

Gallipoli v Russo

2010 NY Slip Op 33650(U)

November 16, 2010

Supreme Court, Suffolk County

Docket Number: 08-39607

Judge: Joseph C. Pastorella

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

P R E S E N T :

COPY

Hon. JOSEPH C. PASTORESSA
Supreme Court

Mot. Seq. # 002 - MD

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THE TRUST U/W/O NICK GALLIPOLI,	:	MELTZER, LIPPE, GOLDSTEIN & BREITSTONE
	:	Attorney for Plaintiff
Plaintiff,	:	190 Willis Avenue
- against -	:	Mineola, New York 11501
	:	
ERIC RUSSO, ESQ. and VANBRUNT, JUZWIAK :	:	L'ABBATE, BALKAN, COLAVITA & CONTINI
& RUSSO, P.C.,	:	Attorney for Defendants
	:	1001 Franklin Avenue
Defendants.	:	Garden City, New York 11530
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Upon the following papers numbered 1 to 31 read on this motion to stay the action; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 13 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 14-24; Replying Affidavits and supporting papers 25-31; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this pre-note of issue motion (002) by the defendants, Eric Russo. Esq. and Vanbrunt, Juzwiak & Russo, P.C., pursuant to CPLR 2201 for an order staying this action pending the conclusion of the matter entitled *R.D. Best Land Contracting Corp. v Trust Under the Will of Nick Gallipoli, et al*, Index No. 08-14207, is denied; and it is further

ORDERED that the moving defendants are directed to serve a copy of this order with notice of entry upon the plaintiff and upon the Clerk of the Calendar Department within thirty days of the date of this order, and the Clerk is directed to schedule this action for a preliminary conference within sixty days of the date of this order, on notice to all parties.

COMPLAINT IN INSTANT ACTION

The complaint in the instant action sets forth that the Trust is the owner of certain premises located along Strongs Road between the intersection of Orchard Road and Strongs Lane, East Patchogue, New York. On or about April 2006, the Trust entered into a verbal agreement with R.D. Best Land Construction Corp. (R.D. Best) by and through Robert Dalcamo (Dalcamo) for a month to month tenancy of one of the eight acres of land on the premises for the purpose of operating a C&D processing facility. During the term of the lease, R.D. Best is alleged to have permitted the dumping of construction and demolition debris (C&D) onto the premises by multiple companies and/or entities. Such pile eventually grew, giving rise to complaints from the neighbors and the issuance of a summons upon the Trust by the Town of Brookhaven on or about June 7, 2006. It is claimed that R.D. Best and Dalcamo did not have the requisite registration to operate the processing facility.

On or about June 2006, the plaintiff Trust alleges it retained the defendants, Russo and VJ&R, to represent it in answering the summons of the Town of Brookhaven and to assist the Trust in addressing any problems created by R.D. Best's tenancy, and that the defendants knew or should have known that R.D. Best's operations violated State Laws and DEC regulations intended to regulate the construction and demolition debris (C&D) processing facilities. In about late September 2006 and early October 2006, representatives of the DEC inspected R.D. Best's facility following complaints of mud from the C&D allegedly running onto Strongs Road and into State protected freshwater wetlands. On or about December 14, 2006, Russo and VJ&R were notified by the Assistant Town Attorney that the subject of complaints to the Town was the pile located adjacent to the wetlands and that the proximity of the pile to the wetlands was an environmental concern. On December 14, 2006, upon the advice of Russo and VJ&R, Nancy Gallipoli-Barrie, a trustee of the Trust, entered a plea of guilty to trespassing and accepted certain Conditions of Discharge imposed by the Court, including that the large dirt pile adjacent to the wetlands be removed within ninety days of December 14, 2006. On or about December 18, 2006, the Trust informed Dalcamo of the Conditions of Discharge and gave him a copy of the same. On or about December 29, 2006, Russo and VJ&R caused a 30 Day Notice to Tenant to be served upon Dalcamo, along with a copy of the Conditions of Discharge. The Notice, however, did not specify that the Trust expected Dalcamo to remove the pile. The Notice further stated, "As there is no lease in effect at this time between the Landlord and the Tenant you are required to quit and vacate the Subject Premises to the Landlord, on or before February 1, 2007, otherwise the undersigned will commence summary proceedings against you to remove you from the subject premises." It is claimed that the Notice did not direct Dalcamo to remove the pile.

At some time in January 2007, Russo and VJ&R met with the attorney for Dalcamo, Richard Scheyer, Esq., out of the presence of Nancy Gallipoli-Barrie who was made to wait in the hallway. During that meeting, Russo and VJ&R were advised by Scheyer that Dalcamo was working for the FBI as an undercover agent and that the FBI wanted Dalcamo to continue accepting deliveries of C&D materials to the premises. It is claimed that although Russo and VJ&R met with one or more FBI agents, that they failed: to obtain from the FBI an agreement to defend and indemnify the Trust in the event that Dalcamo did not remove all of the material being trucked to the premises; did not provide the Trust with immunity from the ongoing violations; agreed not to commence an action to evict Dalcamo without the Trust's consent; failed to advise the Trust of the investigation; failed to discuss with the Trust the economic impact the Trust would incur if Dalcamo continued to allow C&D material to be brought into the facility and did not remove the debris from the premises; and did not protect the Trust from ongoing and increasing liability. The Trust alleges that at no time did it consent to the dumping of the C&D material onto the premises and that Russo and VJ&R never attempted to compel Dalcamo or R.D. Best to lawfully remove the materials from the premises.

It is further asserted that after an Order on Consent was sent to the Trust on or about May 25, 2007 from the DEC Regional Attorney, that Russo and VJ&R rejected the proposed Order on Consent without attempting to assure that the Trust's premises would be brought into compliance with the environmental laws cited by counsel for DEC. Dalcamo continued to bring in additional truckloads of materials, however, Russo and VJ&R failed to seek injunctive relief for the Trust or post a bond to protect the Trust's interest. It was not until August 1, 2007 that Russo and VJ&R sought injunctive relief to enjoin Dalcamo from bringing any additional truckloads of materials onto the Trust's premises. As a result of the foregoing, the Trust claims it was forced to expend money for the damages Russo and VJ&R failed to prevent.

The first cause of action is for legal malpractice based upon the failures set forth above. The second cause of action is also for legal malpractice premised upon the defendants agreeing, without the consent of the Trust, not to take any action that would interfere with Dalcamo's and R.D. Best's operation and the failure to

disclose to the plaintiffs of the agreement. The third-cause of action is premised upon Russo and VJ&R's breach of fiduciary duty to the Trust.

COMPLAINT IN RELATED ACTION

In the related action, *R.D. Best Land Contracting Corp. v Trust Under the Will of Nick Gallipoli, et al*, the plaintiff, R.D. Best claims it was wrongfully denied and deprived access to fill and its byproducts for resale which it stored on property owned by the defendants, Trust Under the Will of Nick Gallipoli (Trust), the Individual Defendants and G & M Dege, Inc. (Dege). R.D. Best claims it was a lawful tenant occupying a one-acre portion of the premises owned by the defendant Trust under an oral month-to-month leasing agreement for the purpose of screening and storing fill and its byproducts for resale, for an agreed-upon rent of \$2,200 per month. In or about July 2006, the plaintiff leased an additional acre from the defendant Trust at an additional rent of \$1,000 per month. In or about May 2007, the plaintiff leased an additional acre from the defendant Trust at an additional rent of \$1,400 per month. On the first cause of action R.D. Best asserts that it owned approximately 100,000 cubic yards of clean fill for which it had a buyer to purchase for \$300,000 and that the defendants prevented and hindered the plaintiff from removing the fill despite the plaintiff's demands causing the plaintiff to be damaged in the amount of \$300,000. On the second cause of action, the plaintiff claims that upon voluntarily vacating the defendants' premises, it left behind a screening plant (equipment) which the defendants, despite the plaintiff's demands, refused to return causing the plaintiff to be damaged in the amount of \$80,000. On the third cause of action, the plaintiff claims that because the defendants have failed to return the screening plant that the plaintiff has sustained loss of income and profits in an amount to be determined.

By way of the defendants' answer dated July 3, 2008, the defendants asserted a first counterclaim in which it is claimed that R.D. Best, by and at the direction of Robert Dalcamo (Dalcamo), illegally dumped or caused to be dumped onto the Trust's property approximately 100,000 cubic yards of dirt, debris and semi-contaminated material causing, constituting a series of tortuous acts against the Trust's property causing the defendants to expend not less than \$7,000,000 in remediation liabilities. By way of a second counterclaim the defendant Trust seeks common law indemnification against the defendants for breach of the duty owed to the Trust by R.D. Best and Dalcamo which breach caused the Trust to expend environmental remediation expenses and liabilities. In its third counterclaim, the Trust asserts that R.D. Best's and Dalcamo's actions created a public nuisance on the Trust's property wherein Dalcamo and R.D. Best are responsible to reimburse the Trust for all expenses and liabilities caused by the nuisance and need to remove approximately 100,000 yard of unclean fill and debris from the Trust's property pursuant to DEC supervision and/or approval.

STAY

In the instant action, the defendants, Russo and VJ&R, seek a stay upon the basis, inter alia, that there are overlapping common issues of fact; a determination of the prior action may dispose of or limit issues which are involved in the subsequent action; to avoid unnecessary risk of inconsistent adjudications; to avoid the waste of judicial resources; and that a preliminary conference was conducted in the first action on December 22, 2008 and no preliminary conference has been conducted in the instant action, thus prejudicing Russo and JV&R.

The CPLR 2201 provides "Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." "When a party seeks the stay of an action pending the outcome of another action, complete identity of parties, causes of action and judgment sought are required.... Although these elements are not specifically set forth in CPLR 2201, they are

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generally adhered to,” *American International Group, Inc. v Greenberg et al*, 2008 NY Slip Op 33102 U, 2008 NY Misc Lexis 8086 [Supreme Court of New York, New York County 2008], citing *952 Associates, LLC v Palmer*, 52 AD3d 236 [1st Dept 2008]; *Mt. McKinley Ins. Co. v Corning, Inc.*, 33 AD3d 51 [1st Dept 2006]; *Somoza v Pechnik* 3 AD3d 394 [1st Dept 2004]; see also, *National Management Corporation v Adolphi et al*, 277 AD2d 553 [3rd Dept 2000]. “In general, only where the decision in one action will determine all the questions in the other action, and the judgment on one trial will dispose of the controversy in both, is a stay justified; this requires a complete identity of the parties, the causes of action and the judgment sought,” *Greenpoint Mortgage Funding, Inc. v Commonwealth Land Title Insurance Company*, 14 Misc3d 1227A [Supreme Court of New York, Nassau County 2007]; *952 Associates, LLC v Palmer*, supra; *Kubricky Construction Corp. v Bucon, Inc.*, 282 AD2d 796 [3rd Dept 2001]. If only a portion of the questions involved in the last action will be settled in the first, a stay will not be granted, *Rosenberg v Slotchin et al*, 181 AD137 [3rd Dept 1917].

It is determined that there is not a complete identity of parties, causes of action or judgment sought in this action and the action entitled *R.D. Best Land Contracting Corp. v Trust Under the Will of Nick Gallipoli, et al*, Index No. 08-14207, although there is undoubtedly overlapping facts, conduct and peculiar facts giving rise to issues in both actions. The issue in this instant action is whether or not the defendants, Russo, Vanbrunt, Juzwiak & Russo, were negligent in their representation of the Trust and departed from the accepted standards of practice in their legal representation of the plaintiffs and whether they breached their fiduciary duty to the Trust. In the underlying action, the plaintiff, R.D. Best, alleges the Trust and individual members and G&M Dege hindered it from removing the fill despite the demands of R.D. Best causing it to be damaged in the amount of \$300,000; that upon voluntarily vacating the premises, it left behind a screening plant (equipment) which the defendants, despite the plaintiff’s demands, refused to return causing the plaintiff to be damaged in the amount of \$80,000; and because the defendants have failed to return the screening plant that R.D. Best has sustained loss of income and profits in an amount to be determined. Based upon the foregoing, although there may be some overlapping factual issues, the causes of action are entirely different; the parties are not identical as Russo and VJ&R are not parties to the first action; different judgments are sought in each action; and there are no common issues of law to be applied to the causes of action pleaded in both actions, see, *Belopolsky et al v Renew Data Corp. et al*, 41 AD3d 322 [1st Dept 2007]; compare, *Global Reinsurance Corporation - U.S. Branch et alv Equitas Ltd., et al*, 20 Misc3d 1115A [Supreme Court of New York, New York County 2008].

“While a motion for the stay of an action pending the determination of another action is primarily addressed to the discretion of the court, a party is generally entitled to an unrestrained right to resort to the courts for prompt enforcement of substantial contractual rights. The possibility or actuality of two trials is not of importance, *Pierre Associates, Incorporated v Citizens Casualty Company of New York*, 32 AD2d 495 [1st Dept 1969]. Therefore, defendants’ concerns of preserving judicial resources is without merit as the possibility or actuality of two trials is not of importance and is not a determinative factor in determining whether a stay is warranted in this action.

It is determined that the prejudice of a delay to the plaintiffs in the instant action occasioned by the institution of a stay outweighs any discernible benefit to the defendants Russo and VJ&R, see, *Wells v St. Vincent’s Hospital*, 199 AD2d 27 [1st Dept 1993]. Although counsel for Russo and VJ&R asserts that the preliminary conference in the other action pending was conducted December 22, 2008, thereby prejudicing them in this action, this court takes notice that depositions have not been conducted and discovery is not complete in that other action. Therefore, counsel’s argument that the other action is ready to be placed on the trial calendar, which would cause them prejudice, is without basis. Counsel for Russo and VJ&R offers no explanation why a preliminary conference has not yet been held in this instant action which is two years old. In

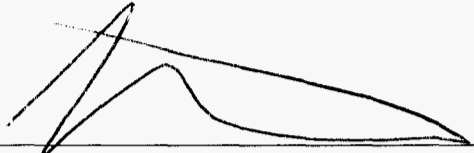
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that depositions have not been conducted and discovery is not complete in either action, prejudice is thereby eliminated to the defendants based upon the stages of the proceedings.

Based upon the foregoing, it is determined that the defendants in the instant action, Russo and VJ&R, have not demonstrated entitlement to a stay of the action.

Accordingly, motion (001) is denied.

Dated: November 16, 2010



HON. JOSEPH C. PASTORESSA

____ FINAL DISPOSITION X NON-FINAL DISPOSITION