

Kaplan v Bernsohn & Fetner, LLC

2014 NY Slip Op 32264(U)

August 19, 2014

Supreme Court, New York County

Docket Number: 652031/2013

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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DAVID P. KAPLAN AND MARCIA
P. KAPLAN,

Plaintiffs,

Index No. 652031/2013

-against-

DECISION/ORDER

BERNSOHN & FETNER, LLC, et al.,
Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmations in Opposition.....	<u>2-4</u>
Cross-motions.....	<u>5-8</u>
Replying Affidavits.....	<u>9-13</u>

Plaintiffs David Kaplan and Marcia Kaplan commenced this action to recover for damages allegedly caused from two leaks from the plumbing during renovations to their apartment that caused damages to several units ("Action #1"). Defendant Bernsohn & Fetner, a defendant in Action #1, has brought a motion to consolidate Action #1 with four other actions, Actions # 2, 3, 4, and 5, which also arise from the two water leaks. Central Plumbing Specialties, Co, Inc., a defendant in Action #6, has brought a cross-motion to consolidate that action with the other five actions for joint trial only. The Kaplans, defendants in Action #7, have brought a cross-motion to consolidate Action #7 with the first six actions. Defendants Massachusetts Bay Insurance Company, sued herein as The Hanover Insurance Group and Harleysville Insurance Company have brought cross-motions to sever the claims of the plaintiffs

in Action #1 against them for purposes of trial only. In opposition to the motions to consolidate, some of the parties to the various actions request that the seven actions be consolidated only for joint trial and discovery purposes and that they retain their own index numbers. The cross-motions to sever are opposed.

Pursuant to CPLR § 602(a), “[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” Further, “[w]here an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court.” CPLR § 602(b). Whether to try the two actions jointly or to consolidate completely is within “the sound discretion of the trial court.” *Ventures Intern. v. Uppstrom*, 166 A.D.2d 321 (1st Dept 1990).

In the instant action, the court finds that because all seven actions involve common questions of law and fact, they should be consolidated but only for joint trial and discovery purposes. It is undisputed that all of the actions arise out of the water leaks in the Kaplan’s apartment. However, based on the fact that many of the actions have different parties and that some of the parties are plaintiffs in some actions and defendants in other actions, a joint trial and discovery, rather than complete consolidation under one index number, is more appropriate.

The court also finds that the claims against Massachusetts Bay Insurance Company, sued herein as The Hanover Insurance Group, and Harleysville Insurance Company should only be joined with all the other Actions for discovery purposes and should be severed from Action #1 and all the other Actions for trial. The courts have recognized “that even where common

questions exist, it is prejudicial to insurers to have the issue of insurance coverage tried before the jury that considers the underlying liability claims.” *Cruz v. Taino Constr. Corp.*, 38 A.D.3d 391, 392 (1st Dept 2007). *See also Robles v. Microtech Cont. Corp.*, 90 A.D.3d 531 (1st Dept 2011)(court properly exercised discretion in severing action against insurer “to avoid the prejudice that would result from the jury’s awareness of the existence of liability insurance”). In the instant action, the court finds that it would be appropriate to sever the claims against Massachusetts Bay Insurance Company, sued herein as The Hanover Insurance Group, and Harleysville Insurance Company. The claim being brought against the two insurance companies is for a declaratory judgment as to plaintiffs’ right to insurance coverage from these defendants while the claims against the other defendants concern the other defendants’ liability for the underlying damage. Under these circumstances, the actions against the insurance companies should be severed for purposes of trial so that the jury is not made aware of the insurance issues when deciding the issues of responsibility for the leaks.

Settle order providing that all seven actions are consolidated for joint discovery and joint trial only, providing that the claim in Action #1 against Massachusetts Bay Insurance Company, sued herein as The Hanover Insurance Group, and Harleysville Insurance Company are consolidated for discovery only and are severed from Action #1 and the other Actions for trial, providing that all of the seven actions shall retain separate index numbers and the plaintiff in each caption shall file its own note of issue at the time of trial, providing that the movant is directed to serve a certified copy of this order upon the Clerk of the Civil Court, who shall, upon such service and the payment of any fees, transfer to this court all of the papers heretofore filed in Action #7 and providing that a copy of this order with notice of entry shall be served on the

