

Floren v Kirwin

2019 NY Slip Op 34698(U)

September 13, 2019

Supreme Court, Nassau County

Docket Number: Index No. 609267/18

Judge: Randy Sue Marber

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE

TRIAL/IAS PART 8

LUCAS FLOREN, X

Plaintiff,

-against-

Index No.: 609267/18
Motion Sequence...02
Motion Date...09/05/19
(Action No. 1)

JAMES J. KIRWIN and DIANE S. KIRWIN,

Defendants.

LUCAS FLOREN, X
X

Plaintiff,

-against-

Index No.: 606260/19
(Action No. 2)

DAVID S. SCHUSTER,

Defendant.

Papers Submitted: X
Notice of Motion.....X
Affirmation in Opposition.....X

Upon the foregoing papers, the motion by the Plaintiff, LUCAS FLOREN, seeking an Order, pursuant to CPLR § 602 (a), consolidating Action No. 1 under Index No. 609267/18 and Action No. 2 under Index No. 606260/19, for all purposes under Index No. 606260/19, is **GRANTED**.

The Plaintiff commenced Action No. 1 under Index No. 609267/18, by the electronic filing of a Summons and Complaint on July 12, 2018, only as against the Defendants, JAMES J. KIRWIN and DIANE S. KIRWIN (hereinafter the “Kirwin Defendants”), to recover damages for personal injuries allegedly sustained when the Plaintiff tripped and fell due to a defective/dangerous condition that purportedly existed on the Kirwin Defendants’ property located at 15 Haymaker Lane, Levittown, New York (*See* Complaint in Action No. 1, annexed to Motion as Exhibit “A”). Issue was joined on behalf of the Kirwin Defendants by the electronic filing of a Verified Answer on August 14, 2018.

During the course of party-depositions in Action No. 1, it was discovered that the Plaintiff’s fall occurred on property owned by DAVID S. SCHUSTER (Defendant in Action No. 2) located at 19 Haymaker Lane, Levittown, New York. Thereafter, on May 7, 2019, the Plaintiff commenced Action No. 2 against DAVID S. SCHUSTER (*See* Complaint in Action No. 2, annexed to Motion at Exhibit “B”). Issue was joined on behalf of the Defendant, SCHUSTER, by the electronic filing of a Verified Answer on June 10, 2019.

The Plaintiff now moves to consolidate the two actions on the grounds that both matters arise out of the same incident. The Plaintiff further avers that discovery revealed that the Kirwin Defendants may have caused or contributed to the alleged defective condition due to their alleged removal of a tree situated on Schuster’s property. Insofar as discovery in the Schuster action remains, the Plaintiff posits that there are still questions as to whether the Kirwin Defendants and/or Defendant Schuster are responsible for the alleged defective condition.

No opposition has been submitted by the Defendant, Schuster.

In their opposition, the Kirwin Defendants claim that the Plaintiff's delay in seeking consolidation will prejudice the Kirwin Defendants as discovery in Action No. 1 is complete and a Note of Issue has been filed. In this regard, counsel for the Kirwin Defendants avers that the Plaintiff waited five months after learning of Schuster's potential liability before moving to consolidate the actions and that the consolidation motion was only filed in response to the summary judgment motion filed by the Kirwin Defendants in Action No. 1.

CPLR § 602 (a) provides that consolidation among actions should be granted where there are common questions of law and/or fact. However, consolidation of actions should not be granted if doing so would prejudice a substantial right of the opposing party (*See Perini Corp. v. WDF, Inc.*, 33 A.D.3d 605, 606 [2d Dept. 2006]); *Best Price Jewelers.Com, Inc. v. Internet Data Storage and Systems, Inc.*, 51 A.D.3d 839, 857 [2d Dept. 2008]). A motion for consolidation may be made at any time before trial, however a court may deny a motion on the ground of laches (*See Rennert Diana & Co., Inc. v. Kin Chevrolet, Inc.* 137 A.D.2d 589 [2d Dept. 1988]) (a court properly denied the defendant's second motion for consolidation where the initial motion had been denied with leave to renew on proper papers, but the defendant had waited nearly two years to renew the motion and did not do so until one of the actions had been marked "final" for trial).

In the instant matter, the Court finds consolidation is appropriate as both actions arise out of the same incident and involve common questions of law and fact. Contrary to the Kirwin Defendants' contentions, they failed to demonstrate that a

substantial right would be prejudiced by granting consolidation. While a Note of Issue was filed in Action No. 1, no trial date has been scheduled yet. Moreover, only a limited amount of discovery remains in Action No. 2, upon completion of which the matter will be certified. That is, any delay resulting from the consolidation would be minimal and insufficient to warrant denial of the consolidation motion.

Accordingly, it is hereby,

ORDERED, the motion by the Plaintiff, LUCAS FLOREN, seeking an Order, pursuant to CPLR § 602 (a), consolidating Action No. 1 under Index No. 609267/18 and Action No. 2 under Index No. 606260/19, for all purposes under Index No. 606260/19, is **GRANTED**, and the actions are hereby consolidated under Index No. 606260/19; and it is further

ORDERED, that motion (Mot. Seq. 01) filed by the Defendants, JAMES J. KIRWIN and DIANE S. KIRWIN, in Action No. 1, returnable on October 28, 2019, shall be transferred to the consolidated action under Index. No. 606260/19; and it is further

ORDERED, that the Defendants in the consolidated action are hereby granted leave, within ten (10) days of the date of entry of this Order, to file an amended Answer to assert cross-claims, if any; and it is further

ORDERED, that counsel for all parties are directed to appear for the previously scheduled **Compliance Conference and a motion conference on the Kirwin Defendants' summary judgment motion, in the newly consolidated action under Index No. 606260/19, on October 28, 2019 at 9:30 a.m. before the Hon. Randy Sue Marber**; and it is further

ORDERED, that the caption of this matter shall be amended to reflect the consolidation and the Clerk of the Court is directed to amend the caption as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

_____ X
LUCAS FLOREN,

Plaintiff,

Index No.: 606260/19

-against-

JAMES J. KIRWIN, DIANE S. KIRWIN and DAVID
A. SCHUSTER,

Defendants.

_____ X

This decision constitutes the decision and Order of this Court.

DATED: Mineola, New York
September 13, 2019



Hon. Randy Sue Marber, J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE