

Zurich Am. Ins. Co. v Optimum Gen. Contr., Inc.

2020 NY Slip Op 31714(U)

June 2, 2020

Supreme Court, New York County

Docket Number: 156329/2019

Judge: Barbara Jaffe

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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. BARBARA JAFFE **PART** **IAS MOTION 12EFM**

Justice

-----X

ZURICH AMERICAN INSURANCE COMPANY AS
SUBROGEE OF NEWMARK FAMILY
PROPERTIES, LLC,

Plaintiffs,

- v -

OPTIMUM GENERAL CONTRACTING, INC.,

Defendant.

-----X

INDEX NO. 156329/2019

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12-18 were read on this motion to consolidate.

By notice of motion, defendant Optimum moves pursuant to CPLR 602(a) to consolidate this action with one filed by Hartford Casualty Ins. Co. against it, pending in this court, under index number 659890/2019 (second action). The motion is submitted on default.

In the instant complaint, it is alleged that Newmark Family Properties, LLC, owner of the premises at 560 Broadway, New York, New York, contracted with defendant to perform construction work, including roofing, at the premises. Plaintiff, an insurer of the premises, alleges that on or about July 21, 2018, defendant replaced a skylight with a temporary cover, which later blew away and caused water damage to the premises. Plaintiff thus commenced the instant subrogation action in June 2019 related to the property damage suffered by its insured. (NYSCEF 1).

In the second action, it is alleged that a fine art gallery shared space at the premises, and that its property also sustained water damage on July 21, 2018. The gallery's insurer thus

commenced that subrogation action in July 2019. (NYSCEF 16).

Defendant contends that the claims in the two actions arise from a single incident in which it is alleged that defendant's negligence caused property damage to the insureds. Because both actions involve common questions of law and fact and arise out of the same occurrence, defendant seeks to consolidate them.

Pursuant to CPLR 602(a),

[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.

“There is a preference to join cases for discovery and trial in the interests of judicial economy and ease of decision-making where there are common questions of law and fact.” (*Lema v 1148 Corp.*, 176 AD3d 653, 654 [1st Dept 2019]). Deference is thus accorded to the court's discretion to join actions, and the burden is on the non-movant to show that consolidation will “prejudice a substantial right.” (*Id.*).

Here, the two subrogation claims arise from damages sustained in the same incident. The “plain identity between the issues involved in the two controversies” strongly favors consolidation. (*Matter of Vigo S. S. Corp. [Marship Corp. of Monrovia]*, 26 NY2d 157, 161 [1970]). To the extent that both claims depend on a single determination of negligence, they likely involve similar if not identical evidence and witnesses. (*see Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 335 [1st Dept 2005] [holding that resolution of single fraud claim would require same evidence and witnesses]).

Given plaintiff's default on the motion, there is no showing of prejudice resulting from the consolidation.

However, whereas consolidation merges two or more actions “into a single action to be

disposed of by a single decision or verdict, in the case of a jury trial” (*Padilla v Greyhound Lines, Inc.*, 29 AD2d 495, 497 [1st Dept 1968]), “[a] joint trial preserves the integrity of the several actions, requires a separate decision or verdict, as the case may be, and several judgments, with the costs of the particular action in each case *iid.*).

Here, plaintiff asks that the actions be consolidated with joint discovery and a joint trial of all of the matters in issue. (NYSCEF 13). When a request is “loosely described as one for consolidation,” it is inferred that a litigant is generally seeking a joint trial. (*Bank of N.Y. v Rodgers*, 40 AD2d 777, 778 [1st Dept 1972]). As the two actions involve different plaintiffs and the damages sought by each are specific to each, joint discovery and trial are warranted.

Accordingly, it is hereby

ORDERED, that the motion to consolidate is granted to the extent of permitting joint discovery and a joint trial; it is further

ORDERED, that the above-captioned action is consolidated in this court for discovery with the action captioned *Hartford Casualty Insurance Co. a/s/o Staley Wise, Inc. v Optimum General Contracting, Inc.*, Index no. 653890/19; it is further

ORDERED, that within 30 days from entry of this order, counsel for the movant shall serve a copy of the order with notice of entry upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to transfer the other action to this part and to mark the court's records to reflect the consolidation for purposes of discovery; and it is further

ORDERED, that within 30 days from entry of this order, counsel for the movant shall serve a copy of the order with notice of entry upon the Clerk of the Trial Support Office (Room 158); it is further

ORDERED, that upon payment of the appropriate calendar fees and the filing of notes of

issue and statements of readiness in each of the above actions, the Clerk of the Trial Support Office shall place the aforesaid actions upon the trial calendar for a joint trial; and it is further

ORDERED, that at said joint trial plaintiff in the instant action shall have the right to open and close before the jury.

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BARBARA JAFFE, J.S.C.

6/2/2020
DATE

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