

<b>Merchant Capital v Rxwholesale.com LLC</b>
2021 NY Slip Op 32773(U)
December 21, 2021
Supreme Court, Kings County
Docket Number: Index No. 526161/21
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8

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MERCHANT CAPITAL,

Petitioner, Decision and order

- against -

Index No. 526161/21

RXWHOLESALE.COM LLC & SCRIPTS  
WHOLESALE INC.,

Respondents, December 21, 2021

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PRESENT: HON. LEON RUCHELSMAN

The petitioner has moved pursuant to CPLR §5227 seeking the turnover of certain assets held by Scripts Wholesale Inc. Scripts has cross-moved seeking to dismiss the petition. The motions have been opposed respectively. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

On August 19, 2021 the petitioner obtained a judgement against the debtor RXWholesale.com LLC in the amount of \$2,811,210.42. The following day the petitioner served a restraining notice on Scripts Wholesale Inc., that all funds owed to RXWholesale should be forwarded to the petitioner to satisfy the judgement. A few days later Scripts informed the petitioner that \$439,684.56 was due and owing to RXWholesale. RXWholesale has not forwarded any of the funds. On September 21, 2021 the petitioner instituted an action against Scripts and other defendants for violations of CPLR §5222 and CPLR §5232 and for the tortious interference with the collection of a judgement. This action was instituted on October 14, 2021 seeking a

determination that the petitioner is entitled to the funds held by Scripts. The petitioner now seeks summary judgement essentially ordering a turnover of that amount in partial satisfaction of the debt owed by RXWholesale. Scripts has moved seeking to dismiss the action on numerous grounds including the fact the plaintiff is a fictitious name and that there is another action pending seeking the same relief.

#### Conclusions of Law

CPLR §3211(a)(4) provides that a motion to dismiss a lawsuit on the grounds another lawsuit is pending should be granted when "both suits arise out of the same subject matter or series of alleged wrongs" (id, Aurora Loan Services LLC v. Reid, 132 AD3d 778, 17 NYS3d 894 [2d Dept., 2015]). Thus, where the reliefs sought in the two actions are "substantially the same" then dismissal is proper (Scottsdale Insurance Company v. Indemnity Insurance Corp., RRG, 110 AD3d 783, 974 NYS2d 476 [2d Dept., 2013]). The term "substantially the same" is defined as a cause of action as sufficiently similar to a simultaneously pending cause of action, when the ruling of one may directly conflict with the ruling of the other (see, Diaz v. Philip Morris Companies, Inc., 28 AD3d 703, 815 NYS2d 109 [2d Dept., 2006]). Thus, a motion to dismiss made in this case should be granted where an identity of parties and causes of action in the pending

action raises the danger of conflicting rulings. "CPLR 3211(a)(4) vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action" (Whitney v. Whitney, 57 NY2d 731, 454 NYS2d 977 [1982]).

Paragraph 37 of the verified Complaint in the September action alleges that "Scripts has not fully complied with its obligations pursuant to the restraining notice and is attempting to transfer the funds due and owing to RX to another party, notwithstanding the restraining notice" (see, Merchant Capital v. RXWholesale.com LLC, Scripts Wholesale Inc., Gabriel Betesch and Yehuda Mermelstein, ¶ 37). Further, the verified complaint in that action asserts that the plaintiff in that action, the petitioner MC in this action "through New York City Marshal Stephen Biegel served a Levy and Demand pursuant to CPLR 5232 on Scripts on August 20, 2021, directing it to turn over to MC any and all assets due and owing to the Judgment Debtors, including RX. Scripts has not fully complied with its obligations pursuant to the levy and demand by failing to turn over any funds due to RX to MC and is instead attempting to transfer the funds due and owing to RX to another party, notwithstanding the restraining notice" (see, id at ¶¶ 41, 42). The verified complaint in the September action further asserts that Scripts is attempting to divert funds owed to RXWholesale to other parties

to frustrate recovery efforts by MC.

The petition in this action similarly seeks recovery of the same funds currently possessed by Scripts to partially satisfy its judgement that are the subject of the September action.

First, there is no requirement for identical legal theories to be presented in both actions as long as the two actions are 'substantially similar' (Cheric, Cherico & Associates v. Midollo, 67 AD3d 622, 886 NYS2d 914 [2d Dept., 2009]). The causes of action in this case essentially seek funds held by Scripts. The causes of action in the September lawsuit seek a determination that Scripts is unlawfully frustrating the petitioner's efforts to recover those funds. These two lawsuits seek essentially the same relief, namely the recovery of funds held by Scripts. Thus, there is no basis for dual lawsuits that deal, essentially, with the same issues. Moreover, the danger of a conflict of rulings raised by a parallel pending action addressing the exact same issues is apparent.

Further, the mere fact the September action has other defendants is not a basis in which to distinguish the two lawsuits. The petitioner argues that "the relief sought in the prior action was damages stemming from the defendants' (in that action) actions" (see, Affirmation in Opposition to Motion and in Further Support of Petition, ¶ 8). However, those 'actions' consists of the failure to turn over the funds due to a sheriff's


levy and to generally avoid paying the funds. That is the same conduct that is alleged in this action. The petitioner has not presented any basis why two lawsuits were instituted seeking essentially the same relief.

Because this lawsuit is substantially the same as the September action and that a finding in this action may conflict with the rulings of that action, the court exercises its discretion pursuant to CPLR §3211(a)(4) and dismisses this action. Thus, the motion seeking to dismiss this lawsuit is granted. The motion seeking summary judgement is denied.

So ordered.

ENTER:

DATED: December 21, 2021  
Brooklyn N.Y.

  
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Hon. Leon Ruchelism  
JSC