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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. THOMAS P. PHELAN,**

*Justice*

TRIAL/IAS PART 5  
NASSAU COUNTY

**BRYAN J. PACELLI and KELLY PACELLI,**

Plaintiff(s),

-against-

**AUSTIN ENVIRONMENTAL CORP.,**

Defendant(s).

ORIGINAL RETURN DATE:09/18/08

SUBMISSION DATE: 10/16/08

INDEX No.: 2633/08

ACTION No. 1

MOTION SEQUENCE #1,2

The following papers read on this motion:

|                       |   |
|-----------------------|---|
| Notice of Motion..... | 1 |
| Cross-Motion.....     | 2 |
| Answering Papers..... | 3 |

Plaintiffs' unopposed motion for an order pursuant to CPLR 602(a) consolidating this action with Bryan J. Pacelli and Kelly Pacelli v Intruck Leasing Corp., et al., (Index No. 12211/06; Action No. 2); National Interstate Insurance Company s/h/a Schoolman Transportation System Inc., et al. v Intruck Leasing Corp., et al. (Index No. 16978/06; Action No. 3); Certain Underwriters at Lloyd's London, a/s/o EMH Consulting, Inc. v Westbury Paper Stock Corp., et al., (Index No. 5179/07; Action No. 4); Michelle Galluzo v Intruck Leasing Corp., et al., (Index No. 9261/07; Action No. 5); Kristin Blume v Intruck Leasing Corp., et al., (Index No. 15915/07; Action No. 6) and Debra Loscalzo and Vincent Loscalzo v Intruck Leasing Corp., et al., (Index No. 14979/07; Action No. 7) is denied. In the alternative, the actions shall be tried jointly.

Cross-motion by defendant for an order pursuant to CPLR 3211(a)(7) dismissing the complaint against it for failure to state a claim or, in the alternative, pursuant to CPLR 3212 granting it summary judgment dismissing the complaint against it is determined as provided herein.

Plaintiffs seek to recover damages for personal injuries plaintiff Bryan J. Pacelli suffered in a motor vehicle accident. Plaintiffs allege that on March 15, 2006, while proceeding westbound on the Long Island Expressway, a waste hauling truck owned by Intruck Leasing Corp. collided with plaintiff Bryan Pacelli's vehicle and crushed it between it and a bus. In related

actions, plaintiffs have sued the owner of the truck Intruck Leasing Corp., Westbury Paper Stock, whose merchandise or materials was allegedly being hauled in the truck, and the insurance company. Plaintiffs allege that the truck was overloaded and that the driver was not only negligent but unqualified to operate the truck. In this action, plaintiffs alleged in their original complaint that defendant Austin Environmental Corp. was negligent in hiring Intruck Leasing Corp. to haul Westbury Paper Stock's merchandise or materials.

Austin Environmental Corp. seeks dismissal of the complaint pursuant to CPLR § 3211 or 3212 on the grounds that it never had a relationship with Intruck Leasing Corp. and that it did not hire Intruck Leasing Corp.'s truck to haul Westbury Paper Stock's merchandise or materials. In support of its motion, Austin Environmental Corp. has submitted the affidavit of its President, Thomas Stewart. Mr. Stewart attests that while Austin Environmental Corp. is in the business of brokering waste disposal services for various companies, it does not own any trucks, vehicles or other waste removal equipment. He further attests that while Austin Environmental Corp. hires independent contractors to haul waste for its customers, it has "never contracted with, hired, contacted nor ever heard of Intruck Leasing." (Stewart Aff. ¶7).

In opposition to the cross-motion this motion, plaintiffs' counsel avers that in response to their discovery demand in a related action, Westbury Paper Stock stated as follows: "Defendant Westbury Paper Stock, retained a broker named Austin Environmental, located at 150-12 14<sup>th</sup> Avenue, Whitestone, New York 11357, to hire transport of the load from Westbury Paper Stock's premises to a destination chosen by Austin Environmental" (Laskin Aff. ¶11) and that they commenced this action upon receipt thereof. Nevertheless, when Austin Environmental Corp.'s counsel informed plaintiffs' counsel on or about April 2, 2008, that Austin Environmental Corp. never hired Intruck Leasing Corp. to move Westbury Paper Stock's merchandise or materials but that it did hire Luza Trucking, Inc. to do so, the plaintiffs served an amended complaint in this action alleging that Austin Environmental Corp. negligently hired Intruck Leasing Corp. and Luza Trucking Inc. to transport Westbury Paper Stock's merchandise or materials. After making the instant motion on or about September 11, 2008, Austin Environmental Corp. answered the Amended Complaint on October 8, 2008.

Defendant Austin Environmental Corp.'s motion to dismiss the complaint pursuant to CPLR 3211 is addressed only to the original complaint which was replaced by the amended complaint. Austin Environmental Corp. has not moved pursuant to CPLR 3211 to dismiss the Amended Complaint. See, Terrano v Fine, 17 AD3d 449 (2d Dept. 2005) citing Livadiotakis v Tzitzikalakis, 302 AD2d 369, 370 (2d Dept. 2003). Austin Environmental Corp.'s motion to dismiss the complaint pursuant to CPLR 3211 is accordingly denied.

Austin Environmental Corp.'s motion to dismiss this action pursuant to CPLR 3212 is denied, without prejudice. Not only has Austin Environmental Corp. failed to address its role in hiring Luza Trucking to haul Westbury Paper Stock's merchandise or materials, at this juncture where discovery is yet to take place, summary judgment dismissing the complaint against Austin Environmental Corp. would be premature.

All parties shall serve upon any party so demanding copies of disclosure documents heretofore obtained in the other actions. Upon completion of discovery, the parties shall file separate Notes of Issue and Statements of Readiness as to each action.

Each party shall be entitled to enter a separate Bill of Costs if costs are allowed.

All matters of trial practice, including the right to open and close, are reserved to the Justice presiding at the joint trial.

All papers shall reflect the joint status of these actions.

As Action Nos. 2 through 7 were commenced prior to Action No. 1, Action No. 1 is hereby reassigned to Justice Angela G. Iannacci. Action Nos. 2 through 7 are scheduled for Certification Conferences before the Hon. Angela G. Iannacci on November 12, 2008, at 9:30 a.m., at which time counsel for all parties in both Action Nos. 2 through 7 and Action No. 1 are directed to be present, and a Compliance Conference shall be held in Action No. 1 at that time.

This decision constitutes the order of the court.

Dated: 11-6-08

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**ENTERED**

NOV 12 2008

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

**RE: PACELLI v. AUSTIN ENVIRONMENT**

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