

Specialized Realty Serv., LLC v Maikisch
2012 NY Slip Op 33749(U)
January 4, 2012
Supreme Court, Orange County
Docket Number: 11/2011
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
SPECIALIZED REALTY SERVICES, LLC,

Plaintiff,

-against-

DAVID MAIKISCH,

Defendant.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.
Index No. 11/2011
Motion Date: December 16, 2011

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The following papers numbered 1 to 10 were read on defendant's motion for summary judgment and plaintiff's cross-motion for summary judgment on the first and seventh causes of action:

Notice of Motion-Affirmation in Support-Exhibits	1-3
Notice of Cross-Motion-Affirmation-Exhibits	4-6
Reply Affirmation and Opposition to Cross-Motion-Exhibit-Memorandum of Law	7-9
Plaintiff's Reply Affidavit	10

Upon the foregoing papers, the motions are disposed of as follows:

This is an action seeking among other things, breach of an oral contract, tortious interference with contractual relations, and slander.

Defendant moves for summary judgment on a res judicata theory and plaintiff's failure to plead and demonstrate a fiduciary relationship between it and the defendant. Defendant cross-

[* 2]

moves for summary judgment on the first and seventh causes of action and to deny defendant's motion for summary judgment.

Plaintiff previously commenced an action bearing Index No. 9364/2007 against this defendant as well as against the Town of Tuxedo under many of the same theories of liability and referring to the same property as is present in the instant case. That matter was fully litigated and dismissed by Hon. Elaine Slobod by her order of July 14, 2009 and subsequently affirmed by the Appellate Division, Second Department on January 18, 2011. Plaintiff thereafter moved to reargue before the Second Department which motion was denied. Plaintiff also moved for leave to appeal to the Court of Appeals which motion was denied. Plaintiff thereafter moved to vacate Judge Slobod's decision and order which motion was also denied.

Now, plaintiff brings this action on similar theories and on theories which could have been litigated in the prior action.

Moreover, the issues in this case have been previously decided by a court of coordinate jurisdiction and affirmed by the Appellate Division, Second Department. The doctrine of law of the case precludes a party from relitigating issues previously decided by order of the same court. *See, Baron v Baron*, 128 AD2d 821 (2nd Dept. 1987); *Hoffman v Landers*, 146 AD2d 744 (2nd Dept. 1989); *Detko v McDonald's Restaurants of New York, Inc.*, 198 AD2d 208 (2nd Dept. 1993). "The doctrine of res judicata prohibits a party from relitigating any claim which could have been or which should have been litigated in a prior proceeding" (*County of Nassau v. New York State Pub. Empl. Relations Bd.*, 151 A.D.2d 168, 185, 547 N.Y.S.2d 339, *affd.* 76 N.Y.2d 579, 561 N.Y.S.2d 895, 563 N.E.2d 266; *Hyman v. Hillelson*, 79 A.D.2d 725, 726, 434 N.Y.S.2d 742, *affd.* 55 N.Y.2d 624, 446 N.Y.S.2d 251, 430 N.E.2d 1304; *Coliseum Towers Assocs. v.*

County of Nassau, 217 A.D.2d 387, 389, 637 N.Y.S.2d 972). “[O]nce 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 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 429 N.E.2d 1158).” *Finkelstein v Ilan*, 239 AD2d 545, 546 (2nd Dept. 1997). Whether the doctrine be known as *res judicata*, collateral estoppel or issue preclusion, a judgment or confirmed decision in one action is conclusive not only of matters previously litigated, but also as to any matters which might have been so litigated. *See, Schuykill Fuel Corporation v B. & C. Nieberg Realty Corporation*, 250 NY 304, 306 (1929). This is true even as to matters based upon different theories, so long as they arise from the same transaction or series thereof, since once an issue has been tried, all litigation between the parties arising therefrom should be finally determined. *See, Coliseum Towers Associates v County of Nassau*, 217 AD2d 387, 389-390 (2nd Dept. 1996); *Braunstein v Braunstein*, 114 AD2d 46, 53 (2nd Dept. 1985).

Whether plaintiff seeks to “judge shop” or has different motives is unclear. However, the substantial identity of the parties, the Court’s prior determination, and the issues raised in this case which so closely track those which were already litigated warrants the granting of defendant’s motion for summary judgment. Any “new theories” could have and should have been raised in the prior litigation and to do so now is precluded by *res judicata*. Similarly, plaintiff’s cross-motion for summary judgment must be denied as moot.

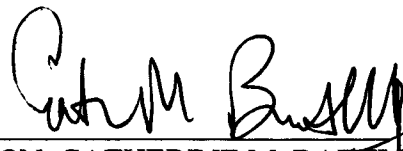
[* 4]

Therefore, defendant's motion is granted in its entirety with \$100.00 motion costs awarded to defendant by plaintiff.

The foregoing constitutes the decision and order of this Court.

Dated: January 4, 2012
Goshen, New York

ENTER



HON. CATHERINE M. BARTLETT,
A.J.S.C.

JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE