

Bakar v Islam

2020 NY Slip Op 31354(U)

April 24, 2020

Supreme Court, Kings County

Docket Number: 512346/2017

Judge: Lorna J. McAllister

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 10**

ASHIK BAKAR,

Plaintiff(s),

-against-

MAZHARUL ISLAM & HASNE ISLAM,

Defendant(s).

Index No.: 512346/2017
Mot. Seq. # 2

DECISION / ORDER

Present:
Hon. Lorna J. McAllister
A.J.S.C.

Recitation, as required by CPLR § 2219(a), of the papers considered on the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1-2</u>
Order to Show cause and Affidavits Annexed.....	<u> </u>
Answering Affidavits.....	<u> </u>
Replying Affidavits.....	<u> </u>
Exhibits.....	<u> </u>
Other: Memorandum of Law.....	<u>3</u>

Upon the foregoing cited papers, and after oral argument, the Decision/Order on this motion is as follows:

The defendant, Mazharul Islam (“Islam”) has moved to dismiss the plaintiff’s complaint with prejudice, pursuant to CPLR § 3211(a) (5), based upon the doctrine of collateral estoppel. The plaintiff Ashik Bakar (“Bakar”) has not opposed the relief sought by the defendant nor appeared in opposition thereto.

Background and contentions

This matter allegedly arose as a result of the tenancy of the plaintiff at the premises known as 91 Chester Avenue, Brooklyn, New York (“subject premises”). In the current complaint, the plaintiff alleges that the subject premises were infested by bedbugs.

The defendant asserts that the plaintiff commenced this case by the filing of a complaint on March 28, 2019 which action seeks the same relief as the matter that was previously brought on June 22, 2017 by the plaintiff and which prior action was dismissed by the Hon. Judge Wavny Toussaint of this Court on February 27, 2019 (see order annexed as Exhibit "B" to defendant's motion to dismiss). That prior complaint which was commenced in June 2017 also alleged in the plaintiff's cause of action that the premises were infested by bed bugs. The prior complaint was dismissed on default as plaintiff's counsel did not oppose the motion nor was there an appearance on behalf of the plaintiff to argue the motion.

Defendant maintains that they moved to dismiss the first complaint upon several grounds including the inadequacy of the pleadings (failure to state a cause of action) and for improper service of process. In addition, the plaintiff has failed to file an affidavit of service as to service of process with respect to either the first or the second complaint.

The defendant asserts that the second complaint is identical to the first complaint with two exceptions. These include that the plaintiff has changed the date of the tenancy in the subject premises in the second complaint by stating a date that is a few years earlier than what was included in the first complaint, and the spouse of the defendant is not named as a party in the second complaint. It is alleged that these changes did not correct the inadequacy of the causes of action pled by the plaintiff (failure to state a cause of action) nor correct the failure of the plaintiff to properly serve the defendant. The defendant asserts that service of the summons and complaint was improper as service was attempted to be made upon the defendant at the subject premises, but defendant maintains that he does not reside at that address, but rather is domiciled in New Jersey.

In addressing the application of the doctrine of collateral estoppel, defendant asserts that they have satisfied the two elements that must be established in order to invoke it. This includes (1) an identity of issues which were necessarily decided in the prior action that are decisive in the present action and (2) a full and fair opportunity by the party against whom collateral estoppel is being invoked to have contested the issue previously decided. The defendant contends that the plaintiff had a full and fair opportunity to participate and the fact that they refused to participate in the litigation proceedings or abandoned it would not preclude its application. A party (the plaintiff) should not be given an unfair advantage as a result of its own default. In addition, the issues are identical in the two cases.

Discussion

This Court in determining that the within complaint of the plaintiff should be dismissed has invoked the doctrine of collateral estoppel. Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity (see *Ryan v New York Tel. Co.*, 62 NY2d 494, 500, 478 NYS2d 823 [1984]). “The two requirements for its application are: first, the identical issue necessarily must have been decided in the prior action and be decisive in the present action, and second, the party to be precluded must have had a full and fair opportunity to contest the prior determination” (*Matter of Abady*, 22 AD3d 71, 81, 800 NYS2d 651 [1st Dept.2005]).

While “[a]n issue is not actually litigated if, for example, there has been a default” (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456-457, 492 NYS2d 584 [1985]), “collateral estoppel may be properly applied to default judgments where the party against whom preclusion

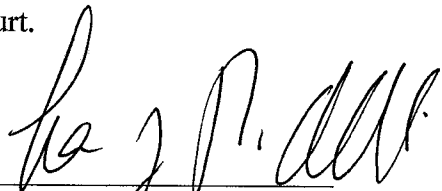
is sought appears in the prior action, yet willfully and deliberately refuses to participate in those litigation proceedings, or abandons them, despite a full and fair opportunity to do so” (*Matter of Abady*, 22 AD3d at 85; see *Brown v Suggs*, 39 AD3d 395, 834 NYS2d 526 [1st Dept. 2007]).

Conclusion

The within motion by defendant, Mazharul Islam to dismiss the complaint of the plaintiff, Ashik Bakar, is granted.

This constitutes the Decision and Order of the Court.

Dated: April 24, 2020



HON. Lorna J. McAllister
A.J.S.C.