SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. Justice

PART 35

Grey Family Properties L.P.

-v-

Edgecombe Avenue et al.

INDEX NO. 650280/15

MOTION DATE

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

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

In this property damage action, defendant Tizir Corporation ("Tizir") moves to dismiss the complaint of plaintiffs Grey Family Properties, L.P. ("Grey") and MRG Property Holding LLC ("MRG") (collectively, "plaintiffs") based on *res judicata*, collateral estoppel, and documetary evidence. In response, plaintiffs cross move for sanctions for defending an alleged frivolous motion.

Factual Background

According to the submissions, MRG owns the property at 740 St. Nicholas Avenue, Grey owns the property adjacent thereto at 738 St. Nicholas Avenue, Tizir owns the property adjacent thereto at 736 St. Nicholas Avenue, and Noel Murrain ("Murrain") owns the property adjacent thereto at 734 St. Nicholas Avenue (collectively referred to as the "four properties"). Edgecombe Avenue 291 Realty LLC ("Edgecombe") owns the property on the other side of the four properties, and constructed a retaining wall at the rear of its property to support a grade differential between it and the four properties.

It is uncontested that *prior* to this action, in September 2014, Edgecombe commenced an action alleging that in March 2014, Edgecombe discovered damage to its property at 291 Edgecombe, which was the result of the collapse of the retaining walls of Murrain, Tizir, and

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

Dated: ____ ____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
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

Grey's adjoining properties (no claim was made against MRG).[1] Murrain, Tizir and Grey joined issue; Grey cross claimed against Tizir for indemnification and contribution, and Tizir cross claimed against Grey for indemnification and contribution. Certain emails discussing settlement were exchanged in March 2015, and an agreement to settle Edgecombe's action was reached. A Stipulation of Discontinuance was drafted and/or dated April 16, 2015[2]; cross-claimant Grey and MRG commenced this direct action against Tizir on April 17, 2015 for damages from the collapse.

In this action, filed during the exchange of releases in Edgecombe's action, plaintiffs allege that likewise in March 2014, *Edgecombe's* retaining wall failed, causing the natural rock slope to collapse into its back yard. It is also alleged that the failures of Tizir and Murrain (owners of two of the four adjoining properties) to remediate and maintain their respective properties caused the rock slope to collapse. The collapse of the rock slope caused the backyards of MRG and Grey's properties to subside, and the Department of Buildings issued partial vacate orders to plaintiffs, who have since been unable to enjoy their backyards.

Emails were then exchanged from April 24, 2015 through May 19, 2015, concerning executions of the Stipulation of Discontinuance, and references to this instant action were made. Nevertheless, the Stipulation was finally executed, and Tizir now argues that said Stipulation of Discontinuance bars plaintiffs from maintaining this action on *res judicata*, collateral estoppel, and documentary evidence grounds.

Discussion

Pursuant to CPLR 3211(a)(5), "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the cause of action may not be maintained" because of collateral estoppel or *res judicata*.

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. The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again" (*Mays v New York City Police Dept.*, 48 AD3d 372, 852 NYS2d 106 [1st Dept 2008] *citing Matter of Hunter*, 4 NY3d 260, 269, 794 NYS2d 286, 827 NE2d 269 [2005]).

"Collateral estoppel applies when (1) the issues in both proceedings are identical; (2) the issue in the prior proceeding was actually litigated and decided; (3) there was a full and fair opportunity to litigate in the prior proceeding; and (4) the issue previously litigated was necessary to support a valid and *final judgment on the merits* (*Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 928 NYS2d 515 [1st Dept 2011] *citing Ryan v New York Tel. Co.*, 62 NY2d 494, 500–501, 478 NYS2d 823, 467 N.E.2d 487 [1984] (emphasis added)).

In each instance, the prior issue must have been decided (*see NAMA Holdings, LLC v Greenberg Traurig, LLP*, 62 AD3d 578, 880 NYS2d 34 [1st Dept 2009] ("The doctrine of res

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[1] Edgecombe also named Dongbu Insurance Company for breach of insurance agreement in failing to pay Edgecombe's claim under an insurance policy.

[2] Tizir asserts that the Stipulation of Discontinuance was finally executed by all parties on June 23, 2015.

judicata does not apply, absent a final adjudication on the merits") *citing Clearwater Realty Co. v Hernandez*, 256 AD2d 100, 101, 681 NYS2d 270 [1998]; *see also, Hughes v Farrey*, 30 AD3d 244, 817 NYS2d 25 [1st Dept 2006] (stating that for the doctrine of collateral estoppel to apply, "the issues raised must be identical *and must have been decided in the prior action* and be decisive to the present action"); *Zimmerman v Tower Ins. Co. of New York*, 13 AD3d 137, 788 NYS2d 309 [1st Dept 2004] ("Collateral estoppel is a component of the broader concept of res judicata, wherein the parties to a litigation and those in privity with them are conclusively bound by a judgment on the merits by a court of competent jurisdiction regarding issues of fact and questions of law necessarily decided therein in any subsequent action); *see also, Neighborhood Partnership Housing Dev. Fund v Blakel Const. Corp.*, 34 AD3d 303, 824 NYS2d 89 [1st Dept 2006] (finding that the denial of a motion for summary judgment is not a collateral estoppel bar to a similar motion in a subsequent action because it is not an adjudication on the merits)).

Distinctly, a party may move for judgment dismissing one or more causes of action asserted against it pursuant to CPLR 3211 [a] [l] on the ground that "a defense is founded upon documentary evidence." Such a motion may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *Mill Financial, LLC v. Gillett*, 122 A.D.3d 98, 992 N.Y.S.2d 20 [1st Dept 2014]).

Affidavits, deposition transcripts, and emails do not qualify as "documentary evidence" for purposes of this rule (*see Regini v Board of Managers of Loft Space Condominium*, 107 AD3d 496, 968 NYS2d 18 [1st Dept 2013]; *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651, 924 NYS2d 336 [1st Dept 2011]; *Marin v AI Holdings (USA) Corp.*, 35 Misc 3d 1227(A), 953 NYS2d 550 (Table) [Supreme Court, New York County 2012]; *Kearins v Gruberg, McKay & Stone*, 2 Misc 3d 1001, 2004 WL 316521 [Supreme Court, Bronx County 2004] (affidavits and depositions cannot be the basis for this motion); *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 780 NYS2d 593 [1st Dept 2004] (deposition and trial testimony and a three-page e-mail narrative "are of a type that 'do not meet the CPLR 3211(a)(1) requirement of conclusively establishing [the] defense as a matter of law'"); *Realty Investors v Bhaidaswala*, 254 AD2d 603, 679 NYS2d 179 [3d Dept 1988] (rejecting use of reply affidavit to support a motion to dismiss based on documentary evidence); *Williamson, Picket, Gross v Hirschfeld*, 92 AD2d 289, 290 [1st Dept 1983] (stating that affidavits do not qualify as "documentary evidence" for purposes of this rule]).

The record establishes that MRG was not a party to the Edgecombe action or a party to the Stipulation of Discontinuance. And, the record fails to demonstrate that MRG was in sufficient privity with Grey. Therefore, MRG could not have asserted any claim for damage to its property and is not bound by the Stipulation of Discontinuance. As such, *res judicata* and collateral estoppel principles do not apply to MRG in this action; in the same vein, the Stipulation of Discontinuance does not constitute documentary evidence that refutes MRG's damage claims to its property. Thus, dismissal of MRG's claims is denied on all grounds.

As to Grey, it is undisputed that Edgecombe's complaint arose out of a March 2014 incident arising out of the collapse of a retaining wall and sought damages to the Edgecombe premises only. It is undisputed that Grey asserted cross-claims for indemnification and contribution against Tizir (in the event Grey was found liable to Edgecombe for damages to *the*

Edgecombe property), based on Tizir's alleged failure to maintain Tizir's property. However, Grey *did not* assert any claims against Tizir for damages to *Grey's own (738)* property arising from Tizir's negligence. Nevertheless, since *res judicata* applies not only to claims actually litigated between the same parties, but also to claims that could have been raised in the prior litigation, that Grey did not, in fact, raise any claim against Tizir for damages Grey sustained to its own property is not dispositive. Thus, the issue is whether Grey's herein damage claim against Tizir for Tizir's negligent maintenance, *could have* been raised against Tizir in the previous, Edgecombe action.

"Determining whether claims are part of the same transaction involves a 'pragmatic test ... 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'" (*O'Connor v. Demarest*, 74 A.D.3d 1522, 902 N.Y.S.2d 714 [3d Dept 2010] *citing Xiao Yang Chen v. Fischer*, 6 N.Y.3d 94, 100–101, 810 N.Y.S.2d 96, 843 N.E.2d 723 [2005] [internal quotation marks and citations omitted]). Yet still, *res judicata* applies where there is a showing that claim for damages could have been been raised by "the same party [or those in privity thereof], based upon the same harm and arising out of the same or related facts" (*Parker v. Blauvelt Volunteer Fire Co., Inc.*, 93 N.Y.2d 343, 712 N.E.2d 647, 690 N.Y.S.2d 478 [1999]).

The "transactions" underlying the Edgecombe action and this action involve the alleged negligence of Tizir in maintaining its property as related to the collapse of the retaining wall on Edgecombe's property. Here, it is alleged that a portion of the rock slope behind Tizir's 736 property dislodged and fell into Edgecombe's property, "said collapse of the rock slope was due to the ongoing failure and/or refusal of Tizir . . . to properly repair, inspect, remediate, service and otherwise maintain [its] respective propert[y] at 736 . . . .," and the collapse of the rock slope caused Grey's backyard to subside (Grey Complaint ¶¶21-22). In response to Edgecombe's previous complaint alleging that the Edgecombe property suffered damages as a result of Tizir's and Grey's failure to properly maintain their respective properties (Edgecombe Complaint, ¶12, 16,), Grey asserted a cross-claim against Tizir, albeit for contribution and indemnification, alleging that any damages to Edgecombe's property was due to "the wrongful conduct" of Tizir (Answer ¶¶19-20).

Fifty CPW Tenants Corp. v Epstein (16 AD3d 292, 792 NYS2d 58 [1st Dept 2005]) is instructive. In *Fifty CPW Tenants Corp.*, a cooperative tenant sued its cooperative for damages caused by a leaking roof in a prior action, in which the cooperative commenced a third-party action for indemnification and contribution against the roofing contractor. During settlement discussions in the prior action, the cooperative commenced a direct action against the roofing contractor for recovery on the masonry and roofing guarantees of the same work at issue in the third-party action. The cooperative and roofing contractor then settled the third-party action by stipulation of discontinuance "with prejudice." The Appellate Division, First Department, held that the stipulation of discontinuance of the third-party indemnification and contribution claims against the roofing contractor had *res judicata* effect upon the cooperative's direct action against the roofing contractor as the "guarantee claims asserted herein could have been litigated in" the third-party action against the roofing contractor, "notwithstanding that the amount sought under

the guarantees is not limited to the amount of [the cooperative's] liability" to the tenant. (*id.*) The stipulation of discontinuance "did not contain any reservation of the right *to pursue related claims or limitation of the claims disposed of those actually asserted in that proceeding. . . .*" (*Id.* at 294) (Emphasis added). And, the First Department noted that during the negotiations, the cooperative sought to insert in the stipulation of discontinuance a reservation of its right to pursue claims against the roofing contractor "pending in other actions," and that the roofing contractor refused to agree (*id.*). Thus, the First Department held, the cooperative "cannot now escape the effect of its agreement to a stipulation that ended its third-party action against [the roofing contractor] 'with prejudice' and without qualification or limitation." (*id.*)

This reasoning applies here, since at the time of Grey's settlement with Tizir of its cross-claims for indemnification and contribution, a request was made to include a reservation of rights to preserve the claims asserted in this instant action, and the request was expressly rejected.

And, although Tizir did not seek any remedy for damages suffered upon its own property, and the damages at issue in the previous Edgecombe action were for those suffered upon the Edgecombe property, Grey cites no countervailing caselaw permitting the Court to deny *res judicata* or collateral effect of a Stipulation of Discontinuance on such a ground.

Plaintiffs' conclusory claim that their defense counsel "could not and did not assert either a counterclaim against Edgecombe or a cross claim against Tizir or Murrain for damages Grey sustained to the Grey Family Property due to the collapse of the retaining wall" (Patricia C. Wik affidavit ¶8) is insufficient. Because a counterclaim is "any cause of action in favor of one or more defendants . . . against one or more plaintiffs, a person whom a plaintiff represents or *a plaintiff and other persons alleged to be liable*" (emphasis added)). Therefore, Grey could have asserted a counterclaim against Edgecombe *and* other persons alleged to be liable, including Tizir herein, and the counterclaim "need not arise out of the transaction or occurrence out of which the plaintiff's claim arises, *nor otherwise be related to the plaintiff's claim*. It can be *any cause of action the defendant has* against the plaintiff, legal or equitable" (Practice Commentaries by Patrick M. Connors, McKinney's Consolidated Laws of New York Annotated). As further explained in the Practice Commentaries, "[w]hile a defendant who elects not to counterclaim is free to bring a separate action for any relief related to the claim in the first action, the doctrine of collateral estoppel may ultimately result in dismissal of the second action based on findings in the first." (*Id.*). Likewise, under "CPLR 3019(b), a cross-claim may be asserted between defendants for any cause of action at all, whether or not related to the plaintiff's main claim." (Id.). And, in the absence of any indication that the Stipulation of Discontinuance is not binding, whether defense counsel for Grey only had authority to settle Grey's cross-claims for indemnification and contribution related to Edgecombe's property does not defeat the effect of the Stipulation of Discontinuance at this juncture.

Finally, it is noted that the fact that the present action was pending at the time the Stipulation of Discontinuance was entered into is inconsequential (*Forte v. Kaneka America Corp.*, 110 A.D.2d 81, 493 N.Y.S.2d 180 [2d Dept 1985] (stating that although "the present action cannot be classified as 'future litigation on the same cause' because it was pending when the stipulations were entered into, for purposes of res judicata the effective date of a final judgment is the date of its rendition, without regard to the date of commencement of the action in

which it is rendered or the action in which it is to be given effect")).

As to plaintiffs' cross motion for sanctions, sanctions is denied. 22 NYCRR § 130-1.1 gives the Court, in its discretion, authority to award costs "in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees" and/or the "imposition of financial sanctions upon a party or attorney who engages in frivolous conduct." 22 NYCRR § 130-1.1 (c) states that conduct is frivolous if:

"(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

(3) it asserts material factual statements that are false."

TIzir's conduct in bringing the instant motion is not so egregious as to warrant sanctions and it cannot be said that Tizir's motion was frivolous.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Tizir Corporation to dismiss the complaint of plaintiffs Grey Family Properties, L.P. and MRG Property Holding LLC based on *res judicata*, collateral estoppel, and documetary evidence is denied as to MRG Property Holding LLC and granted solely as to Grey Family Properties, L.P. and the claims by Grey Family Properties, L.P. against Tizir Corporation are hereby severed and dismissed; and it is further

ORDERED that plaintiffs' cross-motion for sanctions against Tizir is denied; and it is further

ORDERED that MRG shall serve and file its Answer within 30 days from the date of this order; and it is further

ORDERED that the parties shall appear for a preliminary conference on February 2, 2016, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated 12/2/15 ENTER: _____, J.S.C.
HON. CAROL R. EDMEAD
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE