

Fabricius v 1150 Fifth Ave. Owners Corp.

2021 NY Slip Op 30215(U)

January 25, 2021

Supreme Court, New York County

Docket Number: 652110/2019

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

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DAGMAR FABRICIUS

Plaintiff,

- v -

1150 FIFTH AVENUE OWNERS CORP.,

Defendant.

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INDEX NO. 652110/2019
MOTION DATE 01/21/2021
MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The motion for summary judgment by defendant is granted.

Background

Plaintiff owns shares in a cooperative building owned by defendant and entered into a proprietary lease for Apartment 14A. She claims that there have been countless water leaks in her apartment that have caused serious damage and required the building’s super to tear open the walls on at least three occasions.

Defendant points out that there have been numerous housing court cases between the parties in which defendant asserted that plaintiff failed to pay her maintenance. Defendant contends that the most recent of these cases started in 2018 and plaintiff asserted counterclaims in that case that are identical to the allegations in the instant action. Eventually, the 2018 housing court case settled. Defendant argues that the counterclaims in that housing court case were never severed and, therefore, were resolved in that case and plaintiff cannot assert them here.

Defendant moves for summary judgment on three grounds: the merger doctrine, res judicata and the statute of limitations. It argues that the merger doctrine applies because plaintiff asserted counterclaims in the 2018 housing court case, a proceeding which involved a settlement that disposed of that case. Defendant maintains that the doctrines of res judicata and collateral estoppel apply because plaintiff made the same assertions about the water leaks in that housing court case and insists that these allegations were inextricably intertwined with that proceeding. Defendant insists that plaintiff's water leak complaints should have been litigated in connection with defendant's demand for rent in housing court.

Defendant also argues that plaintiff's remedy concerning the alleged severance of the counterclaims in housing court was to appeal to the Appellate Term. It points out that there is no order for severance in the housing court case and so this Court is unable to simply assume the counterclaims were severed. It points out that plaintiff's fourth cause of action is for a breach of the warranty of habitability—a counterclaim raised by plaintiff in the landlord tenant case.

In opposition, plaintiff questions the timing of the instant motion and suggests the motion was only brought because defendant does not want to do discovery. She claims she had no issues living in the apartment until 2009 when she started to “get the run around” when she made complaints about water leaks. Plaintiff admits that she withheld monthly maintenance payments in late 2014 and defendant commenced landlord tenant proceedings instead of fixing the problems. She insists that she settled the 2018 housing court case and is fully up to date with her maintenance payments.

Plaintiff maintains that the settlement only pertained to the money she owed and did not resolve anything concerning her affirmative claims against defendant. Plaintiff points to an

affirmation from one of her attorneys in the housing court case who asserts that a Housing Court Judge severed the counterclaims in open court.

In reply, defendant emphasizes that plaintiff filed the complaint in this case prior to entering into the settlement agreement and that the counterclaims in the housing court case and the causes of action here are identical. Defendant argues that plaintiff did not preserve her rights to pursue the claims in this case in the settlement agreement.

Discussion

The central question on this motion is the effect of the settlement agreement for the 2018 housing court case. Plaintiff asserts that this settlement related only to the amounts she owed to defendant while defendant insists that it resolved the entire case, including the counterclaims alleged by plaintiff.

A review of the settlement agreement reveals that there is no mention of the instant action or the counterclaims. It does not contemplate that plaintiff could pursue the water leak claims in this case nor does it expressly state that the counterclaims were resolved. The First Department has found that a stipulation of discontinuance “which did not contain any reservation of the right to pursue related claims or limitation of the claims disposed of to those actually asserted in that proceeding, is accorded the same res judicata effect as a judgment on the merits” (*Fifty CPW Tenants Corp. v Epstein*, 16 AD3d 292, 294 [1st Dept 2005]).

Other cases have held the inverse: that expressly preserving a claim while settling a holdover proceeding permits a plaintiff to pursue that claim (*see e.g., Bruce v Coll. Properties, Inc.*, 10 AD3d 538, 539, 782 NYS2d 61 [1st Dept 2004]; *99 Cents Concepts, Inc. v Queens Broadway, LLC*, 70 AD3d 656, 658, 893 NYS2d 67 [2d Dept 2010] [holding that where the claims “asserted by the plaintiff in this action arise out of the same transaction as its

counterclaim in the Civil Court proceeding, the so-ordered stipulation settling the Civil Court proceeding expressly recited that it was without prejudice to the Supreme Court action, and did not dismiss the plaintiff's counterclaim. Under these circumstances, the so-ordered stipulation was not a final judgment on the merits of the plaintiff's counterclaim which would be entitled to res judicata effect in this action").

These cases compel the Court to grant defendant's motion and conclude that the doctrine of res judicata bars plaintiff from pursuing this case. The stipulation of settlement ended the 2018 housing court case. And it is undisputed that plaintiff asserted counterclaims in that 2018 housing court case that are nearly identical to the claims raised here (they deal with the alleged water leaks in the apartment). Plaintiff cannot assert claims here that were part of a housing court case that she settled and where the settlement agreement did not preserve her rights to pursue those claims in Supreme Court.

The Court observes that plaintiff did not produce any documentation to show that the counterclaims were severed or dismissed in Housing Court. Although plaintiff insists that a judge severed the counterclaims orally, that is not sufficient for this Court to conclude that the counterclaims were severed. That is why orders are memorialized in writing or, at the very least, stated on the record as part of a transcript. An affirmation from plaintiff's counsel does not suffice. The Court is unable to conclude that the counterclaims were severed based on a hearsay assertion—counsel for plaintiff offers statements by another party (a judge) for the truth of the matter asserted.

There is no doubt that the stipulation of settlement should have been drafted better. Defendant should have insisted that the instant Supreme Court action be dismissed and plaintiff should have expressly preserved her right to pursue claims concerning the water leaks especially

given the fact that she had already commenced this action when that case was settled. But that didn't happen and this Court must decide what preclusive effect, if any, that stipulation of settlement has on this case. This Court finds that the claims in this case are barred under the doctrine of res judicata because they were asserted as counterclaims in the housing court case, a case which was settled.

The Court cannot render a decision based on the recollections from attorneys about what may have been said at various appearances years ago in housing court. It can only rely on the fact that there was a written settlement that disposed of the case, plaintiff had counterclaims pending in that case when that case was settled and there is nothing to suggest that the counterclaims were preserved.

Accordingly, it is hereby

ORDERED that the motion by defendant for summary judgment is granted and the Clerk is directed to enter judgment accordingly along with costs and disbursements upon presentation of proper papers therefor.

1/25/2021

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE