

White v Cubesmart L.P.

2018 NY Slip Op 34488(U)

August 9, 2018

Supreme Court, Bronx County

Docket Number: Index No. 20167/2018E

Judge: Donald Miles

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 8**

Index No.: **20167/2018E**
Motion Calendar No. 17
Motion Date: 7/02/18



VICTORIA WHITE,

Plaintiffs,

-against-

DECISION/ ORDER
Present:
Hon. Donald Miles
Justice Supreme Court

CUBESMART L.P., CUBESMART ASSET
MANAGEMENT, LLC, CUBESMART MANAGEMENT,
LLC, SEDGEWICK CLAIMS MANAGEMENT, INC.,
MARVIN CHIN, SIOBHAN McGEE and BRIAN WADIAK,

Defendants,

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to Dismiss.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support, and Exhibits (A through C) in Support.....	1
Affirmation in Opposition.....	2
Reply Affirmation.....	3

Upon the foregoing papers, and following oral argument, the Decision/Order on this Motion is as follows:

Defendants' pre-answer motion to dismiss plaintiff's complaint, pursuant to CPLR §§3211(a)(5) & (7), is granted.

Plaintiff commenced this personal injury action on or about January 5, 2018, by filing a summons and complaint in which plaintiff alleges that on January 9, 2015, while at the CUBESMART located at 1376 Cromwell Avenue, Bronx, New York, upon exiting her vehicle, she slipped on ice in the parking lot and suffered injuries as a result. Defendants, in lieu of an answer, have moved to dismiss plaintiff's complaint on grounds of res judicata and failure to state a cause of action.

Plaintiff previously sued for the same relief as requested in the instant matter, also in Bronx County, under Index Number 3000041/2016. The summons and complaint was filed on or about January 6, 2016 and an answer was interposed on behalf of the defendant CUBESMART

on or about January 19, 2016. Plaintiff subsequently served a Verified Bill of Particulars dated June 13, 2016, alleging that the slip and fall took place on January 9, 2015 at the aforesaid premises. Plaintiff alleged that the defendant was negligent in allowing snow and ice to accumulate on the sidewalk and parking lot, causing a dangerous and unsafe condition. The defendant brought multiple motions to dismiss plaintiff's claim, pursuant to CPLR § 3126, for failure to provide discovery. In an Order dated September 13, 2017, the Honorable Julia Rodriguez, granted defendant's motion, without any opposition from plaintiff's counsel, and dismissed plaintiff's action. Thereafter, plaintiff made a motion to vacate default, restore, renew and reargue the defendant's motion, which was subsequently withdrawn by movant in a letter dated January 8, 2018.

Defendants contend that plaintiff should not be permitted to recommence the action that was already dismissed due to plaintiff's own failure to provide court ordered discovery. The second action contains two causes of action, the first of which is identical to the claims in the first dismissed action. The second cause of action seeks summary judgment and punitive damages for alleged spoliation of evidence. Plaintiff claims that the surveillance video which shows plaintiff driving in the parking lot and crashing into doors and metal barriers, but does not show the plaintiff slipping and falling on ice, is not complete since it does not show the slip and fall. Plaintiff sues the third-party administrator handling claims for CUBESMART'S insurer, SEDGWICK, and one of its employees. Defendants contend that there is no viable cause of action for spoliation of evidence and as such same should be dismissed for failure to state a cause of action.

Plaintiff opposes the motion and contends that the dismissal of the initial action was not on the merits and occurred as a result of losing contact with the plaintiff. As to the second cause of action, plaintiff argues that the motion must be denied as moot as plaintiff amended her complaint and no longer makes a claim for spoliation as a separate cause of action.

"On a motion to dismiss, pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction" (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; citing CPLR § 3026). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any

cognizable legal theory” (id. at 87-88; citing *Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]).

Dismissal may be granted under CPLR 3211 (a) (5) where the “cause of action may not be maintained because ...[of] *res judicata* ...” Under 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” (*Landau, P.C. v Larossa, Mitchell & Ross*, 11 NY3d 8, 12 [2008]; quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343 [1999]). Thus, “[a]s 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” (id. at 12-13). “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” (*Chen v Fischer*, 6 NY3d 94, 100 [2005]; citing *Matter of Modes v Axelrod*, 70 NY2d 364, 372 [1987]; *Matter of Reilly v Reid*, 45 NY2d 24, 28 [1978]). Here, defendants argue that *res judicata* requires dismissal of the claims against them.

A necessary element of *res judicata* is that the prior judgment be a “final determination on the merits” (*Landua P.C.*, 11 NY3d at 13). CPLR § 5013 does not require that the prior judgment contain the words “on the merits” in order to be given *res judicata* effect; “it suffices that it appears from the judgment that the dismissal was on the merits” (*Strange v Montefiore Hosp. & Med. Center*, 59 NY2d 737, 739 [1983]). Generally, a dismissal based on pleading deficiencies is not considered “on the merits” for purposes of *res judicata* (*Komolov v Segal*, __AD3d__, 2012 NY Slip Op 04690 [1st Dept 2012]; citing *Avins v Federation Employment and Guidance Svc, Inc.*, 61 AD3d 505, 506 [1st Dept 2009]). Thus, where the prior action is dismissed with “no indication that the dismissal was without prejudice or not on the merits,” it will not have a *res judicata* effect on a subsequently filed, timely action (id.). However, “[e]ven where an order does not explicitly so state, a dismissal is one on the merits for *res judicata* purposes if the order addressed the merits and was not issued purely on account of technical pleading deficiencies” (*Plaza PH2001 LLC v Plaza Res. Owner LP*, __AD3d__, 2012 NY Slip Op 05119 [1st Dept 2012] [rejecting plaintiff’s argument that *res judicata* did not apply because “with prejudice” was deleted from the form of the dismissal order]).

The violation of a conditional preclusion order or conditional order of dismissal is viewed as a determination on the merits (see *Santoli v 475 Ninth Ave. Assocs., LLC*, 38 AD3d 411, 417 [1st Dept 2007]; citing *Tejeda v 750 Gerard Props. Corp.*, 272 AD2d 124, 125 [1st Dept 2000]; see also *Cruz v Kamlis Dresses & Sportswear Co.*, 238 AD2d 103, 104 [1st Dept 1997]; citing *Strange*, 59 NY2d at 739 [judgment based on violation of preclusion order is an award on the merits and a party's "failure to prosecute an appeal bars further litigation of the same facts raised in the prior proceeding"]; see also *Yates v Roco Co.*, 48 AD3d 800, 800 [2d Dept 2008] [although dismissal in prior action based upon a preclusion order because of plaintiff's repeated failures to appear for an independent medical examination did not specifically recite that such dismissal was "on the merits," it nonetheless should have been accorded *res judicata* effect in order to prevent plaintiff from "circumventing the preclusion decree"]; citing *Kalinka v St. Francis Hosp.*, 34 AD3d 742, 744 [2d Dept 2006] [dismissal upon the grant of an order of preclusion after determining party had willfully and contumaciously failed to comply with disclosure given *res judicata* effect in subsequent action]). However, a dismissal based solely on a party's nonappearance, in absence of a conditional order of dismissal or a finding of willful and contumacious conduct, may not be treated as a dismissal "on the merits" (see *Hernandez v St. Barnabas Hosp.*, 89 AD3d 457, 458 [1st Dept 2011] [prior action dismissed for plaintiff's counsel's failure to attend a calendar call has no *res judicata* effect]; see also *Brooks v Haidt*, 59 AD3d 233, 234 [1st Dept 2009] [plaintiff not barred by *res judicata* where plaintiff's prior action involving same claims was dismissed under 22 NYCRR 202.27 (b) in an order that was without prejudice to a motion to have the matter restored and did not otherwise indicate intention to dismiss on the merits]; citing *Espinoza v Concordia Intl. Forwarding Corp.*, 32 AD3d 326, 328 [1st Dept 2006] [second action not barred by *res judicata* where prior action was dismissed based upon plaintiff's failure to appear at a scheduled conference, even though plaintiff did not attempt to vacate her default in prior action]).

This court finds that the prior action under Index Number 3000041/2016 and the instant matter are identical claims. The dismissal of the case, pursuant to CPLR § 3126, is a sanction precluding all evidence and dismissing the case based upon the Court's determination that plaintiff's lack of cooperation with disclosure was wilful, deliberate and contumacious. Not only

did plaintiff fail to oppose the motion, but its subsequent motion to vacate, renew and reargue was withdrawn. Plaintiff cannot now bring another action arising out of the same alleged slip and fall from January 9, 2015 at 1376 Cromwell Avenue, Bronx, New York. Plaintiff is precluded by *res judicata* and the action must be dismissed.

Plaintiff purports to amend the complaint by adding parties, without the leave of the court and despite the fact that more than twenty days have passed since service of the complaint. Furthermore, plaintiff has not attached a proposed Amended Complaint. In any event, plaintiff has not opposed the branch of the motion, pursuant to CPLR § 3211(a)(7) seeking dismissal of the second cause of action for failure to state a cause of action.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss plaintiff's complaint is granted in its entirety and it is further

ORDERED that the Clerk shall enter judgment in favor of the defendants dismissing the plaintiff's complaint.

This constitutes the Decision and Order of the Court.

AUG 09 2018

DATE



HON. DONALD MILES, J.S.C.