

Casella Constr. Corp. v 322 E. 93rd St., LLC
2019 NY Slip Op 31977(U)
July 3, 2019
Supreme Court, New York County
Docket Number: 155098/2017
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
CASELLA CONSTRUCTION CORP.,
Plaintiff,

-against-

Index No.: 155098/17

322 EAST 93RD STREET, LLC,
Defendant.

Motion Sequence No.: 004

-----X
322 EAST 93RD STREET, LLC,
Counterclaimant,

-against-

324 E. 93 LLC,
Additional Counterclaim Defendant,

-----X
324 E. 93 LLC,
Fourth-Party Plaintiff,

-against-

DAVID SHEPHERD and ASHLEY SHEPHERD,
Fourth-Party Defendant.

-----X

Doris Ling-Cohan, J.

Additional counterclaim defendant/fourth party plaintiff 324 E. 93 LLC's (324 LLC) motion for leave to reargue and/or renew its prior motion to consolidate the within mechanic's lien foreclosure action with a wrongful death action captioned *Thuku v 324 E. 93 LLC* (Index No. 506859/17 [Sup Ct, NY County]) (Thuku Action) (CPLR 602) or, alternatively, to sever 322 East 93rd Street, LLC's (322 LLC) first counterclaim (the First Counterclaim) and 324 LLC's fourth-party claims against David Shepherd and Ashley Shepherd (the Shepherd Claims) (CPLR 603) and plaintiff Casella Construction Corp.'s (Casella) cross-motion to sever the First Counterclaim

and the Shepherd Claims (CPLR 603) from this action are denied, for the reasons stated below.

In the main action against 322 LLC, Casella seeks to foreclose on a mechanic's lien for \$200,903.40. 322 LLC owns the premises next door to additional counterclaim defendant 324 LLC. Some time after a fire occurred in 324 LLC's building, Casella performed construction services, in order to stabilize a party wall shared by 324 LLC's and 322 LLC's respective buildings. David Shepherd and Ashley Shepherd (together, the Shepherd defendants) were tenants that lived in 324 LLC's building. 324 LLC asserts claims of common law and contractual indemnification and contribution against the Shepherd defendants.

The Thuku Action was commenced by the estate of a tenant who died in the fire at 324 LLC. The defendants in the Thuku Action are 324 LLC, the Shepherd defendants, and a management company, Perry Gault Management Co. Inc. The Thuku case, which was initially commenced in Supreme Court, Kings County, was transferred to New York County, on or about December 24, 2018.

By order dated October 9, 2018, this Court denied 324 LLC's original motion to consolidate this action with the Thuku Action (the Order). In the within motion to reargue and/or renew, 324 LLC maintains that this Court misconstrued the facts by overlooking questions of law and fact common to the Thuku Action, the First Counterclaim, and the Shepherd Claims. 324 LLC contends that these claims all relate to the same fire, involve issues of negligence and causation of the fire, and that consolidation is required to avoid the expense of duplicative evidence and the danger of

inconsistent determinations. 324 LLC further asserts that both cases are at the same stage of litigation, in that only minimal discovery has been exchanged.

Based upon the within submissions, the motion to reargue and/or renew is denied, and this Court adheres to its decision denying the motion to consolidate, for the reasons stated in the Court's original decision. Significantly, 324 LLC has failed to properly follow CPLR 2221 (f), which requires that "[a] combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought" (*see Taylor v Paskoff & Tamber, LLP*, 29 Misc 3d 1125 (Sup Ct, NY County 2010); *Estate of Ansell*, 191 Misc2d 252 [Sur Court, Westchester County 2002]).

Further, with respect to 324 LLC's request for renewal, there is no basis for renewal has been supplied as 324 LLC failed to assert "new facts not offered on the prior motion that would change the prior determination or . . . demonstrate that there has been a change in the law that would change the prior determination". *See* CPLR §2221(e).

In addition, to the extent that 324 LLC seeks reargument of this Court's order dated October 9, 2018, 324 LLC failed to establish that this Court overlooked or misapprehended any matters of fact or law to warrant that this Court grant reargument. *See* CPLR §2221(d)(2); *William P. Pahl Equipment Corp. v. Kassiss*, 182 AD2d 22, 27 [1st Dept 1992], *leave to appeal dismissed in part, denied in part* 80 NY2d 1005, *reargument denied* 81 NY2d 782 [1993][*citing Schneider v. Solowey*, 141 AD2d 813 (2nd Dept 1988)].

Moreover, as previously indicated, the Thuku Action is about the loss of human life at 324 LLC, while the within action is a lien foreclosure action relating to the recovery of money owed for construction services rendered, as well as allegations of property damage to a neighboring building due to the fire and the work performed on the party wall after the fire. There is clearly no overlap on the damages element in this case with the Thuku case. *See* Pattern Jury Instructions 2019 PJI, 2:320 (wrongful death and conscious pain and suffering damages); *compare* PJI 2:311; 2:312 (property damages).

Further, the records in the New York County Clerk's e-filing system for the Thuku Action demonstrate that discovery of the plaintiff witnesses has already occurred, and that on May 7, 2019, the Court ordered the deposition of 324 LLC to commence that afternoon (*see* Index no. 452203/2018, NYSCEF Document No. 232). Consequently, one of 324 LLC's arguments for consolidation, that it sought to be deposed only once, is likely moot.

Alternatively, 324 LLC moves for an order severing the First Counterclaim and the Shepherd Claims. 324 LLC relies upon the Court's reasoning in the October 9, 2018 order, arguing that the Court's determination that the Thuku action is dissimilar from this action leads to the conclusion that severance is proper (324 LLC Memorandum of Law, at 4). Quoting the October 9, 2018 order, 324 LLC argues that if the negligence claims in this case "remain a part of the same action, the two matters 'would complicate the issues in each case, prolong the course of discovery and ultimately confuse the jury at the trial of the matter'" (*id.*).

Casella, in cross-moving for severance, argues that its mechanic's lien claim, involving post-fire construction, should be separated from unrelated claims for property damages, due to 324 LLC's and the Shepherd defendants' alleged negligence in causing the fire. Casella contends that only Casella and 322 LLC are parties in the mechanic's lien dispute, which involves issues of 324 LLC's consent and knowledge about the work and the manner in which it was performed, which is more narrow in scope than the fire-based negligence claims. Casella compares the First Counterclaim and the Shepherd Claims with the post-fire construction claims, stating that the former involve additional witnesses concerning: (1) the fire and its origin; (2) the construction of 324 LLC's and the Shepherd defendants' apartment prior to the fire; and (3) the property damage suffered. Casella argues that, absent severance: (1) it will be prejudiced by delay and costs associated with fact depositions and expert investigations that are not related to Casella's claim; (2) Casella's refile of an additional summary judgment motion will be delayed; and (3) confusion will arise if all of the issues are tried together.

In opposition, 322 LLC contends that of its six counterclaims, only the First Counterclaim concerns the fire, and that, even if that counterclaim were severed, 324 LLC would remain as a party in this action. 322 LLC further contends that severance would result in more discovery and depositions, as 322 LLC and 324 LLC would have to participate in two separate litigations, with two trials, each involving many of the same parties and witnesses participating in depositions and the trials. 322 LLC argues that there is also an overlap in proof between the fire-based negligence claims and the post-construction negligence counterclaims, as the fact finder would need to consider proof concerning Casella's conduct and Casella's negligence, when determining the

damages that are due to the fire.

CPLR 603 provides that

“In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.”

While Casella may incur greater costs in having the First Counterclaim and the Shepherds Claims litigated together, if severance is effected, 322 LLC and 324 LLC will incur greater costs by conducting discovery in two separate cases, that include at least some of the same witnesses. Moreover, Casella does not point to any actual delays that have been caused by additional discovery, and does not explain how its timing in making a second summary judgment motion is affected by discovery concerning the cause of the fire.¹ Further, at this time, multiple Court orders with respect to the completion of discovery have been issued in this case; thus, a good portion of the discovery affecting Casella’s lien claim should already have been completed, and Casella already submitted documents relating to its claim when it made its summary judgment motion.

Casella mentions expert witnesses, but does not claim to need to endure the cost of hiring expert witnesses and analyzing issues about the fire, or explain why it would be required to bear extensive costs for discovery regarding the fire’s origins. As discovery in the Thuku Action is likely to be ahead of that in this case, presumably there will be fewer discovery delays here. Severance itself would more likely cause a delay. While there may be additional costs and delays associated with discovery relating to the First Counterclaim and the Shepherd Claims, Casella has

¹ This is not a determination that Casella is permitted to file a second summary judgment motion.

not demonstrated that it will suffer substantial prejudice, or that adjustments could not be made to the discovery schedule to lessen any burden.

Neither movant has persuasively demonstrated that confusion on the part of the trier of fact would result if 322 LLC's property damage claims relating to the fire are not separated from property damages claims for Casella's later work on the same premises, and Casella's attempt to get paid for that work. Furthermore, there appears to be overlap in damages claims, as 322 LLC's claim against 324 LLC include damages of the cost of Casella's work and Casella's alleged negligence. 324 LLC seeks indemnification of any such damages from the Shepherd defendants. At this juncture, judicial economy is not served by severing the claims.

In light of the foregoing, it is

ORDERED that additional counterclaim defendant 324 E. 93 LLC's motion to re-argue and/or renew or, in the alternative, to sever, is denied; and it is further

ORDERED that plaintiff Casella Construction Corp.'s cross motion to sever is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.

Dated: July 3, 2019



Hon. Doris Ling-Cohan, J.S.C.