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SCAN

SHORT FORM ORDER md,md,md

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

JOHN PATERNO,

Plaintiff(s),

-against-

MOTION DATE: 10/8/09
INDEX No.:590/08
MOTION SEQUENCE NO:3,4,5

CAL. NO.:2009N2124

JOHN CARROLL and LISA HEBERLEY CARROLL,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-6
Notice of Cross Motion.....	7-9
Notice of Cross Motion.....	10-16
Answering Affidavits.....	17.18
Replying Affidavits.....	19,20
Rejoinder:	21,22

Upon the foregoing papers, it is ordered that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint in its entirety, directing the plaintiff to return to defendants their security deposit of $12,000 plus interest pursuant to Gen. Ob. Law § 7-103, and $664 plus interest for a hot water tank, awarding defendants their attorney's fees and costs pursuant to RPL § 234, and scheduling an inquest for the determination of additional money damages claimed by defendants; cross-motion by the plaintiff for an order pursuant to 22 NYCRR § 202.21(e) and 212.17(c) striking defendants' note of issue and vacating the certificate of readiness and a second cross-motion by the plaintiff for an order pursuant to CPLR § § 3211(a)(5),(6) and (b) and/or 3217(a)(2) and (c) striking the defendants' counterclaims and affirmative defenses

pursuant to the principle(s) of *res judicata* and/or collateral estoppel on the grounds that the defendants cannot assert same given that they have previously duly executed a Stipulation of Discontinuance with prejudice, and granting summary judgment pursuant to CPLR § 3212 in favor of the plaintiff, striking the defendants' answer pursuant to CPLR § 3126(3) for their alleged willful and contumacious ongoing refusal to provide necessary discovery that they had agreed to, and upon the granting of the plaintiff's motion, scheduling this matter for an inquest for the purpose of determining all of the plaintiff's damages are determined as hereinafter follows.

On or about January 7, 2008 plaintiff-landlord commenced the within action against the defendants-tenants to recover for damages allegedly sustained by the plaintiff for wrongfully cancelling a lease. Plaintiff leased a condominium unit he owned to the defendants. The condominium, located in North Hills, Nassau County, consisted of three floors. The first floor on ground level comprised of a living room and dining room area, kitchen and master bedroom. The second floor had two bedrooms. A finished basement had another bedroom. There were three bathrooms, one on each floor of the unit. The tenants executed a one-year lease for the period August 1, 2006 to July 31, 2007. On or about May 17, 2007 the tenants sent the landlord a letter confirming the fact that they had elected to exercise the option to renew the lease as of August 1, 2007. The agreed annual rent was $73,200 for the term of the one year lease payable monthly in the sum of $6,100.00. Tenants paid the rent of $6,100 for August 2007. Thereafter, on or about September 17, 2007 the tenants moved out.

In the complaint the plaintiff alleges the defendants "are in breach of the written leasehold agreement by failing to pay plaintiff the balance due on the lease of $67,100.00 plus the interest due and owing from the date thereof, together with the cost of re-renting the premises, the cost of removing clothing and furniture after they abandoned said premises in the amount of $750.00; the cost of a public storage facility in the amount of $600.00 and continuing as of September 1, 2007; and the cost of a van rental in the amount of $350.00."

On or about October 31, 2008 the defendants interposed an

answer containing affirmative defenses and counterclaims. The first counterclaim alleges damage to tenants' property in the sum of $40,000.00. The second and fourth counterclaims seek return of $12,000.00 security deposit. The third counterclaim seeks reimbursement for repair of hot water heater in the amount of $664. The fifth counterclaim alleges damages from a mold condition. The sixth counterclaim alleges constructive eviction and demands the return of 14 days rent. The seventh counterclaim alleges breach of a warranty of habitability.

On or about March 31, 2008 the plaintiff interposed a verified answer to the counterclaim.

Defendants argue that the complaint should be dismissed because the landlord failed to maintain the tenants' security deposit in a segregated account as required by Gen. Ob. Law § 7-103. The affidavit of the landlord and the bank records demonstrate that the security deposit in the sum of $12,000 was placed in the John Paterno Rent Account that he originally maintained at North Fork Bank in Great Neck. Subsequently, he changed banks and transferred the rent account to Signature Savings Bank in Great Neck.

Three factors are determinative of a landlord's breach of the statutory obligations concerning maintenance of a security deposit: (1) whether the deposit was held in a segregated account and in the name of the actual landlord; (2) whether the landlord responded to demands for information regarding the maintenance of the security account, either prior to or during litigation and (3) whether the landlord complied with the independent duty to give the tenant notice of a bank and its address. The landlord complied with items (2) and (3) during discovery by furnishing information regarding the account. Violation of the notice provision alone does not entitle the tenants to the return of their security deposit [*Shandwick USA v Exenet Technologies*, 192 Misc2d 280 (Civ. Ct. N.Y. County 2002); *Purfield v Kathrane*, 73 Misc2d 194 (Civ. Ct. N.Y. County 1973)].

During discovery the landlord produced bank records showing that he deposited $12,000 in the John Paterno Rent Account. Tenants argue that since the landlord withdrew money from the account on

numerous occasions, it was not a trust account as contemplated by Gen. Ob. Law § 7-103. The number of transactions in and out of the John Paterno Rent Account is not determinative of whether there was commingling and a violation of Gen. Ob. Law § 7-103. What the defendants must demonstrate is whether or not the John Paterno Rent Account would be subject to the reach of an income execution issued by the general creditors of John Paterno. Based on the submissions now before the Court, the defendants have not at this time established there was commingling so as to warrant the immediate return of the tenant's security deposit and a violation of Gen. Ob. Law § 7-103 (*Leroy v Sayers*, 217 AD2d 63).

On April 30, 2008 the plaintiff served a demand pertaining to the defendants' treating and/or examining physicians seeking copies of medical records and HIPA authorizations. To date the defendants have failed to comply with the demands for authorization to procure medical records of the defendant Lisa Heberley Carroll.

In opposition, the defendants argue, and the counterclaim demonstrates, that they are not claiming personal injuries, nor are they seeking damages from any such injuries. The defendant testified that her doctor advised her to move due to her pregnancy and the alleged adverse effects of the mold condition. Defendants provide no credible medical evidence to substantiate that claim. Defendant Lisa Heberley Carroll has not even submitted an affirmation from her treating physician to substantiate her allegation. The defendants shall be precluded at trial from offering proof regarding the alleged medical condition as justification for vacating the premises before the expiration of the lease (*Bivona v Trump Mar. Casino Hotel Resort*, 11 AD3d 574, 575; *Kontos v Koakos Syllogos "Ippocrates", Inc.*, 11 AD3d 661; *Corriel v Volkswagen of Am.*, 127 AD2d 729, 731; *see also Orner v Mount Sinai Hosp.*, 305 AD2d 307). In light of the preclusion order prohibiting the defendants from introducing any medical testimony at trial, the plaintiff's motion to vacate the note of issue for failure to provide the medical authorization is moot and denied.

On or about October 26, 2007 the defendants brought an action in District Court, County of Nassau, Third District, against John Paterno, the plaintiff in this action. The tenants asked for the return of the $12,000 security deposit and $664 in reimbursement

for a hot water heater on or about December 3, 2007. On or about December 3, 2007 John Paterno served an answer, affirmative defenses and a counterclaim in the District Court proceeding. He sought to recover $67,000 (breach of lease); $1,670 (cost to repair damages); $750.00 (cost to remove personal property); $600.00 (cost of storage); and $350.00 (cost of rental of van) for a total of $70,470.00. The parties executed a Stipulation of Discontinuance With Prejudice dated April 17, 2008 discontinuing the District Court Action. Plaintiff now moves in this court to dismiss defendants' counterclaim asserting the Stipulation of Discontinuance with Prejudice is *res judicata* and collateral estoppel.

"Under the doctrine of *res judicata* or collateral estoppel, a party is barred from relitigating in a state action a claim or issue that is identical to that litigated and resolved in a prior federal action" (New York Jur 2d, Judgments, § 428, at 193; see also *Lodal, Inc. v Home Ins. Co.*, 309 AD2d 634). This rule is founded upon the belief that "it is for the interest of the community that a limit should be prescribed to litigation, and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause be fairly and impartially tried; but proper public tranquility demands that, having been once so determined, all litigation of that question, and between those parties, should be closed forever" (*Fish v Vanderlip*, 218 NY 29, 36-37; see also *Hendrick v Biggar*, 209 NY 440). "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 relitigate an issue that has already been decided against it" (*Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 455).

Res judicata, or claim preclusion, is invoked to prevent a party, or one who is in privity with the party, from relitigating a previously litigated action. In other words, *res judicata* will only apply if there has been a final judgment on the merits. This form of claim preclusion applies to all issues and theories of recovery applicable to the cause of action, whether or not they were actually litigated.

"As a general rule, 'once 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; *Matter of Reilly v Reid*, 42 NY2d 24, 30). Thus, where a plaintiff in a later action brings a claim for damages that could have been presented in a prior CPLR *article* 78 proceeding against the same party, based upon the same harm and arising out of the same or related facts, the claim is barred by res judicata (*Pauk v Board of Trustees*, 111 AD2d 17, 20-21, aff'd 68 NY2d 702)" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347-348.

Collateral estoppel, or issue preclusion, is a corollary to the doctrine of *res judicata*. It bars the relitigation of an issue (as distinguished from the action or claim) which was actually and necessarily previously decided in a prior proceeding (*Ryan v New York Telephone*, 62 NY2d 494). To invoke the "issue preclusion" doctrine of collateral estoppel the following elements must be established: 1) an identity of an issue which was necessarily decided in the prior action and 2) a full and fair opportunity by the party against whom collateral estoppel is being invoked to have contested the said issue (*Allied Chemical v Niagara Mohawk Power*, 72 NY2d 271). Since the goal of the doctrine is to avoid duplicative decisions on the same question, emphasis has been placed on the identity of issue, as opposed to the identity of the parties involved, although an "identity" of parties is not absolute. As explained and held in *Ryan (supra)*, collateral estoppel will apply even if the tribunal or court was not the same, and the doctrine will also bar a party who was "in privity" with a party to the prior action.

> "The doctrine of collateral estoppel, a narrower species of *res judicata*, preclude 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 *or those in privity, whether or not the tribunals or causes of action are the same"* (cases and authorities cited emphasis supplied) (*Ryan v New York Telephone Co., supra*, at p. 500).

In determining whether or not privity exists between a party to the second action with a party in the prior action, the Courts have not established a hard and fast rule. Indeed, privity has been described as an "amorphous term" [*Weiner v Greyhound Bus Lines, Inc.*, 55 AD2d 189].

> "Privity has also been held to exist where there is a relationship between the litigant in the current suit and the party to the prior suit 'such that the interests of the nonparty can be said to have been represented in the prior proceeding' (*Green v Santa Fe Indus.*, 70 NY2d 244, 253)... [The rule in New York] eschews strict reliance on formal representative relationships in favor of a more flexible consideration of whether all of the facts and circumstances of the party's and nonparty's actual relationship, their mutuality of interests and the manner in which the nonparty's interests were represented in the prior litigation establishes a functional representation such that 'the nonparty may be thought to have had a vicarious day in court.' ... Further, the Court of Appeals has also held that 'collateral estoppel is a doctrine based on general notions of fairness involving a *practical inquiry* into the *realities of the litigation...*; it should never be rigidly or mechanically applied' (*Matter of Halyalkar v Board of Regents of State of New York*, 72 NY2d 261, 268-269" (*Slocum on Behalf of Nathan A v Joseph B*, 183 AD2d 102).

The general rule is that a stipulation of discontinuance "with

prejudice" is afforded *res judicata* effect and will bar litigation of the discontinued causes of action (*see Rossi v Twinbogo co.*, 193 AD2d 481). However, the language "with prejudice" is narrowly interpreted when the interests of justice, or the particular equities involved, warrant such an approach (*Van Hof v Town of Warwick*, 249 AD2d 382; *Dolitsky's Dry Cleaners v Y L Jericho Dry Cleaners*, 203 AD2d 322, 323).

Plaintiff's attorney asserts he never learned of the Stipulation of Discontinuance until he obtained the prior District Court file in order to respond to defendants' allegations that Paterno was the instigator of these legal proceedings. Defendants' attorney argues that it was the plaintiff's attorney who prepared the District Court Stipulation with Prejudice and mailed a copy to him. Moreover, defendants' attorney asserts that neither party intended to waive their claims since their claims were already being litigated in the within Supreme Court action when the District Court Stipulation with Prejudice was executed in April 2008, as evidenced by extensive discovery and depositions that followed in this action.

Any objection or defense based on a ground set forth in CPLR § 3211(a)(1), (3), (4), (5) or (6) is waived unless raised either by a pre-answer motion or in the responsive pleading (CPLR 3211(e). In reply to defendants' counterclaim, the plaintiff failed to assert an objection under CPLR 3211(a). The time to amend as of right under CPLR 3025(a) has expired. In order for the plaintiff to amend the reply and raise the defense of *res judicata*, leave of the Court is required under CPLR 3025(b). CPLR § 3018(b) is quite explicit in requiring the defense of collateral estoppel to be affirmatively pleaded and CPLR 3211(e) provides that failure to include the defense either originally or in an amendment constitutes a waiver (*Rodriguez v City of New York*, 92 AD2d 813, *aff'd.* 62 NY2d 673; *cf. Mayers v D'Agostino*, 58 NY2d 696).

There being no application before this court to amend the reply to include a CPLR 3211(a) defense of *res judicata* or collateral estoppel, plaintiff's motion to dismiss the counterclaim based on *res judicata* and collateral estoppel is denied.

The allegations in the complaint state that the tenants

wrongfully terminated the lease and the landlord is entitled to damages. The defendants' counterclaim alleges constructive eviction due to a mold condition. Defendants seek to recover the security deposit and damages. There are numerous issues of fact regarding the mold condition that is alleged to be the cause of the underlying dispute. Summary judgment is a drastic remedy which may be granted only where there are no clear triable issues of fact. Even the color of a triable issue forecloses the remedy of summary judgment (*Andre v Pomeroy*, 35 NY2d 361; *In re Cuttitto Family Trust*, 10 AD3d 656).

Theerefore, the respective motions for summary judgment dismissing the complaint and the counterclaims are both denied.

Dated: OCT 19 2009

J.S.C.