SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION - FIRST DEPARTMENT

----------x

E

Plaintiff-Appellant

Docket No:

Index No. _____

-against-

Q

Defendant-Respondent

----------x

MEMORANDUM OF LAW IN SUPPORT OF APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

_____
_____
_____
_____
_____
Attorney for Plaintiff-Appellant

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MEMORANDUM OF LAW IN SUPPORT OF APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

INTRODUCTION

It is also respectfully submitted that leave should be granted to appeal to the Court of Appeals as the appeal raises novel, important and complex legal issues that are of great public importance and interest in the Insurance industry in New York. This Court should grant the motion for leave so that any or all of the following question of law may be reviewed, each of which are believed to be decisive of the correctness of this Court's determination. Among the novel, important and complex legal issues the Court of Appeals should consider and to which it has not spoken are:

(1) Whether the Court erred in holding that the two actions that E sought to be consolidated, do not involve common questions of law or fact?

(2) Whether the Court erroneously held that litigating an insurance coverage claim together with underlying liability issues is inherently prejudicial to the insurer?

(3) Whether the Court erred in holding that litigating the actions separately will allow Q to take any necessary discovery to which it is entitled, while avoiding prejudice caused by delay to M. Consolidation of the actions at this stage would not cause undue delay as further discovery is not required in the two actions as both the actions are closely knit and substantiated by same evidences?

These issues ought to be reviewed by the Court of Appeals. Clarification from the Court of Appeals on these issues will benefit any related pending and future litigation in this State's Courts.

For the reasons set forth above, leave should be granted to appeal to the Court of Appeals.

WHEREFORE, it is respectfully requested that this application be granted in its entirety, together with such other and further relief as this Court deems just and proper.

PROCEDURAL HISTORY

1. MD a lessee of certain floors at _____ (construction site) entered into a construction management contract with S, under which S was required to procure liability insurance for itself and MD's as an additional insured. S obtained self-insured retention coverage of $_____ general commercial liability insurance policy from N, its primary insurer.

2. S subcontracted E to perform carpentry work at _____ under the sub-contract dated _____. The subcontract required E to obtain liability insurance for an amount of at least $_____ combined single limit, naming S as an additional insured. E obtained primary liability insurance from Q for an amount of _____ USD per occurrence and $_____ in aggregate and excess insurance coverage from IC for an amount of $_____. S obtained self-insured retention insurance policy from its primary insurer N.

3. Plaintiff, M, an employee of E claims he was injured at the construction site while working, on _____. M asserts these unsubstantiated claims despite the fact that E has invested in the development and maintenance of an industry leading Safety Program in which employees are regularly trained to report all accidents to the on-site foreperson. The E foreperson is trained to conduct an investigation in which the injured worker is secured in a safe manner and medical attention is immediately procured. The Foreperson was instructed to conduct interviews of the witnesses and to collect photographic evidence of the conditions at the site of the accident. On the day of the purported accident, M did not inform anyone that he had an accident at the site and in fact no one at this busy site witnessed the accident. As such, M is left with injuries to his knees that are incapable of being examined against any credible independent evidence that establishes the accident occurred at the construction site in question. A legitimate question that may be posed to M is why would he fail to follow this protocol? The program is designed to prevent

the exacerbation of an injury by seeking immediate medical attention. M could legitimately be asked why not one person on this busy construction site witnessed this purported accident? Another question that can be posed to M is whether he

injured his knee off the site and sought relief by fabricating an accident at the site, which could provide a large insured based award. All these questions were/ are raised due to the intentional and blatant deviation from M's obligation to follow protocol.

4. M's attorney advised S's Corporate Claims Manager, V, through a letter dated _____, that M was asserting a claim in connection with injuries he suffered as a result of the accident, at the construction site in question, that took place on _____.

5. V forwarded the letter to A, representative of S's primary insurer, N.

6. A, by a letter dated _____ also informed Q of M's accident and requested Q to provide indemnification to S in connection with M's claim.

7. On _____, M filed a personal injury action in the Bronx against S and others. S then filed a third-party Complaint on _____ against E and impleaded E as a third-party defendant in M's personal injury action. S informed E by a letter dated _____ that a third-party action was filed against it, and sent the relevant summons and Complaint to E. However, E was not notified by Q about the quantum of damages claimed by M, which purportedly exceeded Q's coverage amount, until September _____.

8. Thereafter, S and MD commenced a declaratory judgment action against Q, IC, and E on _____, seeking a judgment declaring that each of them owes a duty to indemnify and defend S and others against M's personal injury action. In _____, IC came to know about M's accident and legal action.

9. IC came to know about M's action in _____ by virtue of the Declaratory Judgment action filed by S in _____, well before E's knowledge that such occurrence might result in a claim or suit

under the Commercial Excess Umbrella liability policy of IC. On _____, E erred on the side of caution and, through its Brokers _____, reported the incident to IC. E received such knowledge concerning the enhancement of the claim by M for the first time, on _____, through a letter from Q's counsel F. However, IC sent a denial letter disclaiming its duty to provide coverage to E on March 02, 2012. IC does not have a plausible explanation for such delay. Such belated denial by IC is not effective, and does not insulate IC from its duty to indemnify E, under the excess insurance coverage. S has also refused to pay the self-retention amount of $ 500,000.00 on the ground that IC policy affords priority coverage over the N policy.

10. Accordingly, on February 14, 2014, E filed a declaratory judgment action against IC and S seeking an order declaring that (a) IC has a duty to provide coverage and to defend and indemnify E in connection with the personal injury action preferred by M, and (b) S has a duty to pay the self-insured retention of $ _____ under the N policy in order to contribute towards the damages claimed by M.

11. On _____, IC filed a Motion for Summary Judgment requesting this Court to declare that IC has no obligation under the Policy to defend or indemnify E and requesting this Court to dismiss all claims against IC, with prejudice.

12. On _____, E filed a Memorandum of Law in Opposition to the Motion for Summary Judgment filed by IC asserting the duty of IC to defend and indemnify E pursuant to the Policy against any claim/ liability that may accrue / arise in M's third party action. The Supreme Court, through an order dated _____ denied E's Memorandum of Law in Opposition to the Motion for Summary Judgment and granted a decision in favor of IC declaring that IC is not obligated to defend or indemnify the Plaintiff with respect to the personal injury action pending in New York State Supreme Court, Bronx County. An appeal is proposed against the decision of the Supreme Court. Despite the fact that E has paid IC for the Excess Insurance Coverage in question and IC had full

knowledge of the facts and circumstances of this case since ____, and despite the fact that IC has no legitimate grounds to deny coverage in this case, E is now forced to assume a defense of the Excess issues without any insurance coverage at this point.

13. As so previously pled, on _____, E filed a Complaint against Q, the insurance provider from whom E obtained primary liability insurance for an amount of $_____ per occurrence and $_____ in aggregate pursuant to Commercial General Liability policy no. _____ between _____ - _____ and policy no. _____ between _____ and _____. E alleged that Q breached its contractual obligation under the Insuring Agreement to give notice to E as soon as practicable when Q's limit of insurance was actually used up. Q breached its covenant of good faith and fair dealing towards E under the Insuring Agreement by not providing timely notice of IC's excess coverage trigger.

14. On _____, Third Party Defendant, E filed Memorandum of Law in Support of Motion for Joint Trial pursuant to CPLR 602 (a) of the Breach of Contract action entitled E v. Q.

15. On _____, Supreme Court of the State of New York signed an Order to Show Cause as to why an order should not be made joining an indispensable party, the E v. Q to the M action pursuant to CPLR 602(a) and CPLR 2201.

16. On _____, S served an Affirmation in Opposition to Third Party Defendant/Plaintiff in the Joinder Action Motion to Join the actions in question.

17. On _____, Q filed an Affirmation in Opposition of non-party Q to E's Motion to Consolidate stating the reasons for opposing the joinder of Q as an indispensable party and consolidation of the breach of contract action (E v. Q) with the personal injury action of M, Plaintiff. The arguments made by S are mirrored in the Q Opposition Papers.

18. On _____, E, in response to the Affirmations in Opposition filed a Reply Affirmation asserting that Severance of the said actions in question is inappropriate as the claims involve

common factual and legal issues and that a legally cognizable claim of breach of contract exists against Q.

19. On _____, Q filed an Affirmation in support of Q's motion to dismiss the breach of implied covenant of good faith and fair dealing (second cause of action) and negligent performance of the insurance contract (third cause of action) contained in the Complaint filed by E alleging breach of contract against Q dated _____ for failure to state a cause of action and as duplicative of the breach of contract action (first cause of action).

20. On _____, E filed an affirmation in support of E's cross motion for summary judgment and support of cross motion to transfer the action to Bronx County and in opposition to Q's motion to dismiss.

21. On _____, Q filed a Reply Affirmation in support of Q's motion to dismiss and in opposition to E's cross-motion for summary judgment stating that Q's motion to dismiss should be granted because plaintiff's claims for breach of the implied covenant of good faith and fair dealing and for negligent performance in the second and third causes of action, and for attorney fees, failed to state a cause of action. The Reply Affirmation also stated that E's cross-motion for summary judgment should be denied because it is procedurally defective, is not supported by admissible evidence, and is premature.

22. Thereafter, on or about _____, E proffered a Reply Affirmation to Q's Affirmation in Opposition to Q's Cross Motion for Transfer of this Action to Bronx County, Supreme Court stating that E's cross motion for summary judgment is neither defective nor premature and that negligence and the implied covenant of good faith and fair dealing is not duplicative of breach of contract and must not be dismissed.

23. Through the Memorandum of law in support of Motion for Joint Trial, E sought to join Q as a necessary Party that would bear culpability if the Plaintiff were able to prove damages that

exceeded the _____Dollars so contained in E's General Liability Policy issued by the same Q. The Movant sought to join in that action as a Party assigned Counsel to represent E in the Action at Bar. An examination and analysis of the Discovery Strategy said Counsel pursued was purely confined to the role of protecting the limits of the General liability policy. Although a great deal of the Discovery focuses on the incredulous claim that the Plaintiff fell at the E Construction Site and that said fall created damages to the Plaintiff's knees, the medical

evidence revealed degeneration factors. Degeneration as a causation issue was not pursued as it would address the Excess issue of multiple employers being potential contributing Parties. Medical Examination and Analysis that addressed the discernment of Degeneration as opposed to acute trauma was never pursued.

24. As such the Movant needed join the trial with action titled E v. Q Insurance Corp., the Defendant-Respondent, dated _____, for breach of contract, pursuant to CPLR 602(a) in view of the fact that Q is a necessary and indispensable party. E wanted to ascertain whether the actual cause of the knee replacements that the Plaintiff underwent were due to the injuries sustained by M by the alleged accident at the site, as falsely asserted by him in his complaint, or the wear and tear over the years of working construction.

25. The lower court dismissed E's Memorandum of Law in support of Motion for Joint Trial on _____ and entered in the office of the Clerk of the County of Bronx on _____.

26. On _____, E filed an appeal against the decision of the lower court in the Supreme Court of the State of New York, Appellate Court, First Division.

27. The Appellate Court denied E's Motion to join Q as a party to a personal injury action and consolidate the personal injury action with E's coverage action against Q on _____, and entered in the office of the Clerk on _____.

Accordingly, E has brought this action to file an appeal in the Court of Appeal against the order of the Appellate Court dated _____, which denied E's Motion to join Q as a party to the personal injury action and consolidate the personal injury action with the coverage action.

STATEMENT OF TIMELINESS

I respectfully submit that the timeliness chain is intact in as much as:

> On ___ , Plaintiff was served by regular mail with the Notice of Entry of the order dated __ from which it now seeks leave to appeal to the Court of Appeals :
>
> Given the foregoing, and pursuant to CPLR 2103(b)(2) and 5513(b), the time for this application would not expire until _____. As such this application is timely submitted
>
> This motion for leave to appeal is noticed to be heard at a motion date at least eight days and mot more than fifteen days after service hereof, and as a result, is compliant with CPLR 5516.

ARGUMENT

I. STANDARD OF REVIEW

In determining whether to grant leave to appeal, courts generally look to the novelty, difficulty, and importance of the legal and public policy issues the appeal raises. *In re Shannon B.*, 70 N.Y.2d 458, 462 (1987) (granting leave on an "important issue"); *Town of Smithtown v. Moore*, 11 N.Y.2d 238, 241 (1962) (granting leave "primarily to consider [a] question . . . of state-wide interest and application"); *Neidle v. Prudential Ins. Co. of Am.*, 299 N.Y. 54, 56 (1949) (granting leave because of "[t]he importance of the decision" and "its farreaching consequences"); see also 22 N.Y.C.R.R. § 500.22 (leave should be granted when "the issues are novel or of public importance"); COURT OF APPEALS OF THE STATE OF NEW YORK: ANNUAL REPORT OF THE CLERK OF THE COURT: 2010, at 2 (2011) (leave is most often granted to address "novel and difficult questions of law having statewide importance"); *People ex rel. Wood v. Graves*, 226 A.D. 714, 714 (3rd Dept. 1929) ("Motion

to appeal granted as the questions of law presented are of general public importance and ought to be reviewed by the Court of Appeals.").

Leave to appeal to the Court of Appeals is particularly warranted where, as here, a case presents an important and novel issue of law involving issues not just of individual or local import, but of statewide, national, and international significance. See, e.g., *Guice v. Charles Schwab & Co.*, 89 N.Y.2d 31, 38 (1996).

As discussed in detail below, the novel and complex questions raised in this case should be heard by the Court of Appeals.

II. THE NOVEL AND COMPLEX QUESTIONS REQUIRE CONSIDERATION BY THE COURT OF APPEALS.

The question of prejudice in the personal injury case and coverage action being tried together is the most important and complex issue before the New York Court. E, however has stated earlier and still maintains that there is no coverage claim in this matter and the case at bar deals with breach of contract action. E submits that the Court should recognize that the issues raised in the case are novel and implicitly recognize their great importance and legal significance statewide, nationally and internationally when E states that the prejudice to the rights of Q, the insurer and Q's reliance on *Kelly* case are complex issues that requires consideration at an advanced level which will ultimately affect the insurance industry as a whole.

III. THE COURT OF APPEALS SHOULD DETERMINE WHETHER, AND TO WHAT EXTENT, THE APPELLATE COURT ERRED AS A MATTER OF LAW.

In addition to presenting novel and complex questions of law and issues of state, national, and international importance, the Court's ruling should be reviewed by the Court of Appeals to determine whether, and to what extent, it erred as a matter of law. See *Shindler v. Lamb*, 9 N.Y.2d 621 (1961).

Questions presented

Question 1:

The Appellate Court erred in holding that the two actions that E sought to be consolidated, do not involve common questions of law or fact.

The Court of Appeals should determine whether this Court erred in ruling that the personal injury action and the breach of contract action involve different contracts, different parties, and different factual issues. E respectfully submits that the Court utterly ignored the principles laid down by the appellate division courts in myriad of cases which state that consolidation should be granted.

The New York Appellate Court held that, "Although great deference is to be accorded to the motion court's discretion, it is well settled that there is a preference for consolidation in the interest of judicial economy where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right." *Geneva Temps, Inc. v. New World Communities, Inc*., 24 A.D.3d 332, 334 (N.Y. App. Div. 1st Dep't 2005); See also *Firequench, Inc. v. Kaplan*, 256 A.D.2d 213 (N.Y. App. Div. 1st Dep't 1998). The court further held that, "Consolidation is mandated by judicial economy where two lawsuits are intertwined with common questions of law and fact." *Id.*

The New York Court of Appeals stated that, "Consolidation is a valuable and important tool of judicial administration. The Court also stated that, "This is especially true when the courts are overwhelmed with huge numbers of cases which involve substantially the same questions of fact…." *Consorti v. Armstrong World Indus*., 72 F.3d 1003, 1006 (2d Cir. N.Y. 1995).

E submits that the Appellate Court disregarded the principle that consolidation is generally favored in the interest of judicial economy and where common question of law and facts existed. The Court of Appeals also have recognized such well-established principle in *Consorti* case. The Court of

Appeals has recurrently espoused that consolidation 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.

This Court failed to critically analyze the strident comparisons based on facts that E set forth to prove that damages from Q Breach of contract were intertwined with M damages. The Court failed to address the stark facts that Q was obligated to provide coverage and displayed a confirmatory approach in the M case with this regard. It is obvious that in this matter, E could not sue Q for coverage and that the action that E actually filed against Q rests in breach of contract action and resulting damages.

The Court erred with regard to another factor to be weighed by the Court in consolidation cases. In determining whether or not severance would be appropriate, the Court must consider the extent of similarities between the cases in the joinder motion. In the case at bar, the facts of each cause of action are similar, each involves the same provider, the same insurance company, the same insurance contract, and common questions of the application and interpretation of Insurance Policy. Such common questions of law aptly justified consolidation. In the case at bar, there exists no evidence to sustain the fact that the issues are so complex as to preclude resolution by one jury, severance will inure to the detriment of E due to the intertwined issues of law and fact in the two sets of actions namely, breach of contract action (E v. Q) and the personal injury action of M. E is still substantially relying on an expectation of a joint trial so as to ward off Q from seeking separate trials which is utterly prejudicial to E; particularly when Q's counsel also fails to state, with specificity, how consolidation would have been prejudicial to its rights.

Therefore, it is submitted that the Honorable Appellate court erred in denying E's Motion for Joint Trial with the Breach of contract action dated _____ entitled E - v. - Q, (Index No. _____) regardless of common questions of law and fact that existed in the actions sought to be

consolidated. As such E submits that the Court should permit such important issues to be determined by the Court of Appeals.

Question 2:

The Court erroneously held that litigating an insurance coverage claim together with underlying liability issues is inherently prejudicial to the insurer.

The Appellate Court obliviously determined that The E is intending to consolidate coverage action and underlying personal injury action. Where, however, as a matter of fact E has asserted that the complaint against Q dated _____ does not encompass any coverage issue it strictly deals with breach of contract on part of Q and damages arising out of such breach.

Q relied on *Kelly v. Yannotti*, 4 N.Y.2d 603, 176 N.Y.S.2d 637 (1958) for demonstrating the protection granted to cases that involved an attempt to interject insurance coverage to a liability case, to all cases involving an insurance carrier, even if they are the transgressor. There is no legal authority cited by Q to expand this unique protection of the insurance industry beyond the limited scope that the *Kelly* Court ruled in coverage cases. The case that E has brought against Q and seeks to Join in the underlying action, it bears repeating based on the redundancy of Q's defense, is not a coverage case.

A scrutiny of *Kelly v. Yannotti*, 4 NY 2d 603,607 (NY 1968) reveals that it involved a third-party defendant insurer, wherein the court found that the main action and third-party action should be severed. In this case, action against the *defendants'* liability carrier was severed to avoid the obvious resultant prejudice during the trial of the plaintiffs' personal injury actions. None of the parties to the case at bar has sufficiently adduced any evidence stating prejudice to the parties by virtue of joint trial. They merely state prejudice based upon inapplicable coverage issues. Q sought to extend the *Kelly* as an absolute bar to joinder. In fact, the *Kelly* Case does not extend such

protection to the Insurance Industry. Therefore, it can be concluded that the facts of the *Kelly* case cited by Defendant/third party plaintiff, differs in volumes as compared to the facts of the case at bar. Unlike *Kelly v. Yannotti*, there is no issue of insurance coverage at the trial in the present matter.

It is clear that the burden to prove prejudice is upon the opposing party who opposes the joint trial. Likewise, S and Q in the present matter had also failed to demonstrate prejudice to a substantial right. Q's opposition briefs merely cry prejudice and seek refuge in stale cases that apply only to joinder actions seeking to join declaratory judgements with the underlying negligence action. The Courts have provided unique protection to Insurance Companies under those restricted set of facts. However, the Court failed to consider that Q miscarried the notion of the protection under *Kelly* and could not effectively propose authorities which stand for the position that the Insurance industry is so special that the Courts will shield them from Joinder Action despite the fact that Q's inactions caused damages to E and that the facts and circumstances of the present case are intertwined.

Q has made futile attempts of proving prejudice by utterly turning a blind eye to the actual facts and points of law. E recapitulates its contention that Q will not be prejudiced by the consolidation of Liability action and Coverage action which can be aptly demonstrated by the New York Court of Appeals decision in *Salm.* The New York Court of Appeals has held in *Salm v Moses,* 13 N.Y.3d 816, 817-818 (N.Y. 2009) that the presumption of prejudice against an insurer in a jury trial is always palpable but the rule is not absolute. The Court further held that if evidence that a defendant carries liability insurance is relevant to a material issue in the trial, it may be admissible notwithstanding the resulting prejudice. *Id.*

In *Salm v Moses*,

> In a dental malpractice action, it was held that, the trial court did not abuse its discretion in granting defendant's motion to preclude plaintiff from cross-examining

> defendant's expert regarding the fact that he and defendant were both shareholders of and insured by the same dental malpractice insurance company. Although generally inadmissible, if evidence that a defendant carries liability insurance is relevant to a material issue in the trial, it may be admissible notwithstanding the resulting prejudice. The evidence may be excluded if the trial court finds that the risk of confusion or prejudice outweighs the advantage in receiving it. In this case, plaintiff speculated that a verdict in defendant's favor could result in a $100 benefit based on the expert's shareholder status. The trial court's finding that this financial interest was likely "illusory" and that the possibility of bias was attenuated was reasonable. Absent a more substantial connection to the insurance company, or at least something greater than a de minimis monetary interest in the carrier's exposure, the court did not abuse its discretion in precluding the testimony. The Court noted that evidence of liability insurance injects a collateral issue into the trial that is not relevant as to whether the insured acted negligently. Although we have acknowledged that liability insurance has increasingly become more prevalent and that, consequently, jurors are now more likely to be aware of the possibility of insurance coverage, we have continued to recognize the potential for prejudice. The rule, however, is not absolute. If the evidence is relevant to a material issue in the trial, it may be admissible notwithstanding the resulting prejudice of divulging the existence of insurance to the jury. The order of the Appellate Division granting limine to preclude plaintiff from cross-examining defendant's expert regarding the fact that he and defendant were both shareholders of and insured by the same dental malpractice insurance company was affirmed, with costs.

The effect of the Court of Appeals decision is to expand *Kelly* and overrule Salm. Basically, the Court is assuming jury prejudice blindly and will protect the insurance industry at all cost. This is where we seek to constrain *Kelly* just to the limited coverage issues and not expand its unique protection to cover damages they cause by their own actions. We should use Judge Sweet analysis in this point.

In *Salm* case Judge Pigott (concurring) noted that

> In my view, courts should no longer treat insurance coverage as the third rail of trial practice such that it can neither be mentioned, even incidentally, nor be the basis of appropriate inquiry as to possible bias, as in the ruling here.It is common knowledge that most defendants carry insurance. *see, e.g., Oltarsh v Aetna Ins. Co.*, 15 NY2d 111, 118, 204 NE2d 622, 256 NYS2d 577 [1965] ["it is the rare individual who today does not know that 'defendants in negligence cases are insured and that an insurance company and its lawyer are defending.' This is not to say that evidence of insurance should be admitted as a matter of course; there must always be a legitimate basis for its admission. However, in my view, there are appropriate instances when insurance evidence should be admitted to establish a party's or a witness's bias or interest, and trial courts should not shy away from admitting it if, after conducting the appropriate balancing test, they think that its admission is relevant under the circumstances. Ordinarily, in a case such as the one before us, a court should reserve decision on the

> motion until the expert takes the stand and can be questioned, outside the presence of the jury, about his interest in defendant's insurance company and any possible bias. Then a reasoned ruling could be made. Because plaintiff did not request such an opportunity, under these facts, I concur in the majority's decision to affirm.

Basically, in the case at bar, the Court assumed jury prejudice blindly and this eventually would lead to extending safeguards to the insurance industry at all cost in the negligence and coverage actions.

As expounded above, Kelly is inapposite to the case at bar, Kelly applies to coverage issues and the case at bar does not deal with any kind of coverage actions and consists claims for damages arising out the breach of contract on part of Q. Therefore, it is evident that Kelly is applicable only to few other limited insurance cases with the exception of the case at bar.

E submits that the Appellate Court apparently, marginalised the assertions that E is not seeking to consolidate a liability action with a separate coverage action**.** E in its complaint dated _____, asserts that Q committed a breach of contract by failing to notify E promptly about M's excess claim and E consequently failed to provide timely notice to IC. IC denied coverage on the basis of such belated notice of claim. Due to Q's breach of insurance contract, E would be deprived of the excess insurance and would be exposed to liability towards M. As such, it is clear that E's claim for damages based on Breach of contract and M's claim for damages are intertwined and therefore ought to be consolidated.

The Appellate Court based its unfounded resolution that joint trial be prejudicial to the insurer and unduly influence the verdict on the case law authorities cited by Q which are inapposite to the case at bar. E, rightfully asserts that the case laws cited by Q are applicable where a party seeks to consolidate actions involving insurance coverage and underlying liability action. However, E has continually accentuated the contention that the case at bar, does not deal with any insurance coverage issues. The issues in the action that E seeks to consolidate with the underlying personal

injury action revolves around the Q's breach of insurance contract. Therefore, Q's allegation that consolidation is prejudicial to its rights is fruitless and fails sufficient substantiation. As such, the efforts Q's counsel made futile attempts to state prejudice and further its disputations with regard to prejudice were tenuous.

Therefore, the Appellate Court erred in stating that prejudice is inherent to the insurer Q if issues of coverage are consolidated with issues of liability whereas the authorities cited above clearly state that no prejudice would be caused to Q from the consolidation of the said actions. Moreover, the issue in case at bar does not deal with any coverage claims. As such E submits that the Court should permit such important issues to be determined by the Court of Appeals.

Question 3:

The Court erred in holding that litigating the actions separately will allow Q to take any necessary discovery to which it is entitled, while avoiding prejudice caused by delay to M. Consolidation of the actions at this stage would not cause undue delay as further discovery is not required in the two actions as both the actions are closely knit and substantiated by same evidences.

In actions involving a common nucleus of facts, the New York Appellate Court has concluded that, "Consolidation of the two actions for discovery purposes was appropriate since there were common questions of law and fact, there was no demonstration that the consolidation would prejudice any substantial right of defendants, and any delay caused by the consolidation is not sufficient reason to bar it" *Plot Realty LLC v. DeSilva,* 45 A.D.3d 312, 313 (N.Y. App. Div. 1st Dep't 2007).

On similar lines, in *Marbilla, LLC v. 143/145 Lexington LLC,* 116 A.D.3d 544 (N.Y. App. Div. 1st Dep't 2014) it was noted that, the court properly denied the third-party defendant's motions to dismiss and sever. It stated that the third-party actions will not unduly delay the determination of

the main action or prejudice the substantial rights of third party defendant or any other party. It also stated that the third-party actions present questions of law and fact in common with the main action, and thus a joint trial is preferable.

In *Alsol Enters. v. Premier Lincoln-Mercury, Inc*, the Appellate Court has rightly stated that, "Mere delay is not a sufficient basis upon which to deny consolidation." *Alsol Enters. v. PremierLincoln-Mercury, Inc.,* 11 A.D.3d 494 (N.Y. App. Div. 2d Dep't 2004).

E contends that Q failed to sufficiently demonstrate the undue delay and the resulting prejudice to the party. In the case at bar, the discovery is complete in M's personal injury action and no additional discovery is required in breach of contract action. E submits that the two actions are interwoven having common nucleus of facts. Therefore, it follows that the evidence considered in the said actions are same and it can be concluded that no additional discovery of relevant documents is necessary other than those already produced. As such, there is no requirement for further discovery in breach of contract action causing impediment to consolidation of the actions. As such consolidation of the actions will not cause any undue delay resulting in prejudice to Q. E submits that even after the actions are consolidated, the actions may proceed apace without any prejudice or delay. Therefore, consolidation of the said actions is appropriate.

E asserts that delay as alleged by Q was caused fundamentally for the reason that Q failed to fulfil its obligation under the insurance contact to provide timely notice to E about the exhaustion of primary coverage limits. Such failure on part of Q to provide written notice of the exhaustion of the general liability until ___ is primarily the root cause of the delay. Further, the fact that E, independent of Q assigned counsel, was not provided with a copy of the record of the M action until _____ is another root cause for the delay. E asserts that the Court disregarded that E was subjected to travail by asserting severance. The Court improperly evidenced prejudice in the Joinder and held that the contract action was subject to factual discovery when in actuality Q was not prejudiced by

the consolidation. Q's inactions ultimately led to the delays and after committing such default in sending timely notice Q has no position to state that its rights are prejudiced.

Therefore, the Appellate Court erred in holding that litigating the actions separately will allow Q to take any necessary discovery to which it is entitled, while avoiding prejudice caused by delay to M. As such E submits that the Court should permit such important issues to be determined by the Court of Appeals.

CONCLUSION

As this appeal raises novel legal issues, as the novel legal issues it raises are of great public importance and interest within New York and throughout the United States and internationally, as the E raises numerous complex legal arguments establishing that this Court made substantial legal errors that ought to be reviewed by the Court of Appeals, and this Court should grant the E's Motion for Leave to Appeal to the Court of Appeals.

Dated: _____

New York, New York.

_____
_____
_____
_____
Attorney for Plaintiff-Appellant