Thomas v Grunberg 77 LLC
2018 NY Slip Op 32577(U)
October 9, 2018
Supreme Court, New York County
Docket Number: 159556/17
Judge: Doris Ling-Cohan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 36

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TERRELL THOMAS,

Plaintiff,

INDEX NO.: 159556/17

SEQ. NO.: 001,002

-against-

GRUNBERG 77 LLC, B.R. GUEST HOLDINGS, LLC and 359 COLUMBUS AVENUE, LLC,

Defendants.

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LING-COHAN, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 28, 30, 33
were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 32
were read on this motion to/for DISMISS.

Defendant Grunberg 77 LLC (Grunberg) moves (motion seq. 001) pursuant to CPLR 3211 (a) (1) and (7), to dismiss the verified complaint. Defendants B.R. Guest Holdings, LLC (B.R. Guest) and 359 Columbus Avenue, LLC (359 Columbus) move (motion seq. 002) for relief, pursuant to CPLR 3211 (a) (1), (5), and (7). Plaintiff Terrell Thomas opposes both motions and defendants reply. The motions are consolidated for decision.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, a wheelchair user who suffers from medical conditions that inhibit walking and restrict body range of motion and movement, filed the instant lawsuit asserting causes of action for disability discrimination and common law negligence. Plaintiff's claims stem from

allegations that defendants owned, leased, operated and controlled a restaurant, known as Isabellas (Restaurant), which was inaccessible to him as a wheelchair user (Complaint,¶ 1, 5, 17). Plaintiff further claims that numerous architectural barriers at the restaurant not only deprived him of the full and equal opportunity that defendants provide to non-disabled customers, but endangered his safety and deterred him from seeking access to the restaurant (Complaint, ¶¶ 20, 22-4, 26, 29).

Plaintiff alleges that (1) Grunberg is the owner of real property located at 359 Columbus Avenue in New York City; (2) 359 Columbus leased and operated the restaurant which was located at 359 Columbus Avenue from Grunberg; (3) B.R.Guest is the owner of 359 Columbus, as well as a guarantor on a lease involving the restaurant; and (4) B.R. Guest also operates the restaurant (Complaint ¶ 8-13).

On or about March 13, 2015, prior to commencing the instant lawsuit, plaintiff filed an action against Grunberg and 359 Columbus in the Unites States District Court for the Southern District of New York, entitled *Thomas v Grunberg 77 LLC, et al.*, 2017 WL 3263141, SD NY, July 28, 2017, No. 15-cv-1925[1] (Federal Action) (Grunberg's Moving Papers, Exhibit 1). In addition to plaintiff's federal law claim under Title III of the Americans with Disabilities Act 42 USC §§12181, *et. seq.*, (ADA), plaintiff asserted the same state and local claims in his Federal Action that he raised in the instant complaint (*id.*, ¶ 3). During the pendency of the federal action, 359 Columbus gave notice of its intent to vacate the premise. Subsequently, in May 2017, the restaurant permanently closed and ceased all operations. On July 28, 2017, the federal action was dismissed on the grounds that plaintiff's only federal claim, seeking injunctive relief under

[1] B.R. Guest was not named in the federal action.

the ADA, became moot with the closure of the restaurant. The federal court declined to exercise supplemental jurisdiction over plaintiff's non-federal claims and dismissed those claims without prejudice because those claims "present questions 'best left to the courts of the State of New York.'"(citations omitted) (see *Thomas v Grunberg 77 LLC, et cetera, supra*, 2017 WL 3263141).

Plaintiff commenced the instant action in October 2017, and reasserts his state and local law causes of action, alleging defendants violated sections of the (1) New York Executive Law §296 *et. seq*. (Executive Law); (2) New York State Civil Rights Law §40 (Civil Rights Law); and (3) Administrative Code of the City of New York §8-107 *et. seq*. (Administrative Code). Plaintiff now seeks, inter alia, a judgment, pursuant to Civil Rights Law §40-d, compensatory damages, costs, expenses and attorneys' fees (Complaint, at ¶50, 57, 60, 69). The Court notes that plaintiff withdrew his fourth cause of action for common law negligence against all defendants. Accordingly, the following discussion and analysis will be applied to plaintiff's remaining three causes of action.

DISCUSSION

Grunberg moves for an order, dismissing the complaint, pursuant to CPLR 3211 (a) (1), (7), based on documentary evidence and failure to state a cause of action. B.R. Guest and 359 Columbus move separately seeking dismissal, pursuant to CPLR 3211 (a) (1), (5), & (7), based on documentary evidence; res judicata; and failure to state a cause of action.

Grunberg claims that plaintiff cannot maintain his causes of action, because he can not establish that the restaurant is a public place of accommodation as defined in Executive Law § 292(2), since it is undisputed that the restaurant closed five months prior to the commencement

of the instant lawsuit, and is no longer in operation (Grunberg Moving Papers, ¶ 6, 7). Grunberg further argues that plaintiff failed to establish any actual injury which resulted from the Grunberg's alleged violations of the law (*id.*,¶ 8).

Also, Grunberg asserts that dismissal is warranted, pursuant to CPLR 3211 (a) (1), because documentary evidence establishes a defense to plaintiff's claims. In support of its motion, Grunberg specifically relies on the pleadings of the federal action and the alleged judicial admissions of plaintiff (*id.*, 12).

In opposition to Grunberg's motion, plaintiff argues that he has alleged facts supporting the claim by asserting that (1) he is a person with a disability; (2) the restaurant was a place of public accommodation within the meaning of Executive Law § 292 (2)(a) at the time the defendants violated the above referenced statutes; (3) architectural barriers existed which prevented him access to the restaurant; and (4) defendants endangered his safety and denied him the benefits from services or accommodations based on his disability (Plaintiff's Affirmation in Opposition to Grunberg's Motion at ¶11,12,13, 14; Complaint ¶16). Plaintiff alleges that due to his disability, he was subjected to disparate treatment by denying him equal opportunity to use the restaurant (Complaint ¶ 56). As a result, plaintiff claims he suffered and continues to suffer emotional distress, including but not limited to, humiliation, embarrassment, stress, and anxiety (Complaint ¶ 62).

B.R. Guest and 359 Columbus argue, pursuant to CPLR 3211 (a) (7), that (1) plaintiff's claim for injunctive relief is moot because the restaurant is no longer a place of public accommodation; (2) plaintiff has failed to allege any actual damages; (3) B.R. Guest did not make any changes in policy or accessibility-related modifications to the premises in response to

plaintiff's prior federal action; and (4) B.R. Guest is not a proper defendant. Next, B.R. Guest and 359 Coloumbus submit that pursuant to CPLR 3211 (a) (5), plaintiff's request in the instant action for a judgment declaring him a prevailing party in the prior federal action is barred by the doctrine of *res judicata*. Finally, B.R. Guest claims it can establish a defense, pursuant to CPLR 3211 (a) (1), in the form of documentary evidence which illustrates that it is not a proper party to this action because it is not an owner, franchisor, manager, superintendent, agent or employee of a place of public accommodation, as required in the statutes relied upon by plaintiff (B.R. Guest and 359 Columbus' Memo of Law, at 1). They rely on various documents, including the pleadings and decision of the prior federal action, judicial admissions of plaintiff, a lease, a lease renewal agreement, various declarations, and a notice of intent to vacate.

In opposition to B.R. Guest and 359 Columbus' motion, plaintiff reiterates his claim that: (1) he is a member of a class protected from discrimination by a public accommodation because he uses a wheelchair for mobility; (2) defendants owned, operated and controlled the restaurant which qualifies as a place of public accommodation; (3) the complaint sufficiently notifies defendants that they committed acts of discrimination. Moreover, plaintiff argues that the federal court did not adjudicate any claims, brought in the prior action, on the merits.

LEGAL STANDARD

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal is warranted pursuant to CPLR 3211 (a) (1) "only if the documentary

evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (id.; at 88 see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). "Put differently, the documentary evidence must 'resolv[e] all factual issues as a matter of law and conclusively dispos[e] of the plaintiff's claim'" (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806 [2d Dept 2011]; *see also Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002]).

Pursuant to CPLR 3211 (a) (5), the Court may dismiss a cause of action as barred by collateral estoppel or res judicata. Collateral 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]). The doctrine of collateral estoppel applies when issues in the subsequent action are identical to issues which were "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" (*Blauvelt*, 93 NY2d at 349).

"In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one'" (*Leon v Martinez*, 84 NY2d at 88, quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] [other citations omitted]). "[U]nless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it , . . . dismissal should not eventuate" (*Guggenheimer v Ginzburg*, 43 NY2d at 275).

Finally, "[i]t is true that 'in considering a motion to dismiss brought pursuant to CPLR 3211 (a) (7), the court must presume the facts pleaded to be true and must accord them every favorable inference' . . . . However, 'factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . , are not entitled to such consideration'" (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]).

ANALYSIS

MOTION SEQ. 001

Grunberg argues that plaintiff's first, second, and third causes of action, should be dismissed, pursuant to CPLR 3211 (a) (7), for failing to state a cause of action, i.e. that the restaurant is a place of public accommodation and that plaintiff suffered an actual injury which resulted from a statutory violation.

Plaintiff's first cause of action alleges Grunberg discriminated against him in violation of Executive Law §296 (2), by maintaining and/or creating an inaccessible place of public accommodation (complaint ¶ ¶ 29, 43-46). Specifically, plaintiff claims defendants failed to (1) make all readily achievable accommodations and modifications to remove barriers to access, in violation of Executive Law § 296(2) (c) (iii); and in the alternative, (2) provide plaintiff with reasonable alternatives to barrier removal as required, pursuant to Executive Law §296 (2)(c)(iv) (id. ¶ 30, 31, 48, 49).

New York State Executive Law §296 (2) (a), provides, in part, that:

> It shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation...

> [because of disability]... directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof.

Plaintiff's second cause of action is a claim for disability discrimination, pursuant to NYC Administrative Code §8-107(4).

NYC Administrative Code §8-107(4) governing public accommodations, provides, in pertinent part:

> a. It shall be unlawful discriminatory practice for any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation: 1. Because of any person's...disability,...: (a) To refuse, withhold from or deny to such person the full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodations;

As to his third cause of action, plaintiff seeks a penalty be imposed against defendants, under New York State Civil Rights Law §§40-c, d.

Civil Rights Law §40-c , "Discrimination", provides in pertinent part, as follows:

> (2) "No person shall, because of race, creed, color, national origin, sex, marital status, sexual orientation or disability...be subjected to any discrimination in his or her civil rights, or to any harassment, ...in the exercise, thereof, by any other person or by any firm, corporation or institution..."

Civil Rights Law §40-d, "Penalty for violation", states in relevant part, that:

> "Any person who shall violate any of the provisions of the foregoing section..., or who shall aid or incite the violation of any of said provisions shall for each and every violation thereof be liable to a penalty of not less than one hundred dollars nor more than five hundred dollars, to be recovered by the person aggrieved thereby in any court of competent jurisdiction in the county in which the defendant shall reside.

> In addition, any person who shall violate any of the provisions of the foregoing section shall be deemed guilty of a class A misdemeanor. At or before the commencement of any action under this section, notice thereof shall be served upon the attorney general."

In support of its motion, Grunberg claims that the restaurant ceased doing business and permanently closed on May 15, 2017, approximately five months prior to plaintiff commencing this lawsuit (Phillips' Affirmation ¶7). Grunberg submits the applicable statutes in this case define a place of public accommodation in the present tense and since the restaurant is no longer a place of public accommodation, plaintiff cannot meet his burden under Executive Law § 292 (2) (a) (Phillips' affirmation ¶17).

Plaintiff concedes the restaurant is closed, but argues that it was a place of public accommodation at the time Grunberg violated the anti-discrimination laws and his right as an aggrieved person is not extinguished by a subsequent act, such as closure of a restaurant (Parker affirmation ¶ 23).

To make out a prima facie case under the statutes set forth in the complaint, a plaintiff must establish that he: (1) is a member of a protected class; and (2) was directly or indirectly refused, withheld from, or denied the accommodations, advantages, facilities or privileges of a place of public accommodation based upon his disability.

Executive Law § 292 (9) defines a public place of accommodation as including :

> "...all places included in the meaning of such terms as : ... restaurants, or eating houses, or any place where food is sold for consumption on the premises..."

The Administrative Code defines "disability" purely in terms of impairments: "any physical, medical, mental or psychological impairment, or a history or record of such

impairment" (Administrative Code § 8–102[16] [a]). These include: "an impairment of any system of the body; including, but not limited to: the neurological system; the musculoskeletal system; the special sense organs and respiratory organs, including, but not limited to, speech organs; the cardiovascular system; the reproductive system; the digestive and genito-urinary systems; the hemic and lymphatic systems; the immunological systems; the skin; and the endocrine system" (Administrative Code § 8–102[16][b] [1]).

The complaint sets forth that the plaintiff is a member of a protected class and suffers from a disability within the meaning of Executive Law §296 (21) and Administrative Law §8-102 (16) (Plaintiff's opposition ¶ 12). The complaint further alleges that Grunberg owned and operated and controlled a public accommodation within the meaning of Executive Law §292(9) (Complaint ¶¶6,15).

The term, "place of public accommodation" as defined under Executive Law §292 (9), should be construed broadly (*Matter of Cahill v. Rosa*, 89 NY2d 14, 21, [1996]). The Court is mindful that under Executive Law § 300 the provisions of Article 15 of the Executive Law shall be "construed liberally for the accomplishment of the purposes thereof" (*City of Schenectady v State Division of Human Rights*, 37 NY2d 421, 428 [1975]; *see also* Executive Law § 300; *Matter of Cahill v. Rosa,* 89 NY2d 14, *supra*). In *Charnoff v Baldwin Realty Group, Inc.*, 8 Misc 3d 1023(A), 2005 NY Slip Op 51252(U) [Sup Ct, Nassau County 2005], the Supreme Court held that plaintiff's right to seek monetary damages arising from an accessibility related violation of the Executive Law survives the closure of a public accommodation.

Both the Administrative Code and Executive Law make it a violation for a public accommodation to deny a person the ability to use and enjoy their public accommodation.

In the instant case, the legislative goal and purpose for the Human Rights Laws would not be advanced by the strict construction being advanced by the defendants.

As to Grunberg's argument that plaintiff fails to allege an actual injury, Grunberg argues that the allegations in the complaint are bare and conclusory. They assert that plaintiff does not identify or provide any details of the purported architectural barriers (Grunberg's Moving Papers, ¶24).

A review of the complaint, however, reveals that plaintiff set forth that "numerous architectural barriers existed at the defendants' place of public accommodation that prevented and/or restricted access to plaintiff, a person with a disability" and "Plaintiff desired to access the entire Isabella's premises but was deterred from doing so due to architectural barriers (Complaint, ¶15, 20). Further, plaintiff cites to the barriers alleged in the federal court complaint to supplement the details of the complaint herein, which this court notes was part of Grunberg's moving papers. Thus, Grunberg was clearly aware of the specific barriers complained of.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the court may freely consider affidavits on other materials that remedy any defect with the complaint (*WDF Inc. v Trustees of Columbia Univ. In the City of N.Y.*, 156 AD3d 530, 530 [1st Dept 2017]). The Court is too accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference and whether the plaintiff can ultimately establish his allegation is not part of the calculus in determining a motion to dismiss (*EBC I, Inc., v Goldman Sachs & Co.*, 5 NY3d 11, 19). In the instant case, plaintiff has sufficiently pled his claim, as supplemented by the complaint of the Federal Action, which amply provides detailed facts surrounding the plaintiff's allegations of discriminatory conduct and his injury. As such, the branch of Grunberg's motion to dismiss, the first, second and third causes of

action, pursuant to CPLR 3211 (a) (7), is denied.

The branch of Grunberg's application for dismissal of the first, second and third causes of action, pursuant to CPLR 3211 (a) (1), based on documentary evidence, is denied for the reasons set forth below.

Grunberg relies on a premise that plaintiff readily conceded that the door in question was power-activated, single hinged door and that the door knobs that the plaintiff observed on the doors were decorative only and had no functionality (Grunberg's Moving Papers ¶26). Grunberg asserts that plaintiff's admissions and an expert report in the federal action are documentary evidence which require dismissal of plaintiff's entire complaint. In particular, Grunberg argues that plaintiff never attempted to gain access to the restaurant and was mistaken in his belief that the entrance door to the restaurant had been permanently screwed shut with metal bars (*id.*, 27). Grunberg references an expert report used in the federal action which concluded that the fourth door on West 77th street, from Columbus Avenue, is labeled as accessible and has a portable ramp (*id.*, 11). Grunberg further posits that the door was determined to be automatic with a push button at both the inside and outside of the door (*id.*, ¶11, 12). Grunberg claims that once plaintiff was confronted with the report, he was forced to concede that the metal bars were decorative elements that did not impede the door's operation (*Id.*, ¶s 26, 27). In light of the admissions, Grunberg argues that plaintiff cannot allege, in good faith, that he suffered an injury in fact arising from any architectural barriers.

In opposition, plaintiff submits that the email and expert report relied upon by defendants is unsigned, unsworn, incomplete and unauthenticated (Plaintiff's Opposition, ¶38). Plaintiff argues that Grunberg's Exhibit D is not authenticated by a person with personal knowledge

and does not constitute undeniable or unambiguous evidence, required under CPLR 3211 (a) (1).

Grunberg's Exhibit D consists of two pages out of what appears to be a 22 page report prepared by plaintiff's expert for the prosecution of plaintiff's Federal Action. The report merely provides a description of the four doors located at the restaurant and describes a push button for operating an automatic door. This description is consistent with plaintiff's pleading. While defendants argue that plaintiff is bound by the statements made in the report of his own expert, a review of Exhibit D does not establish any admission by plaintiff in regards to whether or not he sustained an injury under Executive Law or Administrative Code and in his opposition, plaintiff argues that the push button mechanism did not work when he repeatedly pushed it in his attempt to gain access to the restaurant.

Thus, the Court concludes that the documentary evidence relied on by defendants in seeking dismissal fails to resolve all factual issues as a matter of law, and does not conclusively dispose of plaintiff's claim (*see Weiss v TD Waterhouse*, 45 AD3d 763 [2d Dept 2007]). As such, the branch of Grunberg's motion to dismiss plaintiff's first, second, and third causes of action, pursuant to CPLR 3211 (a) (1), based upon documentary evidence, is denied.

MOTION SEQ. 002

B.R. Guest and 359 Columbus move collectively to dismiss the complaint, pursuant to CPLR 3211 (a) (1) (5) & (7). Initially, B.R. Guest moves to dismiss the complaint, on the grounds that they are not a proper party to this action because they (1) do not fall into any of the categories identified by the applicable statutes in this case; and (2) did not own, lease or operate the restaurant. B.R. Guest argues that the Executive Law, Civil Rights Law and Administrative

Code all limit liability for public accommodation discrimination to specific categories of "persons", not businesses or corporations and that the Court is without authority to hold a parent company liable for any violations of the statutes.

Executive Law § 292 (1) entitled "Definitions", reads, in pertinent part as follows :

> "(1). The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."

Administrative Code § 8-102(1) likewise, states:

> "The term "person" includes one or more natural persons, proprietorships, partnerships, associations, group associations, organizations, governmental bodies or agencies, corporations, legal representative, trustees, trustees in bankruptcy, or receivers."

While New York Civil Rights Act § 40 governing public accommodations does not contain a definition section, General Construction Law §110 provides that "this chapter is applicable to every statute unless its general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required to be given by this chapter".

Accordingly, for the purpose of the New York Civil Rights Law, General Construction Law Section 37, states that:

> "the term person includes a corporation and a joint-stock association. When used to designate a party whose property may be the subject of any offense, the term person also includes the state, or any other state, government or country which may lawfully own property in the state."

Thus, B.R. Guest's argument is without merit. Clearly, as a limited liability company, B.R. Guest qualifies as a "person" under the statutes.

Next, B.R. Guest claims that documentary evidence establishes that B.R. Guest is not

an owner or operator of the restaurant. Further, B.R. Guest submits that plaintiff admitted this fact by failing to name B.R. Guest as a party to the Federal Action. In fact, B.R. Guest argues that plaintiff himself asserted in his federal lawsuit that 359 Columbus was the owner and operator of the subject premises. In support, B.R. Guest relies on provisions in a lease agreement and lease renewal agreement (B.R. Guest's Moving Papers, Exhibits 4 & 5).

In opposition, plaintiff asserts that his complaint alleges that both B.R. Guest and 359 Columbus operated the restaurant and B.R. Guest owned and operated the property pursuant to its corporate practices and in furtherance of its corporate agreement with 359 Columbus. Moreover, the lease, lease renewal and notice of intent to vacate, according to the plaintiff do not support the argument that B.R. Guest should be dismissed from the action.

The submission shows that B.R. Guest is a party to the lease as it guaranteed the terms and conditions of the lease for Isabella's premises of 359 Columbus Avenue, LLC and its operation at the restaurant (Plaintiff's Affirmation in Opposition to Defendant's B.R. Guest Holdings, LLC and 359 Columbus Avenue, LLC's Motion to Dismiss, at 16).

As the documents presented herein do not conclusively dispose of the claims in the matter at bar, that branch of B.R. Guest's motion to dismiss the first, second and third causes of action, pursuant to CPLR (a) (1) & (7), is denied.

Next, B.R. Guest and 359 Columbus move to dismiss the complaint, pursuant to CPLR 3211 (a) (5), as barred by the doctrine of collateral estoppel and res judicata.[2] The plaintiff opposes the motion, noting that, the District Court declined to exercise supplemental jurisdiction over his state and local law claims.

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[2] As previously stated, B.R. Guest was not named in the Federal Action.

B.R. Guest and 359 Columbus, in their memorandum of law in support of their motion to dismiss, pursuant to CPLR 3211 (a) (5) set forth case law on the legal standard for collateral estoppel and res judicata. They, however, did not set forth any facts in their memorandum in support of the motion to dismiss, establishing either legal theory.

"Res judicata does not require the precluded claim to actually have been litigated; its concern, rather, is that the party against whom the doctrine is asserted had a full and fair opportunity to litigate the claim" (*Gropper v 200 fifth Owner LLC*, 151 AD3d 635, 635 [1st Dept 2017]; citing *EDP Med. Computer Sys., Inc. v United States*, 480 F 3621, 626 [2d Cir 2007]). The rationale underlying the principle of res judicata 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 (*Gramatan Home Investors Corp. v Lopez,* 46 NY2d 481, 485 [1979]). Thus, "[w]here a dismissal does not involve a determination on the merits, the doctrine of res judicata does not apply" (*Chin Tsun Yang v Sneh Prabha Shukla*, 138 AD3d 668, 669, [2d Dept 2016] [citations omitted]; *see also Matter of Kiess v Kelly*, 118 AD3d 595, 596 [2d Dept 2014]).

In the instant case, while the issues, raised in the Federal Action are identical to those raised in the instant complaint, the plaintiff did not have an opportunity to litigate his claims. When the District Court dismissed plaintiff's case, it did so without prejudice and without adjudicating any issue or claim raised by the plaintiff in the federal action (*Miraim Kaller Family Irrevocable Trust*, 56 Misc 3d at 401). Accordingly, that branch of the motion by B.R. Guest and 359 Columbus for an order dismissing the first, second and third causes of action, pursuant to CPLR (a) (5), is denied.

CONCLUSION

Accordingly, based upon the foregoing, it is hereby

ORDERED that Grunberg's motion to dismiss is denied in its entirety; and it is further

ORDERED that the motion to dismiss by B.R. Guest and 359 Columbus is denied in its entirety; and it is further

ORDERED that the branch of the defendants' motions seeking to dismiss plaintiff's fourth cause of action is denied as moot.

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon defendants, with notice of entry.[3]

DATED: 10/9, 2018

Hon. Doris Ling-Cohan, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[3] By separate order dated 10/9/18, a discovery schedule has been issued.