Romero v 2200 N. Steel, LLC
2016 NY Slip Op 32164(U)
October 28, 2016
Supreme Court, Queens County
Docket Number: 700521/2012
Judge: David Elliot

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

FLORENTIN ROMERO,
Plaintiff(s),

- against -

2200 NORTHERN STEEL, LLC,
Defendant(s).

Index
No. 700521 2012

Motion
Date September 15, 2016

Motion
Cal. No. 144

Motion
Seq. No. 7

The following papers read on this motion by defendant 2200 Northern Steel, LLC (2200 Northern), for an order, pursuant to CPLR § 602, consolidating this action (Action No. 1) and another action currently pending in this court entitled *2200 Northern Steel, LLC v Steel Los III, LLP*, Index No. 703741/2014 (Action No. 2).

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF151-162
Answering Affirmation - Exhibits.....	EF163-164,167-168
Reply.....	EF165-166, 169-170

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

Plaintiff commenced Action No. 1 to recover damages for personal injuries alleged to have been sustained on January 7, 2012 as a result of a workplace accident while he was employed by Steel Los III, LP (Steel Los). The action was commenced against 2200 Northern, the owner of the premises at which the accident is alleged to have occurred. After plaintiff's first note of issue was filed on July 26, 2013, 2200 Northern commenced a third-party action against Steel Los seeking indemnification and contribution. Steel Los then moved for an order severing the third-party action or, in the alternative, vacating the note of issue. Citing (1) the preliminary conference order dated August 27, 2012 regarding the potential for severance if a third-party action were brought after the compliance conference

date; (2) the compliance conference order dated February 19, 2013, regarding the promptness of commencing third-party actions; (3) the impending trial date, which at the time, was scheduled for June 30, 2014; and (4) the belated impleader of Steel Los, this court, by order dated May 12, 2014, granted Steel Los' motion to the extent that the third-party action was severed and continued as Action No. 2.

In Action No. 2, Steel Los moved for summary judgment dismissing 2200 Northern's complaint against it. By order dated May 18, 2016 (Livote, J.), the motion was denied as premature, despite the issues raised as to whether the anti-subrogation doctrine forbade 2200 Northern's claims against Steel Los, inasmuch plaintiff "may ultimately prove that the injuries alleged herein would qualify for the grave injury exception under Section 11 of the Workers Compensation Law." Court records indicate that Action No. 2 has an appearance scheduled in the Trial Scheduling Part on November 10, 2016.

2200 Northern now moves to consolidate the actions, contending that Action Nos. 1 and 2 share common issues of fact as to, among other things, the cause and extent of plaintiff's injuries, said injuries claimed by plaintiff to be grave. 2200 Northern also states that Steel Los has had ample opportunity to engage in discovery and has, at this point, been provided with all relevant discovery pertaining to Action No. 1.

Steel Los submits a limited opposition to the motion to the extent that: (1) the two actions cannot be consolidated to the extent that Steel Los – as plaintiff's employer – cannot be made a direct party-defendant in Action No. 1; and (2) the two actions cannot be fully re-joined since some of the issues involved in Action No. 2 do not share common issues of law and fact, *i.e.*, insurance coverage and anti-subrogation. To that end, Steel Los contends that any determination of the issues in Action No. 2 should abide the outcome of the trial of Action No. 1. Otherwise, citing Steel Los' clear interest in the outcome of Action No. 1, it requests that it be entitled to receive updated authorizations, including *Arons* authorizations, for plaintiff's physicians as well as for the Workers' Compensation Board and carrier, and any employers, and any discovery which was exchanged in Action No. 1 in which Steel Los did not take part.

Plaintiff submits opposition to the motion, stating: (1) that he would be greatly prejudiced since Action No. 1 is ready for trial and, if consolidation were ordered, there would be further delay since Steel Los would need to review new discovery and Steel Los and 2200 Northern would need to complete discovery; and (2) that there are no common issues of law between the two actions, Action No. 1 being a personal injury action and Action No. 2 sounding in contract and insurance coverage.

"Where common questions of law or fact exist, a motion to consolidate or join for trial pursuant to CPLR 602 should be granted absent a showing of prejudice to a substantial right by the party opposing the motion" (*Oboku v New York City Tr. Auth.*, 141 AD3d 708 [2d Dept 2016]; *see New York Tile Wholesale Corp. v Thomas Fatato Realty Corp.*, 115 AD3d 832 [2d Dept 2014]; *Cusumano v Cusumano*, 114 AD3d 633 [2014]).

Here, while Steel Los is correct that a true consolidation is not appropriate, the court finds that the actions should be combined for joint trial.[1] As plaintiff's employer, Steel Los certainly has an interest in the outcome of the main action as to the cause and extent of plaintiff's injuries, *i.e.*, whether Steel Los controlled plaintiff's work, or whether plaintiff suffered from a "grave injury." The court further finds that, to the extent Steel Los contends that the issues raised in Action No. 2 should abide the outcome of the trial of the main action, such a determination should more appropriately be made by the Justice presiding over the trial of the two actions.

The prejudice cited by plaintiff in opposition is not significant as suggested. As counsel for Steel Los concedes in partial opposition to the motion, following Steel Los' review of discovery material post-severance, "Steel Los determined that it did not need any additional depositions" and that "[i]n addition, since the medical expert reports obtained and exchanged by counsel for 2200 Northern were favorable to the defense position, it was determined that it would not be necessary to obtain additional examinations." The documents requested by Steel Los are not so burdensome to produce. In any event, the matter does not next appear in the Trial Scheduling Part until March 14, 2017, and the Standards and Goals date for Action No. 1 is on or about September 2, 2017. Any prejudice can thus be minimized by this court ordering expeditious discovery (*see Cusumano*, 114 AD3d at 634).

Accordingly, it is hereby

ORDERED that Action Nos. 1 and 2 shall be tried jointly in this Court; and it is further

ORDERED, that the title of the actions combined for joint trial shall be:

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1. It is noted that third-party actions such as the one originally commenced here are not unheard of (*see e.g. Storms v Dominican Coll. of Blauvelt*, 308 AD2d 575 [2d Dept 2003]; *Small v Yonkers Contr.*, 242 AD2d 378 [2d Dept 1997]). Indeed, the court contemplated in its May 12, 2014 order that the parties may later seek to re-join the third-party action.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

FLORENTIN ROMERO,
Plaintiff,

Action No. 1
Index No. 700521/2012

-against-

2200 NORTHERN STEEL. LLC,
Defendant.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

2200 NORTHERN STEEL, LLC,
Plaintiff,

Action No. 2
Index No. 703741/2014

-against-

STEEL LOS III, LP,
Defendant.

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and it is further

ORDERED, that 2200 Northern shall serve a copy of this Order with Notice of Entry upon all parties to the actions as combined for joint trial, Clerk of Queens County, and the Clerk located in Room 140 of this Courthouse, within 30 days of the entry date of this order; and it is further

ORDERED that any issues regarding logistics or mechanics of the trial as to the different claims made in both actions may, if the parties be so advised, be raised before the Justice assigned to try the actions as combined; and it is further

ORDERED that, within 30 days from the date of this order, 2200 Northern shall provide Steel Los with copies of any discovery which was exchanged and/or conducted while Action No. 1 and Action No. 2 were severed, to the extent not already provided; and it is further

ORDERED that, within 30 days from the date of this order, plaintiff shall provide to Steel Los updated duly executed authorizations, including *Arons* authorizations, for plaintiff's treating doctors, as well as for the Workers' Compensation Board, Workers' Compensation carrier, and any relevant employment records for the period set forth in the preliminary conference order in Action No. 1, to the extent not already provided.

A copy of this order is being mailed to counsel for all parties on this date.

Dated: October 28, 2016

J.S.C.