

Allied World Assur. Co. (U.S.) Inc. v Aspen Specialty Ins. Co.
2018 NY Slip Op 32160(U)
September 4, 2018
Supreme Court, New York County
Docket Number: 655224/17
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 4

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ALLIED WORLD ASSURANCE COMPANY (U.S.) INC.
and M. CARY INC.,

Plaintiffs,

-against-

Index No. 655224/17

ASPEN SPECIALTY INSURANCE COMPANY,
MERCHANTS MUTUAL INSURANCE COMPANY,
DIMENSIONAL DRYWALL AND ACOUSTIC LLC and
QUALITY CRAFT MARBLE TILE & STONE, INC.,

Defendants.

-----X
NERVO, J.:

In this declaratory judgment action, defendant Dimensional Drywall & Acoustic LLC (Dimensional Drywall) moves, pursuant to CPLR 3211 (a) (4) and 3214 (b), for dismissal of the complaint as against it on the grounds that (1) there is another action pending between plaintiff M. Cary, Inc. (M. Cary) and Dimensional Drywall for the same causes of action, and (2) that plaintiffs have failed to state a cause of action against Dimensional Drywall for insurance coverage.

For the reasons set forth below, Dimensional Drywall's motion is granted.

FACTS

This is a declaratory judgment action stemming from the underlying action entitled *Hodzic v M. Cary Inc.*, which is currently pending in the Queens Supreme Court under index No. 5480/12, and scheduled for trial.

Nifa Hodzic (Hodzic), the plaintiff in the underlying action, alleged that she was injured in a slip and fall on August 2, 2010 at her place of employment, the J.P. Morgan Chase Bank located at 77 Lexington Avenue, New York, New York, because of negligently performed

construction work. M. Cary was the general contractor for this construction work, and, on August 2, 2010, entered into a Subcontractor Agreement with Dimensional Drywall (*see* affirmation of Gill M. Coogler, exhibit A). In the Subcontractor Agreement, Dimensional Drywall agreed to both defend and indemnify M. Cary for any claims that arose in connection with its work (Subcontractor Agreement, § 9).

On March 14, 2012, Hodzic commenced the underlying action seeking recovery for personal injuries (*see* affirmation of Jenna L. Mastroddi, exhibit A). Initially, M. Cary was the only defendant. On March 20, 2013, Hodzic amended her complaint to assert direct claims against Dimensional Drywall and defendant Quality Craft Marble Tile & Stone, Inc. (Quality Craft) (*see id.*, exhibit C). On October 17, 2013, M. Cary commenced a third-party action against both Dimensional Drywall and Quality Craft, claiming entitlement to common law and contractual indemnity and contribution, and pleading the third party defendants' negligence for the accident (*see id.*, exhibit B).

In her bill of particulars dated May 11, 2012, Hodzic alleges that the incident took place in the area of copiers, printers and scanners, and that the defendants were negligent in failing to adequately perform and/or supervise construction work; in performing construction work in a negligent and improper manner; in failing to adequately remedy defective construction/renovation work; in failing to properly safeguard/barricade the accident location; and in creating and/or allowing a raised, unsafe condition to exist at the premises (*see id.*, exhibit D).

This action was commenced on August 7, 2017, more than five years after the underlying action was commenced. In this action, plaintiffs M. Cary and Allied World Assurance Company

(U.S.) Inc., M. Cary's insurer, seek a declaratory judgment that defendants Aspen Specialty Insurance Company, Merchants Mutual Insurance Company and National Union Fire Insurance Company are obligated to provide defense and indemnity coverage in the underlying action to M. Cary as an additional insured, and that Dimensional Drywall and Quality Craft are obligated to provide contractual defense and indemnity to M. Cary for the underlying action (amended complaint, ¶ 1).

DISCUSSION

Dimensional Drywall contends that because the claims asserted against it are duplicative of those made against it in the underlying action, they must be dismissed pursuant to CPLR 3211 (a) (4).

CPLR 3211 (a) (4) authorizes dismissal where "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." A court has broad discretion as to the disposition of an action when another is pending (*Whitney v Whitney*, 57 NY2d 731, 732 [1982]; *Certain Underwriters at Lloyd's, London v Hartford Acc. & Indem. Co.*, 16 AD3d 167, 168 [1st Dept 2005]). In considering whether to dismiss or stay a later-filed action in deference to an earlier-filed action, the court should determine whether there is a "substantial identity" of the parties (*White Light Prods., Inc. v On the Scene Prods.*, 231 AD2d 90, 94 [1st Dept 1997]; see also *Montalvo v Air Dock Sys.*, 37 AD3d 567, 567 [2d Dept 2007]). "Substantial identity" of the parties "generally is present when at least one plaintiff and one defendant is common in each action" (*Proietto v Donohue*, 189 AD2d 807, 807-808 [2d Dept 1993], quoting *Morgulas v Yudell Realty*, 161 AD2d 211, 213 [1st Dept 1990]).

Further, to warrant dismissal or a stay, the two actions must be sufficiently similar, and

the relief sought must be “the same or substantially the same” (*White Light Prod., Inc. v On the Scene Prod., Inc.*, 231 AD2d at 94 [citation omitted]). “It is not necessary that the precise legal theories presented in the first proceeding also be presented in the second proceeding,” but “[r]ather, it is necessary that ‘both suits arise out of the same subject matter or series of alleged wrongs (citation omitted)’” (*Simonetti v Larson*, 44 AD3d 1028, 1029 [2d Dept 2007]).

Courts routinely dismiss later-filed cases pursuant to CPLR 3211 (a) (4) where, as here, the identity of the parties and the causes of action are substantially the same, thus raising the danger of conflicting rulings relating to the same matter (*see e.g. Certain Underwriters at Lloyd’s, London*, 16 AD3d at 168 [dismissing New York action where a suit involving the same parties and substantially the same claims had been pending for over a year in a Connecticut court]; *see also Employers Ins. of Wausau v Primerica Holdings*, 199 AD2d 178, 178 [1st Dept 1993]).

It is clear that the claims in this action against Dimensional Drywall must be dismissed as the relief sought in this action and in the underlying action as against Dimensional Drywall is “the same or substantially the same,” both actions arise out of the same operative facts, and there is a substantial identity of the parties. Plaintiffs’ claims here – that Dimensional Drywall is obligated to provide contractual defense and indemnity to M. Cary for the underlying action – are the same claims that M. Cary asserted as against Dimensional Drywall in the underlying action in the third-party action. As such, the underlying action, which is currently set for trial, will necessarily resolve all of the issues raised by these claims, and will thus eliminate the need for duplicate hearings, and the possibility of inconsistent rulings. Moreover, there is substantial identity of the parties, as both M. Cary and Dimensional Drywall are parties in the underlying

action.

In opposition to the motion, plaintiffs argue that the claims here are not duplicative of the those in the underlying action because M. Cary never made a claim for contractual indemnification in its cross claims. The court rejects this argument, as plaintiffs completely ignore the third party action commenced by M. Cary against Dimensional Drywall, in which M. Cary specifically asserted claims for common law and contractual indemnity as against Dimensional Drywall.

Accordingly, the claims in this action asserted by plaintiffs as against Dimensional Drywall must be dismissed pursuant to CPLR 3211 (a) (4). In light of this determination, it is unnecessary to address the remaining branch of the motion seeking dismissal for failure to state a cause of action.

The court has considered the remaining arguments, and finds them to be without merit.

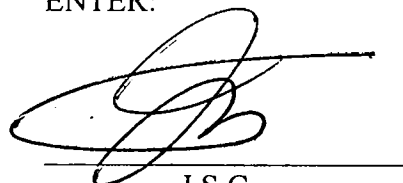
Accordingly, it is

ORDERED the motion of defendant Dimensional Drywall & Acoustics LLC for dismissal of the complaint as against it is granted, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

Dated: ^{Sept.} August 4, 2018

ENTER:

A handwritten signature in black ink, appearing to be 'F. Nervo', written over a horizontal line.

J.S.C.

HON. FRANK P. NERVO