

Jones v Riese Org.

2010 NY Slip Op 32545(U)

September 15, 2010

Supreme Court, New York County

Docket Number: 105489/2010

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLOMON

PRESENT: _____

PART 55

Justice

Index Number : 105489/2010

JONES, CHARLES

VS.

RIESE ORGANIZATION

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 7/7/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-3

4-6, 7-8

9-10, 11

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided by the court's
memorandum decision and order.

FILED

SEP 16 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/15/10

JANE S. SOLOMON *s.c.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X
CHARLES JONES

Index No.:105489/2010

Plaintiff,

DECISION & ORDER

-against-

THE RIESE ORGANIZATION d/b/a RIESE
RESTAURANTS and/or RIESE BROS;
BOARD OF MANAGERS OF 761-779
SEVENTH AVENUE CONDOMINIUM; BOARD OF
MANAGERS OF EXECUTIVE PLAZA
CONDOMINIUM,

Defendants.

-----X

FILED
SEP 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

JANE S. SOLOMON, J.:

This is an action for continuing trespass/nuisance, negligence, and a permanent injunction, commenced by the filing of the summons and complaint on April 27, 2010. Defendant Taft Friday 50th Street, LLC., i/s/h/a The Riese Organization (Riese) moves to dismiss the complaint as against it, under CPLR 3211(a)(5), on the grounds of res judicata, collateral estoppel and the statute of limitations. It also seeks sanctions. Defendants Board of Managers of 761-779 Seventh Avenue Condominium and Board of Managers of Executive Plaza Condominium (together, the Condominiums) cross move to dismiss the complaint as against them on the same grounds. Pro se plaintiff, Charles Jones (Jones), cross moves for a preliminary injunction, a temporary restraining order (TRO), and for sanctions.

FACTS

Jones is the owner of unit 802 (the Unit) in the

Executive Plaza Condominium located at 150 West 51st Street, in Manhattan. He purchased the Unit in 1987. Executive Plaza is one of three "sections" of 761-779 Seventh Avenue Condominium, the Master Condominium; the other sections are a hotel and a commercial section that houses multiple restaurants. Riese operates a restaurant in the commercial section.

Twenty one years ago, the Condominiums built an exhaust flue (Flue) to vent fumes from the commercial section to the roof. The Flue is located on the wall of an airshaft, and rises past Jones's bedroom window. Jones complained about the Flue to the condominium board, but construction was completed and restaurants began to use it.

In 2003, thirteen years after the Flue was completed, Jones commenced a lawsuit (*Jones v. DNA Contracting, LLC., et al.*, Index No. 116782/2003, [Sup Ct, New York Co., 2003][the 2003 Action]) against several entities including Riese and the Condominiums. Jones alleged, amongst other things, that the Flue constituted a continuing trespass or nuisance because it "vibrates, emits heat and expels odors and food particles into the air that forces Plaintiff to keep Plaintiff's three windows facing the interior airshaft closed at all times to avoid health hazards" (Motion, Ex. B-1, ¶ 111). The sole allegation against Riese, for continuing trespass, was dismissed because of a statute of limitations violation and Jones's motion to amend his

complaint to include a request for a permanent injunction was denied (Decision of Justice Edmead, attached to Motion, Ex. D, p. 11). Jones's personal injury claims were severed and he was given leave to replead in a new action. The parties settled the remainder of the lawsuit, which was then discontinued with prejudice (Condominium Cross Motion, Ex. B).

Jones's personal injury lawsuit (*Jones v. DNA Contracting, LLC., et. al.*, Index. No. 404111/2005 [Sup. Ct., New York Co., 2005][the 2005 Action]), which included the Condominium defendants, though not Riese (Condominium Cross Motion, Ex. C), commenced in 2005 and was discontinued with prejudice pursuant to a stipulation of discontinuance in 2007 (*Id.*, Ex. D).

Throughout both the 2003 and 2005 Actions, Jones maintained that construction work in the airshaft in 2003 caused him to suffer respiratory injuries consisting of uncontrollable sneezing, coughing, difficulty sleeping, chest constriction, respiratory problems, and trouble breathing (Second Amended Verified Complaint, 2003 Action, attached to Motion, Ex. B-1, ¶ 44).

In the present complaint, Jones alleges that the "heat, toxic fumes, grease and other particles" that the Flue allegedly had been emitting since 1989 aggravated his respiratory problems in 2008 (Complaint, ¶ 15), leading to his present claim.

DISCUSSION

A. Prior Claims

Riese and the Condominium defendants argue that the doctrines of Res Judicata and Collateral Estoppel should preclude Jones from again raising the issue of damages and injunctive relief because the issues were decided in the 2003 and 2005 Actions. Jones counters that, despite the final dispositions of the prior actions, he is still able to seek injunctive relief, and that his continuing nuisance claim does not run afoul of Res Judicata or Collateral Estoppel because it is based on the new allegation that the Flue has exacerbating his medical condition. Riese responds that the claim for injunctive relief stems from Flue emissions, a claim identical to Jones' prior arguments (see, Jones Affidavit, attached to Motion, Ex. C, ¶ 26), and that the harm sought to be prevented by the injunction is the same harm already litigated.

Res Judicata, or claim preclusion, dictates that "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" (*Parker v. Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343, [1999]).

Collateral Estoppel, or issue preclusion, "precludes a party from relitigating in a subsequent action . . . an issue

clearly raised in a prior action . . . and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v. New York Telephone Co.*, 62 NY2d 494 [1984]).

Jones's claim that the Condominiums negligently installed the Flue arises from a transaction and set of facts already litigated and concluded in the 2003 and 2005 actions. Accordingly, Jones is estopped from arguing it here, and that claim is dismissed.

Jones's claim for "aggravation for existing medical condition," which has been construed by all parties as one for monetary damages arising from a continuing trespass or nuisance, is, likewise, barred. The issue of the heat, odor and particulate matter allegedly "spewing" from the Flue was raised in the 2003 matter and was dismissed. Jones new allegation--that his coughing has gotten worse since 2008--does not allow relitigation of this claim for monetary damages. Moreover, were his claim not barred by *res judicata* or collateral estoppel, it is barred by the statute of limitations. The harm in this 2010 action is the "heat, toxic fumes, grease and other particles" that began entering into the Unit in 1989. Continuing trespass claims for monetary damages are governed by a three year statute of limitations (CPLR 214-c(2); see, *Jensen v. General Elec. Co.* 82 NY2d 77 [1993]). Accordingly, Jones's monetary damages claim

is dismissed.

Jones' final claim is one for a permanent injunction and TRO. In the 2003 Action, Jones attempted to amend his complaint with a request for an injunction. The court in that action denied the motion to amend for lack of good cause shown. Collateral Estoppel requires that the party to be precluded from relitigating the issue "had a full and fair opportunity to contest the prior issue" (*Ryan, supra*, 62 NY2d at 501). Because the claim was not litigated, Collateral Estoppel does not apply. That being said, Res Judicata does apply. Jones knew and complained of the Flue emissions and vibrations since 1989, well before the 2003 Action. He did not seek injunctive relief in that action (in either his complaint or his first amended complaint). Because Res Judicata prevents a plaintiff from bringing "all other claims arising out of the same transaction . . . even if based upon different theories or if seeking a different remedy" (*Parker, supra*, 93 NY2d 343, [1999]), Jones's claim for a permanent injunction is denied. His cross motion for a preliminary injunction is likewise barred.

B. Sanctions

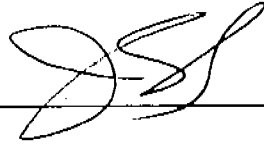
Riese seeks sanctions under 22 NYCRR §130-1.1 for Jones's alleged frivolous conduct in bringing this action. It seeks attorneys' fees, costs, and an injunction enjoining Jones from any further litigation arising from the facts presented.

the court in which he seeks to bring the same; and it further is

ORDERED that Jones's cross motion is denied.

Dated: September 15, 2010

Enter:



J.S.C.

JANE S. SOLOMON

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