

Velez v Captain Luna's Mar., Inc.

2011 NY Slip Op 31285(U)

May 13, 2011

Sup Ct, Queens County

Docket Number: 31810/2007

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

----- x Action No. 1
JULIO VELEZ Index No.: 31810/2007
Plaintiff, Motion Date: 04/28/11
- against - Motion No.: 39
CAPTAIN LUNA'S MARINA, INC., CAPTAIN Motion Seq.: 5
MIKE, JOHN LUNA, VIVA EMPANADA, BABY
LUNA, SPLASH DRY CLEANING, QUEENS BAY
REALTY CORP., MIKE TANNON, CROSSBAY
FISHING STATION CORP., BENEFICIA INC.
D/B/A/SPLASH LAUNDROMAT and MLC
FISHING, INC.,

Defendants.

----- x
JULIO A,. VELEZ, Action No. 2
Plaintiff, Index No. 22620/2010

-against-

CLARA DECANDIA AS SURVIVING JOINT
TENANT BY THE ENTIRETY OF JOSEPH
DECANDIA, DECEASED, CLARA C. DECANDIA
REVOCABLE TRUST and ROMA VIEW CATERING,

Defendants.

-----x
The following papers numbered 1 to 20 were read on this motion by
defendant BENEFICIA INC. d/b/a/ SPLASH LAUNDROMAT s/h/a SPLASH
DRY CLEANING and cross-motion of defendant CAPT. MIKE'S MARINA
CORP. s/h/a CAPTAIN MIKE, MIKE CANON s/h/a/ MIKE TANNON, MLC
FISHING, INC. and cross-motion of the defendant VIVA EMPANADA all
for an order pursuant to CPLR 602 consolidating Action No. 1 with
Action No. 2:

Papers
Numbered

Defendant BENEFICIA, INC. Notice of Motion-Affirmation-Affidavits-Service-Exhibits.....	1 - 5
Defendant VIVA EMPANADA's cross-motion-Affidavits.....	6 - 9
Defendant CAPT. MIKE'S Cross-Motion-Affidavit.....	10 - 12
Defendant DECANDIA Affirmation in Opposition.....	13 - 15
Defendant ROMA VIEW Affirmation in Opposition.....	16 - 18
Defendant BENEFICIA, INC.'s Reply Affirmation.....	19 - 20

This is a personal injury action in which plaintiff, JULIO A. VELEZ("plaintiff"), seeks to recover damages for injuries he sustained on September 22, 2007, as a result of a slip and fall accident on a ramp at a marina located at 158-35 Cross Bay Boulevard, Howard Beach, New York. As a result of the accident the plaintiff sustained a fractured right ankle which necessitated an open reduction with internal fixation. The plaintiff initially commenced an action for negligence against defendants CAPTAIN LUNA'S MARINA, CAPTAIN MIKE, JOHN LUNA, VIVA EMPANADA and BABY LUNA by the filing of a summons and complaint on December 27, 2007. On January 28, 2008 the plaintiff filed a supplemental summons and complaint adding SPLASH DRY CLEANING, QUEENS BAY REALTY CORP. and MIKE TANNON as party-defendants.

By decision and order dated June 19, 2008, this Court granted leave for the plaintiff to serve a second amended summons and second amended complaint adding CROSSBAY FISHING STATION CORP., BENEFICIA INC. d/b/a/ SPLASH LAUNDROMAT as defendants. By order dated May 20, 2010, Justice Ritholtz signed an order

consolidating the instant action filed under Index No. 31810/2007 with the action filed against defendant MLC Fishing, Inc. under Index No. 6115/2010.

On September 7, 2010 plaintiff filed a summons and complaint under Index No. 22620/2010 (Action 2. herein) naming CLARA DECANDIA AS SURVIVING JOINT TENANT BY THE ENTIRETY OF JOSEPH DECANDIA, DECEASED, CLARA C. DECANDIA REVOCABLE TRUST and ROMA VIEW CATERING AS PARTY DEFENDANTS. Issue was joined in that action by service of defendants' answer dated November 12, 2010.

After discovery was completed in Action No. 1 the plaintiff filed a Note Of Issue on December 8, 2010.

Defendant BENEFICIA INC. now moves for an order pursuant to CPLR 602 consolidating the two above captioned matters for trial on the ground that both actions arise of the same slip and fall accident that occurred on September 22, 2007. Counsel contends that since these actions arise out of the same accident, common questions of law and fact are involved and that a consolidation will save time and costs for the Court, attorneys and witnesses involved in this case. Defendant VIVA EMPANADA cross-moves for an order consolidating the two actions also stating that both actions share the same factual predicate and share common questions of law and fact as to which party or parties, if any, were negligent in the happening of the accident in question. Counsel contends that the plaintiff will not be prejudiced as he is asserting the exact same factual predicate against all

defendants.

Counsel for defendants CAPTAIN MIKE, MIKE CANNON and MLC FISHING, INC. submitted an affirmation in support of the motions for consolidation in which he adopts and incorporates the arguments made by the movants and also contends that consolidation is warranted as it would join the defendants in Action No. 2, the owners of the subject premises, who are necessary and indispensable parties.

Counsel for ROMA VIEW, a defendant in Action NO. 2 submits an affirmation opposing the consolidation on the ground that discovery has been completed in Action No. 1 and a Note of Issue was filed on December 8, 2010, whereas Action No. 2 has just begun and defendants in Action No. 2 have not been provided with any of the documents from Action No. 1. Counsel contends that consolidating Action No. 2 with Action No. 1 will be prejudicial to the defendants in Action No. 2 as there will be insufficient time within which to complete discovery before Action No. 1 goes to trial. Counsel for DECANDIA, co-defendants in Action No. 2 also oppose consolidation on the ground that Action No. 1 is already on the trial calendar and Action NO. 2 has not even reached the preliminary conference stage. Defendant DECANDIA contends that it will be prejudiced by a consolidation of the two actions.

The plaintiff has not submitted any papers in opposition to

the motion for consolidation.

Upon review and consideration of the motions for consolidation and the opposition thereto, this court finds that motion to consolidate is granted. "Where common questions of law or fact exist, a motion to consolidate should be granted absent a showing of prejudice to a substantial right by the party opposing the motion (see Kally v. Mount Sinai Hosp., 44 AD3d 1010 [2d Dept. 2007]; Flaherty v. RCP Assocs., 208 AD2d 496 [2d Dept. 1994]). "Consolidation is appropriate where it will avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts" (see Best Price Jewelers.Com, Inc. v Internet Data Storage & Systems, Inc., 51 AD3d 839 [2d Dept. 2008]).

Here, it is clear that the interests of justice and judicial economy will be served by consolidation of the two actions, since both actions concern the same parties and the claims arise out of the same circumstances (see Nigro v Pickett, 39 AD3d 720 [2d Dept. 2007]); The defendants in Action No. 2 have failed to demonstrate that consolidation will be prejudicial or that their time for discovery will be curtailed. It should be noted that although a Note of Issue has been filed in Action No. 1, it usually takes approximately eight months before a ready case is scheduled for trial. Moreover, there are still several pending motions for summary judgment in Action No. 1. Thus, there

should be sufficient time for defendants in Action NO. 2 to complete discovery and to receive copies of necessary documents from Action No. 1 prior to the case being calendared in the Trial Scheduling Part.

Accordingly, it is hereby

ORDERED, that the motion to consolidate Action No. 1 and Action No. 2 is granted and the two actions are hereby consolidated under Index No. 31810/2007. The title of the action as consolidated shall be:

- - - - - x

JULIO VELEZ,

Index No.: 31810/2007

Plaintiff,

- against -

CAPTAIN LUNA'S MARINA, INC., CAPTAIN MIKE, JOHN LUNA, VIVA EMPANADA, BABY LUNA, SPLASH DRY CLEANING, QUEENS BAY REALTY CORP., MIKE TANNON, CROSSBAY FISHING STATION CORP., BENEFICIA INC. D/B/A/SPLASH LAUNDROMAT and MLC FISHING, INC., CLARA DECANDIA AS SURVIVING JOINT TENANT BY THE ENTIRETY OF JOSEPH DECANDIA, DECEASED, CLARA C. DECANDIA REVOCABLE TRUST and ROMA VIEW CATERING,

Defendants.

- - - - - x

The parties are given leave to serve amended answers asserting any cross-claims and counterclaims necessitated by the consolidation within 30 days after service of a copy of this order with notice of entry thereof.

The moving defendants shall serve a copy of this order with notice of entry on all parties to the actions consolidated, the Clerk of Queens County and the Clerk of the Trial term Office. Upon such service, the Clerk of the Court shall consolidate the papers in the actions hereby consolidated and shall mark her records to reflect the consolidation.

Further, moving defendant BENEFICIA is directed to serve copies of all pleadings, orders and discovery previously had in the action under Index No. 31810/07 upon defendants ROMA VIEW and DECANDIA within 30 days of the entry date of this order.

Lastly, all counsel shall attend a preliminary conference for the purposes of expediting discovery for the newly added defendants on **June 22, 2011 at 9:30 a.m.** at the Preliminary Conference Part located at Queens County Supreme Court, 88-11 Sutphin Boulevard, Jamaica, New York.

Dated: May 13, 2011
n Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.