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2022-07-28

### Fishbein v. Goldman

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<b>Fishbein v Goldman</b>
2022 NY Slip Op 32582(U)
July 28, 2022
Supreme Court, New York County
Docket Number: Index No. 150975/2018
Judge: Francis A. Kahn III
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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. FRANCIS A. KAHN, III PART IAS MOTION 32

*Acting Justice*

-----X

INDEX NO. 150975/2018

JENNIFER FISHBEIN,

MOTION DATE \_\_\_\_\_

Plaintiff,

MOTION SEQ. NO. 001

- v -

JANE GOLDMAN, ALLAN GOLDMAN, AMY GOLDMAN and  
DIANE KEMPER AS EXECUTORS OF THE ESTATE OF  
LILLIAN GOLDMAN and THE LILLIAN GOLDMAN FAMILY  
LLC,

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 54-63, 66-118  
were read on this motion and cross-motion for SUMMARY JUDGMENT

Upon the foregoing documents, the motion and cross-motion are decided as follows:

Plaintiff resides in apartment 2C located at 145 West 55<sup>th</sup> Street, New York, New York, a building owned by Defendants Estate of Lillian Goldman and Lillian Goldman Family LLC. As captioned, Defendants Jane Goldman, Alana Goldman, Amy Goldman and Diane Kemper are the executors of the Estate of Goldman.

In 2016, Plaintiff sustained property damage to her apartment including water incursion causing damage to walls, ceiling, cabinetry in kitchen, mold and paint and plaster damage. After allegedly contacting Defendants about these issues, Plaintiff commenced a HP proceeding by order to show cause and petition in Civil Court of the City of New York, New York County, Housing Part B (L & T Index No. 6146/2017). In this proceeding Plaintiff, represented by counsel, sought an order directing the correction of conditions in her apartment as well as an award of reasonable attorney's fees. The Estate of Lillian Goldman, the Lillian Goldman Family LLC and the Department of Housing Preservation and Development of the City of New York ("DHPD") were respondents in the HP proceeding.

During this HP proceeding, DHPD issued an inspection report initially identifying ten violations in the subject apartment: three class "C" violations, five class "B" violations and two class "A" violations. The class "C" violations were for lead paint found on the door frame in the bathroom, first room, and on the picture molding on the south wall in the second room. The class "B" violations were for the repair of the wood countertop and wood base cabinet in the kitchen, plaster and paint the south and west walls in the second room, the repair the upper and lower spring balances in the south window in the second room and to replace the missing wood

baseboard at the west wall in the second room. The class "A" violations were to paint the peeling paint in the kitchen and paint the window frame in the first room.

Subsequently, the DHPD performed three more inspections and found additional violations. Further class "C" violations were cited for lead paint found on the door frame and window in the first room, the east wall in the kitchen, the south wall in the second room, the bathroom door and closet door frames in first room, for the north and east walls in the kitchen, door frames for the closets in the foyer, the window frame in the second room, bathroom door and closet door frames in first room. DHPD issued class "B" violations for nuisance based upon the presence of mice and for a broken kitchen cabinet base. The class "A" violations were for the repair of the wood floor in the second room, to replace the countertop of the base kitchen cabinet and to paint the west wall in second room.

On January 9, 2018, the parties to the HP proceeding entered a consent order wherein the Goldman Respondents agreed to correct the violations found by DHPD. By an addendum attached to the consent order, the Goldman Respondents further agreed to other repairs not classified as violations, including replacement of wooden window frames and the front door and "pursuant to Local Laws of 2004, Turnover requirements, if required by law, and to submit lead paint results and mold testing and repair/mediation reports to Petitioner."

Petitioner moved, in the HP proceeding, to hold the Goldman Respondents in criminal and civil contempt, for the award of costs and expenses, to compel compliance with the consent order and a judgment for civil penalties. The Civil Court held a hearing on this motion wherein documentary and testimonial evidence was received. At the conclusion of the hearing, the parties submitted "post-trial memoranda."

That Court (Schreiber, J.H.C), by decision dated September 10, 2019, denied Petitioner's motion entirely holding she had failed to meet her burden of proof. That Court found that extensive repairs were made by various companies hired by the Goldman Respondents and that most of the violations were dismissed and closed by DHPD. These companies included Newline Contractors for kitchen repairs, painting and plastering; GAC Environmental to perform mold inspections; and ALC Environmental to perform lead remediation. The court further noted that DHPD was not seeking civil penalties against Goldman Respondents since all the violations, save a single class "A" one, were dismissed and closed. The court directed Respondents to correct the remaining open violations within thirty days of the order.

While the Civil Court matter was pending, Plaintiff, now *pro se*, commenced this action by filing her summons and complaint. Plaintiff filed a second amended complaint asserting six causes of action. This action includes claims for [1] a judgment seeking a declaration that Defendants failed to comply with Local Law of 2004, HUD regulations 24 C.F.R. §§35.80 through 35.98 and EPA regulations 40 CFR §§745.100 through 745.119; [2] constructive eviction; [3] breach of warranty of habitability; [4] breach of contract; [5] breach of covenant of quiet enjoyment; and [6] nuisance. Defendants answered denying Plaintiff's causes of action and asserted affirmative defenses which included collateral estoppel and *res judicata*.

Defendants originally moved to dismiss all claims asserted against them pursuant to CPLR §3211[a][5], based upon *res judicata*, or in the alternative upon collateral estoppel. This Court, by order dated April 22, 2021 (NYSCEF Doc. No. 81), converted the motion into one for motion for summary judgment and set a new briefing schedule to afford the parties proper notice as required by statute (*see* CPLR §3212[c]; *Wan Li Situ v MTA Bus Co.*, 130 AD3d 807, 808 [2d Dept 2015]).

Within the briefing schedule, Plaintiff filed a cross-motion for summary judgment wherein she asserts that the claims filed in her amended complaint could not have been brought in the prior HP proceeding. Further, Plaintiff posited that to the extent that these claims could have been brought in the prior action, since these problems continue to exist, her claims are protected by the continuing wrongs doctrine. She also claimed Defendants' motion was untimely. The cross-motion was unopposed.

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also Smalls v AJI Industries. Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Defendants established, *prima facie*, that all of Plaintiff's current claims could have or should have been asserted in the prior HP proceeding. The doctrine of *res judicata* holds that a final judgment bars further actions between the same parties on either the same cause of action or any claim related to the same course of conduct, unless the requisite elements and proof required for the new claim "vary materially" from those of the claim in the prior action (*see Ginezra Assoc. LLC, v Ifantopoulos*, 70 AD3d 427, 429 [1st Dept 2020] *quoting Lukowsky v Shalit*, 110 AD2d 563, 566 [1st Dept 1985]).

All of Plaintiff's causes of action in her second amended complaint are based on water incursion, mold, paint and plaster damage and lead paint that started in May 2016. The pleading sets forth that after Plaintiff commenced the underlying HP proceeding (naming DHPD as a respondent), the parties' attorneys in the underlying HP proceeding exchanged e-mails regarding the remedial work required. The conditions were inspected multiple times by DHPD. These same parties in the underlying HP proceeding then entered a consent order on January 9, 2018, enumerating precisely the repairs that were needed and settling the matter. When Defendants supposedly failed to comply with the terms of the consent order, Plaintiff in the underlying action moved for relief and was granted a hearing and further was allowed to submit a post-hearing memorandum to the Civil Court. Ultimately, that court determined the respondents made most of the repairs and that the DHPD dismissed and closed the violations issued.

In opposition, Plaintiff fails to provide any justification for the omission of her instant claims from the underlying HP action. “The Housing Part was created by the Legislature in 1972 with the enactment of New York City Civil Court Act § 110. Its purpose is to hear ‘actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing standards, including, but not limited to, the multiple dwelling law and the housing maintenance code, building code and health code of the administrative code of the city of New York’” (*Prometheus Realty Corp. v City of New York*, 80 AD3d 206, 209-210 [1st Dept 2010] citing CCA §110[a]). Given the Housing Part’s expansive jurisdiction to enforce proper housing standards, including violations of any laws relating to housing standards, Plaintiff should have raised her claims in the underlying case (*see Osman v Kirschenbaum*, 24 Misc3d 143[A] [App Term, First Dept, 2009] citing Administrative Code of the City of New York §27-2115[a]; CCA §110[c]).

In opposition, Plaintiff’s argument that the instant claims could not have been considered in the HP contempt hearing that was narrowed by the Consent Order she voluntarily entered is misplaced. Plaintiff, through counsel, commenced her action in the Housing Part and listed her allegations of violations, including water damage, mold, lead paint and Defendants’ failure to perform annual inspections. Despite the two reports cited by Plaintiff in her motion papers as to the purported lack of enforcement of these violations, DHPD made multiple inspections and issued violations as warranted. Although being inextricably interwoven to the condition of her apartment, Plaintiff elected not to claim that Defendants failed to comply with Local Law of 2004, HUD regulations 24 C.F.R. §§35.80 through 35.98 and EPA regulations 40 CFR §§745.100 through 745.119, nor asserted claims for constructive eviction, breach of warranty of habitability, breach of contract, breach of covenant of quiet enjoyment and nuisance that she now currently asserts in the second amended complaint. Since the claims in both proceedings arise from the same series of transactions, the claims herein should have been raised in the prior proceeding (*see Napoli v New York Post*, 206 AD3d 816 [2d Dept 2022]; *Jacobson Development Grp, LLC v Grossman*, 198 AD3d 956, 959-960 [2d Dept 2021]; *Bayer v City of New York*, 115 AD3d 897, 898-899 [2d Dept 2014]).

Plaintiff’s reliance on the continuing-wrong doctrine is inapposite. That precept tolls running of the statute of limitations to the date of the commission of the last wrongful act when there is a series of continuing wrongs (*see Affordable Housing Assoc, Inc., v Town of Brookhaven*, 150 AD3d 122, 126 [2d Dept 2017]). Contrary to Plaintiff’s argument, it does not shield Plaintiff’s claims from the effect of *res judicata* (*consider Jensen v General Elec. Co.*, 82 NY2d 77, 85 [1993] [Employing continuing-wrong doctrine does not avoid the requirement to sue on all accrued causes of action or potentially face *res judicata* bar.]). The Olmsted and Fishbein affidavits confirm that the conditions alleged stem from the same conditions claimed in the HP action.

Defendants’ motion is also not untimely. As set forth in CPLR §3211[e], “[a]ny objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision [a] is waived unless raised either by [a motion to dismiss] or in the responsive pleading.” Here, Defendants asserted the affirmative defenses of *res judicata* and collateral estoppel, which are contained in CPLR §3211[a][5], in their answer to the second amended complaint. Having properly pled these affirmative defenses, Defendants’ motion to dismiss the

complaint was preserved and timely (cf. *U.S. Bank, N.A. v Gilchrist*, 172 AD3d 1425 [2d Dept 2019]). Thereafter, this Court converted the motion to a motion for summary judgment (see CPLR §3211[c]; *Corrales v Zoning Bd of Appeals of Village of Dobbs Ferry*, 164 AD3d 582, 586 [2d Dept 2018][motion to dismiss based on pure legal argument properly converted to motion for summary judgment]). Moreover, a summary judgment motion can be made any time after issue is joined and within 120 days after the note of issue is filed (see CPLR §3212[a]; *Brill v City of New York*, 2 NY3d 648, 651-652 [2004]). Since Defendants answered and a note of issue was not filed, a summary judgment motion is timely.

Accordingly, it is

ORDERED that Defendants' motion for summary judgment is granted and Plaintiff's complaint is dismissed, and it is

ORDERED that Plaintiff's cross-motion is denied as moot.

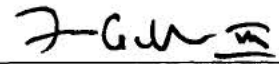
7/28/2022  
DATE

CHECK ONE:  CASE DISPOSED  DENIED

APPLICATION:  GRANTED  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

  
 FRANCIS A. KAHN, III, A.J.S.C.  
 HON. FRANCIS A. KAHN, III  
 J.S.C.