| **Lash Affair by J. Paris, LLC v Mediaspa, LLC** |
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| 2017 NY Slip Op 32668(U) |
| November 27, 2017 |
| Supreme Court, Westchester County |
| Docket Number: 58370/2017 |
| Judge: Terry J. Ruderman |
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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LASH AFFAIR BY J. PARIS, LLC,

Plaintiff,

-against-

MEDIASPA, LLC,

Defendant.

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DECISION AND ORDER
Motion Sequence No. 1
Index No. 58370/2017

RUDERMAN, J.

The following papers were considered in connection with defendant's motion to dismiss the complaint in this action pursuant to CPLR 3211(a)(4) based on the existence of another pending action, or, in the alternative, to consolidate this action with the prior action pending in New York County, pursuant to CPLR 602(a):

| Papers | Numbered |
|---|---|
| Notice of Motion, Affirmation, Exhibits A - B, and Memorandum of Law | 1 |
| Affirmation in opposition, exhibits A - M | 2 |

It is undisputed that plaintiff Lash Affair by J. Paris, LLC ("Lash Affair") hired defendant Mediaspa, LLC ("Mediaspa") to build a website for Lash Affair. The executed contract dated February 27, 2016, provided that the project would cost $60,000 and take four months. The parties' working relationship broke down in or around March 2017, with each party taking the position that the other was in default of the contract. Mediaspa claims that Lash Affair paid for Mediaspa's work, as invoiced, until March 2017, when it refused to pay an invoice for $5,325, for which Mediaspa now seeks a money judgment. Lash Affair claims that after repeated delays

and extra costs, it became apparent that Mediaspa was unable to perform the services as contracted, and it declared Mediaspa to be in default.

Lash Affair elaborates on the nature of the dispute in its complaint, asserting that under the parties' contract, Mediaspa agreed to provide Lash Affair with a website using the new Magento 2 e-commerce platform, rather than the well-established shopping cart format known as the Magento 1. However, according to Lash Affair, Mediaspa failed to disclose that it had never before built a website using the new Magento 2 e-commerce platform, or that it would be using its work on Lash Affair's website to learn how to use the new platform. Lash Affair also claims that although it repeatedly advised Mediaspa that the website would need to be editable by Lash Affair in-house, and although Mediaspa gave it assurances that it could work around the limitations of Magento 2, in fact, Magento 2, as an open source platform, requires a developer to make any changes, so every future edit would require Mediaspa's services.

By December 2016, Lash Affair had paid Mediaspa not only the agreed-on $60,000, but an additional $11,990 to purchase software called Fishbowl, which Mediaspa claimed was necessary for the website being constructed, as well as $12,564.89 in additional charges, purportedly for work that was not covered in the Scope of Work described in the contract. Therefore, Lash Affair states, on or about December 20, 2016, it advised Mediaspa to stop work on the contract. Yet, on or about March 9, 2017, Mediaspa sent an invoice for an additional $5,325, which amount Lash Affair refused to pay.

Lash Affair hired an attorney who sent a demand letter to Mediaspa on May 1, 2017 seeking a refund of the $85,055.39 it had already paid to Mediaspa, and warning of its intent to commence a lawsuit. Settlement discussions ensued but broke down, and Mediaspa filed its own

action against Lash Affair in New York County Supreme Court on May 26, 2017. That complaint alleges causes of action for breach of contract, unjust enrichment, and quantum meruit, and seeks a money judgment of $5,325. Although Mediaspa notified Lash Affair of its action through emailed copies of the papers, Lash Affair was not formally served with the summons and complaint until August 18, 2017, almost three months later.

Lash Affair filed this action against Mediaspa in Westchester County Supreme Court on May 31, 2017, and served Mediaspa with the papers on the same date. The complaint contains causes of action for fraud in the inducement, breach of contract, negligence in performance of contractual work, constructive fraud, unjust enrichment and deceptive business practices in violation of General Business Law § 349. On August 18, 2017, the same date as Mediaspa served the New York County summons and complaint, Mediaspa also filed this motion to dismiss the complaint in the Westchester action on the ground that this was the later-filed action. Soon thereafter, Lash Affair moved in the New York County proceeding to dismiss pursuant to CPLR 3211(a)(4) or, in the alternative, to change its venue to Westchester County. That motion is currently sub judice in New York County Supreme Court.

Currently before this Court is Mediaspa's motion to dismiss the complaint in this action pursuant to CPLR 3211(a)(4) based on the existence of a prior pending action, or, in the alternative, to consolidate this action with the prior action pending in New York County, pursuant to CPLR 602(a).

Analysis

Pursuant to CPLR 3211(a)(4), "[a] party may move for judgment dismissing one or more causes of action asserted against him 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."

The cases Mediaspa cites emphasize that to dismiss on this ground, even where both actions arise out of the same subject matter, "the relief sought must be 'the same or substantially the same'" (*see White Light Prods. v On the Scene Prods.*, 231 AD2d 90, 94 [1st Dept 1997]).

Here, while Mediaspa seeks payment of a $5,235 invoice, Lash Affair seeks the return of the $85,055.39 it paid, based on its contention that, inter alia, Mediaspa falsely claimed to have expertise in using a particular new e-commerce platform, and that this misrepresentation caused extra expense and lengthy delays.

Since the relief sought by the two parties is not the same or substantially the same, it is apparent that the action brought by Lash Affair may not be dismissed pursuant to CPLR 3211(a)(4). There is, however, other appropriate relief that this Court may now order "as justice requires" pursuant to that statute.

Absent dismissal, if the two actions proceed where each was brought, there is certainly, as Mediaspa points out, the possibility of conflicting rulings. The alternative relief suggested by Mediaspa, the consolidation of the two actions, is the appropriate remedy. The only remaining issue is the appropriate county in which the litigation should proceed.

The so-called "first to file" rule, regarding which court should determine an action where the parties filed their actions in two separate courts (*see e.g. Wachtell, Lipton, Rosen & Katz v CVR Energy, Inc.*, 143 AD3d 648 [1st Dept 2016]), is not applicable here. While Mediaspa commenced its New York County action by filing on May 26, 2017, five days before Lash Affair commenced this Westchester County action by filing on May 31, 2017, that race-to-the-

courthouse victory is immaterial. Indeed, "courts have often deviated from the first-in-time rule where one party files the first action preemptively, after learning of the opposing party's intent to commence litigation" (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 8 [1st Dept 2007], citing *White Light Prods. v On the Scene Prods.*, 231 AD2d 90, 100 ["(d)efendants should not be rewarded for their precipitous filing, approximately a week after learning of plaintiffs' intention to bring an action"]; *see also IRX Therapeutics, Inc. v Landry*, 150 AD3d 446, 447 [1st Dept 2017]). Here, Lash Affair informed Mediaspa by its May 1, 2017 letter of its intent to sue should the parties be unable to settle, which tends to indicate that Mediaspa's prior filing was preemptive in nature.

Moreover, following its May 26, 2017 New York County filing, Mediaspa took no steps in that action; indeed, Mediaspa did not even serve Lash Affair until several months later. Where a complaint was not served in the "prior" action, "it did not constitute a prior pending action for the purposes of [CPLR 3211[a][4]]" (*Sotirakis v United Servs. Auto. Assn.*, 100 AD2d 931 [2d Dept 1984], citing *Louis R. Shapiro, Inc. v Milspemes Corp.*, 20 AD2d 857 [1st Dept 1964] and Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:14, p 20).

Accordingly, the Mediaspa action pending in New York County is not entitled to the designation of, or the protection accorded to, a prior pending action. Indeed, Federal courts in the Second Circuit have held that where a prior filed action "has been filed in apparent anticipation of the other pending proceeding[,] such a course of action is an equitable consideration militating toward 'allowing the later filed action to proceed to judgment in the plaintiff's chosen forum'" (*see Hartford Accident & Indem. Co. v Hop-On Intl. Corp.*, 568 F

Supp 1569, 1573 [SD NY 1983], quoting *Factors Etc., Inc. v Pro Arts, Inc.*, 579 F2d 215, 219 [2d Cir 1978], *cert denied*, 440 US 909 [1979]).

The foregoing case law militates in favor of allowing the action to proceed to judgment in Lash Affair's chosen forum, Westchester County. Moreover, Westchester, rather than New York County, is the proper venue for the litigation to proceed.

"[T]he place of trial shall be in the county in which one of the parties resided when it was commenced; . . . or, if none of the parties then resided in the state, in any county designated by the plaintiff" (CPLR 503[a]). In Mediaspa's New York County complaint it states that it is a New York limited liability company with a business address in White Plains, Westchester County, New York. Indeed, this is the address that appears on Mediaspa's invoice to Lash Affair. Further, Mediaspa's filing with the New York State Department of State provides an address in Rye, Westchester County, New York for service of process. The address listed in a party's certificate of incorporation as the location of its principal office is a proper location for venue purposes (*see Memminger v Nelson Gardens, Inc.*, 14 AD3d 442, 443 [1st Dept 2005]; CPLR 503[c]).

Since Lash Affair is a Connecticut limited liability company with a business address in Phoenix, Arizona, the proper place of venue pursuant to CPLR 503(a) is where Mediaspa resides and maintains offices. That venue is Westchester County. The only nexus between this litigation and New York County is that Mediaspa's principal resides in New York County, which is not relevant to the consideration of the proper venue. Therefore, the consolidated action should be heard in Westchester County rather than New York County.

Since, where a party moves for dismissal pursuant to CPLR 3211(a)(4), the court may

"make such order as justice requires," Mediaspa's motion is granted only to the extent of directing the consolidation of the two actions in Westchester County.

Accordingly, it is hereby

ORDERED that the action encaptioned Mediaspa LLC v Lash Affair By J. Paris, LLC, New York County Index No. 652863/2017, is transferred from Supreme Court, New York County to Supreme Court, Westchester County, and the Clerk of the Supreme Court, New York County, is directed to mark its records accordingly and to transfer any files in that matter to the Clerk of the Supreme Court, Westchester County, and it is further

ORDERED that the files transferred from the action encaptioned Mediaspa LLC v Lash Affair By J. Paris, LLC, under New York County Index No. 652863/2017, shall be consolidated with and into Westchester County Index No. 58370/2017 in the case encaptioned Lash Affair by J. Paris, LLC v Mediaspa LLC, and the Mediaspa pleading shall be deemed an answer with counterclaims, and it is further

ORDERED that the parties are directed to appear for a preliminary conference on Monday, January 29, 2018, at 9:30 a.m. in the Preliminary Conference Part, Courtroom 811, Westchester County Supreme Court, 111 Martin Luther King Boulevard, White Plains, New York.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
November 27, 2017

Terry Jane Ruderman
HON. TERRY JANE RUDERMAN, J.S.C.