

McGlynn, Hays & Co., Inc. v Storage Constr. Co. LLC
2018 NY Slip Op 32055(U)
August 22, 2018
Supreme Court, New York County
Docket Number: 156064/2018
Judge: Joel M. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. JOEL M. COHEN</u>	PART	45
	<i>Justice</i>		
-----X		INDEX NO.	<u>156064/2018</u>
MCGLYNN, HAYS & CO., INC.		MOTION DATE	<u>07/30/2018</u>
Plaintiff,		MOTION SEQ. NO.	<u>001</u>
- v -			
STORAGE CONSTRUCTION COMPANY LLC,			
Defendant.			

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23
 were read on this motion to/for DISMISS

Upon the foregoing documents:

Defendant moves to dismiss the Complaint on the ground that there is a prior-filed action involving the same parties and the same subject matter pending in another court. For the reasons described below, the motion to dismiss is granted.

Procedural Background

On June 26, 2018, Storage Construction Company (“SCC”) filed an action in Supreme Court, Kings County (the “Kings County Action”) against McGlynn, Hays & Co. (“McGlynn”). Two days later, on June 28, 2018, McGlynn (Plaintiff in this action) filed the instant action against SCC (Defendant in this action) in this court. Defendant filed a motion to dismiss the instant action on July 13, 2018.

Legal Standard

CPLR §3211(a)(4) allows for dismissal of an action when “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.” When there is a prior action pending, “New York courts generally follow the so-called ‘first-in-time’ rule, which provides ‘the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere.’” (*Syncora Guarantee Inc. v. J.P. Morgan Securities LLC*, 110 A.D.3d 87 (1st Dep’t 2013) (citing *White Light Prods. v. On The Scene Prods.*, 231 A.D.2d 90, 96 (1st Dep’t 1997), quoting *City Trade & Indus., Ltd. v. New Cent. Jute Mills Co.*, 25 N.Y.2d 49, 58 (1969), quoting *H.M. Hamilton & Co. v. American Home Assur. Co.*, 21 A.D.2d 500, 506 (1st Dep’t 1964)).

Dismissal is warranted if there is a “substantial identity of the parties in the two actions and the two causes of action.” *Velez v. Union Sanitorium Ass’n*, 106 A.D.2d 280, 281 (1st Dep’t 1984) (quoting *Forget et al v. Raymer et al.*, 65 A.D.2d 953, 954 (4th Dep’t 1978)). Moreover, “the court has broad discretion to dismiss an action on the ground that another action is pending between the same parties arising out of the same subject matter or series of alleged wrongs.” *Shah v RBC Capital Markets LLC*, 115 A.D.3d 444, 444-45 (1st Dep’t 2014) (citing (*Whitney v. Whitney*, 57 N.Y.2d 731 (1982))).

Legal Analysis

Both actions involve a contractual agreement between the parties, in which McGlynn was to do work on the elevators at 3024 Cropsey Avenue, Brooklyn, New York 11224. In the Kings County Action, SCC demands specific performance of the contract, and claims unjust enrichment to McGlynn due to McGlynn’s failure to substantially comply with the contract. (Exhibit 2 of Defendant’s Affirmation [NYSCEF 6] at 2-3). In the instant action, McGlynn demands payment for services rendered to SCC under the same contract. (Complaint [NYSCEF 2] at 2). Defendant SCC brought an action in Kings County on June 26, 2018, two days prior to

Plaintiff McGlynn's action in New York County filed on June 28, 2018. Both the Kings County Action and the instant action involve the same parties and arise out of the same contractual dispute.

Plaintiff McGlynn argues that the parties are not identical because SCC lists "ABC Companies" and "John Does" as fictitious defendants in the Kings County Action. (Affirmation in Opposition to Motion [NYSCEF 14] at 2). However, Defendant SCC explains that the fictitious companies and individuals were named due to uncertainty as to McGlynn's proper legal name, and will be dropped from the suit after discovery confirms the name of the relevant company. (Reply Memorandum of Law in Support of Motion [NYSCEF 22] at 2, citing CPLR §1024). In any event, there is no dispute that both suits involve the same contract and involve the same substantive questions regarding an alleged breach of the agreement. Dismissal is, therefore, warranted under CPLR §3211(a)(4). *See Shah*, 115 A.D.3d at 444-45.

Plaintiff's reliance on *Seaboard Surety Co. v. Gillette Co.* 75 A.D.2d 525 (1st Dep't 1980) for the proposition that first-in-time priority does not apply when two actions are commenced simultaneously is misplaced. In that case, the cases were filed within hours of each other, and service was completed the same day that the defendant filed its action in another court. *Id.* at 525 (declining to apply the first-in-time rule when two cases were filed "almost simultaneously"). By contrast, Plaintiff McGlynn here commenced the instant action *two days* after the filing of, and one day after being served with, Defendant's King County Action. Plaintiff McGlynn was thus well aware that it was filing a duplicative action in this Court. (Exhibits 2, 3 of Defendant's Affirmation in Support [NYSCEF 6, 7]). These facts distinguish *Seaboard Surety* and suggest that Plaintiff McGlynn brought the instant action for strategic

purposes. CPLR §3211(a)(4) is designed to permit dismissal of such actions that would waste the time and resources of the parties and the Courts.

Therefore, it is:

ORDERED Defendant's motion is granted and Plaintiff's complaint is dismissed without prejudice.

8/22/2018

DATE


JOEL M. COHEN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE