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A Mismatched Pair: Second Department Holds Consolidation “Inapt” Where One Action is Subject to a Meritorious Motion to Dismiss

Consolidation under CPLR 602(a) allows for multiple actions that involve common questions of fact and law to be merged under the same caption. The procedural tool is intended to avoid unnecessary duplication of trials, save on costs, and prevent injustice that may result from divergent decisions on the same facts. Sometimes, however, plaintiffs move to consolidate for more strategic purposes, such as avoiding dismissal of a time-barred complaint by merging it with a related but timely action. Generally, it is within the trial court’s discretion whether to consolidate the multiple actions. However, a recent case out of the Appellate Division, Second Department held that discretion is not unfettered. In a matter of first impression for the department, the court held that consolidation should only be granted when each action is “itself viable, meaning that neither is confronted with a pending—and apparently meritorious—motion to dismiss.”

The Case: *HSBC Bank USA, N.A. v. Francis*

In *HSBC v. Francis*, the defendant’s mortgage was foreclosed upon in 2008. The plaintiff’s predecessor in interest obtained a judgment that needed to be corrected. The court, however, never entered the corrected judgment, and the case remained open.

Nine years later, in 2017, the plaintiff commenced an action to foreclose on the same mortgage. In that action, the defendant moved to dismiss on statute of limitations grounds, after which the plaintiff cross-moved to consolidate the 2008 and 2017 actions. The trial court granted the plaintiff’s cross-motion to consolidate and denied the motion to dismiss as academic.

On appeal, the Appellate Division, Second Department reversed the lower court’s consolidation order. Initially, the court noted that there was no appellate authority directly on point, as prior cases involving dueling motions to dismiss and consolidate were “limited to actions where dismissals were granted so as to render the issue of consolidation academic.” In other words, those courts had decided the two issues in the reverse order from the *Francis* court — the motion to dismiss first and consolidation second. Analogizing from those cases, however, the Second Department held the trial court had improvidently granted consolidation before first adjudicating the defendant’s dismissal motion: “[I]n general, consolidation should be denied where one of the cases to be consolidated is subject to a meritorious motion to dismiss.” Turning to the merits, the Appellate Division held the defendant carried her burden of showing the 2008 action was time-barred. The court, therefore, granted the defendant’s motion to dismiss and denied the motion to consolidate as moot.

Takeaway

CPLR 602(a) is intended to streamline the disposition of matters. For consolidation to be proper, each action must be viable in its own right. If one of the cases is subject to a meritorious motion to dismiss, consolidation will not save the plaintiff in the Second Department.