

**Long Is. Pipe Supply Inc. v RCI Plumbing Corp.**

2023 NY Slip Op 31251(U)

April 19, 2023

Supreme Court, New York County

Docket Number: Index No. 151715/2020

Judge: Debra A. James

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DEBRA A. JAMES PART 59**

*Justice*

-----X

LONG ISLAND PIPE SUPPLY INC.,

Plaintiff,

- v -

RCI PLUMBING CORP., SURETEC INSURANCE  
COMPANY, and ATLANTIC SPECIALTY INSURANCE  
COMPANY,

Defendant.

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INDEX NO. 151715/2020

MOTION DATE 04/19/2023

MOTION SEQ. NO. 001 002 003  
004 005

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30

were read on this motion to/for STRIKE AFFIRMATIVE DEFENSE.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 33, 34, 35, 36, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for MODIFY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for ATTORNEY - RELIEVE.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion pursuant to CPLR § 602 of plaintiff  
to join this action with Long Island Pipe Supply Inc v RCI  
Plumbing Corp, Supreme New York County Index No 151716/2020 and

Long Island Supply Inc v RCI Plumbing, Index No. 151717/2020

(motion sequence number 001) is DENIED; and it is further

ORDERED that to the extent that plaintiff seeks a preliminary conference order (motion sequence number 002), the motion of plaintiff is GRANTED, without opposition, and counsel are directed to post on NYSCEF a proposed preliminary discovery conference order or competing proposed preliminary discovery conference order(s) at least two days before June 22, 2023, on which date counsel are directed to appear via Microsoft Teams, unless such appearance be waived by the court; and it is further

ORDERED that to the extent that it seeks to dismiss defendant RCI Plumbing Corporation's answer for failure to produce discovery (motion sequence number 002), such motion is DENIED; and it is further

ORDERED that the cross motion pursuant to CPLR 3211(a) of defendant RCI Plumbing Corp. for summary judgment (motion sequence number 003) is DENIED; and it is further

ORDERED that, upon further deliberation, the court's ruling during oral argument is vacated, and to the extent that it seeks to amend the complaint to substitute the name of "RCI PLBG Inc." for "RCI Plumbing Corp.", as defendant, the motion of plaintiff to amend its complaint pursuant to CPLR 305(c) (motion sequence number 003) is DENIED; and it is further

ORDERED that, to the extent that it seeks to amend the complaint to delete the sixteenth through twentieth cases of action, to add a claim for trust fund accounting and diversion of trust funds pursuant to New York Lien Law relating to each of the five remaining construction projects that are subject of the herein action and other technical changes set forth in the red-lined proposed amended complaint appended to the papers (motion sequence number 003), the motion of plaintiff is GRANTED; and it is further

ORDERED that defendants shall post on NYSCEF an amended answer to the amended complaint on or before June 16, 2023; and it is further

ORDERED that the motion of plaintiff to amend its Notice of Mechanic's Lien filed against real property known as

- (1) 250 Fifth Avenue, New York, New York, Block 00830, Lot 0037;
- (2) 42 Trinity Place, New York, New York 10006, Block 00019, Lot 0013;
- (3) 566 Gulf Avenue, Staten Island, New York, New York 10314, Block 01760, Lot 0025;
- (4) 34-12 36<sup>th</sup> Street, Astoria, New York, New York 11106, Block 00643, Lot 0001; and
- (5) 36-02 34<sup>th</sup> Avenue, Astoria, New York, New York 11101, Block 00644, Lot 0028,

each to correct the misdescription of the party to whom it furnished goods and materials from RCI Plumbing Corp. to RCI PLBG INC. (motion sequence number 004), is GRANTED, without opposition; and it is further

ORDERED that the motion of Stephen Holihan, Esq., the law office of Holihan & Associates, to be relieved as attorney for defendant RCI Plumbing Corp. (motion sequence number 005) is GRANTED, without opposition, upon filing of proof of compliance with the following conditions; and it is further

ORDERED that, within ten (10) days from entry, such attorney shall serve a copy of this order with notice of entry upon the former client at its last known address by regular first class mail, and upon the attorneys for all other parties appearing herein by posting to the New York State Courts Electronic Filing System; and it is further

ORDERED that, together with the copy of this order with notice of entry served upon the former client, moving counsel shall forward a notice directing the former client to appoint a substitute attorney within thirty (30) days from the date of the mailing of the notice and the client shall comply therewith; and it is further

ORDERED that any new attorney retained by defendant RCI Plumbing Corp. shall file a notice of appearance with the Clerk of the General Clerk's Office and the Clerk of the Part within forty

(40) days from the date the notice to retain new counsel is mailed; and it is further

ORDERED that no further proceedings may be taken against the former client without leave of this court for a period of forty (40) days after service on the former client of the aforesaid notice to appoint a substitute attorney; and it is further

ORDERED that the departing attorney shall, within ten (10) days from entry, serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office, the filing of a notice of appearance as provided herein, and the filing of papers as aforesaid 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.

#### DECISION

This court agrees with defendant RCI Plumbing Corp. that the herein action shouldnot be joined for discovery and trial with the subsequent actions by plaintiff against real property owners who are not parties to this action and which actions involve contracts that are separate and apart from the contract that is subject of the herein action. See JM Mechanical Corp v Washington Federal Savings and Loan Association, 80 AD2d 884 (2<sup>nd</sup> Dept 1981). Unlike in Matter of Grynberg v BP Exploration

Operating Co, Ltd, 127 AD3d 553 (1<sup>st</sup> Dept 2015), cited by plaintiff, there is no danger of inconsistent rulings among these actions, in which there is no overlapping proof.

With regard to plaintiff's motion to strike defendant RCI Plumbing Corp's motion for such defendant's failure to disclose, see 22 NYCRR §202.12(h).

Following oral argument on today, this court has further deliberated with respect to plaintiff's motion seeking to substitute as defendant, "RCI PLBG Inc" for "RCI Plumbing Corp", the latter, an allegedly misnamed entity. Upon such further deliberations, this court agrees with defendant RCI Plumbing Corp, who, by submitting irrefutable documentary evidence, has established that RCI PLBG Inc., is a corporate entity, separate and apart from defendant RCI Plumbing Corp. Therefore, as argued by defendant RCI Plumbing Corp, plaintiff has failed to establish that such proposed additional defendant was properly served. See Smith v Garo Enterprises, Inc., 60 AD3d 751, 752 (2d Dept 2009):

([t]his is not a case where a party is misnamed. . . rather it is a case where plaintiff seeks to add or substitute a party defendant. The plaintiff failed to establish that [such corporation] was properly served. Having failed to establish that the proposed additional defendant[] [was] properly serviced, the plaintiff was not entitled to relief [it] sought pursuant to CPLR 305© or CPLR 3025).

With respect to the cross motion of defendant RCI Plumbing Corp for summary judgment pursuant to CPLR 3212, this court must deny such motion as such defendant submits no affidavit of a

person with knowledge attesting to the proposition that plaintiff provided no goods or materials to such defendant, and therefore, even without opposition from plaintiff, has not prima facie established its entitlement to summary judgment relief. The affirmation of its attorney, as the unverified answer, has no probative value as to same. See Simpson v Term Industries, Inc, 126 AD2d 484, 485 (1<sup>st</sup> Dept 1987).

*Debra A. James*

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4/19/2023

DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE