

**O'Hara v The New School**

2014 NY Slip Op 33629(U)

October 31, 2014

Supreme Court, New York County

Docket Number: 100984/12

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

EA  
11/12/14  
E

HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

PART 5

PRESENT: \_\_\_\_\_  
Justice

Michael G. O'Hara  
-v-  
The New School, Suret Organizations  
et al

INDEX NO. 100984/12  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 03

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

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COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 10-31-14  
OCT 31 2014

  
\_\_\_\_\_, J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 5

-----X  
MICHAEL G. O'HARA and GLORIMAR O'HARA,

Plaintiffs,

-against-

**DECISION AND ORDER**

Index No. 100984/12  
Seq. No. 003

THE NEW SCHOOL, DURST ORGANIZATION,  
INC., TISHMAN CONSTRUCTION GROUP,  
SKIDMORE OWINGS & MERRILL, LLP,  
LANGAN ENGINEERING & ENVIRON-  
MENTAL SERVICES, INC., URBAN  
FOUNDATION ENGINEERING, LLC, and  
DESIMONE CONSULTING ENGINEERS,

Defendants.

-----X  
THE NEW SCHOOL, DURST ORGANIZATION,  
INC., and TISHMAN CONSTRUCTION  
CORPORATION OF NEW YORK,

Defendants/Third-Party  
Plaintiffs,

against

THE CITY OF NEW YORK and NEW YORK  
CITY DEPARTMENT OF ENVIRONMENTAL  
PROTECTION,

Third-Party Defendants.

-----X  
**KATHRYN E. FREED, J.S.C.**

Third-Party  
Index No. 590373/12

**FILED**

NOV 12 2014

**COUNTY CLERK'S OFFICE  
NEW YORK**

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION, AFFIRMATION IN SUPPORT, AND EXHIBITS ANNEXED	1-2 (Exh. A-Z)
PLAINTIFFS' AFFIDAVIT IN OPPOSITION AND EXHIBITS ANNEXED	3 (Exh. A-D)
DEFENDANTS' REPLY AFFIRMATION	4
AFFIRMATION IN OPPOSITION OF PLAINTIFF HARLEYSVILLE WORCESTER INS. CO., PLAINTIFF IN ACTION BEARING INDEX NO. 151740/13	5
AFFIRMATION WITH EXHIBITS ANNEXED AND MEMORANDUM IN OPPOSITION OF PLAINTIFFS 7-11 EAST 13 <sup>TH</sup> STREET TENANTS CORP., 7-11 EAST 13 <sup>TH</sup> STREET CONDOMINIUM, AND SAM KIM AND MONICA KIM IN ACTIONS BEARING INDEX NOS. 151740/13, 151743/13, 154017/13, AND 154017/13	6-7 (Exh. A-D)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER IS AS FOLLOWS:

In this action, plaintiffs Michael G. O'Hara and Glorimar O'Hara allege, inter alia, that they sustained damage to their home at 5 East 13<sup>th</sup> Street in Manhattan due, inter alia, to the negligence of defendants The New School, Tishman Construction Corporation of New York s/h/a Tishman Construction Group, The Durst Organization, Inc., and Urban Foundation Engineering, LLC (hereinafter collectively "the moving defendants"). The damage allegedly occurred in 2010 during the construction of a building for The New School on Fifth Avenue between 13<sup>th</sup> and 14<sup>th</sup> Streets. Pursuant to CPLR 602 (a), moving defendants seek to consolidate the captioned action, for the purposes of discovery, with four other actions, to wit, the action entitled

7-11 East 13<sup>th</sup> Street Tenants Corp., 7-11 East 13<sup>th</sup> Street Condominium, and Harleysville Worcester Insurance Company, as Subrogee of 7-11 East 13<sup>th</sup> Street Tenants Corp. and 7-11 East 13<sup>th</sup> Street Condominium, Plaintiffs, v The New School, Tishman Construction Corporation of New York, The Durst Organization, Inc. Urban Foundation/Engineering, LLC, DeSimone Consulting Engineers, Skidmore, Owings & Merrill, LLP and Langan Engineering & Environmental Services, Inc., Defendants, Index No. 151740/13 (“action no. 2”);

the action entitled

7-11 East 13 Street Tenants Corp., David Masenheimer, James Edward Morgan, Asaf Yogev, Barbara Thompson, Sarah Thompson, Evan Oppenheimer, Lia Levenson, Matt M. Oner, Daniella Van Gennep, Peter Nakada, Donald Wilmott, Sean Farquharson, John G. Donahue, Charles Stimson, Adam Singer, James McCarthy, Joshua Kessler, Bettina Micheli, Phillip Liu, Evan Reilly, Lesley Ann Skillen, Laurence Cantor, Richard Martin, Patricia White, Robert Angert and Shana Schwartz, Plaintiffs v The New School, Tishman Construction Corporation of New York, The Durst Organization, Inc. Urban Foundation/Engineering, LLC, DeSimone Consulting Engineers, Skidmore, Owings & Merrill, LLP and Langan Engineering & Environmental Services, Inc., Defendants, Index No. 151743/13 (“action no. 3”);

the action entitled

Sam Kim and Monica Kim, Plaintiffs v The New School, Tishman Construction Corporation of New York, The Durst Organization, Inc. Urban Foundation/Engineering, LLC, DeSimone Consulting Engineers, Skidmore, Owings & Merrill, LLP and Langan Engineering & Environmental Services, Inc., Defendants, Index No. 154017/13 (“action no. 4”); and

the action entitled

David Z., Inc. v The New School, Index No. 651626/12 (“action no. 5”).

Movants also seek a protective order, pursuant to CPLR 3103(b), staying all discovery in this matter until their motion for consolidation is decided.

While the moving defendants’ notice of motion seeks consolidation, without any limitation, it is clear from the papers they have submitted in connection with their motion that they are seeking consolidation only for the purpose of conducting discovery. As so limited, the

motion is opposed by plaintiffs Michael and Glorimar O'Hara. The plaintiffs in action nos. 2, 3, and 4 do not oppose consolidation as to discovery, on the condition that discovery is conducted in a manner which will not prejudice their rights or those of the O'Haras. The plaintiffs in action no. 5 have not taken any position with regard to the motion.

As a general rule, consolidation, in whole or in part, is favored where actions involve common questions of law and fact, absent prejudice to a substantial right of the party opposing consolidation. *Amcan Holdings, Inc. v Torys LLP*, 32 AD3d 337, 339 (1<sup>st</sup> Dept 2006) citing *Amtorg Trading Corp. v Broadway & 56<sup>th</sup> St. Assoc.*, 191 AD2d 212, 213 (1<sup>st</sup> Dept 1993). All of these actions arise from construction of a building by the New School that is alleged to have caused the earth under the adjacent and nearby buildings owned, in whole or in part, by the plaintiffs in these actions to shift, resulting in the buildings settling and sustaining damage. The responses to the motion by the plaintiffs in action nos. 2, 3, and 4 call for a discovery schedule as to those actions, elements of which have been proposed by both the moving defendants and the plaintiffs in action nos. 2, 3, and 4.

In opposing the motion, the O'Haras' argue that document discovery in their case has been completed, while it has barely begun in the other actions, and that the complexity of discovery would be greatly increased as a result of consolidation, given that defendants would, presumably, seek to depose each of the 26 individual plaintiffs in action no. 3, at least as to their claimed damages.

The question of whether actions should be consolidated lies in the discretion of the court. *See Mt. Hawley Ins. Co. v Interstate Fire & Cas. Co.*, 98 AD3d 859 (1<sup>st</sup> Dept 2012). A court may deny consolidation where, as here, actions are at different procedural stages. *See Goldman v*

*Rosen*, 15 AD3d 321 (1<sup>st</sup> Dept 2005). Although any prejudice arising from the more advanced discovery stage of the O’Haras’ lawsuit might be mitigated by requiring the movants to provide the plaintiffs in action nos. 2-5 documents which have already been provided to the O’Haras (*see generally Morell v Basa*, 300 AD2d 134 [1<sup>st</sup> Dept 2002]), this Court finds that, even if such documentation is produced, future delay arising from the unusually large number of depositions to be held in the actions which movants seek to consolidate with the captioned action would prejudice the O’Haras’ substantial right to move forward expeditiously with their action. *See generally Garcia v Geshner Realty Corp.*, 280 AD2d 440, 440-41 (1<sup>st</sup> Dept 2007) (even where main and third-party actions contained common issues of fact, case could be severed where failure to do so would result in further delay causing prejudice to plaintiff); *cf. Fisher 40<sup>th</sup> & 3rd Co. v Welsbach Elec. Corp.*, 266 AD2d 169 (1<sup>st</sup> Dept 1999) (where possible delay existed due to consolidation, court found that such delay could be avoided by court order directing that discovery be expedited).

Additionally, even where common issues of law and/or fact exist, consolidation is not appropriate where “individual issues predominate” concerning the circumstances of each case. *Bender v Underwood*, 93 AD2d 747 (1<sup>st</sup> Dept 1983). Here, since the damages in all of the actions sought to be consolidated allegedly arose from construction of the same building by The New School, it appears at first blush that these actions share a common nucleus of fact and law. However, since action nos. 2-5 arise from damage to buildings other than that involved in the captioned action, they will require site-specific discovery regarding damages, and are likely to require such specific discovery regarding liability. Thus, this Court finds, in its discretion, that action nos. 2-5 should not be consolidated with the captioned action.

Finally, that branch of the motion seeking a protective order is denied, since this discovery-related motion was not accompanied by an affirmation of good faith as required by 22 NYCRR § 202.7. In any event, since the movants sought a protective order staying discovery pending the outcome of their consolidation motion, their request for a protective order is moot given that the consolidation motion is resolved by this order.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion by defendants The New School, Tishman Construction Corporation of New York s/h/a Tishman Construction Group, The Durst Organization, Inc., and Urban Foundation Engineering, LLC is denied in all respects; and it is further,

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

Dated: October 31, 2014

**FILED** ENTER:

NOV 12 2014

**COUNTY CLERK'S OFFICE  
NEW YORK**



**KATHRYN E. FREED, J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT**