

Rodriguez v VNO 225 W. 58th St. LLC

2019 NY Slip Op 33436(U)

November 19, 2019

Supreme Court, New York County

Docket Number: 152624/2019

Judge: Robert D. Kalish

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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INDEX NO. 152624/2019

RAFAEL RODRIGUEZ,

MOTION DATE 11/12/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

VNO 225 WEST 58TH STREET LLC,
VORNADO REALTY TRUST,
LENDLEASE (US) CONSTRUCTION INC,
LENDLEASE (US) CONSTRUCTION LMB INC,
THERESA LIBRETTI and FRIDA RESTIVO,

DECISION + ORDER ON MOTION

Defendants.

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NYSCEF Doc Nos. 20-28 and 34-39 were read on this motion to consolidate.

Motion by defendants Theresa Libretti and Frida Restivo pursuant to CPLR 510, 511 and 602 (a) for an order transferring and consolidating with the instant action ("Action 1") the Suffolk County action under index no. 609716/2019 ("Action 2" and, together with Action 1, the "Actions") is granted to the following extent.

Plaintiff Rafael Rodriguez commenced Action 1 on March 12, 2019, against defendants VNO 225 West 58th Street LLC, Vornado Realty Trust, Lendlease (US) Construction, Inc, Lendlease (US) Construction LMB Inc (collectively, the "Lendlease Defendants"), Theresa Libretti, and Frida Restivo (Restivo, together with Libretti, hereinafter referred to as the "Motor Vehicle Defendants" and, collectively with the Lendlease Defendants, "Defendants"). Rafael Rodriguez alleges in his first cause of action violations of the Labor Law as against the Lendlease Defendants in connection with his alleged fall from a scissor lift at premises located at 220 Central Park South, New York, New York (the "Premises") on or about April 14, 2016. Rafael Rodriguez alleges in his second cause of action that he was injured in a collision on the Sunrise Highway in Islip, New York, on or about August 9, 2016 (the "Collision"), due to the negligence of the Motor Vehicle Defendants, with Restivo the owner of the subject vehicle and Libretti its operator.

All Defendants have answered or appeared in Action 1.

On July 1, 2019, Plaintiff e-filed a request for judicial intervention together with a request for a preliminary conference. The court scheduled the preliminary conference for September 24, 2019.

On August 27, 2019, prior to the preliminary conference, the Motor Vehicle Defendants filed the instant motion pursuant to CPLR 510, 511 and 602 (a) for an order transferring and consolidating Action 1 (the instant action) and Action 2 (an action currently pending in Suffolk

County). Movants argue that, in the second action, commenced on May 21, 2019, they are the defendants and the plaintiff is Sandra Rodriguez, a passenger in the motor vehicle operated by Rafael Rodriguez during the Collision. Movants state that they are seeking an order “consolidating” the Actions. (Affirmation of Zachary ¶ 2 [a].) Movants also state that both motor vehicle actions involve common questions of law and fact and are seeking “the consolidation of the captioned actions . . . in New York County.” (*Id.* ¶ 8.) In listing the new caption, movants list Action 1 and Action 2 separately, one above the other, their captions intact. Subsequently, movants request that the Actions be “consolidated for *joint trial*” (*id.* ¶ 10 [emphasis added]) and “consolidate[d] . . . for purposes of a *joint trial*” (*id.* at 4 [“wherefore” clause] [emphasis added]). Movants also request other and further relief as this Court deems just and proper. (*Id.*)

On September 24, 2019, the Court held a preliminary conference in this matter. Counsel for Sandra Rodriguez appeared at the conference and agreed to be bound by the scheduling order and that Sandra Rodriguez would appear for an examination before trial on November 15, 2019, as to the Actions.

On October 17, 2019, the Lendlease Defendants filed papers in partial opposition to the instant motion. The Lendlease Defendants request that the Court “[j]oin the two actions for the sole purpose of joint discovery scheduling, conferencing and pre-note proceedings under CPLR 602 (a)” and otherwise deny the motion of the Motor Vehicle Defendants. (Affirmation of Miller ¶ 2 [2].) The Lendlease Defendants further request that the Actions be kept under separate index numbers for the duration of joint discovery and that any note of issue or judgment be filed separately. The Lendlease Defendants argue, in sum and substance, that their potential liability is limited to the incident of April 14, 2016, and that they have no connection as to the Collision or to the damages either Rafael Rodriguez or Sandra Rodriguez may have sustained as a result of the Collision. The Lendlease Defendants further argue that there is no nexus between the Lendlease Defendants and Sandra Rodriguez and that a full consolidation would create rights for claims and cross claims between all the parties, potentially forcing the Lendlease Defendants to defend unwarranted and unnecessary claims relating to the addition of Sandra Rodriguez. The Lendlease Defendants argue that the Motor Vehicle Defendants are “seeking to cast the entire liability of the consolidated action entirely on the Lendlease Defendants, which would prejudice the Lendlease Defendants who were not involved in the motor vehicle accident.” (*Id.* ¶ 17.)

No request for judicial intervention has been filed in Action 2.

Neither Rafael Rodriguez nor Sandra Rodriguez has submitted papers in the instant motion.

DISCUSSION

CPLR 602 (a) provides that “[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” CPLR 602 (b) provides, in relevant part, that “[w]here an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together

with that in the supreme court.” “Where common questions of law or fact exist, a motion to consolidate or for a joint trial pursuant to CPLR 602 (a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion.” (*Mas-Edwards v Ultimate Servs., Inc.*, 45 AD3d 540, 540 [2d Dept 2007].)

Here, the parties do not dispute that the Actions involve common questions of law and fact as to the Collision. As such, it is left to the discretion of this Court whether and to what degree the Actions should be joined.

Critically, movants simultaneously ask that the Actions be “consolidated” and “consolidated for joint trial.” As Professor Vincent C. Alexander has explained in the commentaries:

“Each has its own conceptual and practical attributes. Consolidation completely merges the separate actions such that they lose their original identity. Some courts and commentators have used physiological metaphors suggesting that an ‘organic fusion’ occurs. The parties are realigned into a single caption with one group of plaintiffs against one group of defendants. There will be but one verdict or decision . . . and one judgment with a single bill of costs. Upon consolidation, the former defendants in the individual action all become co-defendants, creating new opportunities for amending the pleadings to assert additional claims, counterclaims and cross-claims among the newly conjoined parties.

“An order for joint trial, in contrast, leaves the individual actions intact. They are merely brought together in one venue for simultaneous pretrial and trial proceedings. The captions of the individual complaints remain the same, separate verdicts or decisions are rendered, separate judgments are entered and individual bills of costs are taxed.”

(CPLR 602, C602:2, Distinctions Between Consolidation and Joint Trial [citations omitted].)

Here, based on the moving papers, the Motor Vehicle Defendants have requested an order for joint trial of the Actions in New York County. Such an order encompasses the pretrial proceedings such as discovery to which the Lendlease Defendants do not object. Such an order further ensures that, while the trials may be simultaneous in nature, separate verdicts or decisions will issue. Contrary to the arguments raised by the Lendlease Defendants, an order for joint trial will not result in the addition of any additional claims against any parties now sharing a caption because Sandra Rodriguez will be kept distinct from the Lendlease Defendants. Rather, “a joint trial will avoid unnecessary duplication of proceedings, save unnecessary costs and expenses and prevent the injustice which would result from divergent decisions based on the same facts.” (*Mas-Edwards* at 540.) Those savings relate directly to all discovery and to the common questions of law and fact between Action 1 and Action 2 as to the Motor Vehicle Defendants.

On November 13, 2019, the parties participated in a teleconference with the Court regarding discovery in this matter. As a result, the parties stipulated to amend the complaints in both actions to separate the causes of action between the two different incidents. The parties

further stipulated to an order for joint trial of the Actions in New York County. The Court has so-ordered the stipulation, annexed.

As such, the Court will approve an order for joint trial pursuant to CPLR 602, but the Actions shall remain separate for the purposes of any motions, and each shall maintain its own index number, shall require its own note of issue, and shall remain separated as to any verdicts or decisions. (*See e.g., MCC Funding LLC v Diamond Point Enters.*, 36 Misc3d 1206[A] *10 [Sup Ct, Kings County 2012, Hinds-Radix, J.]; *Smellie v Santiago*, 38 Misc3d 1203[A] [Sup Ct, Queens County 2012, Markey, J.]

For the convenience of the parties and the Court, and to ensure clarity as to dispositive motions, issues related to the accident of Rafael Rodriguez at the Premises shall be the subject of one motion (and cross motion if sought) between Rafael Rodriguez and the Lendlease Defendants, while issues related to the Collision shall be the subject of a separate motion (and cross motions if sought) between Rafael Rodriguez, Sandra Rodriguez, and the Motor Vehicle Defendants. The Court expects that this will become relevant on motions for summary judgment. As to other types of motions such as those relating to discovery issues, any party in either action may move as to any other party.

CONCLUSION

Accordingly, it is

ORDERED that the motion by defendants Theresa Libretti and Frida Restivo pursuant to CPLR 510, 511 and 602 (a) for an order transferring and consolidating with the instant action (“Action 1”) the Suffolk County action under index no. 609716/2019 (“Action 2”) is granted to the extent that it is

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ORDERED that pursuant to CPLR 602 (b) the actions are combined for the purposes of joint trial, under the following caption:

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 RAFAEL RODRIGUEZ,

 Plaintiff, Index No.: 152624/2019

 - against - Action 1

 VNO 225 WEST 58TH STREET LLC,
 VORNADO REALTY TRUST,
 LENDLEASE (US) CONSTRUCTION INC.,
 LENDLEASE (US) CONSTRUCTION LMB INC.,
 THERESA LIBRETTI and FRIDA RESTIVO,

Defendants.

-----X
 SANDRA RODRIGUEZ,

 Plaintiff, Index No.: [TBA]

 - against - Action 2

 THERESA LIBRETTI and FRIDA RESTIVO,

Defendants.

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And it is further

ORDERED that pursuant to CPLR 602 (b) venue of Action 2 is changed from the Supreme Court, County of Suffolk, to this Court; and it is further

ORDERED that, within 10 days from entry of this order, counsel for movants shall serve a certified copy of this order on the Clerk of the Supreme Court, Suffolk County, shall pay the appropriate transfer fee, if any, and shall contact the staff of said Clerk and cooperate in arranging the transfer of the file; and it is further

ORDERED that the Clerk of the Supreme Court, Suffolk County shall transfer to the Clerk of the Supreme Court, New York County the file in the action venued in that court; and it is further

ORDERED that service upon the Clerk of the Supreme Court, Suffolk County shall be made in accordance with any applicable protocol or other procedures of said county; and it is further

ORDERED that the Clerk of the Supreme Court, Suffolk County and the Clerk of this Court shall coordinate the transfer of the documents being removed to this court pursuant to CPLR 602 (b) so as to ensure an efficient transfer and to minimize insofar as is practical the

reproduction of documents, including with regard to any documents that may be in digital format; and it is further

ORDERED that, within 10 days from entry of this order, counsel for movants shall serve a copy of this order with notice of entry on all parties in the actions and on the Clerk of this Court (60 Centre Street, Room 141B); and it is further

ORDERED that the Clerk of this Court, upon service of a copy of this order with notice of entry and the transfer of the file to this court, shall, without a further fee, assign a New York County Index Number to the transferred action and record such action in the Clerk's records; and it is further

ORDERED that, as applicable and insofar as is practical, the Clerk of this Court shall file the documents transferred pursuant to this order under the New York County Index Number of the transferred action in the New York State Courts Electronic Filing System or make appropriate notations of such documents in the e-filing records of the court so as to ensure access to the documents; and it is further

ORDERED that, within 10 days from entry of this order, counsel for movants shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), together with a Request for Judicial Intervention ("RJI") for the transferred action or, if an RJI was filed in the action while pending in Supreme Court, Suffolk County, a copy of that RJI (in which event, no additional fee shall be charged therefor); and it is further

ORDERED that, upon the service of such documents, the Clerk of the General Clerk's Office shall mark the court's records to reflect the transfer and assign the transferred action to the undersigned Justice of this court; and it is further

ORDERED that service upon the Clerk of this Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on this court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that all parties shall continue to comply forthwith with the Court's September 24, 2019 preliminary conference order; and it is further

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ORDERED that the matter is respectfully reassigned to Part 22, the Motor Vehicle Part based on this Court's communications with Part 22 regarding management of the Actions; and it is further

ORDERED that all parties in the Actions are directed to appear in Part 22, located at 80 Centre Street Room 136, New York, New York 10013, on Monday, December 10, 2019, at 9:30 a.m. for a compliance conference.

The foregoing constitutes the decision and order of the Court.

11/19/2019
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input checked="" type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					<input type="checkbox"/>
					OTHER
					REFERENCE

Robert D. Kalish
HON. ROBERT D. KALISH
 J.S.C.