

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D25191
H/prt

_____AD3d_____

Argued - October 8, 2009

PETER B. SKELOS, J.P.
ANITA R. FLORIO
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2008-07385
2009-01531

DECISION & ORDER

Julio Mercado, et al., respondents, v City of New York, defendant, Alex Pierre, appellant.

(Index No. 30723/06)

Grossman & Grossman, P.C., New York, N.Y. (Brett M. Grossman of counsel), for appellant.

Pacheco & Lugo, PLLC, Brooklyn, N.Y. (Betty Lugo of counsel), for respondents.

In an action to recover damages for personal injuries, etc., the defendant Alex Pierre appeals, as limited by his brief, from (1) so much of an order of the Supreme Court, Kings County (Knipel, J.), dated June 30, 2008, as denied that branch of his motion which was to dismiss the complaint insofar as asserted against him pursuant to CPLR 3211(a)(4), and (2) so much of an order of the same court (Schmidt, J.), dated November 26, 2008, as denied his separate motion to dismiss the complaint insofar as asserted against him pursuant to CPLR 3211(a)(4).

ORDERED that the orders are affirmed insofar as appealed from, with one bill of costs.

The plaintiff commenced three separate actions against, among others, the appellant, under identical complaints, to recover damages for personal injuries resulting from a slip and fall accident on the sidewalk abutting the appellant's premises. The second action was later discontinued. The defendant Alex Pierre moved, inter alia, to dismiss the complaint in the instant action, which was the third action, insofar as asserted against him pursuant to CPLR 3211(a)(4) based on the pendency

December 1, 2009

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of the first action, and separately moved to dismiss that complaint insofar as asserted against him pursuant to CPLR 3211(a)(4) based on the pendency of the second action at the time the third action was commenced. The Supreme Court denied that branch of the appellant's motion, and the appellant's separate motion, and dismissed the first action. We affirm.

CPLR 3211(a)(4) permits the dismissal of a cause of action where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires" (CPLR 3211(a)(4); see *Moreo v Regan*, 140 AD2d 313, 314). "[W]hen two actions for the same relief are pending, it is within the court's discretion to dismiss a prior pending action instead of dismissing the later action pursuant to CPLR 3211(a)(4)" (*Great W. Bank v Terio*, 200 AD2d 608, 609, citing *Dunn v Dunn*, 86 AD2d 772; see Siegel, Practice Commentaries, McKinney's Cons Law of NY, Book 7B, CPLR C3211:18). Here, the Supreme Court providently exercised its discretion in denying that branch of the appellant's motion which was to dismiss the complaint insofar as asserted against him pursuant to CLPR 3211(a)(4), and the appellant's separate motion for the same relief (see *Moreo v Regan*, 140 AD2d at 314; *Dashew v Cantor*, 85 AD2d 619; *Ferrandino v Cartelli*, 12 AD2d 604; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:16; Weinstein-Korn-Miller, NY Civ Prac ¶ 3211.20).

SKELOS, J.P., FLORIO, BALKIN and LEVENTHAL, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court