

<b>Astoria Landing, Inc. v New York City Council</b>
2017 NY Slip Op 30786(U)
March 1, 2017
Supreme Court, Queens County
Docket Number: 703002/16
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 6

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ASTORIA LANDING, INC.,

Index No. 703002/16

Plaintiff,

Motion  
Date October 5, 2016

-against-

Motion  
Cal. No. 9

THE NEW YORK CITY COUNCIL and THE  
NEW YORK CITY BOARD OF STANDARDS  
AND APPEALS,

Motion  
Seq. No. 1

Defendants.  
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FILED  
MAR 24 2017  
COUNTY CLERK  
QUEENS COUNTY

Papers  
Numbered

Notice of Motion.....	EF 11
Affidavits-Exhibits.....	EF 12
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Aff. In Opposition.....	EF 2
Memorandum.....	EF 3
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Upon the foregoing papers it is ordered that this motion by defendants, The New York City Council ("City Council") and the New York City Board of Standards and Appeals ("BSA") for an order dismissing the Complaint of plaintiff Astoria Landing, Inc. ("Astoria") pursuant to CPLR 3211(a)(5) and (7) on the grounds that plaintiff's claims are time-barred, barred under the doctrines of res judicata and collateral estoppel, and fail to state a cause of action against defendants is hereby decided as follows:

The underlying action arises out of defendant BSA's Resolution dated December 4, 2012, which Resolution denied plaintiff, Astoria's request to legalize an advertising sign located at the premises of 24-59 32<sup>nd</sup> Street, Queens, New York, which premises were owned by plaintiff. Pursuant to New York

City Administrative Code §25-207(a) and CPLR 217, plaintiff was required to file any Article 78 challenges to the December 4, 2012 Resolution within thirty (30) days after the filing of the Resolution in the BSA's office. On or about March 25, 2013, plaintiff commenced an Article 78 proceeding seeking an Order and Judgment reversing the BSA's Resolution dated December 4, 2012. Since plaintiff did not file its Article 78 proceeding challenging the December 4, 2012 Resolution until March, 2013, the Court in a Decision/Order of Justice Jeffrey D. Lebowitz dated August 28, 2013, dismissed plaintiff's claims as time-barred (see, *Astoria Landing v. BSA*, Index No. 6217/2013 (Sup Ct, NY County 2012)). Said decision was thereafter affirmed in a Decision/Order dated October 28, 2015 by the Appellate Division, Second Department in *Matter of Astoria Landing v. BSA*, 132 AD3d 986 [2d Dept 2015]). Therein, the Court held, inter alia, that the BSA's Resolution was "filed with the office of the New York City Board of Standards and Appeals on December 5, 2012." Via the within action, plaintiff now seeks an order annulling the December 4, 2012 Resolution.

In the instant action, plaintiff asserts a federal and state procedural due process violation. Plaintiff now alleges that the "BSA never served any copy of its Decision on the Plaintiff" and that the "BSA could not produce any affidavit of Service or receipt showing that they ever sent their Decision dated December 4, 2012 to the Plaintiff." Plaintiff asserts that it did not timely file its Article 78 proceeding because of the defendant BSA's failure to mail a copy of the December 4, 2012 Resolution to plaintiff. Plaintiff alleges that the BSA did not mail a copy of the December 4, 2012 Resolution to plaintiff and as a result, plaintiff missed the thirty (30) day statute of limitations period for filing its Article 78 proceeding to challenge the December 4, 2012 Resolution.

Res judicata, or claim preclusion, bars relitigation of claims "where a judgment on the merits exists from a prior action between the same parties involving the same subject matter" (*Matter of Hunter*, 4 NY3d 260, 269[2005]). "[O]nce 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'" (*Xiao Yang Chen v. Fischer*, 6 NY3d 94 [2005], quoting *O'Brien v. City of Syracuse*, 54 NY2d 353, 357 [1981]). Res judicata precludes re-litigation of all claims which were raised, or could have been raised, in the prior action (see, *Xiao Yang Chen v. Fischer*, 6 NY3d at 100; *Cypress Hills Cemetery v. City of New York*, 67 AD3d 853, 854 [2009], leave to appeal denied 14 NY3d 712 [2010]). The primary purposes of res judicata are grounded

in public policy concerns and are intended to ensure finality, prevent vexatious litigation and promote judicial economy (see, *Matter of Hodes v. Axelrod*, 70 NY2d 364, 372 [1987]; *Matter of Reilly v. Reid*, 45 NY2d 24, 28 [1978]). However, unfairness may result if the doctrine is applied too harshly; thus "[I]n properly seeking to deny a litigant two 'days in court', courts must be careful not to deprive [the litigant] of one" (*Matter of Reilly v. Reid*, 45 NY2d at 28). It is not always clear whether particular claims are part of the same transaction for res judicata purposes. A "pragmatic" test has been applied to make this determination--analyzing "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage" (Restatement [Second] of Judgments § 24 [2]; see, *Xiao Yang Chen v. Fischer*, 6 NY3d at 100-101; *Smith v. Russell Sage Coll.*, 54 NY2d 185, 192-193 [1981]; *Matter of Reilly v. Reid*, 45 NY2d at 29).

Collateral estoppel, or issue preclusion, "precludes a party from relitigating in a subsequent action . . . an issue clearly raised in a prior action . . . and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v. New York Telephone Co.*, 62 NY2d 494 [1984]; see also, *Buechel v. Bain*, 97 NY2d 295, 303 [2001], cert denied 535 US 1096 [2002]; *Kedik v. Kedik*, 86 AD3d 766, 767 [2011]; *Matter of Frontier Ins. Co.*, 73 AD3d 36, 41 [2010]). Moreover, as a general rule, future litigation between parties arising from the same transaction is precluded following a valid final judgment in previous actions, even if a new action is based upon different theories or seeks a different remedy (see, *Matter of Josey v. Goord*, 9 NY3d 386, 389-390 [2007]; *Parker v. Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). Collateral estoppel requires that the party to be precluded from relitigating the issue "had a full and fair opportunity to contest the prior issue" (*Ryan, supra*, 62 NY2d at 501).

Applying these principles, the Court finds that plaintiff is attempting to relitigate issues that have previously been decided. The 2013 Article 78 proceeding and the instant action arose out of the exact same transaction, the rendering and filing of the December 4, 2012 Resolution. Both the 2013 Article 78 proceeding and the instant action arose out of the same set of facts and circumstances, ie. the rendering and filing of the BSA's December 4, 2012 Resolution. As plaintiff's Article 78 challenge to the December 4, 2012 Resolution was brought to a final conclusion, all other claims arising out of the December 4,

2012 Resolution are now barred. The plaintiff's current challenges to the mailing and filing of the December 4, 2012 Resolution were already raised in the context of plaintiff's 2013 Article 78 proceeding. As plaintiff's Article 78 challenge to the December 4, 2012 Resolution was previously dismissed, plaintiff's instant claims regarding the December 4, 2012 Resolution are now barred. Furthermore, the Court notes that it is well-established law that a dismissal on statute of limitations grounds is considered a dismissal on the merits for *res judicata* purposes and will serve to bar a second action (*Sosa v. JP Morgan Chase Bank*, 33 AD3d 609 [2d Dept 2006]).

Accordingly, the plaintiff's Complaint is dismissed on the grounds that it is barred by the doctrines of *res judicata* and collateral estoppel.

As the Complaint has been dismissed on the grounds that it is barred by the doctrines of *res judicata* and collateral, the Court need not reach a determination regarding the remaining grounds for dismissal.

This constitutes the decision and order of the Court.

Dated: March 1, 2017



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**Howard G. Lane, J.S.C.**

FILED  
MAR 24 2017  
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QUEENS COUNTY