

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D29543
G/kmb

_____AD3d_____

Argued - December 9, 2010

PETER B. SKELOS, J.P.
ANITA R. FLORIO
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2009-08137

DECISION & ORDER

George R. Osborne, et al., appellants,
v Rossrock Fund II, L.P., respondent.

(Index No. 1709/09)

George R. Osborne, Clinton Corners, N.Y., appellant pro se.

MacVean, Lewis, Sherwin & McDermott P.C., Middletown, N.Y. (Kevin F. Preston and Ferol Reed McDermott of counsel), for respondent.

In an action to recover damages for breach of contract, the plaintiffs appeal from an order of the Supreme Court, Dutchess County (Brands, J.), dated August 4, 2009, which granted the defendant's motion to dismiss the amended complaint pursuant to CPLR 3211(a)(4), (5), and (7).

ORDERED that the appeal by the plaintiff Patrisha Osborne is dismissed as abandoned (*see* 22 NYCRR 670.8[a]); and it is further,

ORDERED that the order is affirmed insofar as reviewed; and it is further,

ORDERED that the defendant is awarded one bill of costs.

“Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties or those in privity with them of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding” (*Goldstein v Massachusetts Mut. Life Ins. Co.*, 32 AD3d 821, 821; *see Matter of Hunter*, 4 NY3d 260, 269). Here, the claims of the plaintiff George R. Osborne (hereinafter the

appellant) arise out of the same transaction as those raised in a prior foreclosure action, and could have been raised in that prior action. Since the defendant mortgagee was awarded summary judgment on the complaint and dismissing, inter alia, the appellant mortgagor's counterclaim in the foreclosure action (*see Rossrock Fund II, L.P. v Osborne*, _____AD3d____ [Appellate Division Docket No. 2009-07645; decided herewith]), the doctrine of res judicata bars this action (*see Cypress Hills Cemetery v City of New York*, 67 AD3d 853, 854). Accordingly, the Supreme Court properly granted that branch of the defendant's motion which was to dismiss the amended complaint pursuant to CPLR 3211(a)(5).

In light of our determination, we need not address the appellant's remaining contentions.

SKELOS, J.P., FLORIO, BALKIN and LEVENTHAL, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court