

Aspen Am. Ins. Co. v 232 Smith St. LLC

2021 NY Slip Op 31879(U)

June 3, 2021

Supreme Court, Kings County

Docket Number: 500480/2019

Judge: Lillian Wan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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ASPEN AMERICAN INSURANCE COMPANY,
as Subrogee of 228 SMITH STREET, LLC,

Index No.: 500480/2019
Motion Date: 03/16/2021
Motion Seq.: 01

Plaintiff,

– against –

DECISION AND ORDER

232 SMITH STREET LLC, SDS LEONARD, LLC,
and CLEARWATER ENTERPRISES, INC.,

Defendants.

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232 SMITH STREET LLC and SDS LEONARD, LLC,

Third-Party Plaintiffs,

– against –

CLEARWATER ENTERPRISES, INC.,

Third-Party Defendant.

-----X
232 SMITH STREET LLC and SDS LEONARD, LLC,

Second Third-Party Plaintiffs,

– against –

SOLOMON ROSENZWEIG, PE P.C.,

Second Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 01) 28-53 and 57-82 were read on this order to show cause to consolidate.

232 Smith Street, SDS Leonard LLC, Second Development Services Inc., and Louis V. Greco, Jr. (hereinafter “Movants”) who are defendants, third-party plaintiffs, and second third-party plaintiffs in three of the four below-referenced actions, move for an Order pursuant to CPLR §§ 602(a) and 1001(a) joining the instant Action (“Action 1”) with *230 Smith Street Brooklyn Realty, LLC, et al, v. 232 Smith Street LLC, et al*, Index No. 517069/2019 (“Action 2”); *228 Smith Street LLC v. 232 Smith Street LLC, et al*, Index No. 522114/2019 (“Action 3”); and *228 Smith Street, LLC v. Aspen American Insurance Company*, Index No. 520055/2018 (“Action 4”) for the purposes of joint discovery and joint trial on liability only. Clearwater Enterprises,

Inc., a defendant and third-party defendant in the instant action and a party to Action 3, and Solomon Rosenzweig, PE, P.C., the second third-party defendant in the instant action, filed affirmations in support of the motion. Several parties filed opposition to the motion: Aspen American Ins. Co. (defendant in Action 4), 230 Smith Street Brooklyn Realty LLC and Phyllis Klein (plaintiffs in Action 2), Aspen American Insurance Company as Subrogee of 228 Smith Street, LLC (plaintiff in the instant Action), 228 Smith Street LLC (plaintiff in Actions 3 and 4), and Oaklander, Coogan & Vitto Architects, P.C. (defendant in Action 2). Tarka Management Services, Inc. and Tarka Management Design & Services, Inc. did not file opposition. J.E. Levine Builder, Inc. d/b/a Levine Builders, Inc., a defendant in Action 2, also filed opposition but has since been discontinued from Action 2; as such, its opposition is moot. For the reasons set forth below, the motion is granted in part.

The Movants argue that the questions of fact and law in the four Actions are nearly identical in all respects, warranting the joining of all four lawsuits for discovery and joint trial on liability. The Movants state that all actions arise out of alleged negligent excavation and/or construction activities that occurred in or around September or October 2016 at 232-240 Smith St. in Brooklyn, New York. The Movants further contend that there are common questions of law and fact, namely, to what extent the defendants are liable for the damages sustained by the plaintiffs in all Actions on account of the subject incidents. The Movants further argue that courts will find a common question of law or fact where there would be an overlap in the relevant evidence between the cases, citing to *RCN Const. Corp. v Fleet Bank, N.A.*, 34 AD3d 776, 777 (2d Dept 2006) in support of this assertion. Clearwater Enterprises, Inc. and Solomon Rosenzweig PE, P.C. support the motion, adopting the Movants' arguments and emphasizing that judicial economy would be best served by consolidation.

Aspen American Insurance Company (hereinafter Aspen) opposes, arguing that the motion should be denied in its entirety. Aspen contends specifically that Action 4 is unique in that it is strictly a contract action. Aspen further states that it is only a party to Action 4 and is not named in its individual capacity in any other Action. Aspen cites *Beerman v Morhaim*, 17 AD3d 302, 303 (2d Dept 2005), a decision cited by the Movants in support of their motion, in which the Second Department noted that the defendants in that case had "failed to specify the commonality of issues of law" between the two pending matters.

230 Smith Street Brooklyn Realty LLC and Phyllis Klein (hereinafter 230 Smith and Dr. Klein) also oppose and assert that including Action 2, which sounds in strict liability and breach of contract, in a consolidation with actions sounding in insurance coverage and common law negligence would cause extreme delay in Action 2. 230 Smith and Dr. Klein contend that such a delay would be inherently prejudicial to the plaintiffs, namely Dr. Klein, who is an elderly woman suffering from terminal cancer, and would further prejudice her in that she would have to expend already limited resources. 230 Smith and Dr. Klein also argue that though there is factual overlap, the argument that consolidation would streamline discovery is a fictional one. 230 Smith and Dr. Klein argue that though it is policy in New York to freely grant motions to consolidate in the interest of judicial economy, such consolidation should not be granted if it will materially prejudice one of the parties. See *Fransen v Maniscalco*, 256 AD2d 305 (2d Dept 1998).

Aspen American Insurance Company as Subrogee (hereinafter Aspen as Subrogee) opposes and adopts the arguments made by Aspen. Aspen as Subrogee also notes that Action 4 is distinct and advances the argument that Movants have not met their burden with regard to showing that common questions of law and fact exist throughout the four actions. 228 Smith Street LLC (hereinafter 228 Smith) also joins with the other parties opposing the motion but breaks from them by stating that while discovery should be joined, the respective trials should be separate. Finally, Oaklander, Coogan & Vitto Architects, P.C. (hereinafter Oaklander) also opposes, asserting that there are no common questions of law and fact, that consolidating the Actions would lead to severe delay, and that Oaklander is only a party to one action.

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.” “A motion for consolidation is addressed to the sound discretion of the trial court, and absent a showing of substantial prejudice by the party opposing the motion, consolidation is proper where there are common questions of law and fact.” *Beerman*, 17 AD3d at 303; *see also Progressive Northeastern Ins. Co. v North State Autobahn, Inc.*, 71 AD3d 657 (2d Dept 2010). However, actions simply involving the same parties is not enough, and “[w]here one action sounds in negligence and the other in contract, it is inappropriate to grant consolidation.” *RCN Const. Corp. v Fleet Bank, N.A.*, 34 AD3d 776, 777 (2d Dept 2006) (it was inappropriate to consolidate actions when one sounded in fraud and the other in contract, and there was no showing that the proof with respect to each action overlapped). The absence of an overlap of relevant evidence in the matters to be consolidated also justifies the denial of a motion for consolidation. *Id.*

In the instant matter, there are common questions of law and fact with respect to Actions 1, 2 and 3 sufficient enough to warrant consolidation of these matters for the purposes of trial and discovery. The primary question at the heart of Actions 1, 2 and 3 is who is responsible, and to what extent, for the allegedly negligent construction activities taking place on or near 228-240 Smith Street in September and October 2016. There is also an overlap in discovery, as recovery for the damages sought in Action 1 are also sought by another party in Action 3. However, it would not be appropriate to consolidate Action 4, as that action sounds purely in contract, not in tort. *See Beerman* at 303; *see also RCN Const. Corp.* at 777.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the motion to consolidate by 232 Smith Street, SDS Leonard LLC, Second Development Services Inc., and Louis V. Greco, Jr. is **GRANTED** to the extent that Actions 1, 2 and 3 only are consolidated for the purposes of joint trial and discovery;

ORDERED, that the trial of this action and all pre-trial proceedings shall occur in Supreme Court, Kings County; and it is further

ORDERED, that each action shall retain its own index number; and it is further

ORDERED, that separate RJIs, Notes of Issue and Judgments shall be filed in each action; and it is further

ORDERED, that the order in which the parties will open and close shall be determined by the trial court; and it further

ORDERED, that a copy of this order with Notice of Entry shall be served on all parties within 30 days hereof.

This constitutes the decision and order of the Court.

DATED: June 3, 2021



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.