STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ELIZABETH KETCHAM,

Plaintiff,

-against-

ROBERT A. SCHRAMM
and JOAN SCHRAMM,

Defendants.

DECISION and ORDER
INDEX NO. 1812-08
RJI NO. 01-09-96350

Supreme Court Albany County All Purpose Term, February 26, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Anderson Byrne, LLC
Michele Anderson, Esq.
Attorney for Plaintiffs
48 Union Avenue, Suite 1
Saratoga Springs, New York 12866

Frank Mahady, Esq.
Attorney for Defendants
120 Broadway
Albany, New York 12054

TERESI, J.:

On January 16, 2004, the Hon. Thomas Keegan issued a Decision and Order in the action entitled Schramm v. Tomasik, Et. Al. (Albany County Index No. 2415-03)[1]. Plaintiff in that action (Robert Schramm) is a defendant herein. The only other defendant in this action is Robert Schramm's wife (hereinafter collectively referred to as "the Schramms" or "Defendants"). The Plaintiff in this action was a defendant in the Tomasik action, and is now known as Ketcham (hereinafter "Ketcham" or "Plaintiff"). The Tomasik action was commenced by Mr. Schramm

[1] The Order will hereinafter be referred to as the "Keegan Order" and the action itself will be referred to as the Tomasik action.

seeking specific performance of an oral contract to purchase a parcel of property owned by Ketcham or possession of that parcel due to adverse possession. The disputed parcel of property was specifically defined by a metes and bounds description attached to Mr. Schramm's complaint in the Tomasik action[2]; and located thereon was a leech field Mr. Schramm built to service his residence. The Keegan Order dismissed Mr. Schramm's causes of action for specific performance and his claim of adverse possession of the disputed parcel.

Plaintiff commenced this permanent injunction/trespass action to enjoin Defendants from trespassing upon the disputed parcel, for damages and for a declaratory judgment. Issue was joined by Defendants and a Note of Issue has been filed. Plaintiff now moves for summary judgment seeking a permanent injunction and a declaration that Defendants' license to use the disputed parcel has been revoked. Defendants oppose Plaintiff's motion and cross move to amend their answer, for summary judgment on their amended answer, to dismiss Plaintiff's complaint for failure to comply with discovery and to Dismiss Plaintiff's complaint because another action is pending. Because Plaintiff demonstrated her entitlement to a permanent injunction, and Defendants raised no issue of fact, her motion is granted to that extent. Defendants' cross motions, however, are each unsupported on this record and denied.

"[S]ummary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence

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[2] The parcel of property at issue in the Tomasik action is referred to herein as the "disputed parcel", and is the same parcel at issue in this action.

to demonstrate the absence of any material issues of fact." (Smalls v. AJI Industries, Inc., 10 NY3d 733 [2008] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). With the burden shifted, the opponent of the motion must "assemble, lay bare and reveal his proofs in order to show that the allegations in the complaint are real and capable of being established upon a trial". (Manculich v. Dependable Auto Sales and Service, Inc., 39 AD3d 1070 [3d Dept. 2007]).

Plaintiff's motion is, in part, based upon the Keegan Order's res judicata effect. As is well recognized, "[t]he doctrine of res judicata bars litigation between the same parties, or others in privity, of any cause of action arising out of the same transaction which either was or could have been asserted in the prior proceeding." (McDonald v. Lengel, 2 AD3d 1182, 1183 [3d Dept. 2003], quoting Matter of State of New York v Town of Hardenburgh, 273 AD2d 769, 772 [3d Dept. 2000]). Moreover, the prior proceeding must have been disposed of with "a final judgment on the merits." (Rowley, Forrest, O'Donnell & Beaumont, P.C. v Beechnut Nutrition Corp., 55 AD3d 982, 984 [3d Dept. 2008], quoting Kinsman v. Turetsky, 21 AD3d 1246 [3d Dept. 2005]).

On this record, Plaintiff sufficiently demonstrated that the Keegan Order is res judicata of the Schramms' claims herein. Because the Keegan Order was "an order entered on a motion for summary judgment[, it] constitutes a disposition on the merits and, accordingly, is entitled to preclusive effect for purposes of res judicata." (Kinsman, supra 1247).

Likewise, because Mr. and Ms. Schramm are in privity with respect to the disputed

parcel, the Keegan Order precludes both Schramms' claims herein. "Generally, to establish privity the connection between the parties must be such that the interests of the nonparty can be said to have been represented in the prior proceeding." (In re Stephiana UU., 66 AD3d 1160 [3d Dept. 2009], quoting Green v Santa Fe Indus., 70 NY2d 244, 253 [1987][citation omitted]). Although Ms. Schramm was not a named plaintiff in the Tomasik action, her interest in the Tomasik action was sufficiently represented by her husband. Specifically, on this record it appears that Ms. Schramm's interest in the disputed parcel has not changed since the commencement of the Tomasik action, there was no impediment to her joining her husband as a plaintiff in that action and her husband had a full and fair opportunity to litigate that action. Additionally, although not a named party, Ms. Schramm was fully involved in the prosecution of the Tomasik action, as a witness named in that action's complaint and by submitting an affidavit of fact considered on the Keegan Order.

Moreover, the Schramms' claims in this action arose from "the same transaction which either was or could have been asserted in the prior proceeding [i.e. the Tomasik action]." (McDonald, supra). As set forth above, Mr. Schramm commenced the Tomasik action seeking ownership of the disputed parcel, either by specific performance of an oral contract or adverse possession. The Keegan Order dismissed both claims, and accordingly they are not viable defenses in this action. Similarly unavailing is the Schramms' new claim of right to the disputed parcel, pursuant to an oral 99 year lease, because it could have been asserted in the Tomasik action. As the Schramms had a full and fair opportunity to litigate their ownership of the disputed parcel and their rights to possession and use of it in the Tomasik action, all such claims are now barred by res judicata.

Additionally on this record, Plaintiff demonstrated her ownership of the disputed parcel and the Schramms' trespass upon it. In this action the Schramms have not contested Plaintiff's deeded ownership right to the disputed parcel; and in the Tomasik action Mr. Schramm alleged such ownership in his complaint. Moreover, it is undisputed that the Schramms' leech field extends into the disputed parcel, and that Plaintiff has not authorized such use. As such, Plaintiff sufficiently demonstrated, as a matter of law, both the res judicata effect of the Keegan Order and her legal right to an injunction prohibiting the Schramms' continued trespass upon the disputed parcel.

With the burden shifted, the Schramms failed to raise any issues of fact. Ms. Schramm's affidavit does not demonstrate that the Keegan Order has no res judicata effect, her lack of privity with her husband, or that her current 99 year lease claim could not have been brought in the Tomasik action. Likewise, neither Mr. Schramm or Mr. Merli's affidavits raise such issues. To the extent that Ms. Schramm's affidavit addresses issues relative to portions of Plaintiff's property not included within the disputed parcel, such allegations were ill-defined and irrelevant. The complaint in this action specified the disputed parcel as the only portion of property at issue, as was the case in the Tomasik action, and any allegations relative to portions of Plaintiff's property outside of the disputed parcel are irrelevant herein.

Accordingly, to the extent that Plaintiff's motion for summary judgment seeks an injunction prohibiting the Schramms from accessing the disputed parcel and requiring them to remove their encroachment on the disputed parcel, it is granted. Plaintiff shall submit an order to this Court, on notice to Defendants, requiring the Schramms to remove all encroachments on the disputed parcel. The Order shall provide that the Schramms shall have ninety days from the date

of service of such order, with notice of entry, to remove such encroachments.

To the extent that Plaintiff's motion also seeks a declaratory judgment that Defendants' license to use the disputed parcel has been revoked, such motion is denied. On this record, Plaintiff set forth no proof that Defendants possess, or possessed, a license. As such, she failed to demonstrate her entitlement to a declaration that such license was revoked.

Turning to the Schramms' motion to amend their answer, because they set forth no "excuse for the delay" and Plaintiff would be prejudiced by the amendment, it is denied. While leave to amend is generally freely granted, "denial of a motion to amend is appropriate when there is prejudice to the opposing party and no showing of a satisfactory excuse for the delay". (Ciarelli v Lynch, 46 AD3d 1039, 1040 [3d Dept. 2007]). Here, because a Note of Issue has been filed and Plaintiff has had no opportunity to conduct discovery relative to Defendants' new claims, Plaintiff would be prejudiced by allowing the amendment Defendants seek. Moreover, the Defendants have offered no excuse for their delay. Accordingly, this portion of the Defendants' motion is denied.

Similarly, because Defendants failed to comply with 22 NYCRR 202.7(a)(2), their motion to dismiss Plaintiff's complaint based upon her failure to attend a deposition is denied. (Koelbl v. Harvey, 176 AD2d 1040 [3d Dept. 1991]). Upon this discovery dispute motion, Defendants were required to submit an "an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." (22 NYCRR 202.7[a][2]). No such affirmation was submitted, requiring summary denial of the motion. (Koelbl, supra; Diel v. Rosenfeld, 12 A.D.3d 558, 559 [2d Dept. 2004]). Additionally, in light of the factual issues raised by Plaintiff relative to her non appearance, the Defendants

failed to demonstrated her "willful and contumacious conduct." (Diel, supra). Nor did Defendants demonstrate, on this record, that Plaintiff's deposition would have yielded "facts essential to justify opposition" to her summary judgment motion. (CPLR §3212[f]).

Lastly, Defendants' motion for summary judgment / to dismiss "on the ground that there is pending and unresolved an action seeking the same or similar relief" is denied, due to Defendants' waiver. CPLR §3211(a)(4) states that "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that... there is another action pending between the same parties for the same cause of action in a court of any state or the United States." CPLR §3211(e) further requires that "[a]ny objection or defense based upon a ground set forth in [CPLR §3211(a)(4)]... is waived unless raised either by [a pre-answer] motion or in the responsive pleading." Here, Defendants failed to raise this defense in a pre answer motion to dismiss or in their answer. Accordingly, Defendants waived this affirmative defense, and their motion based thereon is denied.

Accordingly, Plaintiff's motion for summary judgment is granted to the extent set forth above and Defendants' motions are denied.

This Decision and Order is being returned to the attorneys for the Plaintiff. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute

entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: April 2, 2010
Albany, New York

JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated January 5, 2010, Affirmation of Michelle Anderson, undated, with unattached Exhibits "A"-"Response".
2. Notice of Cross Motion, undated, Affidavit of Joan Schramm, dated January 11, 2010, Affidavit of Robert Schramm, dated January 11, 2010, Affirmation of Frank Mahady, dated January 11, 2010, with attached unnumbered exhibits, Affidavit of Joseph Merli, dated January 29, 2010, with attached unnumbered exhibits.
3. Affidavit of of Michelle Anderson, dated February 16, 2010, with attached Exhibits "A"-"C"; Affidavit of Elizabeth Ketcham, dated January 29, 2010, with attached unnumbered exhibits.
4. Affirmation of Frank Mahady, dated February 26, 2010.