

New York Athletic Club of the City of N.Y. v Florio

2013 NY Slip Op 31882(U)

August 9, 2013

Sup Ct, New York County

Docket Number: 159314/2012

Judge: Eileen A. Rakower

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

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 15

**NEW YORK ATHLETIC CLUB OF THE CITY OF
NEW YORK,**

Plaintiff,

- v -

**DANIEL FLORIO AND AMBASSADOR FUEL
AND OIL BURNER CORP.,**

Defendants.

INDEX NO. 159314/2012
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. 001

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

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

Answer — Affidavits — Exhibits _____

Replying Affidavits _____

<u>PAPERS NUMBERED</u>	
1	_____
2	_____

AMENDED ORDER

Plaintiff New York Athletic Club of the City of New York, Inc. ("NYAC") brings this motion pursuant to CPLR §602(a) to consolidate its action with two currently pending actions "arising out of the same facts and circumstances." Defendant Ambassador Fuel and Oil Burner Corp. ("Ambassador Fuel") does not oppose the motion to consolidate the pretrial proceedings of the actions, but moves to reserve its right to apply for separate trials of the actions pursuant to CPLR §603 and CPLR R §4011 following the completion of discovery, to the extent separate trials will avoid prejudice and confusion of the issues.

NYAC owns and operates a Marina located at 31 Shore Road, Pelham Manor, New York. On May 17, 2012, a fire erupted aboard Defendant Daniel Florio's ("Florio") motor yacht Carole Jaye ("Carole Jaye") which was located in NYAC's boat yard. The fire extended beyond the limits of the Carole Jaye, allegedly causing fire, smoke and soot damage to the premises of NYAC and other

neighboring boats.

NYAC brought the first action before this court on December 28, 2012, *New York Athletic Club of the City of New York v. Daniel Florio and Ambassador Fuel and Oil Burner Corp.* (Index No. 159314/2012) asserting that the damage to NYAC's property was caused by the negligence of Defendants Florio and Ambassador Fuel (collectively, "Defendants") and for indemnity and contribution against Defendants.

The second action before this court, commenced on January 18, 2013, *Ciro Galano and The Northern Assurance Company of America v. Daniel Florio, Ambassador Fuel and Oil Burner Corp, Jose Frietes and John Does 1, 2 and 3*, (Index No. 150561/2013) seeks to recover for damages to *Ciro Galano's* yacht as a result of the May 17, 2012 Carole Jaye fire. The complaint alleges that the fire was caused by the negligence of Florio, Ambassador Fuel, and Ambassador Fuel employee Jose Frietes. Additionally, Galano's subrogee insurer, The Northern Assurance Company of America, also seeks damages as a result of the fire.

The third action before this court, commenced on January 30, 2013, *New Hampshire Insurance Company as subrogee of Frank Taubner and all other named insureds under policy number YM083324100 and as subrogee of Fletcher Duke and all other named insureds under policy number SA-532-95-25 v. Ambassador Fuel and Oil Burner Corp., Daniel Florio and New York Athletic Club of the City of New York*, (Index No. 150888/2013) seeks to recover for damages for the damage to the vessels owned by Frank Taubner and Fletcher Duke as a result of the May 17, 2012 Carole Jaye fire. This action alleges that the fire was caused by the alleged negligence of Florio, Ambassador Fuel and NYAC.

CPLR §602(a) gives the trial court discretion to consolidate actions involving common questions of law or fact. There is a preference for consolidation in the interest of judicial economy and ease of decision-making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right. (*Progressive Ins. Co. v. Vasquez*, 10 AD3d 518, 782 NYS2d 21 [1st Dept 2004]).

Additionally, CPLR §603 gives the trial court discretion to sever trials of any claim or issue in the interest of convenience or to avoid prejudice. The court's discretion should be exercised sparingly, and is inappropriate where the claims

involve common factual and legal issues. (*Lelekakis v. Kamamis*, 41 A.D.3d 662, 839 N.Y.S.2d 773 [2nd Dept 2007]). Severance "increases litigation and places an unnecessary burden on the court facilities by requiring two separate trials instead of one." (*Shanley v. Callanan Indus.*, 54 N.Y.2d 52, 429 N.E.2d 104, 444 N.Y.S.2d 585 [1981]).

All three claims arise out of the same incident, the fire aboard the *Carole Jaye* on May 17, 2012, and seek recovery of damages for vessel damage as a result thereof. All actions involve common questions of law, regarding whether any of the Defendants were negligent and whether Defendants shall indemnify Plaintiff pursuant to the Storage Agreement for claims asserted against it resulting from the fire.

The actions are not in different procedural stages, since discovery has not commenced, depositions have not yet been taken, and there would not be undue delay or confusion caused by consolidation. Defendant does not oppose the motion to consolidate the pretrial proceedings in these actions and has not indicated that it will be prejudiced following the completion of discovery. Moreover, it would not further convenience to order separate trials of actions involving common factual and legal questions.

Wherefore, it is hereby,

ORDERED that the motion is granted and the above-captioned action is consolidated in this Court with *Ciro Galano and The Northern Assurance Company of America v. Daniel Florio, Ambassador Fuel and Oil Burner Corp, Jose Frietes and John Does 1, 2 and 3*, and *New Hampshire Insurance Company as subrogee of Frank Taubner and all other named insureds under policy number YM083324100 and as subrogee of Fletcher Duke and all other named insureds under policy number SA-532-95-25 v. Ambassador Fuel and Oil Burner Corp., Daniel Florio and New York Athletic Club of the City of New York*, under Index Number 159314/2012, and the consolidated action shall bear the following caption:

NEW YORK ATHLETIC
CLUB OF THE CITY OF NEW YORK

Index No.
159314/2012

Plaintiff,

-against-

DANIEL FLORIO AND AMBASSADOR
FUEL AND OIL BURNER CORP.,

Defendants.

CIRO GALANO AND THE NORTHERN
ASSURANCE COMPANY OF AMERICA,

Plaintiff,

-against-

DANIEL FLORIO, AMABSSADOR FUEL
AND OIL BURNER CORP., JOSE FRIETES
AND JOHN DOES 1, 2, AND 3

Defendants.

NEW HAMPSHIRE INSURANCE COMPANY,
AS SUBROGEE OF FRANK TAUBNER AND
ALL OTHER NAMED INSUREDS UNDER POLICY
NUMBER YM083324100 AND AS SUBROGEE OF
FLETCHER DUKE AND ALL OTHER NAMED
INSUREDS UNDER POLICY NUMBER SA-532-95-25

Plaintiffs,

-against-

AMBASSADOR FUEL AND OIL BURNER
CORP., DANIEL FLORIO AND NEW YORK
ATHLETIC CLUB OF THE CITY OF NEW YORK,

Defendants.

And it is further,

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further,

ORDERED that the parties shall appear for a preliminary conference at 80 Centre Street, Room 327 on July 30, 2013 at 9:30 a.m.; and it is further,

ORDERED that movant is directed to serve a copy of this order with notice of entry on the County Clerk (Room 141 B), who shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further,

ORDERED that movant is directed to serve a copy of this order with notice of entry on the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: August 9, 2013


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE