

**Shortt v City of New York**

2014 NY Slip Op 32512(U)

September 10, 2014

Supreme Court, New York County

Docket Number: 153538/2012

Judge: Lucy Billings

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----x

SHELDON SHORTT and MYRTLE SHORTT,

Index No. 153538/2012

Plaintiffs

- against -

DECISION AND ORDER

CITY OF NEW YORK, NYC DEPARTMENT OF  
DESIGN AND CONSTRUCTION, NEW YORK CITY  
TRANSIT AUTHORITY, METROPOLITAN  
TRANSPORTATION AUTHORITY, NYC DEPARTMENT  
OF TRANSPORTATION, LONG ISLAND RAILROAD  
d/b/a MTA LONG ISLAND RAILROAD, and  
METRO NORTH COMMUTER RAILROAD d/b/a MTA  
METRO NORTH RAILROAD,

Defendants

-----x

LUCY BILLINGS, J.S.C.:

Defendants move to consolidate a later action in this court under Index Number 158204/2012 with this action under its Index Number 153538/2012. C.P.L.R. § 602(a). In both actions the same plaintiffs sue the same defendants for personal injury due to defendants' violations of New York Labor Law §§ 200, 240(1), and 241(6) on the same construction site at 37th Street and Park Avenue in New York County. The two actions' similarities end at those parameters.

I. THE FIRST ACTION

In this first action, plaintiff Sheldon Shortt claims he injured his head, neck, and back, both shoulders, and his right knee and ankle during excavation of a tunnel June 13, 2011, when he was holding a heavy piece of concrete safety walkway that was being assembled. The piece of walkway fell apart, dragging him

with its weight to the ground. He thus claims that the force of gravity contributed to his injury, so that the inadequate protection against his fall violated Labor Law § 240(1), as well as 12 N.Y.C.R.R. §§ 23-1.2, 23-1.3, 23-1.4, 23-1.5, 23-1.7(b); 23-2.2, 23-2.3, 23-6.1, and 23-6.2 under Labor Law § 241(6). Insofar as plaintiffs rely on specific duties enforceable against defendants, their first action focusses on the requirements governing hazardous openings, 12 N.Y.C.R.R. § 23-1.7(b); concrete floors and other concrete work, 12 N.Y.C.R.R. § 23-2.2; assembly of structural steel, 12 N.Y.C.R.R. § 23-2.3; and hoisting equipment, 12 N.Y.C.R.R. § 23-6.1, including its rigging. 12 N.Y.C.R.R. § 23-6.2.

## II. THE SECOND ACTION

After Shortt was advised that he was capable of returning to work with restrictions in October 2011, plaintiffs claim in their second action that on November 30, 2011, during excavation of a different tunnel, apart from the tunnel Shortt was working in June 13, 2011, he injured only his right hand, which had been unaffected by his fall June 13, 2011. He was injured November 30, 2011, when he was carrying plywood, and the plywood or his foot caught on obstructions in his work area; where different witnesses observed the circumstances of his injury. While the complaint claims a violation of Labor Law § 240(1), plaintiffs rely not on that statute, but instead on their claimed violations of 12 N.Y.C.R.R. §§ 23-1.5, 23-1.7(d) and (e), 23-1.30, and 23-2.1(a) and (b) under Labor Law § 241(6).

Plaintiffs' second action focusses on the prohibitions against slipping and tripping hazards, sharp projections, scattered tools and materials, and debris in passageways and work areas, 12 N.Y.C.R.R. § 23-1.7(d) and (e); requirements for storage of equipment and materials and disposal of debris, 12 N.Y.C.R.R. § 23-2.1(a) and (b); and requirements for adequate illumination at a minimum level. 12 N.Y.C.R.R. § 23-1.30. Section 23-1.5, like §§ 23-1.2, 23-1.3, and 23-1.4 that plaintiffs cite in their first action, Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 504 (1993) (§ 23-1.4); Schuliaz v. Arnell Constr. Corp., 261 A.D.2d 247, 248 (1st Dep't 1999) (§ 23-1.2), does not impose specific duties enforceable against defendants. Kochman v. City of New York, 110 A.D.3d 477, 478 (1st Dep't 2013) (§ 23-1.5); Cordeiro v. TS Midtown Holdings, LLC, 87 A.D.3d 904, 906 (1st Dep't 2011); Weinberg v. Alpine Improvements, LLC, 48 A.D.3d 915, 918 (3d Dep't 2008) (§§ 23-1.2, 23-1.3, 23-1.5); Williams v. White Haven Mem. Park, 227 A.D.2d 923, 923 (4th Dep't 1996) (§§ 23-1.3, 23-1.5).

### III. JOINT PROCEEDINGS

Plaintiffs claim that the right hand injury incapacitated Shortt from work for only four weeks, but by January 2012 his pain from his June 2011 injuries had increased, required surgeries, and from then on totally and permanently incapacitated him from work. Given this claimed sequence of effects, joint disclosure on damages in the two actions will avoid duplication of authorizations for and production of medical records and

duplication of court appearances regarding compliance with disclosure requirements. C.P.L.R. § 602(a). Joint disclosure on damages likely will clarify, better than separate proceedings, precisely which injuries caused what incapacity and for how long and whether the incapacity claimed after 2011 resulted from congenital abnormalities or degenerative conditions. Id.

Insofar as depositions in the two actions may include the same parties and other witnesses, the parties may agree to conduct one deposition of a witness for both actions to avoid duplication of background information and, consistent with C.P.L.R. § 3117(a), may use a deposition in one action in the other action at trial. E.g., Sadhwani v. New York City Tr. Auth., 66 A.D.3d 405, 405 (1st Dep't 2009); Rivera v. New York City Tr. Auth., 54 A.D.3d 545, 547 (1st Dep't 2008); Claypool v. City of New York, 267 A.D.2d 33, 35 (1st Dep't 1999). See Barnes v. City of New York, 44 A.D.3d 39, 45 (1st Dep't 2007); Weinberg v. City of New York, 3 A.D.3d 489, 490 (2d Dep't 2004). Otherwise, the core questions even of the same witnesses likely will differ, due to the distinct causes of plaintiffs' injury and distinct theories of liability. In the event liability is determined separately from damages in each action, via summary judgment or a bifurcated trial, the intersecting issues regarding the causes, effects, and duration of plaintiffs' injuries may warrant a joint trial on damages.

#### IV. FULL CONSOLIDATION

Full consolidation and a joint trial on liability, however, likely will produce more confusion among the jurors than efficiency in the disposition of the actions. Simoni v. Costigan, 100 A.D.3d 531, 531 (1st Dep't 2013); Addison v. New York Presbyt. Hosp./Columbia Univ, Med. Ctr., 52 A.D.3d 269, 270 (1st Dep't 2008); County of Westchester v. White Plains Ave., LLC, 105 A.D.3d 690, 691 (2d Dep't 2013). See Geneva Temps, Inc. v. New World Communities, Inc., 24 A.D.3d 332, 335 (1st Dep't 2005). Fairness of the trial always must prevail over judicial economy in any event.

Moreover, the common issues, personal injury due to violations of the same statutes, do not predominate over the issues that the jury must treat distinctly: the principal claims that rely on violations of completely different regulatory requirements, albeit under the same statute, arising from different circumstances, and causing completely different injuries. Simoni v. Costigan, 100 A.D.3d at 531; Addison v. New York Presbyt. Hosp./Columbia Univ, Med. Ctr., 52 A.D.3d at 270; County of Westchester v. White Plains Ave., LLC, 105 A.D.3d at 691; Beerman v. Morhaim, 17 A.D.3d 302, 303 (2d Dep't 2005). Given these distinct issues, defendants have not shown, and the court does not perceive, how maintaining the actions separately would pose a risk of inconsistent dispositions. See Murphy v. 317-319 Second Realty LLC, 95 A.D.3d 443, 445 (1st Dep't 2012); Badillo v. 400 E. 51st St. Realty LLC, 74 A.D.3d 619, 620 (1st

Dep't 2010); Amcan Holdings, Inc. v. Torys LLP, 32 A.D.3d 337, 340 (1st Dep't 2006); Matter of Progressive Ins. Co., 10 A.D.3d 518, 519 (1st Dep't 2004). In sum, while the two actions may involve common peripheral issues just as all actions for personal injuries due to defendants' negligence do, the central cause of plaintiffs' injury, as long as it is due to defendants' actions or omissions, and the theory of liability in each action are distinct.

V. CONCLUSION

Consequently, the court grants defendants' motion for consolidation only to the extent of ordering joint disclosure regarding plaintiffs' damages in the action in this court under Index Number 153538/2012 along with this action. C.P.L.R. § 602(a). The court otherwise denies defendants' motion, without prejudice to (1) agreed joint depositions on all issues of the same witnesses in both actions and (2) a motion for a joint trial on damages in both actions, in the event liability is determined separately from damages in each action. Id.

DATED: September 10, 2014

*Lucy Billings*  
 \_\_\_\_\_  
 LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
 J.S.C.