

lease. In that litigation the Respondent-Tenant answered and interposed an affirmative defense and counterclaim, which was resolved by Stipulation in which defendant consented to a judgment in the amount of \$53,617.44 with a judgment of possession to issue, execution of which was stayed to permit payment of various amounts, and if payments were not timely made, upon 5 days notice to Respondent, a Marshall was entitled to execute the Warrant of Eviction.

The plaintiff was evicted by Marshall Daley on July 25, 2007 who prepared an inventory of property.

It appears that defendant's motion to dismiss the instant complaint may be appropriate to the extent the complaint is based upon allegations which have previously been decided.

It appears that the Civil Court "So Ordered" stipulation dated April 19, 2007 and a Court decision dated June 29, 2007, coupled with the Appellate Term decision denying the appellant's appeal may be sufficient to preclude the plaintiff's recovery in the instant suit on the grounds of collateral estoppel and res judicata as alleged in the instant motion.

The amended verified complaint recites the plaintiff's cause of action and are numbered one through eight.

The first cause of action alleges that defendant was not entitled to rent "in respect of half the basement" and the landlord "never delivered the possession of the full basement as per terms of the lease."

The second cause of action is for "refund of the excess real estate taxes" paid by plaintiff for use of the full basement which defendant never provided.

The third cause of action demands "refund of the excess condo charges" because of defendant's failure to provide full use of the basement.

The fourth cause of action alleges that the defendant "failed and neglected to provide essential amenities such as heat and running hot water for the last four years."

The fifth cause of action alleges that because of the "deprivation of access" to half the basement "for more than six years" and "failure to provide essential amenities" "the

plaintiff lost goodwill, customers, and business."

The sixth cause of action alleges that the defendant was "obligated to maintain and repair the public portions of the leased premises both exterior and interior" and the defendant's failure to do so despite plaintiff's entreaties resulted in total damage to asbestos pipes resulting in "various health problems including but not limited to lungs, breathing, neurological damages."

The seventh cause of action alleges that plaintiff was "entitled to receive five days notice from the Marshall before actual eviction" and the plaintiff was evicted on July 27, 2007 and "had no time to wind up his business" resulting in a loss of inventory, fixtures and other items.

The eighth cause of action is for punitive damages due to the malicious and otherwise unconscionable conduct of the defendant.

The stipulation dated April 19, 2007, between the defendant as petitioner, Queens Broadway, LLC (hereinafter "Broadway") and plaintiff as respondent, provides for 99 Cents Concepts, Inc. (hereinafter "Concepts") payment of \$53,614.44 and awards final judgment of possession to Broadway which was stayed for payment of \$9,000.00 to Broadway for payment of current rent, tax, and common charges. If payment was not made then following a five day notice to Concepts' attorney by certified mail, Broadway could engage a City Marshall to obtain possession pursuant to the term of the stipulation.

There is a clause in the stipulation which provides "all agreements above without prejudice to resp. Supreme Court Case." It is noted that the instant case was commenced by filing the summons and initial complaint on March 13, 2007, a month after the initial stipulation of April 19, 2007.

There is a subsequent order of the Civil Court, dated June 26, 2007, staying execution of the warrant through July 5, 2007 for payment of \$32,659.46, which amount "represents compliance" with the stipulation with the exception of July 2007 rent.

The Court order provides that if payment was not received by July 5, 2007 "the Marshall may proceed to evict" if the petitioner's attorney files an affidavit of non-payment. No further notice of eviction by the Marshall is necessary."

Concepts, by order to show cause filed in the Appellate Term, stayed its eviction. The affirmation of Concepts' attorney in support of the order to show cause at paragraph "4" recites that Concepts has paid "excess rent, excess real estate taxes and excess condo charges from the inception of the tenancy, though the landlord never delivered the possession of the full basement." There is at least one page missing from defendant's Exhibit "F," however, at paragraph "11." The affirmation recites that Concepts received Notice of Eviction from Marshall Daley on June 14, 2007.

Counsel's affirmation continues at paragraph "16," that Broadway "never disputed that possession of the full basement as per terms of the lease was delivered to the respondent/tenant and the landlord has been recovering the rent, real estate taxes, and other charges for half of the basement the possession of which was never delivered to the respondent/tenant." Indeed the affidavit of Monsoor Choudhry, President of Concepts, recites a paragraph "14," that "the landlord never disputed that possession of the full basement as per terms of the lease was [never] delivered to the respondent/tenant and the landlord has been receiving the rent, real estate taxes, and other charges for half of the basement the possession of which was never delivered to the respondent/tenant."

On August 27, 2007, the Appellate Term, after reading the affirmation and affidavit denied Concepts' motion.

The lease provides at paragraph "20" that the tenant takes the premises without the landlord's making any representation as to the physical condition of the leased premises and acknowledges that the tenant takes possession "as is."

The lease also provides at paragraph "47" that the tenant is responsible for heat and air conditioning." In paragraph "64" the tenant represents that it was "thoroughly acquainted with the condition" of premises and takes it "as is" and the tenant specifically acknowledges that the landlord "has made no representations as to the condition" of the premises or "has no representations as to the condition of the "premises" or "any equipment or facilities."

At paragraph "67" the tenant assumed all responsibility for the installation and maintenance of heating, ventilation and air-conditioning.

With these facts in mind, the defendant moves for dismissal of the instant complaint pursuant to CPLR § 3212.

The defendant relies on collateral estoppel and res judicata.

These doctrines of preclusion rely on questions of fact or law resolved in prior litigation which are presented in subsequent actions.

Collateral estoppel precludes relitigation of factual issues decided in a prior suit which preclude needless litigation when the second action addresses a different cause of action from the prior suit but involves relitigation of issues necessary to the outcome of the first. Park Lane Hosiery Co., Inc. v. Shore, 439 US 322, 327.

Res judicata precludes relitigation of an issue which has resulted in a judgment on the merits in a prior action for the same cause of action. Parklane Hosiery Co., Inc. v. Shore, supra, 327.

New York takes a "transactional analysis approach to res judicata" so that once a claim is brought to a final conclusion, all other claims arising out of the same acts or series of acts are barred even though based on "different theories" or seeking a "different remedy" and extends to defenses which were actually raised or could have been raised. Santiago v. Lalani, 256 AD2d 397 subsequent appeal denied 290 AD2d 494. This is based on the theory that when two actions have "such a measure of identity that a different judgment in the second would destroy or impair the rights or interests established by the first" res judicata will prevail to provide finality and assure that either party will not be "vexed by further litigation." Matter of Reilly v. Reed, 45 NY2d 24).

The defendant has demonstrated through the affidavit, affirmation, exhibits and the amended verified complaint, that the defendant is entitled to summary judgment as a matter of law as to the first six causes of action. Plaintiff has failed to rebut the defendant's motion for summary judgment as to these causes of action, by evidence which challenges the defendant's assertions. Alvarez v. Prospect Hospital, 68 NY2d 320; Winegrad v. New York University Medical Center, 64 NY2d 851).

Further, as to the last cause of action sounding in

maliciousness, this eighth cause of action must be dismissed because it plainly fails to meet the statutory requirement that it be plead with particularity (CPLR § 3016). There is nothing in the amended complaint taken as a whole which supports the allegation that defendant acting maliciously.

The only viable cause of action is the seventh cause of action dealing with the execution of the plaintiff's property by the Marshall. The plaintiff has demonstrated the existence of triable issues of fact as to this cause of action. See Zuckerman v. City of New York, 49 NY2d 557.

The Court finds that the defendant has met the burden of posting an undertaking of \$100,000.00 which is sufficiently secure to ensure the plaintiff's rights.

The case cited by the plaintiff of Matter of Mandrarchia v. Russo, 53 Misc29 1018, is inappropriate. The initial paragraph of that decision indicates that it relates to a fact pattern distinctly different from the issue presented. In the instant case, the initial stipulation of April 19, 2007 was "so ordered" by the Court. There is also a second order signed by the Court dated June 27, 2007 and there is the decision of the Appellate Term dated August 27, 2007.

Accordingly, causes of action one, two, three, four, five, six and eight are dismissed for the reasons set forth herein.

So Ordered.

Dated: Long Island City, N.Y.
November 13, 2008

ROBERT J. MCDONALD
J.S.C.