

**350 E. Houston St., LLC v Travelers Indem. Co. of
Am.**

2025 NY Slip Op 34569(U)

November 25, 2025

Supreme Court, New York County

Docket Number: Index No. 650450/2018

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC PART 36

Justice

-----X

INDEX NO. 650450/2018

350 EAST HOUSTON STREET, LLC
and BERKELEY INSURANCE COMPANY,
Plaintiffs,

MOTION SEQ. NO. 012

- v -

TRAVELERS INDEMNITY COMPANY OF AMERICA,
TEMPLE INSURANCE COMPANY, COPPS FOUNDATIONS
INC., and PETERSON GEOTECHNICAL CONSTRUCTION
LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

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COPPS FOUNDATIONS INC.,
Third-Party Plaintiff,

Third-Party
Index No. 595847/2019

-against-

NOBLE CONSTRUCTION GROUP,
LLC,
Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 012) 478, 479, 480, 481, 482, 483, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494

were read on this motion to/for

CONSOLIDATE/JOIN FOR TRIAL

Defendant Copps Foundations, Inc. (“Copps”) moves, pursuant to CPLR 602, to consolidate the present action (“Action No. 1”) with another action captioned *Copps Foundations Inc. v 350 East Houston LLC*, Sup Ct, NY County, Index No. 159324/2021 (“Action No. 2”), or in the alternative, for joint trial.

The facts underlying this matter were set forth in prior decisions and orders of this court, with which familiarity is presumed. Briefly, this action arises out of a construction project located at 11 Avenue C, New York, New York 10009 (the, “Property”) owned by plaintiff 350 East Houston Street, LLC (“Houston”) (NYSCEF Doc. No. 482, *Wojak affirmation, exhibit C*, ¶ 8). Houston hired third-party defendant Noble Construction Group, LLC (“Noble”) as its construction manager for the project (*id.*, ¶ 9). Noble retained Copps pursuant to a trade contract (the, “Copps Contract”) to perform excavation work, and Copps subcontracted a portion of its work to defendant Peterson Geotechnical Construction LLC (“Peterson”) (*id.*, ¶¶ 10 and 18). Defendants Travelers Indemnity Company of America (“Travelers”) issued a commercial general liability insurance policy to Copps (the, “Travelers Policy”), and Temple Insurance Company (“Temple”) issued an umbrella liability insurance policy to Copps (the, “Temple Policy”) (*id.*, ¶¶ 14 and 16).

On March 21, 2017, excavation work on the project damaged the foundation of an adjacent property located at 249 East Second Street (*id.*, ¶ 27). The owner of that property, non-party 249 East Second Realty, LLC, demanded that Houston repair the damage (*id.*, ¶ 32). Houston alleges that it incurred \$1.2 million in costs to repair the adjacent property and that it will incur \$500,000.00 in additional repair costs (the, “249 Damages”) (*id.*, ¶ 34). Houston further alleges that it sustained more than \$1 million in damages stemming from the need to remediate defective construction work performed by Copps and Peterson, along with extra costs and delay damages on the project (“Project Damages”) (*id.*, ¶ 31).

In January 2018, Houston and its insurance carrier, plaintiff Berkley Insurance Company (together, plaintiffs), commenced this action against Travelers, Temple, Copps, Peterson and Peterson’s insurance carrier, Axis Insurance Company (“Axis”) (NYSCEF Doc. Nos. 1-2, summons and complaint). The claims against Axis have been dismissed (NYSCEF Doc. No. 77, *Decision and Order on Mot. Seq. Nos. 001-003*). As against the remaining defendants, the amended complaint pleaded causes of action for a declaratory judgment against Travelers and Temple related to the Travelers and Temple Policies (first); breach of contract against Travelers (second); a judgment declaring that Copps is obligated to pay the 249 Damages and the Project Damages (fifth); breach of contract against Copps (sixth); negligence against Copps (seventh); and negligence against Peterson (tenth)¹ (NYSCEF Doc. No. 482, ¶¶ 44-57, 70-85 and 102-104). In October 2019, Copps commenced a third-party action against Noble for contribution and indemnification (NYSCEF Doc. No. 127, *third-party summons and complaint*).

After plaintiffs filed a note of issue and certificate of readiness on June 16, 2023 (NYSCEF Doc. No. 198, *note of issue*), plaintiffs Copps and Temple moved for summary judgment in the main action, Travelers cross-moved to sever the insurance coverage claims from plaintiffs’ liability claims, and Noble moved for summary judgment in the third-party action. The amended complaint against Temple and the third-party complaint against Noble were dismissed (NYSCEF Doc. Nos. 462-463, *Decisions and Orders on Mot. Seq. Nos. 009 and 010*). Plaintiffs’ motion on its first and fifth causes of action for a declaratory judgment against Travelers and Copps, respectively, was granted, and the balance of the motion was denied or denied as moot (NYSCEF Doc. No. 460, *Decision and Order on Mot. Seq. No. 007*). Travelers’ cross-motion to sever was denied (*id.*). Copps’ motion for summary judgment dismissing the amended complaint was denied (NYSCEF Doc. No. 461, *Decision and Order on Mot. Seq. No. 008*). Plaintiffs and Copps have filed notices of appeal (NYSCEF Doc. Nos. 472-476, *Notices of Appeal*).

On October 12, 2021, Copps commenced Action No. 2 against Houston and Noble for breach of contract, alleging that Noble failed to pay it for its work on the Project, and to foreclose on a mechanic’s lien (NYSCEF Doc. No. 480, *Wojak affirmation, exhibit A, ¶ 11 and 29*). A review of the documents filed on NYSCEF shows that Houston served an answer to the complaint (NYSCEF Doc. No. 9, *Houston answer, in Action No. 2*). Copps served Noble with process via the Secretary of State on February 8, 2022 (NYSCEF Doc. No. 12, *affidavit of service in Action No. 2*), but it does not appear that Noble has answered.

¹ The seventh cause of action for a declaratory judgment and the eight cause of action for breach of contract asserted against Peterson were dismissed (NYSCEF Doc. No. 77).

Copps now moves to consolidate the two pending actions. Copps argues that common questions of law and fact exist, there is no prejudice to a substantial right to any party, and consolidation would avoid potentially inconsistent judgments.

Plaintiffs counter that the motion should be denied on two grounds. First, consolidation will substantially prejudice their rights in Action No. 1 as each action is at a significantly different procedural stage. Second, both actions involve distinct legal and liability issues and involve different parties. Action No. 1 concerns a declaration of insurance coverage whereas Action No. 2 concerns a mechanic's lien. Moreover, that fact that Copps is a defendant in one action and a plaintiff in the other can cause jury confusion.

Copps responds that plaintiffs have failed to demonstrate any substantial prejudice to their rights that would warrant denial of its motion.

CPLR 602(a) provides that the court may consolidate two pending actions that involve “common question of law or fact” and “to avoid unnecessary costs or delay.” Thus, “joining cases together is designed to ‘reduce the cost of litigation, make more economical use of the trial court’s time, and speed the disposition of cases’” (*Matter of New York City Asbestos Litig.*, 121 AD3d 230, 242 [1st Dept 2014], *affd* 27 NY3d 1172 [2016]; see also *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 74 [1st Dept 2002]), quoting *Chinatown Apts., Inc. v New York City Tr. Auth.*, 100 AD2d 824, 825 [1st Dept 1984] [stating that “[c]onsolidation of actions is appropriate ‘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’”]). Consolidation, however, is not appropriate “where the actions involve dissimilar issues or disparate legal theories, or where a joint trial would substantially prejudice an opposing party or pose a risk of confusing the jury or rendering the litigation unwieldy” (*HSBC Bank USA, N.A. v Francis*, 214 AD3d 58, 63 [2d Dept 2023] [internal quotation marks and citation omitted]). The party opposing consolidation bears the burden of demonstrating that consolidation will prejudice a substantial right (*Vanguard Constr. & Dev. Co., Inc. v 400 Times Sq. Assoc., LLC*, 237 AD3d 488, 491 [1st Dept 2025]).

The parties do not dispute that the claims in both actions arise out of the excavation work performed on the same project. Nevertheless, Copps’ motion to consolidate Action Nos. 1 and 2 is denied. First, the two actions “are at markedly different procedural stages and consolidation would result in undue delay in the resolution of either matter” (*L.B. v Stahl York Ave. Co.*, 188 AD3d 421, 422 [1st Dept 2020]; accord *Abrams v Port. Auth. Trans-Hudson, Corp.*, 1 AD3d 118, 119 [1st Dept 2003]). By filing the note of issue in June 2023, plaintiffs certified that Action No. 1 was ready for trial (see *Maurer v Maurer*, 96 AD3d 417, 418 [1st Dept 2012] [denying motion for consolidation where “one action was ready for trial and the others were not”]). By contrast, no request for judicial intervention has ever been filed in Action No. 2. Indeed, after Copps filed the affidavit attesting to service of process upon Noble, there had been no activity in that action until April 2025, when Houston filed a consent to change attorney form (NYSCEF Doc. No. 14, *consent, in Action No. 2*). It does not appear that Noble has answered or otherwise appeared in Action No. 2, and Copps has never moved for a default judgment. Copps did not file the present motion until April 2025, nearly two years after plaintiffs filed the note of issue in Action No. 1 (see *L.B. v Stahl York Ave. Co.*, 188 AD3d at 422).

Second, both actions involve dissimilar legal theories and principles (*see Kukielka v Santana*, 191 AD3d 532, 533 [1st Dept 2021]; *Liconia-Rubio v New York City Health & Hosps. Corp.*, 219 AD3d 1225, 1226 [1st Dept 2023]; *Fidelity Natl. Tit. Ins. Co. v Altshuler Shaham Provident Funds Ltd.*, 120 AD3d 1135, 1136 [1st Dept 2014], *lv dismissed* 25 NY3d 1036 [2015]). As argued by plaintiffs, Action No. 1 concerns insurance coverage. “[I]t has long been recognized 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 AD3d 1423, 1425 [2d Dept]; *accord McGinty v Structure-Tone*, 140 AD3d 465, 466 [1st Dept 2016]). Action No. 1 also concerns whether Copps and Peterson were negligent in performing the excavation work, whereas Action No. 2 concerns Houston’s alleged breach of contract. “Where one action sounds in negligence and the other in contract, it is inappropriate to grant consolidation.” (*Heydt Contracting Corp. v Tishman Constr. Corp.*, 163 AD2d 196, 197 [1st Dept 1990]). Last, the fact that Copps would be a defendant and a plaintiff if the actions were consolidated will likely result in juror confusion (*see Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 335 [1st Dept 2005]). In the exercise of discretion, the court declines to direct consolidation or a joint trial of Action Nos. 1 and 2. Accordingly, it is hereby

ORDERED that the motion of defendant Copps Foundations, Inc. to consolidate this action with the action captioned *Copps Foundations Inc. v 350 East Houston LLC*, Sup Ct, NY County, Index No. 159324/2021, is denied; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded NYSCEF, counsel for 350 East Houston Street, LLC and Berkeley Insurance Company shall serve a copy of this decision and order, with notice of entry, upon all parties; and it is further

ORDERED that this constitutes the decision and order of this court.

November 25, 2025



 HON. VERNA L. SAUNDERS, JSC

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