

**Qualls v BOP NE, LLC**

2021 NY Slip Op 34128(U)

June 8, 2021

Supreme Court, Bronx County

Docket Number: Index No. 31173/2017E

Judge: Lucindo Suarez

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This opinion is uncorrected and not selected for official publication.



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 19

Mtn. Seq. # 1

ROMEL QUALLS,

Index No.: 31173/2017E

Plaintiff,

- against -

**DECISION and ORDER**

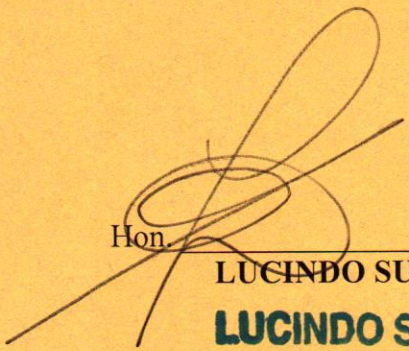
BOP NE, LLC and TISHMAN CONSTRUCTION  
CORPORATION,

Defendants.

	<u>PAPERS NUMBERED</u>
Plaintiff's Order to Show Cause, Affirmation in Support, Emergency Affirmation Seeking Stay	1, 2, 3
Defendants' Affirmation in Opposition (Action # 1) <sup>1</sup>	4
Defendants' Affirmation in Support (Action # 2) <sup>2</sup>	5

Upon the enumerated papers, Plaintiff's order to show cause seeking to consolidate is granted, in accordance with the annexed decision and order.

Dated: **6/8/2021**

  
 Hon. \_\_\_\_\_  
**LUCINDO SUAREZ, J.S.C**  
**LUCINDO SUAREZ, J.S.C**

<sup>1</sup> At the return date of this application, Defendants in Action # 1 argued that this court should not consider Plaintiff's reply affirmation dated June 4, 2021. This court finds that it is constrained pursuant to 22 NYCRR §202.8-d from considering Plaintiff's reply affirmation as he failed to seek advance permission from the court to submit same.

<sup>2</sup> Defendants Tishman Construction Corporation of New York, BOP NE Tower Lessees and BOP NE LLC's in Action # 2 submitted an affirmation in support of the instant application to consolidate.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 19

Mtn. Seq. # 1

ROMEL QUALLS,

Index No.: 31173/2017E

Plaintiff,

- against -

**DECISION and ORDER**

BOP NE, LLC and TISHMAN CONSTRUCTION  
CORPORATION,

Defendants.

PRESENT: Hon. Lucindo Suarez

Upon the enumerated papers; a virtual Microsoft Teams conference held June 7, 2021; there being no opposition at the conference concerning the instant application to consolidate except for Defendants in Action # 1 who maintained their opposition; and due deliberation; this court finds:

That Plaintiff's application to consolidate Action # 1 bearing Bronx County Index Number 31173/2017E and Action # 2 bearing Bronx County Index Number 26440/2018E is mandated as both actions involve common questions of law and fact and Defendants in Action # 1 failed to demonstrate any prejudice to a substantial right as a result of the consolidation.

The aforementioned actions seek monetary damages arising from the same construction accident that occurred on September 21, 2017. Plaintiff, Romel Qualls, in Action # 1 and Plaintiff, Joseph Pacheco, in Action # 2 (collectively "Plaintiffs") were both employed by E-J Electric Installation Co. ("E-J Electric").<sup>1</sup> On the day of the accident, both Plaintiffs were

<sup>1</sup> Plaintiffs' employer, E-J Electric, is named as a Third-Party Defendant in Action # 2.

assigned to perform work to the façade of a building located at the construction site. The area of the building's façade where Plaintiffs were required to work was at an elevated height.

Therefore, in order to reach their work area, Plaintiffs had to work upon an elevated boom platform. Plaintiffs allege that as the boom platform was being moved from one elevation to another its mechanical arm struck a column causing it to shake and become unstable. As a result, both Plaintiffs were ejected to the ground below. Plaintiff, Romel Qualls, sustained serious permanent injuries and Plaintiff, Joseph Pacheco, died as a result of the accident. Consequently, both actions assert claims under Labor Law §§240(1), 241(6), 200 and for common law negligence, *inter alia*.

Great deference is accorded to a motion court's discretion in granting consolidation pursuant to CPLR 602(a); where there are common questions of law and fact, there is a preference for consolidation in the interest of judicial economy unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right. *See Kukielka v. Santana*, 191 A.D.3d 532, 138 N.Y.S.3d 335 (1st Dep't 2021).

Here, Plaintiff contends that consolidating both actions is appropriate because the facts, parties, and claims asserted in both actions are almost identical. Moreover, Plaintiff argues that because both Plaintiffs were involved in the same accident that discovery concerning liability will be the same. Therefore, Plaintiff argues that these matters should be consolidated to avoid inconsistent decisions based upon the same set of facts.

Moreover, Defendants in Action # 2 contend that these matters should be consolidated because the same Judge is assigned to preside over both matters and when dispositive motions are filed a consolidation of these matters will further judicial economy and prevent inconsistent rulings. In addition, Defendants in Action # 2 argue that although both actions are at different

stages of discovery, they maintain that the discovery in Action # 2 will be limited to a deposition of Plaintiff's Administrator. Defendants in Action # 2 further argue that physical examinations will not be required due to the death of Plaintiff, Joseph Pacheco. Lastly, Defendants in Action # 2 posit while Action # 2 asserts third-party claims against Plaintiffs' employer, E-J Electric, a separate verdict sheet will be provided to the jury solely surrounding the issues pertaining to the third-party claims, therefore, eliminating any confusion for the jury.

In opposition, Defendants in Action # 1 contend that because discovery in Action # 1 is almost complete and discovery in Action # 2 is still in its infancy these matters should not be consolidated. In addition, Defendants in Action # 1 claim that they will be prejudiced if both matters were tried together because the damages sought in both matters are markedly different. Further, Defendants in Action # 1 argue that they will be prejudiced if both actions are tried together as jury confusion will result due to the third-party claims asserted in Action # 2.

This court finds that Defendants in Action # 1 have not carried their burden in demonstrating that a substantial right will be prejudiced. This court notes that Plaintiffs in either matter have not filed a note issue and certificate of readiness for trial. Furthermore, at the conference it was disclosed that in Action # 1 there may be a need to conduct non-party depositions before the conclusion of discovery. Moreover, at the conference it was further disclosed that in Action # 2 the deposition of the Administrator, Caesar Pacheco, was already scheduled for July 9, 2021, and outside of said deposition the remaining discovery in Action # 2 will be limited due to the death of Plaintiff, Joseph Pacheco. Therefore, although Action # 1 and # 2 are at different stages of discovery this court is unpersuaded that consolidating these matters will result in undue delay.

In addition, this court finds that while Action # 1 and # 2 have some separate and distinct claims for damages and Action # 2 has third-party claims not asserted in Action # 1<sup>2</sup>, this court finds that those issues do not outweigh or establish prejudice of substantial right as there are numerous common questions of fact and law regarding Defendants' liability in Action # 1 and # 2 under Labor Law §§240(1), 241(6), 200 and for common law negligence, thereby, making consolidation of these matters appropriate. *See Matter of NY City Asbestos Litig.*, 111 A.D.3d 574, 975 N.Y.S.2d 660 (1st Dep't 2013).

Moreover, this court finds that discovery and trial will involve overlapping facts, expert witnesses, documentary evidence, and legal issues, therefore, the consolidation of these matter will streamline discovery, and any issues concerning jury confusion may be addressed by appropriate instructions or at a later date the court may elect to bifurcate or sever the actions for trial. *See Matter of Oct. 31*, 2021 N.Y. Slip. Op. 03375 (1st Dep't 2021).

Accordingly, it is

ORDERED, that Plaintiff's order to show cause seeking to consolidate Action # 1 bearing Bronx County Index Number 31173/2017E with Action # 2 bearing Bronx County Index Number 26440/2018E, is granted, and consolidated for all purposes including a joint trial on liability and damages under Index Number 31173/2017E; and it is further

ORDERED, that the consolidated action shall bear the following caption:

[INTENTIONALLY LEFT BLANK]

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<sup>2</sup> This court notes that Third-Party Defendant, E-J Electric, filed a summary judgment motion in Action # 2 seeking to dismiss the third-party complaint.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 19

ROMEL QUALLS and CESAR PACHECO, as  
Administrator of the Estate of JOSEPH PACHECO,  
and CESAR PACHECO as Guardian of J.A.P, an  
Infant under the age of 18 and CESAR PACHECO  
as Guardian of T.A.P. an Infant under the age of 18,

Index No.: 31173/2017E

Plaintiffs,

- against -

BOP NE, LLC, TISHMAN CONSTRUCTION  
CORPORATION, TISHMAN CONSTRUCTION  
CORPORATION OF NEW YORK, and BOP NE  
TOWER LESSES,

Defendants.

TISHMAN CONSTRUCTION CORPORATION OF  
NEW YORK, BOP NE TOWER LESSES and  
BOP NE LLC,

Third-Party Plaintiffs,

- against -

E-J ELECTRIC INSTALLATION CO.,

Third-Party Defendant.

and it is further

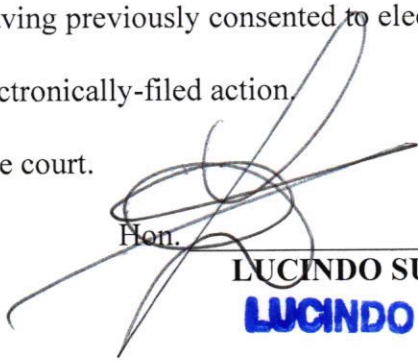
ORDERED, that the pleadings in these actions shall stand as the pleadings in the consolidated action; and it is further

ORDERED, that upon service on the Clerk of the Court and the Motion Support Office (Room 217) of a copy of this decision and order with notice of its entry, the Clerk shall consolidate the papers in these actions and shall mark the Clerk's records to reflect the consolidation; and it is further

ORDERED, that the respective attorneys having previously consented to electronic filing, this consolidated action shall continue as an electronically-filed action.

This constitutes the decision and order of the court.

Dated: 6/8/2021

Hon.   
**LUCINDO SUAREZ, J.S.C.**  
**LUCINDO SUAREZ, J.S.C.**

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At an IAS Part 19 of the Supreme Court of the State of New York, held in and for the County of Bronx, at the courthouse located at 851 Grand Concourse, Bronx, New York on the 17<sup>th</sup> day of May, 2021

1A-19  
Co/JT

PRESENT:

HON. LUCINDO SUAREZ  
Justice

-----X  
ROMEL QUALLS

Plaintiff,

-against-

BOP NE, LLC and TISHMAN CONSTRUCTION CORPORATION,

Defendants.  
-----X

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX  
-----X

CESAR PACHECO, as Administrator of the Estate of JOSEPH PACHECO, and CESAR PACHECO as Guardian of J.A.P., an infant under the age of 18 and CESAR PACHECO as Guardian of T.A.P., an Infant Under the age of 18,

Plaintiffs,

-against-

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, BOP NE TOWER LESSES and BOP NE LLC,

Defendants.  
-----X

TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, BOP NE TOWER LESSES and BOP NE LLC,

Third-Party Plaintiffs

-against-

E-J ELECTRIC INSTALLATION CO.

Third Party Defendant  
-----X

Index No.: 31173/17

**ORDER TO  
SHOW CAUSE**

**Action No. 1**

Index No.: 26440/18

**Action No.2**

Upon reading and filing the annexed Petition of MATTHEW J. FEIN, ESQ., dated May 12, 2021, after due deliberation,

Let the respective parties in Action No.1, Bronx County Index Number 31173/17 and Action No.2, Bronx County Index Number 26440/18 show cause before the

*VIA virtual conference*

Hon. LUCINDO SUAREZ at IAS Part 19 of the Supreme Court, Bronx County, at the Courthouse located at 851 Grand Concourse, Bronx, New York on the 7<sup>th</sup> day of June

—, 2021 at ~~9:30~~<sup>10:30</sup> o'clock in the forenoon of that day, or as soon thereafter as counsel can heard, why an order should not be entered:

1. Under the auspices of CPLR §602(a), Consolidating Action No.1, Bronx County Index Number 31173/17 and Action No.2, Bronx County Index Number 26440/18 for purposes of Joint Discovery and Trial in that the aforesaid actions have common questions of law and fact that should be heard before the same tribunal;
2. Immediately, upon the signing of this application by the Court, staying all discovery in both matters until such time that the instant Order to Show Cause is heard and decided upon; and
3. For such other and further relief as this Court deems just and proper.

SUFFICIENT CAUSE APPEARING THEREFORE, let service of a copy of this Order to Show Cause by ~~Email and E-filing under NYSEF~~<sup>overnight delivery service</sup> together with the papers upon which it is based, upon all parties, on or before the 21<sup>st</sup> day of May, 2021, be deemed good and sufficient service.

*J.S.C.*

*JSC*

ENTER:  
\_\_\_\_\_  
J.S. C.  
LUCINDO SUAREZ