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Supreme Court, Albany County,
 Special Term.

STATE of New York, Plaintiff,

v.

Francis LUNKING and LJR Enterprises, Inc., Defendants.

Francis Lunking and LJR Enterprises, Inc., Third-Party
 Plaintiffs,

v.

Violante & Sons Tank & Pump Corp., and Ameron Pipe,
 Inc., Third-Party
 Defendants.

Index No. L00485-96.

Oct. 27, 2003.

State sued alleged discharger of petroleum to recover cleanup and removal costs associated with petroleum spill on their property pursuant to law permitting innocent land owner to seek contribution from actual discharger of oil contaminants. Alleged discharger commenced third party action against installer of underground pipe on alleged discharger's property and manufacturer of pipe. Installer and manufacturer, as third-party defendants, asserted affirmative defense of collateral estoppel and sought to dismiss alleged discharger's third-party complaint, claiming that suit was pending between parties in another court in action that alleged discharger brought against installer and manufacturer of pipe. The Supreme Court, Albany County, Benza, J., held that: (1) installer and manufacturer were not entitled to dismissal of third party complaint filed by alleged discharger of petroleum due to pendency of action against them in another county, and (2) denial of alleged discharger's motion to consolidate suit against installer and manufacturer did not collaterally estop third-party action against installer and manufacturer.

Motion denied.

West Headnotes

[1] Abatement and Revival [§ 8\(2\)](#)

[2k8\(2\) Most Cited Cases](#)

Installer and manufacturer of underground pipe that

allegedly resulted in petroleum spill on property of alleged discharger of petroleum were not entitled to dismissal of third party complaint filed by alleged discharger, in state's action against alleged discharger, based on fact that alleged discharger had sued installer and manufacturer in another county for petroleum spill, even though complaints in both actions involved same parties and pertained to contamination from petroleum spill; two actions were based on separate theories of recovery, and dismissal of third-party complaint would foreclose alleged discharger from pursuing statutory remedy against installer and manufacturer for contribution pursuant to state law. [McKinney's CPLR 3211\(a\) \(4, 5\)](#); [McKinney's Navigation Law §§ 181\(1\), 185\(1\)](#).

[2] Judgment [§ 649](#)

[228k649 Most Cited Cases](#)

[2] Judgment [§ 714\(1\)](#)

[228k714\(1\) Most Cited Cases](#)

Pursuant to collateral estoppel doctrine, denial of alleged discharger's motion to consolidate suit against installer and manufacturer of underground pipe that allegedly resulted in petroleum spill on property, in alleged discharger's breach of contract suit against installer and manufacturer, did not preclude third-party action brought by alleged discharger against installer and manufacturer in state's subsequent strict liability action against alleged discharger to recover cleanup and removal costs; actions did not involve same theories of recovery, reason for denial of motion to consolidate was based on observation that suits involved different questions of fact and law, and order denying consolidation motion did not rule on merits of alleged discharger's right to seek contribution under strict liability statute. [McKinney's CPLR 3211\(a\) \(4, 5\)](#); [McKinney's Navigation Law §§ 181\(1\), 185\(1\)](#).

Hon. Eliot Spitzer, Attorney General of the State of New York, Drew A. Lochte, Esq., of Counsel, Albany, attorneys for plaintiff.

Hancock & Estabrook, LLP, [John L. Murad, Jr., Esq.](#), of Counsel, Syracuse, attorneys for defendants/third-party plaintiffs.

Thorn, Gershon, Tymann and Bonanni, LLP, [Mandy M. Carrigan, Esq.](#), of Counsel, Albany, attorneys for third-party

defendant Violante & Sons Tank & Pump Corp.

Kernan & Kernan, Leighton R. Burns, Esq., of Counsel,
Utica, attorneys for third-party defendant Ameron Pipe, Inc.

DECISION and ORDER

BENZA, J.

*1 Third-Party Defendant, Violante & Sons Tank & Pump Corp. (Violante) seeks an order pursuant to [CPLR 3211\(a\)\(4\)](#) and [CPLR 3211\(a\)\(5\)](#) dismissing the third-party complaint alleging there is another action pending between the parties for the same cause of action in Oneida County, New York. Defendant Violante also alleges defendants are collaterally estopped from attempting to join the actions by third-party practice as a prior application to consolidate the actions was denied by Supreme Court. Third-Party Defendant, Ameron Pipe, Inc. (Ameron) joins the motion and seeks an order dismissing the third-party complaint of defendants pursuant to [CPLR 3211\(a\)\(4\)](#) and CPLR (a)(5). The plaintiff, State of New York supports the motions to dismiss the complaint by the Third-Party Defendants. The Defendants/Third-Party Plaintiffs oppose the motions. For this discussion, Lunking and LJR Enterprises, Inc., Defendants/Third-Party Plaintiff shall be referred to as plaintiffs and Third-Party Defendants, Violante and Ameron shall be referred to as defendants

In 1988, plaintiffs commenced an action in Oneida County against defendants to recover damages incurred a result of a petroleum leak on their property. Plaintiffs asserted negligence and breach of contract claims against Violante, the installer of the underground pipes which held petroleum and breach of warranty, negligence and strict products liability claims against Ameron, the manufacturer of the pipes. Many years later, the State of New York commenced this action in Albany County against Lunking and LJR for cleanup and removal costs associated with the petroleum spill pursuant to Article 12 of the Navigation Law. Lunking and LJR commenced a third party action against Violante and Ameron. Violante asserted an affirmative defense of (1) collateral estoppel and (2) there is another action pending between the same parties for the same cause of action in another court.

Defendants aver that the causes of action asserted by plaintiffs in this proceeding are exactly the same as asserted in the 1988 litigation in Oneida County. Defendants allege that the relief requested by plaintiffs is substantially the same. Defendants claim that they should not be forced to defend against the same claims involving the same parties in two separate actions. In addition, defendants allege that the plaintiffs sought to consolidate this action in the first action and said motion to consolidate was denied by Supreme Court and affirmed by the Appellate Division, Fourth Judicial Department on November 15, 2003. Defendants allege that plaintiffs are attempting to circumvent the Appellate Division's denial of their consolidation motion by impleading the defendants in the instant State action. Defendants claim that the third-party action against the defendants must be dismissed pursuant to [CPLR 3211\(a\)\(5\)](#) on the ground that the Appellate Division's decision denying the consolidation motion has a collateral estoppel effect on whether the defendants should be parties to the State action venued in Albany County. Defendants contend the plaintiffs had a "full and fair opportunity" to argue their consolidation motion in the first action in Oneida County and in the Appellate Division.

*2 Plaintiffs oppose the defendants' motions and allege the instant action is not the same as the pending action in Oneida County and the defendants have failed to establish that the doctrine of collateral estoppel applies to bar the third-party action. Plaintiffs contend that they sought recovery against defendants based upon common law damages for breach of contract and tort. Plaintiffs allege the State action against the parties involved a statutory cause of action for clean up and removal costs from the petroleum spill. Plaintiffs contend that they have a statutory right to seek contribution and indemnification from the defendants in the State action.

In response to a motion pursuant to [CPLR 3211](#), the pleadings shall be liberally construed, the facts alleged accepted as true, and every possible favorable inference given to plaintiff (see, [Leon v. Martinez](#), 84 N.Y.2d 83, 614 N.Y.S.2d 972, 638 N.E.2d 511). On such a motion, the court is limited to examining the pleading to determine whether it states a cause of action (see, [Guggenheimer v. Ginzburg](#), 43

[N.Y.2d 268](#), [401 N.Y.S.2d 182](#), [372 N.E.2d 17](#)). In examining the sufficiency of the pleading, the court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (see, *Matter of Board of Education v. State Education Dept.*, [116 A.D.2d 939](#), [498 N.Y.S.2d 516](#)). On such a motion, the court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (see, *Leon v. Martinez*, *supra*, 87-88; *Pietrosanto v. NYNEX Corp.*, [195 A.D.2d 843](#), [600 N.Y.S.2d 802](#)).

[1] CPLR 3211(a)(4) vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties for the same cause of action (see, *Whimsey v. Whimsey*, [57 N.Y.2d 731](#), [454 N.Y.S.2d 977](#), [440 N.E.2d 1324](#)). The initial action in Oneida County was commenced by plaintiffs seeking recovery from defendants for damages sustained as a result of an oil leak. Plaintiffs sought recovery for negligence and breach of contract from defendant Violante and for breach of warranty, negligence and strict products liability against defendant Ameron. The subsequent State action venued in Albany County seeks recovery from plaintiffs pursuant to statute (see, Article 12 of New York State Navigation Law) for cleanup costs and penalties relating to the oil contamination. A review of plaintiffs original complaint and its third party complaint in the State action, reveal that the parties are the same and the actions pertain to the costs of remuneration of the oil contamination on the subject real property owned by plaintiffs. However, the theories of recovery are not similar. Plaintiffs as owners of the property, are entitled in the State action to invoke [Navigation Law § 185\(1\)](#) which allows an innocent or faultless land owner to seek contribution from the actual discharger even if the landowner itself is liable as a discharger under [Navigation Law § 181\(1\)](#) (see, *State v. Green*, [96 N.Y.2d 403](#), [729 N.Y.S.2d 420](#), [754 N.E.2d 179](#)). If the third-party complaint in the State action on behalf of plaintiffs is dismissed, the plaintiffs would be improperly foreclosed from pursuing their statutory remedy against the defendants for contribution and indemnification pursuant to [Navigation Law § 185\(1\)](#). Here, the two actions are based on separate theories of recovery and, as such, this Court

may exercise its discretion and deny the motion to dismiss pursuant to [CPLR 3211\(a\)\(4\)](#) (see, *Haller v. Lopane*, [305 A.D.2d 370](#); *Spector v. Zuckerman*, [287 A.D.2d 704](#), [732 N.Y.S.2d 243](#)).

*3 [2] Next collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" *Ryan v. New York Telephone Co.*, [62 N.Y.2d 494](#), [478 N.Y.S.2d 823](#), [467 N.E.2d 487](#); *Bank v. Brooklyn Law School*, [297 A.D.2d 770](#), [747 N.Y.S.2d 800](#). "There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action and there must have been a full and fair opportunity to contest the decision now said to be controlling" (*Schwartz v. Public Administrator of County of Bronx*, [24 N.Y.2d 65](#), [298 N.Y.S.2d 955](#), [246 N.E.2d 725](#)).

In the initial action, plaintiffs' motion to consolidate the two actions was denied by Supreme Court. Defendants contend that plaintiffs are precluded from commencing a third-party action by collateral estoppel as the consolidation motion was denied after plaintiffs had a full and fair opportunity to litigate the issues. Plaintiffs allege the two actions are not the same as it does not seek to combine the two actions for breach of contract, breach of warranty and strict liability along with the State's strict liability action. Rather, plaintiffs contend that they are seeking to implead the defendants in the State action pursuant to [Navigation Law § 181\(5\)](#) which allows an owner subject to strict liability ([Navigation Law § 181\(1\)](#)) to seek contribution and indemnification for the clean up costs and penalties assessed to the owner by the State.

In the consolidation motion in the Oneida County action, Supreme Court determined that the two actions were not similar:

[t]here are very different questions of fact and law in these cases, such that a jury could be easily confused by the different standards, duties and damages involved in the common law causes of action set forth in Action Number One and the statutory causes of action set forth in Action Number Two."

Supreme Court did not discuss the merits of the common law allegations in the first action nor did it discuss the merits of the statutory right of plaintiffs to seek contribution and indemnification pursuant to the state's Navigation Law. The court notes, the issue of whether or not the allegations in the third-party complaint constituted a "discharge" as defined by the statute were not raised by the parties. The relief sought by plaintiffs is pursuant to the statute for indemnification and contribution and the issue of whether or not defendants were deemed "dischargers" as defined by the appropriate statute is not before this court.

Plaintiffs third-party action against defendants seeks a statutory remedy which was recognized by Supreme Court in the consolidation motion. Therefore, plaintiffs are not precluded from commencing a third-party action in order to allege a statutory claim for contribution and indemnification against defendants. Defendants' motion to preclude the third-party action of plaintiffs pursuant to [CPLR 3211\(a\)\(5\)](#) by collateral estoppel is denied.

*4 Accordingly, defendants' motions seeking the dismissal of plaintiffs' third-party complaint pursuant to [CPLR 3211\(a\)\(4\)](#) and [CPLR 3211\(a\)\(5\)](#) are denied.

This memorandum constitutes the Decision and Order of the Court. All papers including this Decision and Order are returned to the attorneys for Defendants/Third-Party Plaintiffs. The signing of this Decision and Order shall not constitute entry or filing under [CPLR 2220](#). Counsel is not relieved from the applicable provision of this rule in regard to filing, entry and Notice of Entry.

Papers Considered:

1. Notice of Motion dated August 4, 2003;
2. Affidavit of Mandy M. Carrigan, Esq. dated August 4, 2003 with exhibits annexed;
3. Memorandum of Law dated November 4, 2003;
4. Notice of Motion dated August 7, 2003;
5. Affirmation of Leighton R. Burns, Esq. dated August 7, 2003 with exhibits annexed;

6. Affirmation in Support of Motion to Dismiss of Drew A. Lochte, Esq. dated August 12, 2003;

7. Affirmation of John L. Murad, Jr., Esq. dated September 3, 2003 with exhibits annexed;

8. Memorandum of Law dated September 3, 2003;

9. Reply Affidavit of Mandy M. Carrigan, Esq. dated September 4, 2003.

2003 WL 22673976 (N.Y.Sup.), 2003 N.Y. Slip Op. 51389(U)

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