

AIG Prop. Cas. Co. v Long Is. Power Auth.
2019 NY Slip Op 34371(U)
March 26, 2019
Supreme Court, Queens County
Docket Number: Index No. 701573/14
Judge: Bernice D. Siegal
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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 25
Justice

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AIG PROPERTY CASUALTY COMPANY (f/k/a
Chartis Property Casualty Company) as subrogee of
SHEILA SCANDOLE,

Plaintiff,

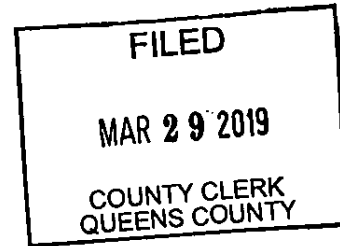
Index No.: 701573/14
Motion Date: 10/15/2018

Motion Seq. No.: 5

-against-

LONG ISLAND POWER AUTHORITY (LIPA)
and NATIONAL GRID PLC a/k/a NATIONAL
GRID USA, INC., NATIONAL GRID USA, INC.,
KEYSPAN ENERGY TRADING SERVICES, LLC
d/b/a NATIONAL GRID, NATIONAL GRID USA,
and NATIONAL GRID ENERGY TRADING
SERVICES, LLC

Defendants.
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The following papers numbered 1 to 10 read on this motion by defendant Long Island Power Authority, defendant Long Island Lighting Company and defendant National Grid Electric Services, LLC for an Order pursuant to CPLR §603 and/or §1003 severing the multiple plaintiffs' actions from each other; and upon severance, pursuant to CPLR §603 and/or §4011, ordering three separate representative liability trials by one plaintiff per neighborhood; and granting LIPA and NGES such further and different relief as this Court deems just and proper.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	1 - 4
Affirmation in Opposition - Exhibits	5 - 9
Reply Affirmation	6 - 10

Upon the foregoing papers it is ordered that Defendants' motion to sever the multiple

plaintiffs' actions from each other and upon severance ordering three separate representative liability trials by one plaintiff per neighborhood is denied.

I. The Allegations of the Complaint

The plaintiffs were owners of real and personal property located on the Rockaway Peninsula, County of Queens, New York on or before October 29, 2012. They were also customers of the Long Island Power Authority (LIPA) and National Grid PLC a/k/a National Grid US8, Inc., National Grid USA, Inc., Keyspan Electric Services, LLC, and Keyspan Energy Trading Services, d/b/a National Grid.

LIPA, formed under Public Authorities Law §1020 as a non-profit municipal electric provider, owned and operated an electric transmission and distribution system that serviced areas on Long Island, including the Rockaway Peninsula. Between 1997 and 2002, LIPA entered into management service agreements with Keyspan Electric Services, LLC and Keyspan Energy Trading Services, LLC (collectively Keyspan Electric). After mergers, Keyspan Electric changed its name to National Grid. In 2012, National Grid had three main functions pursuant to its agreements with LIPA: (1) the operation and maintenance of the transmission and delivery system, (2) the repair of the transmission and delivery system, and (3) customer service. National Grid had responsibilities concerning emergency preparedness and planning regarding such events as hurricanes and flood surges subject to the supervision of LIPA.

Before October 2012, both LIPA and National Grid knew that flooding in areas such as the Rockaway Peninsula created the danger of fires caused by the corrosive effects of salt water on live electrical wiring. The defendants also knew that de-energization in flood prone areas was “an accepted custom and accepted usage by utilities throughout the country.”

In late October, 2012, Superstorm Sandy, also called “Hurricane Sandy,” nearly 2,000 miles across, moved up the Atlantic coastline, causing the National Weather Service to issue high wind and flood watches for areas in New York and New Jersey. On October 28, 2012, the City of New York issued a mandatory evacuation order for the Rockaway Peninsula. On October 29, 2012, the superstorm hit the New York City Metropolitan area at high tide, and the resulting surge flooded many areas in the city and on Long Island, including the Rockaway peninsula, with devastating effect.

The defendants had left electrical transmission lines energized, and electrical arcing from flood waters coming into contact with the live wires started fires which destroyed the premises owned and/or occupied by the plaintiffs.

II. The Instant Action

The plaintiffs began the instant action by the filing of a summons and a complaint on July 2, 2013.

The first cause of action, which is for negligence, alleges that the defendants had a duty to establish an emergency response plan concerning areas that were known to be prone

to flooding and that the plan should have dealt with electrical wiring that could cause fires by coming into contact with salt water. The failure of the defendants to de-energize the Rockaway Peninsula allegedly “constituted a departure from good and accepted engineering principles as set forth in the National Electrical Safety Code” and “ a departure from the custom and practices of electrical utilities throughout the country.”

The second cause of action, which is for gross negligence, alleges that “the defendants were grossly negligent in failing to de-energize the Peninsula and [in failing] to implement appropriate emergency protocols.”

The third cause of action is also for negligence, not for fraud, despite some allegations concerning reliance on representations made by the defendants about an emergency response plan. In it Plaintiff alleges that the defendants were negligent in “fail[ing] to advise the plaintiffs, as required by emergency protocols, to turn off electricity in their homes prior to evacuating the Peninsula and thereafter in order to prevent fire,” and thus this failure to advise caused the destruction of homes and property. It also contains an allegation that the defendants were negligent in failing to de-energize the Peninsula.

The fires that are a subject of the within action occurred in Breezy Point, Belle Harbor and Rockaway Park. The Heeran action (Index No. 702558/2013) was commenced by approximately 100 plaintiffs who resided in all three neighborhoods at the time of the fires. The Bavasso action (Index No. 22879/2013) was commenced by over 10 plaintiffs who resided in Belle Harbor and Rockaway Park at the time of the fires. The Connolly action (Index No. 6341/2013) was commenced by 15 plaintiffs, all of whom resided in Breezy Point

at the time of the fires. The Baumann action (Index No. 13286/2013) was commenced by approximately 15 plaintiffs, all of whom resided in Breezy Point at the time of the fires.

There are also 8 subrogation actions based on the same fires commenced against the Defendants by insurance carriers Adirondack Insurance Exchange (Index No. 700552/2014), The Hanover Insurance Company (Index No. 700418/2014), AIG Property Casualty Co. (Index No. 701573/2014), The Hartford (Index No. 700105/2014), Nationwide Insurance Co. (Index No. 700106/2014), Narragansett Bay Insurance Company (Index No. 700108/2014), New York Property Insurance Underwriting Association (Index No. 700109/2014), Praetorian Insurance Company and Wesco Insurance Company (Index No. 704580/2014).

Defendants contend that based on the deposition testimony the fires occurred in three separate neighborhoods.

In November 2014, the parties entered into a stipulation to join the cases for the purposes of discovery. Pursuant to the November 10, 2014 stipulation, the parties agreed “that the order of the trial(s) of the various actions and parties thereto shall be determined by the Court after the filing of Notes of Issue.”

The Notes of Issue were filed in March of 2018.

Prior orders of this court concerning motions by the defendants to dismiss on the grounds of governmental function immunity made in this action (*see, Heeran v Long Island Power Authority (Lipa)*, 2014 WL 4092329 [Sup. Ct. July 09, 2014]) and in related actions (*see, Connolly v Long Island Power Authority*, 2014 WL 12519907 [(Sup. Ct. July 15, 2014)]; *Baumann v. Long Island Power Auth.*, 45 Misc3d 257, 989 [(Sup. Ct. 2014)]), were appealed

by the defendants. The Appellate Division affirmed the denial of the motions, holding that the provision of electricity was properly categorized as a proprietary function. (*See, Heeran v. Long Island Power Auth.*, 141 A.D.3d 561 [2nd Dept. 2016]; *Connolly v. Long Island Power Auth.*, 141 AD3d 555 [2nd Dept. 2016]; *Baumann v. Long Island Power Auth.*, 141 AD3d 554 [2nd Dept 2016].) The Court of Appeals affirmed all three cases sub nom *Connolly v. Long Island Power Auth.*, 30 NY3d 719 (2018), holding that the plaintiffs had adequately alleged that the defendants were acting in a proprietary capacity, rather than in a governmental capacity, when they allegedly were negligent in failing to preemptively de-energize the electrical grid.

III. The Instant Motion

A. Introduction

Defendants now move for an Order pursuant to CPLR §603 and/or §1003 severing the multiple plaintiffs' actions from each other and upon severance, pursuant to CPLR §603 and/or §4011, ordering three separate representative liability trials by one plaintiff per neighborhood.

B. Argument

Defendants initially argue that the severance is appropriate because the four separate

actions were commenced by plaintiffs whom were not necessarily grouped by their neighborhood and to avoid undue prejudice. Defendants concede that the plaintiffs all claim generally the same theories of negligence against defendants in each of the four actions. (Defendants' Affirmation in Support.)

"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." (CPLR 603.)

"The determination to grant or deny a request for a severance pursuant to CPLR 603 is a matter of judicial discretion." (*Herskovitz v. Klein*, 91 A.D.3d 598, 599 [2nd Dept 2012] quoting *Naylor v. Knoll Farms of Suffolk County, Inc.*, 31 A.D.3d 726, 727 [2nd Dept 2006].) "This discretion should be exercised sparingly." (*Zili v. City of New York*, 105 A.D.3d 949 [2nd Dept 2013]; *Shanley v. Callanan Industries, Inc.*, 54 N.Y.2d 52 [1981].)

"While the granting of a motion for consolidation or joint trial hinges upon a finding of common issues of law or fact, the granting of severance generally depends upon an absence of such commonality." (*Herskovitz v. Klein, supra. citing* CPLR §603; 3-603 Weinstein-Korn-Miller, N.Y. Civ. Prac., CPLR §603.03.) "Thus, severance may be inappropriate where there are common factual and legal issues involved in two causes of action, and the interests of judicial economy and consistency of verdicts will be served by having a single trial." (*Herskovitz v. Klein, supra. citing* *Curreri v. Heritage Property Inv. Trust, Inc.*, 48 A.D.3d 505 [2nd Dept 2008]; *Naylor v. Knoll Farms of Suffolk County, Inc.*, *supra.*)

In support of their motion to sever, defendants cite to *Addison v. New York*

Presbyterian Hospital/Columbia University Medical Center, 52 A.D.3d 269 (1st Dept 2008) wherein the First Department held that actions should not be consolidated as “individual issues predominate, concerning particular circumstances applicable to each plaintiff,” (*Addison v. New York Presbyterian Hospital/Columbia University Medical Center*, supra at 270.) but fail to provide authority for their requested relief of severance. Herein, there are common questions of law and fact as evidenced by Defendants’ own motions for summary judgment based on governmental immunity and the motions to dismiss for a lack of duty to de-energize that were each premised on the same questions of law and fact. Furthermore, in all three fires, plaintiffs allege the same issues of negligence and causation. The same holds true with respect to Defendants reliance on *Bender v. Underwood*, 93 A.D.2d 747 (1st Dept 1983) wherein the First Department found that consolidation was not appropriate despite common questions of law and fact because individual issues predominated so as to preclude direction of joint trial. (*Bender v. Underwood*, supra.)

Defendants also cite to *DeAngelis v. New York Univ. Med. Ctr.*, 292 AD2d 237 (1st Dept 2002) wherein the First Department held that severance was appropriate in a malpractice action brought by twin sisters despite a common issue as to whether it was malpractice to perform a certain procedure because of predominance of differing facts that would impact a malpractice action. Those differing facts included, “significantly different medical histories” and “Defendant surgeon’s performance of second surgery with knowledge of complications that arose after first.” (*DeAngelis v. New York Univ. Med. Ctr.*, supra at 237-238.) The Court found that the latter circumstance had a “particular potential for

prejudicing defendants.” (*DeAngelis v. New York Univ. Med. Ctr.*, supra at 237-238.) Severance in *DeAngelis v. New York Univ. Med. Ctr.* was predicated on the fact that the physician performed the second surgery already knowing about the complications of the first and the potential prejudice of that fact would have prejudiced the defendant. Herein, there is no such prejudice present.

While it is clear that the type of prejudice that was in play in *DeAngelis v. New York Univ. Med. Ctr.* is not in play herein, Defendants nonetheless argue, in reliance upon and quoting the affidavit of Dr. Antonio Rangel (“Rangel”), a purported expert in behavioral economics, that the consolidation of multiple cases “induces a systematic shift in the likelihood that the jury rules in favor of one of the parties, in comparison to the judgments that it would make in the associated unconsolidated trials.”

Even if the Court would agree with the Rangel conclusions, any potential prejudice is outweighed by the possibility of inconsistent verdicts in the event that the cause of action against them were tried separately. (*Chiarello v. Rio*, 101 A.D.3d 793 [2nd Dept 2012].) Furthermore, Dr. Rangel submitted a similar affidavit in the *New York City Asbestos Litigation*, 2017 WL 2671002 (Sup. Ct. N.Y. County 2017) wherein the court found that despite Dr. Rangel’s contention that consolidation would lead to “sizable and systematic biases,” consolidation was appropriate.

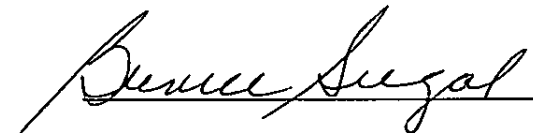
As noted earlier, severance is inappropriate where, as here, there are common factual and legal issues involved in each of the causes of action, “and the interests of judicial economy and consistency of verdicts will be served by having a single trial.” (*Herskovitz v.*

Klein, supra. citing *Curreri v. Heritage Property Inv. Trust, Inc.*, 48 A.D.3d 505 [2nd Dept 2008]; *Naylor v. Knoll Farms of Suffolk County, Inc.*, *supra.*) Any potential prejudice is outweighed by the possibility of inconsistent verdicts in the event that the cause of action against the defendants were tried separately. (*Zili v. City of New York*, 105 A.D.3d 949[2nd Dept 2013]; *Chiarello v. Rio*, 101 A.D.3d 793 [2nd Dept 2012]; *Page v. Lar Lakeshore Corp.*, 138 A.D.2d 970 [4th Dept 1988].)

Conclusion

For the reasons set forth above, Defendants' motion for an Order pursuant to CPLR §603 and/or §1003 severing the multiple plaintiffs' actions from each other; and upon severance, pursuant to CPLR §603 and/or §4011, ordering three separate representative liability trials by one plaintiff per neighborhood is denied.

Dated: 3/26/2019


Bernice D. Siegal, J. S. C.

