

Aranda v Jaffee

2015 NY Slip Op 30226(U)

February 5, 2015

Supreme Court, Suffolk County

Docket Number: 11-22551

Judge: Ralph T. Gazzillo

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 11-15-13 (#005)
MOTION DATE 4-23-14 (#006)
ADJ. DATE 8-12-14
Mot. Seq. # 005 - MotD
006 - MD

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JOSE ANTONIO ARANDA and JOSE GUERRERO,

Plaintiffs,

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- against -

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SCOTT JAFFEE, AMY JAFFEE, SPECTORGROUP 11, LLP d/b/a SPECTOR GROUP, SG DESIGN BUILD, LLC, IZZO EXCAVATION, INC., OCEANSIDE IRON & STEEL SUPPLY, INC., FIRST CLASS CONCRETE CORP., GF CONSTRUCTION, INC., DUBINSKY CONSULTING ENGINEERS, P.C., JOHN HANCOCK, JR. LLC d/b/a NEW MILLENNIUM BUILDINGS SYSTEMS LLC, ABC COMPANY ONE THROUGH ABC COMPANY TEN (fictitious names meant to describe one or more entities responsible for care, control and management as construction manager or subcontractor of the construction project where plaintiffs were injured), and XYZ COMPANY ONE THROUGH XYZ COMPANY TEN (fictitious names meant to describe one or more entities acting as general contractor or subcontractor for this construction project where plaintiffs were injured),

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Defendants.

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SPECTORGROUP 11, LLP,

Third-Party Plaintiff,

- against -

BELVEDERE CONTRACTING SERVICES,
INC. and UNIVERSAL READY MIX, INC.,

Third-Party Defendants.
-----X

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Upon the following papers numbered 1 to 49 read on these motions for dismissal/consolidation; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12, 13 - 23; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 24 - 26, 27 - 29; 30 - 32; 33 - 35; 36 - 37; 38 - 39; 40 - 42; Replying Affidavits and supporting papers 43 - 44; 45 - 46; 47 - 49; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (005) by defendant SG Design Build, LLC, and the motion (006) by third-party defendant Universal Ready Mix, Inc., are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant SG Design Build, LLC, for, inter alia, an order dismissing plaintiffs' Labor Law §241(6) claims is granted to the extent indicated herein, and is otherwise denied; and it is

ORDERED that the motion by third-party defendant Universal Ready Mix, Inc., for an order removing two actions currently pending in the Supreme Court, Nassau County, and joining them for trial with this action is denied.

Plaintiffs Jose Aranda and Jose Guerrero seek to recover damages for personal injuries allegedly sustained on July 27, 2011, when they fell as a result of the collapse of the roof of an underground sports court which had been constructed beneath the front yard of the Brookville home of defendants Scott Jaffe and Amy Jaffe. The accident occurred when plaintiffs, who were in the process of moving wheelbarrows filled with dirt across the front yard, fell into an open hole when the roof of the underground court collapsed. Plaintiffs filed separate actions naming the homeowners and various contractors working on the construction project as defendants. By order of this court dated March 1, 2013, plaintiffs' actions were consolidated under index number 11-22551. Defendant Spector Group II, LLP, impleaded Belvedere Contracting Services, Inc., and Universal Ready Mix, Inc., as third party defendants to the action. Shortly thereafter, Scott and Amy Jaffe commenced a second action under index number 12-600823 in Supreme Court, Nassau County, asserting claims for breach of contract and property damage against a number of the contractors who worked on the construction project, including third-party defendant Universal Ready Mix. A third action commenced in Supreme Court, Nassau County, under index number 13-151114, was brought by Chartis Property Casualty Company, as subrogee of the homeowners.

Defendant SG Design Build, LLC (“SG”) now moves for dismissal of plaintiffs’ Labor Law §241(6) claims against it based on their failure to allege the violation of any specific applicable sections of the New York Industrial Code in relation to such claim, and for leave to amend its answer to the complaint in Action No. 1 to include a defense based on sections 11 and 29 of the Workers’ Compensation Law. In particular, SG asserts that the proposed amendment should be permitted, since the Workers Compensation Board has determined plaintiff Jose Guerrero was its employee at the time of the alleged accident. Neither plaintiff opposes the branch of SG’s motion seeking to amend its answer to include a defense based upon sections 11 and 29 of the Workers’ Compensation Law. However, they oppose the branch of the motion seeking dismissal of their Labor Law §241(6) claim, arguing that the failure to identify specific provisions of the Industrial Code in their pleadings is not fatal to such a claim, and that they have, subsequent to the making of this motion, served SG with a Supplemental Bill of Particulars specifying the provisions which were allegedly violated.

At the outset, the court grants the unopposed branch of SG’s motion for an order permitting it to amend its answer to include a defense based on the Workers’ Compensation Law (*see Murray v New York*, 43 NY2d 400, 401 NYS2d 773 [1977]; *Bonavita v McNicholas*, 72 AD3d 859, 898 NYS2d 866 [2d Dept 2010]; *Nastasi v Span, Inc.*, 8 AD3d 1011, 778 NYS2d 795 [4th Dept 2004]; *Brown v Collora*, 278 AD2d 266, 718 NYS2d 183 [2d Dept 2000]). Leave to amend should be freely given where, as here, the opponent is not surprised or prejudiced by the proposed amendment, and the proposed amendment appears to be meritorious (*see Bonavita v McNicholas, supra; Brown v Collora, supra*). However, the branch of SG’s motion seeking dismissal of plaintiffs’ Labor Law §241(6) claims pursuant to CPLR 3211(a)(7) is denied, as SG has indicated in its reply papers that it is withdrawing its request for such dismissal. In any event, the papers submitted by plaintiffs in opposition to the motion includes supplemental Bill of Particulars alleging the violation of various sections of the Industrial Code. The court notes that while a plaintiff’s initial failure to specify specific applicable provisions of the Industrial Code in his or her pleadings is not fatal to a Labor Law §241(6) claim (*see Galarraga v City of New York*, 54 AD3d 308, 310, 863 NYS2d 47 [2008]; *Kelleir v Supreme Indus. Park*, 293 AD2d 513, 513-514, 740 NYS2d 398 [2002]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 705 NYS2d 577 [2000]), to recover damages on a cause of action alleging a violation of Labor Law § 241 (6), the rule or regulation alleged to have been breached must be a specific, positive command and must be applicable to the facts of the case (*see Forschner v Jucca Co.*, 60 AD3d 996, 883 NYS2d 63 [2d Dept 2009]; *Cun-En Lin v Holy Family Monuments*, 18 AD3d 800, 796 NYS2d 684 [2d Dept 2005]).

Third-party defendant Universal Ready Mix, Inc. (“Universal”) now moves, pursuant to CPLR 602, for an order removing the actions commenced in Nassau County and joining them for discovery and trial with the instant action. Universal contends that the actions should be joined, since they all arise from the same incident, involve common questions of law and fact, and joinder will promote judicial economy. The motion is opposed by plaintiffs Scott and Amy Jaffe, and defendant Izzo Excavation Inc. The opponents argue that the actions, which respectively involve claims for personal injuries, property damage, and breach of contract should not be joined for trial, since they involve distinct questions of law and fact, require different standards of proof, and joinder would lead to prejudicial delay and issue confusion.

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The motion is denied. A motion to consolidate or join for trial two or more actions rests within the sound discretion of the trial court (*see* CPLR 602; *Matter of Long Is. Indus. Group v Board of Assessors*, 72 AD3d 1090, 1091, 900 NYS2d 128 [2d Dept 2010]; *North Side Sav. Bank v Nyack Waterfront Assoc.*, 203 AD2d 439, 610 NYS2d 862 [2d Dept 1994]). While CPLR 602 provides that actions “involving a common question of law or fact” may be consolidated by court order, consolidation or joinder is inappropriate where the cases involve different factual issues and legal claims (*Gibbons v Groat*, 22 AD2d 996, 997, 254 NYS2d 843 [3d Dept 1964]; *see Pau v Bellavia*, 145 AD2d 609, 536 NYS2d 472 [2d Dept 1988]), and would result in jury confusion and prejudice to defendants (*see Simoni v Costigan*, 100 AD3d 531, 953 NYS2d 858 [1st Dept 2012]; *Suckishvili v Visiting Nurse Serv. of N.Y.*, 74 AD3d 433, 900 NYS2d 874 [1st Dept 2010]). Moreover, it is improvident to consolidate actions pending in different counties when, as a result of such consolidation, certain parties would appear as both plaintiff and defendant in the consolidated action (*see Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 806 NYS2d 519 [1st Dept 2005]; *M & K Computer Corp. v MBS Indus.*, 271 AD2d 660, 706 NYS2d 194 [2d Dept 2000]).

Although the actions arise from the same incident, a joint trial is inappropriate where, as here, the actions set forth distinct claims for damages based on negligence, the Labor Law, and breach of contract (*see Progressive Northeastern Ins. Co. v North State Autobahn, Inc.*, 71 AD3d 657, 896 NYS2d 137 [2d Dept 2010]; *Beerman v Morhaim*, 17 AD3d 302, 791 NYS2d 854 [2d Dept 2005]; *Heydt Contracting Corp. v Tishman Constr. Corp.*, 163 AD2d 196, 558 NYS2d 47 [1st Dept 1990]). Moreover, not only will consolidation result in Scott and Amy Jaffe appearing as both plaintiffs and defendants in the consolidated action (*see M & K Computer Corp. v MBS Indus.*, *supra*), but joinder of their claim for property damage with a claim by their insurer for subrogation is an improvident exercise of the court’s discretion, since “[i]t is generally recognized that, even where common facts exist, it is prejudicial to insurers ‘to have the issue of insurance coverage tried before the jury that considers the underlying liability claims’” (*Paramount Ins. Co. v Rosedale Gardens, Inc.*, 293 AD2d 235, 242, 743 NYS2d 59 [1st Dept 2002], *quoting Medick v Millers Livestock Mkt.*, 248 AD2d 864, 865, 669 NYS2d 776 [3d Dept 1998]; *see also Christensen v Weeks*, 15 AD3d 330, 330, 790 NYS2d 153 [2d Dept 2005]).

Dated: _____

2/5/15

 A.J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION

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