SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED, J.S.C. **PART** 2
Justice

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JOYCE DE LA ROSA,

Plaintiff,

- v -

252 SEVENTH SPE OWNER LLC, WHOLE FOODS MARKET GROUP, INC.

Defendant.

INDEX NO. 157926/2016

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number

were read on this application to/for Dismissal

Upon the foregoing documents, it is

ordered that the motion is granted.

Plaintiff Joyce De La Rosa alleges disability discrimination based on accessibility barriers at a Whole Foods Market owned by defendants 252 Seventh SPE Owner LLC ("252 Seventh") and Whole Foods Market Group, Inc. ("Whole Foods"). Defendants move for an order, pursuant to CPLR 3211 (a) (1) and (5), dismissing the complaint based on the dismissal, with prejudice, of plaintiff's identical claims in a prior federal court action. Defendants also move, pursuant to 22 NYCRR 130-1.1, for sanctions against plaintiff based on the allegedly frivolous nature of this action.

BACKGROUND

Plaintiff is disabled and uses a wheelchair (Exhibit D to motion, complaint, at ¶ 6). Defendant 252 Seventh owns property located at 252 Seventh Avenue ("the property"), and defendant Whole Foods leases the property and operates it as a grocery store (*id.*, at ¶¶ 7-9).

Plaintiff alleges that there are numerous architectural barriers at defendants' grocery store that restrict plaintiff's access (*id.*, at ¶13). She asserts that defendants made substantial alterations to the Property in 2001, but failed to comply with various state and local laws with regard to access for disabled persons. She asserts that the property has inaccessible bathrooms, check-out aisles, and service counters; insufficient maneuvering clearances and excessively sloped paths; and lacks handrails (*id.*, at ¶¶ 14-20).

On May 22, 2015, plaintiff commenced an action in federal court ("the federal action") against the same defendants, asserting the same barriers to access to the property (Exhibit A to motion, federal complaint, at ¶¶ 13-24). She brought claims alleging violations of the New York State Executive Law § 296, the Administrative Code of the City of New York ("the Administrative Code"), New York Civil Rights Law §§ 40-c and 40-d, and common law negligence. She also brought a claim for violation of Title III of the Americans with Disabilities Act ("ADA") (42 USC §§ 12181 et seq) (Exhibit A to motion, federal complaint, at ¶¶ 51-85). Based on these claims, plaintiff sought damages, as well as injunctive and declaratory relief, and attorneys' fees, pursuant to both the ADA (42 USC § 12205) and Administrative Code § 8-502 (Exhibit A to motion, federal complaint, at ¶ 90).

Plaintiff and defendants conducted discovery in the federal action, including an expert inspection of the property. On June 3, 2016, defendants moved for summary judgment dismissing the complaint on the ground that the barriers alleged in the complaint were either remedied or were

not violations of the ADA, the New York City Building Code, or the state and local law claims alleged in the complaint.

On August 9, 2016, the plaintiff, who did not oppose the summary judgment motion, stipulated to dismiss the complaint with prejudice under Federal Rules of Civil Procedure Rule 41 (a) (2) (Exhibit C to motion). The stipulation of discontinuance with prejudice was so-ordered by the federal court (Exhibit B to motion).

Six weeks after the discontinuance of the federal action, plaintiff commenced the captioned action seeking recovery for the same disability discrimination under Executive Law § 296, New York State Civil Rights Law § 40, Administrative Code § 8-107, and common law negligence (Exhibit D to motion). The complaint in this matter is virtually identical to that in the federal action, except that it omits the allegations regarding violations of the ADA (*compare* federal complaint, at ¶¶ 1-2, 5-13, 18, 21-23, 25-27, 29-36, 51-90 *with* the complaint at ¶¶ 1-2, 5-13, 15, 17-19, 21, 23-79).

Defendants move to dismiss the complaint in the captioned action with prejudice based on the doctrines of res judicata and collateral estoppel. They also seek sanctions in the form of their attorneys' fees, pursuant to 22 NYCRR 130-1.1, on the ground that this action is frivolous.

DISCUSSION

The motion to dismiss is granted and the complaint is dismissed. The request for sanctions is denied.

The doctrine of res judicata, or claim preclusion, is designed to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication" (*Allen v McCurry*, 449 US 90, 94 [1980]; *Insurance*

Co. of State of Pa. v HSBC Bank USA, 10 NY3d 32, 38 [2008]). Under the doctrine, a final judgment on the merits precludes a party or its privy from relitigating issues that were or could have been raised in that action (*Allen v McCurry*, 449 US at 94). Under New York's transactional approach, where 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]). The doctrine bars not only claims that were raised, but also those that could have been raised, if they arose from the same transaction or series of transactions (*Marinelli Assoc. v Helmsley-Noyes Co., Inc.*, 265 AD2d 1, 5.[1st Dept 2000]; *Lane v Birnbaum*, 258 AD2d 389, 389 [1st Dept 1999]). A dismissal with prejudice by a federal court in a prior action between the same parties is entitled to res judicata effect, and cannot be collaterally attacked in state court (*Dipoumbi v New York City Police Dept.*, 150 AD3d 467, 468 [1st Dept 2017]; *Lane v Birnbaum*, 258 AD2d at 389; *LaVigna v Capital Cities/ABC*, 245 AD2d 75, 76 [1st Dept 1997]).

Here, plaintiff's claims are barred by the doctrine of res judicata because she agreed to a dismissal with prejudice of the prior action alleging the identical claims (*see Gropper v 200 Fifth Owner LLC*, __ AD3d __, 2017 NY Slip Op 05183, 2017 WL 2744273 [1st Dept 2017]). Initially, plaintiff sought a voluntary partial dismissal of her federal action after discovery and, after defendants submitted a summary judgment motion, which she failed to oppose (*see* Exhibit C to motion, federal court transcript, at 3), plaintiff then consented to a full dismissal with prejudice, which was so-ordered by the court (*id.* at 3-4). "A voluntary dismissal with prejudice is an adjudication on the merits for res judicata purposes" (*Gropper v 200 Fifth Owner LLC*, __ AD3d __, 2017 NY Slip Op 05183, * 1). Plaintiff discontinued the federal court action despite clearly

having a full and fair opportunity to litigate her claims (*see EPD Med. Computer Sys., Inc. v United States*, 480 F3d 621, 626 [2d Cir 2007]).

Plaintiff maintains that the captioned action is not subject to dismissal because she is alleging "new" claims in this action that consist of continuing violations of the state disability discrimination provisions that she alleged in the federal action (*see e.g.* Executive Law § 296 [2]; Administrative Code § 8-107 [4]). The complaint in this action alleges that the "barriers to access within defendants' place of public accommodation continue to exist and deter plaintiff," such as that there are inaccessible maneuvering clearances, excessively sloped travel paths, and inaccessible service counters (Exhibit D to motion, complaint, at ¶¶ 20, 27-28). However, these allegations do not constitute a new claim (*see Gropper v 200 Fifth Owner LLC*, __ AD3d __, 2017 NY Slip Op 05183, * 1). Rather, they are simply "additional instances of what was previously asserted," which she had a full and fair opportunity to litigate (*id.*).

The vague allegations about new continuing violations set forth by plaintiff's counsel (affirmation in opposition at 10) are unavailing, as they are not set forth in the complaint or in evidentiary form. Moreover, plaintiff was aware of such issues during the federal action upon the inspection of the property, and could have raised them in that proceeding (*Gropper v 200 Fifth Owner LLC*, __ AD3d __, 2017 NY Slip Op 05183, * 1). In fact, plaintiff's counsel specifically stated on the record in federal court that additional violations had been uncovered during the inspection, but indicated that his client would be better off withdrawing the federal action and deciding whether she wanted to continue the action in another forum (Exhibit C, federal court tr., at 3). Thus, plaintiff was aware of the additional violations at the time she agreed to dismiss her claims with prejudice in federal court, did not reserve her right to pursue additional violations or limit the claims disposed of to those actually asserted in the federal action and, thus, her claims in

this action are precluded (*see Fifty CPW Tenants Corp. v Epstein*, 16 AD3d 292, 293 [1st Dept 2005]).

With respect to plaintiff's request for attorneys' fees as a "prevailing party" pursuant to Administrative Code § 8-502 (g), plaintiff also sought this relief in her federal court complaint (Exhibit A to motion, federal complaint, at ¶ 90). She was given the opportunity in the federal action to pursue all her claims, and did so for over a year, conducting discovery, and getting to the summary judgment motion stage. However, she chose to discontinue all of her claims, including the request in her federal complaint for "attorneys' fees, expenses and costs pursuant to the ADA and the Administrative Code" (*id.*). Since she cannot now pursue a separate cause of action solely for such fees (*Gropper v 200 Fifth Owner LLC*, __ AD3d __, 2017 NY Slip Op 05183, * 1), the complaint is dismissed.

Finally, defendants' request for sanctions is denied. While plaintiff's claims are barred by the doctrine of res judicata, her pursuit of her claims can be supported by a reasonable argument for an extension or modification of existing law (*see* Exhibit A to plaintiff' affirmation in opposition).

In light of the foregoing, it is hereby:

ORDERED that the branch of defendants' motion to dismiss the complaint is granted and the complaint is dismissed in its entirety, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of the defendant's motion seeking sanctions is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

7/14/2017
DATE

HON. KATHRYN E. FREED, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	DO NOT POST			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE