

Astacio v Riverside 1795 Assoc., LLC

2023 NY Slip Op 34015(U)

November 13, 2023

Supreme Court, New York County

Docket Number: Index No. 159165/2020

Judge: Judy H. Kim

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JUDY H. KIM PART **05RCP**

Justice

-----X

JULIO ASTACIO,

Plaintiff,

- v -

RIVERSIDE 1795 ASSOCIATES, LLC, EDUARDO
JIMENEZ, HENSHAW REALTY LLC, THE CITY OF NEW
YORK,

Defendant.

-----X

INDEX NO. 159165/2020
MOTION DATE 08/02/2023
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46 were read on this motion to CONSOLIDATE/JOIN FOR TRIAL.

On October 28, 2020, plaintiff commenced this action alleging that on February 26, 2020, he slipped and fell on the sidewalk abutting 11 Henshaw Street and 13 Henshaw Street, New York, New York (NYSCEF Doc. 1 [Compl. at ¶¶6-7]). Plaintiff asserted negligence claims against defendants: (i) Riverside 1795 Associates, LLC (the alleged owner of 11 Henshaw Street); (ii) Henshaw Realty LLC (the alleged owner of 13 Henshaw Street); (iii) Eduardo Jimenez d/b/a Stellar Management (“Stellar”), the property manager for Riverside 1795 Associates, LLC; and (iv) the City of New York (*Id.*). On January 26, 2021, Riverside and Jimenez interposed an answer (NYSCEF Doc. No. 13).

On March 10, 2022, plaintiff commenced a separate action entitled Julio Astacio v La Marina Parking LLC and Henshaw Realty LLC, in the Supreme Court of New York, Bronx County under index number 803750/2022E (the “Bronx Action”), arising out of the same accident. As pertinent here, plaintiff alleged in the Bronx Action that his February 26, 2020 slip and fall

occurred on the sidewalk abutting “284 Dyckman Street a/k/a 13-19 Henshaw Street” (NYSCEF Doc. No. 29 [Compl. at ¶6]).

On July 27, 2022 Riverside and Jimenez served a 90-Day Notice on plaintiff by certified mail, return receipt requested, demanding that plaintiff resume prosecution of the instant action, comply with outstanding discovery, and file a note of issue within ninety days of receipt of the demand (See NYSCEF Doc. 43). Plaintiff did not comply with these demands but instead filed the instant motion to consolidate the Bronx action within the instant action. Plaintiff argues that consolidation is appropriate because both actions arise from the same accident and involve common questions of law and fact.

Riverside and Jimenez oppose plaintiff’s motion and cross-move, pursuant to CPLR §§3211(a)(1) and 3216, to dismiss this action. In support of their cross-motion, Riverside and Jimenez submit a 1998 deed (the “Deed”) transferring title of 284 Dyckman Street from non-parties Jonathan Krantz, Carolyn Krantz, and Natalie Krantz as Trustees Under the Will of Paul Krants, and Jonathan Krantz, James Krantz, and Carolyn Krantz, individually, to Henshaw Realty LLC (See NYSCEF Doc. No. 42), as well as an affidavit from Jimenez, attesting that Riverside and Jimenez did not own, operate, manage, maintain, or control either 11 or 13 Henshaw Street (NYSCEF Doc. No. 36 [Jimenez Aff. at ¶¶3-4]). They also submit the 90 Day Notice and an affidavit of service attesting to the service of same on plaintiff (See NYSCEF Doc. Nos. 43 and 44).

Plaintiff does not oppose this cross-motion.

DISCUSSION

Plaintiff's motion to consolidate the Bronx Action within the instant action is granted. "Consolidation is generally favored in the interest of judicial economy ... where cases present common questions of law and fact, unless the party opposing the motion demonstrates that a consolidation will prejudice a substantial right" (Raboy v McCrory Corp, 210 AD2d 145 [1st Dept 1994] quoting Amtorg Trading Corp v Broadway & 56th St Assoc, 191 AD2d 212, 213 [1st Dept 1993]). Here, the Bronx Action and the instant action arise from plaintiff's February 27, 2020 slip and fall and present common questions of law and fact. Moreover, "[w]here two actions involving identical issues are pending in separate counties, the actions should be consolidated pursuant to CPLR §602 in the county where the first action was commenced absent special circumstances" (Laureano v Rand, 2019 NY Slip Op 33440[U] [Sup Ct, New York County 2019] quoting Harrison v Harrison, 16 AD3d 206, 207 [1st Dept 2005]). As this action was commenced prior to the Bronx Action and the accident at issue occurred in New York County, the Court exercises its power pursuant to CPLR §510 and changes the venue of the Bronx Action to New York County and consolidates the Bronx Action within the instant action.

That branch of Riverside and Jimenez's cross-motion to dismiss plaintiff's complaint is granted, without opposition, pursuant to CPLR §3216¹—it is undisputed that over one year has passed since joinder and that Riverside and Stellar duly served plaintiff with the 90-Day Notice to which plaintiff failed to timely respond (CPLR §3216[b]).

¹ Riverside and Jimenez's submissions do not establish that dismissal under CPLR §3211(a)(1) is warranted. The Deed establishes that they did not own 284 Dyckman Street (which, accordingly to plaintiff, encompasses 13-19 Henshaw Street), but is insufficient to establish that they did not own, manage, or control 11 Henshaw Street. Jimenez's affidavit is also insufficient to do so, as it is not documentary evidence appropriate for consideration on a CPLR §3211(a)(1) motion.

Accordingly, it is

ORDERED that the cross-motion by Riverside 1795 Associates LLC and Eduardo Jimenez d/b/a Stellar Management to dismiss the complaint as against then is granted and the complaint is dismissed as against these defendants; and it is further

ORDERED that plaintiff's motion is granted and the action entitled Julio Astacio v La Marina Parking LLC and Henshaw Realty LLC, pending in the Supreme Court of New York, Bronx County under index number 803750/2022E, shall be transferred to New York State Supreme Court, New York County and, upon such transfer, consolidated within the instant action; and it is further

ORDERED that the consolidation shall take place under New York County index number 159165/2020 and the consolidated action shall bear the following caption:

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

-----X
JULIO ASTACIO,

Index No.: 159165/2020

Plaintiffs,

-against-

HENSHAW REALTY LLC,
THE CITY OF NEW YORK, and
LA MARIANA PARKING LLC

Defendants.
-----X

and it is further

ORDERED that, within thirty days from the date of this decision and order, counsel for plaintiff shall serve a certified copy of this order upon the Clerk of the Supreme Court, Bronx County, and shall pay the appropriate fee, if any, for such transfer and shall contact the staff of said Clerk to arrange for the effectuation of the transfer in an efficient manner; and it is further

ORDERED that service upon the Clerk of the Supreme Court, Bronx County shall be made in accordance with any applicable protocol or other procedures of said county; and it is further

ORDERED that the Clerk of the Supreme Court, Bronx County shall transfer the documents on file in Julio Astacio v La Marina Parking LLC and Henshaw Realty LLC under index number 803750/2022E to the Clerk of the Court of the Supreme Court, New York County, for the purpose of consolidation; and it is further

ORDERED that the Clerk of the Supreme Court, Bronx County and the Clerk of this Court shall coordinate the transfer of the documents being transferred so as to ensure an efficient transfer and to minimize insofar as practical the reproduction of such documents, including with regard to any documents that may be in digital format; and it is further

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

ORDERED that, within ten days from entry of this order, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, on the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who shall consolidate the documents in the actions hereby consolidated and shall mark their records to reflect the consolidation; and it is further

ORDERED that, within ten days from the date of this decision and order, plaintiff shall serve a copy of this decision and order, with notice of entry, on all defendants herein and in the Bronx Action within fifteen days of the date of this decision and order; and it is further

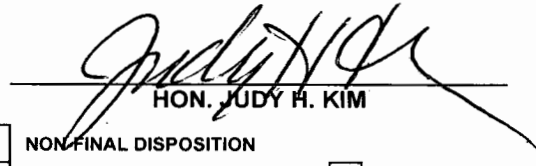
ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on*

Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on this court's website at the address www.nycourts.gov/supctmanh); and it is further

This constitutes the decision and order of the Court.

11/13/2023

DATE


HON. JUDY H. KIM

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