Jaspaul v Toyota Lift of N.Y.
2016 NY Slip Op 30166(U)
January 29, 2016
Supreme Court, Queens County
Docket Number: 1944/2011
Judge: David Elliot

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

DEO JASPAUL,
Plaintiff,

- against -

TOYOTA LIFT OF NEW YORK, etc., et al.,
Defendants.

MOBILE AIR TRANSPORT, INC., et ano.,
Third-Party Plaintiffs,

-against-

KAWAL TRUCKING, INC.,
Third-Party Defendant,

HI-LIFT OF NEW YORK, INC., etc., et ano.,
Second Third-Party Plaintiffs,

-against-

SUMMIT HANDLING SYSTEMS, INC.,
Second Third-Party Defendants.

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The following papers numbered 1 to 11 read on this motion by defendants/third-party plaintiffs Mobile Air Transport, Inc. (Mobile Air) and the Air Group, Inc. (Air Group), for an order: (1) restoring a related action, also pending in this court (before a different Justice thereof) entitled *Mobile Air Transport, Inc., et ano. v Summit Handling Systems, Inc.*, Index No. 6807/2014 (Action No. 2), to active status; and (2) consolidating Action No. 2 with this action (Action No. 1).

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Upon the foregoing papers it is ordered that the motion is determined as follows:

By prior order dated February 4, 2014, this court denied that branch of a motion by Mobile Air/Air Group for leave to commence a third third-party action against second third-party defendant Summit Handling Systems, Inc. (Summit). The court noted that, while leave of the court to commence such an action is typically not necessary, the compliance conference order issued in this case limited the parties' ability to do so. It was determined, by virtue of the court's February 4, 2014 order, that Mobile Air/Air Group did not attempt to assert their claims against Summit within the time constraints set forth in the compliance conference order, and no good cause was shown for their having failed to do so.

As a result, Mobile Air/Air Group commenced Action No. 2 directly against Summit for, *inter alia*, contribution and indemnification. Summit filed a motion to dismiss. That motion was granted by order dated December 23, 2014 (Raffaele, J.), on the basis of *res judicata*, to wit: that, because this court determined that Mobile Air/Air Group were barred from commencing a third-party action against Summit, the former was barred from relitigating same by virtue of commencing Action No. 2.

By Decision and Order of the Appellate Division, Second Judicial Department dated November 4, 2015 (*Mobile Air Transport, Inc. v Summit Handling Sys., Inc.*, 133 AD3d 576 [2015]), the December 23, 2014 order was reversed, and Summit's motion to dismiss was denied. The Court stated that Action No. 2 was not barred by *res judicata*. Referring to this court's February 4, 2014 order barring Mobile Air/Air Group from asserting a third-party action against Summit, the Court stated: "that denial was not on the merits or with prejudice, but was instead premised solely on [Mobile Air/Air Group's] failure to assert those causes of action within the time constraints set forth in a compliance conference scheduling order issued by the court in that action." As such, the Court held that Mobile Air/Air Group were free to commence Action No. 2.

As to the first branch of the motion seeking to restore Action No. 2 to the "trial calendar," in light of the Appellate Division Decision and Order, notwithstanding the fact

that this court does not preside over Action No. 2 and any relief sought with respect to that action would have had to have properly been brought before the Justice assigned thereto,[1] the motion would nevertheless be denied as moot inasmuch as Action No. 2 has already been restored to active status based on the Appellate Division Decision and Order. It is noted that the matter cannot be "restored" to the trial calendar, inasmuch as a review of the County Clerk file with respect to that case reveals that no Note of Issue has been filed therein.

Turning to the second branch of the motion, Mobile Air/Air Group contend that the two actions should be consolidated, as it is undisputed that they share common questions of law and fact, and further because the interests of justice and judicial economy warrant the relief sought. Summit implicitly concedes that the actions share common questions of law and fact; however, it opposes the motion on the ground that same would cause prejudice to its substantive rights.

To the extent Summit avers that Mobile Air/Air Group's attempt to commence Action No. 2 and then consolidate it into this one is "nothing more than a thinly veiled attempt to circumvent the Court's prior decision which precluded Mobile Air[/Air Group] from asserting third party claims," same is an insufficient basis to deny the relief sought. First, the Appellate Division clearly indicated that *res judicata* did not bar Mobile Air/Air Group from commencing a new lawsuit against Summit despite this court's ruling. Second, that Mobile Air/Air Group are utilizing the procedural mechanisms available to them via the Civil Practice Law and Rules of this State in order to achieve a particular desired outcome cannot serve as a basis to deny the motion.

To the extent Summit states that Mobile Air/Air Group delayed in (1) commencing Action No. 2, and (2) filing the instant motion, the court does not find this delay prejudicial considering (1) Mobile Air/Air Group were well within the statute of limitations period for commencing Action No. 2[2] and (2) the instant motion was filed a mere twenty days after the Appellate Decision and Order; the former was contingent upon a finding favorable to Mobile Air/Air Group as to the latter, irrespective of whether or not this action was pending on the trial calendar.

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1. This premise was outlined in a prior order of this court, dated December 16, 2015, whereby the court declined to sign an order to show cause filed by Summit which, *inter alia*, sought an order dismissing Action No. 2.

2. A claim for, *inter alia*, contribution does not, generally, even accrue until payment is made by the party seeking contribution and the statute of limitations on such a claim is six years (CPLR 213; *see generally Ruiz v Griffin*, 50 AD3d 1007 [2008]).

Finally, to the extent that Summit claims that it was let out of this action nearly two years ago and that it was never given an opportunity to conduct discovery with respect to potential claims brought by Mobile Air/Air Group, any difference between the two actions with respect to at what stage of discovery each is, is not significant or prejudicial enough to warrant two separate trials in this action (*Fransen v Maniscalco*, 256 AD2d 305 [1998]). It is noted that Summit is not a stranger to the facts of this case (or those asserted in Action No. 2, for that matter); indeed, it actively participated in the following: a compliance conference, post-note of issue discovery by virtue of being a party to two separate so-ordered stipulations, and the submission of papers on four separate substantive motions. Further, after Summit was let out of this action, Summit filed a proposed order to show cause in this action (under Seq. No. 13), which the court declined to sign, whereby Summit, among other things, sought summary judgment dismissing Action No. 2. Summit appears to have renewed its application for that relief, but now within the context of Action No. 2, said motion appearing to be calendared in the Centralized Motion Part with a return date of March 16, 2016.

It is further noted that – assuming plaintiff complies with the order of January 11, 2016 (Weinstein, J.) requiring him to file a note of issue by February 15, 2016 – the trial in this action is not imminent. The order indicates that the matter would be set down for a conference on May 1, 2016.[3]

Accordingly, that branch of the motion for an order restoring Action No. 2 to active status is denied as moot. That branch of the motion for an order consolidating the two actions is granted to the extent that the actions are consolidated for all purposes under the main Index No. in Action No. 1. The caption shall read as follows:

3. It is significant to note that the word "conference" replaced "immediate trial."

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

DEO JASPAUL, Index No. 1944/11

Plaintiff(s),

-against-

TOYOTA LIFT OF NEW YORK a/k/a TOYOTA LIFT OF NEW YORK, INC., THE AIR GROUP, INC., MOBILE AIR TRANSPORT, INC., and FORK LIFT HEADQUARTERS, INC.,

Defendant(s)

MOBILE AIR TRANSPORT, INC., and THE AIR GROUP, INC.,

Third-Party Plaintiff(s)

-against-

KAWAL TRUCKING, INC., and SUMMIT HANDLING SYSTEMS, INC.,

Third-Party Defendants(s).

HI-LIFT OF NEW YORK INC. d/b/a TOYOTA LIFT OF NEW YORK (i/p/a TOYOTA LIFT OF NEW YORK a/k/a TOYOTA LIFT OF NEW YORK, INC.) and FORK LIFT HEADQUARTERS, INC.,

Third-Party Plaintiff(s)

-against-

SUMMIT HANDLING SYSTEMS, INC.,

Third-Party Defendant(s).

Further, Mobile Air/Air Group are directed to serve a copy of this order with notice of entry upon all remaining parties to the consolidated action, the Clerk of Queens County, and the appropriate Clerk in Room 140 of this Courthouse, within thirty (30) days of entry of this order.

Dated: January 29, 2016

J.S.C.