

<b>Mosley v 137th St. Props., LLC</b>
2012 NY Slip Op 31309(U)
April 13, 2012
Sup Ct, NY County
Docket Number: 117893/2009
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

LUCY BILLINGS

PRESENT: \_\_\_\_\_ J.S.C. Justice

PART 46

Index Number : 117893/2009

**MOSLEY, SEAN**

VS.

**137TH STREET PROPERTY**

SEQUENCE NUMBER : 004

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1

\_\_\_\_\_

\_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that ~~this motion~~

*The court denies defendant's motion to dismiss the complaint, pursuant to the accompanying decision. C.P.L.R. §§ 3211(a)(4) and (5), 3216.*

**FILED**

MAY 17 2012

NEW YORK COUNTY CLERKS OFFICE

Dated: 4/13/12

*Lucy Billings*

LUCY BILLINGS J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

-----x

SEAN MOSLEY,

Index No. 117893/2009

Plaintiff

- against -

DECISION AND ORDER

137TH STREET PROPERTIES, LLC,

Defendant

-----x

LUCY BILLINGS, J.S.C.:

**FILED**

**MAY 17 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff sues to recover for personal injuries he sustained on October 9, 2009, while on defendant's premises. Plaintiff commenced this action by filing a summons and complaint December 22, 2009. Defendant moves to dismiss the complaint with prejudice on the grounds of res judicata, collateral estoppel, and issue preclusion. C.P.L.R. § 3211(a)(5). For the reasons explained below, the court denies defendant's motion.

Plaintiff commenced a prior action to recover for personal injuries sustained October 9, 2009, on defendant's premises by filing a summons and complaint October 20, 2009, which was assigned Index No. 115433/2009. In that action, the court (Kenney, J.) granted defendant's motion to compel disclosure in an order dated May 14, 2010, which provided that "failure to comply with these Court issued orders, shall result in dismissal of the complaint, upon written notice of motion of such non-compliance." Aff. of Paul Tripodo Ex. A. The court (Kenney, J.) also granted a motion by plaintiff's attorney to withdraw as

counsel in an order dated June 24, 2010, which directed plaintiff to retain a new attorney or notify the court in writing within 30 days of his intent to proceed without an attorney and stayed the action for that period. Although defendant claims Justice Kenney dismissed the prior action due to plaintiff's noncompliance with the prior orders, the dismissal order dated June 2, 2011, simply provides: "It is hereby ordered that the Clerk of the Court shall enter judgment in favor of defendant and against plaintiff, dismissing the complaint." *Tripodo Aff. Ex. F.*

Under the doctrines of res judicata and claim preclusion, a final judgment on a claim bars future actions between the same parties for the same claims or other claims arising from the same transactions between the parties. Landau v. LaRossa, Mitchell & Ross, 11 N.Y.3d 8, 12 (2008); Josey v. Goord, 9 N.Y.3d 386, 389-90 (2007); Matter of Hunter, 4 N.Y.3d 260, 269 (2005); Parker v. Blauvelt Volunteer Fire Co., 93 N.Y.2d 343, 347 (1999). The judgment must be on the merits to give it preclusive effect. Landau v. LaRossa, Mitchell & Ross, 11 N.Y.3d at 13; Kalisch v. Maple Trade Fin. Corp., 35 A.D.3d 291 (1st Dep't 2006); Espinoza v. Concordia Intl. Forwarding Corp., 32 A.D.3d 326, 328 (1st Dep't 2006).

Defendant demonstrates that the complaints in this action and the prior action allege the same personal injury claim between the same parties. See Lusk v. Weinstein, 85 A.D.3d 445, 446 (1st Dep't 2011); North Am. Van Lines, Inc. v. American Intl. Cos., 38 A.D.3d 450, 451 (1st Dep't 2007); AmBase Corp. v. Pryor

Cashman Sherman & Flynn LLP, 35 A.D.3d 174, 175 (1st Dep't 2006). The court's dismissal of the prior action, however, does not furnish a basis to dismiss this action. The order dated June 2, 2011, did not indicate whether the dismissal of the prior action was with or without prejudice. A judgment need not explicitly state that it is with prejudice to be treated as a determination on the merits, as long as the judgment appears to be a dismissal on the merits. Strange v. Montefiore Hosp. & Med. Ctr., 59 N.Y.2d 737, 739 (1983). See Barrett v. Kasco Constr. Co., 56 N.Y.2d 830, 831 (1982); Karniol v. Good Move Trucking, 281 A.D.2d 287, 287-88 (1st Dep't 2001). The June 2011 order does not specify the reasons for the dismissal, however, nor has defendant presented its motion seeking dismissal and leading to that order. Without more, it must be considered as without prejudice and thus not on the merits. C.P.L.R. § 5103; 420 E. Assoc. v. Estate of Lennon, 225 A.D.2d 326 (1st Dep't 1996).

Even accepting defendant's contention in this action that the dismissal was based on plaintiff's noncompliance with the orders of May 14, 2010, and June 24, 2010, a dismissal due to noncompliance with those orders is not a dismissal on the merits. Maitland v. Trojan Elec. & Mach. Co., 65 N.Y.2d 614, 615-16 (1985). See Strange v. Montefiore Hosp. & Med. Ctr., 59 N.Y.2d at 739; Tejada v. 750 Gerard Props. Corp., 272 A.D.2d 124, 125 (1st Dep't 2000). Since the dismissal of the prior action was not on the merits, res judicata does not bar plaintiff's current action, Landau, P.C. v. LaRossa, Mitchell & Ross, 11 N.Y.3d at

13; Kalisch v. Maple Trade Fin. Corp., 35 A.D.3d 291; Espinoza v. Concordia Intl. Forwarding Corp., 32 A.D.3d at 328, or any future claim within the statute of limitations. Avins v. Federation Empl. & Guidance Serv., Inc., 67 A.D.3d 505, 506 (1st Dep't 2009); 420 E. Assoc. v. Estate of Lennon, 225 A.D.2d 326.

While the order of May 14, 2010, specifically required plaintiff to comply with disclosure or face dismissal, because the order further required a motion to effect dismissal, the order may not be treated as a conditional order of dismissal, which if violated by plaintiff would have preclusive effect. Strange v. Montefiore Hosp. & Med. Ctr., 59 N.Y.2d at 739; Barrett v. Kasco Constr. Co., 56 N.Y.2d at 831; Tejada v. 750 Gerard Props. Corp., 272 A.D.2d at 125. Even if the court treated the May 2010 order as a conditional order of dismissal, however, plaintiff's commencement of this action may not be viewed as an attempt to circumvent the order, because he commenced this action before both the May 2010 order and the order directing him to retain a new attorney or provide notice of his intent to proceed without an attorney.

Finally, since the first action already had been dismissed when defendant made this motion, this action is not subject to dismissal on the ground that another action is pending. C.P.L.R. § 3211(a)(4); L-3 Communications Corp. v. SafeNet, Inc., 45 A.D.3d 1, 7-8 (1st Dep't 2007). See Chang v. Zapson, 67 A.D.3d 435, 436 (1st Dep't 2009); Counsel Abstract, Inc. Defined Benefit Pension Plan v. Jerome Auto Ctr., Inc., 23 A.D.3d 274, 276 (1st

Dep't 2005). Nor has defendant met the requirements for dismissal based on neglect to prosecute. C.P.L.R. § 3216. Dismissal on that ground, in any event, would not be on the merits. Merchants T & F, Inc. v. Kase & Druker, 19 A.D.3d 134 (1st Dep't 2005).

Consequently, the court denies defendant's motion to dismiss this action on each of the grounds set forth. C.P.L.R. §§ 3211(a)(4) and (5), 3216. This decision constitutes the court's order.

DATED: April 13, 2012

*Lucy Billings*  
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LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
J.S.C.

**FILED**

**MAY 17 2012**

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