

Prospect Resources Inc. v Levant Capital N. Am., Inc.

2024 NY Slip Op 30155(U)

January 12, 2024

Supreme Court, New York County

Docket Number: Index No. 158915/2021

Judge: Alexander M. Tisch

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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. ALEXANDER M. TISCH PART 18

Justice

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INDEX NO. 158915/2021
PROSPECT RESOURCES INC.,
MOTION DATE 11/23/2022
Plaintiff,
MOTION SEQ. NO. 001

- v -

LEVANT CAPITAL NORTH AMERICA, INC.,
MASSIMILLIANO PINCIONE
Defendant.
**DECISION + ORDER ON
MOTION**

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35
were read on this motion to/for DISMISSAL

According to the complaint, plaintiff, Prospect Resources, Inc., is the owner of a building at 37 West 57th Street in New York City. Prospect Resources leased Suite 701 in that building (the Premises) to defendant Levant Capital North America, Inc. (Tenant). Defendant Massimilliano Pincione (Guarantor) guaranteed Tenant’s obligations under the lease. The lease was to start on May 15, 2015, and run through September 30, 2025. By May 26, 2017, Tenant had failed to make payments and owed Prospect Resources \$42,270.39. Prospect Resources sued Tenant in Civil Court in 2017, eventually being awarded a money judgment for \$34,830.37 and a possessory judgment with a warrant of eviction. Tenant was evicted from the Premises on February 27, 2018. Tenant paid the money judgment on or before August 21, 2018. Plaintiff then sought to reopen the civil case to seek additional monetary damages, but the Civil Court denied the motion on the ground that a judgment had been issued and a satisfaction of judgment filed, leaving no controversy.

On September 29, 2021, plaintiff filed this action asserting claims for breach of contract, continuing damages, and attorneys’ fees and expenses, seeking rent accruing through the date of the complaint from Tenant and Guarantor, among other damages. Defendants move to dismiss the complaint pursuant to CPLR § 3211(a)(5) based on collateral estoppel, res judicata, payment,

and/or release, request their costs and legal fees pursuant to the lease, and seek sanctions against plaintiff for bringing a frivolous action. Plaintiff cross-moves for sanctions.

Defendants' Motion to Dismiss

CPLR § 3211(a)(5) provides for a motion to dismiss on the ground that “the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds.” “Collateral estoppel, or issue preclusion, ‘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 . . . whether or not the tribunals or causes of action are the same’” (*Parker v Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343, 349 [1999], quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Collateral estoppel “applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action” (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d at 349; *Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 201 [1st Dept 2011] [stating that collateral estoppel applies to bar a claim where: there is identity of issues; the issue was decided in a prior proceeding after “a full and fair opportunity to litigate;” and the final judgment was on the merits]; *Thomas v City of New York*, 239 AD2d 180, 180 [1st Dept 1997] [“once a claim has been finally determined on the merits in a proceeding where the opponent of preclusion has had a full and fair opportunity to litigate the claim,” claims arising out of the same transaction or series of transactions are precluded, “despite the fact that the claims are based on a different theory or seek a different remedy”]). “Res judicata, or claim preclusion, is invoked to estop a party, or one who is in privity with the party, from relitigating a previously litigated action” (NYPRAC-TORTS § 19:40; *Lopez v Fenn*, 90 AD3d 569 [1st Dept 2011]). “A judgment in one action is conclusive in a later one, not only as to any matters actually litigated therein, but also as to any that might have been litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first” (*Schuykill Fuel Corp. v B. & C. Nieberz Realty Corp.*, 250 NY 304, 306–307 [1929]).

Defendants argue that plaintiff had a full and fair opportunity to litigate the issues raised here in the 2017 Civil Court case, so this case should be dismissed. Defendants point out that Plaintiff asserted claims for rent arrears and attorneys’ fees in the Civil Court action, and the

Guarantor is in privity with Tenant, the defendant in that action, so the preclusion also applies to Guarantor. Defendants also contend plaintiff could have raised the instant claims for additional rent in the 2017 Civil Court action, that the Civil Court denied plaintiff's request for the full amount sought in that action, and plaintiff accepted the Civil Court's final judgment in that matter, filing a satisfaction of judgment which released Tenant from any obligations under the lease, and on which defendants relied.

Plaintiff contends that the claims raised here are not subject to dismissal as res judicata, collateral estoppel, payment, and/or release, since these claims were not litigated on the merits in the Civil Court action. While plaintiff had requested a money judgment for \$101,878.87 in that action, which included unpaid rent which accrued after the filing of that complaint, the Civil Court only issued a judgment for \$34,830.37, since plaintiff had not requested the petition be amended to include rent accruing after it was filed. Therefore, according to plaintiff, the issue of rent accrued after the filing of the Civil Court petition was never determined on its merits and so is not barred. Further, plaintiff argues the satisfaction of judgment it filed in that case only covers the judgment amount, not future rental arrears.

Here, plaintiff's claims are barred by the doctrine of res judicata. The claims are based on the same breach of the same contract which was the subject of the plaintiff's 2017 Civil Court action. They could have been brought there, so may not be brought in this new action (*see Rojas v Romanoff*, 186 AD3d 103, 107 [1st Dept 2020]). In fact, plaintiff attempted to assert them, but failed to amend its pleading in that action. As far as the Guarantor was not a party to that action, he is in privity with the Tenant, and so the preclusion applies to the claims against him as well (*id.* at 109). Defendants' motion to dismiss is hereby granted.

Defendants' Motion for Attorneys' Fees and Costs

Defendants seek an award of attorneys' fees and costs pursuant to Article 68 of the lease (NYSCEF Doc. No. 10), which provides that, in the event of litigation between the parties to the lease, the losing party will pay the prevailing party's legal fees and costs. Plaintiff does not dispute the existence or enforceability of the prevailing party clause in paragraph 68 of the lease. As defendants are the prevailing party in this action, they are entitled to their reasonably incurred attorneys' fees, as well as reasonable expenses and court costs. Defendants request \$7,500 but provide no supporting documents evidencing the basis for this request. Alternatively, they

request an inquest. This portion of the motion is therefore granted, and the matter will be referred to a special referee for an inquest on the issue of fees, costs, and expenses.

Defendants' Motion and Plaintiff's Cross-Motion for Sanctions

Defendants also seek sanctions pursuant to 22 NYCRR 130-1.1, claiming that this entire action is completely without merit, and thus frivolous. Plaintiff cross-moves for sanctions, asserting defendants' motion is frivolous. Section 130-1.1 gives the Court discretion to award sanctions resulting from frivolous conduct. As defendants' motion to dismiss is being granted, it is not frivolous, and the plaintiff's cross-motion fails. As to the defendants' request for sanctions, while the motion to dismiss is granted, the complaint is not entirely frivolous. The Court declines to use its discretion to grant sanctions at this time.

Therefore, it is

ORDERED that defendants' motion is granted in part. The portion of the motion seeking to the dismiss the claims is hereby granted. The portion of the motion seeking sanctions is denied, and the portion of the motion seeking attorneys' fees, expenses, and costs is granted and referred to the special referee for an inquest; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the question of the amount of reasonable attorneys' fees, expenses, and costs, which is hereby submitted to the JHO/Special Referee for such purpose; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/suptctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for defendants shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter,

the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further


ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that the plaintiff's cross-motion for sanctions is hereby denied.
This constitutes the decision and order of the Court.

1/12/2024
DATE


ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: