

Torres v Eastchester Union Free Sch. Dist.
2021 NY Slip Op 33260(U)
September 21, 2021
Supreme Court, Westchester County
Docket Number: 61636/2018
Judge: Terry Jane Ruderman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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 THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
JAVIER E. TORRES and ANA B. TORRES,

Plaintiffs,

-against-

DECISION AND ORDER
Motion Sequence Nos. 6 - 8
Index No. 61636/2018

EASTCHESTER UNION FREE SCHOOL DISTRICT
and THE EASTCHESTER BOARD OF EDUCATION,

Defendants.
-----X

RUDERMAN, J.

The following papers were considered in connection with the motion of defendants Eastchester Union Free School District and the Eastchester Board of Education for an order consolidating the above-captioned case (Action No. 1) with *Javier Torres and Ana Torres v. School Construction Consultants, Inc.*, Index Number 57702/2020 (Action No. 2) and other related relief (sequence 6); the cross motion of plaintiffs Javier E. Torres and Ana B. Torres for an order directing defendants to accept their supplemental bill of particulars (sequence 7); and the cross motion of Piazza Brothers, Inc.¹ for an order seeking similar relief to that sought by defendants in motion sequence 6 (sequence 8):

<u>Papers – Sequence 6</u>	<u>Numbered</u>
Notice of Motion; Affirmations, Exhibits A - K	1
Affirmation in Opposition, Exhibits A - J	2
Affirmation in Reply	3
 <u>Papers – Sequence 7</u>	 <u>Numbered</u>
Notice of Cross Motion; Affirmation, Exhibits 1 - 12	4
Affirmation in Opposition, Exhibit A	5
 <u>Papers – Sequence 8</u>	 <u>Numbered</u>
Notice of Cross Motion; Affirmation, Exhibits A - E	6
Affirmation in Opposition, Exhibits 1 - 4	7
Affirmation in Reply	8
Sur-Reply Affirmation	9

¹ Piazza Brothers, Inc. is a third-party defendant in Action No. 2.

These labor law actions arise out of an incident that occurred on August 2, 2017, in which plaintiff Javier E. Torres² was injured while working as a member of a demolition crew at Eastchester High School (EHS). Plaintiffs allege that Torres was standing on an A-frame ladder using a sledgehammer to demolish a cinder block wall, and that when he struck the wall with the sledgehammer, several rows of cinder block fell and struck him and the ladder he was standing on, causing him and the ladder to fall to the ground together. At the time of the incident, plaintiff was an employee of Piazza Brothers, Inc. (Piazza), a general contractor actively engaged in the renovation and reconstruction of EHS. Defendants Eastchester Union Free School District and The Eastchester Board of Education (collectively "the Eastchester defendants") own EHS. Plaintiffs filed the summons and verified complaint in Action No. 1 on July 31, 2018. They filed a note of issue in Action No. 1 on February 13, 2020.

On July 27, 2020, plaintiffs commenced Action No. 2 against School Construction Consultants, Inc. (SCC) by filing a summons and verified complaint, which includes claims under Labor Law § 241 (6) based on violations of 12 NYCRR 23-1.4 (b) (16) and 23-3.3 (b) (3) and (c). SCC filed a third-party summons and verified complaint against Eastchester Union Free School District and Piazza on December 7, 2020. To date, there has been no request for judicial intervention (RJI) filed in Action No. 2.

On November 10, 2020, this Court denied plaintiffs' motion for, inter alia, leave to file and serve an amended bill of particulars, which would have asserted additional claims under Labor Law § 241 (6) based on violations of 12 NYCRR 23-1.4 (b) (16) and 23-3.3 (b) (3) and (c),³ holding that neither proposed claim had merit. This Court denied plaintiffs' motion for reargument on April 5, 2021.

In March 2021, plaintiffs served the Eastchester defendants with a first supplemental verified bill of particulars, claiming that plaintiff underwent lumbar spinal fusion surgery on September 11, 2020 in relation to the subject accident. The Eastchester defendants rejected the first supplemental verified bill of particulars by a letter dated March 25, 2021.

² Plaintiff Ana B. Torres is suing derivatively. All references to "plaintiff" throughout refer to the injured plaintiff, Javier E. Torres.

³ The same Industrial Code violations were alleged in Action No. 2.

The Eastchester Defendants' Motion (Sequence 6)

The Eastchester defendants move for an order (a) consolidating Action No. 1 with Action No. 2, (b) holding that this Court's November 10, 2020 decision and order is law of the case, and that the issues decided therein cannot be relitigated, (c) vacating plaintiffs' note of issue and certificate of readiness in Action No. 1, (d) removing Action No. 1 from the trial calendar until discovery is complete, and (e) compelling plaintiff Javier E. Torres to appear for a further deposition and a further independent medical examination (IME) or precluding plaintiffs from introducing any evidence as to the new surgery at the time of trial.

In support of their motion, the Eastchester defendants contend that the actions must be consolidated because they both arise out of the same accident, and common questions of law and fact exist. Additionally, they argue that plaintiffs would not be prejudiced by consolidation because plaintiffs have been aware of SCC's involvement since mid-2019, but chose not to file Action No. 2 until nearly a year later. To support this assertion, the Eastchester defendants cite John Piazza's July 2, 2019 deposition testimony, in which he testified that he was hired by SCC.

Additionally, the Eastchester defendants take the position that, upon consolidation, the law of the case doctrine should apply with respect to this Court's November 10, 2020 decision and order. This would preclude any claims arising out of Labor Law § 200 (1) and 241 (6) based on violations of 12 NYCRR 23-1.4 (b) (16) and 23-3.3 (b) (3) and (c) from Action No. 2.

Finally, the Eastchester defendants seek to vacate the note of issue based on plaintiffs' claim for additional damages from the recent spinal surgery. They argue that plaintiff's newly claimed lumbar spine surgery amounts to unusual and unanticipated circumstances which require additional pretrial discovery. Specifically, the Eastchester defendants maintain that they are entitled to a further deposition of plaintiff as well as a further IME. The Eastchester defendants concede that they have received various medical record authorizations, but have not processed them or reviewed the related medical records. Alternatively, they contend that plaintiffs should be precluded from offering any evidence as to the damages related to the September 2020 surgery at trial.

Plaintiffs concede that defendants are entitled to additional discovery based on the supplemental bill of particulars pursuant to CPLR 3043 (b), but maintain that vacating the note of issue is not necessary. In opposition to consolidation, plaintiffs argue that the two actions should not be consolidated because they neither share identity of the parties nor identity of the issues.

Specifically, Piazza and SCC are not parties to Action No. 1, and the actions involve different issues because the claims against SCC in Action No. 2 are based upon a written contract which is not at issue in Action No. 1. Plaintiffs also take the position that the law of the case doctrine should not be applied to Action No. 2 with respect to the alleged Industrial Code violations because there has been no opportunity to explore the issues in discovery.

In its opposition, SCC takes the position that the actions should not be consolidated because they are at different stages of litigation, as Action No. 1 is ready for trial and Action No. 2 is in the preliminary discovery phase. It argues that, if the matters are consolidated, SCC will be prejudiced by the need to complete discovery in Action No. 2 on a truncated schedule. Additionally, SCC contends that the instant motion is procedurally defective because no RJI has been filed in Action No. 2.

To highlight the early procedural posture of Action No. 2, SCC notes that it has yet to receive a bill of particulars, medical authorizations for plaintiff's treatment records, or discovery relating to the demolition work that plaintiff was performing at the time of the accident. Moreover, SCC asserts that it was not present at any party deposition and has not received any paper discovery in Action No. 1. If the actions are consolidated, SCC maintains that either they should be consolidated under Action No. 2's index number, or the note of issue in Action No. 1 should be vacated.

In reply, the Eastchester defendants contend that CPLR 602 (a) requires only common questions of law or fact to warrant consolidation, not identity of the issues as plaintiffs assert. Nevertheless, they argue that both actions involve the same issues of law and fact. The Eastchester defendants acknowledge that further discovery is needed in Action No. 2, but maintain that consolidation would not prevent that discovery because they are moving to vacate the note of issue in Action No. 1 so that discovery can continue.

Plaintiffs' Cross Motion (Sequence 7)

Plaintiffs cross move for an order directing the Eastchester defendants to accept the first supplemental verified bill of particulars. Plaintiffs argue that the September 2020 lumbar spine surgery did not amount to unusual or unanticipated circumstances because the injuries to the lumbar spine and the anticipated need for subsequent treatment of those injuries were alleged in the original bill of particulars. Plaintiffs also cite to papers filed in February 2020 in support of

their motion for summary judgment, which indicate the need for an additional discectomy followed by spinal fusion surgery at the L4-5 and L5-S1 level.

Plaintiffs further argue that, before the end of September 2020, they advised counsel for the Eastchester defendants that the lumbar spinal fusion surgery had occurred on September 11, 2020 at White Plains Hospital, which counsel acknowledged in a November 12, 2020 letter to plaintiffs. Subsequently, in November 2020, plaintiffs provided the Eastchester defendants with a copy of the relevant operative report and a complete set of medical authorizations for the Eastchester defendants to obtain relevant medical records directly from White Plains Hospital. Plaintiffs contend that they properly served defendants with the first supplemental verified bill of particulars in accordance with CPLR 3043 (b) on March 9, 2021, and the Eastchester defendants had no legal basis to reject service because it was timely and they are not alleging any new causes of action.

In opposition, the Eastchester defendants argue that plaintiffs improperly served their first supplemental verified bill of particulars six months after the subject surgery was performed and over a year after the note of issue was filed in Action No. 1. The Eastchester defendants maintain that the note of issue must be vacated so that further discovery can be completed because, contrary to the January 30, 2020 trial readiness order, discovery is not complete and this matter is no longer ready for trial.

Piazza's Cross Motion (Sequence 8)

Piazza cross moves for an order (a) consolidating Action No. 1 with Action No. 2, (b) holding that this Court's November 10, 2020 decision and order is law of the case, and that the issues decided therein cannot be relitigated, (c) vacating plaintiffs' note of issue and certificate of readiness in Action No. 1, (d) removing Action No. 1 from the trial calendar until discovery is complete, and (e) compelling plaintiff Javier E. Torres to provide outstanding discovery and appear for a deposition and an IME, or precluding plaintiffs from introducing any evidence at the time of trial.⁴

Piazza asserts that discovery is outstanding in both matters because plaintiff needs to appear for a supplemental deposition and a further IME in Action No. 1, and has failed to respond

⁴ The Eastchester defendants move for identical relief in motion sequence 6, with the exception of a slight variation in item (e).

to its discovery demands in Action No. 2. Therefore, Piazza takes the position that it would be practical and expedient to vacate the note of issue in Action No. 1 and consolidate the two matters for discovery and trial.

With respect to the outstanding discovery in Action No. 2, Piazza explains that it served a demand for a bill of particulars, along with other individual discovery demands, upon plaintiffs on January 26, 2021. Piazza reiterated the same demands in a March 24, 2021 letter to plaintiffs. On May 19, 2021, Piazza emailed plaintiffs to again inquire about its discovery demands; plaintiffs responded and advised that discovery would be forthcoming. However, Piazza asserted that it had not received any discovery at the time it filed this motion on June 8, 2021. Piazza makes similar arguments to those raised by the Eastchester defendants in support of applying the law of the case doctrine, vacating the note of issue, and compelling plaintiffs to comply with discovery demands.

In opposition, plaintiffs argue that Piazza has not served them with any discovery demands, and that they have only received discovery demands from SCC, with which they complied. Additionally, plaintiffs contend that all of Piazza's discovery demands were served only on third-party plaintiff SCC. In further opposition to consolidation, plaintiffs again argue that the two actions neither share identity of the parties nor identity of the issues, and that plaintiffs would be prejudiced by consolidation by being deprived of the right to pursue discovery in Action No. 2.

SCC also opposes the branch of Piazza's motion seeking consolidation, making arguments identical to those that it raised in opposition to the Eastchester defendants' motion to consolidate.

In reply, filed on June 29, 2021, Piazza indicated that it still had not received any outstanding discovery from plaintiffs. Piazza argues that the negligence and Labor Law claims in Action No. 2 are identical to those made in Action No. 1. Additionally, Piazza characterizes Action No. 2 as plaintiffs' attempt to circumvent this Court's November 10, 2020 decision rejecting the proposed Labor Law § 241 (6) claims and the rules regarding amendment of the complaint.

In a sur-reply dated June 29, 2021, plaintiffs' attorney described a miscommunication between him and counsel for the Eastchester defendants regarding the subject discovery demands, which has finally been clarified. Plaintiffs' attorney further indicated that he would respond to those demands within 30 days.

Analysis

"Where common questions of law or fact exist, a motion to consolidate or for a joint trial pursuant to CPLR 602 (a) should be granted absent a showing of prejudice to a substantial right

by the party opposing the motion” (*Brown v Cope Bestway Express, Inc.*, 99 AD3d 746, 747-48 [2d Dept 2012]). In such circumstances, consolidation or joint trial would “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” (*Gutman v Klein*, 26 AD3d 464, 465 [2d Dept 2006]). The trial court has broad discretion in deciding whether to order consolidation (*see Hershfeld v JM Woodworth Risk Retention Group, Inc.*, 164 AD3d 1423, 1424 [2d Dept 2018]).

As an initial matter, SCC offers no support for its position that the motions to consolidate are procedurally defective because there has been no RJI filed in Action No. 2. That argument is rejected.

It is undisputed that both actions arise out of a single incident. The arguments raised by plaintiffs and SCC – that the two actions are at different procedural stages and, therefore, consolidation would result in prejudice stemming from a truncated discovery schedule – is alleviated by vacating the note of issue and allowing discovery to continue, as discussed further below. Since the actions contain similar questions of law and fact, and no party has established that it would be prejudiced by consolidation, defendants’ motions for consolidation are granted.

To eliminate potential prejudice to any party following consolidation, defendants are directed to accept service of plaintiffs’ first supplemental verified bill of particulars, the note of issue and certificate of readiness in Action No. 1 are vacated, and discovery will continue with respect to both actions.

“A party may serve a supplemental bill of particulars with respect to claims of continuing special damages and disabilities without leave of court at any time, but not less than thirty days prior to trial. Provided however that no new cause of action may be alleged or new injury claimed and that the other party shall upon seven days notice, be entitled to newly exercise any and all rights of discovery but only with respect to such continuing special damages and disabilities” (CPLR 3043 [b]). As of this date, this matter has not yet been scheduled for trial. Plaintiffs’ service of its first supplemental verified bill of particulars in March 2021 was timely pursuant to CPLR 3043 (b) because it was clearly served more than 30 days before trial.

Plaintiffs have also not claimed a new injury. Plaintiffs alleged the relevant injuries to the lumbar spine, and the anticipated need for subsequent treatment of those injuries, in the original bill of particulars. Indeed, they also referenced the surgery in the papers in support of their summary judgment motion, specifically noting that plaintiff would require an additional

discectomy to be followed by a spinal fusion at the L4-5 and L5-S1 level. Since it does not raise any new injury or causes of action, plaintiffs properly served their first supplemental verified bill of particulars pursuant to CPLR 3043 (b) and defendants have not established a valid basis for rejecting it.

Additionally, as contemplated by CPLR 3043 (b) and argued by defendants, plaintiffs concede that additional discovery is needed with respect to the September 11, 2020 surgery. As a result, Action No. 1 is no longer ready for trial. Moreover, plaintiffs' belated filing of Action No. 2, which must now be consolidated with Action No. 1 as discussed above, amounts to unusual and unanticipated circumstances that warrant vacating the note of issue and certificate of readiness in Action No. 1 so that discovery can continue (*see* 22 NYCRR 202.21 [d]).

Finally, upon consolidation, the law of the case doctrine will apply to all aspects of the consolidated action with respect to all prior orders. "The doctrine of law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding. The doctrine applies only to legal determinations that were necessarily resolved on the merits in a prior decision" (*Brownrigg v New York City Hous. Auth.*, 29 AD3d 721, 722 [2d Dept 2006]). The law of the case doctrine squarely applies here.

In the November 10, 2020 decision and order in Action No. 1, this Court dismissed plaintiffs' Labor Law § 200 (1) claim and held that plaintiffs' proposed Labor Law § 241 (6) claims based on violations of 12 NYCRR 23-1.4 (b) (16) and 23-3.3 (b) (3) and (c) were inapplicable. 12 NYCRR 23-1.4 (b) (16) merely defines "demolition work," and cannot be the basis for liability because it does not create a specific, positive command (*see Gasques v State of New York*, 15 NY3d 869, 870 [2010]). 12 NYCRR 23-3.3 (b) (3) and (c) do not apply to the facts at bar because the cinder blocks that struck plaintiff fell as a result of the performance of the demolition work, not from structural instability caused by the progress of the demolition work (*see Maldonado v AMMM Props. Co.*, 107 AD3d 954 [2d Dept 2013]).

Plaintiffs had a full and fair opportunity to litigate these points, and they were necessarily resolved on the merits in the context of plaintiffs' motion for summary judgment. Since no extraordinary circumstances exist to warrant ignoring the law of the case doctrine, plaintiffs are not entitled to relitigate these issues with respect to Action No. 2 (*see Brownrigg*, 29 AD3d at 722).

Based upon the foregoing, it is hereby,

ORDERED that defendants' motion (sequence 6) is granted; and it is further
 ORDERED that plaintiffs' cross motion (sequence 7) is granted; and it is further
 ORDERED that Piazza's cross motion (sequence 8) is granted; and it is further
 ORDERED that the note of issue in Action No. 1 is vacated; and it is further
 ORDERED that the above-captioned action is consolidated for discovery and joint trial
 with Action No. 2, *Javier Torres and Ana Torres v. School Construction Consultants, Inc.* (Sup
 Ct Westchester County Index Number 57702/2020); and it is further

ORDERED that the new caption of the consolidated actions shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF WESTCHESTER

-----X
 JAVIER E. TORRES and ANA B. TORRES,

 Plaintiffs, Index No. 61636/2018

 -against- ACTION 1

 EASTCHESTER UNION FREE SCHOOL DISTRICT
 and THE EASTCHESTER BOARD OF EDUCATION,

Defendants.

-----X
 JAVIER E. TORRES and ANA B. TORRES,

 Plaintiffs, Index No. 57702/2020

 -against- ACTION 2

 SCHOOL CONSTRUCTION CONSULTANTS, INC.,

Defendant.

-----X
 SCHOOL CONSTRUCTION CONSULTANTS, INC.,

 Third-Party Plaintiff,

 -against-

 EASTCHESTER UNION FREE SCHOOL DISTRICT
 and PIAZZA BROTHERS, INC.,

Third-Party Defendants.

-----X
 and it is further

ORDERED that all parties are directed to appear in the Preliminary Conference Part on a date and in a manner of which they will be notified by that Part.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York

September 21, 2021



HON. TERRY JANE RUDERMAN, J.S.C.