

11 E. 68th St. LLC v Madison 68 Realty LLC
2014 NY Slip Op 31872(U)
July 10, 2014
Supreme Court, New York County
Docket Number: 650771/14
Judge: Melvin L. Schweitzer
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Background

Madison commenced the first-filed action on March 10, 2014 against East 68th and Royal Abstract of New York LLC (Escrow Agent). The complaint in the first-filed action asserts a claim against East 68th for breach of a Purchase Agreement (Agreement) entered into by Madison and East 68th on or about September 21, 2011. The breach of contract claim arises from East 68th's alleged failure to comply with the requirements of Article 29 of the Agreement, namely its untimely and unsatisfactory responses to Madison's information inquiries in connection with the conversion of the property subject to the Agreement to a condominium form of ownership. The first-filed action also seeks damages pertaining to a holdback escrow agreement dated December 29, 2011 between Madison, East 68th, and the Escrow Agent. The complaint in the first-filed action alleges a breach of contract claim against the Escrow Agent for its failure to disburse to Madison the funds escrowed under the Escrow Agreement (EA), as well as a claim for breach of the implied covenant of good faith and fair dealing against East 68th for objecting to the release of the escrow funds despite the fact that East 68th purportedly had no right to object to the terms of the EA. Notably, the first-filed action also includes a cause of action (its fifth cause of action) seeking a declaratory judgment concerning the Agreement. Madison requests a judgment declaring it has not breached the Agreement by failing to disclose certain information in relation to the occupancy status of Units SE3, SE5, SE6, SE7, and SE8 of the property in controversy.¹

On March 11, 2014, a day after Madison commenced the first-filed action and served the summons and complaint, East 68th initiated the current action. East 68th asserts claims against Madison for breach of contract, breach of the implied covenant of good faith and fair dealing,

and fraud arising from the Agreement. East 68th's breach of contract claim stems from Madison's representation that Units SE3, SE5, SE6, SE7, and SE8 in the property subject to the Agreement were storage units when they were actually part of occupied residential apartments. These units were the basis of Madison's fifth cause of action that sought a declaratory judgment in the first-filed action.

Madison contends that under New York's first-filed rule, a complaint filed second should be dismissed in favor of an earlier-filed pending action, stayed until there is a resolution in the first action, or consolidated into the first action. As this action was filed after Madison's first-filed action, Madison believes the first-filed action should take precedence under the first-filed rule and result in the dismissal of East 68th's action. East 68th contends the entire thrust of its complaint is limited to the Agreement's provisions on Units SE3, SE5, SE6, SE7, and SE8, whereas Madison's complaint is broader in scope, alleging additional contractual breaches against East 68th and the Escrow Agent, and only references those five units in its declaratory judgment cause of action. Thus, East 68th believes that while both actions arise from the same transaction and occurrence – the purchase and conversion of the property into a condominium – the alleged wrongs are entirely distinct from one another.

Discussion

Under the first-filed rule, the action that is commenced first is the action in which a complaint was first filed. *Harrison v Harrison*, 16 AD3d 206, 207 (1st Dept 2005). A case in which a complaint is filed "only a day before" the filing of a complaint in another action is generally immune from dismissal based on CPLR 3211 (a) (4) under the first-filed rule. *Reckson Assocs. Realty Corp. v Blasland, Bouck & Lee, Inc.*, 230 AD2d 723, 725 (2d Dept 1996).

¹ Madison had not filed a Request for Judicial Intervention as of the date of this Decision and Order.

“Pursuant to CPLR 3211 (a) (4), a court has broad discretion as to the disposition of an action when another action is pending and may dismiss one of the actions where there is a substantial identity of the parties and causes of action.” *See Simonetti v Larson*, 44 AD3d 1028, 1028 (2d Dept 2007). The “critical element is that both suits arise out of the same subject matter or series of alleged wrongs.” *See Cherico, Cherico & Assocs. v Midollo*, 67 AD3d 622, 622 (2d Dept 2009); *see also JC Mfg., Inc. v NPI Electric, Inc.*, 178 AD2d 505, 505 (2d Dept 1991) (affirming dismissal of certain counterclaims and claims in the third-party complaint because the “pleadings in both actions show that both are based on the same contractual agreements and arise out of the same actionable wrongs. Additionally, there is substantial identity of the parties, and the nature of the relief sought is substantially the same. We see no good reason for two actions rather than one.”). Courts must ultimately determine whether the relief sought is “the same or substantially the same.” *Kent Development Co. Inc. v Liccione*, 27 NY2d 899 (1975); *Parker v Rich*, 140 AD2d 177 (1st Dept 1988). If the court finds such symmetry in the parties’ claims, then it has wide discretion to decide whether to dismiss, stay, or consolidate the current suit.

The critical issue in determining this motion is whether East 68th’s claims in this action arise out of the same subject matter or alleged wrongs as Madison’s claims in the first-filed complaint. The fact that two lawsuits emanate from a common transaction or occurrence is not necessarily sufficient to warrant dismissal based upon CPLR 3211 (a) (4). *Kent Development Co. Inc.*, 27 NY2d at 901. It is debatable whether the instant action and the first-filed action involve wholly distinct and separate issues and relief. They share significant similarities, particularly the occupancy status issue, but Madison’s first-filed action is more comprehensive as it includes EA breaches and the alleged Article 29 breach.

East 68th asserts that Madison's cited cases stand solely for the proposition that when two pending actions involve the same claims and same relief, dismissal, or in the alternative, a stay or consolidation may be warranted. However, Madison is correct to note that the precise subject matter in the instant action is also at issue in the first-filed complaint, so there is clearly enough overlap present for the court to decide whether the current action should be dismissed, stayed, or consolidated.

East 68th's complaint alleges three claims for breach of contract arising from the parties' Agreement. These claims relate to the five storage units at the property that East 68th reveals were actually occupied as residential units. All of East 68th's claims (breach of contract, breach of implied covenant of good faith and fair dealing, and fraud) revolve around the alleged misrepresentations concerning those five units. The same subject matter is implicated in the first-filed complaint in its fifth cause of action relating to a letter that East 68th sent to Madison on May 9, 2012 declaring that Madison breached Articles 7.1.5, 7.1.6(a), 7.1.6(m), 7.1.6(n), 7.1.17, 7.1.20, and 7.1.21 of the Agreement, the relevant provisions on the occupancy status of Units SE3, SE5, SE6, SE7, and SE8. This letter allegedly served as a "Claim Notice" whose viability also impacts the escrow issue in Madison's first-filed complaint, further evincing how the two actions are similar to one another. East 68th's discovery requests in the first-filed action clarify that East 68th is prepared to litigate therein the claims arising from its May 9, 2012 letter. East 68th made demands for documents related to Units SE3, SE5, SE6, SE7, and SE8 and communications related to the individuals who occupied those units. This action and the first-filed action involve the same subject matter and alleged wrongs.

East 68th contends there is no identity of issues because it has not asserted counterclaims in the first-filed action. The assertion of claims in both actions by a party is not required for a finding of identity of issues under CPLR 3211 (a) (4). *See Reckson Assocs. Realty Corp.*, 230 AD2d at 724. The fact that Madison's claim concerning the units in the first-filed action is for declaratory relief does not attenuate the court's belief that a dismissal, stay, or consolidation may be warranted. "[T]he action for a declaratory judgment having been first commenced, this court is not ousted of its jurisdiction by the proceeding later brought . . . and that the situation is an appropriate one for a declaratory judgment." *Lakehill Assocs., Inc. v Frame*, 33 Misc 2d 100, 101 (Sup Ct 1962); *see also Brookhaven Memorial Hosp. Med. Ctr., Inc. v County of Suffolk*, 155 AD2d 404, 404 (2d Dept 1989) (declaratory judgment action need not be dismissed in favor of other pending action simply because declaratory judgment was commenced first).

If the court were to determine that dismissal of this action would be premature, then a stay of the instant case pending the outcome of the first-filed action might be appropriate pursuant to the court's powers under CPLR 3211 (a) (4). *See Case Capital Corp. v Morgan Invest., Inc.*, 154 AD2d 501, 501 (2d Dept 1989) (concluding the trial court properly employed its discretion pursuant to CPLR 3211 (a) (4) in staying one of the pending actions).

After reflecting on the options at its disposal, however, the court concludes that consolidating the instant action into the first action is the most equitable and rational outcome, and will avoid the waste of judicial resources and the risk of inconsistent verdicts. Under CPLR 602 (a), "a court . . . may order the actions consolidated," assuming both "involve [a] common question of law or fact [and] are both pending before a court." The action that was commenced first is the action that should retain priority. *See City Trade & Indus., Ltd. v New Cent. Jute Mills*

Co., 25 NY2d 49, 58 (1969) (“Generally the court which has first taken jurisdiction is the one in which the matter should be determined.”). The first-filed rule also typically applies to consolidation orders under CPLR 602 (a). *Parker v Troutman Sanders LLP*, 89 AD3d 638, 638 (1st Dept 2011) (granting consolidation into court where first action was commenced). Even if the complaint in the first action was filed only a few days before a subsequent action, the first-filed rule demands that consolidation be into the first-filed action. *Lakehill Assocs., Inc.*, 33 Misc 2d at 101 (ordering consolidation of a case filed “[a]bout December 15” into a case filed “[o]n or about December 18 . . . but subsequent to the commencement of” the first action).

While Madison believes that its motion to dismiss should be granted because the two actions focus on the same breach of contract issue, the court finds that dismissal of East 68th’s suit would not be appropriate. The occupancy status issue is common to both complaints, yet Madison’s first-filed complaint also includes additional causes of action that are entirely distinct from the subject matter of East 68th’s complaint.

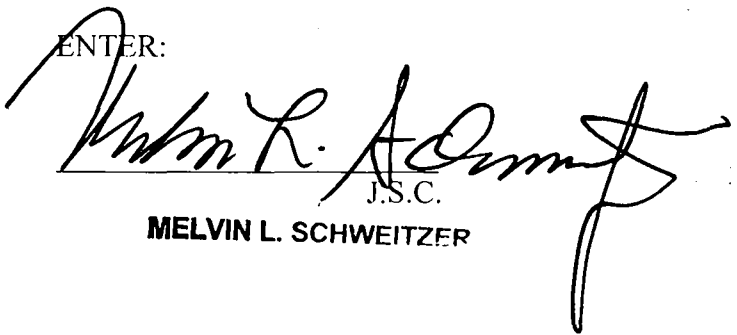
While both actions arise from a common transaction, the totality of the alleged harms are disparate enough in the court’s opinion to warrant East 68th’s action to continue. Rather than having East 68th’s action progress as its own separate case, the court orders the actions be consolidated so that the court can fully decide the breach of contract issue in a single, unified proceeding.

Accordingly, it is

ORDERED that defendants’ motion to dismiss is denied; and it is further

ORDERED that the current action be consolidated with defendants’ prior action, Index No. 650752/2014, for the purposes of discovery and trial.

Dated: July 10, 2014

ENTER:

J.S.C.
MELVIN L. SCHWEITZER