

<b>FPG CH 94 Amity, LLC v Pizzarotti LLC</b>
2020 NY Slip Op 34284(U)
December 22, 2020
Supreme Court, Kings County
Docket Number: 512149/2019
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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FPG CH 94 AMITY, LLC,  
Plaintiff, Decision and order

- against - Index No. 512149/2019

PIZZAROTTI LLC,  
Defendant, December 22, 2020

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PIZZAROTTI LLC,  
Third Party Plaintiff,

- against -

BUSA BUILDERS LLC, SUFFOLK CONCRETE  
CONSTRUCTION INC., DAY & NITE AIR  
CONDITIONING SERVICE CORP., RGB GROUP INC.,  
PEDINI SPA, PRECISION BUILDERS GROUP LTD.,  
DAY ELEVATOR & LIFT INC., ROMAN LABOR  
SERVICES CORP., MASTERS ARCHITECTURAL  
METAL INC., & ORIGINAL WINDOW INC.,  
Third Party Defendants,

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved pursuant to CPLR §602 seeking to consolidate, for purposes of joint trial, this matter with a related New York County matter entitled *DAY & NITE AIR CONDITIONING SERVICE CORP.*, on behalf of themselves and as a representative for all others who may be deemed Beneficiaries of a certain Trust created pursuant to Lien Law Article 3-A, v. *PIZZAROTTI IBC, LLC, FBG COBBLE HILL ACQUISITIONS, LLC, BUSA BUILDERS LLC, FPG CH 94 AMITY, LLC* and "JOHN DOE 1" THROUGH "JOHN DOE 10" said parties being Corporate Officers and/or Directors and/or Members of *Pizzarotti IBC, LLC, FBG Cobble Hill Acquisitions, LLC, BUSA Builders LLC, FPG CH 94 Amity, LLC*, whose

names are unknown to Plaintiff, Index Number 655503/2019. The plaintiffs oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

In this action the plaintiffs have sued the defendant who entered into a contract and then a subsequent Letter Agreement to construct residential townhouses located at 88-98 Amity Street in Kings County. Further, the defendant has instituted third party actions against many of the subcontractors including Day and Nite Air Conditioning Service Corp., [hereinafter 'Day and Nite'] seeking indemnification. In the other action, Day and Nite sued Pizzarroti essentially alleging they were not paid for work performed. The defendant now seeks to consolidate that action with this action, for purposes of discovery, since they involve common questions of law and fact. The plaintiff opposes the motion arguing the although the two lawsuits concern the same construction project the two actions do not really involve common questions of law and fact and thus a motion for joint trial should be denied.

#### Conclusions of Law

It is well settled that when two cases represent common questions of law or fact then there should be a consolidation (Moses v. B & E Lorge Familt Trust, 147 AD3d 1043, 48 NYS3d 427 [2d Dept., 2017]). A party objecting to the consolidation has

the burden of demonstrating prejudice which harms a substantial right (Oboku v. New York City Transit Authority, 141 AD3d 708, 35 NYS3d 710 [2d Dept., 2016]).

This action concerns allegations that Pizzarotti breached the contract and the Letter Agreement by failing to adequately or timely complete the work. In the New York action Pizzarotti alleges that Day and Nite is responsible for some of these issues. Thus, both cases really involve which entity is responsible for the breach and which entity is the cause of plaintiff's claims. The case of International Paving Systems Inc., v. Van-Tulco Inc., 806 F.Supp 17 [E.D.N.Y. 1992] is instructive. In that case the City of New York entered into a contract with an entity Van-Tulco to renovate the bus ramps at the ferry terminal in Staten Island. Van-Tulco hired AVA Construction as a subcontractor to install the concrete for the project, called LMC or latex modified concrete. AVA hired another subcontractor, IPS who was responsible for supplying the LMC. Cracking developed and the City of New York refused payment until the cause of the cracking was determined. In one action IPS sued Van-Tulco seeking payment pursuant to a bond based on the fact AVA never paid them for the LMC delivered. In another action AVA sued Van-Tulco for payment for the installation of the LMC. In that action Van-Tulco counterclaimed and argued AVA's poor workmanship caused the cracking. Van-Tulco moved to

consolidate both actions. In granting the motion in the case brought by IPS the court explained that "both this case and the Related Action concern the defective condition of the LMC at the Project and payment for the same. The actions differ only insofar as the instant action concerns the contractual relationship between IPS and Van-Tulco, whereas in the Related Action, AVA is suing Van-Tulco for the money due on its subcontract, and Van-Tulco has counterclaimed against AVA on the ground that AVA is responsible for the cracking and delamination. Because IPS provided the LMC pursuant to a sub-subcontract with AVA, IPS' responsibility for the cracking and delamination may be integral to a determination of AVA's responsibility. Thus, both actions involve the same issues of fact and law: What entity or entities is responsible for the cracking and delamination and which parties, if any, should recover on their contracts" (id).

In this case the plaintiff has asserted the defendant is responsible for breaching the agreement. However, the defendant asserts that Day and Nite in fact is part of the reason that breaches occurred. The New York action involves whether Day and Nite committed any breaches which will surely inform the facts of this lawsuit. Therefore, the two actions share common questions of law and fact.

It should be noted that unlike International Paving Systems Inc., v. Van-Tulco Inc. (supra) or Vecciarelli v. King


Pharmaceuticals, Inc., 71 AD3d 595, 899 NYS2d 14 [1<sup>st</sup> Dept., 2020 or Pierre-Louis v. DeLonghi America, Inc., 66 AD3d 855, 887 NYS2d 632 [2d Dept., 2009] cited by the defendants, the joinder of the two cases will not resolve any potential inconsistent that may arise. In these cases Day and Nite is a defendant (third party) in this action and a plaintiff in the New York action, thus one trial will never take place and joining the actions for purposes of discovery does not minimize in any way the chance of any inconsistency.

Nevertheless, the two actions surely concern common questions and the motion seeking consolidation for purposes of joint trial is granted. The clerk of New York County is directed to facilitate the joinder of the cases for purposes of discovery.

So ordered.

ENTER:

DATED: December 22, 2020  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC