

New Ninth Ave. Corp. v Kookmin Best Ins. Co., Ltd.

2025 NY Slip Op 32292(U)

June 23, 2025

Supreme Court, New York County

Docket Number: Index No. 653980/2021

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M

Justice

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NEW NINTH AVENUE CORP.,

Plaintiff,

INDEX NO. 653980/2021

MOTION DATE 05/30/2025

MOTION SEQ. NO. 003

- v -

KOOKMIN BEST INSURANCE CO., LTD., ZIEGLER
BROKERAGE, LLC, 855-857 NINTH AVENUE CORP., ERIC
ABT,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108

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

Upon the foregoing documents, defendant’s motion is denied.

Background

New Ninth Avenue Corp. (“New Ninth”) is a cooperative corporation that owns an apartment building on Ninth Avenue with 33 units. Part of the House Rules forbade the listing of a unit for short-term occupancy, such as AirBnb listing, and required that all subtenants apply to the Board of Directors. 855-857 Ninth Avenue Corp. (“855-857 Ninth”) owns the shares attributable to Unit 3A, which it was renting to Eric Abt. In October of 2017, New Ninth became aware that Mr. Abt was listing Unit 3A on Airbnb and other short-term rental websites. They wrote to 855-857 Ninth requesting that Mr. Abt be evicted for breaking the House rules. No eviction action was taken.

In 2020, Mr. Abt rented Unit 3A to Michael Hannant through AirBnb for the months of August and September. The unit had allegedly been improperly outfitted as a two-bedroom unit with unsafe partitions and locking doors. During this time, New Ninth was carrying certain

insurance policies on the Ninth Avenue premises, which included risk of loss by fire. On the morning of September 4, 2020, a person invited to the unit by Mr. Hannant appears to have used an accelerant and lighter to set the unit on fire. The resulting blaze claimed the life of Mr. Hannant and caused extensive damage to Unit 3A and common areas in the building. New Ninth submitted a claim to their insurance company Kookmin Best Insurance Co., Ltd. (“KBIC”) for the fire damage. The claim was denied on the basis that the application prepared by New Ninth’s broker, Ziegler Brokerage LLC, contained material misrepresentations.

The Procedural Background

There were three lawsuits filed as a result of the series of events outlined above. The first is a suit brought by New Ninth in June of 2021 against KBIC, Ziegler, 855-857 Ninth, and Mr. Abt (the “Insurance Coverage Action”). In this suit, New Ninth is asserting claims of negligence and breach of contract relating to the denial of insurance coverage and the refusal to evict Mr. Abt. The second proceeding is a wrongful death action brought by Mr. Hannant’s parents against Mr. Abt, New Ninth and their Board, 855-857 Ninth and the company’s owner, Airbnb, and two property management companies for the apartment building (the “Wrongful Death Action”). Finally, Certain Underwriters at Lloyd’s brought a subrogee action on behalf of 855-857 Ninth against Mr. Abt and Airbnb (the “Subrogee Action”). This action had claims for breach of contract and negligence, seeking to recover monies paid out by the unit owner and tenant as a result of the fire.

Discussion

Mr. Abt brings the present motion to consolidate all three actions. He argues that because there are common issues of fact for the three proceedings, as they all involve the listing of the unit on AirBnb and the September fire, consolidation would avoid unnecessary duplication and

save on costs and expenses. The motion has been opposed by the plaintiffs in the Wrongful Death Action and the other defendants in the Insurance Coverage Action. Their arguments are largely that Mr. Abt failed to make a showing that consolidation would be proper, and that the differences between the legal issues, parties, and the litigation stages of the different proceedings would cause unnecessary confusion and prejudice if the actions were consolidated. For the reasons given below, the motion to consolidate is denied.

The Consolidation Standard

CPLR § 602(a) allows a court to consolidate pending proceedings that concern “a common question of law or fact.” Consolidation would be proper “where it will avoid unnecessary duplication of trials, save unnecessary costs and expense and prevent the injustice which would result from divergent decisions based on the same facts.” *Chinatown Apartments, Inc. v. New York City Transit Authority*, 100 A.D.2d 824, 825 [1st Dept. 1984]. Although the decision lies in the motion court’s discretion, there is a preference for consolidation when there are “common questions of law *and* fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right.” *Kukielka v. Santana*, 191 A.D.3d 532, 532 – 33 [1st Dept. 2021] (emphasis added). Further reasons for denying a motion to consolidate include if there are “dissimilar issues or disparate legal theories” or if the consolidation would “pose a risk of confusing the jury or rendering the litigation unwieldy.” *Cromwell v. CRP 482 Riverdale Ave., LLC*, 163 A.D.3d 626, 627 – 28 [2nd Dept. 2018].

The Legal and Factual Issues Here Are Dissimilar

One reason why consolidation of these three actions would not be appropriate is that they involve dissimilar legal issues. While there are some common factual questions to all three actions, the legal nexus between the actions is more attenuated. For example, the Wrongful

Death Action involves issues of tort law, whereas the Subrogee Action and the Insurance Coverage Action involve questions of breach of contract and insurance coverage. In the Insurance Coverage Action, the legal issues include professional negligence, vicarious liability, and the extent of insurance coverage. The Subrogee Action includes the issue of whether AirBnb would be liable for payments made by the unit owner due to representations made in their marketing. The Wrongful Death Action involves tort legal issues cause by Housing Code violations. The First Department has held that “[w]here one action sounds in negligence, and the other in contract, it is inappropriate to grant consolidation.” *Heydt Contracting Corp. v. Tishman Constr. Corp.*, 163 A.D.2d 196, 197 [1st Dept. 1990].

Additionally, while all three actions can be said to draw from the same factual pool, so to speak, which set of facts are material and which parties are involved (other than the common thread of Mr. Abt) differs between the actions. The Insurance Coverage Action is concerned with the fire damage to the building common areas and the insurance coverage carried by the building owner. The Wrongful Death Action is focused largely on the conditions within Unit 3A that allegedly led to Mr. Hannant’s injuries. The Subrogee Action alleges that AirBnb and Mr. Abt should be liable for the payments that the unit owner made in connection to the fire. The factual issues that are material to each proceeding overlap but are not identical.

Consolidation Would Prejudice Some of the Parties’ Rights

KBIC argues that it would be prejudicial to bring the issue of insurance coverage into an action that involves issues of personal injury. The Second Department has held that “it is inherently prejudicial to insurers to have the issue of insurance coverage tried before the jury that considers the underlying liability claims, even where common questions of law and fact exist.” *Hershfeld v. JM Woodworth Risk Retention Group, Inc.*, 164 A.D.3d 1423, 1425 [2nd Dept.

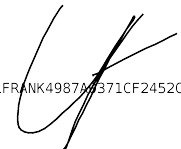
2018]; *see also McGinty v. Structure-Tone*, 140 A.D.3d 465, 466 [1st Dept. 2016] (holding that “litigating an insurance coverage claim together with the underlying liability issues is inherently prejudicial to the insurer”). The insurers in these actions would be prejudiced by consolidation, particularly given the addition of the Wrongful Death Action. Additionally, adding the issue of liability for a person’s death could unfairly prejudice the jury against other parties in the consolidated action who are also defendants but not being charged with liability for Mr. Hannant’s death. Mr. Abt argues that the use of tools such as limiting instructions can mitigate the prejudice to the other parties arising from consolidation. But given the specific circumstances here and given the other problems with meeting the standard for consolidation, the Court does not find that consolidation with limiting instructions would be proper.

Consolidation Would Risk Confusing the Jury

There is also the issue of whether consolidation of the three proceedings would run the risk of causing unnecessary confusion for the jury. In *Catlett*, the Second Department held that a joint trial of a personal injury action and a property damage/business loss action, despite both arising from the same fire, would not be proper as it “may prove unwieldy and could result in jury confusion.” *Catlett v. Szechuan Gourmet*, 211 A.D.3d 796, 798 [2nd Dept. 2022]. Here there are three actions, one for personal injury, one for insurance coverage, and one for subrogee damage recovery. Consolidating these would risk an unwieldy action that causes unnecessary confusion for the jury as to which party is liable for what under which legal theory. Further areas of unnecessary confusion for the jury include the fact that several parties are plaintiff in one action but defendant in another, that there are multiple contracts between multiple parties with multiple types of breaches alleged, and that there are different burdens of proof involved for different claims against the same party. Accordingly, it is hereby

ADJUDGED that the motion to consolidate is denied.

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6/23/2025
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: