

**East 115th St. Realty Corp. v Focus & Struga Bldg.  
Devs. LLC**

2010 NY Slip Op 30688(U)

March 29, 2010

Supreme Court, New York County

Docket Number: 604164/2007

Judge: Eileen Bransten

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

PRESENT: Hon. EILEEN BRANSTEN  
*Justice*

PART 3

EAST 115TH STREET REALTY CORP.,  
Plaintiff,

INDEX NO. 604164/2007  
MOTION DATE 10/02/2009  
MOTION SEQ. NO. 004  
MOTION CAL. NO. \_\_\_\_\_

-against-

FOCUS & STRUGA BUILDING DEVELOPERS LLC,  
GREAT AMERICAN INSURANCE COMPANY OF  
NEW YORK, ABAD CONSULTING (a corporation),  
I. ARTHUR YANOFF & CO., LTS, and MAZZOCCHI  
WRECKING INC., SHARON ENGINEERING, P.C.,  
and S IRON WORK INCORPORATED,

Defendants.

FOCUS & STRUGA BUILDING DEVELOPERS, LLC,  
Third-Party Plaintiff,

THIRD-PARTY INDEX NO.: 590610/2008

- against -

SHARON ENGINEERING, P.C. and  
S IRON WORK INCORPORATED,

Thrd-Party Defendants.

**FILED**

MAR 30 2010

NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 13 were read on this motion to Consolidate.

PAPERS NUMBERED

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

1

J.S.C. Answering Affidavits — Exhibits

6

J.S.C. Replying Affidavits & Authorized Sur-reply

6

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ORDERED that Defendant Focus & Struga Building  
Developers, LLC's motion to consolidate is decided in accordance with the accompanying  
memorandum decision.

Dated: 3-29-10



HON. EILEEN BRANSTEN, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE  
DATED:

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

-----X  
EAST 115TH STREET REALTY CORP.,

Plaintiff,

Index No.: 604164/2007  
Motion Date: 10/02/09  
Motion Seq. No.: 004

-against-

FOCUS & STRUGA BUILDING DEVELOPERS LLC,  
GREAT AMERICAN INSURANCE COMPANY OF  
NEW YORK, ABAD CONSULTING (a corporation),  
I. ARTHUR YANOFF & CO., LTS, and MAZZOCCHI  
WRECKING INC., SHARON ENGINEERING, P.C.,  
and S IRON WORK INCORPORATED,

Defendants.

-----X  
FOCUS & STRUGA BUILDING DEVELOPERS, LLC,

Third Party Plaintiff,

Third Party  
Index No.: 590610/2008

-against-

SHARON ENGINEERING, P.C. and  
S IRON WORK INCORPORATED,

Third Party Defendants.

-----X  
EILEEN BRANSTEN, J:

Defendant/Third Party Plaintiff Focus & Struga Building Developers, LLC, (“Focus & Struga”) moves for an order: (1) consolidating three allegedly related actions under Index Nos. 114029/2007 (“Action No. 2”), 107808/2008 (“Action No. 3”), and 112005/2008 (“Action No. 4”), all pending in Supreme Court, New York County, pursuant to CPLR 602 [a], with this action (“Action No. 1”); (2) removing an allegedly related action pending in Supreme Court, Kings County, under Index No.: 18874/2008 (“Action No. 5”) and another

pending in Supreme Court, Queens County, under Index No.: 20149/2008 (“Action No. 6”), to Supreme Court, New York County, and consolidating these actions with Action No. 1 for joint discovery and trial pursuant to CPLR 602 [b]; and (3) staying all current discovery proceedings in Action Nos. 1, 2, 3, 4, 5 and 6 until a decision is reached on this motion pursuant to CPLR 2201.

## **BACKGROUND**

### **I. The Building**

East 115th Street Realty Corp., plaintiff in Action No. 1 and defendant in Action Nos. 2 through 6, (“East 115th Street”), owns a five story masonry building located at 1861 Lexington Avenue, New York, New York (“the Building”). East 115th Street planned a renovation of the Building and hired Focus & Struga to be the general contractor on the project. On March 27, 2007, the Building partially collapsed during renovation. East 115th Street then hired Mazzocchi Wrecking Inc, (“Mazzocchi”) to demolish and remove the remains of the partially collapsed building.

### **II. The Lawsuits**

Six lawsuits emerged from these facts. A summary of the various allegations and assertions in each action is as follows:

**A. Action No. 1** *East 115th Street Realty Corp. v Focus & Struga, et al.*, Sup Ct, New York County, Bransten, J., Index No. 604164/07  
[first commenced action based on the partial collapse of the Building – complaint filed 12/19/07].

Plaintiff seeks damages for its loss as a result of the partial collapse of the Building and the demolition and removal of the remaining structure against: (a) Focus & Struga and Mazzocchi for breach of contract and negligence; (b) Great American Insurance Company of New York (“GA”), for breach of insurance contract; and (c) Abad Consulting (“Abad”) and I. Arthur Yanoff & Co. Ltd. (“Yanoff”),<sup>1</sup> East 115th Street’s insurance brokers, for failure to procure insurance. Focus & Struga filed a Third Party Complaint against Sharon Engineering, P.C. (“Sharon”) and S Iron Work Incorporated for indemnification and contribution (Dominic Boon Affirmation in Support of Focus & Struga’s Motion to Consolidate [“Focus & Struga Aff.”], Exs. A, G).

**B. Action No. 2** *Colgate Scaffolding & Equipment Corp. v Focus Construction Corp., et al.*, Sup Ct, New York County, Friedman, J., Index No. 114029/07.

Plaintiff Colgate Scaffolding & Equipment Corp. (“Colgate”) seeks damages for a sidewalk bridge it installed for and rented to Focus Construction Corp. (“Focus Constr.”) and Focus & Struga. Colgate alleges that the sidewalk bridge was destroyed by the partial

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<sup>1</sup> Yanoff’s opposition papers were submitted under the name Risk Placement Services i/s/h/a I Arthur Yanoff & Co., Ltd. There is no dispute as to the propriety of Risk Placement Services submitting opposition papers for Yanoff. Therefore, any reference to Yanoff encompass Risk Placement Services.

collapse of the Building and the demolition and removal of remaining structure. Colgate asserts breach of contract and negligence claims against defendants Focus Constr. and Focus & Struga, a negligence claim against defendant East 115th Street and seeks foreclosure of a mechanic's lien against all defendants (Focus & Struga Aff., Ex. J).

**C. Action No. 3** *Verizon New York, Inc. v East 115th Street Realty Corp and Focus & Struga Building Developers, LLC*, Sup Ct, New York County, Friedman, J., Index No. 107808/08.

Plaintiff Verizon New York, Inc., ("Verizon"), asserts negligence claims against both defendants for damages to its 600 pair telephone cable allegedly caused by the partial collapse. East 115th Street filed a third party complaint against Focus & Struga and Mazzocchi for indemnification and contribution for any costs and/or damages resulting from Verizon's claim (Focus & Struga Aff., Exs. L, Q).

**D. Action No. 4** *Victor Gaston v East 115th Street Realty Corp. and Jacob Azoulay*, Sup Ct, New York County, Friedman, J., Index No. 112005/2008.

Plaintiff Victor Gaston ("Gaston") claims that the Building's partial collapse damaged his adjacent building and forced him to vacate the premises for an extended period of time. Gaston asserts claims against both defendants for negligence, nuisance, infliction of emotional distress, strict liability and administrative code violations. East 115th Street asserted a third party complaint against Focus & Struga, Focus Constr. and Mazzocchi for

indemnification and contribution for any costs and/or damages resulting from Gaston's claim (Focus & Struga Aff., Exs. S, U).

**E. Action No. 5** *Carmen Rivera v City of New York, et al.*, Sup Ct, Kings County, Smith, J., Index No. 18874/08.

Plaintiff Carmen Rivera ("Rivera") allegedly fell and was injured on April 7, 2007, (10 days after the Building's partial collapse) while walking on a construction path adjacent to the Building. Rivera asserts negligence claims against defendants the City of New York ("NYC"), East 115th Street, Focus & Struga and Mazzocchi for allegedly causing the collapse and the path's subsequent unsafe condition (Focus & Struga Aff., Ex. X).

**F. Action No. 6** *Jorge Cajiga v East 115th Realty*, Sup Ct, Queens County, Elliot, J., Index No. 20149/08.

Plaintiff Jorge Cajiga ("Cajiga") was employed by Focus & Struga and claims that he was injured during the Building's partial collapse. Cajiga contends that defendant East 115th Street failed to provide a safe work environment. East 115th Street filed a third party complaint against Focus & Struga, Focus Constr. and Mazzocchi for indemnification and contribution for any costs and/or damages resulting from Cajiga's claim (Focus & Struga Aff., Exs. CC, EE).

### **III. Focus & Struga's Motion to Consolidate**

Focus & Struga moves, pursuant to CPLR 602 [a], to consolidate Action Nos. 2 through 6 with Action No. 1 for discovery and trial purposes. Focus & Struga assert that each case involves common facts and issues related to the partial collapse of the Building and the demolition and removal of the remaining structure. Focus & Struga contend that consolidation would cause no prejudice to any party in the six cases. Focus & Struga argue that consolidation would avoid duplication of discovery and trials, streamline discovery, save judicial resources and prevent divergent outcomes. They state that discovery is ongoing in each matter and, thus, consolidation will not burden the discovery process. They argue that the cost of discovery would not increase because attendance at depositions is not mandatory and parties can forego attendance of a deposition which is irrelevant to their case (Focus & Struga Aff. ¶¶ 15-21).

Currently action Nos. 2, 3 and 4 have been consolidated for joint discovery and trial before Justice Marcy Freidman in the New York State Supreme Court, New York County (*see* Short Form Order, 114029/2007, Friedman, J., Mot. Seq. Nos. 001 [dated Nov 14, 2008] and 002 [dated Feb 10, 2009]). Action Nos. 5 and 6 remain in Kings and Queens Counties respectively.

On March 12, 2010, the court granted GA's motion for summary judgment against East 115th Street, dismissing East 115th Street's third cause of action against GA and

holding that the builder's risk insurance policy GA issued East 115th Street was void *ab initio* due to material misrepresentations in the insurance application (*East 115th Street Realty Corp. v Focus & Struga, et al.*, Sup Ct, NY County, Mar. 12, 2010, Bransten, J., Index No. 604164/2007). Although the decision dismisses the only cause of action East 115th Street asserts against GA, co-defendants Focus & Struga, Abad, Yanoff, and Mazzocchi each asserts cross-claims against GA for indemnification and contribution in their respective answers to East 115th Street's Complaint (Focus & Struga Aff., Exs. B, D, E and F). Because the court's decision did not dismiss the co-defendants' cross-claims, consolidation would affect GA. Therefore, the court shall consider GA's opposition to Focus & Struga's motion to consolidate. However, the court shall not consider GA's argument as it pertains to East 115th Street's third cause of action against GA because such argument is moot in light of the March 12, 2010 Decision and Order.

#### **IV. Responses to Focus & Struga's Motion**

##### **A. Parties Against Consolidation for Both Discovery and Trial**

###### **1. GA & Yanoff**

Yanoff, defendant and cross-claim defendant in Action No. 1, and GA, cross-claim defendant in Action No. 1, separately oppose the motion to consolidate in its entirety. First Yanoff asserts that East 115th Street's causes of action against Yanoff and Abad (collectively

“the Insurance Defendants”) share no “plain identification between issues involved” with the issues asserted by Rivera in Action No. 5 or Cajiga in Action No. 6 (*see* Margaret McBurney’s Affirmation in Opposition of Focus & Struga’s Motion to Consolidate [“Yanoff Opp. Aff.”] ¶7). East 115th Street, plaintiff in Action No. 1, asserts claims against the Insurance Defendants alleging that they failed to procure proper builder’s risk insurance to cover East 115th Street’s losses as a result of the Building’s partial collapse and the demolition and removal of the remains of the structure. Rivera, in Action No. 5, and Cajiga, in Action No. 6, both assert causes of action based on personal injury. Yanoff argues that, while all of the actions share some relationship to the Building’s partial collapse, material and factual issues between Action No. 1 and Action Nos. 5 and 6 are sufficiently different to require the court to deny Focus & Struga’s motion to consolidate.

Second, GA and Yanoff argue that consolidation would prejudice substantial rights of the Insurance Defendants (Yanoff Opp. Aff. ¶¶ 8 - 9). They argue that, because Action No. 1 is the only case which involves insurers, consolidation of all the actions would significantly increase the Insurance Defendants’ discovery costs and complicate otherwise straightforward issues. The Insurance Defendants aver that the insurance claims of Action No. 1 are unrelated to the facts and issues of the other cases and that consolidation could result in the Insurance Defendants taking part in a significant amount of irrelevant and

expensive discovery (Yanoff Opp. Aff. ¶11; Brianne Biggiani's Affirmation in Opposition to Focus & Struga's Motion to Consolidate ["GA Opp. Aff.,"] ¶¶ 7 - 9).

GA and Yanoff further argue that the presence of an insurance company as a defendant would prejudice the Insurance Defendants at trial (Yanoff Opp. Aff. ¶11; GA Opp. Aff. ¶¶7-9). Yanoff contends that courts have recognized that the presence of insurance in a litigation could skew the jury's decision in favor of a plaintiff (Yanoff Opp. Aff. ¶8, citing *Kelly v Yannotti*, 4 NY2d 603 [1958]).

Third, GA and Yanoff argue that consolidation would prejudice all parties in Action Nos. 1 through 6. They contend that consolidation would increase the costs for all parties and create delay in the prosecution of those cases that are at a more advanced discovery and/or litigation stage. GA and Yanoff further argue that consolidation for trial purposes would add complexity to the jury's duty and may create jury confusion by increasing the number of causes of action, witnesses, evidence and parties (GA Opp. Aff. ¶¶9-10 Yanoff Opp. Aff. ¶¶10-11).

## **2. Carmen Rivera**

Rivera, plaintiff of Action No. 5, opposes consolidation for both trial and discovery purposes (Affirmation of Eric M. Baum in Opposition of Focus & Struga's Motion to Consolidate ["Rivera Opp. Aff.,"] ¶4). Rivera argues that her case is a simple personal injury case and that consolidation would complicate her case and cause jury confusion by adding

more causes of action, facts and witnesses (*id.*). Rivera further argues that consolidation would delay the prosecution of her case and increase her costs and expenses (*id.*).

### **3. Sharon Engineering, P.C.**

Sharon, defendant and third-party defendant in Action No. 1, also opposes consolidation for both trial and discovery (Affirmation of Aisha L. Joseph in Opposition to Foccus & Struga's Motion to Consolidate ["Sharon Opp. Aff.,"] ¶¶5-7). Sharon contends that consolidation is improper because: (1) East 115th Street, who asserts claims for indemnification and contribution against Sharon, would suffer prejudice by being identified as both a plaintiff and defendant at trial; and (2) the claims in the different actions are distinct and contain greatly disparate legal issues (Sharon Aff. ¶¶5-8). Sharon argues that a conglomeration of distinct causes of action, related merely because of a basis in the Building's collapse, would lead to jury confusion and result in an unfair trial (*id.* at ¶¶8-10).

## **B. Parties Against Consolidation For Trial**

### **1. East 115th Street**

East 115th Street is the plaintiff in Action No. 1, defendant in Action Nos. 2 through 6 and third-party plaintiff in Action Nos. 3, 4 and 6. East 115th Street does not oppose consolidation for discovery purposes. However, echoing Sharon, East 115th Street opposes consolidation for trial purposes. East 115th Street argues that consolidation of all six Actions

for trial will result in East 115th Street's identification as both plaintiff and defendant at trial, and that such a position could prejudice its recovery as a plaintiff (Affirmation of Alyssa E. Litman in Partial Opposition to Focus & Struga's Motion to Consolidation ["East 115th Street Opp. Aff.,"] ¶2).

## **2. Victor Gaston**

Gaston, plaintiff in Action No. 4, opposes consolidation of the Actions for trial (Affirmation of Jose Rios in Opposition to Focus & Struga's Motion for Consolidation ["Gaston Opp. Aff.,"] ¶¶2-3). Gaston argues that consolidation would prejudice his substantial rights by, in effect, creating a new case with new plaintiffs and defendants, thus interfering with his right to open and close his case (Gaston Opp. Aff. ¶¶6-7). Gaston also argues that consolidation would lead to jury confusion by adding unrelated causes of action and an increased number of witnesses. Gaston contends such complication is unwarranted and will delay prosecution of his cause of action (*id.* at ¶¶8-13).

## **C. Parties Not Opposing Consolidation**

### **1. The City of New York**

The City of New York ("NYC"), defendant in Action No. 5, does not oppose consolidation for either discovery or trial purposes. NYC does request that the case be consolidated to its court, a Differentiated Case Management Part, which it claims is the only

appropriate court in which tort claims can be brought against the City of New York (Affirmation of Megan Burrows Carpenter in Opposition of Focus & Struga's Motion for Consolidation ["NYC Opp. Aff."] ¶2).

## **2. Verizon and Jorge Cajiga**

Verizon, plaintiff in Action No. 3, and Cajiga, plaintiff in action No. 6, did not submit papers in opposition to Focus & Struga's motion and did not appear at oral argument on the motion.

## **ANALYSIS**

### **I. Standard of Law for Consolidation**

"When actions involving a common question of law or fact are pending before a court, the court, upon motion, ... 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]). "A motion to consolidate is directed to the sound discretion of the court, and the court is given wide latitude in the exercise thereof" (*Inspiration Enterprises, Inc. v Inland Credit Corp.*, 54 AD2d 839, 840 [1st Dept 1976]). "Consolidation is appropriate where it will avoid unnecessary duplication of trials, save unnecessary costs and expense and prevent the injustice which would result from divergent decisions based on the same facts" (*Chinatown Apts., Inc. v New York City Tr. Auth.*, 100 AD2d 824, 825 [1st Dept 1984]).

However, “[t]he identity of facts is insufficient to merit consolidation of the actions” if both actions, though arising out of the same transaction, do not require a showing of proof that overlaps (*Beerman v Moorhaim*, 17 AD3d 302, 302 [2d Dept 2005]).

“Consolidation is generally favored in the interest of judicial economy and ease of decision-making where cases present common questions of law and fact, ‘unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right’” (*Raboy v McCrory Corp.*, 210 AD2d 145, 147 [1st Dept 1994], quoting *Amtorg Trading Corp. v Broadway & 54th St. Assocs.*, 191 AD2d 212, 213 [1st Dept 1993]). “The burden of showing prejudice to a substantial right rests upon the party opposing a motion for consolidation” (*Hill v Smalls*, 49 AD2d 724, 725 [1st Dept 1975]).

Courts have found that substantial rights are prejudiced when: (1) there are no common facts between the cases (*Heydt Contr. v Tishman*, 163 AD2d 196); (2) the issues in the actions to be consolidated are distinct in nature (*Beerman v Morhaim*, 17 AD3d 302 [2d Dept 2005]); and (3) consolidation would result in a common defendant in all cases where “presentation of both claims to the same jury would tend to bolster each claim to defendants’ disadvantage” (*Tarshish v Assoc. Dry Goods Corp.*, 232 AD2d 246, 247 [1st Dept 1996]).

A parties substantial rights may also be prejudiced if consolidation causes a delay in trial (*see Inspiration Enterprises, Inc. v Inland Credit Corp.*, 54 AD2d 839, 840 [1st Dept 1976]). However, “mere delay [alone] is not a sufficient basis upon which to deny

consolidation” (*Raboy v McCrory Corp.*, 210 AD2d 145, 147 [1st Dept 1994]). Delay in proceedings which may result from consolidation can be remedied by directing the parties in a non-advanced action to proceed expeditiously to achieve the same case status as the action to which it is consolidated (*see Chinatown Apts., Inc.*, 100 AD2d at 825; *Tillotson v Shulman*, 73 AD2d 688, 689 [2d Dept 1979]).

An insurance entity’s substantial rights are prejudiced when consolidation would result in issues of insurance coverage being “tried before the jury that considers the underlying liability claims” (*Cruz v Taino Constr. Corp.*, 38 AD3d 391, 392 [1st Dept 2007]). “The specific knowledge of the dispute over insurance coverage would of necessity temper the thinking of the jury and unduly influence their verdict. The prejudice inherent in a situation of this sort should be avoided” (*Transamerica Ins. Co. v Tolis Inn, Inc.*, 129 AD2d 512, 513 [1st Dept 1987]).

Consolidation should be denied when it would result in jury confusion (*Skelly v Sachem Cent. Sch. Dist.*, 309 AD2d 917, 918 [2d Dept 2003]). Jury confusion could result when: (1) a party is identified as both a plaintiff and a defendant (*Geneva Temps, Inc. v New York Communities, Inc.*, 24 AD3d 332, 335 [1st Dept 2005]; *see also Bass v France*, 70 AD2d 849, 850 [1st Dept 1979]); (2) consolidation would substantially increase the amount of causes of action, witnesses and facts to be heard at trial (*Skelly*, 309 AD2d at 918); or (3) consolidation would unduly complicate the issues and dis-serve the goal of CPLR 602 to

“avoid[] unnecessary costs or delay” (*Durante v Renstar*, 76 AD2d 825, 826 [2d 1980], quoting CPLR 602 [a]).

Although any one of the above factors will allow for the denial of consolidation, courts may also review the totality of circumstances that consolidation would engender (*Skelly*, 309 AD2d at 917 [finding consolidation inappropriate where, despite common issues, there was: disparity between the cases’ stages of litigation, unwieldiness of a joint trial, risk of jury confusion and the prejudice of the parties right to a fair trial]; *Gouldsbury v Dan’s Supreme Supermarket, Inc.*, 138 AD2d 675 [2d Dept 1988]).

## **II. Consolidation is Denied for Both Trial and Discovery Purposes for All Actions**

Because the opponents to Focus & Struga’s motion to consolidate have established that consolidation for both discovery and trial purposes would prejudice the substantial rights of the parties, (*Raboy*, 210 AD2d at 147; *Hill*, 49 AD2d at 725), and because the decision regarding consolidation is in the discretion of the court, (*Inspiration Enterprises, Inc.*, 54 AD2d at 840), Focus & Struga’s motion to consolidate Action Nos. 2 through 4 with Action No. 1 and remove and consolidate Action Nos. 5 and 6 with Action No. 1 is denied in its entirety. Consolidation of these actions would not would not serve the purpose for which CPLR 602[a] was enacted (*Skelly*, 309 AD2d at 917).

### **A. The Insurance Defendants**

GA and Yanoff have established that consolidation would prejudice substantial rights of the Insurance Defendants. They have shown that: (1) the issues of insurance coverage are distinct in nature from the personal injury, labor law and property damage issues (*Beerman*, 17 AD3d at 203); (2) consolidation of all the actions would complicate straightforward insurance issues leading to jury confusion (*Skelly*, 309 AD2d at 918; *Durante*, 76 AD2d at 826); and (3) consolidation would increase discovery costs and may require the Insurance Defendants to take part in costly and voluminous discovery which is not relevant to the causes of action alleged against them (*Durante*, 76 AD2d at 826). Consolidation for trial purposes would also prejudice the Insurance Defendants because the jury's knowledge of existing or disputed insurance coverage may affect the "thinking of the jury and unduly influence their verdict" (*Transamerica Ins. Co.*, 129 AD2d at 513).

### **B. East 115th Street**

East 115th Street and Sharon have also established that consolidation of Action Nos. 1 through 6 would prejudice substantial rights of East 115th Street at trial. They have shown that the consolidated case would identify East 115th Street as both plaintiff and defendant to the jury due East 115th Street being plaintiff in Action No. 1 and defendant in Action Nos. 2 through 6. Such dual identification confuse a jury and could prejudice East 115th Street's

recovery as plaintiff (*Geneva Temps, Inc.*, 24 AD3d at 335; *M&K Computer Corp. v MBS Indus., Inc.*, 271 AD2d 660, 660 [2d Dept 2000]).

### **C. Rivera and Cajiga**

Yanoff and Rivera have established that consolidation of Action Nos. 5 and 6 with Action Nos. 1 through 4 for both trial and discovery purposes would prejudice Rivera and Cajiga's substantial rights. They have shown that: (1) the legal issues to be resolved for Rivera and Cajiga are distinct from those in the other cases – personal injury as opposed to property damage and breach of contract (*Beerman*, 17 AD3d at 303; *Heydt Contracting Corp.*, 163 AD2d at 197); (2) consolidation would complicate Rivera and Cajiga's cases and confuse the jury by adding unrelated issues, causes of action, witnesses and facts at trial (*Skelly*, 309 AD2d at 918; *Durante*, 76 AD2d at 825); and, (3) like the prejudice upon consolidation to the Insurance Defendants, consolidation of Rivera's and Cajiga's cases would protract those parties' discovery, substantially increase their discovery costs and may result in Rivera and Cajiga taking part in voluminous and irrelevant discovery (*Durante*, 76 AD2d 826; *Skelly*, 309 AD2d at 918).

Moreover, Rivera's claim lacks common facts with all of the other actions (*Heydt Contracting Corp.*, 163 AD2d at 196). Unlike the other five actions, Rivera's cause of action arose after the Building's March 27, 2007, partial collapse. Her claim seeks damages for a trip and fall on a sidewalk/construction path adjacent to the Building ten days later, not with

the collapse itself (*see* Sharon Opp. Aff. ¶11). Thus, Rivera's action does not require a showing of proof which overlaps with the other cases (*Beerman*, 17 AD3d at 302).

#### **D. Totality of Circumstances**

GA, Yanoff, Rivera, Sharon, and Gaston have also shown that the totality of circumstances require denial of consolidation (*Skelly*, 309 AD2d at 917; *Gouldsbury*, 138 AD2d at 675). Although delay is generally insufficient to deny consolidation, (*Raboy*, 210 AD2d at 147), the court considers delay when determining motions to consolidate (*Skelly*, 309 AD2d at 917; *Gouldsbury*, 138 AD2d at 675). Here, all six actions are at different stages of discovery and consolidation would result in delay of those cases whose discovery is further advanced. Consolidation would cause delay in the prosecution of numerous claims.

Second, Consolidation of Action Nos. 1 through 6 would lead to jury confusion. Consolidating all actions would result in a substantial amount of claims, counterclaims, defenses, parties, witnesses, and evidence. Such a trial could lead to jury confusion and possibly prejudice of the parties right to a fair trial (*Skelly*, 309 AD2d at 917 [finding consolidation inappropriate where, despite common issues, there was: disparity between the cases' stages of litigation, unwieldiness of a joint trial, risk of jury confusion and the prejudice of the parties right to a fair trial]; *Gouldsbury v Dan's Supreme Supermarket, Inc.*, 138 AD2d 675 [2d Dept 1988]).

For the reasons stated above, Focus & Struga's motion to consolidate Action Nos. 2 through 4 with Action No. 1 and remove and consolidate Action Nos. 5 and 6 with Action No. 1 is denied in its entirety.<sup>2</sup> Focus & Struga's motion for a temporary restraining order to stay discovery of the actions is denied as moot.

Accordingly, it is

ORDERED that defendant Focus & Struga's motion to consolidate the actions under Index Nos.: 114029/2007, 107808/2008 and 112005/2008, pending in Supreme Court, New York County, with this action, pursuant to CPLR 602 [a], is denied; it is further

ORDERED that defendant Focus & Struga's motion to remove the action pending in Supreme Court, Kings County, under Index No. 18874/2008 and the other pending in Supreme Court, Queens County, under Index No. 20149/2008, to Supreme Court, New York County, and to consolidate those actions with the instant matter, pursuant to CPLR 602 [b], is denied; and it is further

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<sup>2</sup> This decision does not, in any way, effect the prior consolidation of Action Nos. 2, 3 and 4 before the Hon. Marcy Friedman (*see* Short Form Order, 114029/2007, Friedman, J., Mot. Seq. Nos. 001 [dated Nov 14, 2008] and 002 [dated Feb 10, 2009]).

ORDERED that defendant Focus & Struga's motion for a temporary restraining order staying all current discovery proceedings in all six actions until a decision is reached on this motion pursuant to CPLR 2201 is denied as moot.

This constitutes the Decision and Order of the Court

Dated: New York, New York  
March 29, 2010

**FILED**  
MAR 30 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

ENTER

  
\_\_\_\_\_  
Hon. Eileen Bransten