SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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WASHINGTON HEIGHTS MEZZ LLC,

Plaintiff,

- against -

74 PINEHURST LLC,

Defendant.

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Index No. 159036/2013

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

AMENDED ORDER

Plaintiff, Washington Heights Mezz LLC ("Plaintiff" or "Mezz"), brings this action to recover damages based on the alleged collapse of a defective retaining wall (the "Retaining Wall") on June 8, 2013. Plaintiff claims that the Retaining wall is situated on property held by defendant, 74 Pinehurst LLC ("Defendant" or "Pinehurst"), and that the alleged collapse created a hazardous condition and caused damage to Plaintiff's real property, located at 70-72 Pinehurst Avenue, New York, New York (the "Mezz Property").

Plaintiff now moves for an Order, pursuant to CPLR § 602, consolidating the above captioned action ("Action No. 2") for joint trial and discovery with the action titled *74 Pinehurst LLC v. Zoria Construction NY, Inc.*, ("Action No. 1"), which was filed in New York County under the index number 652246/2013, and subsequently transferred to Suffolk County, where it is currently pending, on the ground that the two actions involve common parties and common questions of law and fact; and for an Order adding Zoria Construction NY Inc. ("Zoria") as a party defendant in the above-captioned action and to deem the service of the attached supplemental summons and amended complaint with these papers as satisfactory for purposes of commencing litigation against such parties.

Defendant opposes consolidation for trial, but does not oppose consolidation for purposes of joint discovery. Defendant does not oppose Plaintiff's motion to add Zoria as a party defendant in this action.

CPLR § 602(a) gives the trial court discretion to consolidate actions involving common questions of law or fact. "'[C]onsolidation is generally favored by the courts 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' (*Amtorg Trading Corp. v Broadway & 56th St. Assoc.*, 191 AD2d 212, 213, 594 NYS2d 204 [1993]). The burden of demonstrating prejudice to a substantial right is on the party opposing consolidation (*Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 74, 747 NYS2d 441 [2002])." (*Amcan Holdings, Inc. v. Torys LLP*, 32 A.D.3d 337, 339 [1st Dep't 2006]).

"Where two actions involving identical issues are pending in separate counties, the actions should be consolidated pursuant to CPLR 602 in the county where the first action was commenced absent special circumstances (*Mattia v. Food Emporium*, 259 AD2d 527 [1999])." (*Harrison v. Harrison*, 16 A.D.3d 206, 207 [1st Dep't 2005]).

Here, it is undisputed that Actions No. 1 and 2 are based on the Retaining Wall's alleged collapse on June 8, 2013, and that these actions share common questions of law and fact. However, Pinehurst argues that there are certain issues in Action No. 1, such as Pinehurst's contractual relationship with Zoria, the defendant in Action No. 1, which do not involve Plaintiff. Pinehurst argues that these issues "may" require the separate trial of Actions No. 1 and 2, particularly since Zoria is not yet named as a defendant in Action No. 1.

Accordingly, consolidation is warranted in the interest of judicial economy and ease of decision-making. These actions share common questions of law and fact, and Pinehurst fails to demonstrate that consolidation will prejudice a substantial right.

As far as venue for the action is concerned, Pinehurst commenced Action No. 1 in New York County on June 25, 2013. Plaintiff commenced the instant action in New York County on October 2, 2013, more than three month later.

However, Action No. 1 was transferred, by Order dated October 24, 2013, to Suffolk County, upon Zoria's motion for a change of venue. Pinehurst opposed that

motion and cross-moved to retain venue in New York County, and on November 27, 2013, Pinehurst filed a motion to renew its cross-motion to retain venue in New York County in Action No. 1. By Order dated April 16, 2014, the Court granted Pinehurst's motion to renew its cross-motion to retain venue in New York County in Action No. 1; and, upon renewal, denied Pinehurst's cross-motion for the same.

Thus, Action No. 1 has been determined to be properly venued in Suffolk County. Accordingly, the actions should travel together in Suffolk County, where the first action currently is pending[1].

Pursuant to CPLR §3025(b), "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences at any time at any time by leave of court . . . . Leave shall be freely given upon such terms as may be just . . . ." "CPLR 3025 allows liberal amendment of pleadings absent demonstrable prejudice." (*Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 271 A.D.2d 278, 280 [1st Dept. 2000]). Notwithstanding the absence of prejudice, leave to amend a pleading must be denied where the proposed amendment is plainly lacking in merit (*see Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 A.D.2d 636 [1st Dept. 1993]).

Additionally, CPLR § 1002 provides, "Persons against whom there is asserted any right to relief jointly, severally, or in the alternative, arising out of the same transaction, occurrence, or series of transactions or occurrences, may be joined in one action as defendants if any common question of law or fact would arise." (CPLR § 1002[b]).

Here, Plaintiff seeks to recover damages allegedly resulting from the collapse of the Retaining Wall. Plaintiff claims that Zoria performed construction services affecting the Retaining Wall, and that such services likely contributed to the collapse at issue, and to Plaintiff's resulting damages. Plaintiff argues that Zoria is already named as a defendant in related litigation, i.e. Action No. 1, and that, as a result, the proposed amendment to Plaintiff's complaint will not prejudice Zoria.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for leave to amend its complaint is granted without opposition, and the amended complaint in the proposed form

[1] Certainly, the parties cannot hope to circumvent the prior Order of Justice Mendez, which transferred venue of Action No. 1 to Suffolk County, by seeking this consolidation.

annexed to the moving papers shall be deemed served on the parties upon service of a copy of this Order with a notice of entry thereof; and it is further

ORDERED that Plaintiff's motion for consolidation is granted only to the extent that the above-captioned action in its amended form is joined for purposes of trial and discovery with Action No. 1, and the two actions shall travel together; and it is further

ORDERED that, within 30 days from entry of this order, counsel for the movant shall serve a certified copy of it upon the Clerk of the Supreme Court of New York County, who, upon payment of the proper fees, shall transfer to the Clerk of the Supreme Court, Suffolk County, all of the papers on file in the above-captioned action; and it is further

ORDERED that the Clerk of the Supreme Court, Suffolk County, upon receipt of a copy of this Order with notice of entry, shall, without further fee, assign an index number to the matter transferred pursuant to this Order; and it is further

ORDERED that, within 45 days from entry of this Order, counsel for the movant shall serve a copy of it with notice of entry upon the Clerk of the Trial Support Office in Suffolk County, together with a Request for Judicial Intervention, for which the Clerk shall not charge a fee.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: October 22, 2014

EILEEN A. RAKOWER, J.S.C.