

**Vested Props., Inc. v Greater N.Y. Mut. Ins. Co.**

2010 NY Slip Op 30382(U)

January 20, 2010

Supreme Court, Nassau County

Docket Number: 8148/08

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 17 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

\_\_\_\_\_x

**VESTED PROPERTIES, INC.,**

**Plaintiff(s),**

**-against-**

Index No. 8148/08

Motion Submitted: 12/9/09

Motion Sequence: 003, 004, 005

**GREATER NEW YORK MUTUAL INSURANCE  
COMPANY,**

**Defendant(s).**

\_\_\_\_\_x

**GREATER NEW YORK MUTUAL INSURANCE  
COMPANY,**

**Third-Party Plaintiff(s),**

**-against-**

**CANTON ON THE PARK, LLC, SPRINGLINE  
BUILDERS, LLC, VESATILE CONSULTING AND  
TESTING SERVICES, INC. AND ROMAN  
SOROKKO, P.E.,**

**Third-Party Defendant(s).**

\_\_\_\_\_x

**SPRINGLINE BUILDERS, LLC,**

**Fourth-Party Plaintiff(s),**

**-against-**

**ILLINOIS UNION INSURANCE COMPANY, INA**

**SURPLUS INSURANCE COMPANY,  
WESTCHESTER SURPLUS LINES INSURANCE  
COMPANY, ACE WESTCHESTER SPECIALTY  
GROUP, ACE USA COMPANIES, TITUS  
ASSOCIATES, VESTED PROPERTIES, INC.,  
JOHN DOES 1-10 and “XYZ” COMPANIES 11-20,**

**Fourth-Party Defendants.**

\_\_\_\_\_ x

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XXX  
 Answering Papers.....XXX  
 Reply.....  
 Briefs: Plaintiff’s/Petitioner’s.....  
       Defendant’s/Respondent’s.....XX

Motion by Fourth-Party Defendants Illinois Union Insurance Company, INA Surplus Insurance Company, Westchester Surplus Lines Insurance Company, ACE Westchester Specialty Group and ACE USA Companies (collectively “the Fourth-Party Insurance Coverage Defendants”) for an order pursuant to CPLR § 603 and § 1010, granting their motion to sever the insurance coverage claims against them from the first and third-party actions and the remainder of the claims in the fourth-party action in Action #1, is granted in part and denied in part. The claims against the Fourth-Party Insurance Coverage Defendants in the fourth-party action herein, shall be severed for trial but not for discovery purposes, from the first-party action, the third-party action, and the remainder of the fourth-party action in Action #1 herein.

Cross-motion by Defendant/Third-Party Plaintiff Greater New York Mutual Insurance Company (“GNY”) for an order pursuant to CPLR § 2201, granting a stay of trial pending resolution of the fourth-party action is denied.

The further motion by GNY for an order pursuant to CPLR § 3025, permitting it to amend its third-party complaint to add Titus Associates as a Third-Party Defendant, and further pursuant to CPLR § 602 granting consolidation of Action #1 and Action #2 for discovery purposes only, is granted to the extent that the amendment is granted, and Action #1 and Action #2 shall be joined for discovery purposes only.

Vested is the owner of real property located at 31 Ocean Parkway in Brooklyn. Caton on the Park, LLC (“Caton”) is the owner of adjoining property at 23-45 Caton Place in Brooklyn. In November, 2005, Caton began demolition of two commercial buildings on its property. Vested alleges that Caton acted negligently, and that as a result, a building on Vested’s property sustained physical damage. Vested commenced Action #1 against GNY seeking first-party coverage under an insurance policy issued to it by GNY.

GNY filed a third-party complaint against Springline Builders LLC (“Springline”) the construction manager on the project, Caton, Versatile Consulting and Testing Services, Inc. (“Versatile”) (provider of engineering services), and Roman Sorokko, P.E. (“Sorokko”) (Versatile’s principal), alleging, *inter alia*, that any damage to Vested’s building was attributable to the negligence of these defendants. GNY alleges that it will become subrogated to the rights of Vested against these defendants.

Springline commenced the fourth-party action against the Fourth-Party Insurance Coverage Defendants, seeking *inter alia* a declaration that it is entitled to a defense and indemnity in the third-party action. Springline also alleges negligence and breach of contract claims against Titus Associates (“Titus”), with whom it subcontracted to perform excavation and foundation work, as well as claims of tortious interference with contractual relations against Vested. It appears that Titus has not answered or appeared in the fourth-party action.

Vested commenced Action #2 against Caton seeking payments for damages to its property and injunctive relief to prevent further damage.

The court may order severance of any claim or issue in furtherance of convenience and to avoid prejudice (*CPLR § 603*). Even where common facts exist, it is prejudicial to insurers to have the issue of insurance coverage tried before the same jury that considers the underlying liability claims (*Burlington Ins. Co. v. GUMA Construction Corp.*, 66 A.D.3d 622, 887 N.Y.S.2d 177 (2d Dept., 2009); *Smith v. McClier Corp.*, 38 A.D.3d 322, 831 N.Y.S.2d 413 (1<sup>st</sup> Dept., 2007); *Christensen v. Weeks*, 15 A.D.3d 330, 790 N.Y.S.2d 153 [2d Dept., 2005]). “It is not the fact of a jury trial, which constitutes the basis for the claim of prejudice here, but it is the fact that the issues in both the main and third-party actions will be passed upon by the same jury” (*Kelly v. Yannotti*, 4 N.Y.2d 603, 607, 152 N.E.2d 69, 176 N.Y.S.2d 637 [1958]).

Here, in Action #1, the same jury will hear, among other things, the allegations of negligence against Springline, while also hearing Springline’s case for insurance coverage from the Fourth-Party Insurance Coverage Defendants. Under these circumstances, the Fourth-Party Insurance Coverage Defendants have established their claim of prejudice.

Consequently the request by the Fourth-Party Insurance Coverage Defendants for severance of the fourth-party insurance coverage claims pursuant to CPLR § 603 and § 1010 is granted to the extent that the fourth-party insurance coverage claims shall be tried separately.

Fourth-Party Insurance Coverage Defendants further argue that severance is necessary because they have only recently been brought into this action and some discovery has already taken place. They assert that severance will serve the convenience of the parties to the first-party action and the third-party action and enable them to conduct proper discovery. This basis for severance does not suffice on this record where no depositions have been conducted, and only documents have been exchanged. Fourth-Party Insurance Coverage Defendants can easily obtain the documentation already exchanged, and will be afforded an adequate opportunity to conduct discovery without causing undue delay to any other party. For this reason, severance of the fourth-party insurance coverage claims for the purposes of discovery is denied.

GNY requests an order staying trial of the first and third-party actions pursuant to CPLR § 2201, pending resolution of the fourth-party insurance coverage claims. GNY claims that if the first and third-party actions are resolved before the fourth-party insurance coverage claims, “it is likely that the damage award will force Springline into insolvency. GNY will be left with an unenforceable judgment and will suffer irreparable harm.” In addition to being conclusory and unsupported in the record, such a claim does not support the request for a stay, which may properly be ordered to avoid risk of inconsistent determinations and potential waste of judicial resources (*Zonghetti v. Jeromack*, 150 A.D.2d 561, 541 N.Y.S.2d (2d Dept., 1989), or where a determination in one action will dispose of the controversy in another action (*952 Associates LLC v. Palmer*, 52 A.D.3d 236, 859 N.Y.S.2d 138 [1<sup>st</sup> Dept., 2008])). In the absence of a proper basis for a stay, the request by GNY for such relief is denied.

GNY seeks to add a claim against Titus in the third-party action, because it recently learned that Titus had performed excavation and/or foundation work at Caton’s premises. GNY argues that if it should be held liable under the insurance policy for any portion of Vested’s damages, it will seek to enforce its subrogation rights against those who caused Vested’s loss, including Titus.

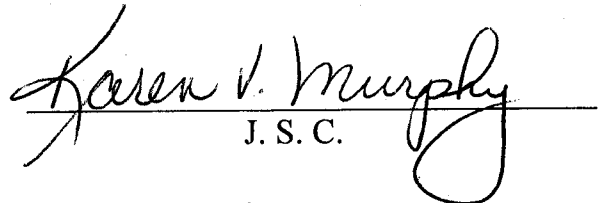
Leave to amend pleadings should be freely granted in the absence of surprise or prejudice to the opposing party (*CPLR 3025(b); WMC Mortgage Corp. v. Vandermulen*, 63 A.D.3d 1050, 880 N.Y.S.2d 574 (2d Dept., 2009), and provided that the proposed amendment is not patently devoid of merit and palpably insufficient (*Vista Properties LLC v. Rockland Ear Nose & Throat Associates, PC.*, 60 A.D.3d 846, 875 N.Y.S.2d 248 (2d Dept., 2009), lv. app. dsmd. 12 N.Y.3d 900 (2009); *Kinzer v. Bederman*, 59 A.D.3d 496, 873 N.Y.S.2d 692 [2d Dept., 2009])). Here the proposed amendment is not patently devoid of

merit or palpably insufficient, and Titus cannot claim surprise or prejudice as it was already served in the fourth-party action. Accordingly, the motion for leave to amend the third-party complaint to include a claim against Titus is granted.

Finally, GNY seeks an order consolidating Action #1 and Action #2 for discovery only, on the grounds that Caton's liability in causing the damages to Vested's property is common to both actions. The power to order consolidation rests in the sound discretion of the court and should be granted in the interest of judicial economy where common issues of law or fact exist (see generally *Skelly v. Sachem Central School District*, 309 A.D.2d 917, 766 N.Y.S.2d [2d Dept., 2003]). As Caton's liability for the damages to Vested's property is common to both actions, there is a proper basis for GNY's request. However, rather than consolidation, which merges the separate actions, the Court prefers joinder, which leaves the individual actions intact. The Court hereby joins Action #1 and Action #2 for discovery purposes only.

The foregoing constitutes the Order of this Court.

Dated: January 20, 2010  
Mineola, N.Y.

  
J. S. C.

**ENTERED**  
FEB 19 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE