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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

915 2nd PUB INC., d/b/a THADY CON'S BAR & RESTAURANT and 915 SECOND AVENUE REALTY CORP.,

Plaintiffs,

Index No.: 604047/07

-against-

QBE INSURANCE CORPORATION,

Defendant.

The following papers, numbered 1 to 2 were read on this motion by defendants(s) for an order of consolidation with a second, purportedly related, insurance subrogation action (motion sequence number 001).

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ☒ No

In this commercial contract action, defendant moves for an order of consolidation with a second, purportedly related, insurance subrogation action (motion sequence number 001). For the following reasons, this motion is denied.

BACKGROUND

Plaintiff 915 Second Avenue Realty Corp. (915 Realty) is the owner of a building (the Building) located at 915 2nd Avenue in the County, City and State of New York. *See* Notice of Motion, Exhibit 1 (complaint), ¶ 2. Co-plaintiff 915 2nd Pub Inc., d/b/a Thady Con's Bar & Restaurant (Thady Con's), a licensed New York State corporation, is the Building's commercial tenant, and formerly operated a well-known Irish bar/restaurant there. *Id.*, ¶ 1. Defendant QBE Insurance Corporation (QBE) is a New York State licensed corporation that engages in the

commercial property and liability insurance business. *Id.*, ¶¶ 3-7.

On March 11, 2005, Thady Con's purchased a commercial property insurance policy from QBE that named itself and 915 Realty as insureds (the Policy). *Id.*, ¶ 8. On December 15, 2005, the Building was extensively damaged as a result of demolition and excavation work that was being performed in the adjacent lot. *Id.*; Exhibit 1, ¶ 11. As a result, Thady Con's was forced to close, and all of the Building's residential tenants were ordered to vacate the premises by the New York City Department of Buildings. *Id.*, ¶ 12. Both Thady Con's and 915 Realty suffered an immediate loss of business income thereafter. *Id.*, ¶ 13. Accordingly, both plaintiffs immediately contacted QBE to assert claims pursuant to the Policy. *Id.*, ¶ 16. QBE determined that plaintiffs had suffered property damage and business losses, and initially paid Thady Con's the sum of $100,000.00; however, plaintiffs assert that that sum is insufficient to compensate all of their losses, and that QBE has failed to make all of the contractually required payments specified by the terms of the Policy. *Id.*, ¶¶ 17-22. On March 27, 2006, 915 Realty sold the Building to non-party 49th East Develop, LLC for $2 million. *See* Memorandum of Law in Opposition to Motion (NY Concrete), Exhibit C.

Plaintiffs commenced this action (the first action) on December 6, 2007, by filing a complaint that sets forth causes of action for: 1) breach of contract; and 2) legal fees and other money damages. *See* Notice of Motion, Exhibit 1. QBE filed an answer on January 28, 2008. *Id.*; Exhibit 2. On July 2, 2008, QBE also filed a separate action in this court, bearing index no. 109277/08 (the second action), that named itself as the subrogor for the plaintiffs herein, and that named as defendants 49 East Develop, LLC (49 LLC), 49th East Develop, LLC (49th LLC), E&S Development Corp. (E&S Corp.), E&S Development and Properties, LLC (E&S LLC), Emes Construction Corp. (Emes) and New York Concrete (NY Concrete). *Id.*; Exhibit 3. QBE's complaint in the second action sets forth twelve causes of action for negligence. *Id.* All of the defendants in the second action filed timely answers. *Id.*; Exhibits 4-7.

QBE now moves to consolidate the first action with the second action (motion sequence number 001). Although plaintiffs have not submitted any opposition papers, all of the defendants named in the second action, except Emes, oppose QBE's motion.

DISCUSSION

CPLR 602 (a) provides that:

> 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.

Although the decision as to whether or not to consolidate rests within the court's sound discretion, "there is a preference for consolidation in the interest of judicial economy where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation [would] prejudice a substantial right." *See Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 334 (1st Dept 2005), citing *Raboy v McCrory Corp.*, 210 AD2d 145, 147 (1st Dept 1994).

Here, QBE cites the holding of the Appellate Division, First Department, in *Williams v Rockefeller Ctr. Props.* (282 AD2d 285, 286 [1st Dept 2001]), which upheld a trial court's order to consolidate two actions on the grounds that "[b]oth actions were brought by the same plaintiff, arose out of the exact same incident, and involve the same causes of action." QBE then argues for consolidation on the ground that the same factors exist here. *See* Notice of Motion, Christofides Affirmation, ¶ 18. QBE also asserts that "none of the parties in either of the two actions will suffer any prejudice if the two actions are consolidated," but that "prejudice will accrue to [QBE] if the two actions are not consolidated." *Id.*, ¶ 20.

49th LLC responds that there are no common issues of law or fact as between the first

and second actions herein.[1] *See* Rosinsky Affirmation in Opposition, ¶ 6. 49th LLC specifically notes that the first action sounds in breach of contract whereas the second action sounds in negligence. *Id.*, ¶¶ 7-8. 49th LLC argues that well-settled New York State case law recognizes that such actions should be tried separately because of the prejudice to an insurer that inherently exists where a jury trying the negligence claims is aware of the existence of insurance coverage. *Id.*, ¶¶ 10-11. 49th LLC's reading of the law appears to be correct. *See e.g. Cruz v Taino Constr. Corp.*, 38 AD3d 391, 392 (1st Dept 2007), quoting *Medick v Millers Livestock Mkt.*, 248 AD2d 864, 865 (3d Dept 1998), and citing *Kelly v Yannotti*, 4 NY2d 603, 607 (1958). 49th LLC also argues that it would be prejudiced by the consolidation of the first and second actions herein by the likelihood of jury confusion that would result from the different legal and factual issues that must be determined in the first and second actions. *See* Rosinsky Affirmation in Opposition, ¶¶ 12-13. NY Concrete raises the same arguments regarding lack of common issues of law or fact and jury confusion. *See* Memorandum of Law in Opposition to Motion (NY Concrete), at 9-11, 12-15. NY Concrete also notes that QBE's assertion that it will suffer prejudice if the instant motion is denied is merely a conclusory statement that QBE has failed to explain. *Id.*, at 11.

In its reply papers, QBE argues that it will be prejudiced by the failure to consolidate the first and second actions herein because of the operation of the applicable statutes of limitations. *See* Christofides Reply Affirmation, ¶¶ 4-9. QBE specifically asserts that a two-year statute of limitations applied to plaintiffs' breach of contract claim in the first action, while a three-year statute of limitations applied to QBE's subrogation claim in the second action. *Id.*, ¶¶ 4-5. QBE then asserts that, as a result of plaintiffs' delays in prosecuting their first action breach of

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[1] 49 LLC, E&S Corp. and E&S LLC join in 49th LLC's opposition without submitting any further argument. *See* Rosenberg Affirmation in Opposition, ¶ 2.

contract claim, the statute of limitations has now expired on QBE's second action subrogation claim. *Id.*, ¶ 6. QBE claims that it was forced to commence the second action "prematurely, based only on the monies [for which] it [had] already indemnified [plaintiffs]," and not for the full amount of the claim. *Id.*, ¶ 7. Finally, QBE argues that, should the court deny its consolidation motion, "QBE would be in the prejudicial position of going to trial with only a portion of its total losses being considered as damages and unable to amend its complaint to seek the full potential claim against its insured's tortfeasors." *Id.*, ¶ 8. After careful consideration, however, the court rejects QBE's argument.

In the first place, all of QBE's allegations appear to be incorrect. Plaintiff's cause of action for breach of contract has a six-year statute of limitations, not a two-year statute of limitations. CPLR 213. QBE had asserted that the Policy specified a shorter time period, however, QBE failed to present a copy of the Policy to bear out its allegation. Further, there is no basis for concluding that the statute of limitations has expired on QBE's subrogation claim. Rather, the copies of the pleadings submitted herewith make it clear that both the first action and the second action were commenced in a timely fashion. *See* Notice of Motion, Exhibits 1, 3. Finally, QBE has presented no evidence to support its conclusory assertion that plaintiffs have improperly delayed in prosecuting the first action.

In the second place, QBE's reading of the legal issues appears to be mistaken. QBE cites no statute or case law, nor is the court aware of any, which would curtail QBE's right to amend its pleadings in the second action to effect a change in the amount of damages it seeks in its prayer for relief. Indeed, if such a limit existed in the law, it would impose an artificial status quo that would also, perforce, limit plaintiffs' ability to recover more than the $100,000.00 amount that QBE has already paid, regardless of whether plaintiffs ultimately prevail in the first action. However, the law imposes no such limitation. Instead, as 49th LLC's correctly points out, the law recognizes that scenarios in which jurors are asked to determine questions of

liability for negligence under circumstances where they are aware that insurance coverage exists to pay for such liability are inherently prejudicial. *Cruz v Taino Constr. Corp.*, 38 AD3d at 392. Because 49th LLC has, thus, demonstrated that it and the other second action defendants are the parties likely to suffer prejudice, while QBE has offered only a conclusory claim to the contrary, the court finds that QBE's motion to consolidate should be denied.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 602, of defendant QBE Insurance Corporation is, in all respects, denied.

This constitutes the Decision and Order of the Court.

Dated: 9-27-10

Enter:

PAUL WOOTEN J.S.C.

Paul Wooten
J.S.C.

FILED
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