Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

CAB EAST, LLC,

Plaintiff,

-against-

GERARD L. CLARK,

Defendant.

Index No. 16391/11

Motion
Date February 21, 2012

Motion
Cal. No. 4 and 34

Motion
Sequence No. 1 and 2

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Upon the foregoing papers it is ordered that this motion by defendant, Gerard Clark for an order pursuant to CPLR 3211(a)(2), (a)(5), (a)(7), dismissing this action and CPLR 214(3) and CPLR 3004 and motion by defendant, Gerard Clark to amend his pending application for a motion to dismiss pursuant to CPLR 3211(a)(2), (5), (7) by adding §§ (1), (3), (c), CPLR 4518 and 5021(a)(2) are hereby consolidated solely for the purposes of disposition of the instant motions and are both hereby denied.

Plaintiff, Cab East LLC commenced this action seeking to recover possession of certain chattel presently in defendant's possession, pursuant to plaintiff's ownership interest allegedly stemming from a Lease Agreement for a 2006 Land Rover vehicle entered into by plaintiff and defendant. Defendant now moves to dismiss the complaint prior to serving an Answer.

At the outset, the Court notes that to the extent the defendant claims that the action should be dismissed because the summons and complaint were not properly served upon him, said is

denied. There are no factual disputes regarding this point. Defendant admits that he received a copy of the summons and complaint at the address plaintiff maintains they served defendant at. The Court finds that the Affidavit of Service of Roberto Reyes sworn to on July 29, 2011 indicates a prima facie case that service was properly effectuated upon defendant pursuant to CPLR 308(4). Mr. Reyes' affidavit clearly demonstrated that plaintiff complied with the service requirements of CPLR 308(4), also referred to as "nail and mail", in that after exercising due diligence to serve the defendant in person, he "nailed and mailed" the documents to the defendant's last known address. Such a properly executed affidavit of service created a presumption of mailing by plaintiff and of receipt by defendant (*see, Kihl v. Pfeffer,* 94 NY2d 118 [NY 1999]. Defendant has failed to rebut the presumption of proper service. It is undisputed that the address where defendant claims he should have been served at is a UPS Store Mailbox. The Court concludes that plaintiff properly obtained personal jurisdiction over defendant when he was properly served pursuant to CPLR 308(4). As defendant failed to present sufficient evidence to rebut plaintiff's prima facie case, that branch of defendant's motion to dismiss the complaint on the ground that the Court lacks jurisdiction over the defendant is denied.

CPLR 33211(a)(5)-res judicata and collateral estoppel

That branch of defendant's motion to dismiss plaintiff's causes of action pursuant to CPLR 3211(a)(5) on the grounds of collateral estoppel and res judicata is denied.

The doctrine of collateral estoppel precludes a litigant from re-litigating an issue where that litigant has had a full and fair opportunity to litigate the issue in a prior proceeding where the identical issue was necessarily decided (*Capital Telephone Co., Inc v. Pattersonville Telephone Co., Inc*, 56 NY2d 11 [1982]). There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and . . . there [must be] a full and fair opportunity to contest the decision now said to be controlling" (*see, Schwartz v. Public Administrator of the County of Bronx*, 24 NY2d 65 [1969]).

"Principles of res judicata require that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" (*Chen v. Fischer*, 6 NY3d 94 [2005])[internal citations

omitted]). "It is not always clear whether particular claims are part of the same transaction for res judicata purposes. A 'pragmatic' test has been applied to make this determination-analyzing 'whether the facts are related in time, space, origin, or motivation whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'" Id. [internal citations omitted]). "The doctrine of res judicata prohibits a party from relitigating any claim which could have been, or which should have been litigated in a prior proceeding" (*County of Nassau v. New York State Public Employment Relations Board*, 151 AD2d 168 [2d Dept 1989][internal citations omitted]). The rule applies to claims that either were actually litigated or could have been litigated in a prior proceeding (*see*, *Cohen v. City of New York*, 2001 NY Slip Op 50028u (Sup Ct, New York County 2001). Res judicata will only be applicable where there "has been a final judgment on the merits" (*Lewis v. City of New York*, 844 NYS2d 650 [Sup Ct, Bronx County 2007]). The main objective of res judicata is to "ensure finality, prevent vexatious litigation, and promote judicial economy" (*see*, *Chen*, *supra*).

In the instant action, defendant has failed to establish a prima facie case that there was a prior proceeding where the identical issue was necessarily decided or that a claim in this case actually was litigated or could have been litigated in a prior proceeding. Defendant argues that res judicata or collateral estoppel should apply to the Bankruptcy Court's Order dated May 31, 2011. The record reflects however, that the Bankruptcy Court's Order was not a final order or judgment and did not consider the merits of the case. The Order denied plaintiff's request that the Court use its equitable powers to issue an Order to turn over the vehicle and does not address the merits of plaintiff's claim of ownership over or entitlement to the vehicle at issue.

CPLR 3211(a)(5)-Statute of Limitations

That branch of defendant's motion to dismiss plaintiff's causes of action pursuant to CPLR 3211(a)(5) on the grounds of the action being time-barred is denied.

The Court finds that plaintiff's action seeking replevin of the vehicle is not time-barred. Pursuant to CPLR 214(3), "an action to recover a chattel or damages for the taking or detaining of a chattel" must be commenced within three (3) years. The time within which the action must be commenced shall be computed from the time when the right to make the demand is

complete CPLR 206(a)]. "However, "[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not part of the time within which the action must be commenced." CPLR 204(a).

Defendant maintains that the statue of limitations on plaintiff's cause of action began to run on October 30, 2007, during defendant's first bankruptcy proceeding, when the parties entered into a Stipulation and Conditional Order vacating plaintiff's automatic stay ("Stipulation") and argues that this Stipulation served as a demand for replevin of the subject vehicle and that it lifted the bankruptcy stay that was in effect, specifically allowing plaintiff to proceed with a replevin action. However, upon reading the Stipulation, the Court finds defendant's contention to be misguided. The Stipulation states "that the lease with respect to the Vehicle and the underlying debt on same is hereby assumed by the Debtor" and it set forth a payment schedule to be followed by defendant in order to maintain the Lease current. The Stipulation's default provision stated that if

> any ... future payments are not received by [Plaintiff] in full and on time as set forth above, then [Plaintiff] or its counsel shall mail a written Notice of Default to the Debtor ... In the event the Debtor fails to cure the default within five (5) days of said mailing, then [Plaintiff] may serve on [Defendant ...] and file with this Court an Affidavit (or Affirmation) of Non-Compliance and proposed final order vacating the automatic stay and providing that [Plaintiff] may pursue its rights under applicable State Law with respect to the Vehicle ...

This Court finds the language of the Stipulation indicates that plaintiff did not have the ability to proceed with a replevin action unless the court issued a further order vacating the automatic stay in the event that defendant failed to comply with the terms of the Stipulation. The record reflects that plaintiff did seek such relief on April 4, 2008 after defendant defaulted under the Stipulation and that on June 6, 2008, before any order could be issued by the Bankruptcy Court vacating the automatic stay, defendant's bankruptcy proceeding was dismissed. This dismissal served to lift the automatic stay and marks the first date when the replevin action could have been commenced. The record additionally reflects that the defendant thereafter

filed a second bankruptcy petition on July 9, 2008, and so in accordance with CPLR 204(a), the automatic stay from the bankruptcy case tolled the statue of limitations for the replevin action. Up to this point, a total of 36 days elapsed from the first date when the replevin action could have been commenced. The second bankruptcy petition was dismissed on September 23, 2008, and so, the accrual of time for state of limitations resumed running at that point. The record further reflects that defendant filed a third bankruptcy petition on June 29, 2009, and so the statute of limitations on the replevin action was tolled again. As of the date of the commencement of defendant's third bankruptcy proceeding, and taking into account the tolling time under the second bankruptcy proceeding, 315 days had elapsed since the earliest time the replevin action could have been commenced. On September 30, 2009, the Bankruptcy Court issued an Order Granting Relief from Stay and allowed plaintiff to seek relief under applicable state law. The Order stated that it would become effective ten (10) days after entry or October 10, 2009. At that point in time, plaintiff could have proceeded with a replevin action. On July 13, 2011, plaintiff commenced the replevin action. At the time of commencement of the replevin action, including the tolling under the second and third bankruptcy filings, 956 days elapsed since the first time the replevin action could have been commenced. This is within the three (3) year (1095 days or 3 x 365 days) time frame plaintiff had to commence the action pursuant to CPLR 214.

The Court finds that defendant has failed to establish a prima facie case in support of any of the remaining branches of the motion. Additionally, defendant has improperly sought to reach the merits of the complaint on this mere CPLR 3211 motion (*see, Stukuls v. State of New York, supra; Jacobs v. Macy's East Inc., supra*). Defendant is granted leave to serve and file an Answer within 30 days from the date that plaintiff serves a copy of this order with notice of entry on defendant.

This constitutes the decision and order of this Court.

A courtesy copy of this order is being mailed to defendant, pro se and counsel for plaintiff.

Dated: April 24, 2012

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Howard G. Lane, J.S.C.