Central Park Track Club Corp. v Strands Labs, Inc.
2011 NY Slip Op 33910(U)
August 31, 2011
Supreme Court, New York County
Docket Number: 650304/2011
Judge: Anil C. Singh

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

HON. ANIL C. SINGH

PRESENT: SUPREME COURT JUSTICE PART 61

Index Number : 650304/2011

CENTRAL PARK TRACK CLUB

VS.

STRANDS LABS, INC.

SEQUENCE NUMBER : 001

DISMISS COMPLAINT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/30/11

HON. ANIL C. SINGH J.S.C.
SUPREME COURT JUSTICE

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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CENTRAL PARK TRACK CLUB CORPORATION

Plaintiff,

-against-

STRANDS LABS, INC.,

Defendant.

----------X

DECISION AND ORDER

Index No. 650304/2011

HON. ANIL C. SINGH, J.:

Defendant moves to dismiss the complaint in its entirety pursuant to CPLR 3211(a)(4), contending that an earlier-filed lawsuit between the same two parties – involving the same facts, circumstances and claims – is pending in an Oregon court. Plaintiff opposes the motion.

BACKGROUND

Defendant provides various on-line services, including one for distance runners. Starting in 2009, the parties to this action began sponsoring groups of runners and events.

On February 8, 2010, they executed a Sponsorship Agreement (Agreement) (Motion, Ex. A), which was signed on behalf of plaintiff in New York and on behalf of defendant in Oregon. Pursuant to the terms of the Agreement, defendant

was to provide various services using its personnel and equipment located at its corporate headquarters in Oregon.

On October 7, 2010, defendant's chief executive officer (CEO) met with officers of plaintiff in New York. At the meeting, defendant's CEO stated that defendant intended to renew the Agreement with plaintiff for an additional year.

Approximately three weeks later, defendant's CEO e-mailed plaintiff, stating that he had resigned his position. Motion, Ex. B. Plaintiff responded by e-mail, expressing its chagrin, and attached to the e-mail a copy of the amended contract, asking who would be responsible for signing it on behalf of defendant. Motion, Ex. C. The amended Agreement was identical to the original Agreement, with the exception that the dates were changed to reflect the new term, beginning on February 1, 2011, and ending on February 1, 2012.

No one from plaintiff ever signed the amended Agreement. Defendant states that, after October 2010, plaintiff kept pressing defendant to renew the Agreement. On or about January 14, 2011, defendant informed plaintiff that it did not consider itself bound by the oral representations of its former CEO. On January 17, 2011, plaintiff's counsel wrote to defendant, contending that, at the time the oral agreement was reached, defendant's CEO had the authority to bind defendant to the new Agreement. Motion, Ex. D. On January 20, 2011, defendant

filed suit against plaintiff in the state court in Oregon, seeking a declaratory judgment that the Agreement had not been renewed. Motion, Ex. E.

In his affidavit in support of the instant motion, defendant's general counsel states that he did not immediately serve plaintiff with the Oregon summons and complaint, allegedly because defendant was hoping to settle the matter amicably. After several failed telephone negotiations, defendant served plaintiff with the Oregon summons and complaint on February 4, 2011. Motion, Ex. F. On the previous day, February 3, 2011, plaintiff filed and served a summons with notice for the instant action, after being told in a telephone conversation with defendant that suit had been filed in Oregon. On February 17, 2011, defendant made a demand for a complaint in this action, and on March 15, 2011, plaintiff filed the complaint and served defendant with said complaint.

Defendant avers that, on April 13, 2011, the Oregon court denied plaintiff's motion to dismiss the action for lack of personal jurisdiction. Opp., Ex. G.

Defendant contends that the present action should be dismissed because it is duplicative of the earlier action filed in Oregon involving the same parties and the same issues. In the alternative, defendant requests that, should the court decide not to dismiss the instant action, the court stay this action pending the outcome of the Oregon litigation.

Plaintiff asserts that the instant action is one for breach of contract, not declaratory judgment, which, it claims, is totally different relief, and that this court may exercise its discretion so as to permit the instant action to go forward. Moreover, plaintiff argues that the Oregon action was preemptive, designed to frustrate plaintiff from seeking its remedies in New York. In addition, plaintiff says that Oregon is not a convenient forum for the determination of this matter. However, the court notes that this argument was discussed by the Oregon court in denying plaintiff's motion to dismiss that action. *Id.*

In reply, defendant maintains that the Oregon action was commenced two months before the instant action, and that its resolution would also resolve the issue in dispute herein.

DISCUSSION

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

> "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
>
> * * *
>
> (4) 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 ... ."

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the

opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 (1st Dept 1999). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 is precluded. *Khayyam v Doyle*, 231 AD2d 475 (1st Dept 1996).

Defendant's motion is granted.

> Pursuant to CPLR 3211(a)(4), a court has broad discretion as to the disposition of an action when another action is pending. Thus, a court may dismiss an action pursuant to CPLR 3211 (a) (4) where there is a substantial identity of parties for the same cause of action. Further, to warrant dismissal, the two actions must be 'sufficiently similar' and the relief sought must be 'the same or substantially the same' [internal citations omitted].

Montalvo v Air Dock Systems, 37 AD3d 567, 567 (2d Dept 2007).

> It is not necessary that the precise legal theories presented in the first action also be presented in the second action ... . The critical element is that 'both suits arise out of the same subject matter or series of alleged wrongs' [internal citations omitted].

Cherico, Cherico & Associates v Midollo, 67 AD3d 622, 622 (2d Dept 2009).

There is no question that the parties in both actions are identical, and that the subject matter of both litigations is whether or not the parties have an

enforceable agreement. Plaintiff's position is that, because the Oregon action seeks equitable relief and the New York action seeks damages, the two actions are dissimilar. However, "[a] difference in the characterization of damages does not create, 'in and of itself, a substantial difference between the actions' [internal citation omitted]." *White Light Productions, Inc. v On The Scene Productions, Inc.*, 231 AD2d 90, 94 (1st Dept 1997). Further, plaintiff has failed to demonstrate why it could not counterclaim for damages under the Agreement in the Oregon action and be granted the relief it seeks here should the Oregon court determine that defendant is not entitled to the declaratory relief sought.

> As a matter of New York policy, the rule has been stated that 'proceedings begun in another State should not be interfered with unless there is some necessity clearly shown.... Generally, 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.' Special circumstances warrant deviation from the general rule, 'if the action sought to be restrained is vexatious, oppressive or instituted to obtain some unjust or inequitable advantage' [internal citations omitted].

Id. at 96.

In the case at bar, the Oregon proceeding commenced with the filing of a summons and complaint on January 20, 2011. Plaintiff filed a summons with notice in New York on February 3, 2011, after learning that defendant had filed

the suit in Oregon, but before it was served in the Oregon action. Plaintiff did not file the complaint in the present action until March 15, 2011.

It has long been the law in this State that a summons with notice does not constitute the commencement of another action under the provisions of CPLR 3211(a)(4). *Wharton v Wharton,* 244 AD2d 404 (2d Dept 1997); *John J. Campagna, Jr., Inc. v Dune Alpin Farm Associates,* 81 AD2d 633 (2d Dept 1981). Hence, there is no question that the Oregon suit predates the New York suit by almost two months.

Even though the technical priority in the commencement of an action is not absolutely determinative, in the case at bar it appears that plaintiff's filing the summons with notice after learning that suit had been filed in Oregon hints that it was motivated "simply by plaintiffs' wish to gain a tactical advantage through forum shopping." *Certain Underwriters at Lloyd's, London v Hartford Accident and Indemnity Company,* 16 AD3d 167, 168 (1st Dept 2005). Further, since plaintiff has already sought, unsuccessfully, to have the Oregon suit dismissed, in the exercise of this court's discretion, defendant's motion is granted, and the instant action is dismissed. *Id.*

In making this determination, the court is convinced that, by filing the appropriate counterclaim for monetary relief for breach of contract, the Oregon

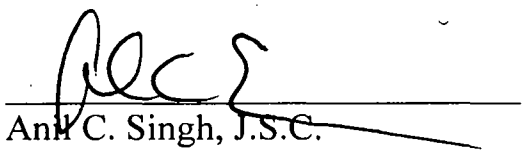
litigation can afford both parties complete relief.

Based on the foregoing, it is hereby

ORDERED that defendant's motion to dismiss this action is granted, and the Clerk of the Court is directed to enter judgment in favor of defendant dismissing this action, together with costs and disbursements to defendant, as taxed by the Clerk upon presentation of an appropriate bill of costs.

Date: August 31, 2011

ENTER:



Ann C. Singh, J.S.C.