

**Grovick Props., LLC v 83-10 Astoria Blvd. LLC**

2011 NY Slip Op 32435(U)

September 13, 2011

Supreme Court, Nassau County

Docket Number: 600794-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

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**GROVICK PROPERTIES, LLC,**  
**Plaintiff,**

**TRIAL/IAS PART: 20  
NASSAU COUNTY**

**Index No: 600794-10  
Motion Seq. No: 2**

**-against-**

**Submission Date: 8/8/11**

**83-10 ASTORIA BOULEVARD LLC; JANE PERLOW,  
Individually and as Trustee of the SIDNEY ESIKOFF  
GRAT # 1; GRACE HAVASY, Individually and as  
Trustee of the SIDNEY ESIKOFF GRAT # 1; MARION  
STERNBERG, Individually and as Trustee of the  
SIDNEY ESIKOFF GRAT # 1; SIDNEY ESIKOFF,  
Individually and as Trustee of the SIDNEY ESIKOFF  
GRAT # 1; and RUSKIN MOSCOU FALTISCHEK, P.C.,  
as Escrow Agent,  
**Defendants.****

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**The following papers having been read on this motion:**

- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Memorandum of Law in Support.....x**
- Affirmation.....x**
- Affirmation.....x**
- State of New York’s Position.....x**
- Affirmation in Opposition.....x**
- Reply Affirmation in Further Support and Exhibits.....x**

This matter is before the Court for decision on the motion filed by Defendant Sidney Esikoff (“Esikoff”) on April 1, 2011 and submitted on August 8, 2011. For the reasons set forth below, the Court denies the motion.

## BACKGROUND

### A. Relief Requested

Esikoff moves for an Order, pursuant to CPLR § 602(a), consolidating an action pending in the Supreme Court of New York, County of Albany, titled *State of New York v. Sidney Esikoff, Individually and as Trustee of the Sidney Esikoff GRAT #1, Jane Perlow, Individually and as Trustee of the Sidney Esikoff GRAT #1, Grace Havasy, Individually and as Trustee of the Sidney Esikoff GRAT #1, Marion Sternberg, Individually and as Trustee of the Sidney Esikoff GRAT #1, Sidney Esikoff GRAT #1, 83-10 Astoria Boulevard LLC, Astoria Gas (NY), Inc., and Richard Finkelstein*, Albany County Index Number L-00029-09 (“Earlier Action”), with the above-captioned action (“Instant Action”) into a single action venued in the Supreme Court of Nassau County.

Richard Finklestein (“Finklestein”), who is a party in the Earlier Action but is not a party in the Instant Action, consents to Esikoff’s motion. The State of New York, which is the plaintiff in the Earlier Action and is not a party in the Instant Action, does not object to the motion. Defendants 83-10 Astoria Boulevard, LLC; Jane Perlow, Individually and as Trustee of the Sidney Esikoff GRAT #1, Grace Havasy, Individually and as Trustee of the Sidney Esikoff GRAT #1, and Marion Sternberg, Individually and as Trustee of the Sidney Esikoff GRAT #1, consent to the motion.

Plaintiff Grovick Properties, LLC (“Grovick”) opposes the motion.

### B. The Parties’ History

The Instant Action was the subject of a prior decision of the Court dated April 11, 2011 (“Prior Decision”) and the Court incorporates the Prior Decision herein by reference. The Prior Decision outlined the action as follows.

Grovick, which alleges that it is an innocent purchaser of real property contaminated by petroleum, seeks to recover from the real property’s prior owners and their operators costs incurred in removing contamination and restoring the real property (“Premises”) to levels that are satisfactory to the New York State Department of Environmental Conservation (“DEC”). Prior to commencing this action, Astoria LLC objected to Grovick’s attempt to recover these costs from a designated escrow account, and refused to compensate Grovick.

In April of 2004, Grovick purchased the Premises, located at 83-10 Astoria Boulevard, East Elmhurst, New York, from Astoria LLC pursuant to a Contract of Sale. Years before the Purchase, discharges of petroleum product contaminated the groundwater and soil at the Premises. The believed source of the contamination was discharges from an underground petroleum product and storage and dispensing system once located at the Premises. After the purchase, and as of July 30, 2010, Grovick incurred costs arising from or relating to the removal of the contamination and remediation of the Premises in the amount of \$534,292, and will continue to incur such costs until the DEC determines that the cleanup is complete.

The Complaint in the Instant Action contains seven (7) causes of action: 1) against Astoria LLC for breach of contract/indemnity pursuant to the Contract, 2) against Astoria LLC and Defendant Ruskin Moscou Faltischek, P.C. ("Ruskin Moscou") for declaratory judgment/escrow pursuant to the Escrow Agreement entered into in connection with the closing on the Premises, 3) against Perlow, the Managing Member of Astoria LLC, and Havasy and Sternberg, Members of Astoria LLC, for fraudulent conveyance in connection with the distribution of the proceeds of the Purchase, 4) against Astoria LLC pursuant to Article 12 of the Navigation Law, 5) against Perlow pursuant to Article 12 of the Navigation Law, 6) against Perlow, Havasy and Sternberg pursuant to Article 12 of the Navigation Law, and 7) against Esikoff pursuant to Article 12 of the Navigation Law. The Complaint also alleges that the Sidney Esikoff Grantor Retained Annuity Trust ("GRAT") # 1 was and is a trust established on or before January 11, 1994 of which Esikoff, Perlow, Havasy and Sternberg are co-trustees.

On or about March 20, 2009, the State of New York ("State") commenced the Earlier Action to recover remediation costs ("Remediation Costs") related to the Premises. The Earlier Action is pending in the Supreme Court of Albany County. All but two of the defendants in the Earlier Action are Defendants in the Instant Action. In the complaint in the Earlier Action, the State alleges that it has incurred approximately \$650,000.00 in Remediation Costs. In the Instant Action, Grovick seeks \$534,292.00 in Remediation Costs.

On or about February 17, 2010, Plaintiff's Counsel made a demand to Ruskin Moscou, the Escrow Agent, for the release of certain escrow funds ("Escrow Funds") held pursuant to the Escrow Agreement. Defendants' Counsel and the State objected to the release of the Escrow Funds. Plaintiff initiated the Instant Action on or about September 14, 2010.

### C. The Parties' Positions

Esikoff submits that consolidation is appropriate on the grounds that 1) the Earlier Action is an action by the State, against all but one of the Defendants in the Instant Action, to recover clean up costs for a particular oil spill (“Spill”); 2) the Instant Action is an action by Grovick against the same Defendants to recover for clean up costs for the same Spill; 3) the factual issues in the Earlier and Instant Action are identical, as are many of the legal claims; 4) the theory of liability against the Defendants, strict liability as a result of their prior ownership of the Premises, is the same in the two Actions; 5) the evidence will be “virtually identical” in the two Actions (Laino Aff. in Supp. at ¶ 8); 6) the pre-trial discovery will be the same in the two Actions; 7) both Actions involve technical issues, and consolidation will avoid the need for expert witnesses to testify in both Actions; 8) consolidation will promote economy and efficiency, and prevent potentially inconsistent results; 9) consolidation will result in the State being a party to the consolidated action, allowing it to pursue its claim to the disputed funds; and 10) Finklestein is a resident of Nassau County and Grovick brought the Instant Action in Nassau County, so neither will be prejudiced by the proposed consolidation.

Grovick opposes consolidation on the grounds that 1) Grovick is not a party to the Earlier Action; 2) the State, Astoria Gas (NY) Inc. (“Astoria Gas”) and Finklestein are parties in the Earlier Action but are not parties in the Instant Action; 3) neither Esikoff nor the other Defendants in the Instant Action moved to dismiss the Complaint for failure to join a necessary party, or raised that defense in their Answer, which suggests that they do not believe that the State, Astoria Gas and Finklestein are necessary parties in the Instant Action; 4) the “true purpose” of Esikoff in filing the instant motion is “to give the State the ability to assert a claim against a private escrow agreement between Grovick and [Astoria LLC] [in the hopes that] the State will leave him alone in exchange for access to the escrowed funds” (Brooks Aff. in Opp. at ¶ 7); 5) consolidation will prejudice Grovick because it will allow Esikoff, and potentially other parties, to argue to the jury that Grovick is claiming a right to escrowed funds to which the State is entitled; 6) the only factual issue in common in the two Actions is the presence of contamination, and that fact has been admitted; 7) the evidence relevant to the first three causes of action in the Instant Action, which relate to breach of contract, declaratory judgment and fraudulent conveyance, is not relevant to the Earlier Action; 8) since the commencement of the

Earlier Action in March of 2009, Esikoff and the other Defendants made no efforts to transfer the Earlier Action to Nassau County; and 9) Esikoff's motivation in making the instant motion is not judicial convenience, but rather an attempt "to use the presence of Grovick and the escrow agreement to deflect their own culpability and liability and point a finger at Grovick" (id. at ¶ 13).

#### RULING OF THE COURT

CPLR § 602(a) provides, in relevant part, that when actions involving a common question of law or fact are pending before a court, the court may order a joint trial of any or all the matters in issue. CPLR § 602(b) provides that, upon motion, the Supreme Court may "remove to itself an action pending in another court." Such motion is addressed to the sound discretion of the court and consolidation is favored and should be granted unless the party resisting consolidation demonstrates prejudice to a substantial right. *Humiston v. Grose*, 144 A.D.2d 907, 908 (4th Dept 1988).

The Court denies Esikoff's motion, in light of the Court's conclusion that consolidation may prejudice a substantial right of Grovick. The Court reaches that conclusion in light of 1) the significant delay in Esikoff moving for consolidation, 2) the potential prejudice to Grovick if the State becomes a party in the Instant Action, 3) the fact that there is not complete identity of parties or claims, and 4) the potential confusion to the jury as a result of the fact that certain evidence may be relevant to the Instant Action but not the State Action. *See Village of Mamaroneck v. Mamaroneck Affordable Condominium Corp.*, 13 A.D.3d 361 (2d Dept. 2004) (trial court properly denied consolidation where, although there were common issues, actions arose out of different transactions and involved different claims by respective plaintiffs).

All matters not decided herein are hereby denied.


This constitutes the decision and order of the Court.

The Court directs counsel to appear before the Court for a Preliminary Conference on October 12, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

September 13, 2011



HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**  
SEP 19 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE