

188-90 Eighth Ave. Hous. Dev. Fund Corp. v Filemyr
2016 NY Slip Op 30612(U)
April 11, 2016
Supreme Court, New York County
Docket Number: 150436/15
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK.
COUNTY OF NEW YORK: Part 55

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188-90 EIGHTH AVENUE HOUSING DEVELOPMENT
FUND CORP.,

Index No. 150436/15

Plaintiff,

-against-

DECISION/ORDER

EDWARD JOSEPH FILEMYR IV, ESQ.,

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
Affidavits in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff 188-90 Eighth Avenue Housing Development Fund Corp. commenced the instant action seeking to recover damages arising out of defendant Edward Joseph Filemyr IV, Esq.'s alleged legal malpractice. Defendant now moves for an Order pursuant to CPLR §§ 3211(a)(1), (5) and (7) dismissing the complaint and for sanctions pursuant to 22 NYCRR § 130-1.1(a). Defendant's motion is resolved as set forth below.

The relevant facts according to the complaint and procedural history of this case are as follows. In or around 2008, plaintiff, a low-income housing corporation, hired defendant to represent it in a holdover and non-payment proceeding against plaintiff's tenant, Havana Chelsea, Inc. ("Havana"), a restaurant corporation, and Havana's principal, Thomas Vicari, in order to collect unpaid rent, taxes and certain other charges. The proceeding culminated in a

trial in or around February 2011 during which plaintiff was represented by defendant. However, before the trial concluded, the parties entered into a settlement agreement, after prolonged settlement discussions, pursuant to which the tenant agreed to pay the sum of \$130,000, to cure any Department of Building or other code violations and the terms of the lease were modified. Plaintiff alleges that at the trial, prior to settlement, defendant failed to have certain necessary and required documents ready for submission and that as a result, *inter alia*, “[p]laintiff was effectively compelled to settle the landlord-tenant action by stipulation of settlement” and “was prejudiced and entered into a stipulation which was economically disadvantageous to [p]laintiff” because “it permitted the tenant to avoid paying correct and owed rents, escalations and other required payments to landlord, it permitted a long-term payback of the rent arrearage that tenant did have to pay, allowed for a smaller than reasonable payback amount per month, and lowered the monthly rent from its previous lawful amount.”

In or around 2013, plaintiff commenced an action against defendant asserting claims for legal malpractice, breach of fiduciary duty and breach of contract based on the above allegations (the “2013 Complaint”). Thereafter, defendant moved to dismiss the 2013 Complaint pursuant to CPLR §§ 3211(a)(1) and (7). In a decision dated May 13, 2014, Justice Donna Mills of the Supreme Court, New York County, granted defendant’s motion and dismissed the 2013 Complaint in its entirety. Specifically, Justice Mills dismissed plaintiff’s legal malpractice claim explaining as follows:

[Defendant’s] documentary evidence, which comprised the transcript of the court proceedings setting forth the admission of the subject lease document at trial. The defendant submitted the deed and lease into evidence as per the introduction of a notice to admit. The plaintiff’s allegation that it was compelled to settle the litigation due to the defendant’s ineptitude is not supported by the transcript.

Additionally, the Court finds that the remaining allegations in the complaint are insufficient to show that the plaintiff stated a cause of action to recover damages for legal malpractice. The plaintiff's allegations amount to nothing more than hindsight criticism of counsel's reasonable course of action. The fact that the plaintiff subsequently is unhappy with the settlement obtained does not rise to the level of legal malpractice.

188-90 Eighth Housing Development Fund Corp. v. Edward Joseph Filemyr IV, Esq., Index No. 155664/13 (Sup. Ct. N.Y. County, J. Mills, May 13, 2014)(internal citations omitted).

Additionally, Justice Mills dismissed plaintiff's claim for breach of fiduciary duty on the ground that the complaint failed to sufficiently state said claim and dismissed plaintiff's claim for breach of contract on the ground that it was duplicative of the legal malpractice claim.

Thereafter, plaintiff moved to reargue Justice Mills' decision, which was denied. Plaintiff then filed a Notice of Appeal on May 15, 2014. Instead of perfecting the appeal, on or about May 13, 2015, plaintiff commenced the instant action asserting claims for legal malpractice, breach of contract and breach of fiduciary duty based on virtually identical allegations to those contained in the 2013 Complaint with the exception of a few paragraphs in which plaintiff provides additional facts about the documents defendant allegedly failed to submit into evidence during the February 2011 trial (the "2015 Complaint").

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some

[*4]
recognizable form any cause of action known to our law.” *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

In the instant action, this court finds that the amended complaint must be dismissed on the basis of *res judicata*. The doctrine of *res judicata*, or claim preclusion, “provides that 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.” *Singleton Mgt. v. Compere*, 243 A.D.2d 213, 215 (1st Dept 1998). This doctrine is applied “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.” *Id.* Further, even if certain claims were not litigated in the prior action, claims brought later will be barred by *res judicata* if they “could have been asserted in the first action and [plaintiff] had a full and fair opportunity to litigate those claims in that action.” *Santiago v. New York Board of Health*, 8 A.D.3d 179, 181 (1st Dept 2004). It is well-settled that the dismissal of a petition or claim for failure to state a cause of action, unappealed from, constitutes a final judgment on the merits for *res judicata* purposes as to the sufficiency of the claim asserted therein. *See Beth Rifka, Inc. v. State*, 114 A.D.2d 560 (2d Dept 1985).

This court finds that the 2015 Complaint must be dismissed based on the doctrine of *res judicata* on the ground that Justice Mills already dismissed the 2013 Complaint, on the merits, which included the identical claims of legal malpractice, breach of contract and breach of fiduciary and were based on allegations identical to those contained in the 2015 Complaint. Paragraphs 1-14 and the paragraphs containing the causes of action in both the 2013 Complaint and the 2015 Complaint are identical and appear to be copied and pasted from the 2013

