

Schusterman v Sutton House, Inc.

2025 NY Slip Op 33526(U)

September 18, 2025

Supreme Court, New York County

Docket Number: Index No. 654231/2024

Judge: Lyle E. Frank

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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. LYLE E. FRANK PART 11M

Justice

-----X

Schusterman, Tracey

Plaintiff,

- v -

Sutton House, Inc.

Defendant.
-----X

INDEX NO. 654231/2024

MOTION DATE 11/08/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion is denied.

Background

The Tax Abatement Charges Dispute

Defendant Sutton House, Inc. is a cooperative corporation and owner of an apartment complex on East 52nd Street. Plaintiff Tracey Schusterman owns the shares appurtenant to one of the units in that building, and the unit (plus another unit which has been consolidated into a single combined unit) has been her primary residence since 2002. When a cooperative unit is used as a primary residence, the New York City Department of Finance offers a property tax abatement. In January of 2020, Plaintiff was sent her maintenance fee billing statement that informed her that the tax abatement was revoked and that she would now be charged extra as a result. Plaintiff informed Defendant of the error and made multiple attempts over the following years to follow up with the managing agent. During this time, Plaintiff was assured that the outstanding abatement charges were not actually due. Then in July of 2022, Defendant sent a formal demand for the unpaid fees. The letter stated that it was Plaintiff’s responsibility to

correct the issue with the DOF. Plaintiff's counsel responded by email pointing out that individual shareholders do not have standing to challenge the tax status of a co-op unit. After this argument was rejected by Defendant, Plaintiff paid the outstanding balance.

In 2023, Defendant retained a new managing agent, and Plaintiff reopened the issue of the abatement. In April, she received an email from DOF confirming that the unit was entitled to the abatement going back to 2018. On May 2nd, 2023, Plaintiff sent Defendant a letter (the "May Letter") explaining the incorrect characterization of charges in the demand letter, and demanding compensation for the improperly assessed fees. Defendant did not reply to the May Letter and would later claim that its counsel at the time failed to disclose this letter to them.

Procedural History

In August of 2023, Plaintiff filed an action against Defendant ("Schusterman 1") that contained several causes of action, including one for a breach of the implied covenant of good faith and fair dealing. In that claim, Plaintiff was seeking money damages related to the payments made on the extra charges and the legal fees incurred in having to respond to the demand for payment. Defendants responded with a pre-answer motion to dismiss for failure to state a claim. During the pendency of the motion to dismiss, Defendant also credited Plaintiff's account with the contested sum, arguing that this mooted the declaratory relief sought in the complaint. They argued that they were not liable for the attorneys' fees, however, because they had never been informed by Plaintiff of the correction to the tax status that had been made by Plaintiff. Plaintiff responded by pointing to the May Letter that had been attached to the complaint and noted that it was only in their reply that Defendant for the first time argued that they had not been informed of the May Letter by prior counsel.

On May 23, 2024, this Court issued an order (the “Dismissal Order”) that granted the motion to dismiss the complaint in the entirety. The reason given for dismissal of the claim for breach of the implied covenant of good faith and fair dealing was that there were insufficient allegations in the complaint going to the issue of what benefit of the proprietary lease that Defendant had sought to withhold from the Plaintiff. The dismissal was not stated to be with prejudice. In response, Plaintiff filed this present proceeding in August of 2024 with a single claim for breach of the implied covenant. She is seeking attorneys’ fees for both proceedings pursuant to the proprietary lease. This complaint includes factual allegations relating to Defendant’s payment of the disputed sum and statements about knowledge that were made during the prior action’s motion to dismiss.

Standard of Review

It is well settled that when considering a motion to dismiss pursuant to CPLR § 3211, “the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according the plaintiff the benefit of every possible inference.” *Avgush v. Town of Yorktown*, 303 A.D.2d 340, 341 [2d Dept. 2003]. Dismissal of the complaint is warranted “if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.”

Connaughton v. Chipotle Mexican Grill, Inc, 29 N.Y.3d 137, 142 [2017].

Discussion

Defendant moves to dismiss the present action on the grounds of res judicata and collateral estoppel. Plaintiff opposes. For the reasons that follow, the motion to dismiss is denied.

The Dismissal Order Was Not on the Merits

The threshold issue for this motion is whether the original dismissal of the claim for a breach of the implied covenant was on the merits. Plaintiff cites to CPLR § 205(a) as support for their ability to bring a new proceeding seeking similar relief to Schusterman 1. This provision states that a plaintiff may commence a new action “upon the same transaction or occurrence or series of transactions or occurrences” after prior action was dismissed, provided that dismissal was not for a select group of reasons, one of which is “a final judgment on the merits.” Even the fact that the second filed summons and complaint is “virtually identical” to the first does not, in and of itself, bar the applicability of CPLR § 205(a). *See Landau, P.C. v. LaRossa, Mitchell & Ross*, 11 N.Y.3d 8, 12 [2008] (denying dismissal of a “virtually identical” second filed summons and complaint). Therefore, the question becomes whether the Dismissal Order was on the merits.

Defendant argues that because the Dismissal Order did not grant Plaintiff leave to amend, it could be considered to be a dismissal on the merits. But the Dismissal Order, which was not with prejudice, stated specifically that the dismissal of this claim was due to a lack of allegations pled in the complaint that go to what benefit under the proprietary lease that was allegedly withheld from Plaintiff. A lack of allegations constitutes insufficient pleadings. And dismissal for insufficient pleading is not considered to be a dismissal on the merits. *See, e.g., Wilder v. Fresenius Med. Care Holdings, Inc.*, 215 A.D.3d 511, 513 [1st Dept. 2023] (holding that dismissal for “failure to state a claim is not a dismissal on the merits with res judicata effect”). In *Favourite*, the Court of Appeals held that when a dismissal was without prejudice and not on the merits, the trial court retains the discretion to consider a complaint that purports to remedy the defect, whether that is through leave to amend or a new action under CPLR § 205(a). *Favourite Ltd. v. Cico*, 42 N.Y.3d 250, 256 – 60. Just as the Court of Appeals there did not require that the appellate court’s dismissal order specifically state that leave to amend was granted, here the

Court is not going to consider the lack of an express grant of leave to amend in the Dismissal Order as barring an otherwise-valid complaint brought under CPLR § 205(a). *Id.*, at 258.

Because the Dismissal Order Was Not on the Merits, Res Judicata and Collateral Estoppel Do

Not Apply

Because the Dismissal Order was not on the merits and was not with prejudice, this complaint was timely and validly filed under CPLR § 205(a). Therefore, the issue then becomes whether Defendant has established that res judicata and collateral estoppel apply. When a prior claim was dismissed (without prejudice) for pleading deficiencies, even if “judicial economy and the discouragement of forum shopping would otherwise warrant dismissal”, the action is not barred by either res judicata or collateral estoppel. *Komolov v. Segal*, 96 A.D.3d 513, 513 [1st Dept. 2012].; *see also Wilder*, at 513. This is because a “dismissal ‘without prejudice’ lacks a necessary element of res judicata – by its terms such a judgment is not a final determination on the merits.” *Landau*, at 13. The Court has no basis under either res judicata or collateral estoppel to dismiss the complaint.

The New Complaint Does Not Appear to Be Futile

Defendant’s papers move to dismiss are solely based on res judicata and collateral estoppel grounds. Because, for the reasons given above, these theories are inapplicable here, the Defendant has not met their burden on the motion to dismiss. But in oral argument for this motion, held on September 17, 2025, arguments were made to the effect that the amended complaint would essentially be futile because it fails to address the pleading defect. While the Court is not taking a position on the merits of the claim, it has reviewed the record and the new complaint, and it does not appear to be so palpably insufficiently pled that it would be futile to permit the new action to proceed. Accordingly, it is hereby

ADJUDGED that the motion to dismiss is denied; and it is further
ORDERED that defendant is directed to serve an answer to the complaint within 20 days
after service of a copy of this order with notice of entry.


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9/18/2025
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	