

<b>Iwanowski v Halevy Life Inc.</b>
2018 NY Slip Op 31906(U)
July 31, 2018
Supreme Court, New York County
Docket Number: 159370/2017
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART 12  
*Justice*

-----X

RAYMOND IWANOWSKI, INDEX NO. 159370/2017  
Plaintiff, MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 1

HALEVY LIFE INC., DECISION AND ORDER  
Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

were read on this application to dismiss

By notice of motion, defendant moves pre-answer pursuant to CPLR 3211(a)(4) for an order dismissing the complaint on the ground that another action pends between the parties. Plaintiff opposes.

The parties' claims against each other arise from a health club membership agreement. After defendant health club unsuccessfully sought payment from plaintiff for an allegedly overdue monthly membership fee, it commenced a small claims action against him for breach of contract. (NYSCEF 5).

In response, plaintiff filed an answer and counterclaims, as follows:

- (1) for his first cause of action, plaintiff alleges that defendant violated article 30 of the General Business Law (GBL) (New York Health Club Services Law), which prohibits a contract for health club services that requires payment of more than

\$3,600 per year, as their membership agreement required a membership fee of more than \$40,000 per year; that defendant sent him an invoice for \$3,500 in violation of the GBL; and that he has thereby been damaged in the amount of no less than \$5,000 including attorney fees and costs; and

- (2) for his second cause of action, plaintiff alleges that a violation of article 30 of the GBL exposes defendant to liability for a civil fine of not more than \$2,500 per violation, and that defendant's demand for payment is such a violation.

(NYSCEF6).

Thereafter, plaintiff commenced his own small claims action against defendant in Civil Court, seeking \$5,000 in damages for a violation of GBL article 30. (NYSCEF 7). At some point thereafter, defendant's small claim and plaintiff's small claims counterclaim were transferred to the Civil Court, where the action presently pends. (NYSCEF 4). Plaintiff's separate small claims action remains pending.

On or about October 20, 2017, plaintiff commenced the instant action, asserting the following claims:

- (1) for a first cause of action, entitled "New York Health Club Services Law," that defendant's membership agreement violated article 30 of the GBL as it caused him to pay more than \$28,000 per year, that the agreement is thus void and unenforceable, and he was damaged in an undetermined amount which includes, but is not limited to, civil penalties, attorney fees, and litigation costs;
- (2) for a second cause of action, that defendant breached its agreement to provide plaintiff with health club services, with damages of no less than \$31,000; and
- (3) for a third cause of action, under the New York Deceptive Practices Act (GBL 349), for defendant's false invoicing of plaintiff for services allegedly rendered to his son pursuant to a separate membership agreement.

In his prayer for relief, plaintiff seeks a judgment declaring that the parties' membership agreement is void and unenforceable, that defendant's conduct of sending a false invoice constitutes a violation of the Deceptive Practices Act, and that defendant breached the parties' agreement; and an award of damages in the sum of \$87,000, \$7,500 as a civil penalty, attorney

fees, costs, and disbursements, and treble damages under the GBL. (NYSCEF 1).

Pursuant to CPLR 3211(a)(4), a claim may be dismissed on the ground that another action pends between the same parties and arises from the same facts or allegations. Thus, when “there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same, a court has broad discretion in determining whether an action should be dismissed pursuant to CPLR 3211(a)(4).” (*Scottsdale Ins. Co. v Indemnity Ins. Corp. RRG*, 110 AD3d 783 [2d Dept 2013]). The exact legal theories need not be asserted in both actions. The “critical element is that ‘both suits arise out of the same subject matter or series of wrongs.’” (*Cherico, Cherico & Assocs. v Midollo*, 67 AD3d 622 [2d Dept 2009], quoting *White Light Prods., Inc. v On the Scene Prods., Inc.*, 231 AD2d 90 [1<sup>st</sup> Dept 1997]). Moreover, a difference in the characterization of the damages sought does not, in and of itself, create a substantial difference between the two actions. (*White Light Prods., Inc.*, 231 AD2d at 94).

The claims related to defendant’s alleged violation of the GBL and failure to provide services to plaintiff are either identical to those advanced in the Civil Court and/or arise from the same subject matter, namely, the membership agreement between them. The parties are identical, and the relief sought is substantially the same, as plaintiff seeks money damages related to his payments to defendant and civil fines permitted under the pertinent GBL statutes. (*See Silver v Whitney Partners LLC*, 130 AD3d 512 [1<sup>st</sup> Dept 2015], *lv denied* 26 NY3d 910 [trial court properly exercised discretion in dismissing claims as other action was pending, despite different legal theories asserted and lack of complete identity of parties]; *Syncora Guarantee Inc. v J.P. Morgan Securities LLC*, 110 AD3d 87 [1<sup>st</sup> Dept 2013] [while plaintiff had different legal theories in two actions, it sought to recover for same alleged harm based on same underlying facts]).

To the extent that plaintiff asserts no breach of contract counterclaim in the Civil Court action, he may amend his complaint there to add it. (CPLR 3025[b]; *PK Rest., LLC v Lifshutz*, 138 AD3d 434 [1<sup>st</sup> Dept 2016]).

While plaintiff characterizes several of his claims here as seeking declaratory relief and beyond Civil Court's jurisdiction, the claims are primarily legal, not equitable, in nature, and are duplicative of plaintiff's substantive claims. To wit, a claim for breach of contract necessarily requires a finding that a party has breached a contract, and a cause of action for violating a statute requires a finding that the statute was violated. (*See Siller v Third Brevoort Corp.*, 145 AD3d 595 [1<sup>st</sup> Dept 2016] [claim for injunction and declaratory relief duplicative of breach of contract claim]; *Urban Soccer Inc. v Royal Wine Corp.*, 53 Misc 3d 448 [Sup Ct, New York County 2016] [where plaintiff seeks relief under breach of contract claim that requires court to resolve contract dispute at issue in separate declaratory judgment claim, declaratory judgment claim should be dismissed]).

Thus, in *Harry M. Stevens, Inc. v Medina*, the Court held that where the first action was for breach of contract, and the second action sought a judgment declaring that the same contract was unenforceable, the second action should have been dismissed as “[w]here there is no necessity for resorting to the declaratory judgment it should not be employed,” and in the first action “plaintiff will have a resolution of the question which he presents” in the second action. (63 AD2d 925 [1<sup>st</sup> Dept 1978]).

There is no merit to plaintiff's allegation that the Civil Court lacks jurisdiction to award the amount of the monetary damages sought in this action. Rather, pursuant to New York City Civil Court Act § 208(a), the Civil Court has jurisdiction over counterclaims for money only regardless of the amount sought. (*See e.g., Matter of Moorman v Meadow Park Rehab. and*

Health Care Ctr., LLC, 57 AD3d 788 [2d Dept 2008] [denying application to remove action from civil court to supreme court, which was based on plaintiff's alleged intent to assert counterclaim for damages in excess of civil court's jurisdictional limit, as civil court has jurisdiction over counterclaims above limit]).

Plaintiff's claim as to his son's membership arises from a different agreement, that between his son and defendant, and thus should be severed from the other claims.

Accordingly, it is hereby

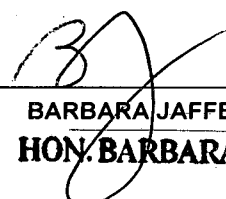
ORDERED, that defendant's motion to dismiss is granted as to plaintiff's first and second causes of action, and denied as to the third cause of action; it is further

ORDERED, that plaintiff is directed, within 30 days of the date of this order, to replead his complaint regarding the third claim and striking all other claims; and it is further

ORDERED, that defendant file an answer to the replead complaint within 30 days of its filing.

7/31/2018

DATE



BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

CHECK ONE:

CASE DISPOSED  
GRANTED  
SETTLE ORDER  
DO NOT POST

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: