

93 A.D.3d 812, 941 N.Y.S.2d 192, 2012 N.Y. Slip Op. 02280
(Cite as: 93 A.D.3d 812, 941 N.Y.S.2d 192)

H

Supreme Court, Appellate Division, Second Department, New York.

Winifred CLARK, etc., respondent-appellant,
v.

James CLARK, Jr., appellant-respondent. (Action No. 1)

Winifred Q. Clark, respondent-appellant,
v.

James Clark, Jr., appellant-respondent. (Action No. 2)

James P. Clark, Jr., appellant-respondent,
v.

Winifred Q. Clark, respondent-appellant, et al., defendant. (Action No. 3).

March 27, 2012.

Background: In action to recover damages for, inter alia, breach of fiduciary duty, the Supreme Court, Nassau County, Warshawsky, J., 2010 WL 1004465, denied defendant's motion to dismiss and granted plaintiff's cross-motion to join action with two related suits for trial, one in which she was plaintiff and another in which she was defendant, and to place venue in Nassau County. The Supreme Court, Nassau County, Warshawsky, J., 2010 WL 3285589, later denied defendant's motion to compel production of documents and for summary judgment and denied plaintiff's cross-motion for leave to amend her answer in suit in which she was defendant. Parties appealed.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) court providently granted motion to join actions for trial;
- (2) placing venue in Nassau County was error, and venue instead should have been placed in Queens County;
- (3) plaintiff's two suits did not involve same causes of action and did not seek same relief;
- (4) plaintiff was entitled to leave to amend her an-

swer in related suit in which she was defendants; and
(5) defendant was entitled to relief on his motion to compel document production.

Affirmed as modified, and remitted in part.

West Headnotes

[1] Trial 388

388 Trial

388I Notice of Trial and Preliminary Proceedings

388k2 k. Trial of causes together. **Most Cited Cases**

Motion seeking a joint trial rests within the sound discretion of the trial court. **McKinney's CPLR 602(a).**

[2] Trial 388

388 Trial

388I Notice of Trial and Preliminary Proceedings

388k2 k. Trial of causes together. **Most Cited Cases**

When there are common questions of law or fact, a joint trial is warranted unless the opposing party demonstrates prejudice to a substantial right. **McKinney's CPLR 602(a).**

[3] Action 13 57(3)

13 Action

13III Joinder, Splitting, Consolidation, and Severance

13k54 Consolidation of Actions

13k57 Actions Which May Be Consolidated

13k57(3) k. Common questions of law or fact; same transaction or series of transactions. **Most Cited Cases**

Action 13 57(4)

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13 Action

13III Joinder, Splitting, Consolidation, and Severance

13k54 Consolidation of Actions

13k57 Actions Which May Be Consolidated

13k57(4) k. Circumstances precluding consolidation in general; prejudice. [Most Cited Cases](#)

Court providently exercised its discretion in granting motion which was, in effect, to join three related actions for trial, two in which moving party was plaintiff and one in which she was defendant, where actions involved common questions of law and fact, and non-moving party failed to show that prejudice would result from joint trial. [McKinney's CPLR 602\(a\)](#).

[4] Venue 401 5.3(2.1)

401 Venue

401I Nature or Subject of Action

401k5 Actions Relating to Real Property

401k5.3 Recovery of Real Estate or Determination of Interest Therein

401k5.3(2) Particular Actions

401k5.3(2.1) k. In general. [Most Cited Cases](#)

Venue 401 16.5

401 Venue

401I Nature or Subject of Action

401k16.5 k. Joinder of causes of action suitable in different counties. [Most Cited Cases](#)

Placing venue in Nassau County following order joining related suits, two in which moving party was plaintiff and one in which she was defendant, was error, and venue instead should have been placed in Queens County, even if moving party started one of her actions in Nassau County prior to filing of related actions, where suit in which moving party was defendant affected title to, or possession, use, or enjoyment of real property located in Queens County. [McKinney's CPLR 507, 602](#).

[5] Venue 401 16.5

401 Venue

401I Nature or Subject of Action

401k16.5 k. Joinder of causes of action suitable in different counties. [Most Cited Cases](#)

Generally, where actions commenced in different counties have been joined for trial, venue should be placed in the county where the first action was commenced, unless special circumstances are present. [McKinney's CPLR 602](#).

[6] Venue 401 5.3(1)

401 Venue

401I Nature or Subject of Action

401k5 Actions Relating to Real Property

401k5.3 Recovery of Real Estate or Determination of Interest Therein

401k5.3(1) k. In general. [Most Cited Cases](#)

In an action affecting title to, or the possession, use, or enjoyment of real property, statute governing real property actions mandates that the venue for such an action be the county in which the property is situated. [McKinney's CPLR 507](#).

[7] Venue 401 57

401 Venue

401III Change of Venue or Place of Trial

401k57 k. Change on court's own motion. [Most Cited Cases](#)

Regardless of whether a specific request is made to the court to change venue, the court may change venue to the appropriate forum in connection with a motion to consolidate or for a joint trial. [McKinney's CPLR 602\(a\)](#).

[8] Abatement and Revival 2 4

2 Abatement and Revival

2II Another Action Pending

2k4 k. Ground of abatement in general. [Most Cited Cases](#)

Court has broad discretion in determining whether an action should be dismissed based upon

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another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same. [McKinney's CPLR 3211\(a\)\(4\)](#).

[9] Abatement and Revival 2 8(2)

2 Abatement and Revival

2II Another Action Pending

2k8 Identity of Cause of Action, Issues, or Relief

2k8(2) k. Identity of causes and issues.

[Most Cited Cases](#)

Abatement and Revival 2 8(4)

2 Abatement and Revival

2II Another Action Pending

2k8 Identity of Cause of Action, Issues, or Relief

2k8(4) k. Identity of relief sought. [Most](#)

[Cited Cases](#)

Abatement and Revival 2 9

2 Abatement and Revival

2II Another Action Pending

2k9 k. Identity of parties. [Most Cited Cases](#)

Two suits did not involve same causes of action, and relief sought was not substantially same, precluding dismissal of one of those suits as already pending, even if suits involved same parties. [McKinney's CPLR 3211\(a\)\(4\)](#).

[10] Pleading 302 261

302 Pleading

302VI Amended and Supplemental Pleadings and Repleader

302k255 Amendment of Plea or Answer

302k261 k. New or different defense.

[Most Cited Cases](#)

Pleading 302 263

302 Pleading

302VI Amended and Supplemental Pleadings

and Repleader

302k255 Amendment of Plea or Answer

302k263 k. Sufficiency of amendment.

[Most Cited Cases](#)

Quieting Title 318 42

318 Quieting Title

318II Proceedings and Relief

318k33 Pleading

318k42 k. Amended and supplemental pleadings. [Most Cited Cases](#)

Defendant was entitled to leave to amend her answer, in quiet title action, to assert defense based on statute of frauds, where proposed amendment was neither palpably insufficient nor patently devoid of merit, and there was no evidence that amendment would prejudice or surprise plaintiff. [McKinney's CPLR 3025\(b\)](#).

[11] Pleading 302 233.1

302 Pleading

302VI Amended and Supplemental Pleadings and Repleader

302k233 Leave of Court to Amend

302k233.1 k. In general. [Most Cited](#)

[Cases](#)

Pleading 302 241

302 Pleading

302VI Amended and Supplemental Pleadings and Repleader

302k241 k. Form and sufficiency of amended pleading in general. [Most Cited Cases](#)

Leave to amend a pleading should be freely given, provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit. [McKinney's CPLR 3025\(b\)](#).

[12] Privileged Communications and Confidentiality 311H 168

311H Privileged Communications and Confidentiality

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311HIII Attorney-Client Privilege

311Hk168 k. Waiver of privilege. [Most Cited Cases](#)

Waiver of the attorney–client privilege may be found where the client places the subject matter of the privileged communication in issue or where invasion of the privilege is required to determine the validity of the client's claim or defense and application of the privilege would deprive the adversary of vital information.

[13] Privileged Communications and Confidentiality 311H 22

311H Privileged Communications and Confidentiality

311HI In General

311Hk22 k. Privilege logs. [Most Cited Cases](#)

Privileged Communications and Confidentiality 311H 178

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege

311Hk175 Determination

311Hk178 k. In camera review. [Most Cited Cases](#)

Party was entitled to relief on his motion to compel opponent to produce documents related to party's ownership of certain real properties, documents that opponent withheld under claimed attorney–client privilege, to extent of directing opponent to provide court with detailed privilege log for in camera review, where documents were potentially pivotal in dispute over properties. [McKinney's CPLR 3122](#).

****194** Lichter Gliedman Offenkrantz, P.C., New York, N.Y. ([Ronald J. Offenkrantz](#) of counsel), and Meyer, Suozzi, English & Klein, P.C., Garden City, N.Y. ([Brian Michael Seltzer](#) of counsel), for appellant-respondent (one brief filed).

Rosenberg Calica & Birney LLP, Garden City, N.Y. ([Ronald J. Rosenberg](#) of counsel), and Butler,

Fitzgerald, Fiveson & McCarthy, New York, N.Y. ([David Fiveson](#) of counsel), for respondent-appellant (one brief filed).

[MARK C. DILLON](#), J.P., [ARIEL E. BELEN](#), [SHERI S. ROMAN](#), and [ROBERT J. MILLER](#), JJ.

***813** In an action, inter alia, to recover damages for breach of fiduciary duty (Action No. 1), which was joined for trial with related actions (Action Nos. 2 and 3), James Clark, Jr., the defendant in Action Nos. 1 and 2 and the plaintiff in Action No. 3, appeals, as limited by his brief, from so much of (1) an order of the Supreme Court, Nassau County (Warshawsky, J.), dated February 23, 2010, as denied his motion pursuant to [CPLR 3211\(a\)\(4\)](#) to dismiss the complaint in Action No. 2 and granted those branches of the cross motion of Winifred Clark, the plaintiff in Action Nos. 1 and 2 and a defendant in Action No. 3, which were, in effect, to join Action Nos. 1, 2, and 3 for trial and to place venue of the joint trial in Nassau County, and (2) an order of the same court dated August 4, 2010, as denied that branch of his separate motion which was to compel the production of certain documents withheld by Winifred Clark based upon attorney-client privilege and work product privilege, and denied that branch of his separate motion which was, in effect, for summary judgment dismissing the complaint in Action No. 1 as time-barred, and Winifred Clark cross-appeals, as limited by her brief, from so much of the order dated August 4, 2010, as denied that branch of her cross motion which was for leave to amend her answer in Action No. 3 to include a defense based upon the statute of frauds.

ORDERED that the order dated February 23, 2010, is modified, on the law, by deleting the provision thereof granting that branch of the cross motion of Winifred Clark, the plaintiff in Action Nos. 1 and 2 and a defendant in Action No. 3, which was to place venue of the joint trial in Nassau County and substituting therefor a provision denying that

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branch of the cross motion and fixing venue of the joint trial in Queens County; as so modified, the order dated February 23, 2010, is affirmed insofar as appealed from, without costs or disbursements; and it is further,

ORDERED that the order dated August 4, 2010, is modified, on the law and in the exercise of discretion, (1) by deleting the provision thereof denying that branch of the cross motion of Winifred Clark, the plaintiff in Action Nos. 1 and 2 and a defendant in Action No. 3, which was for leave to amend her answer in Action No. 3 to include a defense based upon the statute of frauds and substituting therefor a provision granting that branch of the cross motion, and (2) by deleting the provision thereof denying that branch of the motion of James Clark, Jr., the defendant in Action Nos. 1 and 2 and the plaintiff in Action No. 3, which was to compel the production of certain documents withheld by Winifred Clark based upon attorney-client privilege *814 and work product privilege, and substituting therefor a provision **195 granting that branch of the motion to the extent of directing Winifred Clark to provide the Supreme Court with a detailed privilege log; as so modified, the order dated August 4, 2010, is affirmed insofar as appealed from, without costs or disbursements; and it is further,

ORDERED that the matter is remitted to the Supreme Court, Nassau County, and the Clerk of the Supreme Court, Nassau County, shall deliver to the Clerk of the Supreme Court, Queens County, all papers filed in this action and certified copies of all minutes and entries (*see* CPLR 511[d]), and for an in camera review thereafter by the Supreme Court, Queens County, of the allegedly privileged documents in accordance herewith.

James Clark, Jr., the defendant in Action Nos. 1 and 2 and the plaintiff in Action No. 3 (hereinafter James), and his brother William Clark jointly owned certain pieces of property in Brooklyn and Queens, which they managed through a partnership. After William died in 1994, his wife Winifred Clark, the plaintiff in Action Nos. 1 and 2

and a defendant in Action No. 3 (hereinafter Winifred), inherited his ownership interest in the properties. Two of the properties were placed in a trust with Winifred entitled to income during her lifetime. James continued to manage the properties through the partnership and provided Winifred with certain income from the properties. Around 2007, Winifred suspected that James was withholding income from her and that she had not received an interest in all of the properties that had been owned by William.

Subsequently, Winifred commenced an action on behalf of the trust against James in Nassau County (hereinafter Action No. 1), seeking an accounting and to recover damages for breach of fiduciary duty and unjust enrichment. Thereafter, she commenced a second action against James in Nassau County (hereinafter Action No. 2), *inter alia*, to recover damages for breach of a joint venture agreement, conversion, and fraud. James then commenced an action against Winifred and her brother in Queens County (hereinafter Action No. 3), among other things, to quiet title to three pieces of real property in Queens which he alleged were owned 100% by him, and that Winifred had improperly transferred to herself.

[1][2][3] “[A] motion seeking a joint trial pursuant to CPLR 602(a) rests within the sound discretion of the trial court. When there are common questions of law or fact, a joint trial is warranted unless the opposing party demonstrates prejudice to a substantial right” (*Alizio v. Perpignano*, 78 A.D.3d 1087, 1088, 912 N.Y.S.2d 132 [citations and internal quotation marks omitted]; *see* *815 *Pierre–Louis v. DeLonghi Am., Inc.*, 66 A.D.3d 855, 856, 887 N.Y.S.2d 632; *Glussi v. Fortune Brands*, 276 A.D.2d 586, 587, 714 N.Y.S.2d 516). Here, the Supreme Court providently exercised its discretion in granting that branch of Winifred’s cross motion which was, in effect, to join Action Nos. 1, 2, and 3 for trial because the actions involve common questions of law and fact, and James failed to show that prejudice would result from a

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joint trial. Accordingly, we find that the interests of justice and judicial economy would be served by a joint trial (*see Alizio v. Perpignano*, 78 A.D.3d at 1088, 912 N.Y.S.2d 132; *J & A Vending v. J.A.M. Vending*, 268 A.D.2d 505, 506, 703 N.Y.S.2d 53).

[4][5][6][7] However, the Supreme Court erred in granting that branch of Winifred's cross motion which was, in effect, to place venue of the joint trial in Nassau County. "Generally, where actions commenced in different counties have been consolidated pursuant to CPLR 602, the venue should be placed in the county where the first ****196** action was commenced, unless special circumstances are present" (*Gomez v. Jersey Coast Egg Producers*, 186 A.D.2d 629, 630, 588 N.Y.S.2d 589; *see Strasser v. Neuringer*, 137 A.D.2d 750, 751, 524 N.Y.S.2d 830). However, in an action affecting title to, or the possession, use, or enjoyment of, real property, "CPLR 507 mandates that the venue for such an action be the county in which the property is situated" (*GAM Prop. Corp. v. Sorrento Lactalis, Inc.*, 41 A.D.3d 645, 646, 838 N.Y.S.2d 633; *see Antonacci v. Antonacci*, 273 A.D.2d 185, 186, 709 N.Y.S.2d 432). Thus, the joint trial must be conducted in Queens County, where the real property at issue in Action No. 3 is located (*see GAM Prop. Corp. v. Sorrento Lactalis, Inc.*, 41 A.D.3d at 646, 838 N.Y.S.2d 633; *Antonacci v. Antonacci*, 273 A.D.2d at 186, 709 N.Y.S.2d 432; *Avis Rent-A-Car Sys. v. Edmin Realty Corp.*, 209 A.D.2d 656, 657, 619 N.Y.S.2d 334). Regardless of whether a specific request is made to the court to change venue, the court may change venue to the appropriate forum in connection with a motion to consolidate or for a joint trial pursuant to CPLR 602(a) (*see Smith v. Witteman Co.*, 10 A.D.2d 793, 197 N.Y.S.2d 877; *Siegel*, N.Y. Prac. § 116, at 218 [5th ed]).

[8][9] "Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same" (

DAIJ, Inc. v. Roth, 85 A.D.3d 959, 959, 925 N.Y.S.2d 867; *see Whitney v. Whitney*, 57 N.Y.2d 731, 732, 454 N.Y.S.2d 977, 440 N.E.2d 1324). Here, Action Nos. 1 and 2 do not involve the same causes of action, and the relief sought is not substantially the same. Accordingly, contrary to James's contention, the Supreme Court properly denied his motion pursuant to CPLR 3211(a)(4) to dismiss the complaint in Action No. 2.

[10][11] ***816** However, the Supreme Court improvidently exercised its discretion in denying that branch of Winifred's cross motion which was for leave to amend her answer in Action No. 3 to add a defense based upon the statute of frauds. "Leave to amend a pleading should be freely given (*see CPLR 3025[b]*), provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit" (*Ortega v. Bisogno & Meyerson*, 2 A.D.3d 607, 609, 769 N.Y.S.2d 279; *see Campbell v. Genesis Contrs., Inc.*, 76 A.D.3d 1038, 907 N.Y.S.2d 877). "No evidentiary showing of merit is required under CPLR 3025(b)" (*Lucido v. Mancuso*, 49 A.D.3d 220, 229, 851 N.Y.S.2d 238). Here, the proposed amendment to include a defense based upon the statute of frauds was neither palpably insufficient nor patently devoid of merit, and there was no evidence that the amendment would prejudice or surprise James. Therefore, the Supreme Court should have allowed the amendment.

[12][13] Lastly, "a waiver of the attorney-client privilege may be found where the client places the subject matter of the privileged communication in issue ... or where invasion of the privilege is required to determine the validity of the client's claim or defense and application of the privilege would deprive the adversary of vital information" (*New York TRW Tit. Ins. v. Wade's Can. Inn & Cocktail Lounge*, 225 A.D.2d 863, 864, 638 N.Y.S.2d 800 [internal quotation marks omitted]). Here, Winifred is challenging James's ownership of certain properties, but seeks to withhold possibly pivotal documents on that subject. Thus, the Supreme

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Court should have granted that branch of James's motion which was to compel the production of documents withheld by Winifred**197 to the extent of directing Winifred to provide the Supreme Court with a detailed privilege log (*see* [CPLR 3122](#)). We remit the matter to the Supreme Court, Nassau County, with a directive that the Clerk of the Supreme Court, Nassau County, is to deliver to the Clerk of the Supreme Court, Queens County, all papers filed in this action and certified copies of all minutes and entries (*see* [CPLR 511\[d\]](#)), and for an in camera review thereafter by the Supreme Court, Queens County, of the allegedly privileged documents.

The parties' remaining contentions are without merit.

N.Y.A.D. 2 Dept.,2012.

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