

Inner View Inc. v Circle Press, Inc.
2012 NY Slip Op 31029(U)
April 17, 2012
Supreme Court, New York County
Docket Number: 601152/10
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

GISCHE

Justice

PART

10

IN RE VIEW INC

- v -

CARLOS PRESS INC

INDEX NO.

60165 2/10

MOTION DATE

MOTION SEC. NO.

3

MOTION CAL. NO.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPER NUMBER

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

cc May 10 2012 @ 9:30

FILED

APR 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated:

4/17/12

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check If appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG.

☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

Inner View Inc. and Tzelan, LLC

Plaintiff (s),

-against-

Circle Press, Inc., One 2 One on Varick, LLC,
Next Printing & Design, Inc.,
1 800 Postcards, Inc., and Press Access, LLC,

Defendant (s).
_____x

DECISION/ ORDER

Index No.: 601152/10

Seq. No.: 003

PRESENT:

Hon. Judith J. Glache
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers

Defs' OSC (consolidation) w/MJK affirm, DM affd, exhs	1
Pltfs' opp w/BB affirm, TC affd, exhs	2
Defs' reply w/MJK affirm	3

FILED

APR 18 2012

NEW YORK
COUNTY CLERKS OFFICE

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is defendants' motion for an order consolidating this case with the case now pending before Hon. Richard Braun (Tzelan, LLC v. 121 Varick Street, Corp., Supreme Court, N.Y. Co., 105764/11) ("the Varick action") on the basis that David Moyal ("Moyal") is the president of defendants in this action and 121 Varick Street Corp., the defendant in the Varick action. Tammy Chou ("Chou"), the president of Inner View, Inc. ("Inner View") and Tzelan, Inc. ("Tzelan"), plaintiffs in this action, provides her affidavit in opposition. Tzelan is also the plaintiff in the Varick action. Hereinafter, unless otherwise provided, plaintiffs in both actions will be referred to as "Chou" and the

defendants in both actions as "Moyal." Other relief sought in Moyal's motion is: 1) a protective order on the basis that Chou is harassing him with frivolous demands and engaging in "surreptitious" discovery, 2) legal fees for the cost of this motion and 3) Part 130 sanctions.

Background and Arguments

The action at bar is for a private nuisance. Chou is the commercial proprietary lessee of space on the 5th floor of the building located at 121 Varick Street, New York, New York. Moyal has commercial space on the 6th floor, directly above Chou. Chou claims that Moyal is operating a printing press and other heavy equipment that Chou claims is noisy, disruptive and causes excessive vibrations, which according to Chou, renders it difficult for her to get work done. Not only is 121 Varick the defendant in the Varick action, it is also the commercial coop corporation that owns the building. 121 Varick is a principal shareholder whereas Tzelan is a minority shareholder.

Moyal has served Chou with a 30-Day Notice to Cure dated April 18, 2011 ("30 Day Notice"), alleging that Tzelan is illegally using its 5th floor space. The violation alleged is that the space must be used as commercial space, not office space.

The Varick action was commenced May 2011, whereas the action at bar was commenced in May 2010. The Varick action is for, among other things, a Yellowstone Injunction. Justice Braun issued a temporary restraining order, tolling the time to cure the default alleged in the 30-Day Notice and subsequently, Tzelan and 121 Varick entered into a stipulation dated September 30, 2011 providing that 121 Varick was withdrawing that notice, with prejudice. In that stipulation, Tzelan also withdrew its 1st, 2nd, 3rd and 4th causes of action, each of which involved the 30-Day Notice. Still

remaining in the Varick action are: Tzelan's 5th and 6th causes of action ("__COA").

The 5th COA is for Injunctive relief, ordering 121 Varick (the coop) to enforce the proprietary lease against Moyal and declaring him to be in default of his 6th floor lease because of the ownership/operation of the printing press, etc. The 6th COA is for a declaration that an emergency exists on the 6th floor because it is in partial danger of a collapse and there are toxic chemicals flowing down to the 5th floor.

Moyal contends that consolidation is warranted since: 1) the parties are basically the same since he is a principal of defendants in both cases, 2) there is no prejudice to Chou, 3) Chou is judge shopping and, 4) the relief sought is the same and involve common issues of fact and law.

Chou argues that the two cases are completely separate because in the action at bar she seeks relief against the lessees of the 6th floor whereas in the Varick action she seeks an order requiring the coop to enforce the proprietary lease by, if necessary, proceeding to evict Moyal. Chou contends that Moyal, in bringing this motion, is blurring the line between himself as principal of the 6th floor tenants versus himself as the owner/ principal of the coop. According to Chou, this is also Moyal's way of getting having her pay for legal and other fees because Tzelan, as a minority shareholder, is obligated to pay 9.09% of the coop's expenses, including legal fees and expenses. Thus, Chou claims Moyal is using the coop corporation to fund his personal battles with her and other shareholders in the building with whom he may have disputes. In response to these claims, Moyal contends that court can fashion an appropriate remedy which can avoid any conflicts.

Discussion

Regardless of the underlying disputes between these shareholders, Moyal has presented a cogent, rational and persuasive reason why both these cases belong before the same judge, even if they are not consolidated for joint trial. The issues in the Varick action clearly bear upon the issues in the case at bar. Whereas in the action at bar, the dispute is between tenants/lessees, the 121 Varick action seeks action by the board which, according to Chou, is dominated by Moyal. Under those circumstances, true consolidation (i.e. for all purposes) would be too confusing and create a potential conflict because, as Chou correctly states, Moyal would be in the position of having to enforce the 6th floor proprietary lease against himself.

The court will, however, transfer to itself the Varick action and consolidate the two cases for joint discovery only. In this way, both cases will travel together in Part 10, for the most part appearing the same day on the calendar, unless otherwise provided. Moyal has raised valid concerns about discovery in these cases becoming duplicative and presently the parties appear unable to work out the logistics of same independently. By having both cases in this part, discovery can be streamlined and harmonized.

The court has also considered that by having these actions before different judges this is not only burdensome to already strained judicial resources, but there is also the very real possibility of inharmonious if not inconsistent decisions. Thus the salutary goal of CPLR 602, which is to avoid unnecessary costs and delay in trying cases, would be served by consolidating these two actions for this limited purpose (CKS Ice Cream Co., Inc. v. Frusen Gladie Franchise, Inc., 172 AD2d 206 [1st Dept 1991]).

Having granted consolidation for joint discovery only. The new caption shall be as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

Inner View Inc. and Tzelan, LLC.

Index No.: 601152/10

Plaintiff (s),

-against-

Circle Press, Inc., One 2 One on Varick, LLC,
Next Printing & Design, Inc., 1 800
Postcards, Inc., and Press Access, LLC,

Defendant (s).

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

Tzelan, LLC.

Index No.: 105764/11

Plaintiff (s),

-against-

121 Varick Street Corp.,

Defendant (s).

Defendants shall serve a copy of this order with Notice of Entry on the Clerk in Office of Trial Support so the court's records can be so marked. If a further or different order is necessary to effectuate the limited consolidation hereby ordered, defendants may, on notice, present the appropriate order for the court's signature.

Presently the 121 Varick case is on for an appearance before Judge Braun on April 24, 2012. Before this case was consolidated, a status conference was scheduled for June 7, 2012 in Part 10. Defendants shall serve a copy of this order (even if it is not yet entered) upon the Clerk in Judge Braun's part in advance of the April 24th appearance

so that the appearance in that part can be eliminated.

Given the complicated discovery issues that have arisen, the court hereby advances the compliance conference in Part 10 to May 10, 2012 at 9:30 a.m.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that the motion by defendants to consolidate this case with the case before Judge Braun is granted only to the extent that the cases are consolidated for joint discovery; and it is further

ORDERED that the new caption of this case shall be as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

Inner View Inc. and Tzelan, LLC. Index No.: 601152/10

Plaintiff (s),

-against-

Circle Press, Inc., One 2 One on Varick, LLC,
Next Printing & Design, Inc., 1 800
Postcards, Inc., and Press Access, LLC,

Defendant (s).

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

Tzelan, LLC. Index No.: 105764/11

Plaintiff (s),

-against-

121 Varick Street Corp.,

Defendant (s).

ORDERED that defendants shall serve a copy of this order with Notice of Entry on the Clerk in Office of Trial Support so the court's records can be so marked. If a further or different order is necessary to effectuate the limited consolidation hereby ordered, defendants may, on notice, present the appropriate order for the court's signature; and It is further

ORDERED that defendants shall also serve a copy of this order (even if it is not yet entered) upon the Clerk in Judge Braun's part in advance of the April 24th appearance so that the appearance in that part can be eliminated; and It is further

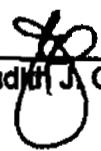
ORDERED that the court hereby advances the compliance conference in Part 10 to May 10, 2012 at 9:30 a.m; and it is further

ORDERED that any relief requested but not addressed is hereby denied; and It is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
April 17, 2012

So Ordered:


Hon. Judith J. Glasco, JSC

FILED

APR 18 2012

NEW YORK
COUNTY CLERK'S OFFICE