

<b>Harvard Steel Sales, LLC v Bain</b>
2020 NY Slip Op 32045(U)
June 25, 2020
Supreme Court, New York County
Docket Number: 451398/2019
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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HARVARD STEEL SALES, LLC

Plaintiff,

- v -

DANIEL BAIN,

Defendant.

-----X

INDEX NO. 451398/2019

MOTION DATE 12/13/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53

were read on this motion to/for DISMISS.

Upon the foregoing documents, and for the reasons set forth below, Daniel Bain's motion to dismiss the complaint pursuant to CPLR § 3211 (a) (4) is granted.

THE RELEVANT FACTS

Harvard Steel Sales, LLC (Harvard Steel) is a limited liability steel distribution company operating out of Cleveland, Ohio (NYSCEF Doc. No. 1, ¶ 4). Galvstar Holdings LLC (Galvstar), a company that Mr. Bain formed to operate a steel processing plant in Buffalo, New York, is a limited liability hot-dip steel galvanizing plant (id., ¶ 6). Mr. Bain is Galvstar's Chief Executive Officer and owner (id., ¶ 5).

According to the complaint, in late 2012, Mr. Bain began speaking with officers of Harvard Steel on behalf of Galvstar about developing a partnership (id., ¶ 7). To wit, Harvard Steel would

purchase steel, ship it to Galvstar to be galvanized, and then recollect and sell it to buyers in various industries, including HVAC manufacturers, who have specific steel requirements (*id.*, ¶¶ 10, 15). Ultimately, the parties entered into a “joint venture” and memorialized the relationship in a Toll Processing Agreement (the **Toll Processing Agreement**), effective December 15, 2012 and executed May 3, 2013 (NYSCEF Doc. No. 1, ¶¶ 12–13) and certain other mutual financial commitments (collectively, the **Joint Venture Agreements**) (*see* NYSCEF Doc. No. 41, ¶¶ 3–5).

In 2016, Galvstar commenced an action in the Supreme Court of the State of New York, New York County (Index No. 652155/2016) against Harvard Steel and Jeremy Jacobs.<sup>1</sup> That action was promptly removed to the United States District Court for the Southern District of New York pursuant to 28 USC §§ 1332, 1441 and 1446 (the **SDNY Action**). Galvstar filed an Amended Complaint in the SDNY Action on August 15, 2016 that joined Galvstar’s assignee, DSB Holdings, LLC (**DSB**) as plaintiff (NYSCEF Doc. Nos. 40–41).

Over the last three and a half years, the SDNY Action has been dismissed, appealed, and partly remanded (*see* NYSCEF Doc. No. 45; *see also* NYSCEF Doc. Nos. 48–49). The parties in the SDNY Action have substantially completed discovery, and Harvard Steel has since moved for summary judgment (NYSCEF Doc. No. 45). Among other things, in the SDNY Action, Harvard Steel also asserts as an affirmative defense (the **Fourteenth Affirmative Defense**) that:

“To the extent Galvstar and Harvard entered into a contract[.]... said contract[] was the result of material misrepresentations by [Galvstar] *or their agent(s), employees and/or officers*, therefore any such contract[] is void or voidable as a matter of law”

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<sup>1</sup> All claims in the SDNY Action against former defendant Jacobs have since been dismissed and Galvstar is the sole defendant in that action.

(NYSCEF Doc. No. 44 at 27; NYSCEF Doc. No. 39, ¶ 6 [emphasis added]).

Approximately two years after the SDNY Action was initially filed, on November 1, 2018, Harvard Steel commenced this action against Mr. Bain in Erie County Supreme Court (NYSCEF Doc. No. 1). In this action, Harvard Steel alleges that Mr. Bain falsely represented to Harvard Steel's officers that Galvstar could produce prime quality galvanized steel, and that these representations were essential to Harvard Steel's willingness both to enter the Toll Processing Agreement, and to develop a business relationship with Galvstar at all (NYSCEF Doc. No. 1, ¶¶ 12–13). Harvard Steel further alleges that it justifiably relied upon Mr. Bain's false representations to its significant detriment and seeks damages on those grounds (*id.*, ¶¶ 37–38).

Mr. Bain moved to change venue and on June 13, 2019 the Erie County Supreme Court (Chimes, J.) ordered a change of venue to this Court (NYSCEF Doc. No. 29). Harvard Steel opposed the motion arguing that, “Erie County was the epicenter of everything that occurred in this case” as Galvstar is based in Buffalo, the steel was shipped to Buffalo, the company creditors and witnesses were located in Buffalo, all the relevant meetings had occurred in Buffalo, and the “equipment” failed in Buffalo (NYSCEF Doc. No. 30 at 3:20-4:7). At the hearing on that motion, where only counsel for Harvard Steel appeared as counsel for Mr. Bain indicated that they would rely on their papers, in granting the motion, the court made clear that it was persuaded by Mr. Bain's argument that, “neither party resided in Erie County when the action was commenced and that a substantial part of the events or omissions giving rise to the claims occurred outside of the county” (*id.* at 5:6-9). The court further commented that:

the plaintiffs failed to establish that a substantial part of the claimed fraud occurred within Erie County. Additionally, plaintiff failed to cross-move to retain venue based on the convenience of material witnesses [citing *Pitegoff v Lucia*, 97 AD2d 896 [3d Dept 1983]]

(*id.* at 5:11-15).

An appeal of this decision has been filed (NYSCEF Doc. No. 31). Putting that aside, thereafter, the action was transferred to the Commercial Division of New York County (NYSCEF Doc. No. 38). As further discussed below, Mr. Bain contends that the Fourteenth Affirmative Defense in the SDNY Action implicates him as Galvstar's employee and as an officer, and so substantially incorporates the claims asserted by Harvard Steel in this action such that it renders the instant claims redundant (*see generally* NYSCEF Doc. No. 39).

### DISCUSSION

Pursuant to CPLR § 3211 (a) (4), a party may move to dismiss an action on the ground that there is another action pending between the same parties for the same cause of action in a court of any state or of the United States. Dismissal on this ground is permissive, not mandatory (*see* CPLR § 3211 [a] [4]). The court may dismiss the action under this provision when: (1) there is substantial identity of the parties, (2) the two actions are sufficiently similar, and (3) the relief sought is substantially the same (*Whitney v Whitney*, 57 NY2d 731, 732 [1982]). The court has broad discretion to determine whether an action should be dismissed under this provision (*see* CPLR § 3211 [a] [4]; *Whitney*, 57 NY2d at 732). Ultimately, the court need not dismiss the action, but rather may make such order as justice requires (*Kent Dev. Co. v Liccione*, 37 NY2d 899, 901 [1975]).

## I. The First to File Rule Weighs in Favor of Dismissal

Although chronology is not dispositive, particularly when the case is in the early stages of litigation or is filed in proximity with the earlier action (*XL Specialty Ins. Co. v Continental Cas. Co.*, 181 AD3d 546, 546 [1st Dept 2020] quoting *IRX Therapeutics, Inc. v Landry*, 150 AD3d 446, 447 [1st Dept 2017]), it is well settled that New York follows the first-in-time-rule, which provides that, in general, the court in which the first action is filed is the court of primary jurisdiction (*City Trade & Indus., Ltd. v New Cent. Jute Mill Co.*, 25 NY2d 49 [1969]). Inasmuch as (i) Galvstar initiated the SDNY Action on April 21, 2016 (NYSCEF Doc. No. 40), (ii) Harvard Steel answered the amended complaint in that action on March 23, 2018, a full eight months prior to initiating the instant action in Erie County on November 1, 2018 (NYSCEF Doc. No. 44), (iii) the SDNY Action has partly survived a motion to dismiss and discovery in that action is complete (*see generally* NYSCEF Doc. No. 45) and (iv) Harvard Steel's summary judgment motion in the SDNY Action is *sub judice* (*id.* at 12–13), under the first to file rule, dismissal is compelling.

## II. Substantial Identity of the Parties Exists

Dismissal under CPLR § 3211 (a) (4) requires substantial identity of the parties (*Montalvo v Air Dock Sys.*, 37 AD3d 567, 567 [2d Dept 2007]). Substantial identity of parties is generally present when at least one plaintiff and one defendant are common to each action (*Morgulas v Yudell Realty*, 1651 AD2d 211, 213 [1st Dept 1990]). However, dismissal does not require complete identity of parties (*Graham v Dim-Rosy USA Corp.*, 128 AD2d 417, 418 [1st Dept 1987], quoting *Barringer v Zgoda*, 91 AD2d 811, 811 [3d Dept 1982]). When analyzing identity, courts consider whether the other pending action has additional parties, possibly

permitting broader relief than in the instant case (*see Barringer*, 91 AD2d at 811). In addition, courts assess whether finding identity of the parties would require piercing the corporate veil, whether the parties request that the Court do so, and whether the defendant has demonstrated that such result is warranted (*see Morgulas*, 1651 AD2d at 213). If the defendant has purposely availed itself of the protection of the corporate form, the court may preclude it from disregarding that form, as the individual principals of a corporation are legally distinguishable from the corporation itself (*id.*). However, the court may also pierce the corporate veil when necessary to prevent fraud or achieve equity (*Walkovszky v Carlton*, 18 NY2d 414, 417 [1966] *citing International Aircraft Trading Co. v Manufacturers Trust Co.*, 297 NY 285, 292 [1948]). When an individual is charged with using control of the corporation to further their own business rather than the corporation's, the court will ultimately need to determine whether *respondeat superior* applies (*Walkovszky*, 18 NY2d at 417).

In the case at *nisi prius*, Harvard Steel, the only plaintiff in the instant case, is the only remaining defendant in the SDNY Action and Mr. Bain is the only defendant here. Although not a named defendant in the SDNY Action, Mr. Bain is an appropriate substitute for both Galvstar and its assignee, DSB, as he is both Galvstar's Chief Executive Officer and its owner and the allegations in both actions including the Fourteenth Affirmative Defense stems from his purported misrepresentations. Notably, Harvard Steel offers no explanation as to why Mr. Bain was not joined in the SDNY Action. In other words, unlike the defendants in *Morgulas*, who simultaneously sought the protection of the corporate form as joint tenants in common and attempted to dissolve that venture when inconvenient, the Fourteenth Affirmative Defense in the SDNY Action explicitly incorporates any claims remaining in that action as against the named

plaintiffs and Mr. Bain as well as its “officer” and potentially against him personally (NYSCEF Doc. No. 39, ¶ 6; NYSCEF Doc. No. 52 at 3).

### III. Substantially Similar Claims Exists

Dismissal under CPLR § 3211(a)(4) also requires that both actions arise from the same subject matter or series of alleged wrongs (*White Light Prods., Inc. v On The Scene Prods., Inc.*, 231 AD2d 90, 94 [1st Dept 1997]; *see also Kent Dev. Co.*, 37 NY2d at 901). In making this determination, courts consider whether the pleadings in both actions demonstrate that they are both based on the same contractual agreements or arise from the same transactions (*JC Mfg., Inc. v NPI Elec., Inc.*, 178 AD2d 505, 506, [2d Dept 1991]; *Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 96 [1st Dept 2013]). The gravamen of both the instant action and the remaining issues in the SDNY action stem from the business relationship between Harvard Steel and Galvstar and the allegations related to Mr. Bain’s alleged misrepresentations in connection with the Toll Processing Agreement and the Joint Venture Agreements. Accordingly, substantially similar claims exist between the SDNY Action and the instant action.

### IV. Relief Sought

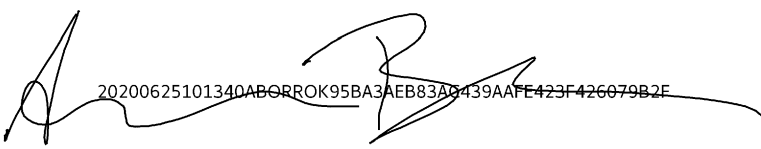
Finally, dismissal under CPLR § 3211 (a) (4) requires that the relief sought in both actions is so substantially similar as to justify dismissal (*see Whitney*, 57 NY2d at 732). The precise legal theories presented in one action do not need to be presented in the other (*Dec v BFM Realty, LLC*, 153 AD3d 497, 497 [2d Dept 2017]) and mere semantic distinctions do not destroy substantial identity of the relief sought (*Simonetti v Larson*, 44 AD3d 1028, 1029 [2d Dept 2007]). Indeed, if the only difference between the two actions is that the relief demanded differs

but could be demanded in either action, the motion to dismiss should be granted (see Falzerano v DeLuca, 154 AD2d 431 [2d Dept 1989]). In both this action and the SDNY Action, Harvard Steel seeks relief based on Mr. Bain’s alleged misrepresentations (NYSCEF Doc. No. 1, ¶¶ 29–38). To the extent that Harvard Steel wishes and may be pursuing damages stemming from this alleged misrepresentation, Harvard Steel fails to explain why any such appropriate damages are not, or could not have been or could not be, pursued in the SDNY Action (see generally Fed Rules Civ Pro Rule 15). In any event, dismissal under CPLR § 3211 (a) (4) is warranted to avoid the risk of inconsistent rulings on similar issues, and to otherwise prevent the parties from being harassed or burdened by multiple substantially similar actions (see White Light Prods., 231 AD2d at 96).

Accordingly, it is

ORDERED that the motion to dismiss pursuant to CPLR 3211 (a) (4) is granted and the complaint against Mr. Bain is dismissed without prejudice to the plaintiff pursuing its claims in the related federal court action; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.



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6/25/2020  
DATE

ANDREW BORROK, 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

