in the *Peri* case have taken a position on this motion.

The court's decision and order is as follows:

Arguments

Plaintiff Flintlock has asserted claims of tortious interference with contract and

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breach of contract against the defendants. James Wu and Sam Chang are members of Tritel Construction, LLC (collectively "Tritel"). Flintlock was the general contractor on a construction project involving the Sheraton and Fashion Times hotels in New York City. According to Flintlock, Tritel induced, urged or otherwise caused Flintlock's concrete subcontractors, defendant FSC Construction, LLC a/k/a, d/b/a, n/k/a EMC Contracting, Inc. ("FSC/EMC") to abandon or "walk off the job," thereby breaching its contract to provide Flintlock with construction services under its contract. Flintlock alleges that Tritel employed coercive means to secure this breach by FSC/EMC including paying FSC/EMC money not to complete Flintlock's project and offering the concrete subcontractor a share in the expected profits of the Tritel project.

The within action was commenced with the filing of the summons and complaint on November 29, 2006. Plaintiff Flintlock served an amended complaint on January 19, 2007. Issue was joined by the Tritel defendants on March 2, 2007. FSC/EMC answered the complaint June 25, 2007, asserting a counterclaim against Flintlock that it failed to provide FSC/ESM workers with a safe work place and therefore FSC/ESM was unable to properly staff the Flintlock project.

Flintlock argues this case should be consolidated with the case of *Peri Formwork Systems, Inc. v. Vigilant Insurance Company, Flintlock Construction Services, LLC, and EMC Contracting, Inc. a/k/a, d/b/a, f/k/a FSC Construction, LLC*, Supreme Court, New York County Index No. 100024/08 ("Peri") because they have common issues of law and fact. The Peri action, which was commenced with the filing of the summons and complaint on January 3, 2008, is assigned to Hon. Charles E. Ramos who presides over a commercial part. Vigilant and Flintlock have answered the Peri complaint, as

has FSC/ESM. Peri has brought a motion for summary judgment against FSC/ESM, but it has not yet been submitted for decision by Justice Ramos.

The *Peri* action is for lien foreclosure and breach of contract. Peri alleges that it made concrete formwork systems and provided services to FSC/EMC (Flintlock's subcontractor) in connection with the Fashion Times hotel project that FSC/ESM accepted, but did not pay for. Peri has recorded a mechanic's lien against the hotel property.

In this case, FSC/ESM has asserted counterclaims against Flintlock, alleging that it was Flintlock that terminated (and therefore breached) their contract, that the termination was without cause, and that FSC/ESM has suffered damages. FSC/ESM also alleges that Flintlock failed to provide FSC/ESM workers with a safe work environment, as required by law.

In the Vigilant/Flintlock answer to the Peri complaint, those defendants assert a number of defenses and counterclaims, including that the lien Peri filed is in an exaggerated amount. Flintlock has asserted a cross claim against its co-defendant FSC/ESM, that it terminated the contract between them "for cause."

The Tritel defendants oppose consolidation arguing that this (Flintlock) action is considerably older and more advanced than the Peri action. According to Tritel, Flintlock has also failed to specify the what issues the two cases have in common. Tritel argues that the issue in this case is whether it (Tritel) induced FSC/ESM to breach its contract (a tort), whereas the Peri action is under the lien law.

Discussion

The court has the discretion to order the consolidation of actions where common

questions of law or fact exist. CPLR § 602 [a]; Bradford v. John A. Coleman Catholic High School, 110 AD2d 965 (3rd dept. 1985). It is unnecessary that all the facts and issues be the same, but there must be “at least some important rules of law and fact in common to both actions.” Bradford v. John A. Coleman Catholic High School, *supra* at 966.

Flintlock has failed to meet its burden, which is to prove that the two cases should be consolidated because there are common questions of law or fact and that consolidation would serve the salutary purpose of CPLR § 602 (a) which is to avoid unnecessary costs and delay. CKS Ice Cream Co., Inc. v. Frusen Glade Franchise, Inc., 172 AD2d 206 (1st Dept 1991).

The action before this court is a tort action whereas Justice Ramos' action is a lien foreclosure action. Although both cases have some parties in common (i.e. Flintlock and FSC/ESM) the claims asserted by the plaintiff in each action are very different and the proof with respect to each lawsuit does not overlap. Heydt Contracting Corp. v. Tishman Const. Corp. of New York, 163 A.D.2d 196 (1st Dept.1990) (*motion to consolidate negligence action with contract action denied*).

Tritel, has on the other hand, made a *prima facie* showing that it will be prejudiced by having the two actions consolidated. The cases are at different procedural stages. In this action, discovery is more advanced than in the *Peri* action, yet there is a pre-note of issue motion for summary judgment before Justice Ramos.

Since judicial economy would not be served, the individuality of the cases predominates over any common issues of fact or law, and Tritel has effectively shown that it will be prejudiced by the consolidation of these actions, Flintlock's motion to

consolidated is denied.

Conclusion


For the reasons stated, Flintlock's motion to consolidate the within action with *Peri Formwork Systems, Inc. v. Vigilant Insurance Company, Flintlock Construction Services, LLC, and EMC Contracting, Inc. a/k/a, d/b/a, f/k/a FSC Construction, LLC*, Supreme Court, New York County Index No. 100024/08, is hereby denied in its entirety.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
 March 31, 2009

So Ordered:



Hon. Judith J. Gische, JSC