

<b>Canzona v Atanasio</b>
2012 NY Slip Op 33823(U)
August 16, 2012
Supreme Court, Suffolk County
Docket Number: 3424-12
Judge: Thomas F. Whelan
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**PUBLISH**

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 45 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 6/21/12  
ADJ. DATES 8/10/12  
Mot. Seq. # 001 - Mot D; SJ  
CDISP Yes

-----X		
CHRISTOPHER CANZONA,	:	MICHAEL B. SCHULMAN & ASSOC.
	:	Attys. For Plaintiff
Plaintiff,	:	225 Broadhollow Rd.
	:	Melville, NY 11747
-against-	:	
	:	MORVILLO, ABRAMOWITZ, ET ALS
CHARLES ATANASIO and	:	Attys. For Defendants
MARY ATANASIO,	:	565 Fifth Ave.
	:	New York, NY 10017
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 9 read on this motion by the defendants for dismissal and for the imposition of costs and sanctions against the plaintiff and his counsel; Notice of Motion/Order to Show Cause and supporting papers 1-3; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 4-5; Replying Affidavits and supporting papers \_\_\_\_\_; Other 6-7 (memorandum); 8-9 (memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the defendants' requests for oral argument on this motion are considered under 22 NYCRR 202.8 and are denied; and it is further

**ORDERED** that those portions of this motion (#001) by the defendants for an order dismissing this action on res judicata and other grounds contemplated by CPLR 3211(a) are considered thereunder and are granted; and it is further

**ORDERED** that those portions of this motion wherein the defendants seek the imposition of costs, in the form of reasonable attorneys' fees and sanctions against the plaintiff by reason of the filing of a notice of pendency in a prior action commenced by the plaintiff, are considered under 22 NYCRR Part 130-1 and are denied; and it is further

**ORDERED** that the remaining portions of this motion by the defendants for the imposition of costs and sanctions against the plaintiff and his current counsel by reason of their commencement and prosecution of this action are considered under 22 NYCRR Part 130-1 and are denied.

In 2011, the plaintiff commenced an action bearing index number 22425/2011 in this court against the defendants to recover damages under theories of contract, implied contract and tort law. The plaintiff's claims arose from transactions principally between the plaintiff and defendant, Charles Atanasio, relating to the purchase of a yacht and a residence on Dune Road in Westhampton, New York in which some or all of the parties had interests therein. By order dated December 20 2011, that action was dismissed pursuant to CPLR 3211 upon motion of the defendants. On January 4, 2012, this court issued a judgment which the defendants duly settled on notice to the plaintiff. No counter judgment was submitted by the plaintiff. The January 4, 2012 judgment, which dismissed all of the claims of the plaintiff with prejudice, was entered by the Clerk of the Court on January 17, 2012.

This action was commenced by the plaintiff on January 31, 2012 by the filing of a summons with notice with the Clerk. According to the defendants, the factual averments set forth in the complaint dated May 7, 2012 arise out of the same transaction as those advanced in the prior action commenced by the plaintiff against the defendants. The defendants thus move for dismissal of the plaintiff's complaint in this action pursuant to CPLR 3211(a)(5) on the grounds that the plaintiff's prosecution of the claims interposed herein are barred by the doctrine of res judicata and by other legal defenses possessed by the defendants, including the statute of frauds and the statute of limitations. For the reasons stated below, the court grants the defendants' application for dismissal of the complaint served in this second action commenced by the plaintiff.

Under New York's transactional approach to the doctrine of res judicata, "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, 445 NYS2d 687 [1981]; see *Parolisi v Slavin*, \_\_\_ AD3d \_\_\_, 2012, WL 3104218 [2d Dept 2012]). The rationale for the doctrine is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again; allowing relitigation would undermine the interest of the community and the litigants in finality (see *Ryan v New York Tel. Co.*, 62 NY2d 494, 500, 478 NYS2d 823 (1984). The fact that causes of action may be stated separately, invoke different legal theories, or seek different relief will not permit relitigation of claims (see *Pondview Corp. v Blatt*, 95 AD3d 980, 943 NYS2d 754 [2d Dept 2012]).

In order for the doctrine to apply, the prior determination must be on the merits (see *Velinskie v Gottlieb*, 92 AD3d 941, 938 NYS2d 909 [2d Dept 2012]). A judgment dismissing a complaint on the grounds that the claims set forth therein are barred by an applicable statute of limitations is a judgment on the merits for purposes of applying the res judicata doctrine (see *Hae Sheng Wang v Pao-Mei Wang*, 96 AD3d 1005, 947 NYS2d 582 [2d Dept 2012]). However, a dismissal for legal insufficiency pursuant

to CPLR 3211(a)(7) will not be given res judicata effect except to the extent that the judgment will be deemed conclusive as to matters actually decided, except where the judgment specifies that it is on the merits (see *Plattsburgh Quarries, Inc. v Palcon Indus.*, 19 AD2d 844, 513 NYS2d 861 [3d Dept 1987]; see also *Coutsodontis v Peters*, 39 AD3d 274, 831 NYS2d 902 [1st Dept 2007]). Where the court's dismissal of a prior action for legal insufficiency is not merely a dismissal for a technical pleading defect, but a dismissal manifestly on the merits, the doctrine of res judicata will bar later asserted claims based on the same transactions and occurrences as those underlying the prior claims (see *Pitcock v Kasowitz, Benson, Torres & Friedman*, 80 AD3d 453, 915 NYS2d 239 [1st Dept 2011]).

Upon review of the complaint served in this action, the court finds that the claims set forth therein arise out of the same transactions and occurrences upon which the claims in the prior action were premised. The court further finds that its December 20, 2011 determination to dismiss the plaintiff's claims in the prior action was a final adjudication on the merits as such dismissal and was not the result of some technical pleading defect. Moreover, the judgment entered thereon reflected the court's adjudication by the inclusion therein of the proviso that the complaint was dismissed with prejudice. That judgment was issued by this court after settlement thereof issued to the plaintiff who failed to object thereto by counter submissions or otherwise. The instant motion by the defendants to dismiss the complaint served in this action on the grounds that the claims asserted therein are barred by the doctrine of res judicata are thus granted and the complaint in this action is dismissed on the merits and with prejudice.

The court further finds that the defendants' moving papers sufficiently established that the claims interposed in the complaint served in this action are barred by the statutory periods of limitations set forth in CPLR 213 and 214 and/or by the writing requirement imposed by the statute of frauds set forth in GOL § 5-703 (1) (see *Chi Kee Pang v Synlyco, Ltd.*, 89 AD3d 976, 933 NYS2d 706 [2d Dept 2011]); *TR-One, Inc. v Lazz Dev. Co., Inc.*, 95 AD3d 1303, 945 NYS2d 416 [2d Dept 2012]). The opposing papers of the plaintiff failed to raise any questions of fact necessary to rebut the defendants' prima facie establishment of these defenses. Those portions of the instant motion wherein the defendants alternatively seek dismissal of the plaintiff's complaint pursuant to CPLR 3211(a)(5) and (a)(7) are thus granted.

Those portions of the defendants' motion for an order imposing sanctions against the plaintiff by reason of the filing of an purportedly improper and unauthorized notice of pendency in connection with the prior action are denied. The moving papers failed to demonstrate that costs and sanctions may be imposed pursuant to 22 NYCRR Part 130-1 for conduct undertaken in a prior action rather than in the action in which the application for costs and/or sanctions is made.

Also denied are the remaining portions of this motion wherein the defendants seek the imposition of costs and sanctions against the plaintiff and his current counsel by reason of their commencement and prosecution of this second action. The court finds that the conduct about which the defendants complain

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does not constitute frivolous conduct as that term is defined in 22 NYCRR Part 130-1 (*see Ram v Hershowitz*, 88 AD3d 891, 931 NYS2d 103 [2d Dept 2011]).

In view of the foregoing, the instant motion (#001) by the defendants is granted to the extent that the complaint served in this action is dismissed as set forth above. The defendants' additional demands for relief are denied.

Settle judgment upon a copy of this order.

DATED: 8/16/12

  
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THOMAS F. WHELAN, J.S.C.