

Agora Gourmet Foods Inc. v Edge
2021 NY Slip Op 32035(U)
April 6, 2021
Supreme Court, Westchester County
Docket Number: 60365/2018
Judge: Gretchen Walsh
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF NEW YORK
COUNTY OF WESTCHESTER

-----X
AGORA GOURMET FOODS INC.,

Plaintiff,

- against -

KALLIE EDGE, DIMITRIOUS VITALIOTIS,
and VASILIOS GARGEROS,

Defendants.

-----X

WALSH, J.

Index No. 60365/2018
Motion Seq. No. 9
Motion Date: 2/6/2021
DECISION & ORDER

The following e-filed documents listed in NYSCEF by Document Numbers 367-379 and 384-289 were read on this motion by Plaintiff Agora Gourmet Foods (“Plaintiff” or “Agora”) for an order pursuant to CPLR 602(b) consolidating two pending actions in the Ossining Justice Court with the current action for trial. Defendants Kallie Edge (“Edge”), Dimitrious Vitaliotis (“Vitaliotis”) and Vasilios Gargeros (“Gargeros”) (collectively “Defendants”) oppose the motion. Upon the foregoing papers, and for the reasons set forth herein, the motion is denied.

Procedural Histories

A. The Instant Action

The factual and procedural background of this case is set forth in this Court’s Decision and Order dated October 20, 2020 (the “Jury Demand Decision”), which is incorporated herein by reference, and which in turn incorporates this Court’s Decision and Order dated August 28, 2020 (the “Summary Judgment Decision”).

The Court initially set a trial date of November 9, 2020 but subsequently postponed the trial date to November 12, 2020 due to Plaintiff’s trial counsel’s childcare issue. In its Jury Demand

Decision, the Court granted Agora the right to withdraw its demand for a trial by jury contained in its Note of Issue. On October 28, 2020, with their appeal of the Jury Demand Decision to the Appellate Division, Second Department, Defendants also moved for a stay of trial pending the appeal. The Second Department granted a temporary stay of the trial pending a determination of the underlying motion. Thereafter, on December 11, 2020, the Appellate Division issued an order denying Defendants' motion for a stay of the trial pending appeal (Affirmation in Opposition of Kate Roberts, Esq. in Opposition dated December 31, 2020 ["Roberts Opp. Aff."], Ex. C). On November 25, 2020, Defendants moved for this Court's recusal or, alternatively, for an order precluding Plaintiff from offering expert testimony at trial. The Decision and Order denying Defendants' motion for recusal and granting in part and denying in part Defendants' motion *in limine* is issued simultaneously herewith. Based on the foregoing, this case is ready for a bench trial, which will be scheduled in short order.

B. The Ossining Justice Court Actions

The Ossining Justice Court Actions (the "holdover proceedings")¹ were brought by Plaintiff's Landlords, which are apparently three limited liability companies created after Defendants in this action brought a proceeding in Ossining Justice Court in 2018.² Defendants brought the first Holdover Proceeding ("HP 1") on November 5, 2019 (amended on November 15, 2019), alleging Plaintiff failed to maintain insurance as required by the lease agreement. On September 15, 2020, Defendants initiated the second Holdover Proceeding ("HP 2") which alleges that Defendants properly terminated the lease based on, *inter alia*, Plaintiff's failure to pay its rents and taxes. On October 1, 2020, the Ossining Justice Court dismissed HP 1, which Defendants contend was erroneous. In HP 2, Plaintiff raised Counterclaims in which Plaintiff contends that because in this action, Plaintiff is seeking to recoup rent it has paid to Defendants based on its claim of overcharge, it has a valid defense to HP 2 and the rent Defendants claim is owed is not actually owed. The Ossining Justice Court held a follow-up conference on November 13, 2020, at which parties made arguments regarding HP 2, and the court set a briefing schedule for legal

¹ The procedural history of the Ossining Actions is set forth in the affirmation of Plaintiff's counsel, Kate Roberts, Esq., made in support of Plaintiff's motion to which Defendants raise no objection.

² For simplicity, the Court will refer to Landlords as Defendants.

arguments. After the parties submitted their briefs in HP 2, on November 23, 2020, Plaintiff's counsel sent an email to this Court requesting a Rule 24 pre-motion conference. This Court held the conference on December 3, 2020, at which this Court granted Plaintiff's request to file the instant motion. On December 4, 2020, the parties had a conference with the Ossining Justice Court, at which it reserved issuing a judgment on use and occupancy for HP 1 and stayed both proceedings until this Court decides the instant motion.

DISCUSSION

CPLR 602(b) provides:

Where an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court. Where an action is pending in the county court, it may, upon motion, remove to itself an action pending in a city, municipal, district or justice court in the county and consolidate it or have it tried together with that in the county court. (CPLR 602[b]).

The standard under CPLR 602(b) for removal and consolidation is the same pursuant to CPLR 602(a) (*see Hae Sheng Wang v Pao-Mei Wang*, 96 AD3d 1005, 1009 [2d Dept 2012] ["Where common questions of law or fact exist, a motion to consolidate [pursuant to CPLR 602(b)] should be granted absent a showing of prejudice to a substantial right by the party opposing the motion"] *quoting Kally v. Mount Sinai Hosp.*, 44 A.D.3d 1010 [2d Dept 2007] *cf. Rodgers v Worrell*, 214 AD2d 553, 554 [2d Dept 1995] ["A motion to consolidate pursuant to CPLR 602(a) rests in the sound discretion of the trial court Absent a showing of prejudice to a substantial right by a party opposing the motion, consolidation should be granted where common questions of law or fact exist"]).

"The test to determine whether the actions have a common question of law or fact is usually met if evidence that would be admissible in one action would also be admissible in the other" (*Leeco Constr. Co. v United States Liab. Ins. Co.*, 22 Misc 3d 611, 612 [Sup Ct New York County 2008]).

The burden of showing prejudice to substantial rights rests upon the party opposing the motion (*Maigur v Saratogian, Inc.*, 47 AD2d 982, 983 [3d Dept 1975]). "Consolidation is appropriate where it will avoid unnecessary duplication of trials, save unnecessary costs and

expense, and prevent an injustice which would result from divergent decisions based on the same facts” (*Best Price Jewelers.com, Inc. v Internet Data Storage & Sys., Inc.*, 51 AD3d 839, 839 [2d Dept 2008] [proper exercise of discretion to order consolidation of two breach of contract actions since they involved same essential facts and transactions between the parties and would require a determination of common issues]).

On the other hand, “[w]here lawsuits arise out of the same transactions, but the proof with respect to each lawsuit does not overlap, the identity of facts is not sufficient to merit consolidation or a joint trial of the lawsuits ... [since it] would not serve the stated purpose of CPLR [602(b)] to wit, to avoid unnecessary costs and delay” (*Aluminum Mill Supply Corp. v Skyview Metals, Inc.*, 117 AD2d 765, 767-768 [2d Dept 1986]). And even if there are some common issues, where the actions arise out of different transactions and involve different claims, consolidation or a joint trial is not warranted (*Village of Mamaroneck v Mamaroneck Affordable Condominium Corp.*, 12 AD3d 361 [2d Dept 2004]).

Additionally, where cases are at different procedural stages and consolidation would result in a delay of a trial consolidation is properly denied (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 94 AD3d 455 [1st Dept 2012]; *Barnes v Cathers & Dembrosky*, 5 AD3d 122 [1st Dept 2004]; *Abrams v Port Auth. Trans-Hudson Corp.* 1 AD3d 118 [1st Dept 2003]; *F & K Supply, Inc. v Johnson*, 197 AD2d 814 [3d Dept 1993]; *Stephens v Allstate Ins. Co.*, 185 AD2d 338 [2d Dept 1992]; *Steuerman v Broughton*, 123 AD2d 681, 682 [2d Dept 1986]).

Beginning in March 2020, the COVID-19 pandemic cast the world into disarray. As part of efforts to minimize the economic impact, the United States Centers for Disease Control and Prevention issued a moratorium on evictions, which to date has been extended through June 30, 2021. New York State followed suit, with the most recent extension expiring in May 2021 (*see* Chapter 73 of the Laws of 2021 [the COVID-19 Emergency Protect Our Small Businesses Act of 2021] effective March 9, 2021). Based on a Memorandum from New York State’s Chief Administrative Judge Lawrence K. Marks dated March 15, 2021, the judges of the Unified Court System have been advised that based on this Act, all commercial eviction proceedings (with minor exception) are stayed through at least May 8, 2021. These include eviction proceedings commenced prior to March 7, 2020. However, given the CDC’s recent extension of the moratorium

to June 30, 2021, this Court anticipates that New York will follow suit and extend the stays of such commercial eviction proceedings until at least June 30, 2021. Accordingly, if the Court were to grant Plaintiff's motion, the action would be stayed and no trial date could be set prior to the expiration of the moratorium.

This case is ready for trial which will be held in short order whereas it is unclear when a trial may occur in the holdover proceedings. In addition, in the holdover proceedings, there are extant briefs on the issue over the propriety of Defendants' termination of the lease and given Defendants' disagreement with the Ossining Justice Court's dismissal of HP 1, there is likely an appeal of that decision as well. Although it appears that HP 2 may contain a common question with this action (*i.e.*, whether Plaintiff has been overcharged rent), consolidation at this stage would result in an undue delay of the trial given the commercial eviction moratorium. Moreover, judicial resources will be conserved because it is likely that this case may be tried and a decision rendered prior to the trial occurring in the Ossining Justice Court. The issue over rent overcharge may be resolved in this action and win or lose, Plaintiff will be collaterally estopped from relitigating that issue in the Ossining Justice Court. For all the foregoing reasons, Plaintiff's motion shall be denied.

CONCLUSION

Based on the foregoing, and for the reasons set forth above, it is hereby

ORDERED that the motion by Plaintiff to consolidate two Holdover Proceedings in the Ossining Justice Court is denied, and it is further

ORDERED that counsel are to appear for a conference by Teams on April 12, 2021 at 11 a.m. to schedule the trial in this action.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
April 6, 2021

ENTER:


HON. GRETCHEN WALSH, J.S.C.

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