

**K-FX Rentals & Equip., LLC v FC Yonkers Assoc.,
LLC**

2014 NY Slip Op 32895(U)

February 27, 2014

Supreme Court, Westchester County

Docket Number: 54201/11

Judge: Mary H. Smith

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This opinion is uncorrected and not selected for official publication.

DECISION AND ORDER

FILED & ENTERED

2 1 2 7/14

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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K-FX RENTALS & EQUIPMENT, LLC, DECORATOR'S
DEPOT, INC. and DAVID WEINMAN,

MOTION DATE: 2/14/14

Plaintiffs,

ACTION NO. 1
INDEX NO.: 54201/11

-against-

FC YONKERS ASSOCIATES, LLC and P.J. HERMAN, LLC,

Defendants.
-----X

**SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY**

-----X
**ONEBEACON AMERICA INSURANCE COMPANY as
subrogee of K-F/X RENTALS & EQUIPMENT, LLC,**

**ACTION NO. 2
INDEX NO.: 53421/12**

and

**FIREMAN'S FUND INSURANCE COMPANY as subrogee
of PICTURE CARS EAST, INC.,**

Plaintiffs,

-against-

P.J. HERMAN, LLC,

Defendant.

-----X
The following papers numbered 1 to 5 were read on this motion by defendant P.J. Herman, LLC for a "partial motion to renew" and for an Order of consolidation, etc.¹

¹Defendant P.J. Herman, LLC's prior motion to consolidate these two actions had been denied based upon this Court's Decision and Order, dated September 28, 2012, based upon said defendant's failure to have filed copies of the pleadings in its motion papers.

To the extent that defendant P.J. Herman, LLC apparently further seeks a decision herewith on all of the pending summary judgment motions, this Court notes that it recently had issued its Decision and Order, dated February , 2014, in Action No. 2, deciding only plaintiff Onebeacon America Insurance Company's motion for summary judgment. This Court notes the time it now has expended in trying to simply understand P.J. Herman's instant request that all of the summary judgment motions be decided herewith. The Court now has learned that each summary judgment in the two actions, as well as this consolidation motion, are all marked in the Court's e-file system as having separate return dates. As the record presently reflects, Onebeacon's summary judgment motion in Action No. 2 had been returnable on January 31, 2014, P.J. Herman's consolidation motion is returnable February 14, 2014, and the three summary judgment motions returnable in Action No. 1 are calendared for February 18, 2014, BUT HAVE YET TO BE ASSIGNED. If P.J. Herman had desired all of the motions to be simultaneously decided on one return date, it properly should timely have requested same of Justice Lefkowitz in the Compliance Conference Part, cogently having identified the various sub judice motions and in which actions said motions were being brought, with what noticed return date, and the date to which it was requesting their collective adjournment. No such letter request is before this Court. In the

Papers Numbered

Notice of Motion - Affirmation (Monahan) - Exhs. (A-F) 1-3
 Answering Affirmation (Phelan) - Exhs. (1-5) 4-5

Upon the foregoing papers, it is Ordered that this renewed motion by defendant P.J. Herman, LLC for an Order of consolidation is granted in the exercise of this Court’s broad discretion to the extent that these two actions shall be jointly tried. See J & A Vending v. Eagle & Fine, 268 A.D.2d 505 (2nd Dept. 2000). Notwithstanding the unexplained and inordinate delay with respect to movant’s having renewed its motion for consolidation, which delay has caused the unnecessary waste of judicial resources in the parallel conferencing of these two actions over these almost past two years, this Court’s recent summary judgment Decision and Order in Action No. 2, dated February 18, 2014, wherein the pertinent facts underlying these two actions has been set forth,² establishes that these actions share the critical common issues of what had caused and/or contributed to the undisputed flooding and ensuing damages to K-F/X Rentals & Equipment, LLC and Picture

absence of same, there simply is no way for this Court to have known and addressed P.J. Herman’s request that the various motions be heard collectively on a new adjourned return date.

²On pages 3-4 of that Decision and Order, this Court had cited to plaintiff Onebeacon’s expert’s opinion that the crushing of the culvert, allegedly due to an improperly installed drain pipe on defendant P. J. Herman’s property, eventually had created a visible sinkhole on defendant’s property which plaintiff’s expert further had found to have been exacerbated by the continued dumping of construction debris by defendant P. J. Herman in an attempt to conceal and level the sinkhole after each rain. Onebeacon’s expert opines to a reasonable degree of engineering certainty that the subject flooding of the insureds’ property, reportedly on March 11, 2011 and April 15, 2011, had been caused by increased storm surface waters having been improperly redirected onto the insureds’ property “and the inability of the surface water to flow away from the subject premises due to the crushed culvert on Defendant PJ Herman’s property.”

[* 4]

Cars East, Inc.'s properties in and/or about March 11, 2011 and April 15, 2011. These actions necessarily involve similar overlapping questions of fact and liability, including issues of comparative negligence, and a joint trial will better serve the interests of justice and judicial economy and eliminate the possibility of divergent decisions by separate juries. See Hanover Ins. Group v. Mezansky, 105 A.D.3d 1000 (2nd Dept. 2013); Perini Corp. v. WDF, Inc., 33 A.D.3d 605 (2nd Dept. 2006); Geneva Temps, Inc. v. New World Communities, Inc., 24 A.D.3d 332 (1st Dept. 2005). Plaintiff Onebeacon has failed to demonstrate that it will suffer substantial prejudice as a result of a joint trial, particularly since discovery is now complete in both actions, this Court previously had rejected Onebeacon's argument that P.J. Herman could not rely upon the affidavit of Thomas A. Mierzwa,³ and Onebeacon's own expert has attributed two separate and/or contributing causes to the flooding of the subject properties, as claimed in each of these actions.

The parties in these now to be jointly-tried actions shall appear in the Settlement Conference Part, room 1600, at 9:30 a.m., on April 4, 2014.

Dated: February 27, 2014
White Plains, New York

³The Court notes that it mistakenly in its earlier Decision and Order on Onebeacon's motion for summary judgment had characterized Mr. Mierzwa as defendant P. J. Herman's expert.



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