SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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VIOLA CAROL,

Index No. 156730/13

Plaintiff,

-against-

DECISION/ORDER

MADISON PLAZA APARTMENT CORP.,

Defendant.

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HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	2
Replying Affidavits.....	3,4
Exhibits.....	5

In a decision dated April 1, 2014, this court granted plaintiff's motion for an Order pursuant to CPLR § 3215 for a default judgment against defendant Madison Plaza Apartment Corp. ("Madison") on the ground that said defendant failed to answer or otherwise appear in the action and its time to do so had expired. Madison now moves for an Order (1) vacating the default judgment; (2) dismissing the complaint; and (3) awarding costs, fees and sanctions. Plaintiff cross-moves for an Order (1) severing defendant's motion to vacate the default judgment from its motion to dismiss the complaint; (2) denying defendant's motion to dismiss the complaint as moot in light of plaintiff's amendment of her complaint "as of right"; or, in the alternative (3) scheduling defendant's motion to dismiss the complaint for oral argument and taking judicial notice of the plaintiff's amendment of her complaint "as of right." For the reasons

set forth below, defendant's motion is granted in part and denied in part and plaintiff's cross-motion is denied.

The relevant facts are as follows. Plaintiff is the owner of the cooperative shares allocated to Unit 9B in the building located at 1825 Madison Avenue, New York, New York (the "Unit"). In July 2013, plaintiff commenced the instant action against Madison seeking a declaratory judgment that the shares in the cooperative apartment building that are allocated to the Unit be re-allocated proportionate to the identical units in the building as per the Offering Plan and its subsequent Amendments so that plaintiff's monthly maintenance may be lowered proportionate to the identical units in the building. In January 2014, plaintiff moved for a default judgment against defendant based on defendant's failure to answer or appear in the action and in April 2014, this court granted plaintiff's motion.

As an initial matter, that portion of plaintiff's cross-motion for an Order severing defendant's motion to vacate the default judgment entered in this action from defendant's motion to dismiss the complaint is denied as there is no basis for such relief.

The court next turns to that portion of defendant's motion for an Order vacating the default judgment entered against it. Pursuant to CPLR § 317,

> A person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense.

Here, defendant's motion to vacate the default judgment is granted as it has established that it did not personally receive notice of the summons in time to defend the action and that it has a

meritorious defense to the action. As an initial matter, defendant has provided the affidavit of David DeGidio, Vice President of defendant's property manager, who has affirmed that defendant never received the summons and complaint at its address because the Secretary of State sent the pleadings instead to 2226 First Avenue, New York, New York, the address of the Sponsor of the building and that the Sponsor is no longer involved with the management of the building. Additionally, defendant has established that it has a meritorious defense to the action on the grounds of *res judicata* based on a previous action filed by plaintiff which was dismissed on the merits as against the defendant. Thus, defendant's motion for an Order vacating the default entered against it is granted.

Plaintiff's assertion that the default judgment should not be vacated on the ground that defendant has failed to provide a reasonable excuse for its default as required by CPLR § 5015 is without merit. Although CPLR § 5015 requires the defaulting party to provide a reasonable excuse for its default, CPLR § 317 allows for the vacatur of a default judgment without providing a reasonable excuse.

The court next turns to that portion of defendant's motion for an Order pursuant to CPLR § 3211 dismissing the complaint based on *res judicata*. "Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter." *Matter of Hunter*, 4 N.Y.3d 260, 269 (2005). "The rationale underlying this principle 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." *Id.*

Here, defendant's motion to dismiss the complaint based on *res judicata* is granted based on a previous action brought by the plaintiff for the same relief which was dismissed against the

defendant on the merits. The procedural history of that action is as follows. In 2010, plaintiff commenced an action against The Board of Directors of Madison Plaza Apartment Corp. (the "Board") and Madison Plaza Associates LLC, the building's sponsor (the "Sponsor"), alleging claims for, *inter alia*, breach of contract, reformation and seeking a declaratory judgment against the Board identical to the one sought in the instant action (the "2010 Action"). The Board and the Sponsor separately moved to dismiss the complaint and plaintiff cross-moved to amend the complaint. Justice Milton Tingling denied both the Board and the Sponsor's motions to dismiss and granted plaintiff's cross-motion to amend and the Board and the Sponsor appealed. In *Carol v. Madison Plaza Associates, LLC*, 95 A.D.3d 735 (1st Dept 2012), the First Department reversed Justice Tingling's decision, denied plaintiff's motion to amend the complaint and dismissed the action against both defendants. Specifically, the First Department held that plaintiff's breach of contract and reformation claims against the Sponsor should have been dismissed on the ground that they were time-barred. *See id.* Additionally, the First Department held that plaintiff's "claims for declaratory and injunctive relief...against the Board...are moot" because such claims were "dependent upon a finding against [the Sponsor]" and all claims against the Sponsor should have been dismissed. *See id.* Plaintiff then moved for reargument and/or leave to appeal to the Court of Appeals, which was denied. Plaintiff also sought leave to appeal directly from the Court of Appeals, which was denied. The court also notes that in 2013, plaintiff commenced another action against the Sponsor seeking the same relief she sought in the 2010 Action (the "Second Sponsor Action"). However, in a decision dated August 6, 2013, Justice Donna M. Mills dismissed the Second Sponsor Action based on collateral estoppel and *res judicata*.

In the instant action, this court now finds that the complaint must be dismissed based on

res judicata. The 2010 Action raised the same facts and claims as the instant action, specifically seeking the same declaratory judgment as plaintiff is seeking in the instant action, involved the same plaintiff and defendant as the instant action and was fully and completely litigated and dismissed on the merits. Thus, plaintiff may not now be allowed to litigate its declaratory judgment action a second time.

To the extent plaintiff asserts that the instant action is not barred by *res judicata* on the ground that Madison is not the same party as the Board, such assertion is without merit. As an initial matter, it is clear to this court that both entities are the same for purposes of this litigation but were sued under different names by the plaintiff. However, to the extent that they may be viewed as separate entities, *res judicata* still applies to bar the instant action. *Res judicata* "dictates 'as to the parties in a litigation *and those in privity with them*, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action.'" *Syncora Guar. Inc. v. J.P. Morgan Sec. LLC*, 110 A.D.3d 87, 93 (1st Dept 2013)(*citing UBS Sec. LLC v. Highland Capital Mgt., L.P.*, 86 A.D.3d 469, 473-74 (1st Dept 2011))(emphasis added). It is well-settled that "the concept of privity 'requires a flexible analysis of the facts and circumstances of the actual relationship between the party and nonparty in the prior litigation.'" *Syncora,* 110 A.D.3d at 93(*citing Evergreen Bank v. Dashnaw*, 246 A.D.2d 814, 816 (3d Dept 1998)). "[P]rivity is 'an amorphous concept not easy of application'...and 'includes...those whose interests are represented by a party to the action....'" *Buechel v. Bain*, 97 N.Y.2d 295, 304 (2001)(*citing Matter of Juan C. v. Cortines*, 89 N.Y.2d 659, 667 (1997)). Indeed, when "addressing privity, courts must carefully analyze whether the party sought to be bound and the party against whom the litigated issue was

decided have a relationship that would justify preclusion, and whether preclusion, with its severe consequences, would be fair under the particular circumstances." *Buechel*, 97 N.Y.2d at 304-05.

Here, the doctrine of *res judicata* applies to bar the instant action against Madison as it is clear that Madison and the Board are in privity with each other. Indeed, both entities are essentially one and the same for purposes of this lawsuit and the Board thoroughly represented the interests of Madison in the 2010 Action. Indeed, the Board's role is to represent the interests of Madison and plaintiff has failed to point to any difference between the two for purposes of the relief she seeks.

That portion of plaintiff's cross-motion requesting that this court deny defendant's motion to dismiss as moot in light of plaintiff's alleged amendment "as of right" of her complaint, or in the alternative, scheduling defendant's motion to dismiss for oral argument to permit the court to take judicial notice of plaintiff's amendment of her complaint "as of right" is denied as plaintiff has not properly amended her complaint as of right. Pursuant to CPLR § 3025(a), "[a] party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it."

Here, plaintiff has not properly amended her complaint "as of right." As an initial matter, it is undisputed that more than twenty days have passed since the initial service of plaintiff's complaint. Additionally, it is undisputed that defendant has not answered the complaint so that there has not been "service of a pleading responding to [the complaint]." Further, the period for responding to the complaint expired when this court granted plaintiff a default judgment on April 1, 2014. As plaintiff has not properly amended her complaint "as of right" and as she has not

sought leave to amend her complaint, her cross-motion is denied.

Finally, that portion of defendant's motion for an Order pursuant to 22 NYCRR 130-1.1 awarding defendant costs, fees and sanctions against plaintiff is denied as there is no basis for such relief.

Accordingly, it is hereby

ORDERED that the default judgment granted in this action on April 1, 2014 is vacated; and it is further

ORDERED that the complaint in this action is dismissed on the basis of *res judicata*; and it is further

ORDERED that defendant's request for sanctions against plaintiff is denied; and it is further

ORDERED that plaintiff's cross-motion is denied in its entirety.

This constitutes the decision and order of the court.

Dated: 11/18/14

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.