

Alberico v LDG Bldrs. LLC
2020 NY Slip Op 32499(U)
July 28, 2020
Supreme Court, New York County
Docket Number: 154621/2016
Judge: Kathryn E. Freed
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**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. 154621/2016

AMANDA ALBERICO,

Plaintiff,

MOTION SEQ. NO. 007

- v -

LDG BUILDERS LLC, ATC PLUMBING & MECHANIC INC.,
ATC CONSTRUCTION GROUP, RIVERSIDE UNIT C, LLC,
AE DESIGN INC. D/B/A ANDRES ESCOBAR &
ASSOCIATES, NEST SEEKERS INTERNATIONAL LLC,
HALSTEAD MANAGEMENT COMPANY, LLC, LEV ASSET
MANAGEMENT, LLC, A.T.C. CONSTRUCTION GROUP
CORP.,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 217, 218

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

In this personal injury action, plaintiff Amanda Alberico moves, pursuant to CPLR 602 (a), to consolidate this action with another action pending before this Court bearing Index Number 159987/2018 and styled *Amanda Alberico v Anthony Thomas Chau Construction Group Corp. et al.* (“the 2018 action”). Plaintiff also seeks to amend the caption to delete parties which are no longer in the action. Defendant opposes the motion IN PART ? After a review of the parties’ contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff was allegedly injured on November 19, 2015 when a decorative wooden plank fell on her while she was working in her office at 100 Riverside Boulevard, New York, New York. She thereafter commenced this personal injury/negligence action against defendants Extell Development Company, Extell Riverside LLC, CRP/Extell Parcel K, L.P., Extell Developer/Riverside, L.L.C., LDG Builders LLC, and ATC Plumbing & Mechanic Inc. by filing a summons and complaint on June 1, 2016. Doc. 1.¹ On July 7, 2016, plaintiff filed a supplemental summons and amended complaint naming Baruch LLC, Nest Seekers International Fifth LLC, and ATC Construction Group as additional defendants. Doc. 3.

On September 27, 2016, plaintiff discontinued her claims against Extell Riverside LLC and Extell Developer/Riverside L.L.C. and ATC Plumbing & Mechanic Inc. discontinued its cross claims against those defendants. Docs. 10-11. On November 1, 2016, plaintiff discontinued its claims against defendants Extell Development Company and CRP/Extell Parcel K, L.P. and ATC Plumbing & Mechanic Inc. discontinued its cross claims against those defendants. Docs. 12-13.

Plaintiff subsequently moved to amend the complaint to name as defendants Riverside Unit C, LLC, AE Design Inc. d/b/a Andres Escobar & Associates, Nest Seekers International LLC, Halstead Management Company, LLC, Lev Asset Management, LLC and A.T.C. Construction Group Corp. and to delete from the caption the parties previously discontinued from the action. Doc. 14. The motion was granted without opposition by order filed January 5, 2017. Doc. 23. By stipulation filed the same day, all claims and cross claims against ATC Plumbing & Mechanic were discontinued. Doc. 22.

¹ LDG Builders LLC never appeared in this action.

By stipulation of discontinuance filed February 9, 2018, defendants Riverside Unit C, LLC and Nest Seekers International LLC discontinued their cross claims against each other. Doc. 94.

By notice of motion filed October 23, 2018, plaintiff moved to amend the complaint to name as additional defendants John Doe; Anthony Thomas Chau Construction Group Corp.; March Chadwick; M. Arch Architects; Marchitects Inc.; March Associates, Architects and Planners, P.C.; A.T.C. Contracting Corp.; and Muraflex. Doc. 99. The motion was granted without opposition by order dated November 30, 2018 and filed December 3, 2018. Doc. 119.

On October 26, 2018, plaintiff commenced the 2018 action against defendants Anthony Thomas Chau Construction Group Corp.; March Chadwick; M. Arch Architects; Marchitects, Inc.; March Associates, Architects and Planners, P.C.; A.T.C. Contracting Corp.; Muraflex; and John Doe. Doc. 155; Ind. No. 159987/18, Doc. 1.² The negligence claim asserted by plaintiff in the 2018 action was identical to that asserted herein. Id. Although Anthony Thomas Chau Construction Group Corp. joined issue in the captioned action, it did not answer in the 2018 action. Doc. 209.

Plaintiff's claims against March Chadwick and M. Arch Architects in the 2018 action were discontinued on January 2, 2019. Ind. No. 159987/18, Doc. 32. On February 18, 2019, plaintiff discontinued her claims in the 2018 action against March Associates, Architects and Planners, P.C. Ind. No. 159987/18, Doc. 35.

By order filed July 5, 2019, this Court granted Halstead Management Company, LLC's motion for summary judgment dismissing the complaint and all cross claims against it. Doc. 137.

By order filed July 16, 2019, the claims against Muraflex in the 2018 action were dismissed. Ind. No. 159987/18, Doc. 46.

² Marchitects has not appeared in the captioned action or in the 2018 action. Additionally, "John Doe" has not been identified and has not appeared in either action.

On August 30, 2019, plaintiff moved to consolidate the captioned action with the 2018 action for the purposes of joint discovery and trial. Docs. 151-152. By order filed October 30, 2019, this Court granted the unopposed motion, holding that the actions involved the same incident and thus shared common issues of law and fact. Doc. 160.

By stipulation filed in the 2018 action on June 29, 2020, all claims and cross claims against defendant A.T.C. Contracting Corp. were discontinued. Ind. No. 159987/18, Doc. 74.

As of this date, the following have answered and remain defendants in the captioned action: ATC Construction Group; Riverside Unit C, LLC; AE Design Inc. d/b/a Andres Escobar & Associates; Nest Seekers International LLC; A.T.C. Construction Group Corp.; and Anthony Thomas Chau Construction Group Corp. Doc. 189 at par. 32.

Plaintiff now moves, by notice of motion filed June 30, 2020 and pursuant to CPLR 602, for a “true consolidation” of the captioned action with the 2018 action under Index Number 154621/16, as well as to amend the caption to eliminate parties against which this case has been discontinued. Doc. 188. In support of the motion, plaintiff argues that the captioned action must be consolidated with the 2018 action for the sake of judicial economy since all of the parties remaining in the captioned action are also parties to the 2018 action.³ Counsel asserts that the only reason the 2018 action was commenced was so that plaintiff could file suit against the defendants plaintiff sought to name as additional defendants in the captioned action before the statute of limitations against those defendants expired on November 19, 2018, at which time the motion to

³ This Court takes umbrage with the statement by plaintiff’s counsel that “for reasons that are unclear to [him], [this Court’s] decision filed October 30, 2019 [Doc. 130] only [o]rdered the cases consolidated for joint discovery and trial.” Doc. 189 at par. 35. However, counsel overlooks that *he himself specifically requested* that the actions be consolidated “for joint discovery and trial” and did not request a true consolidation. Doc. 151; Doc. 152 at 4.

amend the complaint in the captioned action to name those defendants was still undecided. Doc. 189.⁴

In an “affirmation in limited opposition”, counsel for A.T.C. Construction Group Corp., A.T.C. Construction Group s/h/a ATC Construction Group and Anthony Thomas Chau Construction Group Corp. s/h/a Anthony Thomas Chau, Construction Group Corp. asserts that the 2018 action is superfluous since the defendants in the 2018 action are either named as defendants in the captioned action or the claims against them in the 2018 action were dismissed. Doc. 217. Further, claims counsel, to the extent that any of the defendants in the 2018 action failed to appear, it is too late to take a default against them. Doc. 217.

In reply, plaintiff asserts that counsel’s opposing argument that there is no need for the 2018 action is not a basis upon which to deny the motion.

LEGAL CONCLUSIONS:

CPLR 602(a) provides as follows:

[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.

It is well settled that “[t]here 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). Since plaintiff alleges the same cause of action (negligence) arising from the same accident in both actions, and no party

⁴ As noted above, the defendants named in the 2018 action were added as defendants to the captioned action by order dated November 30, 2018 and filed December 3, 2018. Doc. 119.

has claimed any prejudice, consolidation is warranted. *See Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 334 (1st Dept 2005).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion is granted and the above-captioned action is consolidated in this Court with *Amanda Alberico v Anthony Thomas Chau Construction Group Corp., et al.*, Index No. 159987/18, pending in this Court; and it is further

ORDERED that the consolidation shall take place under Index No. 154621/16 and the consolidated action shall bear the following caption:

AMANDA ALBERICO, Plaintiff,

-against-

LDG BUILDERS LLC, ATC CONSTRUCTION GROUP, RIVERSIDE UNIT C, LLC.,
AE DESIGN INC. D/B/A ANDRES ESCOBAR & ASSOCIATES, NEST SEEKERS
INTERNATIONAL LLC, LEV ASSET MANAGEMENT, LLC, A.T.C.
CONSTRUCTION GROUP CORP, ANTHONY THOMAS CHAU CONSTRUCTION
GROUP CORP, MARCHITECTS INC., and JOHN DOE, 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, 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

ORDERED that counsel are directed to appear for a telephonic status conference on November 17, 2020 at 10:30 a.m.; and it is further

ORDERED that prior to the status conference, the parties are to provide the Clerk of Part 2 with a dial-in number and access code for the call OR all parties are to be on the line and are to patch the court in at the time set for the commencement of the conference; and it is further

ORDERED that this constitutes the decision and order of the court.

7/28/2020

DATE

CHECK ONE:

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CASE DISPOSED

GRANTED

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DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

20200728152053KFB201DFBD2A6096B4C71BC359910F7263942

KATHRYN E. FREED, J.S.C.