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### 905 Mother Gaston Corp. v. More

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[\*1]

<b>905 Mother Gaston Corp. v More</b>
2022 NY Slip Op 50321(U)
Decided on April 20, 2022
Civil Court Of The City Of New York, Kings County
Harris, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on April 20, 2022

Civil Court of the City of New York, Kings County

**905 Mother Gaston Corp., Petitioner,**

**against**

**Edmond More a/k/a ADMON MORE, JOHN DOE and JANE DOE,  
Respondents.**

**905 MOTHER GASTON CORP., Petitioner,**

**against**

**RALPH SPEARS, JOHN DOE and JANE DOE, Respondents.**

**905 MOTHER GASTON CORP., Petitioner,**

**against**

**MELINDA GALARZA, JOHN DOE and JANE DOE, Respondents.**

**905 MOTHER GASTON CORP., Petitioner,**

**against**

**MARIE LUBRUN, JOHN DOE and JANE DOE Respondents.**

L & T Index No. 309566/21

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David A. Harris, J.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of respondent's motion to dismiss and for sanctions, listed by NYSCEF number:

309566/21, 309567/21 and 309568/21: 6,7,8,9,10,11,12,13,14,15,16,17,18,19,20,21  
309569/21: 7,8,9,10,11,12,13,14,15,16,17,18,19,20,21,22

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

On the court's own motion, the motions captioned above, pending in four proceedings, are consolidated for purposes of disposition.

After the expiration on September 30, 2021 of four functionally identical documents entitled Ninety (90) Day Notice to Occupant on Termination of Occupancy and Intention to Recover Possession (Notices), petitioner commenced these summary proceedings seeking to recover possession of apartments 1F (309566/21), 1R (309567/21), 2F (309568/21) and 2R (309569/21) in the building located at 905 Mother Gaston Boulevard in Brooklyn (Building). The proceedings seek possession, alleging that respondents remain in possession after the termination of their month to month tenancies.

While no answer has been filed in any of the proceedings, a notice of appearance has been filed by which counsel for respondents purports to appear in all four proceedings

Respondents have also, through their counsel, filed, in each proceeding, the instant functionally identical motion to dismiss. The motion seeks dismissal pursuant to CPLR 3211(a)(5), 3211(a)(7) and CPLR 3211(a)(10), as well as the imposition of a sanction of costs and attorney's fees on petitioner pursuant to 22 NYCRR § 130-1.1.

The instant litigation is neither the first litigation between these parties pending in Housing Court, nor the only litigation now pending. Four prior holdover proceedings were commenced under index numbers 54575/20, 54576/20, 54577/20, and 54578/20 (Prior Proceedings), and a trial held. That trial resulted in a decision and order dated May 26, 2016 — an apparent scrivener's error as the trial took place in 2021 (309566/21, 309567/21 and 309568/21 — NYSCEF No. 8; 309566/21 — NYSCEF No. 9) (Prior Decision). The Prior Decision resulted in the dismissal of the Prior Proceedings. The proceedings against Spears, Galarza, and Lubrun were dismissed when the court found that they were tenants rather than licensees. The proceeding against More was dismissed because More was deceased, and the proceeding was not brought naming an occupant or a representative of the estate. There also remains pending in Supreme Court an as-yet undecided suit to quiet title brought by 905 Mother Gaston LLC.

The three grounds respondents assert for dismissal are res judicata or collateral estoppel, the failure to state a cause of action, and the failure to name a necessary party.

The "absence of a person who should be a party" (CPLR 3211 [a] [10]) can constitute a basis for the dismissal of a proceeding. Here, respondents assert that 905 Mother Gaston LLC is such an entity and that the "LLC who has ownership of the Mother Gaston property and collect[s] money from the tenants clearly has interest in these holdover proceedings and is a necessary party." Joinder, rather than dismissal, exists as a remedy and "[p]ersons who ought to be parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants" (CPLR 1001 [a]). Here, the entity that respondents assert is a necessary party is 905 Mother Gaston LLC, the plaintiff in a pending suit to quiet title.

Of course, such an action may be won or lost. As presently situated, 905 Mother Gaston LLC does not have title to the Building. At trial any respondent may establish that there is no landlord-tenant relationship with petitioner, or that there is a landlord tenant relationship with 905 Mother Gaston LLC. That entity need not be a party for respondents to offer such evidence, [\*2] and respondents may, of course, call witnesses to testify as to the status of 905 Mother Gaston LLC. It need not be a party for any of this to occur.

While this court can determine whether petitioner is the owner or landlord, a determination of the nature, if any, of 905 Mother Gaston LLC's interest in the Building, is beyond the jurisdiction of this court; issues of title are not within the jurisdiction of the Civil Court ([Hague v Rob, 83 AD3d 895](#) [2d Dept 2011]).

Since 905 Mother Gaston LLC need not be a party in order for other respondents to present their defenses, and there is nothing to indicate that 905 Mother Gaston LLC has an interest in the Building that would be inequitably affected by the outcome of this litigation, the branch of respondents' motion seeking dismissal for failure to name a necessary party is denied.

Respondents further seek dismissal on the grounds of res judicata and collateral estoppel, based upon the dismissal of the Prior Decision dismissing four earlier holdover proceedings. Those proceedings were premised on the claim that respondents "entered into possession of the subject premises without permission and are occupying the premises without permission of the owner or prior owner." Such grounds plainly fall within the ambit of RPAPL § 713, "grounds where no landlord-tenant relationship exists." Ultimately, the Prior Decision dismissed all four proceedings, three of them because "respondents are tenants and not squatters." The fourth proceeding, against Admon More, was dismissed because "Mr. More is deceased and no occupant or the estate has been joined." The dismissals, respondents urge, bar the instant proceedings.

It has been held that:

"Pursuant to the doctrine of res judicata, or claim preclusion, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v. City of Syracuse*, 54 NY2d 353, 357, 445 N.Y.S.2d 687, 429 N.E.2d 1158; see [Highlands Ctr., LLC v. Home Depot U.S.A., Inc., 149 AD3d 919](#), 921, 53 N.Y.S.3d 321). Collateral estoppel, or issue preclusion, a narrower species of res judicata, "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 or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v. New York Tel. Co.*, 62 NY2d 494, 500, 478 N.Y.S.2d 823, 467 N.E.2d 487; see *Highlands Ctr., LLC v. Home Depot U.S.A., Inc.*, 149 AD3d at 921, 53 N.Y.S.3d 321)."

([Jacob Marion, LLC v Jones, 168 AD3d 1043](#), 1044 [2d Dept 2019]). The commonality that exists between the instant proceedings and those dismissed by the Prior Decision is that all of the proceedings are brought under Article 7 of the Real Property Actions and Proceedings

Law and involve the same parties. Beyond that visceral similarity, the proceedings fundamentally differ. Unlike their predecessors, the instant proceedings recognize the existence of a landlord-tenant relationship and have been brought after the expiration of notices seeking to terminate that relationship. Respondents appear to argue that the dismissal of a holdover proceeding bars a further holdover proceeding, whatever the basis. The service of proper predicate notice is an element of petitioner's prima facie case (*433 West Assocs. v Murdock*, 276 AD2d 360 [1st Dept 2000]), and in commencing this proceeding, petitioner served the required Notices, inconsistent with the claims of the proceedings dismissed by the Prior Decision. The causes of action in the instant proceedings are distinct, brought pursuant to RPAPL § 711, and petitioner is not [\*3]precluded from maintaining these proceedings by the dismissal of others. The branch of respondents' motion seeking dismissal on the grounds of res judicata and collateral estoppel pursuant to CPLR 3211 [a] [5] is denied.

Petitioner's proceeding against More, however, raises a distinct, troubling issue. The Prior Decision was abundantly clear and unequivocal. The proceeding against More was dismissed because More was deceased and neither an occupant nor his estate, whether through an executor or an administrator, had been named. The Prior Decision is silent as to when More died, but from its terms it is evident that his demise occurred prior to commencement of the proceeding.

Apparently undeterred by the dismissal or its basis, in October 2021, petitioner, through its counsel, commenced the instant proceedings, which include a proceeding against the deceased More. Petitioner further filed an affidavit of service upon the decedent, documenting three unsuccessful attempts at service before resort to conspicuous posting. Such service, of course, was doomed to failure as there is no living respondent who could be served.

Several months later, the same counsel who appeared for respondents at the trial resulting in the Prior Decision, appeared once again. Notwithstanding More's death, counsel filed a notice of appearance in his behalf. Of course, More could not have retained counsel. Apparently undisturbed by the lack of a client, counsel has made the instant motion not only in those proceedings in which counsel has a client, but also in the proceeding brought against the deceased More.

Inexplicably, counsel has submitted to this court both documentation indicating representation of someone who was deceased long before such representation could have commenced, and also a motion seeking affirmative relief on behalf of someone deceased

before the litigation commenced.

The court finds deeply problematic the cavalier approach taken to this litigation by counsel for both parties. Petitioner's counsel was well aware that More was deceased but elected to commence a proceeding against him. Petitioner even utilized a process server, despite the unequivocal nullity that service upon a known decedent represents.

Respondent's counsel, equally aware that More is deceased, could have come before the court as a friend of the court and imparted that information so that judicial resources would not be expended on a nullity. Instead, despite the lack of any client or any authority to do so, counsel elected to file not just a notice of appearance but a pre-answer motion to dismiss on behalf of the decedent.

Under the salient provisions of law, conduct:

"is frivolous if:

(1) It is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law

(22 NYCRR § 130-1.1). Intentionally commencing litigation against someone known to be deceased, particularly where prior litigation was dismissed because the person was deceased, and going through the motions of attempting service upon the decedent, falls comfortably within the ambit of the statute. The litigation was a nullity from the moment the petition was filed, compounded by filing an affidavit of service and inexplicable opposition to a motion to dismiss a proceeding that never should have been commenced against a decedent.

The conduct of respondents' counsel is similarly troubling, counsel having filed a notice of appearance despite the impossibility of ever having been retained by a decedent. That other living tenants of the Building may have retained counsel renders counsel's actions in filing a notice of appearance on behalf of a deceased litigant no less inexcusable. The inappropriate conduct is augmented by the fact that counsel, without a client to provide assent or guidance, elected to make a motion to dismiss on behalf of the decedent.

Counsel for each party has engaged in frivolous conduct for the reasons set forth above. Each is to pay a sanction in the sum of \$750 to the Lawyers Fund for Client Protection, and to file on NYSCEF proof of its payment no later than June 8, 2022 at 3:00 PM, when the proceedings against Spears, Galarza and Lubrun will next appear on the court's calendar. Respondents' counsel is to interpose answer within ten days.

For the same reasons stated in the Prior Decision, the proceeding brought against More, under index number 309566/21 is dismissed; neither an executor nor an administrator nor an occupant has been named.

This is the decision and order of the court.

Brooklyn, New York

April, 20, 2022

DAVID A. HARRIS, J.H.C.

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