

Valiente v Cabrera

2019 NY Slip Op 35077(U)

January 3, 2019

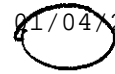
Supreme Court, Nassau County

Docket Number: Index No. 610650/2018

Judge: Jerome C. Murphy

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This opinion is uncorrected and not selected for official publication.



**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

OSCAR VALIENTE,

Plaintiff,

- against -

TRIAL/IAS PART 13

Index No.: 610650-2018

Motion Date: 10/30/18

Sequence No.: 001, 002

MD, MG

DECISION AND ORDER

**ERNESTO CABRERA, GOYA FOODS, INC.,
PENSKE TRUCK LEASING CO., LP, PAUL
DONAGHY, EASTERN FREIGHT WAYS INC.,**

Defendants.

The following papers have been read on this motion:

Motion Seq. 001

Notice of Motion, Affirmation in Support, and Exhibits.....	1
Affirmation of Deborah Lara.....	2
Affirmation in Opposition of Todd Rubenstein and Exhibits.....	3
Affirmation in Opposition of Ian M. Chaikin.....	4
Reply Affirmation of Gamaliel B. Delgado.....	5

Motion Seq. 002

Notice of Motion, Affirmation in Support and Exhibits.....	1
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PRELIMINARY STATEMENT

Defendants, Ernest Cabrera, Goya Foods, Inc., Penske Truck Leasing Co., LP bring this application for an order pursuant to CPLR §602 consolidating Action No. 1, Action No. 2, Action No. 3 and Action No. 4 for all purposes as they arise from the same occurrence and there exist common questions of law and fact; or in the alternative (b) pursuant to CPLR §602 granting consolidation of Actions 1, 2 and 3 for all purposes and pursuant to CPLR§601 joining Action 4

for discovery and joint trial as there exists common questions of law and fact; and (c) pursuant to CPLR §§510 and 511 transferring Venue of Action No. 2 , Action No. 3 and action No. 4 to Nassau County for the purpose of effectuating the consolidation and/or joint trial; and (d) granting such other, further and different relief as this Court may deem just and proper. Plaintiff has submitted opposition to this application.

BACKGROUND

There are four separate actions arising out of a multi-vehicle accident on December 23, 2016 on the Cross Island Parkway, Bronx, New York. A copy of the New York City Police Report is annexed as Exhibit "A".

Action No. 1, on behalf of Oscar Violente, was commenced by the filing of a Summons and Complaint in Supreme Court, Bronx County, on January 13, 2017. Defendants Cabrera, Goya, and Penske moved for a change of venue to Nassau County. Notice of Transferred to Nassau County was filed with the Bronx County Clerk on August 8, 2018 (Exhibit "B").

A copy of the Summons and Complaint is annexed as exhibit "C".

Action No. 2, on behalf of plaintiff, Melissa Walker, individually and as the Administrator of the Estate of Henry Walker, was commenced by the filing of a Summons and Complaint in Supreme Court, New York County on March 10, 2017 (Exhibit "D").

Action No. 3, on behalf of Melissa Walker, individually and as the Administrator of the estate of Khalil Walker, was commenced by the filing of a Summons and Complaint in Supreme Court, New Your County on May 18, 2018 (Exhibit "F").

Action No. 4, on behalf of plaintiff Joseph Lewis, was commenced by the filing of a Summons and Complaint in Supreme Court, New York County, on October 13, 2017 (Exhibit "F").

Counsel for Joseph Lewis moves this court for a Order pursuant to CPLR 602 to consolidate Actions one, two, three and four for all purposes as they arise from the same occurrence and common questions of fact and law exists; and, pursuant to CPLR 510 and 511, transferring Action number 12 New York County for the purpose of effectuating consolidation, and for such other and further relief as to the court may seem just and proper. Defendants

Cabrera, Goya Foods, and Penske Truck Leasing Co., L.P. request the transfer of venue of Action Nos. 2, 3, and 4 from New York County to Nassau County.

With respect to Action No. 4, defendants Paul Donaghy and Eastern Freight Ways, Inc., submit opposition to the motion by defendants Cabrera, Goya Foods, Inc., and Penske Truck Leasing Co., L.P. insofar as they request a change of venue of Action Nos. 2, 3, and 4 from New York County to Nassau County. Plaintiff Melissa Walker, as Administrator of the Estate of Henry Walker, Deceased, in Action No. 2, and Administrator of the Estate of Khalil Walker, Deceased, in action No. 3, also opposes the motion of Cabrera, Goya Foods, Inc., and Penske Truck Leasing Co., L.P., which requests the transfer of Action Nos. 2, 3, and 4 from New York County to Nassau County.

Defendants Paul Donaghy, and Eastern Freight Ways, Inc. annex to their Affirmation in Opposition to the Motion to Consolidate the Decision and Order of Hon. Adam Silvera, New York County, under Index No. 158822/2017. The Court therein granted the motion of plaintiff Joseph Lewis for summary judgment on the issue of liability, and the cross-motion of defendants Paul Donaghy and Eastern Freightways for summary judgment dismissing the Complaint against them was also granted. The action against them was severed, and the caption was amended to reflect the dismissal. The remaining parties were directed to appear for a compliance conference on December 24, 2018.

In Motion Sequence No. 2, counsel for Cabrera, Goya Foods, Inc., and Penske Leasing Co. moves for dismissal of the Complaint against Penske in Action No. 1 pursuant to CPLR 3211 (a)(1) and (7) pursuant to the Transportation Equity Act of 2005, Section 14, 49 U.S.C Chap. 301, Subchapter 1, § 30106, the “Graves Amendment”.

DISCUSSION

Counsel in Motion No. 1 asserts that the Nassau County Action was the first to be filed, and that, since all four actions arise from the same accident, and involve common questions of law and fact, that they should be consolidated in Nassau County.

The consolidation of actions pending in the same, or different, courts is governed by CPLR § 602, which provides as follows:

§ 602. Consolidation

(a) Generally. When 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.

(b) Cases pending in different courts. Where 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 an action is pending in the county court, it may, upon motion, remove to itself an action pending in a city, municipal, district or justice court in the county and consolidate it or have it tried together with that in the county court.

Consolidation, and the closely related “joint trial”, are encouraged because of their ability to reduce calendar congestion and judicial resources. As a practical matter, when consolidation is proposed, the burden falls to the opponent to show that they would suffer prejudice if the relief were granted (*Virgo S.S. Corp. v. Marship Corp.*, 26 N.Y.2d 157, 161 [1970]). The primary issue, of course, is the commonality of questions of law or fact.

Generally, where a consolidation would result in a party appearing as both a plaintiff and a defendant in the joined captions, joint trial, as opposed to consolidation is appropriate. The primary reason is simply to avoid confusion of jurors.

Movants contend that the action in Nassau has priority in time, and that the consolidation of these actions should take place in that County. However, Action No. 1 was improperly filed in Bronx County on January 13, 2017. Because there was no basis for jurisdiction in Bronx County, despite plaintiff’s claim that is where the cause of action arose, the matter was transferred to Nassau County by Order of Hon. Norma Ruiz dated October 19, 2017. Between the filing in Bronx, an improper county, and the Order transferring the matter to Nassau, Action No. 2 was filed in New York County on March 10, 2017, and Action No. 4 was also filed in New York County on October 3, 2017. Thus, both of them were properly filed prior in time to the matter transferred to Nassau County.

The priority in time states that “[g]enerally the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rule of comity to

interfere” (*City Trade and Industries v. New Central Jute Mills Co.*, 25 N.Y.2d 49 [1969]). In *Rae v. Hotel Governor Clinton, Inc.*, 23 A.D.2d 564 (2d Dept. 1965), the Court made it clear that the first-in time rule is contingent upon the court in the first filing having jurisdiction. In this case, the first county to have jurisdiction was New York County.

In addition, in the action initially commenced in the Bronx, and subsequently transferred to Nassau, plaintiff Valiente has been granted summary judgment on the issue of liability, and defendants Donaghy, and Eastern Freight Ways, Inc. have been granted summary judgment dismissing the Complaint against them.

The motion to consolidate Actions 1, 2, 3, and 4 in Nassau County is denied.

In Motion Sequence No. 2, defendant Penske Truck Leasing Co. moves in Action No. 1, presently in Nassau County, for dismissal of the Complaint against it on the basis of the Graves Amendment. Penske submits an Affidavit of Kresten Hansen, a Litigation Claims Examiner for Penske, demonstrates that Penske was not the operator of the vehicle at the time of the accident, and the operator, Cabrera, was not a Penske employee. Penske was, and continues to be, in the business of leasing or renting motor vehicles.

The pleadings in Action No. 1 allege negligence on the part of Cabrera and his employer, Goya Foods. There are no allegations directly against Penske, the owner and lessor of the vehicle. The Graves Amendment (49 U.S.C. § 30106[a]) provides that “the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of such vehicle if the owner (i) is engaged in the trade or business of renting or leasing vehicles, and (ii) engaged in no negligence or criminal wrongdoing” (*Lozano v. Magda, Inc.*, 165 A.D.3d 1249 [2d Dept. 2018], quoting *Bravo v. Vargas*, 113 A.D.3d 579, 580 [2d Dept. 2014]).

In *Lozano*, the Court affirmed the denial of the Motion by Magda, which established that it was in the business of leasing vehicles, but failed to establish that it was neither negligent nor engaged in criminal conduct. The plaintiff in that case alleged negligence on the part of Magda in the care and maintenance of its vehicle. There is no such allegation in the Complaint in this action.

Penske’s unopposed motion to dismiss the Complaint by Valiente against it is granted. In addition to the failure of plaintiff to allege negligence or criminal conduct by Penske in

connection with its ownership of the vehicle, the Affidavit of Mr. Hansen reveals that Penske regularly maintained the vehicle, and had no complaints about its operation. The vehicle underwent routine maintenance on December 20, 2016, and the NYPD CIS' mechanical inspection of the vehicle did not reveal any mechanical malfunction other than the damage caused by the collision.

To the extent that relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
January 3, 2019

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED

JAN 04 2019

NASSAU COUNTY
COUNTY CLERK'S OFFICE