

<b>Bender v Smitell LLC</b>
2021 NY Slip Op 30632(U)
March 4, 2021
Supreme Court, New York County
Docket Number: 159877/2016
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12

*Justice*

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TIMOTHY BENDER,

Plaintiff,

- v -

SMITELL LLC F/K/A BROADWAY TRIO LLC,  
SMITELL LLC, BOVIS LEND LEASE LMB, INC.,  
LEND LEASE (US) CONSTRUCTION LMB INC.,

Defendants.

-----X

SMITELL LLC F/K/A BROADWAY TRIO LLC,  
SMITELL LLC, BOVIS LEND LEASE LMB, INC.,  
LEND LEASE (US) CONSTRUCTION LMB INC.,

Third-party Plaintiffs,

-against-

ZWICKER ELECTRIC CO., INC.,

Third-party Defendant.

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**DECISION + ORDER ON  
MOTION**

Third-Party  
Index No. 595613/2018

The following e-filed documents, listed by NYSCEF document number (Motion 003) 77-84, 86-88 were read on this motion to consolidate.

By notice of motion, plaintiff moves pursuant to CPLR 602 for an order consolidating this action with *Bender v Island Acoustics, LLC, et al.*, pending in this court under index number 159828/2019, and pursuant to CPLR 305 and 1003 for leave to add third-party defendant Zwicker Electric Co., Inc. as a direct defendant. Zwicker opposes only to the extent plaintiff seeks to add it as a direct defendant.

By summons and verified complaint dated November 23, 2016, plaintiff commenced this

action, alleging that on November 14, 2016, while working at the premises located at 219 West 57th Street in Manhattan, he tripped and fell on improperly placed cables on a floor that was not illuminated, and that defendants were negligent and violated Labor Law §§ 200, 240, and 241(6). (NYSCEF 79).

By third-party summons and complaint dated July 23, 2018, defendants impleaded Zwicker for indemnification and contribution. (NYSCEF 81).

By summons and verified complaint dated October 8, 2019, plaintiff commenced another action in this court, advancing the same causes of action for the same occurrence against subcontractors working at the site. (NYSCEF 80).

When multiple actions raise common questions of law or fact, they may be consolidated or joined for trial to avoid unnecessary costs or delay, absent a showing of prejudice. (CPLR 602[a]; *Progressive Ins. Co. v Vasquez*, 10 AD3d 518, 519 [1st Dept 2004]). Commonality between cases is established the claims of each have “more facts and issues in common than unique to each.” (*In re New York City Asbestos Litig.*, 121 AD3d 230, 245 [1st Dept 2014], *affd* 27 NY3d 1172 [2016], and *affd* 27 NY3d 765 [2016]). Here, plaintiff advances the same causes of action in each action and the central issue in both is plaintiff’s trip and fall on cables on the floor of the construction site at which he was working. Thus, consolidation is warranted.

Plaintiff seeks to add Zwicker as a direct defendant, because Zwicker was responsible for all temporary lighting at premises, and plaintiff testified at his deposition that at the time of the accident, in the early evening, there was no lighting. Plaintiff observes that Zwicker was impleaded before the statute of limitations had expired on his claims. (NYSCEF 78). Plaintiff submits a proposed supplemental summons and amended verified complaint. (NYSCEF 82).

Zwicker contends that as it is not united in interest with defendants, plaintiffs' claims, which are now time-barred, cannot be asserted against it. It also argues that it cannot be held vicariously liable for defendants' conduct, as it is not subject to liability under the Labor Law. (NYSCEF 83).

In reply, plaintiff maintains that Zwicker had notice of its claims and it would not be prejudiced by the amendment. Moreover, he asserts, Zwicker is united in interest with defendants in that it may be held liable to defendants for contractual contribution and indemnification. (NYSCEF 86).

Where a third party has been served with a third-party complaint, and the third-party defendant thereby obtains actual notice of the plaintiff's potential claim, the plaintiff may assert a direct claim against the third-party defendant which relates back to the date of service of the third-party complaint. (*Duffy v Horton Mem'l Hosp.*, 66 NY2d 473, 478 [1985]). As it is undisputed that the statute of limitations had not run by the time the third-party action was commenced, and as defendants seek indemnification and contribution from Zwicker, plaintiff's amendment to add Zwicker as a direct defendant is proper and timely. (*See Siegel*, NY Prac § 49 [6th ed 2020] [where plaintiff timely sues defendant and defendant impleads third party for contribution and/or indemnity to cover plaintiff's claims against it within statute of limitations applicable to plaintiff's claims, plaintiff's later amendment to assert direct claim against third-party is timely]).

Accordingly, it is hereby

ORDERED, that plaintiff's motion to add Zwicker Electric Co., Inc. as a direct defendant is granted, and the amended verified complaint, in the form annexed to the motion papers (NYSCEF 82), shall be deemed served upon service of a copy of this order with notice of entry

upon all parties who have appeared in the action; it is further

ORDERED, that plaintiff's motion to consolidate is granted and the above-captioned action is consolidated in this court with *Bender v Island Acoustics, LLC, et al.*, Index No. 159828/2019, pending in this court; it is further

ORDERED, that the consolidation shall take place under Index No. 159877/2016, and the consolidated action shall bear the following caption:

TIMOTHY BENDER,

Plaintiff,

- v -

SMITTELL LLC F/K/A BROADWAY TRIO LLC,  
SMITTELL LLC, BOVIS LEND LEASE LMB, INC.,  
LEND LEASE (US) CONSTRUCTION LMB INC.,  
ZWICKER ELECTRIC CO. INC., ISLAND  
ACOUSTICS, LLC, ISLAND ACOUSTICS,  
INCORPORATED, and ZWICKER ELECTRIC CO.,  
INC.,

Defendants.

SMITTELL LLC F/K/A BROADWAY TRIO LLC,  
SMITTELL LLC, BOVIS LEND LEASE LMB, INC.,  
and LEND LEASE (US) CONSTRUCTION LMB  
INC.,

Third-Party Plaintiffs

- v -

ZWICKER ELECTRIC CO., INC.

Third-Party Defendant.

It is further

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

ORDERED, that, within 30 days from entry of this order, movants 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; it is further

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

ORDERED, that service of this order upon the Clerk of the Court shall be made in hardcopy 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](http://www.nycourts.gov/supctmanh)); 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; it is further

ORDERED, that, within 30 days from entry of this order, movants 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; 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 the parties are directed to either enter into a stipulation encompassing their next compliance conference on or before April 14, 2021, or appear for the conference in room 341, 60 Centre Street, New York, New York, on April 14, 2021 at 2:15 pm or virtually if necessary.

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3/4/2021  
DATE

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BARBARA JAFFE, 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