Original

SHORT FORM ORDER **INDEX NUMBER: 65172-2014**

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

PUBLISH

***Present*: HON. EMILY PINES**
J. S. C.

Original Motion Date: 09-11-2014
Motion Submit Date: 03-24-2015
Motion Sequence No.: 001 MOTDCASEDISP

[X] Final
[ ] Non Final

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STEWART M. KALTER,

Plaintiff,

- against -

RIVERSOURCE LIFE INS. CO. OF NEW YORK,

Defendant.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendant, dated August 18, 2014, and supporting papers (including Memorandum of Law); (2) Affirmation in Opposition by the plaintiff, dated (incorrectly) September 29, 2013; and (3) Reply Memorandum of Law by the defendant, dated October 13, 2014; it is

ORDERED that the motion by the defendant for an order dismissing the complaint pursuant to CPLR 3211 (a) (5), and awarding the defendant attorney's fees and costs associated with preparing its motion, is granted to the extent of dismissing the complaint as barred by the

doctrine of res judicata, and is otherwise denied.

This action, commenced on July 7, 2014, is to recover benefits allegedly due under a disability insurance policy ("the policy") issued by the defendant, Riversource Life Ins. Co. of New York, to the plaintiff, Stewart M. Kalter, on or about April 15, 2001. It appears from the complaint that the plaintiff was injured in an automobile accident on June 28, 2012; that the defendant initially approved the plaintiff's claim for benefits based on the injuries sustained in that accident; but that it subsequently denied the plaintiff's claim for continuing benefits as of April 12, 2013, noting that the plaintiff's "regular occupation" at the time of the accident was "being unemployed" and that there was "no evidence of a condition that would preclude [the plaintiff] from performing the material and substantial duties of an unemployed person."

On June 4, 2013, the plaintiff commenced an action entitled "Stewart M. Kalter, plaintiff, against Ameriprise Financial, Inc. and Riversource Life Ins. Co. of New York, defendants" (Sup Ct, NY County, Index No. 13-155145; "the prior action") which, like this action, was to recover benefits allegedly due under the policy. The plaintiff alleged three causes of action in the complaint: the first, for breach of contract, the second, for violation of General Business Law § 349, and the third, for judgment declaring that the defendants are obligated to continue paying disability benefits to the plaintiff for as long he remains "disabled" under the terms of the policy. On or about August 16, 2013, the defendants moved, pre-answer, to dismiss the complaint. As to Riversource, the defendants argued that dismissal was warranted under CPLR 3211 (a) (1) because Riversource had properly determined that the plaintiff was no longer disabled under the

terms of the policy. Although the parties subsequently agreed to adjourn the motion and to allow the plaintiff additional time to submit papers in opposition, the plaintiff failed to submit any opposition. By order dated October 29, 2013, the court (Hagler, J.) granted the motion "without opposition to the extent of dismissing the complaint." Judgment was entered on January 8, 2014. This action followed. It does not appear that the plaintiff has pursued any further relief in the prior action.

In this action, as in the prior action, the plaintiff pleads three causes of action–breach of contract, violation of General Business Law § 349, and declaratory judgment. The complaint does not differ in any material respect from the complaint in the prior action, except that it names one fewer defendant and includes separate numbered paragraphs corresponding to each of the months subsequent to April 2013 in which the defendant is alleged to have wrongfully withheld the payment of monthly benefits.

The defendant now moves in this action, *inter alia*, to dismiss the complaint on the ground that this action may not be maintained because of collateral estoppel or res judicata.

Pursuant to the doctrine of res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action (*e.g.* ***Parker v Blauvelt Volunteer Fire Co.***, 93 NY2d 343, 690 NYS2d 478 [1999]). As a general rule, "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, 357, 445 NYS2d 687, 688 [1981]). Res judicata applies not only to issues which were or could have been raised in the prior action, but also to an order or judgment taken by default which has not been vacated (***Lazides v P & G Enters.***, 58 AD3d 607, 871 NYS2d 357, *lv denied* 13 NY3d 703, 886 NYS2d 365 [2009]; ***Matter of Eagle Ins. Co. v Facey***, 272 AD2d 399, 707 NYS2d 238 [2000]).

Here, since the plaintiff could have challenged the determination of coverage in the context of the prior action, this action is barred by the doctrine of res judicata (*see* ***James v Arango***, 116 AD3d 1008, 983 NYS2d 902 [2014]; ***Smith v Palmieri***, 103 AD2d 739, 477 NYS2d 206 [1984]). By granting the motion to dismiss in the prior action, Justice Hagler determined, however implicitly, that the defendants had met their burden of submitting documentary evidence sufficient to resolve all factual issues as a matter of law and to conclusively resolve the plaintiff's claims (*see* ***Tooma v Grossbarth***, 121 AD3d 1093, 995 NYS2d 593 [2014]); that the plaintiff chose not to oppose that motion is not a reason to allow him to circumvent the judgment and relitigate his claims. While the plaintiff correctly contends that dismissal resulting from failure to appear on a scheduled court date, failure to comply with a disclosure order, failure to prosecute, or failure to state a cause of action does not involve a determination on the merits and is not generally to be given preclusive effect, it suffices to note that this was not such a dismissal. The court also notes that a judgment, as here, is entitled to res judicata effect even in the absence of a specification that the dismissal is "with prejudice" or "on the merits" (***Barrett v Kasco Constr. Co.***, 56 NY2d 830, 452 NYS2d 566 [1982]; ***Strange v***

Montefiore Hosp. & Med. Ctr., 91 AD2d 507, 456 NYS2d 371 [1982], *affd* 59 NY2d 737, 463 NYS2d 429 [1983]).

Accordingly, the motion is granted to the extent of dismissing the complaint as barred by the doctrine of res judicata. As to the remaining branch of the motion, the court finds no frivolous conduct on the part of the plaintiff or his attorney so as to warrant an award of fees or costs.

Dated: May 19, 2015
Riverhead, New York

EMILY PINES
J. S. C.