

Edgar v Edgar

2015 NY Slip Op 30375(U)

March 10, 2015

Supreme Court, Suffolk County

Docket Number: 9163-2014

Judge: James C. Hudson

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This opinion is uncorrected and not selected for official publication.

**Supreme Court of the County of Suffolk
State of New York - Part XL**

PRESENT:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

x-----x

BRUCE EDGAR and VIRGINIA EDGAR,

Plaintiffs,

-against-

BRUCE M. EDGAR AND JOYCE EDGAR,

Defendants.

x-----x

AMENDED

INDEX NO.: 9163-2014

SEQ. NO.: 002 mot d

PLAINTIFFS ATTY:
TSUNIS, GASPARIS & LUSTIG, LLP
By: Christopher P. Ring, Esq.
2929 Expressway Drive North
Islandia, NY 11749

DEFENDANT'S ATTY:
ANTHONY M. GRANDINETTE, ESQ.
114 Old Country Road
Mineola, NY 11501

Upon the following papers numbered 1-34 read on this motion for Consolidation; Notice of Motion/ Order to Show Cause and supporting papers 1-13; ~~Notice of Cross Motion and supporting papers 4~~; Answering Affidavits and supporting papers 14-29; Replying Affidavits and supporting papers (30-34 not considered); ~~Other 4~~; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED, that the proceeding pending as Action No. 2 in the District Court of the County of Suffolk, Fourth District, Hauppauge is hereby joined for the purposes of trial with the matter under Index Number 009163/2014; and it is further

ORDERED, that petitioner/plaintiffs, Bruce Edgar and Virginia Edgar, shall make payments past due consisting of \$1,550.00 per month from August 1, 2014 through March 1, 2015 for a total of \$12,400.00 and continue to pay \$1,550.00 per month during the pendency of this action; and it is further

ORDERED, that the sums to be paid by petitioner/plaintiffs shall be paid directly to the respondent/defendants; and it is further

ORDERED, that the parties shall enter into a stipulation that the payment

acceptance of rent shall not prejudice the rights of any of the parties to the action, specifically with regard to the claims set forth in the complaint; and it is further

ORDERED, that counsel for petitioner/plaintiffs shall promptly serve a copy of this order with notice of entry by first class mail upon all appearing parties and upon the Suffolk County District Court, Fourth District, and shall promptly thereafter file the affidavits of service with the Suffolk County Clerk; and it is further

ORDERED, that upon being served with a copy of this Order, the clerk of the Suffolk County District Court, Fourth District, is directed to transfer all papers filed under Index Number LT-289-14 to the clerk of this Court.

Petitioners, Bruce Edgar and Virginia Edgar, brought this application by order to show cause to consolidate a special proceeding (Action No. 2) pending in the Fourth District Court, Hauppauge under Index Number LT 289-14, in which they are respondents, to the matter pending in this Court under index number 009163/2014 (Action No. 1). In the Supreme Court action, petitioners are plaintiffs in an action seeking several forms of relief in the nature of constructive trust, unjust enrichment, fraud and breach of agreement, among others, in an effort to establish their rights concerning an improved parcel of real property in St. James, Suffolk County, New York. Respondent/defendants, Bruce M. Edgar and Joyce Edgar, oppose the application to consolidate, seeking to recover possession of the real property in question. The Court did not consider petitioner/plaintiff's reply as the Court did not grant leave for the submission of a reply.

To achieve their goal of consolidation, petitioners offer the following decisions as authority: *Mattia v. Food Emporium, Inc.*, 259 AD2d 527 (2nd Dept. 1999); *In re Daniel*, 181 Misc.2d 941 (Civ. Ct. Bronx Cty. 1999); *Moretti v. 860 West Tower, Inc.*, 221 AD2d 191 (1st Dept. 1995) and *Berman v. Greenwood Village Community Development, Inc.*, 156 AD2d 326 (2nd Dept. 1989). In *Mattia, supra.*, the Second Department held "[a] motion to consolidate actions or for a joint trial pursuant to CPLR 602 (a) rests in the sound discretion of the trial court. Absent a showing of prejudice to a substantial right by a party opposing the motion, consolidation should be granted where common questions of law or fact exist," *Mattia, supra.*, at page 527. In *Moretti, supra.*, the First Department addressed a set of circumstances nearly identical to the case at bar. In that case, the trial court consolidated a summary non-payment proceeding in the New York City Civil Court with a Supreme Court action involving common questions of law and fact. The First Department held in its unanimous affirmance:

The IAS Court was within its discretion in granting removal and consolidation, in the interest of judicial economy, as both cases involved common questions of law and fact and plaintiff would otherwise be unable to obtain full redress of her rights. Neither plaintiff's negligence claims nor her request for injunctive relief could be adjudicated in the nonpayment proceeding (see, *Atherton v 21 E. 92nd St. Corp.*, 149 AD2d 354). The delay in determination of the nonpayment proceeding will not cause prejudice sufficient to justify denial of the motion (see, *Amtorg Trading Corp. v Broadway & 56th St. Assocs.*, 191 AD2d 212), as the parties' real controversy concerns money, not possession of the premises, and as interest may be awarded if defendant prevails (CPLR 5001), *Moretti, supra.*, at 191,192.

In *Berman v. Greenwood Village Community Development, Inc.*, *supra.*, in which the Second Department affirmed a decision coming out of Suffolk County Supreme Court (Tannebaum, J.) in 1989 in which actions were consolidated. The case involved facts and questions of law, again, almost identical to the instant case. In that case, the Berman's sued Greenwood Village for breach of contract and Greenwood brought a summary proceeding to recover rents. The Second Department, in affirming, stated "It is well established that the power to order consolidation rests in the sound discretion of the court, and that where common questions of law or fact exist, consolidation is warranted unless the party opposing consolidation demonstrates prejudice to a substantial right," *Berman, supra.*, at 326, 327 [internal citations omitted]. In that case Justice Tannenbaum ordered the plaintiffs to continue to pay rent during the pendency of the case.

Respondent/defendants, Bruce M. Edgar and Joyce Edgar oppose the application to consolidate. They refer to the hardship that they, as the landowners, will suffer if the summary proceeding is joined to the Supreme Court action. The hardship they allege is that they have been denied the ability to collect rents in order to pay the expenses associated with ownership of the property. In support of their argument, respondent/defendants have relied upon three decisions which are not binding upon this Court, they are: *Cotignola v. Lieber*, 34 AD2d 700 (3rd Dept. 1970); *Lang v. Pataki*, 176 Misc. 2d 676 (Sup. Ct. N.Y. Cty. 1998); and *Carroll v. Nostra Realty Corp.*, [cited as: 2005 N.Y. Misc. LEXIS 3307, 17 (N.Y. Sup. Ct. 2005)]. In *Cotignola, supra.*, the Third Department reversed an order by the County Court adjourning a summary proceeding

for eviction which had been filed by the administrator of an estate against a party in the Surrogate's Court proceeding who was in possession of the subject real estate. The case did not involve a request for consolidation as in the instant application.

In *Lang v. Pataki, supra*, the Supreme Court, New York County, decided a case in which the petitioners brought a proceeding against the Governor and the Housing Court, among others, to enjoin evictions of the petitioners as a class while the issue at stake was decided. At issue on the application for a preliminary injunction and class certification was the constitutionality of the then recent amendments of RPAPL §§ 745 (2) and 747-a contained in chapter 116 of the Laws of 1997. Each individually named plaintiff in the amended complaint asserted that they were at risk of wrongful eviction based on the allegedly unconstitutional laws, *Lang, supra*, at 678. Once again, the case did not involve the issue of consolidation and, as such, can be distinguished from the case at hand. In the instant case, consolidation is an appropriate remedy. The Court can condition the consolidation in such a way as to avoid any potential prejudice or harm of which respondent/defendants complain, *see, Testa v Perillo*, 141 NYS2d 748 (Sup Ct Bronx Cty, 1955), while at the same time serve to hone the issues in the consolidated action.

In *Carroll v Nostra Realty Corp.*, 2005 WL 6165941 (N.Y.Sup.) (Trial Order), 2005 N.Y. Slip Op. 30282, the Supreme Court in New York County granted the consolidation and further granted relief in the form of an order *pendente lite*, compelling the tenant in that case to continue to pay rent to the landlord. "The Supreme Court retains broad discretion in deciding whether to compel payment of use and occupancy *pendente lite* (*Alphonse Hotel Corp. v 76 Corp.*, 273 AD2d 124, 710 NYS2d 890 [1st Dept 2000]). Payment of use and occupancy *pendente lite* 'accommodates the competing interests of the parties in affording necessary and fair protection to both and preserves the status quo until a final judgment is rendered' (*MMB Assoc. v Dayan*, 169 AD2d 422, 564 NYS2d 146, 147 [1st Dept 1991])."

This Court adheres to the principle that "where common questions of law or fact exist, a motion to consolidate should be granted absent a showing of prejudice to a substantial right by the party opposing the motion" [*Kally v. Mount Sinai Hosp.*, 44 A.D.3d 1010, 1010, 844 N.Y.S.2d 415 (2nd Dept., 2007); *see* CPLR 602; *Nigro v. Pickett*, 39 A.D.3d 720, 721, 833 N.Y.S.2d 655 (2nd Dept., 2007)]. Consolidation or joint trials are "favored by the courts in serving the interests of justice and judicial economy" [*Flaherty v. RCP Assoc.*, 208 A.D.2d 496, 498, 616 N.Y.S.2d 801 (2nd Dept., 1994); *see, Shanley v. Callanan Indus.*, 54 N.Y.2d 52, 57, 444 N.Y.S.2d 585, 429 N.E.2d 104

(1981); *Mideal Homes Corp. v. L & C Concrete Work*, 90 A.D.2d 789, 455 N.Y.S.2d 394 (2nd Dept., 1982)]. Additionally, by compelling petitioner/plaintiffs to pay back rent payments and continue to pay rent during the pendency of the proceeding, harm to respondent/defendants is minimized, *see, Testa, supra.*, at 749.

Since petitioner in the matter herein is the respondent in the matter in the lower Court, a joint trial is preferable to consolidate in order to avoid confusion to the trier of fact (*Bass v. France*, 70 A.D.2d 849 [1st Dept. 1979]).

Therefore, after a careful consideration of the foregoing, the motion for consolidation of the two referenced indexed actions is granted to the extent that the actions shall be tried together without consolidation. The Court directs that a separate note of issue and certificate of readiness be filed and separate fees paid for each action.

This constitutes the decision and Order of the Court.

DATED: MARCH 10, 2015
RIVERHEAD, NY



HON. JAMES HUDSON, A.J.S.C.