

Wax v 716 Realty, LLC
2014 NY Slip Op 33896(U)
November 19, 2014
Supreme Court, Kings County
Docket Number: 22020/13
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 19th day of November, 2014.

P R E S E N T:

HON. RICHARD VELASQUEZ
Justice.

-----X
LIAM WAX, by his mother and natural guardian, NOA WAX, NOA WAX individually, and ILANA ZADIK,

Plaintiffs

-against-

Index No.: 22020/13

716 REALTY, LLC, ACE MANAGEMENT REALTY, LLC, TOPCO PEST CONTROL, INC., XYZ REALTY CORP., A fictitious realtor corporation, and JOHN DOE,
Defendants.

-----X

The following papers numbered 1 to read on this motion:

Papers Numbered

Notice of Motions and Cross Motion/	
Affidavits (Affirmations) Annexed _____	1-2,3-4, 5-6
Opposing Affidavits (Affirmations) Annexed _____	7, 8, 9
Reply Affidavits (Affirmations) Annexed _____	10

After oral argument and a review of the submissions herein, the Court finds as follows:

Defendants move by pre-answer Motion for an Order dismissing this action pursuant to CPLR §3211 as this action is barred by the doctrines of *res judicata* and collateral estoppel, and pursuant to CPLR §8303-a, awarding sanctions and attorneys fees against plaintiff ILANA ZADIK and her counsel, EFFIMIA SOTER.

Plaintiffs move the Court for an Order of default judgment and for sanctions against

Defendants on the grounds that Defendants failed to timely Answer or respond to plaintiffs' summons and complaint.

Defendants cross-move the Court for leave to file an Answer.

Background

In January of 2011, Plaintiff Ilana Zadik and Defendant 716 Realty, LLC entered into a lease agreement for rental of an apartment known as 716 Ocean Parkway, Apartment 5G, Brooklyn, NY 11230. The rental period began on January 1, 2011 and ended on December 31, 2011, for a period of one year, with the monthly rent being set at \$1200.00. Ms. Zadik paid the first month's rent and another month's rent as a security deposit, and upon signing the lease moved into the subject apartment.

Ms. Zadik paid February's rent and then withheld rent for the duration of her tenancy. Defendant 716 Realty, LLC commenced a nonpayment proceeding in the Housing Court of Kings County, captioned *716 Realty, Petitioner v. Ilana Zadik, Respondent*, Index Number 72580/11. Ilana Zadik defaulted in appearing, and brought an Order to Show Cause to vacate her default when served with a Marshal's Notice. The Order to Show Cause was conditionally granted on October 17, 2011, on the requirement that Ms. Zadik paid two months' rent to 716 Realty, LLC by October 24, 2011. Ms. Zadik defaulted in payment and the Order to Show Cause was vacated against her on October 27, 2011. Ms. Zadik then filed a motion to be restored to possession of the subject premises and to vacate the default judgment against her. In the decision by Hon. John Lansden dated October 27, 2011, the Court found that "Since the payment of the 2 months rent was a condition precedent for the court to vacate the default and hold a traverse hearing, Respondent's default remains in full affect and holding a traverse hearing is no longer necessary. The warrant my execute without further service of a marshal's notice."

Ms. Zadik appealed Judge Lansden's decision to the Appellate Term, and in a decision dated February 13, 2013, the Appellate Term affirmed Judge Lansden's decision. Thereafter, 716 Realty, LLC. commenced a plenary action against Ms. Zadik in the Civil Court of the City of New York, Kings County, to recover the unpaid rent owed to it. Ms. Zadik filed an answer asserting a general denial of the allegations in the Complaint. A trial was scheduled in the Civil Court for July 1, 2013, and Ms. Zadik appeared before Judge Noach Dear in the *pro se* Part of the Civil Court. For apparently the first time, Ms. Zadik stated that she sought a rent abatement due to bedbugs in her apartment. She requested an adjournment to arrange for the exterminator who serviced the

apartment to testify on her behalf at trial. The matter was adjourned to October 7, 2013 for this purpose, and for Ms. Zadik to request any other witnesses she wished to have testify on her behalf.

On October 7, Ms. Zadik appeared and questioned the representative from 716 Realty LLC on whether the landlord had informed her that there were bedbugs in the building prior to when she had moved in. The next witness, David Cortez, an exterminator from Top of the World Pest Control was not called by Ms. Zadik, but instead was called by 716 Realty, LLC. Mr. Cortez testified that he had been called to Ms. Zadik's apartment on February 18, 2011, regarding a complaint about bedbugs. On his first visit, he found bedbugs to exist in the apartment, and followed protocol to exterminate in all of her rooms and her furniture as well. According to Mr. Cortez' testimony, Ms. Zadik called him approximately seven more times complaining of continued infestation, but he never found any live bedbugs again. Upon each visit after the first one, by Mr. Cortez, Ms. Zadik would remove a vial of dead bedbugs from her refrigerator and show them to Mr. Cortez. It was Mr. Cortez' opinion that Ms. Zadik showed him the same vial of the same bedbugs each time he came. Though he inspected her apartment each time he came, he found no live bedbugs after the first visit. Ms. Zadik questioned Mr. Cortez extensively during her cross-examination of him, but he informed her and the Court that the sole occasion during which he found live bedbugs was his first visit.

Although Ms. Zadik informed the court that she had many witnesses from her building to testify as to the infestation of bedbugs, she did not bring any of these witnesses to testify at trial, and she failed to subpoena any of these witnesses. She also failed to bring any admissible evidence.

Following the trial, Judge Dear awarded a money judgment in the amount of \$10,800.00 to 716 Realty, LLC. against Ms. Zadik. This judgment represents the eights months' rent due and owing 716 Realty, LLC by Ms. Zadik with no abatement.

Ms. Zadik retained attorney William Leavitt, who filed a post-judgment motion, seeking a reduction of the monetary judgment due to the bedbug issue. Mr. Leavitt argued that Judge Dear did not properly credit Ms. Zadik's testimony regarding the presence of bedbugs in the apartment. The motion was denied by Judge Dear.

Plaintiff Zadik commenced the instant proceeding on or about March 25, 2014 with a new attorney, Effemia Soter, Esq.

Discussion

Plaintiffs' Motion for a Default Judgment

First, plaintiffs move the Court for a default judgment in favor of plaintiffs against defendants 716 Realty LLC, Ace Realty Management LLC and Topco Pest Control awarding judgment as demanded in the complaint filed by Plaintiffs against the alleged defaulting defendants 716 Realty LLC, Ace Realty Management LLC, and Topco Pest Control, Inc. Plaintiffs also seek sanctions and attorneys fees against alleged defaulting defendants and the Law Office of Alan J. Sasson, P.C. It must be noted at the outset that the Complaint was served upon all defendants via the New York State Secretary of State. Further, the complaint was verified by plaintiffs' attorney, and not by a party with personal knowledge of facts alleged in the complaint. While plaintiffs contend that defendants' time to interpose an Answer to Plaintiffs' Summons and Complaint was April 14, 2014, CPLR 320 provides that a defendant shall have 30 days to respond to a Complaint where service is via the Secretary of State. As reflected by the Certificate of Service executed by Yitzchak Zelman, Eq., Law Office of Alan J. Sasson, P.C., attorney for all defendants at that time, plaintiffs were served via their attorney, Effie Soter, P.C. on April 25, 2014 by U.S. mail.¹

Second, as mentioned above, the instant Complaint was verified by plaintiffs' counsel, and not by plaintiff, herself. The Appellate Division, Second Department has consistently held that where a motion for a default judgment is made against defendants upon their failure to appear and answer, and the plaintiffs fail to proffer either an affidavit of the facts or a complaint verified by a party with personal knowledge of the facts as required by CPLR 3215(f), the motion is properly denied and plaintiffs are compelled to accept defendants' answer. *Peniston v. Epstein*, 10 A.D. 3d 450, 780 N.Y.S. 2d 916 (2nd Dept. 2004). See also, *DeVivo v. Sparago*, 287 A.D. 2nd 535, 731 N.Y.S. 2d 501 (2nd Dept. 2001); *Fiorino v. Yung Poon Yung*, 281 A.D.2d 513, 721 N.Y.S. 2d 803 (2nd Dept. 2001); and *Grainger v. Wright*, 274 A.D.2d 550, 713 N.Y.S. 2d 182 (2nd Dept. 2000).

Finally, "A verified complaint in support of a motion for leave to enter judgment against a defendant for the failure to answer or appear must contain evidentiary facts from one with personal knowledge; a pleading verified by an attorney is insufficient to establish merits". *Triangle Properties #L2, LLC v. Narang*, 73 A.D.3d 1030, 903 N.Y.S. 2d 424 (2nd Dept. 2010).

¹ Plaintiffs have now conceded that defendants had 30 days to answer, and not 20. Plaintiffs still contend that they have a right to a default as defendants' mistakenly calculated the time to file their file and serve their pre-answer motion to dismiss as April 25th, and were, therefore, late by one day in responding to plaintiffs' Summons and Complaint.

The Court finds as follows: First, defendants' delay in answering is properly excused by the Court given the brief and non deliberate delay, the lack of prejudice to the plaintiffs, the existence of potentially meritorious defenses, and the policy favoring the resolution of cases on their merits. *Nikita v. Parfomak*, 433 A.D.3d 892, 841 N.Y.S. 2d 635 (2nd Dept. 2007). Second, **a default judgment must be and is hereby denied in its entirety as plaintiffs have failed to provide either a verified complaint or an affidavit from a party with personal knowledge of the facts alleged in the complaint.**

As for plaintiffs' contention that because some exhibits were missing from defendants' motion to dismiss, plaintiffs' were not served timely with the motion, the Court finds this contention without merit. As soon as defendants' counsel was notified that the Notice of Motion which was served by mail had exhibits missing from the Motion papers, defendants' counsel faxed the allegedly missing exhibits to plaintiffs' counsel and attached the fax confirmation to his papers.

Defendants' Motion to Dismiss: Collateral Estoppel and Res Judicata

Defendants move the Court for an Order pursuant to CPLR 3211(a) dismissing plaintiffs' complaint on the grounds of collateral estoppel and *res judicata*, contending that plaintiff Zadik was afforded a full and fair opportunity to litigate the issues decisive to the instant action, in *716 Realty, LLC v. Ilana Zadik*, CV-024071-13/KI, Kings County Civil Court. In the Kings County Civil Court Action, defendant therein, Ilana Zadik, raised breach of the warranty of habitability as an affirmative defense to the plaintiff therein, 716 Realty, LLC's, action against her for unpaid rent of \$10,800. The trial was presided over by Judge Noach Dear, who adjourned the trial from July 1, 2013 to October 7, 2013, so that Ms. Zadik could bring in a bedbug exterminator as a witness to present her affirmative defense, and any other witnesses or evidence of her choosing.

At the trial, Ms. Zadik testified she stated that she noticed the bed bugs during her second month as a tenant at the subject premises. She requested an exterminator, and the exterminator came to her apartment on February 18, 2011, according to the exterminator's testimony at trial. The exterminator, David Cortez, testified that he inspected Ms. Zadik's apartment on February 18, 2011, and found an infestation of bedbugs. He treated the entire apartment and furniture in the apartment. He testified that Ms. Zadik continued to call him each month thereafter, and upon his arrival Ms. Zadik would show him a vial that she kept in the refrigerator which contained dead bedbugs. After a search throughout her apartment, Mr. Cortez testified that he never found any live bedbugs again. Each time he came to Ms. Zadik's apartment she would take a vial out of her

refrigerator and show him the same dead bedbugs he saw each time he came. He found live bedbugs on one occasion - February 18, 2011- and never again.

Ms. Zadik also attempted to introduce a medical document which indicated that her daughter had suffered some type of injury. Judge Dear did not accept this document into evidence as it was not a certified medical record, and Ms. Zadik did not bring anyone who had treated her daughter in a medical setting to testify as to the authenticity of this record and what exactly the injuries were.

After hearing the testimony of Ms. Zadik and the exterminator, and reviewing documents Ms. Zadik wanted admitted into evidence, Judge Dear found that her documents were not admissible as evidence. He awarded the defendants all of the rental arrears due and owing which amounted to \$10,800.00, and did not award Ms. Zadik an abatement of rent. Ms. Zadik then retained counsel who moved to reduce the verdict on the ground that Judge Dear did not give a reasonable abatement based upon the evidence adduced at trial. Judge Dear denied Ms. Zadik's motion stating: "Based upon the credibility of the witnesses and the totality of the evidence, this Court finds that no further abatement is justified."

Elements of Res Judicata and Collateral Estoppel Barring Plaintiffs' Complaint

Defendants contend that plaintiffs' action against them is barred by res judicata and collateral Estoppel. Defendants ground their contention in the Kings County Housing Court decision as well as the Kings County Civil Court action tried by Judge Noach Dear. In the nonpayment eviction proceeding in Housing Court, however, the affirmative defense of breach of the warranty of habitability was never raised as far as can be discerned from the testimony of Ms. Zadik in the Civil Court proceeding. When Ms. Zadik was asked by Judge Dear if she raised the complaint about bedbugs in her nonpayment eviction proceeding, Ms. Zadik responded: "I had a lawyer, that's the reason I didn't take a lawyer this time." Judge Dear than asked: "So you raised – you didn't raise the bed bugs on the trial." Ms. Zadik responded: "That's the reason I didn't pay." "You didn't raise that at trial", inquired Judge Dear. "Yes, he did", responded Ms.Zadik. "She was represented by Eleizer Kraus", interjected defendants' counsel, Mr. Zelman. Judge Dear inquired what happened at the trial, and he was informed that Ms. Zadik defaulted on the return date of the trial. Thus, although Ms. Zadik may have raised breach of the warranty of habitability as her defense to nonpayment of rent, the trial did not go forward because Ms. Zadik did not appear.

Ms. Zadik did appear and Answer defendants complaint against her in a plenary proceeding

brought by defendant 716 Realty, LLC in Kings County Civil Court, seeking a judgment for rental arrears found due and owing in the default judgment of possession entered against her in Kings County Housing Court. In her Answer, she asserted a "general denial". However, an attorney retained by plaintiffs later amended the Answer to include: "As and For a First Affirmative Defense – Rent Abatement". In plaintiffs' amended Answer, Ms. Zadik alleged that 716 Realty LLC had "violated the implied warranty of habitability by failing to maintain the premises adequately from at least February 2011 through September 2011 due to a bedbug infestation in the subject premises." She requested a rent abatement of "50% of the monthly rent of \$1200.00 per month for the period from February, 2001 (sic) through September 2011 which should be deducted from any arrears." Pursuant to Judge Dear's decision in that matter, Ms. Zadik did not receive an abatement of rent after a full and fair trial on the issue of whether Ms. Zadik was entitled to an abatement of rent due and owing because of an infestation of bedbugs in her apartment.

Elements of Collateral Estoppel

The doctrine of collateral estoppel precludes a party from relitigating an issue that has been decided against him in a prior proceeding in which he had a fair opportunity to fully litigate that issue. *Kaufman v. Eli Lilly and Company*, 65 N.Y. 2d 499, 455, 492 N.Y.S. 2d 584, 482 N.E. 2d 63 (NY 1985). Collateral estoppel is based upon general notions of fairness and is intended to reduce litigation and conserve the resources of the courts and the litigants. In order to invoke the doctrine of collateral estoppel, two requirements must be satisfied: (1) the identical issues necessarily must have been decided in the prior action, and (2) the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination. *Kaufman v. Eli Lilly and Company*, 65 N.Y. 2d at 456.

With regard to the first requirement, there is no identity of issues between the present action and the prior proceeding if an issue has not been litigated. An issue is not actually litigated if there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading, or by stipulation. Further, the issue must have been material to the first proceeding. *Ryan v. New York Telephone*, 62 N.Y. 2d 494, 500, 478 N.Y.S. 2d 823, 467 N.E. 2d 487 NY 1984).

As to the second requirement, if a party was afforded a full and fair opportunity to litigate in a prior proceeding the issue sought to be precluded in the subsequent proceeding, that decision is now said to be controlling. *DeSimone v. South African Marine Corp., S.A.*, 82 A.D. 2d 820, 439 N.Y.S. 2d 436 (2d Dept. 1981).

The Court finds that Ms. Zadik did not have a full and fair opportunity to litigate in a prior proceeding in Kings County Housing Court because of her default on the day of trial on her issue

of breach of the warranty of habitability by the landlord's alleged failure to rid her apartment of bedbugs. The Court does find, however, that in the plenary action brought by defendants 716 Realty LLC, *et al*, Ms. Zadik did have every opportunity to litigate the issue of an abatement of rent due to the landlord's failure to eradicate bedbugs after proper notice.

While Ms. Zadik retained counsel to amend her Answer to include an affirmative defense of breach of the warranty of habitability, she elected to proceed *pro se* at trial. She was provided a three months and one week's adjournment by Judge Dear in order to identify witnesses to testify on her behalf, to get any documents to be introduced as evidence in proper evidentiary form, and to prepare her case for trial. Even though Ms. Zadik requested a long adjournment at the first day of a scheduled trial, Ms. Zadik did not call any witnesses to testify on her behalf. She did cross-examined the exterminator who serviced her apartment and found no bedbugs after February 2011, and who was called as a witness by 716 Realty LLC. She participated in the trial by cross-examining witnesses called by 716 Realty LLC, and by introducing two documents that she wanted admitted into evidence. These documents, however, were not admissible as they were lacking certification, authentication, and in one case, relevancy.

Ms. Zadik testified on her own behalf, and after trial, Judge Noach Dear found for 716 Realty LLC in the amount of \$10,800.00, which equals ten months of rent at \$1200.00 per month, minus a security deposit of \$1200.00 and first months' rent of \$1200.00

Accordingly, **the Court finds that plaintiffs claims against defendants 716 Realty, LLC, and ACE Management Realty, LLC are barred by the doctrine of collateral estoppel, and must therefore be dismissed in their entirety.**

Doctrine of Res Judicata

The doctrines of *res judicata* and collateral estoppel are designed to put an end to a matter once it is duly decided. *See, Siegel, N.Y. Practice* § 442 at 747 [4th Ed.]. *Res judicata*, or claim preclusion, is invoked when a party, or one in privity with the party, seeks to relitigate a disposition on the merits of claims, or causes of action, arising out of the same, or series of, transactions which were raised, or could have been raised, in the prior action. *See, Matter of Hunter*, 4 NY3d 260, 794 N.Y.S. 2d 286 (NY 2005). In fact, *Hunter* clearly states: "where a judgment on the merits exists from a prior action between the same parties involving the same subject matter", *res judicata* bars re-litigation of those same claims.

Liam Wax, by his mother and natural guardian, Noa Wax, Noa Wax individually, and Ilana Zadik against 716 Realty, LLC are the same parties involved in 716 Realty LLC against Ilana Zadik. Although plaintiff herein Zadik, sued two new parties who were not named as parties in the prior Kings County Civil Court litigation, the allegations against the two new entities cannot be pursued as a prior decision by a court of competent jurisdiction determined that the

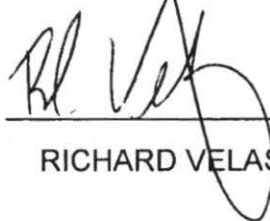
allegations/claims set forth by Ms. Zadik had not been proven. The testimony by Ms. Zadik clearly demonstrates that Ace Realty Management, LLC performed its duties by retaining the services of Topco Pest Control, Inc. to eliminate the bedbug infestation in Ms. Zadik's apartment. Though she continued to complain, Ace Realty Management, LLC continued to retain the services of Topco Pest Control, Inc. Judge Noach Dear found that Ace Realty Management, LLC as well as the exterminator from Topco testified credibly at trial that after the February 18, 2011, treatment by Topco of Ms. Zadik's apartment, no live bedbugs were even found in her apartment after that date. Though Ms. Zadik contended that she had numerous potential witnesses as to the continued infestation of her apartment by bedbugs, she produced no witnesses at trial. Thus, Topco's testimony was deemed credible by Judge Dear, and precludes this action against it. Judge Dear also found the testimony of Ace Realty Management LLC to be credible when it confirm through testimony that Topco Pest Control, Inc. was requested to determine whether the bedbug infestation still existed in Ms. Zadik's apartment, each and every time Ms. Zadik complained. Further, Ms. Zadik offered no proof, whatsoever, that bedbugs existed in her apartment after February 18, 2011.

Therefore, it is the finding of this Court that plaintiffs cannot relitigate the same claims that were decided by Judge Noach Dear in 716 Realty LLC against Llana Zadik, by simply adding two new defendants to relitigate the identical claims. Accordingly, it is the **Order of this Court that all claims by plaintiffs against defendants 716 Realty, LLC, Ace Realty Management LLC, Topco Pest Control, Inc., and XYZ Realty Corporation, a fictitious realtor corporation and John Doe, are hereby dismissed in their entirety.**

Topco Pest Control, Inc. moves the Court by cross-motion for leave to file the Answer annexed to its papers. Defendant Topco Pest Control, Inc.'s motion is moot, as the entire complaint against all defendants has been dismissed.

This constitutes the decision and order of the Court.

ENTER:



RICHARD VELASQUEZ, J.S.C.

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Hon. Richard Velasquez, JSC


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