

<b>New Hampshire Ins. Co. v Dnata Aviation USA, Inc.</b>
2021 NY Slip Op 32306(U)
November 12, 2021
Supreme Court, New York County
Docket Number: Index No. 152186/2021
Judge: Shawn T. Kelly
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 57

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NEW HAMPSHIRE INSURANCE COMPANY, AS  
ASSIGNEE OF ELBA JURADO

Plaintiff,

- v -

DNATA AVIATION USA, INC.,

Defendant.

INDEX NO. 152186/2021

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

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HON. SHAWN KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISS

Defendant Dnata Aviation USA, Inc., moves pursuant to CPLR §3211 to dismiss Plaintiff's Complaint. Specifically, Defendant contends that Plaintiff's claims are time-barred by the applicable Statute of Limitations and are also barred by the doctrine of "res judicata," in that they have already been adjudicated to a conclusion in the Court of Common Pleas in Philadelphia County, Pennsylvania, on April 7, 2021. Finally, Defendant alleges that Plaintiff's Complaint should be dismissed pursuant to CPLR §§3211(4) and 325(d) because of the pendency of another action between the same parties for the same cause of action in the Court of Common Pleas in Philadelphia County, Pennsylvania, at the time of the filing of the Plaintiff's Complaint in the instant action.

**Background**

This is an assignment action arising out of an alleged accident that occurred on December 15, 2017, when Plaintiff's assignor, Elba Jurado, allegedly slipped on ice and fell on a jet bridge

in Terminal One, at John F. Kennedy International Airport, in Queens, New York, while working for non-party Airway Cleaners. Plaintiff alleges that its assignor, Ms. Jurado, sustained personal injuries as a result of this claimed accident.

Defendant contends that on December 15, 2020, Plaintiff commenced an action against Defendant in the Court of Common Pleas, in Philadelphia County, Pennsylvania, for the same cause of action arising out of the same underlying occurrence involving assignor Elba Jurado on December 15, 2017 (herein the "Pennsylvania Action"). Subsequently, on March 3, 2021, Plaintiff commenced the instant action in Supreme Court, New York County, against the same Defendant, alleging the same causes of action arising out of the same underlying occurrence as was claimed in the Pennsylvania Action, which was still pending at the time.

## **Analysis**

### Statute of Limitations

Dismissal of a cause of action under CPLR §3211(a)(5) is appropriate if the cause of action may not be maintained because of "arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, *res judicata*, statute of limitations, or statute of frauds." The applicable three-year statute of limitations for a personal injury action (CPLR §214[5]).

The accident at issue occurred on December 15, 2017 and the present action was commenced on March 3, 2021. Plaintiff argues that inclusive of the tolling effectuated by the Governor's Executive Order 202.8, the action is timely commenced.

Due to the COVID-19 pandemic, on March 20, 2020, Pursuant to Executive Law Section 29-a, Governor Andrew Cuomo issued Executive Order 202.8, tolling New York's statute of limitations and other procedural deadlines until April 19, 2020. Subsequent Executive Orders

further extended the initial toll of the statute of limitations that Governor Cuomo signed at the beginning of the COVID-19 pandemic to November 3, 2020 (see Executive Orders 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, and 202.67). Accordingly, the action is timely commenced.

### Res Judicata

Pursuant to CPLR §3211(4), a party may move for judgment dismissing one or more causes of action against him or her 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 the United States; the court need not dismiss upon this ground but may make such order as justice requires.”

Defendant argues that the Pennsylvania Action’s pending status at the time this action was commenced, a point not in dispute, and the manner in which Plaintiff discontinued the Pennsylvania Action, warrants dismissal. Plaintiff highlights this contradictory positioning by Defendant. Further, Plaintiff maintains that its voluntary discontinuance of the Pennsylvania Action does not bar maintenance of this action under the doctrine of *res judicata*.

The discontinuance in the Pennsylvania Action dated April 7, 2021 is entitled “Praeceptum to Settle, Discontinue and End”. (NYSCEF Doc. No. 9). A sister state judgment can be afforded full faith and credit in New York (*see generally Madjar v. Rosa*, 83 AD3d 1011 [2d Dept 2011]). “Under *res judicata*, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action” (*see Simmons v. Trans. Express, Inc.*, 37 NY3d 107 [June 3, 2021]). However, neither side argues whether a valid final judgment has been entered in the Pennsylvania Action. A unilateral notice filed by Plaintiff in the Pennsylvania Action may have the effect of a judgment, but in the form it has been provided to the court, it is not the equivalent of a final judgment that mandates dismissal at this juncture.

Additionally, Defendant seeks dismissal pursuant to CPLR §3211 and identifies CPLR §§3211[4] and 325[d] as the basis for the relief it requests. CPLR §325[d] is inapplicable, as this statute merely grants the court discretion to remove a case to a lower court. Certainly, the fact that the Pennsylvania Action was pending in its infancy at the time this action was filed does not warrant dismissal, and CPLR §3211[4] grants this court the discretion to deny such relief.


Defendant was not prejudiced by the Pennsylvania Action or its discontinuance and there is no risk of inconsistent results being reached in more than one action. Defendant should have moved pursuant to CPLR §3211[a][5] for an order dismissing this action based upon *res judicata* grounds. However, as discussed, the motion fails to establish that a final judgment has been entered in the Pennsylvania Action. Therefore, Defendant has failed to meet its burden of proof and the motion is denied.

Accordingly, it is hereby

ORDERED that Defendant's motion to dismiss is denied; and it is further

ORDERED that Defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry.

11/12/2021  
DATE

  
SHAWN KELLY, J.S.C.

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