



VOJTECH BLAU v. LLOYD SARA AND 615 COMPANY AND BARNET SCHULMAN

609 N.Y.S.2d 515 (1994) | Cited 0 times | New York Supreme Court | February 7, 1994

Stephen G. Crane, J.

This motion for consolidation is denied. The cross motion for a joint trial is granted.

Action No. 1 is already the result of consolidation of two separate actions. Action No. 2, commenced as the statute of limitations period was ending, is the method its plaintiff used to draw in a party it had only just learned of in depositions in Action No. 1.

These claims arise out of a single occurrence, a bursting pipe in the office of Lloyd Sara, DDS, causing property damage to merchandise and other property owned by Vojtech Blau, Inc. ("VBI"). VBI was insured for part of this loss by Hanover Insurance Co. ("Hanover"). Hanover is a plaintiff by way of subrogation. VBI is a plaintiff for its losses in excess of the insurance reimbursement. Another loss was caused by the same flooding to Mark Lemchen insured by Maryland Casualty Co. ("Maryland") which sues as his subrogee. Defendant Barnet Schulman in Action No. 1 was never served, and it is unclear on the papers what role 615 Company played. The court speculates that it was an owner or manager of the building. Hydraulic Plumbing & Heating Corp. ("Hydraulic") was the contractor installing a sink in Dr. Sara's office. This activity allegedly caused the incident. In Action No. 2 Hydraulic curiously asserted cross claims against Dr. Sara and 615 Company. Recognizing that they are defendants in the companion action, Hydraulic alleged that those defendants "should stipulate to consolidate and merge these two actions." (Verified Answer of Hydraulic, P17.)

Hydraulic, in opposition to consolidation and in support of its cross motion for a joint trial, claims as the sole aspect of prejudice that, if the actions are consolidated, it will lose the defense of the statute of limitations it now has against claims of VBI in its own right and of Maryland. These plaintiffs were not as alert as Hanover in that they failed to start a separate action against Hydraulic or timely move for leave to amend their complaint to bring Hydraulic in as a defendant. Thus, their claims against Hydraulic are now barred.

CPLR 602 (a) prescribes:

"Where actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."



VOJTECH BLAU v. LLOYD SARA AND 615 COMPANY AND BARNET SCHULMAN

609 N.Y.S.2d 515 (1994) | Cited 0 times | New York Supreme Court | February 7, 1994

Consolidation fuses two or more actions into a single, organic lawsuit. Joint trial, on the other hand, maintains the separate character of each action but secures the practical advantage of a single trial of the issues common among them. *Mars Associates v New York City Educational Construction Fund*, 126 A.D.2d 178, 185, 513 N.Y.S.2d 125, appeal dismissed, 70 N.Y.2d 747, 519 N.Y.S.2d 1033, 514 N.E.2d 391; 2 Weinstein-Korn-Miller, NY Civ Prac P602.02. Consolidation will make co-defendants of the defendants in the original, separated actions with the potential for amendments and the assertion of cross claims and counterclaims by them and new causes of action against them by, perhaps, plaintiffs who had not originally sued them. McLaughlin, Practice Commentaries to McKinney's Cons. Laws of NY Book 7B, C602:2 at 182.

The burden is on the party resisting consolidation to demonstrate prejudice. *Vigo S.S. Corp.*, 26 N.Y.2d 157, 161, 309 N.Y.S.2d 165, 257 N.E.2d 624 cert. denied sub nom. *Frederick Snare Corp. v Vigo S.S. Corp.*, 400 U.S. 819, 27 L. Ed. 2d 46, 91 S. Ct. 36. The Appellate Division, Second Department, prefers joint trials over consolidations in the interests of justice and judicial economy. *Megyesi v Automotive Rentals*, 115 A.D.2d 596, 496 N.Y.S.2d 473 and cases cited. Indeed, an example of such a preference is presented by a situation where only one party is common to both actions (*Cola-Rugg Enters. v Consolidated Edison of New York*, 109 A.D.2d 726, 727, 486 N.Y.S.2d 43) or where multiple suits arise from a single tort injuring many people. 2 Weinstein-Korn-Miller, supra, P602.03.

With these broad principles in mind, we may now analyze the claim of Hydraulic that consolidation would prejudice its defense of limitations against potential claims by VBI and Maryland. First, we look at the role such a defense plays in the absence of consolidation.

Hydraulic could be made a third party defendant in Action No. 1. In that event, any plaintiff could amend its complaint to assert a claim directly against Hydraulic. Such a claim would relate back to the date the third party complaint was filed (or served if the third party action was brought under the procedure prior to CPLR 306-b, effective July 1, 1992). *Duffy v Horton Memorial Hospital*, 66 N.Y.2d 473, 478, 497 N.Y.S.2d 890, 488 N.E.2d 820; *Micari v Van Kesteren*, 121 A.D.2d 524, 504 N.Y.S.2d 23; *Cucuzza v Vaccaro*, 109 A.D.2d 101, 103, 490 N.Y.S.2d 518, aff'd 67 N.Y.2d 825, 501 N.Y.S.2d 657, 492 N.E.2d 785. This result is justified on the observation that allowing a plaintiff to amend the complaint to assert a direct claim against the third party defendant would not offend the policies embodied in the statute of limitations where a defendant is already aware of the claim, based on the same transaction or occurrence, previously asserted by another. Thus, it is the notice that a new defendant has within the period of limitations that allows another claim resting on the same transaction or occurrence to relate back under former CPLR 203(e), now CPLR 203(f). See Siegel, NY Prac § 49 at 60 (2d ed. 1991); 1 Weinstein-Korn-Miller, supra, P203.34 at 2-162.

In the case at bar, no third party complaint was filed (or served) to bring Hydraulic into Action No. 1. Therefore, an amendment by any plaintiff in that action to assert a direct claim against Hydraulic would be untimely. In this scenario, then, Hydraulic would retain its limitations defense against VBI and Maryland.



VOJTECH BLAU v. LLOYD SARA AND 615 COMPANY AND BARNET SCHULMAN

609 N.Y.S.2d 515 (1994) | Cited 0 times | New York Supreme Court | February 7, 1994

A second possibility presents itself in the unconsolidated Action No. 1. If Hydraulic is united in interest with Dr. Sara or 615 Company, an amended complaint and supplemental summons could be filed and served on Hydraulic in Action No. 1. Hydraulic will be deemed to have received timely notice because of the same claim asserted against another defendant united in interest with Hydraulic. CPLR 203(c), formerly CPLR 203(b).

By application of this united-in-interest theory, a claim against Hydraulic would relate back to the commencement of Action No. 1. Former CPLR 203(b) now 203(c). To qualify for this treatment, a plaintiff must meet three tests:

"(1) both claims arose out of the same conduct, transaction or occurrence. . . ., (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship he can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits. . . and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well." *Brock v Bua*, 83 A.D.2d 61, 69, 443 N.Y.S.2d 407. See the application of this relation back theory in *Town of Guilderland v Texaco Refining and Marketing*, 159 A.D.2d 829, 552 N.Y.S.2d 704 where the court considered the limitations question in a consolidation context.

The *Brock v Bua* tests have been embraced by the Court of Appeals. *Mondello v New York Blood Center*, 80 N.Y.2d 219, 226, 590 N.Y.S.2d 19, 604 N.E.2d 81.

Applying these tests at bar demonstrates that Hydraulic would still have its limitations defenses against Maryland and VBI. These plaintiffs fail the third test of *Brock v Bua* which requires them to show an excusable mistake in failing to join Hydraulic earlier and that Hydraulic was aware that the action would have been brought against it. There has been no demonstration as well that Hydraulic concealed its role or misled the plaintiffs in any way. 1 *Weinstein-Korn-Miller*, supra, P203.05. This failure obviates the need to determine whether Hydraulic is united in interest with any other defendant in the first instance.¹

Our second examination entails analysis of Hydraulic's defense if the actions are consolidated. As in the impleader situation, as long as Hydraulic had notice of the claim within the period of limitations, another party may assert a claim based on the same transaction or occurrence. *Manti v New York City Transit Authority*, 146 A.D.2d 551, 537 N.Y.S.2d 32 (adding a plaintiff); *Caffaro v Trayna*, 35 N.Y.2d 245, 360 N.Y.S.2d 847, 319 N.E.2d 174 (substituting an executrix and adding a claim of wrongful death to the original negligence action); cf *Alexander*, 1994 Supplemental Practice Commentaries to Book 7B McKinney's Cons. Laws of New York, C203:3 at 21 discussing *Grossman v New York City Health and Hospitals Corp.*, 178 A.D.2d 323, 578 N.Y.S.2d 135 (" . . . Timely commencement of the action against one should suffice to protect those interests of the other that are safeguarded by the statute of limitations, i.e., opportunity for timely investigation of the claim and preparation of a defense. The presence of additional claims is not likely to dilute the relevant



VOJTECH BLAU v. LLOYD SARA AND 615 COMPANY AND BARNET SCHULMAN

609 N.Y.S.2d 515 (1994) | Cited 0 times | New York Supreme Court | February 7, 1994

defensive efforts of the party against whom the action was initially commenced."); see also Siegel, NY Prac, supra § 49 at 60.

Given the liberality with which motions to amend a pleading pursuant to CPLR 3025(b) are granted, it seems clear that consolidation will permit VBI or Maryland to assert their now barred claims against Hydraulic because Hydraulic will be deemed a co-defendant against which Hanover, a co-plaintiff, timely asserted a cause of action based on the identical occurrence. Without consolidation, claims of VBI and Maryland directly against Hydraulic would be barred. Hence, consolidation prejudices Hydraulic.

The curious pleading of Hydraulic virtually demanding consolidation (P17) could be considered a waiver of its objection to consolidation. Yet, Hanover has not relied on this circumstance, and the opportunity remains for Hydraulic to move to amend its pleading to delete this language.

Hanover's argument, to the effect that Action No. 1 resulted from consolidation and a denial of its motion for consolidation of Action No. 2 would be inconsistent is without merit. There was no opposition to the prior consolidation. It was granted on default. No party claimed prejudice. And, Hydraulic was not heard on that prior motion.

Dated: February 7, 1994

Stephen G. Crane

J. S. C.

1. Parties are considered united in interest when they stand or fall together, and judgment against one will affect the other. 1 Weinstein-Korn-Miller, supra, P203.06. This depends on the legal relationship between them. If one is vicariously liable for the negligence of the other, rather than being joint tort feasons, they will be united in interest. Raschel v Rish, 69 N.Y.2d 694, 697, 512 N.Y.S.2d 22, 504 N.E.2d 389; Compare Connell v Hayden, 83 A.D.2d 30, 45, 443 N.Y.S.2d 383 with Ruane v Cooper, 127 A.D.2d 524, 525, 512 N.Y.S.2d 38, appeal dismissed 70 N.Y.2d 693, 518 N.Y.S.2d 1029, 512 N.E.2d 555, and Bari v Wamskau Realty, 99 A.D.2d 710, 711, 472 N.Y.S.2d 4, aff'd, 64 N.Y.2d 684, 485 N.Y.S.2d 527, 474 N.E.2d 1195. See also Mondello v New York Blood Center, 80 N.Y.2d 219, 230, 590 N.Y.S.2d 19, 604 N.E.2d 81. The papers on this motion and cross motion are inadequate to assess the relationship between Hydraulic and any defendant timely sued in Action No. 1.

