

Jakobsdottir v Argo Corporation

2013 NY Slip Op 33313(U)

April 30, 2013

Sup Ct, Queens County

Docket Number: 3387/2013

Judge: Robert J. McDonald

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

BJORG JAKOBSDOTTIR, Index No.: 3387/2013
Plaintiff, Motion Date: 04/23/13
- against - Motion No.: 51
THE ARGO CORPORATION, MARTINIQUE Motion Seq.: 1
REALTY ASSOCIATES and MARTINIQUE
TWELVE KEW GARDENS CORP.,

Defendants.

- - - - - x

The following papers numbered 1 to 13 were read on this motion by defendants, THE ARGO CORPORATION and MARTINIQUE REALTY ASSOCIATES, for an order pursuant to CPLR 3211(a)(4) dismissing the plaintiff's complaint on the ground that there is another action pending in this Court between the same parties for the same cause of action:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....6 - 9
Affirmation in Reply.....10 - 13

On July 19, 2011, the plaintiff, represented by attorney John Ioannou, filed a summons and complaint in Queens County Supreme Court under Index No. 16990/2011 naming THE ARGO CORPORATION, HENRY MOSKOWITZ, ROSE MOSKOWITZ, MARTINIQUE REALTY ASSOCIATES and MARTINIQUE TWELVE KEW GARDENS CORP as defendants. The complaint contains a cause of action for damages for personal injuries allegedly sustained by the plaintiff as the result of an slip and fall accident which took place on March 8, 2010 at the premises located at 137-21 83rd Avenue, Briarwood, Queens County, New York. It is alleged that the defendants owned, operated, controlled, maintained and managed the premises in question.

Subsequent to the commencement of the prior action, Henry Moskowitz died. That action has been stayed pending the substitution of an administrator for the estate of Henry Moskowitz as a party-defendant. In addition, plaintiff's counsel John Ioannou was suspended from the practice of law as of December 10, 2011. He did not withdraw as counsel for the plaintiff and did not arrange for substitution of counsel. Counsel for defendants, Argo and Martinique Realty Associates, Roberta E. Tarshis, Esq., states in her affirmation in support of the motion that by correspondence dated September 9, 2011, December 21, 2011 and March 21, 2012 she requested that plaintiff's counsel take the steps necessary to enable plaintiff to pursue the matter and lift the stay.

On February 20, 2013, the law firm of Sacco & Fillis, LLP, as attorneys for plaintiff Jakobsdottir commenced the instant action in Queens County Supreme Court under Index No. 3387/2013 naming THE ARGO CORPORATION, MARTINIQUE REALTY ASSOCIATES and MARTINIQUE TWELVE KEW GARDENS CORP as defendants. The complaint seeks damages for personal injuries arising out of the same slip and fall accident which took place on March 8, 2010.

In lieu of serving an answer, defendants' move to dismiss the second complaint in its entirety pursuant to CPLR 3211(a)(4) on the ground that there is a prior action still pending in this Court between the same parties for the same cause of action based upon the identical incident.

Jeremy S. Ribakove, Esq., new counsel for plaintiff in the instant action submits an affirmation opposing the defendants' motion to dismiss the instant action stating that when he commenced the instant law suit he was not aware of the prior action. He also states that as he was not substituted as counsel in the prior action he could not file a discontinuance of that action. Counsel also contends that the defendants have no standing to make the motion to dismiss as they have not yet filed an answer. Counsel concedes that there are now two actions in this court on behalf of the plaintiff arising out of the same accident but asserts that pursuant to CPLR 3211(a)(4) the court has discretion in determining which action to dismiss. Counsel asserts that as the prior action is stayed due to the death of a party and the suspension of plaintiff's prior counsel, that it would be more expeditious and less burdensome to dismiss the prior action and proceed with the instant case.

Upon review and consideration of the defendants' motion, plaintiff's affirmation in opposition and defendants' reply thereto this court finds as follows:

A motion to dismiss pursuant to CPLR 3211(a)(4), on the ground that "there is another action pending between the same parties for the same cause of action," shall be granted if it is established that the action for which dismissal is sought was initiated subsequent to another already pending action and that both actions share sufficient identity of parties and the causes of action asserted (see Murphy v 317-319 Second Realty LLC, 95 AD3d 443 [1st Dept. 2012]). A motion to dismiss pursuant to CPLR 3211(a)(4) should be granted where there is a danger of conflicting rulings on the same matter (see Diaz v Philip Morris Cos., Inc., 28 AD3d 703 [2nd Dept. 2006]). However, the court need not dismiss upon this ground but may make such order as justice requires (see Moreo v Regan, 140 AD2d 313[2d Dept. 1988]). Further, pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed on the ground that there is another action pending between the same parties for the same cause of action (see Cherico, Cherico & Assoc. v Midollo, 67 AD3d 622 [2d Dept. 2009]). The statute, however, does not require dismissal but rather directs the court to "make such orders as justice requires" CPLR 3211(a)(4); Whitney v Whitney, 57 NY2d 731 [1982].

First, pursuant to CPLR 3211(e)(f), a motion to dismiss on the ground of prior action pending may be made any time before service of the responsive pleading is required, and such motion extends the time to serve the answer until ten days after service of notice of entry of the order. Therefore, the defendants' have standing to file the instant motion and the motion was timely made.

Second, there is no dispute that the instant action filed under Index No. 3387/13 and the prior action filed under Index No. 16990/2011 arose out of the same slip and fall accident and contain the same allegations of negligence and there is substantial identity of parties in each proceeding.

However, under the circumstances of this case and in the interests of justice, as an administrator has not yet been appointed nor substituted for the deceased defendant, who is not a necessary party, and as plaintiff's attorney in the prior action was suspended and has not withdrawn from the action or arranged for substitution of counsel as required pursuant to NYCRR § 603.13(d)(1)(2), this court finds that to prevent prejudice to the plaintiff due to the suspension of his prior counsel and so that all parties may have a prompt resolution of the action, this Court finds that the most appropriate and expedient remedy is to dismiss the prior action and permit plaintiff to proceed with the instant action (see Mercado v City

of New York, 68 AD3d 730 [2d Dept. 2009] [when 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) (see Great W. Bank v Terio, 200 AD2d 608 [2d Dept.1994]; Dunn v Dunn, 86 AD2d 772 [4th Dept. 1982])].

Accordingly, for all of the above stated reasons it is hereby

ORDERED, that the plaintiff's complaint, filed under Index No. 16990/2011, is dismissed, and it is further,

ORDERED, that the defendants shall file an answer to the instant complaint within ten days of service of a copy of this order with notice of entry thereof.

Dated: April 30, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.