

Ward v Klein

2020 NY Slip Op 32174(U)

May 19, 2020

Supreme Court, Queens County

Docket Number: 708837/19

Judge: Timothy J. Dufficy

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

FILED

**5/21/2020
1:41 PM**

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

**COUNTY CLERK
QUEENS COUNTY**

**Present: HON. TIMOTHY J. DUFFICY
Justice**

IAS PART 35

-----X
ELAINE WARD,

Plaintiff,

Index No. 708837/19

- against -

Motion Date: 12/3/19

**STUART A. KLEIN, ESQ. and LAW OFFICES
OF STUART A. KLEIN, ESQ., also known as,
“aka” KLEIN SLOWIK PLLC,**

Mot. Seq. : 1

Defendants.
-----X

The following papers were read on this motion by defendants Stuart A. Klein, Esq. and Law Offices of Stuart A. Klein, Esq., also known as, “aka” Klein Slowik PLLC (when collectively, “defendants”), for an order dismissing the amended complaint of plaintiff Elaine Ward (plaintiff), pursuant to CPLR 3211 (a) (5), on the grounds that the causes of action pled therein are barred, *inter alia*, by res judicata and their respective statutes of limitation, dismissing the amended complaint on the ground that it fails to state a cause of action, enjoining plaintiff from commencing any further litigation against defendants related to this matter without permission of the appropriate Administrative Judge and, pursuant to 22 NYCRR §130-1.1, awarding defendants costs and imposing financial sanctions upon plaintiff resulting from plaintiff’s frivolous conduct in bringing the within action; cross-motion by plaintiff for sanctions against defendants.

**PAPERS
NUMBERED**

Notice of Motion - Affidavits - Exhibits - Memorandum of Law	EF10 - EF33
Notice of CM - Affidavits - Exhibits	EF36
Ans. Affs. (opp. to CM/further support of motion)	EF37 - EF38
Reply Affs. - Exhibits (further support of CM)	EF39 - EF40

Upon the papers filed in support of the within motion and cross-motion, and the papers filed in opposition or relation thereto, the within motion and cross-motion are determined as follows:

Prior to reaching the merits of the motions now before this Court, it is necessary to set forth some background information. That which follows below was gleaned largely from defendants' papers, the plaintiff having not offered an alternative version of the underlying background.

Plaintiff retained defendant Law Offices of Stuart A. Klein, Esq. (Law Offices), on or about June 8, 2011, to provide her with legal representation in defending her against charges brought by the NYC Department of Buildings (DOB), on or about February 8, 2011, for allegedly violating the NYC Administrative Code by performing "cover work," loosely defined as "plumbing work" performed by an unlicensed plumber, under a work permit obtained by a licensed plumber, but who is not in the direct employ of the licensed plumber, at separate construction projects.

Subsequent to the DOB's filing of its petition against plaintiff, the plaintiff did obtain a Master Plumbers License from the DOB, on March 30, 2011.

Thereafter, DOB amended its petition, on or about June 10, 2011, charging the same violations as alleged in its initial petition, but specifically citing to § 26-142 of the 1968 Code as the violated provision related to the "cover work."

Law Offices represented the plaintiff before an Office of Administrative Trials and Hearings (OATH) Tribunal, which resulted in the withdrawal of two of the three charges alleged in the DOB's amended petition.

In the end, on or about September 1, 2011, OATH Administrative Law Judge Ingrid M. Addison (ALJ) issued a report and recommendation to revoke the plaintiff's NYC Master Plumbers License. By letter dated September 13, 2011, the DOB confirmed the ALJ's report and recommendation.

At the plaintiff's request, Law Offices did prepare papers to commence a proceeding, pursuant to CPLR 7803(4), to contest the OATH determination alleging, *inter alia*, that revocation of the plaintiff's license was excessive. Law Offices prepared the requested papers, including a record on appeal to the Appellate Division.

Plaintiff requested that she be furnished with copies of that which was prepared by Law Offices and, upon being provided with same, secured the services of new counsel, who filed and served the papers, changing only the name of counsel.

There being outstanding invoices not paid by the plaintiff or objected to, by verified complaint dated April 15, 2014, defendant Stuart A. Klein, Esq. commenced an action against the plaintiff in the Supreme Court, New York County (*Stuart A. Klein, Esq., v Elaine D.*

Ward [Index No. 651163/14]), seeking to recover the fees owed. This action was subsequently dismissed, on November 17, 2016, upon plaintiff's failure to appear and proceed (22 NYCRR §202.27 [b]).¹

In the interim, on January 1, 2015, Law Offices reconstituted as Klein Slowik PLLC, successor in interest to Law Offices.

On May 17, 2017, the plaintiff brought suit in the US District Court, Southern District of New York, against twenty-three (23) different defendants, including the City of New York, Mayor Bill de Blasio, the DOB, the Corporation Counsel, Stuart A. Klein, Esq., and The Law Offices of Stuart A. Klein, Esq. (*Elaine Ward, v City of New York, et al.* [17 CV 3710]).

The District Court (Castel, J.), by order dated June 13, 2017, dismissed the plaintiff's complaint as defective, but afforded the plaintiff leave to amend her complaint, which the plaintiff did, by filing an amended complaint, on August 11, 2017, seeking eighteen million dollars (\$18,000,000.00) in damages.

On September 15, 2017, plaintiff's amended complaint was dismissed by the District Court (Castel, J.), for failure to state a cause of action, the Court further finding that any appeal from the order would not be taken in good faith.

Nevertheless, the plaintiff did appeal to the Second Circuit (Docket Number: 17-2973), which, by summary order dated June 17, 2019, affirmed the judgment dismissing the plaintiff's case.

On or about September 14, 2018, while the plaintiff's federal court action was pending determination by the Second Circuit, the plaintiff filed her first action here in Supreme Court, Queens County (*Elaine Ward v Stuart A. Klein, Esq. and Law Offices of Stuart A. Klein* [Index No. 7097/18]). In her sixty allegation verified complaint, the plaintiff alleged five causes of action, to wit, breach of contract causing damage, attorney malpractice, fiduciary breaching duty, legal fraud, and malicious prosecution.

By pre-answer motion to dismiss, dated October 24, 2018, the defendants alleged that the plaintiff's causes of action were barred by their respective statutes of limitation, that the verified complaint failed to state a cause of action, and that the court lacked jurisdiction over the person of the defendants.

¹Order of the Supreme Court of the State of New York, New York County (Reed, J.), dated November 17, 2016.

By order (Butler, J.), dated February 26, 2019, the defendants' motion was granted in its entirety, the court finding that the service of the summons and complaint was not properly made, thus rendering jurisdiction over the defendants defective. In addition, the court found that the plaintiff's complaint failed to state a cause of action, even when affording the complaint a liberal construction, accepting the allegations in the complaint as true, and providing the plaintiff with every possible favorable inference. Lastly, the court found that each of the five causes of action pled were time-barred by their respective statutes of limitation.²

Three months later, on May 21, 2019, the plaintiff filed a second complaint, under the present Index Number, alleging the exact same five causes of action as initially brought under Index Number 7097/18. Notably, each of the sixty allegations contained therein exactly mirrors the wording in the complaint dismissed by the order of February 26, 2019.

On June 13, 2019, the plaintiff filed an amended complaint seeking to amend the caption to how it appears above, which resulted in sixty three allegations, and again pled the same five causes of action. Additionally, yet again, the amended complaint has the exact same wording for each cause of action allegation, only changing one phrase from "legitimate basis" to "probable cause," which is of no moment.

In light of the preceding, the defendants now move this Court, *inter alia*, for dismissal of plaintiff's amended complaint.

Pursuant to CPLR 3211 (a) (5), a party may move for judgment dismissing one or more causes of action against them on the ground that the action may not be maintained because of res judicata.

Where a judgment on the merits exists from an action previously brought between the exact same parties involving the same subject matter, the doctrine of res judicata precludes a party from relitigating such a claim (*see Matter of Josey v Goord*, 9 NY3d 386 [2007]).

Here, it is obvious that in determining plaintiff's first action, separate from the issue of jurisdiction, the court found plaintiff's claims failed to state a cause of action, and that each of the five causes of action pled therein were barred by the respective statutes of limitation and, as such, even absent a jurisdictional issue, dismissal of the first complaint upon the respective statutes of limitations, requires dismissal of this complaint upon res

²With regard to the order of February 26, 2019, the records maintained by the Queens County Clerk show plaintiff to have filed a notice of appeal from same (Appellate Docket No. 2019-4894).

judicata grounds (*see Smith v Russell Sage Coll.*, 54 NY2d 185 [1981]; *see also Marinelli Assoc. v. Helmsley-Noyes Co.*, 265 AD2d 1 [1st Dept 2000]). Insofar as the allegations contained in the amended complaint herein are on all fours with those previously pled and dismissed as being time-barred, the result here is manifest.

The mere fact that the plaintiff has now added Klein Slowik PLLC does not change the result, same being a distinct entity founded on January 1, 2015, as successor to Law Offices, well after the circumstances complained of by the plaintiff as providing the basis for the present suit and those other suits discussed above.

Plaintiff's arguments in opposition and in support of her cross-motion are without merit.

Accordingly, it is hereby

ORDERED that within motion is granted, and plaintiff's amended complaint is dismissed, pursuant to the doctrine of res judicata, the issues in this matter having been previously litigated and determined by the order of February 26, 2019, discussed *supra*; and it is further

ORDERED that the plaintiff is hereby enjoined from commencing any further actions against the defendants herein from the facts and circumstances upon which this suit, the previous Queens County action, and the federal court matter(s) is/was premised; and it is further

ORDERED that plaintiff's cross-motion is denied in its entirety; and it is further

ORDERED that all other requested relief not specifically addressed herein is denied.

The foregoing constitutes the decision and order of this Court.

Dated: May 19, 2020



TIMOTHY J. DUFFICY, J.S.C.

FILED

**5/21/2020
1:41 PM**