40 Misc.3d 1238(A)
Unreported Disposition
(The decision of the Court is referenced in a table in the New York Supplement.)
Supreme Court, Albany County, New York.

STATE OF NEW YORK WORKERS' COMPENSATION BOARD, in its capacity as the governmental agency charged with administration of the Workers' Compensation Law and attendant regulations, and in its capacity as the successor in interest to the New York Healthcare Facilities Workers' Compensation Trust, Plaintiff,

v.

The HAMILTON, WHARTON GROUP, INC., a/k/a The Hamilton Wharton Group, Inc., and Walter B. Taylor, Defendants.

State Of New York Workers' Compensation Board, in its capacity as the governmental agency charged with administration of the Workers' Compensation Law and attendant regulations, and in its capacity as the successor in interest to the New York Healthcare Facilities Workers' Compensation Trust, Plaintiff,

v.

Cathy Madden, Linda Villano, Phyllis Ettinger, Patricia Huber, Rosa Barksdale, Susan Olivet, Elizabeth Rosenberg, Sam Harte, Daniel Mushkin, Timothy Ferguson, Scott Lockwood, Lynn Edmonds, Berenson & Co., LLP, James McGarrity, Lorette Belgraier, Steven Glaser, Defendants. Decision & Order Action No. 2 Index No. 2988–11 (Albany County).

Inter–Community Memorial Hospital of Newfane, Incorporated and Integrated Care Systems, LLC d/b/a Newfane Rehabilitation & Health Care Center, Plaintiffs,

v.

The Hamilton Wharton Group, Inc., Walter B. Taylor, as Managing Director of The New York Health Care Facilities Workers' Compensation Trust and Individually, Cathy Madden, Linda Villano, Phyllis Ettinger, Patricia Huber, Carol Thomas, Rosa Barksdale, Susan Olivet, Sam Harte, Daniel Mushkin, Timothy Ferguson, Jane Doe, John Doe, as Trustees of the New York State Health Care Facilities Workers' Compensation Trust, Matthews, Bartlett & Dedecker, Inc., n/k/a M & T Insurance Agency, Inc., Manufacturers and Traders Trust Company, M & T Bank Corporation, M. Christopher O'Donnell, as agent of Matthews, Bartlett & Dedecker, Inc., n/k/a M & T Insurance Agency, Inc. and Individually, Defendants. Action No. 3 Index No. 133991 (Niagara County).

No. 5–11.
|
Aug. 30, 2013.

Attorneys and Law Firms

Daniel E. Sarzynski, Charles D.J. Case and Matthew Lenahan, Rupp, Baase, Pfalzgraf, Cunninghan & Coppola LLC, Buffalo, for Plaintiffs in Actions Nos. 1 and 2.

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Peter A. Lauricella, Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, Albany, for Cathy Madden, Phyllis Ettinger, Patricia Huber, Elizabeth Rosenberg, Sam Harte, Timothy Ferguson, Lynn Edmonds and Linda Villano.

Louis G. Corsi, Landman Corsi Ballaine & Ford, P.C., New York, for Lorette Belgraier.

David B. Cabaniss, Hiscock & Barclay, LLP, Albany, for Steven Glaser.

Opinion

RICHARD M. PLATKIN, J.

*1 The State of New York, Workers' Compensation Board ("WCB") brings Actions Nos. 1 and 2 in its capacity as the governmental agency charged with the administration of the Workers' Compensation Law and as successor in interest to the New York Healthcare Facilities Workers' Compensation Trust ("the Trust"). Action No. 1 was commenced on June 22, 2011, and Action No. 2 was commenced on September 15, 2011. The suits are

brought against individuals and entities that administered the Trust, served as its trustees and rendered professional services to or on behalf of the Trust. By these actions, the WCB seeks to recover the accumulated deficit of the Trust, estimated at approximately $33 million.

Action No. 3 was commenced on June 27, 2008 by two former employer-members of the Trust: Inter-Community Memorial Hospital of Newfane, Inc. ("Inter-Community") and Integrated Care Systems, LLC ("Integrated"). These plaintiffs seek recovery of, *inter alia,* the assessments that they were required to pay to the WCB as a result of the Trust's accumulated deficit. Among the defendants in Action No. 3 are the two defendants named in Action No. 1 and nine of the former trustees named in Action No. 2 (collectively "Common Defendants").

The WCB now moves to consolidate the three actions and to be substituted as plaintiff in Action No. 3 with respect to the claims asserted against the Common Defendants. The motion is opposed by the plaintiffs in Action No. 3 ("Action No. 3 Plaintiffs") and supported by the defendants in Action No. 1 and most of the former trustees. Additionally, Steven Glaser and Lorette Belgraier, former professional advisors to the Trust who are named as defendants only in Action No. 2, oppose the WCB's motion and cross-move to have the claims against them severed from the other defendants in Action No. 2.

BACKGROUND

The facts underlying Action Nos. 1 and 2 are set forth in *State of N. Y. Workers' Compensation Board v. Madden* (2013 N.Y. Slip Op 50337[U] [March 1, 2013] ["*Madden* "]), which granted in part and denied in part pre-answer motions to dismiss the complaint in Action No. 2. At a preliminary conference held in Action No. 2 on July 8, 2013, a disclosure schedule was established.

Action No. 3 is pending in Supreme Court, Niagara County. On March 16, 2012, the Appellate Division, Fourth Department rejected a challenge to the breach of contract claim alleged therein, reasoning that plaintiffs' "causes of action may contemplate as a component of damages the *pro rata* deficit assessments" (93 AD3d 1176, 1179, [4th Dept 2012]). During the pendency of that appeal, an amended complaint was filed and served alleging a cause of action for implied indemnification. Defendants' motion to dismiss the indemnity claim was denied by Supreme Court (Michalek, J.) on October 12, 2011. Defendants later moved to dismiss the remaining causes of action for lack of standing, but Supreme Court denied the motions in a May 1, 2012 order, concluding that plaintiffs possessed direct claims as former trust members, rather than derivative claims of the Trust. The same order also denied a cross-motion to consolidate the three cases without prejudice to renewal. Under the scheduling orders in Action No. 3 that are part of the present record, party depositions were to be completed by July 31, 2013, and plaintiffs' counsel expects that the case will be trial-ready by year end.

ANALYSIS

A. Substitution

***2** CPLR 1021 provides that "[a] motion for substitution may be made by the successors or representatives of a party or by any party." Substitution is warranted where the party seeking to be substituted as plaintiff is "the assignee of [the current plaintiff's] right, title and interest" in the claim being litigated (*Von Richthofen v. Family M. Found. Ltd.*, 44 AD3d 573, 575 [1st Dept 2007]).

Justice Michalek's order of May 1, 2012 determined that Action No. 3 "is not concerned with the derivative causes of action, only direct claims against defendants which [Supreme Court, Niagara County] and/or the Fourth Department have already passed upon and sustained." This Court considers itself bound by Justice Michalek's rulings in Action No. 3 under the doctrine of "law of the case", which "is designed to eliminate the inefficiency and disorder that would follow if [judges] of coordinate jurisdiction were free to overrule one another in an ongoing case" (*People v. Evans*, 94 N.Y.2d 499, 504 [2000]). Moreover, insofar as the Fourth Department already has passed upon the legal sufficiency of the Action No. 3 Plaintiffs' breach of contract claim, its ruling is binding precedent upon this Court (*see generally Matter of Patrick BB*, 284 A.D.2d 636, 639 [3d Dept 2001]; *Mountain View Coach Lines v. Storms*, 102 A.D.2d 663, 664 [2d Dept 1984]).

Moreover, one of the claims pursued by the Action No. 3 Plaintiffs is a claim for implied indemnity against the Common Defendants. Supreme Court, Niagara County has held that a former member of a group self-insured trust may possess a claim for common law indemnification against the individuals and entities that allegedly contributed to the Trust's deficit. To similar

effect is a recent ruling of the Appellate Division, Third Department (*Murray Bresky Consultants, Ltd v. New York Compensation Manager's, Inc.*, 106 AD3d 1255, 1258–1259 [3d Dept 2013]). However, this Court has held in Action No. 2 that the WCB cannot maintain a cause of action for implied indemnification in its capacity as successor in interest to the Trust or as the government agency charged with administration of the Workers' Compensation Law (*see Madden, supra*).

As the WCB has failed to demonstrate that it possesses all "right, title and interest" to the claims brought against the Common Defendants in Action No. 3–whether by assignment, as successor in interest to the Trust, by operation of law or otherwise-its motion for substitution must be denied.

B. Consolidation

CPLR 602(a) provides that "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion ... may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." "[C]onsolidation is favored by the courts as serving the interests of justice and judicial economy" (*Guasconi v. Pohl*, 2 AD3d 1202, 1203 [3d Dept 2003] [internal quotations omitted]), and a party opposing such a motion has the burden of showing that consolidation would prejudice a substantial right (*Fashion Tanning Co. v. Lumbermens Mut. Cas. Co.*, 105 A.D.2d 1034, 1035 [3d Dept 1984]).

***3** The WCB's motion for consolidation is opposed principally by the Action No. 3 Plaintiffs. While they recognize that the three cases raise common questions of law and fact, particularly with regard to the Common Defendants, the Action No. 3 Plaintiffs argue that they will be substantially prejudiced by the delays attendant to consolidation. Specifically, plaintiffs argue that fact discovery in Action No. 3 is nearly complete, and the case is expected to be trial ready by year end. In contrast, discovery only recently has begun in Action No. 2, and a request for judicial intervention has not even been filed in Action No. 1. The Action No. 3 plaintiffs further assert that they have made considerable investments to diligently progress their case to its current posture, and the WCB's application would deny them the benefits of their expenditures and efforts.

In the Court's view, there certainly are good reasons to consolidate the three actions. Common issues predominate, and adjudication of the cases in a consolidated fashion would promote the interests of economy and avoid inconsistent rulings. Moreover, it appears from the present record that the Action No. 3 Plaintiffs intend to rely on the groundwork performed by the WCB in building a legal case against the Common Defendants, including the forensic audit of the Trust commissioned by the agency-a point that the Action No. 3 Plaintiffs seem to miss in lamenting their own burdens and expenses.

Thus, had the WCB raised the issue of consolidation in this Court within a reasonable period after Actions No. 1 and 2 were commenced in the Summer of 2011, [1] these considerations would likely have trumped any potential prejudice to the Action No. 3 Plaintiffs, who were bogged down in motion practice directed at the sufficiency of their complaint at the time. But two years passed without any effort by the WCB to consolidate, coordinate, intervene or otherwise join the cases. In the interim, critical legal issues have been articulated and resolved in Action No. 3, fact discovery is said to be virtually complete, and the case is expected to be trial ready by the end of the year.

Under the circumstances, the Court finds persuasive the reasoning expressed by Commercial Division Justice Bransten in *MBIA Ins. Corp. v. Countrywide Home Loans, Inc.* (34 Misc.3d 1202[A] [Sup Ct, N.Y. County 2011]):

The court finds the prevention of undue delay to be decisive in this matter. While [the actions] are all at the discovery phase, and are thus not at markedly differently procedural stages, the actions do markedly differ within their respective discovery processes. Whereas [Action No. 3] nears discovery completion, discovery in [Actions No. 1 and 2 are] very far behind. For instance, discovery in [Action No. 2], filed [three] years after [Action No. 3], has only just begun.

[The Action No. 3 Plaintiffs] ha[ve] worked diligently for over [four] years to move [their] case forward, and [they] will suffer significant prejudice in waiting, possibly for two years or more, for the other [two] Actions to arrive at the same point in discovery. Further, it is prejudicial to the front-running plaintiffs to necessarily place completed [ ] discovery aside, to be re-visited and re-evaluated....

*4 For these reasons, the Court is constrained to deny the WCB's motion for consolidation on the present record. However, the Court recognizes that circumstances may change as these cases continue to be litigated, and unforeseen delays may prevent Action No. 3 from reaching the trial calendar as rapidly as plaintiffs' counsel may expect. Accordingly, the foregoing denial is without prejudice to: (a) a renewed motion for a joint trial of the three actions after Action No. 3 is certified trial-ready and placed upon the trial calendar of Supreme Court, Niagara County; and (b) a renewed motion for consolidation or joint trial made with the consent of the Action No. 3 Plaintiffs or subject to provisions that would reasonably mitigate any resulting prejudice to them. [2] And of course, the foregoing is without prejudice to the rights of the parties in Action No. 3 to make a renewed application for consolidation before that Court, as may be authorized under Justice Michalek's order of May 1, 2012.

C. Severance

Finally, Steven Glaser and Lorette Belgraier, each of whom provided professional services to the Trust, cross-move in Action No. 2 for severance. "In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue" (CPLR 603).

In arguing for severance, Glaser and Belgraier argue principally that the remaining contractual and quasi-contractual claims for the recoupment of certain professional fees do not implicate questions of law or fact common to the other defendants in Action No. 2 and that they would be substantially prejudiced by the cost and delay attendant to participation in proceedings concerning the WCB's sweeping allegations of fraud, mismanagement and abuse in regard to the Trust.

While these arguments are not without some force, the Court is not convinced that severance would be appropriate. The complaint in Action No. 2, even as narrowed by the *Madden* decision, continues to allege that Belgraier and Glaser accepted hundreds of thousands of dollars in unearned professional fees, which contributed to the accumulated deficit for which the WCB is seeking recovery. Further, the present record does not foreclose the WCB's arguments that adjudication of the remaining claims against these professional advisors, including the cross-claims asserted by the former trustees, may implicate some of the same witnesses, proof and/or discovery as the claims against the remaining defendants. And the Court is not persuaded that the interests of economy emphasized *supra* would be served by disaggregating the WCB's multi-defendant actions. Accordingly, the motion for severance is denied.

CONCLUSION

Accordingly, [3] it is

ORDERED that motion and cross-motions are denied in all respects.

This constitutes the Decision and Order of the Court. This Decision and Order is being transmitted to counsel for the Action No. 3 Plaintiffs for filing and service. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220, and counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

*5 Papers Considered:

Amended Notice of Motion, dated July 3, 2013;

Notice of Motion, dated July 2, 2013;

WCB's Memorandum of Law, dated July 2, 2013;

Affidavit of Michael Papa, sworn to July 2, 2013;

Affirmation of Daniel J. Sarzynski, Esq., dated July 2, 2013, with attached exhibits A–N;

Memorandum of Law of Inter–Community Memorial Hospital of Newfane, Inc., and Integrated Care Systems, LLC, dated July 24, 2013;

Affidavit of Joseph E. Zdarsky, Esq., sworn to July 24, 2013, with attached exhibits A–J;

Affidavit of Clare A. Haar, sworn to July 24, 2013, with attached exhibits A–D;

Notice of Cross–Motion, dated July 24, 2013;

Memorandum of Law of Defendant Lorette Belgraier, dated July 24, 2013;

Affirmation of Louis G. Corsi, Esq., dated July 24, 2013;

Memorandum of Law of Defendants' Madden, Ettinger, Huber, Rosenberg, Harte, Ferguson, Edmonds, and Villano, dated July 24, 2013;

Affirmation of Peter A. Lauricella, Esq,. dated July 24, 2013, with attached exhibits A–C;

Notice of Cross–Motion, dated July 25, 2013;

Affidavit of David B. Cabaniss, Esq., sworn to July 25, 2013;

Memorandum of Law of Defendant Steven Glaser, dated July 25, 2013;

Affirmation of Leonardo D'Alessandro, Esq., dated July 30, 2013;

Affidavit of Michael Papa, Esq., sworn to July 30, 2013, with attached exhibits A–E;

Reply Affirmation of Charles D.J. Case, Esq., dated July 30, 2013.

All Citations

40 Misc.3d 1238(A), 977 N.Y.S.2d 670 (Table), 2013 WL 4799159, 2013 N.Y. Slip Op. 51483(U)

Footnotes

1 The Court recognizes that Actions Nos. 1 and 2 were not commenced until three years after Action No. 3. However, the WCB has shown that a considerable portion of this delay was associated with the agency's efforts to obtain the forensic accounting of the Trust and to retain outside litigation counsel.

2 The Court strongly encourages the WCB and the Action No. 3 Plaintiffs to negotiate a consensual agreement that would allow these closely-related actions to be, at the very least, the subject of a joint trial.

3 The Court has considered the parties' remaining arguments and contentions but finds them unavailing or unnecessary to the disposition ordered herein.

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