

<b>Alpha Beta Capital Partners, L.P. v Schepis</b>
2018 NY Slip Op 32348(U)
September 14, 2018
Supreme Court, New York County
Docket Number: 651906/2017
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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ALPHA BETA CAPITAL PARTNERS, L.P.,

Plaintiff,

Index No. 651906/2017

against

ANTHONY P. SCHEPIS and FRANK  
CANELAS, JR.,**DECISION & ORDER**

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Defendants.**Anthony Cannataro, J.:**

In this action for breach of contract, Anthony P. Schepis and Frank Canelas, Jr., move to dismiss the complaint based on documentary evidence pursuant to CPLR 3211(a)(1) and based on the doctrine of judicial estoppel because a prior action is pending between the same parties on the same cause of action pursuant to CPLR 3211(a)(4).

The instant action comes to this Court after a complex procedural history between the parties. Plaintiff originally commenced an action against the defendants along with relevant corporate entities in New York in 2013. The parties entered into a June 14, 2013 stipulation wherein plaintiff agreed to discontinue the 2013 New York action as against defendants if they withdrew their motion to dismiss. In 2015, plaintiff filed a separate action in Connecticut against the same defendants and the related corporate entities. The Connecticut action was decided in favor of plaintiff but is now on appeal. This Court recently issued a decision granting summary judgment in favor of the plaintiff in the 2013 action.

Defendants argue that the complaint in the instant action should be dismissed. First, defendants argue for dismissal pursuant to CPLR 3211(a)(4) as there is a prior action pending between the same parties on the same issue. Second, defendants assert that documentary evidence in the form of the June 14, 2013 stipulation discontinuing the action against them should be binding. Defendants further claim that

the stipulation was not a voluntary discontinuance, but a termination of action under CPLR 205. Finally, defendants argue that the Court should apply the doctrine of judicial estoppel in this action as plaintiff currently maintains a position contrary to the one it held in the 2013 New York action.

In response, plaintiff argues that there is not substantial identity of the parties to the 2013 New York action and the instant action. Specifically, plaintiff asserts that individual principals should be distinguished from the corporate entities they represent. Plaintiff asserts that even if this Court finds a substantial identity between the parties, this action should not be dismissed but instead should be consolidated with the 2013 New York action. Plaintiff also argues that the documentary evidence presented does not conclusively refute the plaintiff's factual allegations and therefore does not entitle defendants to dismissal. Finally, plaintiff contests the claim that they have taken a contrary position or secured a judicially endorsed judgment warranting use of the doctrine of judicial estoppel.

On a motion to dismiss pursuant to CPLR 3211, the pleadings are to be afforded a liberal construction, the facts alleged in the complaint are to be accepted as true, the plaintiffs are to be accorded the benefit of every possible favorable inference, and a determination is to be made only as to whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87 [1994]).

"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, 732 [1982]). In order to invoke CPLR 3211(a)(4) "substantial, not complete, identity of parties is all that is required" (*Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 96 [1st Dept 2013]).

Courts have discussed whether individual principals of corporations should be considered substantially similar to the corporation itself. The First Department

in *Morgulas* found that “individual principals of a corporation are legally distinguishable from the corporation itself” (*Morgulas v J. Yudell Realty, Inc.*, 161 AD2d 211, 213 [1st Dept 1990]). However, in *Morgulas*, unlike the case at bar the prior pending action was brought by the defendants as individual principals before the plaintiffs sued the defendants in their corporate capacities. Then, when the defendants moved to dismiss the second action as substantially similar the Court found that having availed themselves of the protection of the corporate form, the defendants could not shed that protection at will (*See id.*). This case more closely resembles *Syncora Guar. Inc. v J.P. Morgan Sec. LLC* (110 AD3d 87 [1st Dept 2013]), in which the same plaintiff brought separate federal and state actions against closely affiliated corporate entities based on the same claims. In *Syncora*, the First Department held that where “a plaintiff seeks the same damages for the same alleged injuries relating to the same transaction from close corporate affiliates, a court may properly make a finding that parties have ‘substantially similar’ identities” (*Id.* at 96).

In the instant case, plaintiff commenced a prior action against the defendants in their corporate capacities and now brings this second action based on the very same claim (for LBIE proceeds) against them in their capacities as individual principals. Here, Anthony P. Schepis and Frank Canelas, Jr., are substantially identical to the Pursuit corporate entities they control.

Dismissal is nonetheless not mandatory or automatic under CPLR 3211(a)(4), but within a court’s “broad discretion” (*Whitney* at 732). Here, plaintiff has attempted to stretch the judiciary’s limited resources by filing actions on the same and related claims against the same parties in two separate New York actions and a Connecticut action. The appropriate remedy under these circumstances is to reduce ongoing litigation by dismissing the instant cause of action. Accordingly, it is

**ORDERED** that defendants motion to dismiss is granted with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is

directed to enter judgment accordingly in favor of said defendants.

Dated: 9/14/18

ENTER:

A handwritten signature in black ink, appearing to read 'Anthony Cannataro', written over a horizontal line.

Anthony Cannataro, JSC