

Torres v 120 Broadway Holdings, LLC

2020 NY Slip Op 32076(U)

June 30, 2020

Supreme Court, New York County

Docket Number: 159374/2018

Judge: Kathryn E. Freed

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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. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 159374/2018

RAFAEL TORRES and MARTA BENITEZ JARAMILLO,

MOTION SEQ. NO. 002

Plaintiffs,

- v -

120 BROADWAY HOLDINGS, LLC, 120 BROADWAY
CONDOMINIUM and JRM CONSTRUCTION
MANAGEMENT LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

JRM CONSTRUCTION MANAGEMENT LLC,

Third-Party
Index No. 595244/2020

Third-Party Plaintiffs,

-against-

RITE-WAY INTERNAL REMOVAL INC.,

Third-Party Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 49, 52, 53, 54

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

In this personal injury action, defendants 120 Broadway Holdings, LLC and 120 Broadway Condominium (collectively "Broadway") move, pursuant to CPLR 602, to consolidate this action, for the purposes of joint discovery and trial, with two actions pending in Supreme Court, Kings County, bearing Index Number 507062/2019 and 514348/2019, which are styled *Miroslaw Chrostowski v 120 Broadway Holdings, LLC et al.* ("the first related action") and *Andrei Percium v 120 Broadway, LLC et al.* ("the second related action"), respectively (Docs. 25-41). Andrei Percium ("Percium"), plaintiff in the second related action, opposes the motion and cross moves

for an order denying Broadway's motion (Doc. 52). In the alternative, Percuin cross moves, pursuant to CPLR 603, for an order limiting the consolidation to discovery and dispositive motions on liability and directing, thereafter, that the actions be severed and remanded to their individual court of origin (Doc. 52). After a review of the motion papers, as well as the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The facts of this case are set forth in detail in the decision and order of this Court filed November 6, 2019 ("the 11/6/19 order"), which denied, with leave to renew upon proper papers, Broadway's motion seeking to consolidate the above-captioned action with the first related action for joint discovery (Doc. 22). In denying the motion, this Court reasoned, *inter alia*, that Broadway's failure to serve the motion papers on all the parties in the first related action rendered its application defective (Doc. 22).

Broadway filed the instant motion on February 5, 2020 (Doc. 25). In opposition to the motion, Percuin argues, *inter alia*, that joint discovery and trial is unwarranted because "there is no identity of parties in the three actions" (Doc. 53 ¶ 5-6). Moreover, he contends that, although the issues of liability are relatively clear, "the issues that will have to be shown to establish each plaintiff's damages and the value of the same are complex and unique to each [individual]" (Doc. 53 ¶ 12). In the alternative, Percuin maintains that, even if this Court finds that consolidation for purposes of discovery is appropriate under these circumstances, said consolidation should be limited solely to pre-trial discovery matters and dispositive motions on liability (Doc. 53 ¶ 14). Percuin contends that plaintiffs, who allege separate and unique injuries, will be prejudiced if their claims are tried together and, moreover, that a joint trial may result in jury confusion (Doc. 53 ¶

15). Thus, Percuin requests that, following discovery and motions on liability, each matter be remanded to its original court for an individual trial on damages (Doc. 53 ¶ 14).

LEGAL CONCLUSIONS:

“[W]here an action is pending in . . . Supreme Court, the Court may, upon motion, remove to itself an action pending in another court and consolidate the actions or have them tried together” (*Yottoy Prods., Inc. v Majestic Realty Assoc.*, 2016 NY Slip Op 30586[U], 2016 NY Misc LEXIS 1206, *4 [Sup Ct, NY County 2016] [internal brackets omitted], *quoting* CPLR 602 [b]). “Consolidation is generally favored by the courts in the interest of judicial economy and ease of decision making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right” (*Amcan Holdings, Inc. v Torys LLP*, 32 AD3d 337, 339 [1st Dept 2006] [internal quotation marks and citation omitted]).

This Court grants Broadway's motion seeking consolidation of all three actions for the purposes of joint discovery and trial insofar as it is undisputed that these matters concern common questions of law and fact arising from the same July 2018 incident (Docs. 28, 33, 38, 53 ¶ 11). Under these circumstances, joint discovery and trial will serve the interest of judicial economy and “avoid unnecessary duplication of proceedings, save unnecessary costs and expenses, and prevent the injustice that would result from divergent decisions based on the same facts” (*Obuku v New York City Tr. Auth.*, 141 AD3d 708, 709 [2d Dept 2016]; *see* CPLR 602 [a]; *Mas-Edwards v Ultimate Servs., Inc.*, 45 AD3d 540, 540-541 [2d Dept 2007]; *Amcan Holdings, Inc. v Torys LLP*, 32 AD3d at 339-340; *Progressive Ins. Co. v Countrywide Ins. Co.*, 10 AD3d 518, 519 [1st Dept 2004]; *Chinatown Apts., Inc. v New York City Tr. Auth.*, 100 AD2d 824, 825 [1st Dept 1984]). The fact that all actions are in similar stages of discovery also supports this Court's determination

to grant Broadway's motion (*see Derezeas v NY Rd. Runners, Inc.*, 2012 NY Slip Op 31201[U], 2012 NY Misc LEXIS 2139, *8 [Sup Ct, NY County 2012]; *compare Barnes v Cathers & Dembrosky*, 5 AD3d 122, 122 [1st Dept 2004]).

Further, this Court finds that Percuin, the only party who opposes Broadway's motion, has failed to demonstrate that joint discovery and trial will prejudice a substantial right (*see Mas-Edwards v Ultimate Servs., Inc.*, 45 AD3d at 541).

In light of the aforementioned, that branch of Percuin's cross motion seeking dismissal of Broadway's motion to consolidate for joint discovery and trial is rendered moot.

Although this Court concedes that severance for purposes of trial may be warranted in circumstances necessary "to avoid *substantial prejudice* to the individual claims arising from potential juror confusion or comparative review of the claims" (*see Toscani v One Bryant Park, LLC*, 139 AD3d 644, 644 [1st Dept 2016]; *Gittino v LCA Vision, Inc.*, 301 AD2d 847, 847-848 [3d Dept 2003]; *Bender v Underwood*, 93 AD2d 747, 748 [1st Dept 1983]), Percuin has failed to demonstrate, at this early stage in the litigation, that a joint trial will result in any such prejudice (*compare Gillard v Reid*, 145 AD3d 446, 446 [1st Dept 2016]). Instead, he asserts, in a rather conclusory fashion, that "medical records for each plaintiff are *likely* to be voluminous, and *may* require different medical treaters or experts to establish the value of their damages" (Doc. 53 ¶11) (emphasis added) (*compare Gittino v LCA Vision, Inc.*, 301 AD2d at 847-848; *Bender v Underwood*, 93 AD2d at 748; *Lefavre v 568 Broadway Holding LLC*, 2019 NY Slip Op 32312[U], 2019 NY Misc LEXIS 4232, *3 [Sup Ct, NY County 2019]). For these reasons, that branch of the cross motion seeking consolidation for the sole purposes of discovery and dispositive motions, and severance of the actions thereafter, is denied, without prejudice, with leave to renew the application

at the conclusion of discovery (*see* CPLR 602 [a]; *see generally* *Toulouse v Chandler*, 5 Misc 3d 11005[A], 2004 Misc LEXIS 1780, *27 [Sup Ct, Westchester County, 2004]).

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that defendants 120 Broadway Holdings, LLC and 120 Broadway Condominium's motion seeking consolidation of the captioned action with the matter styled *Miroslaw Chrostowski v 120 Broadway Holdings, LLC et al.*, pending in Supreme Court, Kings County, under Index Number 507062/2019, is granted and hereby consolidated in this Court for the purposes of joint discovery and trial; and it is further

ORDERED that defendants 120 Broadway Holdings, LLC and 120 Broadway Condominium's motion seeking consolidation of the captioned action with the matter styled *Andrei Percium v 120 Broadway, LLC et al.*, pending in Supreme Court, Kings County, under Index Number 514348/2019, is granted and hereby consolidated in this Court for the purposes of joint discovery and trial; and it is further

ORDERED that the cross motion by Andrei Percuin, plaintiff in the *Andrei Percium v 120 Broadway, LLC et al.* action, seeking, pursuant to CPLR 603, to limit the consolidation to joint discovery and dispositive motions on liability is denied, with leave to renew at the conclusion of discovery, and the cross motion is otherwise moot; and it is further

ORDERED that, within 30 days of entry of this order, counsel for defendants 120 Broadway Holdings, LLC and 120 Broadway Condominium shall serve a certified copy of this order upon the Clerk of the Court, Kings County, and shall contact the Clerk to arrange for the effectuation of this transfer in an efficient manner; and it is further

ORDERED that service upon the Clerk of the Court of Kings County shall be made in accordance with any applicable protocol or other procedures of said county; and it is further

ORDERED that the Clerk of the Court, Kings County, shall transfer to the Clerk of the Court, New York County, all of the papers on file in the actions styled *Mirosław Chrostowski v 120 Broadway Holdings, LLC et al.*, pending in Supreme Court, Kings County, under Index Number 507062/2019, and *Andrei Percium v 120 Broadway, LLC et al.*, pending in Supreme Court, Kings County, under Index Number 514348/2019; and it is further

ORDERED that the Clerk of the Court, Kings County, and the Clerk of this court shall coordinate the transfer of the documents being transferred to this Court so as to ensure an efficient transfer and to minimize, insofar as is practical, the reproduction of documents, including with regard to any documents that may be in digital format; and it is further

ORDERED that, within 30 days of entry of this order, counsel for defendants 120 Broadway Holdings, LLC and 120 Broadway Condominium shall serve a copy of this order with notice of entry upon the Clerk of the Supreme Court, New York County (60 Centre Street, Room 141 B) and the Clerk of the Trial Support Office (60 Centre Street, Room 158), 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 the Clerks are to mark their records accordingly; and it is further

ORDERED that, upon receipt of the case files from the Clerk of the Supreme Court, Kings County, the Clerk of this Court shall, without further fee, assign a New York County index number to the matters transferred pursuant to this order and shall file under the new index number the documents transferred; and it is further

ORDERED that, as applicable and insofar as is practical, the Clerk of this Court shall file the documents transferred to this Court pursuant to this order under the New York County index number assigned to the transferred matters 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 transferred documents; and it is further

ORDERED that, within 30 days of entry of this order, counsel for defendants 120 Broadway Holdings, LLC and 120 Broadway Condominium, Co., Inc. shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), together with a Request for Judicial Intervention ("RJI") in the action that is transferred to this county pursuant to this order or, if an RJI had already been filed in that action, with a copy of that RJI (in which event, no further fee shall be imposed); and it is further

ORDERED that the Clerk of the General Clerk's Office shall assign the transferred action to the undersigned; and it is further

ORDERED that, when the payment of the appropriate calendar fees and the filing of notes of issue and certificates of readiness in each of the above actions is filed, the filer shall annex a copy of this order with notice of entry and the Clerk of the General Clerk's Office shall place the

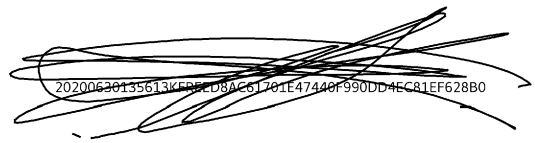
aforesaid actions upon the trial calendar for a joint trial of all matters before the undersigned or another Justice of this Court; and it is further

ORDERED that service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the aforesaid *Protocol*; and it is further

ORDERED that counsel in all actions are directed to appear for a status conference in Room 280, 80 Centre Street, New York, New York, on December 1, 2020, at 2:15 PM; and it is further

ORDERED that this constitutes the decisions and order of this Court.

6/30/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE