

RIS Real Props., Inc. v APF 286 Mad LLC

2013 NY Slip Op 33263(U)

December 23, 2013

Supreme Court, New York County

Docket Number: 652375/2012

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN
Justice

PART 63

Index Number : 652375/2012
RIS REAL PROPERTIES, INC.
vs.
APF 286 MAD LLC
SEQUENCE NUMBER : 002
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1
Answering Affidavits — Exhibits _____ No(s). 2
Replying Affidavits _____ No(s). 3

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

MOTION IS DENIED IN ACCORDANCE
WITH THE PREVIOUS DECISION
AND ORDER.

*This constitutes the decision and
order of the court.*

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

Dated: 12/23/13

Em, J.S.C.

HON. ELLEN M. COIN
 NON-FINAL DISPOSITION

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 63

-----X

RIS Real Properties, Inc.,

Plaintiff,

-against-

APF 286 Mad LLC, GAN 286
Madison LLC, and 286
Madison Associates LLC,

Index No.652375/2012
Subm. Date: Nov. 11, 2013
Mot. Seq.:002

DECISION AND ORDER

Defendants.

-----X

APF 286 Mad LLC, GAN 286
Madison LLC, and 286
Madison Associates LLC,

Third-Party Plaintiffs,

-against-

Robert I. Strougo,

Third-Party Defendant.

-----X

Ellen M. Coin, J.:

Defendants-third party plaintiffs move for leave to amend the third-party complaint. In addition, relying on principles of res judicata and collateral estoppel, they move for summary judgment dismissing plaintiff's complaint; to strike the affirmative defenses and counterclaims filed by third-party defendant Robert I. Strougo (Strougo); and for summary judgment against Strougo.

Parties and Procedural Background

APF 286 Mad LLC, GAN 286 Madison LLC and 286 Madison Associates LLC (collectively, APF) are the owners and landlords of a building (the Building) located at 286 Madison Avenue, New York, New York. (Telleria Aff. ¶1 at 1). RIS Real Properties, Inc. (RIS) is the tenant of the 22nd floor (the Premises) of the Building, pursuant to a lease dated July 7, 2011 (the Lease) (Compl. ¶¶ 1-4; admitted in Ans. ¶¶ 1, 21-23). The Lease included a personal guarantee (the Guarantee) executed by RIS's principal, Strougo (Lease, Ex C to Telleria Aff.; Answer to Third Party Compl. ¶2, Ex K to Telleria Aff.).

This action was commenced on or about July 6, 2012 by filing a summons with the County Clerk and the complaint was filed on or about August 2, 2012. The complaint alleges that RIS was fraudulently induced to enter into the Lease due to false representations concerning the use of the terrace (complaint, ¶¶ 10-14).

On or about July 18, 2012, APF commenced a summary proceeding (the Non-Payment Proceeding) in the Civil Court of the City of New York, New York County, entitled *APF 286 Mad LLC, GAN 286 Madison, LLC and 286 Madison Associates LLC v RIS Real Properties, Inc. and Robert I. Strougo, Esq., Watters & Svetkey, LLP, David M. Blum, Esq., Robert A. Burstein, Esq., Keith E. Wilson, Esq., Manolo Costa New York, NYC Realty and XYZ, Inc., L*

& T index number 73123/2012. The Non-Payment Proceeding sought possession of the Premises, alleged rent arrears, future accruing rent and attorneys' fees.

By order dated and entered January 2, 2013 (the First Civil Court Decision), Hon. Frank Nervo granted APF's motion for summary judgment on liability, but found that APF had not shown entitlement to the amount claimed. The order also struck the affirmative defense and counterclaim that APF "fraudulently induced [RIS and guarantor Strougo] into entering into the [L]ease" (First Civil Court Decision at 1, 2).

The Non-Payment Proceeding was tried and by order dated June 28, 2013, Hon Nancy M. Bannon issued a decision after trial (the Second Civil Court Decision). In the Second Civil Court Decision, the Court awarded APF \$145,632.33 for rent and unpaid rent, plus attorneys' fees and expenses of \$65,199.56, for a judgment in the total amount of \$210,831.89, plus interest from May 1, 2012 (Second Civil Court Decision at 6, 8). On July 25, 2013, judgment (the Civil Court Judgment) was entered pursuant to the Second Civil Court Decision.

This court's records indicate that an appeal was taken from the First and Second Civil Court Decisions and the Civil Court Judgment and that it is docketed under index number 570078/2013. On January 17, 2013, RIS moved for a stay pending appeal of the First Civil Court Decision; the stay was declined by order of

Hon. Martin Schoenfeld dated January 18, 2013. On August 26, 2013, RIS moved for a stay of enforcement of the Civil Court Judgment pending appeal; the stay was denied by order of Hon. Alexander Hunter dated August 27, 2013. On September 13, 2013, RIS moved by order to show cause to, *inter alia*, modify the prior denial of the stay and to fix an undertaking for the stay; the stay was granted by order of Hon. Debra Samuels dated October 15, 2013, conditioned upon partial payment of \$100,000.00. On October 24 and 25, 2013, RIS made three payments in partial satisfaction of the Civil Court Judgment (Solomon Aff. ¶2), totaling the requisite amount. The appeal of the Civil Court Judgment is still pending.

APF contends that it should be granted summary judgment dismissing RIS's complaint and granted summary judgment against Strougo based upon the Guarantee, due to the *res judicata* and collateral estoppel effects of the First and Second Civil Court Decisions and the Civil Court Judgment.

RIS and Strougo assert that they lacked a full and fair opportunity to contest the merits, arguing that the First and Second Civil Court Decisions improperly made factual findings, applied the wrong standard for summary judgment and were, therefore, erroneous (Strougo Aff., ¶¶ 20, 22, 25-34, 43). They also note that the appeal of the Civil Court Judgment is still pending (*id.*, ¶¶ 55-56).

Summary Judgment

A party seeking summary judgment has the burden to establish a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). This burden is a heavy one, and on a motion for summary judgment facts must be viewed in the light most favorable to the non-moving party. (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, --NY3d--, 2013 NY Slip Op 08373 [2013]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]).

Res Judicata and Collateral Estoppel

"Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject

matter. The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation [since] ... a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). Under New York's "transactional analysis approach [to res judicata] ... 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" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 474 [1st Dept 2011]).

In distinction to res judicata or claim preclusion, "[c]ollateral estoppel, or issue preclusion, 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party ..., whether or not the tribunals or causes of action are the same'" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999], quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Collateral estoppel "applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action" (*id.*; *BDO Seidman LLP v Strategic*

Resources Corp., 70 AD3d 556, 560 [1st Dept 2010]; *Lumbermens Mut. Cas. Co. v 606 Rest., Inc.*, 31 AD3d 334, 334 [1st Dept 2006]). Collateral estoppel "is based upon the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]).

However, the doctrines of res judicata and collateral estoppel are applicable "when [the] claim between the parties has been previously 'brought to a final conclusion'" (*City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 127 [2007] [italics in original], quoting *Parker*, 93 NY2d at 347; *Jericho Group Ltd. v Midtown Dev., L.P.*, 67 AD3d 431, 432 [1st Dept 2009], *lv denied* 14 NY3d 712 [2010]). Where the prior action or proceeding "is still pending . . . [finality is lacking, and] thus, the doctrine of res judicata does not apply" (*Weichert v Wilson*, 198 AD2d 858, 858 [4th Dept 1993]).

Amending Pleadings

Generally, leave to amend pleadings is freely granted, in the absence of prejudice (*Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]; *Robinson v Day*, 103 AD3d 584, 584 [1st Dept 2013]). However, "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading", so that the court can determine whether there is

colorable merit to it (CPLR 3025[b]; see also *Kilkenny v Law Off. of Cushner & Garvey, LLP*, 76 AD3d 512, 513 [2d Dept 2010]; *Chang v First Am. Tit. Ins. Co. of N.Y.*, 20 AD3d 502, 502 [2d Dept 2005]).

Discussion

The First Civil Court Decision explicitly denied RIS's claim that APF "fraudulently induced" it into entering into the Lease (First Civil Court Decision at 1). The Civil Court Judgment was necessarily based upon the finding of liability against RIS and that Strougo, as RIS's principal, is in privity with RIS. RIS's and Strougo's claim that they did not have a full and fair opportunity to contest the merits in the Non-Payment Proceeding is, in essence, a claim that the First and Second Civil Court Decisions were wrong (Strougo Aff. ¶¶ 55-56). The merits of the prior judgment or proceeding may not be collaterally attacked based upon a claim of error (*Hunter*, 4 NY3d at 269; *Parker*, 93 NY2d at 347).

However, *res judicata* and collateral estoppel are applicable "when [the] claim between the parties has been previously 'brought to a *final conclusion*'" (*City of New York*, 9 NY3d at 127 [emphasis added] quoting *Parker*, 93 NY2d at 347; *Jericho Group*, 67 AD3d at 432). In this matter, the appeal of the Civil Court Judgment "is still pending," and although "the pendency of an appeal does not deprive a challenged judgment of preclusive

effect," (73A NY Jur Judgments §396 [2d ed 2013]; see also *Franklin Dev. Co. v Atlantic Mut. Ins. Co.*, 60 AD 3d 897, 899 [2nd Dept 2009]), RIS obtained a stay of execution of the portion of the judgment granting monetary relief pending disposition of the appeal. Thus, there is not finality in the prior action and the doctrines of *res judicata* and collateral estoppel do not yet apply. (Cf. *Da Silva v Musso*, 76 NY2d 436, 440 [1990]). Accordingly, so much of APF's motion as seeks summary judgment based upon *res judicata* and collateral estoppel is denied, without prejudice to renewal after final resolution of the appeal of the Civil Court Judgment.

Amended Pleadings

While leave to amend is freely granted, APF has failed to proffer a copy of the proposed amended third-party complaint and the court is unable to determine the third-party complaint's merits (*Kilkenny*, 76 AD3d at 513). The portion of APF's motion that seeks leave to amend the third-party complaint is denied without prejudice to renewal upon proper papers which shall include a copy of this order with notice of entry and a copy of "the proposed amended . . . pleading clearly showing the changes or additions" and reflecting the payments made by RIS in partial satisfaction of the Civil Court Judgment (CPLR 3025[b]).

It is, therefore,

ORDERED that the portion of defendants' motion that seeks to

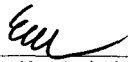
amend the third-party complaint is denied with leave to renew upon proper papers which shall include a copy of this order with notice of entry and a copy of the proposed amended third-party complaint; and it is further

ORDERED that so much of defendants' motion as seeks (1) summary judgment dismissing plaintiff's complaint, (2) to strike the affirmative defenses and counterclaims of third-party defendant Robert I. Strougo, (3) summary judgment on the third-party complaint as against Robert I. Strougo is denied without prejudice to renewal after the appeal from the judgment in the action in the Civil Court of the City of New York, New York County, L & T index number 73123/2013, entitled *APF 286 Mad LLC, GAN 286 Madison, LLC and 286 Madison Associates LLC v RIS Real Properties, Inc. and Robert I. Strougo, Esq., Watters & Svetkey, LLP, David M. Blum, Esq., Robert A. Burstein, Esq., Keith E. Wilson, Esq., Manolo Costa New York, NYC Realty and XYZ, Inc.*, has been resolved in its entirety.

This constitutes the Decision and Order of the Court.

ENTER:

Dated: December 23, 2013



Ellen M. Coin, A.J.S.C.