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| AIG Prop. Cas. Co. v Riverbank Apt. Corp. |
| 2023 NY Slip Op 30105(U) |
| January 10, 2023 |
| Supreme Court, New York County |
| Docket Number: Index No. 156620/2021 |
| Judge: Mary V. Rosado |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO
Justice

PART 33M

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INDEX NO. 156620/2021

**AIG PROPERTY CASUALTY COMPANY A/S/O ELLIOT
CUKER,**

MOTION DATE 08/30/2022

Plaintiff,

MOTION SEQ. NO. 001

- v -

**RIVERBANK APARTMENT CORP., DEBRA JOESTER,
STEPHEN JOESTER,**

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL

Upon the foregoing documents, Plaintiff AIG Property Casualty Company A/S/O Elliot Cuker’s (“Plaintiff”) motion to join for trial and discovery the instant action (“Action 1”) with another pending action bearing Index No. 152551/2022 (“Action 2”) pursuant to CPLR § 602(a) is granted.

CPLR § 602(a) provides that “when 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...and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” Further, “[t]here is a preference to join cases for discovery and trial in the interests of judicial economy and ease of decision making where there are common questions of law and fact, unless the party opposing the motion demonstrates that joint trial will prejudice a substantial right” *Lema v 1148 Corporation*, 176 AD3d 653, 654 [1st Dept 2019]). It is not required that all questions of law or fact be common to the various actions (*Kupferschmid v Hennessy*, 221 AD2d 225, 226 [1st Dept 1995]). Indeed, where the commonality involves two interrelated

injuries, absent prejudice to a substantial right to a party, a joint trial is appropriate (*Witherspoon v New York City Housing Authority*, 238 AD2d 276 [1st Dept 1997]). Moreover, the fact that the same witnesses will have to be used in multiple actions is another factor weighing in favor of a joint trial (*David Vogel, Inc. v Spraker*, 12 AD2d 744, 744 [1st Dept 1961]).

Action 1 stems from alleged damages in Apartment 6A of the building located at 166 Bank Street, New York (the “Building”) (NYSCEF Doc. 1). The Building is owned by Defendant Riverbank Apartment Corp. (“Riverbank”) (*id.* at ¶ 12). Subrogor Elliot Cukor is the tenant of Apartment 6A (*id.* at ¶ 13). Defendants Debra Joester and Stephen Joester (collectively the “Joesters”) are tenants of Apartment PHA in the Building (*id.* at ¶ 14). It is alleged that on or about August 11, 2018, large quantities of water came from Apartment PHA into Apartment 6A from the roof, terrace, deck, gutters, and drains causing property damage in the amount of \$80,995.05 (*id.* at ¶ 19). It is alleged that this damage was caused by the negligence of Riverbank and the Joesters (*id.* at ¶¶ 20 and 26). There has not yet been a preliminary conference in Action 1.

Action 2 contains identical parties except Poler Contracting, Inc. (“Poler”) is named as an additional Defendant and Noeline Cuker is named as an additional subrogor (NYSCEF Doc. 15). In Action 2, it is alleged that on or about July 10, 2021, large quantities of water were discharged from Apartment PHA into Apartment 6A from the roofs, terraces, decks, gutters, and drains, causing property damage to the subrogors in the amount of \$160,152.52 (*id.* at ¶ 22). Like in Action 1, it is alleged in Action 2 that at the time of the alleged damages the subrogors were tenants of Apartment 6A, Riverbank owned the Building, and the Joesters were tenants of Apartment PHA (*id.* at ¶¶ 14-16). Also identical to Action 1, it is alleged in Action 2 that the damages were caused by the negligence of Riverbank and the Joesters. The only additional cause of action in Action 2 is that it is alleged that the damagers were also caused by Poler, who was working on the exterior

of the building, including the roofs, terraces, decks, gutters, and drains at the time of the damages (*id.* at ¶¶ 21 and 32). A review of Action 2's docket shows that there has been no preliminary conference and a request for judicial intervention has not even been filed.

Neither Riverbank nor the Joesters oppose Plaintiff's motion. Rather, non-party Poler opposes because the two actions "do not share any common issues of law or fact" and "Poler would be severely prejudiced by a joint trial." (NYSCEF Doc. 21 at ¶ 4). Poler claims it is prejudiced because it would incur further costs by having to review documents and testimony in connection with both actions even though Poler is not involved in Action 1 (*id.* at ¶ 8). Poler also speculates that joining the actions for trial will delay resolution of Action 2 (*id.* at ¶ 9). Poler also claims that jurors will hear evidence relating to both accidents in tandem and may impute the 2018 incident and damages to Poler (*id.* at ¶ 10).

The Court finds Poler's opposition to be without merit. First, there are a multitude of common issues of law or fact, since both leaks are alleged to stem from the same apartment occupied by the same tenants and owned by the same landlord. Moreover, the negligence of Riverbank and the Joester's in their maintenance of Apartment PHA and the roof is at issue in both actions. As such, the commonalities involve two highly interrelated injuries, and therefore a joint trial is warranted (*Witherspoon v New York City Housing Authority*, 238 AD2d 276 [1st Dept 1997]) Furthermore, most of the witnesses in both actions will be identical, which militates in favor of ordering a joint trial (*David Vogel, Inc. v Spraker*, 12 AD2d 744, 744 [1st Dept 1961]).

Poler's fear that jurors will impute the 2018 incident and damages to Poler runs contrary to precedent (*Morell v Basa*, 300 AD2d 134, 135, [1st Dept 2002]; *see also Kuperferschmid v Hennessy*, 221 AD2d 225, 226 [1st Dept 1995] quoting *Gage v Travel Time & Tide, Inc.*, 161 AD2d 276 [1st Dept 1990] ["One jury hearing all the evidence can better determine the extent to

which each defendant caused plaintiff's injuries and should eliminate the possibility of inconsistent verdicts which might result from separate trials"). Further, contrary to Poler's speculative assertion that it would be prejudiced by having to review additional documents and testimony related to the 2018 incident, these additional documents may equally contain relevant information to defenses asserted by Poler in Action 2. Finally, Poler's claim that resolution will be delayed is not a particularized showing of prejudice which warrants denial of Plaintiff's motion (*Witherspoon v New York City Housing Authority*, 238 AD2d 276, 276 [1st Dept 1997]). This holds especially true as Poler has not shown any impediment which would prevent it from settling claims against it separately from the other named Defendants.

Accordingly, it is hereby,

ORDERED that the motion of Plaintiff AIG Property Casualty Company A/S/O Elliot Cuker is granted and the above-captioned action shall be jointly tried with AIG Property Casualty Company A/S/O Elliot Cuker and Noeline Cuker v Riverbank Apartment Corp., Debra Joester, Stephen Joester and Poler Contracting, Inc., Index No. 152551/2022, pending in this court; and it is further

ORDERED that, within 30 days from entry of this order, counsel for plaintiff in AIG Property Casualty Company A/S/O Elliot Cuker and Noeline Cuker v. Riverbank Apartment Corp., Debra Joester, Stephen Joester and Poler Contracting, Inc., Index No. 152551/2022, shall file with the General Clerk's Office a copy of this order with notice of entry, together with, if a Request for Judicial Intervention ("RJI") has not yet been filed in that action, an RJI and shall pay the fee therefor, and the Clerk of the General Clerk's Office shall assign said action to the undersigned or reassign such action to the undersigned, as the case may be; and it is further

ORDERED that, upon payment of the appropriate calendar fees and the filing of notes of issue and certificates of readiness with the General Clerk's Office in each of the above actions, the Clerk of the General Clerk's Office shall place the aforesaid actions upon the trial calendar for a joint trial before the undersigned or other Justice of this court; and it is further

ORDERED that in both actions such filing with the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that on or before February 15, 2023, the parties in both actions shall provide the Court with a proposed preliminary conference order via e-mail to SFC-Part33-Clerk@nycourts.gov ; and it is further

ORDERED that in the event the parties in both actions are unable to agree to a proposed preliminary conference order, that the parties are directed to appear for a preliminary conference on February 22, 2023 at 9:30 a.m. at 60 Centre St., New York, New York, 1007 at 9:30 a.m; and it is further

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ORDERED that within ten (10) days of entry of this Decision and Order, counsel for Plaintiff shall serve a copy of this Decision and Order with notice of entry on all parties to both actions; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

1/10/2023
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | |
| | <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | | FIDUCIARY APPOINTMENT | <input type="checkbox"/> |
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| | | | | | REFERENCE |