

7-11 E. 13th St. Tenants Corp. v New Sch.

2020 NY Slip Op 30603(U)

February 25, 2020

Supreme Court, New York County

Docket Number: 151740/2013

Judge: Laurence L. Love

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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. LAURENCE L. LOVE

PART

IAS MOTION 62

Justice

-----X

INDEX NO. 151740/2013

7-11 EAST 13TH STREET TENANTS CORP., 7-11 EAST
13TH STREET CONDOMINIUM, HARLEYSVILLE
WORCESTER INSURANCE COMPANY, AS SUBROGEE
OF 7-11 EAST 13TH STREET TENANTS CORP., 7-11
EAST 13TH STREET CONDOMINIUM,

MOTION DATE 12/12/2019

MOTION SEQ. NO. 003

Plaintiff,

- v -

THE NEW SCHOOL, TISHMAN CONSTRUCTION
CORPORATION OF NEW YORK, THE DURST
ORGANIZATION, INC., URBAN
FOUNDATION/ENGINEERING, LLC, DESIMONE
CONSULTING ENGINEERS, SKIDMORE, OWINGS AND
MERRILL, LLP, LANGAN ENGINEERING &
ENVIRONMENTAL SERVICES INC.,

**DECISION + ORDER ON
MOTION**

Action #1

Defendant.

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THE NEW SCHOOL, TISHMAN CONSTRUCTION
CORPORATION OF NEW YORK, THE DURST
ORGANIZATION, INC., URBAN
FOUNDATION/ENGINEERING, LLC

Third-Party
Index No. 590970/2013

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT
OF ENVIRONMENTAL PROTECTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 93, 94
were read on this motion to/for MISCELLANEOUS

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7-11 EAST 13TH STREET TENANTS CORP., DAVID
 MASENHEIMER, JAMES MORGAN, ASAF YOGEV,
 BARBARA THOMPSON, SARAH THOMPSON, EVAN
 OPPENHEIMER, LIA LEVENSON, MATT ONER,
 DANIELLA VAN GENNEP, PETER NAKADA, DONALD
 WILMOTT, SEAN FARQUHARSON, JOHN DONAHUE,
 CHARLES STIMSON, ADAM SINGER, JAMES
 MCCARTHY, JOSHUA KESSLER, BETTINA MICHELI,
 PHILLIP LIU, EVAN REILLY, LESLEY SKILLEN,
 LAURENCE CANTOR, RICHARD MARTIN, PATRICIA
 WHITE, ROBERT ANGERT, SHANA SCHWARTZ,

INDEX NO. 151743/2013

MOTION DATE 12/12/2019

MOTION SEQ. NO. 002

Plaintiff,

DECISION + ORDER ON MOTION

- v -

Action #2

THE NEW SCHOOL, TISHMAN CONSTRUCTION
 CORPORATION OF NEW YORK, THE DURST
 ORGANIZATION, INC., URBAN
 FOUNDATION/ENGINEERING, LLC, DESIMONE
 CONSULTING ENGINEERS, SKIDMORE, OWINGS AND
 MERRILL, LLP, LANGAN ENGINEERING &
 ENVIRONMENTAL SERVICES INC.,

Defendant.

-----X

THE NEW SCHOOL, TISHMAN CONSTRUCTION
 CORPORATION OF NEW YORK, THE DURST
 ORGANIZATION, INC., URBAN
 FOUNDATION/ENGINEERING, LLC

Third-Party
 Index No. 590971/2013

Plaintiff,

-against-

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT
 OF ENVIRONMENTAL PROTECTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 65, 66, 67, 68, 69,
 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL.

Upon the foregoing documents, the motions are decided as follows:

Third-Party defendants seek an Order pursuant to CPLR 2201 granting a stay of the instant
 litigation pending a decision on the appeal of the Court's decision by Justice Lyle E. Frank, dated

May 9, 2019, in O'Hara v. The New School, Index No. 100984/2012, which granted the City's motion for summary judgment, dismissing the third-party plaintiff's claims, which are identical to the claims in this action or, in the alternative pursuant to CPLR 603 and 2201, severing and staying the third-party action. Third-Party defendants also seek consolidation pursuant to CPLR 602(a) of the above actions as the identical complaints are being asserted in both actions on behalf of related plaintiffs.

In 2009, the defendants were involved in the building of a 16-story building located on 5th Avenue, between 13th and 14th Streets. Plaintiffs in the instant actions are located at 7-11 East 13th Street. Plaintiffs in the action assigned to Justice Frank are located at 5 East 13th Street, immediately between defendants' building and the instant plaintiff's building. Plaintiffs in both actions allege that as a result of construction activities, their apartment buildings have sustained structural damage. On December 27, 2013, The New School, Tishman Construction Corporation of New York and The Durst Organization, Inc., commenced a third-party action seeking common-law contribution and indemnification from the City alleging that any damage was caused by leaking City utilities. Third-Party plaintiffs sought identical relief in the O'Hara action. After the granting of the City's motion for summary judgment in said case, Notices of Appeal were served in July, 2019. As the parties and issues in the third-party action are identical, the determination of the appeal will have a res judicata effect as the underlying decision specifically found that the City had met its burden of establishing that any actions or omissions did not contribute to the settlement of the subject neighboring buildings.

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 Longo v. Fogg, 150 A.D.3d 724, 725 (2d Dept 2017). Here, the

exact questions of law and fact are identical in the two cases as Action #1 is brought on behalf of the relevant building, its tenants corporation and its insurer and Action #2 asserts identical complaints of behalf of the tenant's corporation and the individual tenants.

Pursuant to CPLR 2201, "[t]he court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." "When a determination in one action will dispose of a controversy in another, the later should be stayed." Hunter v. Hunter, 10 A.D.2d 937 (1st Dept. 1960). Here, the res judicata effect of the ruling on the third-party action in the O'Hara case will have no effect on the issues in the main action other than to delay discovery which has already been proceeding for over six years, as such, a stay of the entire case is inappropriate.

Pursuant to CPLR 603, "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." Here, there are no direct claims asserted against the City in the main action and as such, there will be no prejudice in allowing the main action to proceed while severing the third-party action for future determination and/or reconsolidation, if necessary. If the instant action is not severed, plaintiffs will be prejudiced by an unnecessary delay in this case, and if this action is not stayed, the City will be prejudiced by having to expend resources in defending an action where an identical issue has already been decided in its favor.

ORDERED that the above-captioned actions are consolidated in this Court with 7-11 East 13th Street Tenant's Corp vs. The New School, Index No. 151743/2013, pending in this Court; and it is further

ORDERED that the consolidation shall take place under Index No. 151743/2013 and the consolidated action shall bear the following caption:

7-11 EAST 13TH STREET TENANTS CORP., 7-11 EAST 13TH STREET CONDOMINIUM, HARLEYSVILLE WORCESTER INSURANCE COMPANY, AS SUBROGEE OF 7-11 EAST 13TH STREET TENANTS CORP., 7-11 EAST 13TH STREET CONDOMINIUM, DAVID MASENHEIMER, JAMES MORGAN, ASAF YOGEV, BARBARA THOMPSON, SARAH THOMPSON, EVAN OPPENHEIMER, LIA LEVENSON, MATT ONER, DANIELLA VAN GENNEP, PETER NAKADA, DONALD WILMOTT, SEAN FARQUHARSON, JOHN DONAHUE, CHARLES STIMSON, ADAM SINGER, JAMES MCCARTHY, JOSHUA KESSLER, BETTINA MICHELI, PHILLIP LIU, EVAN REILLY, LESLEY SKILLEN, LAURENCE CANTOR, RICHARD MARTIN, PATRICIA WHITE, ROBERT ANGERT, SHANA SCHWARTZ,

Plaintiffs,

-against-

THE NEW SCHOOL, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, THE DURST ORGANIZATION, INC., URBAN FOUNDATION/ENGINEERING, LLC, DESIMONE CONSULTING ENGINEERS, SKIDMORE, OWINGS AND MERRILL, LLP, LANGAN ENGINEERING & ENVIRONMENTAL SERVICES INC.,

Defendants.

And it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the Court (60 Centre Street, Room 141 B), who shall consolidate the documents in the actions hereby consolidated and shall mark his records to reflect the consolidation; and it is further

ORDERED that counsel for the movant shall contact the staff of the Clerk of the Court to arrange for the effectuation of the consolidation hereby directed; and it is further

ORDERED that service of this order upon the Clerk of the Court shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-filed case, 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 the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that, as applicable and insofar as is practical, the Clerk of this Court shall file the documents being consolidated in the consolidated case file under the index number of the consolidated 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 in the consolidated action; and it is further

ORDERED that the portion of this motion seeking a stay of this entire action is denied; and it is further

ORDERED that the third-party action is severed and the main action is continued; and it is further

ORDERED that the severed third-party action is stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon final determination of the action/proceeding known as O’Hara v. The New School, Index No. 100984/2012, pending before the Appellate Division, First Department; and it is further

ORDERED that, within 30 days from entry of this order, movant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who is hereby directed to reflect the consolidation by appropriately marking the court’s records; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in hard-copy format if this action is a hard-copy matter or, if it is an e-filed case, shall be made in accordance with the procedures set forth in the aforesaid *Protocol*; and it is further

The case, as consolidated, is respectfully referred for reassignment to an IAS Part as the City has been severed from the instant action.

2/25/2020

DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE