

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART: 13

-----X
RESCUE CLEANING CORP.

Index No. 0022874/2019E

-against-

Hon. FERNANDO TAPIA,

BAHADUR, KAPILDEO
-----X

Justice Supreme Court

The following papers numbered 1 to _____ Read on this motion, (Seq. No. 1) for
DISMISSAL, noticed on **May 23 2019**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that this motion is

See annexed Order.

Motion is Respectfully Referred to Justice: _____
Dated: _____

Dated: 07/22/19

Hon. 
FERNANDO TAPIA, J.S.C.

1. CHECK ONE.....
 CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
2. MOTION IS.....
 GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE.....
 SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: Part 13

RESCUE CLEANING CORP.

Plaintiff(s),

v.

Index No.: 22874/2019E

KAPILDEO BAHADUR

Defendant(s).

DECISION

This is an action involving a mechanic's lien foreclosure, whereby defendant, KAPILEDEO BAHADUR allegedly failed to repay a debt of \$175,000 to the plaintiff, RESCUE CLEANING CORP. ("RCC"). BAHADUR moves pursuant to CPLR § 3211(a)(1) to dismiss the plaintiff's complaint on the grounds that it fails to comply with Real Property and Procedure Law § 1301. Alternatively, BAHADUR moves pursuant to CPLR § 602 for an order to consolidate this action with a prior pending action brought forth in the Supreme Court of New York, Queens County.

After careful review of the motion papers, BAHADUR's motion for dismissal is **GRANTED**. BAHADUR's motion for consolidation is **DENIED**.

BACKGROUND

From September 14, 2015 through February 14, 2016, RCC was allegedly contracted to perform restoration and demolition services on BAHADUR's property. (*See* Defendant's Affirmation in Support, Pg. 2, ¶ 4). However, BAHADUR allegedly failed to remit payment to RCC, as a result RCC commenced suit for breach of contract against BAHADUR in the Supreme Court of New York, Queens County under the *Index No. 704786/2016. Id.* at Ex. B. At the time of filing the instant motion RCC's action in Queens County is still pending. *Id.* at Pg. 2, ¶ 6.

DISMISSAL

BAHADUR contends that RCC cannot maintain its lien foreclosure action before this Court because the debt in question is also the subject matter of the previous breach of contract action filed in Queens County. *Id.* at Pg. 3, ¶ 12. However, RCC argues that it can maintain both actions because the Queens County action is for breach of contract and therefore not subject to N.Y. Real Prop. Acts. Law § 1301 is not applicable. (See Plaintiff's Affirmation in Opposition, Pg. 2, ¶ 6).

RPAPL § 1301 (3) provides, "While the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought." The purpose of the RPAPL is to protect a mortgage debtor from multiple lawsuits, if a deficiency judgment could not be obtained against the debtor in a legal action, a subsequent equitable action may not be maintained for the same debt. *Sanders v. Palmer*, 68 N.Y.2d 180 (1985). Under RPAPL § 1301 separate actions for the breach of an agreement and a foreclosure that arise out of the same contract can *only* be maintained if the debts in question are separate and distinct from one another. *P.T. Bank Cent. Asia v. Wide Motion Corp.*, 233 A.D.2d 151 (1st Dep't 1996).

Plaintiff cites 2nd Department case law to posit the argument that because two separate foreclosure actions that arise out of the same mortgage cannot be concurrently maintained, it may instead maintain separate foreclosure and breach of contract actions that arise out of the same contract.¹ Separate equitable and legal actions may not be maintained where each suit seeks to collect upon the *same* debt. Allowing a plaintiff to do so would essentially enable him to 'double-dip' and be rewarded twice. Such a scenario would allow a mortgagee to obtain title of the mortgagor's home in a foreclosure, and subsequently collect money damages for the full value of the mortgage on that same home in a separate breach of contract suit. Here, the mechanic's lien in this instant action and the breach of contract suit in the Queens County action arise out of the same debt as both actions are founded upon BAHADUR's alleged failure to remit payment to RCC for restoration and demolition services. Further, the record has not established that RCC obtained leave from the court in Queens County to pursue this instant action, a requisite whenever a plaintiff seeks to pursue multiple actions arising from the same contract

¹ *Aurora Loan Servs., LLC v. Spearman*, 68 A.D.3d 796 (2nd Dept' 2009); see also, *Sec. Nat'l Servicing Corp. v. LieBowitz*, 281 A.D.2d 615 (2nd Dep't 2001).

when at least one of those suits involves a claim under New York's RPAPL. Accordingly, RCC cannot maintain both of its actions against BAHADUR. Thus, dismissing the instant action is proper. RCC's motion for consolidation is **DENIED** as moot.

CONCLUSION

In sum, RCC cannot maintain the instant action as it filed a previous suit in Queens County containing common questions of law, fact, and seeks collection for an identical debt.

Accordingly, it is

ORDERED that BAHADUR's motion to dismiss is **GRANTED**; it is further

ORDERED that BAHADUR's motion for consolidation is **DENIED** as moot.

This constitutes the Decision and Order of this Court.

Dated: July 22, 2019

Bronx, NY



Hon. Fernando Tapia, J.S.C.