

Atlantic Yards B2 Owner, LLC v Skanska USA Bldg. Inc.
2015 NY Slip Op 31485(U)
August 5, 2015
Supreme Court, New York County
Docket Number: 652681/2014
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK -
NEW YORK COUNTYPRESENT: SALIANN SCARPULLA
JusticePART 39

ATLANTIC YARDS B2 OWNER, LLC

INDEX NO. 652681/2014

- V -

MOTION DATE 5/27/15

SKANSKA USA BUILDING INC.

MOTION SEQ. NO. 002

The following papers, numbered 1 to _____, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause - Affidavits - Exhibits		No(s) _____
Answering Affidavits - Exhibits		No(s) _____
Replying Affidavits		No(s) _____
Cross Motion		<u>Yes</u>

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

Defendant Skanska USA Building Inc. ("Skanska") moves to dismiss plaintiff Atlantic Yards B2 Owner, LLC's ("B2 Owner") first amended complaint pursuant to CPLR § 3211(a)(4). Skanska contends that this action should be dismissed as duplicative of another action pending before me, *Skanska USA Building Inc. v. Atlantic Yards B2 Owner, et al.*, Index No. 652680/2014 ("the Skanska action").

B2 Owner opposes this motion and cross-moves to consolidate this action with the Skanska action pursuant to CPLR § 602. B2 Owner argues that consolidation is a more appropriate remedy than dismissal because the two actions involve common questions of law and fact, but were commenced by different plaintiffs alleging different breaches of the same agreement.

CPLR § 3211(a)(4) provides that a court may dismiss an action when "another action [is] pending between the same parties for the same cause of action in a court of any state or the

United States.” In contrast, under CPLR § 602(a), a court may order that two actions be consolidated or jointly tried when they involve “common question of law or fact.”

The two actions at issue here arise out of a construction management agreement (“the CM Agreement”) that Skanska entered with B2 Owner, under which Skanska agreed to manage the construction of a high-rise residential building using modular units. In this action, B2 Owner asserts that Skanska breached the CM Agreement by failing to perform its work according to schedule, failing to hire employees with sufficient skill, and ceasing to perform its work in August 2014. In the Skanska action, Skanska asserts that B2 Owner breached the CM Agreement by failing to provide a correct design for construction, failing to issue change orders, and failing to make timely payments and financial assurances.

While it is undisputed that the two actions arise out of the same agreement and involve the same parties, I find that the two actions do not involve the same cause of action as required for dismissal under CPLR § 3211(a)(4). *Morgulas v. J. Yudell Realty, Inc.*, 161 A.D.2d 211, 213 (1st Dep’t 1990); *White Light Productions, Inc. v. On the Scene Productions, Inc.*, 231 A.D.2d 90, 94 (1st Dep’t 1997). In this action, B2 Owner asserts a breach of contract cause of action, while in the other action, Skanska asserts its own breach of contract cause of action. As the two actions do not involve the same cause of action, I deny Skanska’s motion to dismiss the first amended complaint pursuant to CPLR § 3211(a)(4).

However, because the two actions involve common questions of law and fact, I grant B2 Owner’s cross-motion for consolidation to the extent of ordering a joint trial of both actions. A joint trial “will avoid unnecessary duplication of proceedings, save unnecessary costs, and prevent the injustice that would arise from divergent decisions based on the same facts.”

Cummin v. Cummin, 56 A.D.3d 400, 400 (1st Dep’t 2008). True consolidation is inappropriate

as it would result in jury confusion because each party would then appear as both a plaintiff and a defendant. *Geneva Temps, Inc. v. New World Communities, Inc.*, 24 A.D.3d 332, 335 (1st Dep't 2005); *Rogin v. Rogin*, 90 A.D.3d 507, 508 n.1 (1st Dep't 2011) (noting the distinction between joint trial and consolidation is critical because "true consolidation, where the captions merge" is inappropriate where a party is plaintiff in one action and a defendant in the other action).

In accordance with the foregoing, it is

ORDERED that defendant Skanska USA Building Inc.'s motion to dismiss plaintiff Atlantic Yards B2 Owner, LLC's first amended complaint pursuant to CPLR § 3211(a)(4) is denied; and it is further

ORDERED that plaintiff Atlantic Yards B2 Owner, LLC's cross-motion to consolidate this action is granted only to the extent that the above-captioned action shall be jointly tried with *Skanska USA Building Inc. v. Atlantic Yards B2 Owner, LLC et al.*, Index No. 652680/2014, pending in this court; and it is further

ORDERED that, within 30 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; and it is further

ORDERED that upon payment of the appropriate calendar fees and the filing of notes of issue and statements of readiness in each of the above actions, the Clerk of the Trial Support Office shall place the aforesaid actions upon the trial calendar for a joint trial; and it is further

ORDERED that counsel are directed to appear for a preliminary conference at 60 Centre Street, Room 208 on September 30, 2015 at 2:15pm.

This constitutes the decision and order of the Court.

DATED:

8/5/15



SALIANN SCARPULLA, J.S.C.

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
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE