

**Virginia Surety Co., Inc. v Travelers Prop. Cas. Co.
of Am.**

2010 NY Slip Op 33789(U)

June 28, 2010

Sup Ct, New York County

Docket Number: 602377/09

Judge: Joan A. Madden

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

PRESENT:HON. JOAN A. MADDEN
Justice

PART 11

**VIRGINIA SURETY COMPANY, INC.,
a/s/o BOVIS LEND LEASE LMB, INC.,**

Index No. **602377/09**

Plaintiff,

MOTION DATE: 3-18-10

- v -

MOTION SEQ. NO.:001

**TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA and FUJITEC
AMERICA, INC.,**

MOTION CAL. NO.:

Defendants.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: [] Yes [x] No

Defendant Fujitec America, Inc. (“Fujitec”) moves pursuant to CPLR 602 (a) to consolidate the above captioned action with Bovis Lend Lease, LMB, Inc. and Zurich American Ins. Co. v. Virginia Surety Insurance Company; Index No. 107326/07 (hereinafter “the insurance action”). Bovis and Virginia Surety Insurance Company Inc’s (“Virginia Surety”), as plaintiff in the instant action, oppose the motion, which is denied.

The instant action involves Virginia Surety’s efforts, as subrogee for Bovis Lend Lease, LMB (“Bovis”), to recover to certain settlement moneys paid out in settlement of claims of plaintiffs in the underlying personal injury action. The underlying personal injury action arose out of December 1, 2005 elevator accident that occurred while work was being performed on a

construction project at 9 West 31st Street, New York, NY. Bovis was the construction manager on the project. The construction elevator at the project was installed and maintained by Fujitec. Travelers Property Casualty Company of America (“Travelers”) is the insurer for Fujitec.

The plaintiffs in the personal injury action were passengers in the elevator at the time of the accident. With the exception of plaintiff Nellie Rodriguez (“Rodriguez”), all of the plaintiffs were employees of one of the subcontractors on the project, GM Crocetti Flooring, Inc. (Crocetti). Virginia Surety issued an insurance policy to Crocetti, which named Bovis as an additional insured, “with respect to liability arising out of ‘your’ [i.e. Crocetti’s] work.” Virginia Surety paid the claims on behalf of Bovis to all of the plaintiffs except for Rodriguez, asserting that Rodriguez’s claim did not arise out of Crocetti’s work since Rodriguez was not a Crocetti employee.

The instant action seeks (1) indemnity against Fujitec based on an indemnification clause in its contract with Bovis, (2) a declaration that Travelers must defend and indemnify Bovis in respect to a claim by Rodriguez, (3) damages for breach of the insurance contract issued by Travelers, and (4) damages in connection with Fujitec’s breach of its duty of due care in procuring insurance.

In the insurance action, Bovis and its insurer Zurich America Insurance Company, Inc., are suing Virginia Surety, Crocetti’s insurer, for defense and indemnity with respect to the remaining claim as to Rodriguez, the one injured party who was not employed by Crocetti, on the grounds that Crocetti is responsible for the accident.

Fujitec argues that consolidation of the two actions is appropriate as the actions raise common issues of fact, including issues regarding responsibility for the underlying elevator accident, and that consolidation will promote judicial economy and preclude inconsistent verdicts.

Virginia Surety counters that the two actions do not share common questions of law and fact and involve completely dissimilar claims brought by different parties. In particular, Virginia Surety argues that contrary to Fujitec’s argument there is no danger of inconsistent verdicts as it

is not seeking to place fault for the elevator accident on two different parties. With respect to the instant action, Virginia Surety asserts that it is not attempting to demonstrate fault but only that the accident “arose out of” Fujitec’s work.

Bovis, as a plaintiff in the insurance action, argues that consolidation will prejudice it as in the instant action, Virginia Surety, as Bovis’ subrogor seeks to show that the accident arose out of Fujitec’s work, which determination, it argues, involves exonerating Crocetti. On the other hand, Bovis argues that, in the insurance action, in order for it, as a construction manager, to obtain coverage from Virginia Surety (as an additional insured under Crocetti’s policy) Bovis must argue that Crocetti was responsible for the accident and Rodriguez’s injuries. Bovis further argues that consolidation would create a conflict of interest since both Travelers and Virginia Surety have agreed to and have been defending Bovis in the underlying personal injury action. In addition, Bovis argues that the two actions are at different stages procedurally since in the insurance action, discovery is complete except one deposition and the this action has been recently commenced.

CPLR 602(a) permits the court to order consolidation or to permit a joint trial of pending actions that involve common questions of law and fact. See Williams v. Rockefeller Center Properties, 282 AD2d 285, 286 (1st Dept 2001). However, even when there are common questions of law and/or fact when “individual issues predominate” concerning the circumstances of each case, consolidation is not appropriately granted. Bender v. Underwood, 93 AD2d 747 (1st Dept 1983). Moreover, when the actions sought to be consolidated are at different stages procedurally, the court may refuse to consolidate the actions. Goldman v. Rosen, 15 AD3d 321 (1st Dept 2005).

Under this standard, consolidation of the Bovis action and the instant action should be denied without prejudice to renewal. Contrary to Virginia Surety’s position, the two actions share a common factual basis as they arose out of the same elevator accident and both may involve a factual determination as to how the accident occurred. However, this may not require that inconsistent positions be taken by Bovis or Virginia Surety since the accident could have

arisen out of Fujitec's work and also have been the result of Crocetti's negligence or otherwise have arisen out of Crocetti's work such that Rodriguez's claim is covered by the Virginia Surety policy with Crocetti naming Bovis as an additional insured. In addition, only the factual issues will be submitted to the jury so that the different legal standards involved will not cause jury confusion.

That being said, however, since all of the issues are not framed at this point, and given the different stages of discovery of the two actions, consolidation should be denied at this juncture. In particular, while the insurance action, which seeks a declaratory judgment, is almost trial-ready, the instant action was recently commenced, so that consolidation may potentially result in an unwarranted delay of the trial in the insurance action which concerns the sole issue of whether Rodriguez claim arose out of Crocetti's work within the meaning of the Virginia Surety policy with Crocetti. Kramer Bros. Freight Lines, Inc. v. M& C Transfer, 15 AD2d 646; Goldman v. Rosen, 15 AD3d 321.

In view of the above, it is

ORDERED that Fujitec's motion to consolidate is denied without prejudice to renewal; and it is further

ORDERED that the parties in the above-referenced action shall appear for a preliminary conference on July 8, 2010 at 9:30 am.

Dated: June 18, 2010



HON. JOAN A. MADDEN
J.S.C.
J.S.C.

Check one: [] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

FILED
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