

Bardsley v Great Lakes Indus. Dev., LLC
2022 NY Slip Op 35225(U)
February 2, 2022
Supreme Court, Erie County
Docket Number: Index No. 814857/2019
Judge: Timothy J. Walker
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DINA BARDSLEY and MICHAEL BARDSLEY,

Plaintiffs,

DECISION AND ORDER

Index No.: 814857/2019

v.

GREAT LAKES INDUSTRIAL DEVELOPMENT, LLC
and INDUSTRIAL MATERIALS RECYCLING, LLC,

Defendants.

ASHLEY TORRES, Individually, et al.,

Plaintiffs,

Index No. 800789/2021

v.

GREAT LAKES INDUSTRIAL DEVELOPMENT, LLC
and INDUSTRIAL MATERIALS RECYCLING, LLC,

Defendants.

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **VINAL & VINAL, P.C.**
Jeanne M. Vinal, Esq., Of Counsel
Attorneys for Plaintiffs

NIXON PEABODY LLP
Kevin T. Saunders, Esq., Of Counsel
Attorneys for Defendant, Great Lakes Industrial Development, LLC

GOLDBERG SEGALLA, LLP
Meghan M. Brown, Esq., Of Counsel
Attorneys for Defendant, Industrial Materials Recycling, LLC

WALKER, J.

Defendants, Great Lakes Industrial Development, LLC (“Great Lakes”) and Industrial Materials Recycling, LLC (“IMR”), have jointly applied for an order (Motion 8; Doc. 170 in *Bardsley*, and Motion 1; Doc. 12 in *Torres*) for an order bifurcating discovery in these joined matters.

On May 10, 2021, this court issued a Decision and Order (Doc. 154)¹ joining these matters “for purposes of discovery and a joint trial limited to the issue of liability.” While the May 10, 2021 Decision and Order effectively bifurcated these matters with respect to trial, it was silent as to discovery.

Plaintiffs oppose the bifurcation of both discovery and trial, and have cross-applied for an order (Motion 9; Doc. 178 in *Bardsley*, and Motion 2; Doc. 20 in *Torres*) granting them leave to renew and/or reargue that part of the May 10, 2021 Decision and Order directing that the matters be joined for purposes of a joint trial limited to the issue of liability.

BACKGROUND

These actions arise out of a warehouse fire that occurred on November 9, 2016, at that part of the former Bethlehem Steel site known as the Steel Works Industrial Park, located at 2800 Hamburg Turnpike, City of Lackawanna, New York (“Fire”).

According to the Complaints in both matters, the Fire originated upon real property “leased and/or operated” by Great Lakes and IMR (*Bardsley* Doc. 1, ¶¶ 8-9; *Torres* Doc. 1, ¶¶ 8-9). At the time of the Fire, boats and vehicles were stored at the warehouse (Doc. 24, p.1). The record reflects that the cause of the Fire has not been determined.

¹ Unless otherwise noted, all references to the NYSCEF System are to *Bardsley*.

The Fire was significant, and as a result, the City of Lackawanna declared a State of Emergency and closed Route 5 (*Id.*, at p. 1). Numerous fire companies and related agencies responded to the Fire, including the City of Lackawanna Fire Department, the City of Buffalo Fire Department, Erie County Emergency Services, New York State Fire, New York State Homeland Security, and the United States Environmental Protection Agency (*Id.*, at pp. 1, 2).

There are in excess of seventy (70) plaintiffs spanning both matters, and they allege certain personal injuries and property damage as a result of the Fire.

DISCUSSION

Defendants' Joint Applications

(Motion 8; Doc. 170 in *Bardsley*, and Motion 1; Doc. 12 in *Torres*)

This Court's broad discretion to bifurcate a trial has been codified in CPLR 603, which provides:

In furtherance of convenience and to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of the others.

Bifurcation of the issues of liability and damages in personal injury actions, such as this matter, is "encouraged" (22 NYCRR § 202.42[a]; *see also, Loncz v. Blagrove*, 254 AD2d 735, 735 [4th Dept 1998] ["[a]s a general rule, issues of liability and damages in a negligence action are distinct and severable issues which should be tried and determined separately"] [citations omitted]).

Moreover, bifurcation is presumed to be appropriate in negligence actions, placing the burden on the party opposing bifurcation to show that their injuries "have an important bearing

on the issue of liability and are probative in determining how the accident occurred” (*Wesselenyi v. Santiago*, 286 AD2d 964, 964 [4th Dept 2001] [“As a general rule, issues of liability and damages in a negligence action are distinct and severable issues that should be tried and determined separately. Plaintiffs failed to establish the applicability of the exception to the general rule, which arises when the injuries sustained by plaintiffs have an important bearing on the issue of liability and are probative in determining how the accident occurred”] [citations and quotations omitted]).

Discovery, as well as trials, may be bifurcated (*Don Buchwald & Assocs., Inc. v. Marber-Rich*, 305 AD2d 338, 338-39 [1st Dept 2003] [“The court properly ‘bifurcated’ discovery on liability and damages, since the primary inquiries relevant to establishing liability on plaintiff’s breach of fiduciary duty and related claims are distinct from the question of whether plaintiff was injured by any proven misconduct and, if so, to what degree”]; *Elie v. City of N.Y.*, 92 AD3d 716, 718 [2d Dept 2012] [trial court erred in denying defendant’s motion to “bifurcate and stay discovery and trial . . . pending resolution of the other claims. Considerations of prejudice and judicial economy warrant granting that relief”]).

Bifurcation of discovery in this matter would promote efficiency and fairness. The court anticipates that discovery focused on negligence will be expedient, given its singular focus on the events surrounding the Fire, and uncomplicated by the anticipated breadth of damages discovery. Contrary to Plaintiffs’ contention that Defendants seek to delay this matter, Defendants have proposed three (3) liability fact witnesses and numerous dates in late February and March 2021, for Plaintiffs’ counsel to select for depositions. Indeed, depositions of these corporate representatives of both Great Lakes and IMR could have already been completed had Plaintiffs’

counsel not unilaterally cancelled them several days before the dates she had chosen (Doc. 172, ¶ 26.)

In contrast, addressing the issues of causation, personal injury, and property damages of more than seventy (70) plaintiffs will take months (if not years), and will be a much more complex endeavor. Regarding property damage, while the Bardsleys claim only vague and unverified property damage, Plaintiffs' alleged property damage in *Torres* is widely varied, such as damage to the siding or roof of a house, garage, or shed, requiring cleaning or replacement of various items; destruction of clothing and furniture; loss of rental property or diminution in value of the house; and death of family pets (*Torres* Doc. 1, *passim*).

With respect to the personal injury claims in the *Bardsley*, this court stated the following in its May 10, 2021 Decision and Order:

Individual issues of medical causation and damages predominate over any common questions of law or fact. There are numerous individual, specific, claimed injuries and damages in just the small group of six (6) putative class representatives that Plaintiffs seek to add to this action. Those few individuals have alleged injuries and damages that vary greatly in degree, severity and type, and include two (2) types of cancer (in an infant and an elderly person), death (of an infant and an elderly person), thyroid issues, throat nodules, osteoarthritis, lung issues, asthma, heart palpitations, anxiety, and the cost of sending a minor to live with another family member (Doc. 123, ¶¶ 54-57). Discovery for each of the claimed injuries and damages will necessarily be unique to each plaintiff.

(Doc. 180, p. 7).

With respect to the personal injury claims in *Torres*, this court stated:

Considering the additional plaintiffs in the *Torres* Action, there are even more disparate and wide-ranging alleged injuries and damages, including “stroke-like symptoms,” neurological injuries,

throat cancer, death, expenses from evacuating, infections, aggravation of various pre-existing conditions, need for oxygen, “zone of danger damages,” COPD, autoimmune disorder, gastroparesis, cardiac arrest, skin irritation, early retirement, aggravation of psoriatic arthritis, seizures, sleep apnea, chest pain, stomach issues, migraines, aggravation of Lupus, blood and circulation issues, hair loss, acute myeloid leukemia, liver failure and stroke that resulted in death, development of allergies and chemical sensitivities, impaired vision, and aggravation of kidney disease.

(*Id.*, at pp. 7-8).

In addition to the sheer number of depositions of Plaintiffs with varying claims of personal injuries and property damage, to prepare for the depositions, Defendants’ counsel will necessarily review a plethora of Plaintiffs’ medical records, both before and after the Fire, property damage claims, etc. Counsel have indicated they also seek to retain, and consult with experts, such as medical personnel and property appraisers, in order to explain the medical injuries and property value diminution, respectively.

Opposing bifurcation, Plaintiffs contend (i) that discovery is incomplete and Defendants are unfairly trying to limit discovery; (ii) delay; and (iii) that the nature of the items on site in the building where the Fire occurred is relevant to liability and damages.

Plaintiffs’ contentions regarding discovery are misplaced, because Defendants seek to bifurcate discovery - not limit it. Defendants are not claiming that they do not need discovery from Plaintiffs or that Plaintiffs should not obtain complete discovery from Defendants. Rather, Defendants are requesting an order that will allow for the efficient completion of discovery in an orderly fashion designed to answer the question of liability prior to proceeding with damages discovery.

With respect to alleged delay, it is Plaintiffs, not Defendants, who have caused delays.

Despite that *Bardsley* has been pending since November 2019 and *Torres* has been pending since January 2021, Plaintiffs have made no effort to identify any defense witnesses they wish to depose. In contrast, Defendants have offered Christopher Wietig, Todd Jaworski, and Paul Kulniszewski, as starting points in an effort to move these matters forward.

Mr. Wietig is the Director of Business Development for non-party, Frontier Group Companies; Mr. Jaworski is the Building Manager for Great Lakes; and Mr. Kulniszewski is the former General Manager of IMR, and he was present on the day of the Fire (*Id.*) As a result of the Fire, IMR is no longer in business, and the Defendants designated Mr. Wietig as a representative for both Defendants because he is familiar with both (Doc. 172, ¶30; Doc. 195, ¶¶47-53). Of course, Plaintiffs may seek to depose other persons, but they have not requested any.

Moreover, the depositions of Mr. and Mrs. Bardsley were scheduled to proceed on November 16, 2021, and the deposition of corporate representatives of both Defendants were scheduled to proceed on November 19 2021. However, on November 12, 2021, Plaintiffs' counsel unilaterally cancelled all depositions, and Plaintiffs have not sought to reschedule them (Docs. 174, 175).

Plaintiffs have also failed to respond to Great Lakes' Omnibus Discovery Demands, which Great Lakes served on Plaintiffs in *Torres* on September 28, 2021. On October 4, 2021, Great Lakes served a Demand for Verified Bill of Particulars in *Torres*, and followed up with a good faith letter to Plaintiffs' counsel on November 10, 2021. Plaintiffs began responding to the

Demand for a Verified Bill of Particulars on January 25, 2022 and between 4:58 p.m. and 7:34 p.m. on such date, Plaintiffs' counsel sent Defendants' counsel eleven (11) electronic mails containing fifty-six (56) attachments, purporting to be the Bills of Particular. As of the date of Defendants' reply submission (the next day), Defendants had not had an opportunity to review counsel's emails to determine whether Plaintiffs' response was complete (Doc. 195, ¶¶26-30).

Finally, Plaintiffs cannot meet their burden of showing that the alleged damages have an important (let alone any) bearing on the issue of liability and are probative in determining how the Fire occurred (*cf. Raiport v. Gowanda Electronics Corp.*, 190 Misc2d 353, 355 [Sup Ct Cattaraugus Cnty 2001] [where defendant manufacturer allegedly contaminated groundwater, resulting in alleged damages to multiple property owners, the issue of liability was found to be “entirely extricable from the ultimate damage”]). There is no nexus between damages and the cause of the Fire, and the court gives no weight to the affidavit of Clarence Yeager, a Plaintiff in *Torres* who was also employed by IMR, because he left IMR's employment approximately two (2) months prior to the Fire (Doc. 183, ¶5).

Plaintiffs also submitted the affidavit of Peter Klemann. Mr. Klemann opines, as a purported expert witness, that the court should reject bifurcation, because “[t]here would be numerous witnesses overlapping on negligence and damages” (Doc. 184, ¶4). Mr. Klemann rendered his opinion “to a reasonable degree of certainty” (*Id.*), but failed to state the field within which he is a purported expert.

Mr. Klemann claims to be a resident of New York State and employed as Chief of Plan Review and Inspection Service for an unnamed “major municipality” (*Id.*, at ¶1). Plaintiffs failed to submit Mr. Klemann's *curriculum vitae*, and the court has no idea how his employment

translates to being an expert on whether “numerous witnesses” may overlap between the liability and negligence trials. The court does not consider Mr. Klemann to be an expert capable of rendering opinions related to the applications before the court and, indeed, the court wholly disagrees with his unsupported conclusions.

In light of the foregoing, and given the presumption to bifurcate in negligence actions, coupled with Plaintiffs’ inability to overcome such presumption, and considering the interests of judicial economy and efficiency, the applications to bifurcate discovery are granted.

Plaintiffs’ Cross-Applications

(Motion 9; Doc. 178 in *Bardsley*, and Motion 2; Doc. 20 in *Torres*)

Plaintiffs challenge that aspect of the May 10, 2021 Decision and Order that *sua sponte* joined *Bardsley* and *Torres* and directed that the joined matter be bifurcated, is a non-final order.

The May 10, 2021 Decision and Order provides, in relevant part, as follows:

ORDERED, that upon the Torres Action being assigned to this court as related to the instant matter [i.e., *Bardsley*], the court shall join it and the instant matter for purposes of discovery and a joint trial limited to the issue of liability (emphasis in original).

(Doc. 180, p. 11).

The court intended to join *Bardsley* and *Torres* by way of the above-quoted language in the May 10, 2021 Decision and Order. However, Plaintiffs contend that the May 10, 2021 Decision and Order did not effect a joinder. Rather, Plaintiffs contend that the court’s use of the phrase “upon the Torres Action being assigned to this court” required a second order to effect the joinder after *Torres* was assigned to this court, which did not occur until October 7, 2021. While the court disagrees with Plaintiffs’ interpretation of the May 10, 2021 Decision and Order, the court recognizes that the language it used could have been more clear and that Plaintiff’s

interpretation of the May 10, 2021 decision and Order is reasonable.

That said, Plaintiffs' cross-applications for leave to renew and/or reargue are granted, but the court confirms what it previously intended to effectuate by the May 10, 2021 Decision and Order; that is, the *Bardsley* and *Torres* actions are hereby joined and bifurcated and, as such, shall proceed to a liability-only trial.

The court reached this decision for the reasons stated above in connection with Defendants' joint applications seeking to bifurcate discovery.

Finally, Defendants object to Plaintiffs' reply submission, consisting of the affidavit of their attorney (Doc. 203 in *Bardsley*; Doc. 45 in *Torres*), because (i) it was electronically filed with the NYSCEF System on January 27, 2022, the day **after** the applications and cross-applications were returnable (on January 26, 2022, at 2:00 p.m., on submission). Despite that Defendants' are correct in having made their objection, the court reviewed and considered Plaintiffs' reply submission, and it had no bearing on the court's determinations herein.

In light of the foregoing, it is hereby

ORDERED, that Defendants' joint applications seeking to bifurcate discovery in the *Bardsley* and *Torres* actions is granted; and it is further

ORDERED, that Plaintiffs' cross-applications to renew and/or reargue this court's May 10, 2021 Decision and Order is granted, and upon renewal and/or reargument, the court confirms its prior ruling; that is, *Bardsley* and *Torres* are hereby joined for discovery and trial, and they are also bifurcated, with a trial on liability to proceed before a trial on damages, assuming a damages trial is required; and it is further

ORDERED, that class certification having previously been denied (Docs. 84, 154), the

caption in *Bardsley* is hereby amended to reflect that the Plaintiffs are limited to “DINA BARDSLEY and MICHAEL BARDSLEY,” and it is further

ORDERED, that all Examinations Before Trial related to liability shall be completed on or before May 31, 2022; and it is further

ORDERED, that all discovery related to liability shall be completed on or before June 30, 2022; and it is further

ORDERED, that the court shall conduct a status conference on May 5, 2022, at 11:00 a.m.

This constitutes the Decision and Order of this Court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: February 2, 2022
Buffalo, New York



HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice