Elias Props. Mgt., Inc. v Said
2018 NY Slip Op 31334(U)
May 15, 2018
Supreme Court, Kings County
Docket Number: 506803/2016
Judge: Richard Velasquez

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of May, 2018.

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

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ELIAS PROPERTIES MANAGEMENT, INC.,
As Agent for Owner,
ELIAS PROPERTIES ROCKAWAY PARKWAY, LLC,

Plaintiff,

-against-

ESSAM SAID,

Defendants.

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Index No.: 506803/2016

Decision and Order

After oral argument and a review of the submissions herein, the Court finds as follows:

Defendant by Motion in Limine moves pursuant to CPLR 3025(b) for an order granting leave to amend the defendant's answer to add the affirmative defense that the claims herein are barred based on the doctrine of collateral estoppel, and 2) pursuant to CPLR 3211 (a)(3), (a)(5), (a)(7), (a)(10) and (e), for an order granting dismissal of the plaintiff's complaint in its entirety.

Plaintiff by Motion in Limine moves for an order 1) precluding the introduction at trial of this action any evidence of a purported affirmative defense of unauthorized or fraudulent signature on the lease agreement or good guy guaranty at issue here; 2) precluding the introduction at the trial of this action any evidence by any purported handwriting expert witness.

ARGUMENTS

Defendant contends the plaintiff does not have standing to sue because they are the Agent of the Owner and the owner is the one who has standing to sue, and that this was already determined by the previous court and as such this case is barred by collateral estoppel.

Plaintiff contends defendant is barred from raising a purported issue with respect to the signature on the lease and good guy guaranty since the issue was previously resolved against the defendant after a bench trial in the civil court. Further, Defendant failed to comply with the CPLR with respect to disclosure in general and specifically with respect to its purported expert witness such that to permit such testimony now on the eve of trial would be unfairly prejudicial to the plaintiff. Any evidence of purported affirmative defense of unauthorized or fraudulent signature on the lease agreement or good guy guaranty at issue here should be prohibited on the grounds of collateral estoppel.

ANALYSIS

First the Court will address the defendants motion regarding CPLR 3211 (a)(3), (a)(5), (a)(7), (a)(10) and (e). Pursuant to CPLR 3211(a)(3) "the party asserting the cause of action has not legal capacity to sue". Pursuant to CPLR3211(a)(5) the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds" Pursuant to CPLR 3211(a)(10) the court should not proceed in the absence of a person who should be a party. Defendant contends that plaintiff is collaterally estopped from bringing this action in Supreme Court because the agent of a disclosed principal does not have standing to bring a claim citing a previous decision rendered in the Civil Court case in the related action. Contrary to

defendant's contention it is clear from the Appellate Term decision that their ruling is limited to summary proceedings brought under RPAPL 721. The present case is not a summary proceeding and it is not brought pursuant to RPAPL 721 and therefore is not applicable to the present case.

In assessing a motion under CPLR 3211(a)(7), "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 401 NYS.2d 182, 372 N.E.2d 17; *Rovello v. Orofino Realty Co., supra*, 40 NY2d at 636, 389 NYS2d 314, 357 N.E.2d 970). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (*see McGuire v. Sterling Doubleday Enters., LP*, 19 A.D.3d 660, 661, 799 N.Y.S.2d 65). In the present case Plaintiff clearly states a cause of action against the defendant for enforcement of a guaranty individually signed by the defendant.

Finally, in addressing defendant's argument regarding CPLR 3211 (e) contesting the standing of the plaintiff. Pursuant to 32111(e): "At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading..." In the present case, defendant failed to object to the plaintiff's standing in their answer or by such motion before their answer was filed with the court. "Accordingly, the Court of Appeals and the intermediate appellate courts, including our

own, have squarely held that an argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211 (e)"; *(see Matter of Fossella v Dinkins*, 66 NY2d 162, 167-168 [1985]; *Dougherty v City of Rye*, 63 NY2d 989, 991-992 [1984]; *Matter of Prudco Realty Corp. v Palermo*, 60 NY2d 656, 657 [1983]; *Security Pac. Natl. Bank v Evans, supra; Matter of Klein v Garfinkle*, 12 AD3d 604 [2004]; *243 *Continental Capital Corp. v Fiore*, 239 AD2d 381 [1997]; *Gilman v Abagnale*, 235 AD2d 989 [1997]; *National Assn. of Ind. Insurers v State of New York*, 207 AD2d 191, 197 [1994], affd 89 NY2d 950 [1997]), quoting *Wells Fargo Bank Minnesota, Nat. Ass'n v. Mastropaolo*, 42 A.D.3d 239, 242–43, 837 N.Y.S.2d 247 (2007) Therefore, defendant's request granting dismissal of plaintiff's complaint pursuant to CPLR 3211 (a)(3), (a)(5), (a)(7), (a)(10) and (e) are hereby denied.

Next the court will address defendant's request pursuant to 3025(b). "Applications for leave to **amend pleadings** under CPLR 3025(b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit" (*Maldonado v. Newport Gardens, Inc.*, 91 AD3d 731, 731–732, 937 NYS2d 260; *see Longo v. Long Is. R.R.*, 116 AD3d 676, 983 NYS2d 579; *United Fairness, Inc. v. Town of Woodbury,* 113 AD3d 754, 755, 979 NYS2d 365; *Faiella v. Tysens Park Apts., LLC,* 110 AD3d 1028, 1029, 975 NYS2d 71). In the present case as discussed above and more extensively below, not only will the proposed amendment unfairly prejudice the plaintiff, that particular issue is precluded.

Collateral Estoppel / Res Judicata

The doctrine of collateral estoppel precludes a party from re-litigating "an issue which has previously been decided against him in a proceeding in which he had a fair

opportunity to fully litigate the point" (*Gilberg v. Barbieri,* 53 NY2d 285, 291, 441 NYS2d 49, 423 NE2d 807; *see, Schwartz v. Public Administrator,* 24 NY2d 65, 69, 298 NYS2d 955, 246 NE2d 725). It is a doctrine intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to re-litigate an issue that has already been decided against it.

There are two requirements which must be satisfied before the doctrine is invoked. First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from re-litigating the issue must have had a full and fair opportunity to contest the prior determination (*Gilberg v. Barbieri,* , 53 NY2d at p. 291, 441 NYS2d 49, 423 NE2d 807; *Schwartz v. Public Administrator,* , 24 NY2d at p. 71, 298 NYS2d 955, 246 NE2d 725; *see, Koch v. Consolidated Edison* *456 *Co.,* 62 NY2d 548, 554–555, 479 NYS2d 163, 468 NE2d 1, *cert. denied* 469 U.S. 1210, 105 SCt. 1177, 84 LEd2d 326; *Ryan v. New York Tel. Co.,* 62 NY2d 494, 500–501, 478 NYS2d 823, 467 NE2d 487).

The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action (*see, Ryan v. New York Tel. Co.,* , at p. 501, 478 NYS2d 823, 467 NE2d 487; *Schwartz v. Public Administrator,* , 24 NY2d at p. 73, 298 NYS2d 955, 246 NE2d 725). *Kaufman v. Eli Lilly and Co.*, 482 NE2d 63, 67 (NY 1985).

Issue preclusion in the sense of collateral estoppel operates to preclude relitigation of discrete issues of law and fact determined, or necessarily determined, in a prior action

or proceeding, and may arise "where the parties are the same and one is barred from relitigating an issue which was adjudicated in the prior action or where the parties are not the same but nonetheless one of the parties to the subsequent action is foreclosed from relitigating an issue which was determined in the first action" (*Matter of American Ins. Co.* [*Messinger-Aetna Cas. & Sur. Co.*], 43 NY2d p. 189, n. 2, 401 NYS2d 36, 371 NE2d 798; see, also, *Brown v. Lockwood,* 76 AD2d 721, 735, 432 NYS.2d 186, ; and discussions in Survey of New York Prac., 53 St. John's L.Rev. 169, and Rosenberg, Collateral Estoppel in New York, 44 St. John's L.Rev. 165, 166–167; Restatement, Judgments 2d, 27, 29).

More specifically, for the doctrine of issue preclusion to apply, it is required: "that the issue as to which preclusion is sought be identical with the issue decided in the prior proceeding, that the *issue have been necessarily decided* in the prior proceeding, and that the litigant who will be held precluded in the present proceeding have had a full and fair opportunity to litigate the issue in the prior proceeding (*Gilberg v Barbieri,* 53 NY2d 285, 291 [441 NYS2d 49, 423 NE2d 807]; *Schwartz v Public Administrator of County of Bronx,* 24 NY2d 65, 71 [298 NYS2d 955, 246 NE2d 725]; see *B.R. De Witt, Inc. v Hall,* 19 NY2d 141 [278 NYS2d 596, 225 NE2d 195]). The burden of establishing the first two elements rests upon the proponent of preclusion, but as to the lack of a full and fair opportunity to contest, the burden is on the opponent (*Schwartz v Public Administrator of County of Bronx,* 24 NY2d 65, 73 [298 NYS2d 955, 246 NE2d 725], *B.R. De Witt, Inc v Hall,* 19 NY2d 141, 148 [278 NYS2d 596, 225 NE2d 195],)" (*Capital Tel. Co. v Pattersonville Tel. Co.,* 56 NY2d 11, 17–18, 451 NYS.2d 11, 436 NE2d 461, emphasis supplied).

Plaintiff's successful invocation of the doctrine of issue preclusion is dependent upon a finding that (1) there exists at bar an identity of issue, (2) which was necessarily determined in the prior action, and which is dispositive of the present case, and (3) the party against whom the estoppel is asserted has had a full and fair opportunity to litigate the issue sought to be precluded in this subsequent action (*Capital Tel. Co. v. Pattersonville Tel. Co.*, , pp. 17–18, 451 NYS2d 11, 436 NE2d 461; *Schwartz v. Public Administrator of County of Bronx,* 24 NY2d 65, 71, 298 NYS.2d 955, 246 NE2d 725).

In addressing the application of issue preclusion to this case, this court is mindful that it constitutes a corollary to the broader doctrine of claim preclusion (*res judicata*), and is a "rule of reason and practical necessity" (*Good Health Dairy Prods. Corp. v. Emery,* 275 NY 14, 18, 9 NE2d 758; *Gramatan Home Investors Corp. v. Lopez,* 46 NY2d 481, 485, 414 NYS.2d 308, 386 NE2d 1328,). Issue preclusion is founded upon policy considerations and judicial recognition of aims which seek, *inter alia,* "to conserve the resources of the courts and litigants" (*Mayers v. D'Agostino,* 58 NY2d 696, 698, 458 NYS2d 904, 444 N.E.2d 1323) and promote the finality of judgments (*Read v. Sacco,* 49 AD2d 471, 473, 375 NYS2d 371). However, this court must additionally recognize that "[o]n a case-by-case basis", issue preclusion "is elusive and difficult to apply" (*Commissioners of State Ins. Fund v. Low,* 3 NY2d 590, 595, 170 NYS2d 795, 148 N.E.2d 136; *Matter of Newsday, Inc. v. Ross,* 80 AD2d 1, 5, 437 NYS2d 376,), and must be approached without rigidity (see *Schwartz v. Public Administrator of County of Bronx,* , 24 NY2d p. 73, 298 NYS2d 955, 246 NE2d 725; *Read v. Sacco,* , 49 AD2d pp. 473–474, 375 NYS2d 371). In every case, the question of fairness in its application must be the "crowning consideration" (*Read v. Sacco,* at 474, 375 NYS2d 371). *Kret by Kret v.*

Brookdale Hosp. Med. Ctr., 462 NYS2d 896, 899–901 (NY App Div. 2d Dept. 1983), *aff'd sub nom. Kret v. Brookdale Hosp. Med. Ctr.*, 462 NE2d 147 (NY 1984).

In the present case, the plaintiffs demonstrate the first requirement that the identical issues necessarily must have been decided in the prior action and be decisive of the present action, because they attach the prior Decision and Order after Trial entered by the Honorable Mary V. Rosado. Here, the plaintiff, is seeking monies based on Judgment entered against the Corporation of which the defendant is the principal. Such judgment was entered after a bench trial. Similarly, in the Landlord Tenant action, the defendant in the present case, testified that the signature on the lease and guaranty was not his signature. After having heard such testimony the Honorable Mary V. Rosado found as follows "Respondent challenged the legitimacy of the signatures on the lease through testimony from ESSAM SAID, who stated that no one on behalf of respondent executed the subject lease and rider"; the decision goes on to a footnote wherein it states: "Respondents argument on this point is contradictory to the parties' previously agreed so-ordered stipulation that the Petitioner's Prima Facie case is conceded and respondents first, second, and third affirmative defenses are struck." The plaintiffs have demonstrated that the party to be precluded from re-litigating the issue must have had a full and fair opportunity to contest the prior determination by submitting the order following a trial in the Landlord Tenant court. Additionally, the defendant herein had an opportunity to appeal said decision and elected not to do so.

In the present case, with regard to the defendant raising the issue of fraudulent signatures on the lease and guaranty those issues raised are identical to the issues that have been litigated fully before the Honorable Mary V. Rosado in the Civil Court for the

City of New York. Specifically, in the Landlord Tenant action ESSAM SAID attempted to argue that the signatures were fraudulent, which are the exact issues raised in the present action. The defendant has had the opportunity to litigate this issue fully before the Honorable Mary V. Rosado in Civil Court for the City of New York. Therefore, the Defendant has failed to meet his burden of establishing he did not have a full and fair opportunity to litigate the issue. The defendants cannot rely on the doctrines of collateral estoppel, issue preclusion in an attempt to dismiss the plaintiff's causes of action and not be barred on the same basis regarding their claims.

Accordingly, Defendants request to Amend the Answer and to dismiss all causes of action in the Complaint is hereby Denied. Plaintiff's request precluding the introduction at trial of this action any evidence of a purported affirmative defense of unauthorized or fraudulent signature on the lease agreement or good guy guaranty; and 2) precluding the introduction at the trial of this action any evidence by any purported handwriting expert witness are hereby granted.

This constitutes the Decision/Order of the Court.

Date: May 15, 2018

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RICHARD VELASQUEZ, J.S.C.

KINGS COUNTY CLERK
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So Ordered
Hon. Richard Velasquez