

**SSJ Dev. of Sheepshead Bay I, LLC v Amalgamated Bank**

2014 NY Slip Op 30913(U)

February 10, 2014

Supreme Court, Kings County

Docket Number: 504568/2013

Judge: Bernard J. Graham

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: Part 36**

SSJ DEVELOPMENT OF SHEEPSHEAD BAY I, LLC,  
SSJ DEVELOPMENT OF MILL BASIN I, LLC, and  
SSJ DEVELOPMENT OF GERRITSEN BEACH I, LLC,

Plaintiff(s),

-against-

AMALGAMATED BANK,

Defendant(s).

Index No.: 504568/13  
Motion Calendar No.  
Motion Sequence No.

**DECISION / ORDER**

Present:  
**Hon. Judge Bernard J. Graham**  
Acting Supreme Court Justice

**Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion for: summary judgment and to dismiss the complaint**

| Papers  | Numbered             |
|---|----------------------|
| Notice of Motion and Affidavits Annexed.....    | _____ 1-2, 3-4 _____ |
| Order to Show cause and Affidavits Annexed..... | _____                |
| Answering Affidavits.....                       | _____ 5 _____        |
| Replying Affidavits.....                        | _____ 6,7 _____      |
| Exhibits.....                                   | _____                |
| Other:.....                                     | _____                |

**Upon the foregoing cited papers, the Decision/Order on this motion is as follows:**

Defendant, Amalgamated Bank (“Amalgamated”), has moved to dismiss the entire action of the plaintiffs, upon the grounds that the claims of SSJ Development of Sheepshead Bay I, LLC, SSJ Development of Mill Basin I, LLC, and SSJ Development of Gerritsen Beach I, LLC (collectively “SSJ Development”) in this new action are barred by the doctrines of res judicata and collateral estoppel. The plaintiffs oppose the motion to dismiss and maintain that neither the doctrine of collateral estoppel nor res judicata are applicable to bar this action or any of the

individual causes of action that are set forth in the summons and complaint of SSJ Development.

Background

On July 27, 2010, Amalgamated commenced three foreclosure actions against each of the SSJ Development plaintiffs. Issue was joined on September 13, 2010, when each of the SSJ Development plaintiffs served Amalgamated with answers that contained affirmative defenses. Thereafter, on January 10, 2011, each of the SSJ Development plaintiffs served amended answers, which included counterclaims<sup>1</sup>. SSJ Development alleged that Amalgamated had committed numerous breaches of both the loan agreement and documents related thereto, a breach of the covenant of good faith and fair dealing, in addition to unlawful breaches of their fiduciary duty, as well as fraud, fraudulent misrepresentation and unjust enrichment. SSJ Development alleged in all three amended answers that notices of default by Amalgamated were improper. SSJ Development also alleged, similar to what is alleged in this action, that Amalgamated breached the loan agreement by refusing to approve the PLA with the IUJAT affiliated unions on the basis that they were not affiliated with the AFL-CIO. In the period of time that ensued, following service of their answers, no discovery requests were demanded of Amalgamated by SSJ Development.

On January 27, 2011, Amalgamated moved for summary judgment and a dismissal of the affirmative defenses of SSJ Development. In opposition to the motions for summary judgment, which were filed in the three separate foreclosure actions, it is alleged by Amalgamated that each of the SSJ Development plaintiffs raised the same arguments that have been raised here. These arguments include an allegation that the failure of the plaintiffs to make payments under the loan agreements was excused due to the unfair conduct engaged in by Amalgamated due to the fact that Amalgamated did not approve either of the two contractors that SSJ Development and its affiliates proposed for the development of the subject mortgaged premises.

On August 3, 2011, the Hon. Justice Hinds-Radix, in a well-reasoned written decision,

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<sup>1</sup>It appears that these amended answers were served beyond the time that the defendants were permitted to amend their answer as of right and without having made a motion to the Court for leave to serve a late answer or to compel acceptance of the amended pleadings. These amended answers were subsequently rejected by counsel for Amalgamated.

awarded summary judgment to Amalgamated and dismissed the affirmative defenses and counterclaims of SSJ Development. The Court determined that Amalgamated established its prima facie entitlement to summary judgment by submitting proof of the notes and other loan agreements, the mortgages, the guarantees and the defaults in payment. In opposition to the summary judgment motion, SSJ Development maintained that they were not in default in making the payments required by the terms of the notes, mortgages and loan agreements. The Court held that the defenses of SSJ Development were contractually barred by the Waiver of Offsets/Defenses/Counterclaims provision contained in the loan agreements, and thus, was an invalid defense to their non-payment. The Court concluded that summary judgment was appropriate because SSJ Development failed to submit facts supporting its assertion that Amalgamated's denial of the non AFL-CIO contractors was unreasonable, or that the denial had any actual impact on the construction schedule. Additionally, the Court determined that SSJ Development failed to demonstrate factual issues with respect to the other alleged defenses to foreclosure, including breach of fiduciary duty, estoppel, fraud, fraudulent misrepresentation, waiver and unjust enrichment.

Defendant's argument:

In moving to dismiss this case, defendant contends that the decision of Judge Hinds-Radix addressed all of the plaintiff's claims in this matter which were plead as affirmative defenses in the foreclosure proceeding, and that the doctrines of collateral estoppel and res judicata are applicable here which would warrant the granting of the relief sought herein.

The decision of Judge Hinds-Radix in determining the merits of the foreclosure proceeding, in which she ruled that SSJ Development cannot establish claims for breach of contract, fraud and breach of fiduciary duty, should not be deemed to be dicta. It is Amalgamated's contention that the courts of this state have held that it is not dicta just because something else was found in the end which disposed of the whole matter. The New York Court of Appeals held that "it cannot be said that a case is not authority on point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter"(see In Re Fay, 291 NY

198, 215 (1943)).

Justice Hinds-Radix, in issuing her decision, held that even if one ignored the express terms of the loan documents and decided the covenant of good faith and fair dealing could be interpreted as barring Amalgamated from unreasonably withholding its approval of non AFL-CIO general contractors, SSJ Development had not presented any evidence of facts beyond conclusory allegations to support the assertion that such unreasonable withholding actually occurred. The Court concluded that SSJ Development failed to submit competent evidentiary proof that Amalgamated acted unreasonably or with bad faith in rejecting the other union affiliation and SSJ development did not submit any admissible evidence relating to the bona fides of USWU and IUJAT and their alleged alternative union affiliations or their credentials, or ability to perform the work under the areas standards for wages and other terms of employment. It is further contended that Judge Hinds-Radix observed that the evidence presented as to the proposed unions suggested that the proposed trade contractors of SSJ may not have complied with the area standards for wages and fringe benefits.

The Court did address the assertion of SSJ Development that Amalgamated had assumed control over the selection of the contractor, thereby shifting the burden of SSJ Development's compliance with the loan agreements to itself. The Court wrote that even if the facts alleged by SSJ Development were true, such facts would have constituted an oral modification of the parties obligations under numerous sections of the loan agreements, an action that is impermissible under the loan documents themselves. Since the SSJ defendants presented no written agreement in which Amalgamated assumed responsibility for finding a contractor, the SSJ defendants failed to demonstrate that Amalgamated assumed any enforceable contractual obligations with respect to finding a contractor. For the same reasons, Justice Hinds-Radix opined, SSJ Development could not demonstrate that a factual issue existed with respect to its other defenses, which included breach of fiduciary duty, estoppel, fraud, fraudulent misrepresentation, waiver and unjust enrichment.

Justice Hinds-Radix also concluded that the SSJ defendants could not state a breach of a fiduciary duty claim because no fiduciary duty arises out of a debtor/creditor relationship.

It is defendant's contention that SSJ Development's entire complaint, which consists of

breach of contract, fraud, breach of fiduciary duty and unjust enrichment claims are barred by res judicata and collateral estoppel as a matter of law because it has already been adjudicated and determined that SSJ Development cannot prove any of these claims against Amalgamated.

As a general rule, the res judicata doctrine requires a final judgment on its merits. It is well settled that an award of summary judgment results in a final judgment on the merits for purposes of res judicata (see Collins v. Bertram Yacht Corp., 42 NYS2d 1033 (1977)). The final judgment awarded in the foreclosure action is a final judgment on the merits. The Court's determination that SSJ Development's claims and defenses are without merit is final as the time to appeal has now passed. Further, a motion granting summary judgment precludes a second action on the same transaction, if the evidence and the issues are the same. The judgment is final not only as to every essential matter which was received to sustain or defeat the claim or demand, but as to any other admissible and essential matter which might have been offered for that purpose (see Eidelberg v. Zellermayer, 5 AD2d 658, 663, 174 NYS2d 300 (1<sup>st</sup> Dept. 1958), aff'd 6 NY2d 815, 188 NYS2d 204 (1999)).

New York Courts have adopted the transaction approach in determining whether res judicata applies, whereby "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred" O'Brien v. City of Syracuse, 54 NY2d 353, 357, 445 NYS2d 687 (1981)). Claims arising out of the same transaction are barred even if the claims are based upon different theories or if seeking a different remedy. "When alternative theories are available to recover what is essentially the same relief for harm arising out of the same or related facts such as would constitute a single "factual grouping". . . , the circumstances that the theories involve materially different elements of proof will not justify presenting the claim by two different actions" O'Brien v. City of Syracuse, 54 NY2d at 357 .

Defendant maintains that it is indisputable that the claims of SSJ Development against Amalgamated arise out of the same transaction litigated in the foreclosure actions, involving the loan agreements. The four causes of action against Amalgamated, breach of contract, fraud, breach of fiduciary duty and unjust enrichment were asserted as affirmative defenses and counterclaims in the three foreclosure actions. Mr. Bojnowski, a principal of the SSJ Development, concedes in his affirmation, that these allegations were previously before the Court.

He further admits that this case involves the same parties, facts and same questions of law as in the foreclosure actions.

The doctrine of res judicata not only bars the issues that were actually litigated in the foreclosure actions, but also any issues arising out of the same transaction that could have been litigated (see Dae Yang v. Korea First Bank, 247 AD2d 237, 237-238 (1<sup>st</sup> Dept. 1998)). In Dae Yang, the Court affirmed the dismissal of a complaint for fraud and malfeasance in the administration of a mortgage as barred by res judicata where plaintiff could have raised the claims in the complaint as a defense in an earlier action, the foreclosure proceeding. Thus, it is defendant's argument, that even if the claims asserted in this action were not asserted as defenses or counterclaims in the foreclosure actions, SSJ Development would still be barred from bringing this action which involves the same transaction, parties, claims and issues. It would not matter how the claims were labeled, (counterclaims or defenses), the outcome would still be the same.

In Saud v. Bank of New York, 929 F2d 916, 917 (2<sup>nd</sup> Cir. 1991), the Court held that where fraud was raised as an affirmative defense in the initial foreclosure action, a subsequent action asserting fraud was precluded under the doctrine of res judicata.

Res judicata applies to bar future actions between the same parties on any claims previously adjudicated, including permissive counterclaims (see Parker v. Blauvelt, 93 NY2d 343, 690 NYS2d 478 (1999)).

In addressing the doctrine of collateral estoppel, it is defendant's assertion that collateral estoppel applies to bar SSJ Development from relitigating its breach of contract, fraud, breach of fiduciary duty and unjust enrichment claims (see Ryan v. New York Tel. Co., 62 NYS2d 494 (1984)). Collateral estoppel, or issue preclusion, precludes a party from revisiting an issue that has already been raised and decided in a prior litigation (see Parker v. Blauvelt Volunteer Fire Co., 93 NY2d 343, 349 (1999)). In order to invoke the doctrine of collateral estoppel, the issue which was necessarily decided in the prior action must be decisive in the present action, and there must have been a full and fair opportunity to contest the decision which is now said to be controlling (see Buechel v. Bain, 97 NY2d 295, 303-304 (2001)).

The burden is on the party seeking to invoke the doctrine of collateral estoppel to show that the issue on which collateral estoppel is sought was decided in the prior action. However, if

the party against whom the doctrine is invoked claims that he or she did not have a full and fair opportunity to address an issue in the earlier action, the burden of that showing is on that party (see Schwartz v. Public Administrator, 24 NY2d 675 (1969)). The Court of Appeals has held that factors such as fairness to the parties, conservation of resources of the court and the litigant, and societal interests in having consistent and accurate results are factors to consider on a case by case basis (see Buechel v. Bain, 97 NY2d at 304).

The issues raised in this new action, whether Amalgamated breached the loan agreements, breached a fiduciary duty, committed fraud and/or was unjustly enriched, were resolved in the foreclosure actions and SSJ Development had a full and fair opportunity to litigate them. The relitigation of these issues would result in Amalgamated having to incur unnecessary fees in defense of these claims and would needlessly waste judicial time and resources.

The issues which form the basis for SSJ Development's breach of contract claim, that Amalgamated violated an oral promise to accept any bona fide contractors as well as the fact that Amalgamated failed to select a contractor for SSJ Development's construction projects have already been addressed and disposed of in the prior foreclosure actions. The Court found that there was nothing improper or unlawful in the refusal by Amalgamated to consent to the union purportedly suggested by SSJ Development, as Amalgamated could refuse this consent for any reason or no reason at all. It was further held that SSJ Development failed to demonstrate that Amalgamated assumed any enforceable contractual obligations with respect to finding a contractor because there was no written agreement in which Amalgamated assumed responsibility for finding a contractor and the agreements and mortgages contain provisions barring oral modifications.

As to the breach of a fiduciary duty claim, the Court ruled in the foreclosure action that a necessary element of the fiduciary duty claim could not be met. The Court held that SSJ Development cannot state a breach of a fiduciary duty claim because no fiduciary duty arises out of a debtor/creditor relationship. Estoppel applies to bar SSJ Development from relitigating whether Amalgamated has a fiduciary duty to SSJ Development, which is required in order to prove a breach of a fiduciary duty (see Ryan v. New York Tel., Co, 62 NYS2d 494 (1984)).

As to the fraud claim, it is defendant's contention that the Court has ruled that a key

element to asserting a fraud claim, reasonable reliance, cannot be satisfied. Justice Hinds-Radix determined that SSJ Development cannot be found to have reasonably or justifiably relied upon Amalgamated's representations that it had assumed control over the selection of the contractor, given SSJ Development's role as the developer of the projects and the unambiguous contractual provisions placing the responsibility of completing the projects on SSJ Development, imposing no obligations on Amalgamated with respect to the properties, barring SSJ Development from relying on Amalgamated, and barring oral modifications of the contract. Since no new facts were presented and the Court, in its order, has already adjudicated and decided that a necessary element to the fraud claim cannot be met, collateral estoppel would apply to bar the fraud claim in this action.

As to the unjust enrichment claim, since the issues which form the basis for SSJ Development's unjust enrichment claim are barred by collateral estoppel, it would effectively preclude the unjust enrichment claim.

As to the argument of SSJ Development that collateral estoppel does not apply since the issue of counterclaims was never addressed by Justice Hinds-Radix in the Decision and Order, Amalgamated responds that the court did treat SSJ Development's claims as counterclaims and not as defenses to the summary judgment motion because the Court did not simply consider whether the defenses created an issue of fact sufficient to bar a finding of summary judgment, but rather, considered whether breach of contract, fraud and breach of fiduciary duty had been established.

In addressing SSJ Development's argument that collateral estoppel does not apply to legal issues, and thus, collateral estoppel does not apply in the matter because the Court only determined legal issues in the foreclosure action, it is defendant's contention that it is well established New York Law that collateral estoppel applies to both legal and factual issues (see David D. Siegel, *New York Practice* 803 (5th ed. 2011)).

SSJ Development had a full and fair opportunity to litigate its defenses and counterclaims in the foreclosure action, which is the same as the claims alleged here. Amalgamated maintains that SSJ Development chose not to make discovery demands. SSJ Development had a full and fair opportunity to appeal the judgment, but instead chose not to do so. In fact, following the

issuance of the decision, there was no activity on the part of SSJ Development for nearly two years, specifically, there was no motion to re-argue or the filing of a Notice to Appeal of the summary judgment determination. Additionally, following the appointment of a referee (William Mackey) to compute and the service of the report of amount due, SSJ Development did not submit any opposition thereto. After the issuance of a final report of amount due, Amalgamated submitted a motion for a judgment of foreclosure, which was granted, unopposed, by the Court on May 7, 2013.

It is well-settled that a party has had a full and fair opportunity to litigate the issues where a party has the opportunity to oppose a motion for summary judgment and thereby raise any related issues or theories, even if the party fails to do so (see Winzelberg v. 1319 50<sup>th</sup> Realty Corp., 39 Misc.3d 1220(A), 972 NYS2d 147 (Sup. Ct. Kings Co. 2013)).

*Plaintiff's contention:*

Plaintiffs contends that they initiated this lawsuit based on certain counterclaims which arose out of the actions and inactions of the defendant that were taken during the relationship between the parties. It is plaintiffs' contention that plaintiffs' default in payment to the defendant pertained to assurances that defendant made that as long as plaintiffs presented a bona fide union to handle the construction, defendant would approve the contractor and fund the construction. The two bona fide unions that were presented to defendant were summarily rejected, resulting in defendant refusing to fund the construction. It resulted in the plaintiffs being unable to complete their projects which prevented them from paying their loan obligations.

Plaintiffs maintain that the decision of Judge Hinds-Radix never discussed or dealt with the issues of counterclaims, but dealt solely with the issue of plaintiffs' defenses. In fact, since defendant rejected plaintiffs' attempts to serve an amended answer with the counterclaims, the counterclaims were never included in the case. It is plaintiffs' contention that the decision and order of Judge Hinds-Radix never discussed or adjudicated the issue of the counterclaims, but only discussed the defenses as defenses. Due to the fact that the issue of counterclaims was never dealt with, but rather the only issue was whether defendant could foreclose, collateral estoppel is inapplicable.

Plaintiffs further contend that the initial determination of Judge Hinds-Radix was that plaintiffs' defenses were barred by the contractual Waiver of Offsets/Defenses/Counterclaims provision. As such, any discussion about hypotheticals beyond that point was unnecessary for the decision, and therefore dicta, or at best an alternate holding, neither of which would carry preclusive res judicata or collateral estoppel effect.

Plaintiffs contend that res judicata does not apply for two reasons. First, since these claims were permissive counterclaims in the foreclosure action and res judicata does not bar them from being brought in a second subsequent action, even if raised as an affirmative defense in the first litigation. Plaintiffs contend that res judicata does not apply to permissive counterclaims. "New York's permissive counterclaim rule allows counterclaims to be raised through separate litigation even if interposed as a defense in prior litigation, as long as a party defendant does not remain silent in one action, then bring a second suit on the basis of a pre-existing claim for relief that would impair the rights or interests established in the first action" (see Sweet Constructors, LLC v. Wallkill Medical Dev., 106 AD3d 810 (2<sup>nd</sup> Dept. 2013)). New York's permissive counterclaim rule allows counterclaims to be raised through separate litigation even if interposed as a defense in a prior litigation (see Classic Automobiles v. Oxford Res., Corp., 204 AD2d 209, 612 NYS2d 32 (1<sup>st</sup> Dept. 1994)). The only time that res judicata will bar a second action on a counterclaim, is where a different judgment in the second action would "impair the rights or interests established in the first action" (see Sweet Constructors, LLC v. Wallkill Medical Dev., 106 AD3d at 811).

It is plaintiffs' contention that the second reason that res judicata does not apply is that this is an action for damages resulting from the actions and inactions of defendant in their dealings with the plaintiffs. This lawsuit does not affect the rights or interests of SSJ Development from the foreclosure action and this case is separate and apart and unrelated to that case.

If there had been factual determinations made by the Court, plaintiffs did not have a full and fair opportunity in that forum, and thus there is no preclusive collateral estoppel effect.

SSJ Development further contends that the dismissal of the defenses based on a

contractual waiver of defenses is not “on the merits”. SSJ Development further argues that despite the Court finding that even if the waiver provision was inapplicable to their defenses, Amalgamated still had not demonstrated that the motion should be denied. Plaintiffs maintain that the subsequent discussion by the Court was unnecessary to its holding and pure dicta.

As to the issue of the applicability of the doctrine of collateral estoppel, SSJ Development maintains that collateral estoppel has even less applicability than res judicata, as collateral estoppel requires that the issue has been necessarily decided. SSJ Development once again maintains that the issue of counterclaims was never addressed by Judge Hinds-Radix. When it comes to collateral estoppel, as a fundamental requirement, “preclusive effect is limited to only those issues that were actually litigated, squarely addressed and specifically decided” (see Church v. New York State Thruway Auth., 16 AD3d 808, 810, 791 NYS2d 676 (3<sup>rd</sup> Dept. 2005) quoting Ross v. Medical Liab. Mut. Ins. Co., 75 NY2d 825, 826 (1990)). Additionally, SSJ Development’s argument that the party seeking to apply collateral estoppel bears the burden of showing that the identical issue was necessarily decided in the prior action.

SSJ Development further maintains that there were no factual issues actually litigated, addressed and specifically decided which would warrant the application of collateral estoppel. Further, SSJ Development was not given a full and fair opportunity to plead their case. Where a party against whom collateral estoppel is asserted claims that they were not afforded a full and fair opportunity in a prior proceeding to contest the decision now said to be controlling, they must be allowed to do so. SSJ Development points to the factors to be considered by the Court which include the nature of the forum and importance of the claim in the prior litigation, the incentive and initiative to litigate, competence of counsel, availability of new evidence, the differences in the applicable law and the foreseeability of future litigation (see Ryan v. New York Telephone Co., 62 NY2d 494, 505 (1984)). SSJ Development’s current counsel bemoans the fact that the forum of the prior case was in the foreclosure part and not in the commercial part of the courts; discovery is rarely done in foreclosures and the competence and expertise of SSJ’s Development former counsel should be called into question.

Discussion

This Court has carefully considered the merits of defendants' motion to dismiss and the arguments presented by counsel for plaintiff SSJ Development, that the causes of action filed in this new action were not previously addressed by the Court in awarding summary judgment to Amalgamated Bank.

This Court in reviewing the prior decision and order dated August 3, 2011, finds that the Court did specifically address those claims that have been included in this proceeding (breach of fiduciary duty, estoppel, fraud, bad faith and unfair dealing, fraudulent misrepresentation, waiver and unjust enrichment) and that they were not merely dicta and superfluous to a finding that an award of summary judgment was appropriate as to the cause of action seeking a judgment of foreclosure.

Judge Hinds-Radix in her decision determined that contrary to the contention of SSJ Development, there was nothing "improper" or "unlawful" in Amalgamated's refusing to consent to the union purportedly suggested by SSJ Development's contractor, as Amalgamated could refuse this consent for any reason, or no reason at all.

As to the cause of action, pertaining to the alleged lack of good faith and fair dealing on the part of Amalgamated, the Court wrote that even if the implied covenant of good faith and fair dealing would require that the union affiliation clause be read to preclude Amalgamated from unreasonably withholding its approval of another union, SSJ Development' evidence is conclusory, and fails to demonstrate the existence of a factual issue. The Court further wrote that SSJ Development had not submitted admissible evidence relating to the bona fides of the USWU and IUJAT, their alleged alternative union affiliations. In addition, the Court found that SSJ Development did not address whether the jurisdiction of these unions covering the type of work to be performed on the project or the trade contractors employing them, would observe the area standards for wages and other terms of employment as required by the Building Loan Agreement. The Court found that SSJ Development failed to demonstrate, with competent evidentiary proof, that Amalgamated acted unreasonably or with bad faith in rejecting the other union affiliation.

The Court further wrote that SSJ Development's conclusory allegations also failed to

demonstrate factual issues with respect to the other alleged defenses to foreclosure, including breach of fiduciary duty, estoppel, fraud, fraudulent misrepresentation, waiver and unjust enrichment. The Court determined that SSJ Development could not state a breach of a fiduciary duty claim because no fiduciary duty claim arises out of a debtor/creditor relationship (see Debroshi v. Bank of Am., N.A., 65 AD3d 882,885 (2009), lv. dismissed 14 NY3d 785 (2010); Banque Nationale de Paris v. 1567 Broadway Ownership Assoc., 214 AD2d 359, 360 (1995)). No claim for unjust enrichment is stated because the parties relationship is governed by valid, enforceable contracts (see Stephen B. Gleich & Assoc. v. Gritsispis, 87 AD3d 216, 927 NYS2d 349 (2<sup>nd</sup> Dept. 2011) and, in any event, SSJ Development failed to demonstrate a factual issue as to whether Amalgamated acted unjustly (see Manderin Trading Ltd. v. Wildenstein, 16 NY3d 173, 182-183 (2011)).

This Court finds that the determination made by Judge Hinds-Radix has res judicata effect upon the claims in this proceeding. A judgment in one action is conclusive in a later one when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first (see Schuylkill Fuel Corp. v. Nieberg Realty Corp., 250 NY 304 (1929); Reilly v. Reid, 45 NY 2d 24, 407 NYS2d 645 (1978)). The former judgment is final, not only as to every essential matter which was received to sustain or defeat the claim or demand, but to any other admissible and essential matter which might have been offered for that purpose (see Pakas v Hollingshead, 184 NY 211, 217 (1906)). Res judicata is certainly applicable because a different judgment in the second action would impair the rights or interests established in the first action (see Sweet Constructors, LLC v. Wallkill Medical Dev., 106 AD3d at 811).

Plaintiff's argument that since Amalgamated's attorney had rejected SSJ Development's answer with counterclaims, the counterclaims were never in the case. However, that is not an accurate assessment as to what transpired before Judge Hinds-Radix, as that Court specifically determined that SSJ Development could not demonstrate that a factual issue existed with respect to its other defenses, which included breach of fiduciary duty, estoppel, fraud, fraudulent misrepresentation, good faith and fair dealing, waiver and unjust enrichment. Additionally, contrary to the argument espoused by SSJ Development's counsel, the decision went well beyond

the issue of whether Amalgamated could foreclose.

In applying the doctrine of collateral estoppel, this Court finds that plaintiff should not be permitted in this action to raise any of the issues they unsuccessfully litigated in the prior proceeding. Collateral estoppel, or issue preclusion, precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party where the party had a full and fair opportunity to litigate the issue in the earlier action (see Parker v. Blauvelt, 93 NY2d at 349; Ryan v. New York Telephone Co., 62 NY2d at 500). This Court is of the opinion that all of the elements necessary for the application of collateral estoppel have been met, and as such, the August 3, 2011 decision would preclude the plaintiff from raising the claims it has set forth in the complaint in this action.

If the Court were not to dismiss this action, Amalgamated would be prejudiced as they have relied upon settled law that “ a judgment of foreclosure and sale entered against a defendant is final as to all questions at issue between the parties, and concludes all matters of defense which were or might have been litigated in the foreclosure action” (see Long Is. Sav. Bank v. Mihalios, 269 AD2d 502, 503, 704 NYS2d 483 (2<sup>nd</sup> Dept. 2000); Countrywide Home Loans Inc. v. Taylor, 39 Misc.3d 597, 598-599, 961 NYS2d 909 (Sup. Ct. Suffolk County 2013). Doctrines such as law of the case, res judicata and collateral estoppel serve to protect the sanctity and finality of judicial orders and judgments ( see Countrywide Home Loans v. Taylor, 39 Misc. 3d at 503.)

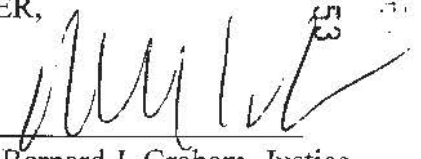
Conclusion:

The motion by defendant, Amalgamated Bank to dismiss the within action of SSJ Development, is granted in its entirety.

This shall constitute the decision and order of the Court.

Dated: February 10, 2014  
Brooklyn, New York

ENTER,

  
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Hon. Bernard J. Graham, Justice  
Supreme Court, Kings County

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KINGS COUNTY CLERK  
