

**Hudson 36, LLC v Harleysville Worcester Ins. Co.**

2022 NY Slip Op 31422(U)

April 28, 2022

Supreme Court, New York County

Docket Number: Index No. 655495/2020

Judge: Dakota D. Ramseur

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DAKOTA D. RAMSEUR PART 34M**

*Justice*

-----X  
 HUDSON 36, LLC, HUDSON 37, LLC,  
 Plaintiffs,  
 - v -  
 HARLEYSVILLE WORCESTER INSURANCE COMPANY,  
 FORWARD HEATING CORPORATION, HISCOX  
 INSURANCE COMPANY INC., HORSEPOWER ELECTRIC  
 AND MAINTENANCE CORP.  
 Defendants.

INDEX NO. 655495/2020  
 MOTION DATE 07/09/2021  
 MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 18, 19

were read on this motion to/for: DISMISSAL

Plaintiffs, Hudson 36, LLC and Hudson 37, LLC (plaintiffs), commenced this declaratory judgment action seeking a declaration that defendants have an obligation to defend plaintiffs in the underlying Labor Law action entitled *Szymczyk v Hudson 36 LLC and Hudson 37 LLC, et al.*, pending in New York County, Index No. 158068/2018 (the underlying action) and that defendants, Forward Heating Corporation and Horsepower Electric and Maintenance Corp., breached their agreements to procure insurance naming plaintiffs as an additional insured. Co-defendant Horsepower Electric and Maintenance Corp. (Horsepower) now moves pursuant to CPLR 3211(a)(4) to dismiss the complaint, arguing that the claims against Horsepower in this action are identical to the claims asserted against Horsepower in the underlying second third-party action. The motion is opposed. For the following reasons, Horsepower's motion is granted in part.

Plaintiff in the underlying action alleges that on July 17, 2018, he was injured while performing construction work at the premises located at 515 West 36th Street, in the County, City, and State of New York. Plaintiff commenced suit against plaintiffs herein, alleging that Hudson 36 was the owner of the premises and Hudson 37 was the construction manager for the construction project. Hudson 37 thereafter commenced a second third-party action asserting claims against Horsepower for, among others, contractual and common law indemnification, contribution, and breach of contract for failure to procure insurance naming Hudson 37 as an additional insured. Thereafter, plaintiffs herein commenced the instant action alleging claims for breach of contract for Horsepower's alleged failure to procure insurance naming plaintiffs as additional insureds.

Pursuant to CPLR 3211(a)(4), a party may move to dismiss a cause of 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 the United States." "It is not necessary that the precise legal theories presented in the first action also be presented in the second action as long as the relief sought is the same or substantially the same" (*Swartz v Swartz*, 145 AD3d 818, 822 [2d Dept 2016]; see *White Light Prods., Inc. v On the Scene Prods., Inc.*, 231 AD2d 90, 94 [1st Dept 1997]). "The critical element is that both suits arise out of the same subject matter or series of alleged wrongs" (*DAIJ, Inc. v Roth*, 85 AD3d 959, 960 [2d Dept 2011]). Further, dismissal under CPLR 3211(a)(4) does not require a complete identity of the parties, but "there must at least be a 'substantial' identity of parties, which generally is present when at least one plaintiff and one defendant is common in each action" (*JPMorgan Chase Bank, Natl Assn v Luxama*, 172 AD3d 1341, 1342 [2d Dept 2019] [internal citations and quotations omitted]; see *Sprecher v*

*Thibodeau*, 148 AD3d 654, 656 [1st Dept 2017] [denying dismissal under CPLR 3211(a)(4) where there is no overlap in plaintiffs]).

Initially, plaintiffs' request in their opposition to withdraw Hudson 37's claims against Horsepower is denied as untimely, since it was served after Horsepower filed its motion to dismiss (*see Jericho Grp., Ltd. v Mid-Town Dev. Ltd. P'ship*, 129 AD3d 561, 561 [2d Dept 2015]; *BDO USA, LLP v Phoenix Four, Inc.*, 113 AD3d 507, 511 [2d Dept 2014]). Plaintiffs have not submitted a stipulation by the parties discontinuing Hudson 37's claims against Horsepower or otherwise complied with CPLR 3217(a). Accordingly, Hudson 37's claims against Horsepower remain viable for the purpose of deciding the instant motion to dismiss.

Turning to the substance of Horsepower's motion, the court finds that Hudson 37 seeks the identical relief in both the instant and underlying actions. To wit, in both actions, Hudson 37 seeks a declaration against Horsepower that Hudson 37 is entitled to contractual indemnification by Horsepower and, in sum, a declaration that Horsepower is obligated to procure and maintain insurance coverage for Hudson 37. Plaintiffs concede as much. Thus, the branch of plaintiff's motion to dismiss Hudson 37's claims is granted.

As for the branch of Horsepower's motion to dismiss Hudson 36's claims against it, Horsepower fails to demonstrate that the parties in both actions are identical. Indeed, while Hudson 36 is a party in the instant action, it is not a party to the second third-party action. Moreover, there is no dispute that Hudson 36 and Hudson 37 are separate entities. Accordingly, the branch of Horsepower's motion to dismiss Hudson 36's claims against it is denied.

Accordingly, it is hereby

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ORDERED that Horsepower’s motion pursuant to CPLR 3211(a)(4) to dismiss plaintiffs’ claims against it is granted, to the extent that co-plaintiff Hudson 37’s claims against Horsepower are dismissed; and it is further

ORDERED that Horsepower shall file and serve its answer within fourteen (14) days; and it is further

ORDERED that the parties shall appear for a virtual preliminary conference on July 12, 2022 at 10:00 a.m., at the same time as the conference in the underlying action; and it is further

ORDERED that Horsepower shall serve a copy of this order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



4/28/2022

DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE