

<b>PS Lofts LLC v Diawara</b>
2020 NY Slip Op 30443(U)
February 5, 2020
Supreme Court, New York County
Docket Number: 158047/15
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42

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PS LOFTS LLC and 327 ST. NICHOLAS LLC

Plaintiffs

Index No. 158047/15

-v-

DECISION AND ORDER

MANTHIA DIAWARA

Defendant.

MOT SEQ 002

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action arising from a landlord/tenant dispute, the plaintiffs, PS 157 Lofts LLC and 327 St. Nicholas LLC, owners as tenants in common, seek \$34,145.16 in use and occupancy from defendant Manthia Diawara, a former tenant, who defaulted in a prior summary holdover proceeding in the Housing Part of the Civil Court. The defendant's daughter Mansita Diawara (Mansita), who resided in the subject apartment, paid use and occupancy on his behalf during the Housing Court proceeding, pursuant to an agreement with the plaintiffs. The plaintiffs now seek to recover from the defendant, who defaulted in the summary proceeding, the difference between the sum paid by Mansita and the market value of the apartment, and attorney's fees . The defendant answered the complaint and counterclaimed for \$10,000, as overpayment of use and occupancy by his daughter.

The defendant moves for (1) summary judgment dismissing the complaint on the grounds that the plaintiffs waived their right to additional use and occupancy, their claims are barred under the principle of *res judicata*, and the claim for attorney's fees is barred by the prohibition against claim splitting, and (2) summary judgment on his counterclaim.

The plaintiffs cross-move for summary judgment on their first cause of action seeking \$34,145.16 in unpaid use and occupancy and second cause of action seeking attorney's fees incurred in the holdover proceeding, and to dismiss the defendant's counterclaim.

The defendant's motion is granted to the extent that the complaint is dismissed. The plaintiffs' cross-motion is granted to the extent that the defendant's counterclaim is dismissed.

## II. BACKGROUND

The defendant entered a lease for apartment 2H of the residential property located at 327 St. Nicholas Avenue in Manhattan, with the plaintiffs' predecessor in interest on October 4, 2001. The lease was continuously renewed by the defendant through September 30, 2010, when the tenancy expired. On May 28, 2010 the plaintiffs informed the defendant that the lease would not be renewed on the ground that the defendant was not using the premises, a rent stabilized apartment, as his

primary residence, in violation of the lease terms and the Rent Stabilization Law. The defendant did not return possession of the premises at the end of the term.

In October 2010, the plaintiff commenced a summary holdover proceeding in the Civil Court of the City of New York, Housing Part against him and "Daman Diawara" and John and Jane Does as undertenants. The defendant failed to appear in that proceeding. However, Mansita, who was not a named party, appeared and argued that she had the right to succeed the tenancy of the defendant. She did not dispute that her father did not use the apartment as his primary residence but argued that the apartment was her primary residence and he was merely the guarantor. She made this argument notwithstanding the fact that the lease and renewals name only her father, defendant Manthia Diawara, as the tenant, and there is no signed guaranty. She did not establish succession rights and ultimately vacated the apartment.

On November 16, 2010, prior to vacating the apartment, Mansita, entered into a stipulation with the plaintiffs whereby she would pay use and occupancy of \$1,184.10 from December 10, 2010 onward *pendente lite*. The November 16, 2010 order does not mention whether the payments were made with or without prejudice to seek further use and occupancy or any other relief. On January 25, 2011, the parties entered a second stipulation, so ordered by the Housing Court, resolving ongoing discovery issues. That order

states that the ongoing payments were to continue without prejudice. According to another order, the matter was to be marked off the calendar pending resolution of the discovery issues. The matter was not restored for 1 ½ years. In the meantime, Mansita made all use and occupancy payments through April 2014. By an order dated November 20, 2013, the Civil Court granted summary judgment to the plaintiff, awarding it a judgment of possession, and a warrant of eviction which was eventually executed on or about April 2, 2014. During that litigation, the Housing Court had precluded the defendant from offering evidence at trial or raising defenses in that proceeding due to his failure to comply with discovery.

Apparently for the purposes of determining an undertaking for an anticipated stay and appeal by Mansita pursuant to CPLR 5519(a)(6), the Housing Court, by order dated March 11, 2014, determined that the fair market use and occupancy of the apartment was \$2,000.00. No money judgment was awarded. The appeal was not pursued.

The plaintiff did not seek further relief against defendant Manthia Diawara in the Civil Court. However, the following year, in August 2015, it commenced the instant action against him in the Supreme Court.

The complaint includes two causes of action, the first does not specify any particular claim or theory of recovery but seeks

\$34,145.16, relying on the 2014 Housing Court determination that there was a monthly deficiency of \$812.98, for a total of \$34,145.16, and the second seeks contractual attorney's fees as per the defendant's lease terms. In his answer, the defendant asserted various affirmative defenses, including that the "the debt has been satisfied" and, claiming that Mansita overpaid use and occupancy, he counterclaimed for \$10,000, as reimbursement for the overpayment.

This motion and cross-motion ensued.

### III. DISCUSSION

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra, at 324; Zuckerman, supra, at 562. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in

its favor as a matter of law (see Alvarez v. Prospect Hospital, supra; Zuckerman v City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1<sup>st</sup> Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2<sup>nd</sup> Dept. 2013).

#### A. The Defendants' Motion

The defendant moves for summary judgment dismissing the complaint on several grounds - the plaintiffs waived their right to additional use and occupancy, their claims are barred under the principle of *res judicata*, and the claim for attorney's fees is barred by the prohibition against claim splitting. He also moves for summary judgment in his favor on his counterclaim seeking \$10,000.

The court finds merit in all three grounds raised by the defendant in support of dismissal of the complaint.

The first ground asserted by the defendant, waiver, requires a showing of "a voluntary and intentional relinquishment of a known and otherwise enforceable right." Golfo v Kycia Assocs., Inc. 45 AD3d 531, 533 (2<sup>nd</sup> Dept. 2007); see Nassau Trust Co. v Montrose Concrete Prod. Corp., 56 NY2d 175 (1982). A waiver "may arise by either an express agreement or by such conduct or a

failure to act as to evince an intent not to claim the purported advantage." Golfo v Kycia Assocs., Inc., supra at 533.

The doctrine of res judicata prohibits a party from relitigating any claim which could have been, or which should have been litigated in a prior proceeding (see Buechel v Bain, 275 AD2d 65 [1<sup>st</sup> Dept. 2001]; Klein v Barrios-Paoli, 237 AD2d 165 [1<sup>st</sup> Dept. 1997]), and 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 (see O'Brien v. City of Syracuse, 54 NY2d 353 [1981]). That is, "[u]nder res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action." Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343, 347 (1999); see Matter of Reilly v Reid, 45 NY2d 24 (1978). As a general rule, New York applies a "transactional approach" to analyzing the doctrine of res judicata, so that "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 Syracuse, supra at 357 (1981).

A related principle is the prohibition against claim splitting, which is raised by the defendant in regard to the plaintiff's claim for attorneys fees. In 930 Fifth Corp. v King,

42 NY2d 886 (1977), the Court of Appeals, in affirming the dismissal of a landlord's action for attorney's fees brought after a summary proceeding in which they recovered possession, explained that "[f]ailure to make a claim for attorney's fees in the initial summary proceeding results in the splitting of a cause of action which is prohibited [citation omitted]." Id. at 887. Thus, "the prohibition against the splitting of causes of action requires that such fees be sought within the action in which they were incurred, and not a subsequent action." Wavertree Corp. v 136 Waverly Assocs., 258 AD2d 392 (2<sup>nd</sup> Dept. 1999). See also O'Connell v 1205-15 First Avenue Assocs., LLC, 28 AD3d 233 (1<sup>st</sup> Dept. 2006).

On his motion, the defendant submits no affidavit of his own. He relies on an affirmation of his counsel and an affidavit of his daughter, who is not a party to this action and was not a named respondent in the Housing Court proceeding. The court further notes that the plaintiff does not submit the pleadings, as required by CPLR 3212(b). However, since the pleadings were electronically filed and available to the court, the omission from the summary judgment motion papers is not a fatal defect. See Washington Realty Owners, LLC v 260 Washington Street, LLC, 105 AD3d 675 (1<sup>st</sup> Dept. 2013); Serowik v Leardon Boiler Works, Inc., 129 AD3d 471 (1<sup>st</sup> Dept. 2015); Studio A Showroom, LLC v Yoon, 99 AD3d 632 (1<sup>st</sup> Dept. 2012). Moreover, the grounds he

asserts are legal grounds, as argued in his Memorandum of Law.

Here, the defendant correctly observes that, while the plaintiffs did not expressly waive their right to seek additional amounts from the defaulting defendant, they did not expressly reserve that right in its stipulations with Mansita, a non-party who the plaintiffs argued was not a legal tenant. Further, the stipulations with Mansita and ongoing acceptance of use and occupancy from her was conduct that evinced an intent not to claim any further monies from the tenant of record. Moreover, the plaintiff waited more than a year after the warrant of eviction was executed against Mansita before attempting to recover additional use and occupancy and attorneys fees from her father, the former legal tenant.

In response to the defendant's arguments regarding waiver and res judicata, the plaintiffs contend that they are entitled to bring this action against the defendant for unpaid use and occupancy and attorney's fees because they would have been unable to enter a money judgment in the underlying Housing Court action. However, the plaintiffs have not established that they could not have raised the current claims in that proceeding. They instead chose to enter into an agreement with the defendant's daughter and not pursue their claims against the defendant in the Civil Court. Indeed, in arguing that it made effective service on the defendant for purposes of an eviction but not for a money

judgment per RPAPL 735(1) and CPLR 308(4), the plaintiff acknowledges that it made a considered decision to not pursue its claim against the defendant.

The initial stipulation they entered with Mansita on November 16, 2010, does not say that acceptance of the use and occupancy was without prejudice, whether to seek any further use and occupancy, attorneys fees or anything else. To the extent that a plenary action may be appropriate for recovering unpaid use and occupancy and attorney's fees after the conclusion of a summary proceeding, such actions are generally preserved by stipulation of the parties (see 237 Realty LLC v. Crawford, 57 Misc.3d 158[A], [App. Term., 1st Dept. 2017]), or directed by the court following the severance of the issue (see 744 E. 215 LLC v. Simmonds, 65 Misc. 3d 1234[A] (Civ Ct NY County 2019)). Here, the plaintiffs have not shown any preservation of the claim by stipulation, or that the issues of unpaid use and occupancy and attorneys' fees were severed by the Housing Court.

Even after they obtained a judgment of possession, the plaintiffs waited more than a year before they commenced this action seeking additional use and occupancy and contractual attorneys fees. Thus, the plaintiffs waived their right to seek additional rent from the defendant.

The issues raised by the plaintiffs here, of unpaid or underpaid use and occupancy and attorney's fees, were or could

have been addressed in the underlying Housing Court proceeding, but were simply not pursued by the plaintiff and are now barred by the doctrine of res judicata. Although the plaintiffs maintain that the defendant waived res judicata as a defense in this action by not pleading it, a court may dismiss any action *sua sponte* on the grounds that it is barred by the doctrine of res judicata. See McLearn v Cowen & Co., 48 NY2d 696 (1979).

In support of his motion for summary judgment on his counterclaim, the defendant submits a copy of a tenant ledger which purports to show that as of February 7, 2014, his daughter paid all use and occupancy, and overpaid \$4,319.24. His motion papers do not explain or address the \$10,000 claimed. As noted previously, the defendant does not submit any affidavit of his own. Nor does Mansita explain the counterclaim amount in her affidavit. Rather, she further clouds the issue by stating, without supporting proof, that the defendant is now also seeking a return of a security deposit of \$1,171 paid in 2001, for a total counterclaim of \$5,490.41. Under these circumstances, the defendant's claim of waiver as against the plaintiff ought to apply to him in regard to his counterclaim, whether it be for \$5,490.41 or any other amount. In any event, the defendant has failed to meet his burden on this portion of the motion by submitting proof in admissible form sufficient to establish the

absence of any material, triable issues of fact. See CPLR 3212(b).

B. The Plaintiffs' Cross-Motion

For the same reasons the court is granting summary judgment in favor of the defendant on the complaint, it is denying the plaintiffs' cross-motion for a judgment in its favor on the complaint. For the same reasons the court denies the defendant's motion for summary judgment on his counterclaim, it grants the plaintiff's motion to the extent it seeks summary judgment dismissing the counterclaim.

IV. CONCLUSION

For the reasons set forth herein, the motion and cross-motion are each granted in part.

As held by the Court of Appeals and as apropos here, "[c]onsiderations of judicial economy as well as fairness to the parties mandate, at some point, an end to litigation." Reilly v Reid, 45 NY2d 24, 27 (1978).

Accordingly, and on the foregoing papers it is,

ORDERED that the defendant's motion for summary judgment is granted to the extent that the complaint is dismissed in its entirety, and the motion is otherwise denied; and it is further,

ORDERED that the plaintiffs' cross-motion is granted to the extent that the defendant's counterclaim is dismissed in its entirety, and the cross-motion is otherwise denied, and it is further,

ORDERED that the that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

**Dated: February 5, 2020**

  
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Nancy M. Bannon, J.S.C.

**HON. NANCY M. BANNON**