

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**1900 ASSOCIATES, LLC
Plaintiff,**

v.

**Case No. 14-138314-CH
Hon. James M. Alexander**

**NORMAN YATOOMA & ASSOCIATES, PC,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION & MOTION TO AMEND

This matter is before the Court on Plaintiff's motion for summary disposition. There is a long and involved litigation history between these parties.

In March 2011, Defendant leased space in Plaintiff's building to house its law offices. Shortly thereafter, in May 2011, Defendant sued Plaintiff on claims that Plaintiff, in relevant part, fraudulently and materially misrepresented the square footage of the office space. As a result, Defendant claimed that it was entitled to damages for breach of contract, fraudulent and innocent representation, and silent fraud – as well as reformation of the contract.

This prior action was assigned to the Hon. Martha Anderson, who ultimately dismissed all of Defendant's claims and entered a judgment against Defendant for Plaintiff's costs and attorney fees (Case No. 11-119400-CH). Defendant subsequently appealed these decisions, and on June 12, 2014, the Court of Appeals affirmed Judge Anderson in all respects. (Docket Nos. 313487 and 316754).

Also while the prior action was pending before Judge Anderson and the Court of Appeals, Defendant remained as a tenant in Plaintiff's building. According to Plaintiff's

Complaint, however, Defendant failed to pay rent for December 2013 through March 2014 (when Defendant moved out of the leased space). Plaintiff then filed the present Complaint seeking to collect unpaid rent and for breach of the commercial lease.

In response, Defendant filed an Answer and Counterclaim (again) alleging that Plaintiff fraudulently and materially misrepresented the square footage of the office space, which entitles it to damages under various theories.

Not surprisingly, Plaintiff files the present motion for summary disposition – arguing that: (1) it is entitled to summary disposition of its Complaint based on Defendant’s failure to offer a defense to breaching the lease, and (2) Defendant’s Counterclaim is barred by res judicata and collateral estoppel.

Plaintiff seeks these rulings under MCR 2.116(C)(9) and (C)(10). A (C)(9) motion tests whether the defendant’s defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff’s right to recovery. *Lepp v Cheboygan Area Schools*, 190 Mich App 726 (1991). And a (C)(10) motion tests the factual support for Plaintiff’s claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Initially, the Court notes that, under its May 27, 2014 summary disposition scheduling order, Defendant was ordered to file a response brief by 4:30 pm on July 8, 2014. Defendant, however, failed to do so. Instead, Defendant filed its response on July 14, 2014 – without any explanation for the delay. Under the May 27 order, “Briefs submitted after the due date will not be considered absent a showing of good cause.”

As a result, the Court finds that Defendant failed to file a timely brief contesting Plaintiff’s right to judgment as a matter of law and, therefore, concedes Plaintiff’s entitlement to judgment. For this reason, the Court GRANTS Plaintiff’s motion for summary disposition.

Assuming arguendo that the Court would consider Defendant's response, the Court will briefly address the same. And when doing so, it makes sense to first address Plaintiff's motion on claims that Defendant's Counterclaim and defenses to Plaintiff's Complaint are barred by both res judicata and collateral estoppel.

A. Res Judicata

The doctrine of res judicata bars a subsequent action when: (1) the prior action was decided on the merits; (2) both actions involve the same parties or their privies; and (3) the claims in the second case were, or could have been, resolved in the first case. *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004); *Sewell v Clean Cut Mgmt*, 463 Mich 569, 575; 621 NW2d 222 (2001).

“Michigan courts have broadly applied the doctrine of res judicata. They have barred, not only claims already litigated, but every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.” *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999), citing *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 160-163; 294 NW2d 165 (1980); and *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995).

In its Response to Plaintiff's motion, Defendant admits that “the first and second res judicata requirements are not in dispute.” Defendant, however, disputes the final element – that the claims were, or could have been, resolved in the first case.

As stated, Defendant brought the prior action on claims that Plaintiff, in relevant part, fraudulently and materially misrepresented the square footage of the office space. As a result, Defendant claimed that it was entitled to damages for breach of contract, fraudulent and innocent representation, and silent fraud – as well as reformation of the contract.

These claims are precisely those argued by Defendant in the present case as defenses to Plaintiff's Complaint and in support of their Counterclaim. These issues were briefed and argued, and Judge Anderson dismissed each of Defendant's claims and ruled that Plaintiff was entitled to its attorney fees and costs associated with that lawsuit. Defendant then appealed Judge Anderson's rulings, which the Court of Appeals affirmed in full. Defendant cannot now get another bite at the apple in this Court.

To the extent that Defendant argues that an August 26, 2013 refund check issued by Plaintiff somehow creates a "new" fraud claim, the Court rejects this argument. This refund derived solely from the parties' prior dispute over the square footage. In other words, the refund was issued because of the existence of prior dispute (the prior alleged fraud) and cannot serve as the basis for a new fraud claim.

For the above reasons, the Court finds that Defendant's defenses to Plaintiff's Complaint and the claims brought in its Counterclaim are barred by res judicata. These parties were both involved in the prior lawsuit, and Judge Anderson ruled on these precise issues. The Court of Appeals affirmed. Defendant's renewed efforts to again revisit these same issues are solely the result of gamesmanship that this Court will not entertain. Defendant is bound by the prior rulings.¹

B. Collateral Estoppel

Plaintiff also argues that Defendant's claims and defenses are barred by collateral estoppel. Our Supreme Court has held:

¹ To the extent that Defendant argues that Judge Anderson "did not permit a complaint amendment to include [claims regarding the HVAC and sign issues]," the Court of Appeals noted (in the context of said motion to amend before Judge Anderson) that Defendant "admitted that it received the relief it sought." As a result, these issues are moot and of no significance to this Court's conclusion on res judicata. Additionally, Defendant's argument inherently admits that these issues were actually raised in the prior action. Defendant simply didn't like the ruling.

Generally, for collateral estoppel to apply three elements must be satisfied: (1) “a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment”; (2) “the same parties must have had a full [and fair] opportunity to litigate the issue”; and (3) “there must be mutuality of estoppel.” “Mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privity to a party, in the previous action. In other words, ‘the estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him.’” *Monat v State Farm Ins Co*, 469 Mich 679, 682-685; 677 NW2d 843 (2004), quoting *Storey v Meijer, Inc*, 431 Mich. 368, 373 n 3; 429 N.W.2d 169 (1988) and *Lichon v American Universal Ins Co*, 435 Mich 408, 427; 459 NW2d 288 (1990).

On this issue, Defendant offers nothing beyond a mere conclusory statement that collateral estoppel does not apply. Michigan law is clear that, “A party may not merely announce a position and leave it to [the] Court to discover and rationalize the basis for the claim.” *National Waterworks, Inc v International Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007).

In any event, a collateral estoppel analysis is largely the same as a res judicata analysis – with the addition of a “mutuality of estoppel” element.

For the same reasons as in the res judicata analysis, the Court concludes that the parties “actually litigated” the above issues before Judge Anderson. They had a full and fair opportunity to do so, and Judge Anderson ultimately dismissed each of Defendant’s claims.

“Mutuality of estoppel” also exists because, had Judge Anderson ruled that Plaintiff had fraudulently misrepresented the square footage of the office space, and Defendant, therefore, was entitled to damages for breach of contract or reformation of the contract, Plaintiff would have been likewise bound.²

² In addition, the *Monat* Court concluded that “where collateral estoppel is being asserted defensively against a party who has already had a full and fair opportunity to litigate the issue, mutuality is not required.” *Monat, supra* at 695. In this case and only with respect to Defendant’s Counterclaim, Plaintiff is asserting collateral estoppel defensively. As a result, although mutuality exists, it is not required for Plaintiff’s motion with respect to Defendant’s Counterclaim.

For the many foregoing reasons, the Court finds that Defendant's claims in its Counterclaim and defenses to Plaintiff's Complaint are wholly barred by the doctrines of both res judicata and collateral estoppel. As a result, Plaintiff is entitled to summary disposition of Defendant's Counterclaim, and the same is DISMISSED with prejudice and in its entirety.

The Court also finds that Plaintiff is entitled to summary disposition of its Complaint under (C)(9) because Defendant's defenses are so clearly untenable as a matter of law that no factual development could possibly deny Plaintiff's right to recovery. As a result, Plaintiff is entitled to summary disposition on the issue of liability.

With respect to damages, however, for reasons not quite clear, Plaintiff does not provide detailed evidence of the amount owed. On page three of its Motion, Plaintiff claims that it seeks \$61,178.03 for Defendant's failure to pay while it occupied the premises from December 2013 through March 2014. There is, however, no affidavit or evidence establishing how Plaintiff arrived at this figure.

Plaintiff also seeks to accelerate the lease and seeks damages in the amount of rent due for the remainder of the term. Plaintiff claims that future rent totals \$376,111.44. As a result, Plaintiff seeks a total judgment of \$437,289.47. Plaintiff, however, acknowledges that it is required to mitigate its damages on future rent, and suggests that it can refund Defendant the balance on future rent and amend the judgment once the premises are re-leased.

C. Sanctions and Costs

Plaintiff also seeks recovery of its costs and attorney fees under Section 24 of the Lease, MCR 2.114(D), MCR 2.625(A)(2), and MCL 600.2591.

Section 24 of the Lease provides:

If either party uses the services of an attorney in connection with (a) any breach or default in the performance of any of the provisions of this Lease, in order to secure compliance with such provisions or recover damages therefor or to terminate this Lease or (b) any action brought by either party against the other in which the party bringing the suit does not prevail, the non-prevailing party shall reimburse the prevailing party upon demand for any and all reasonable attorneys' fees and expenses so incurred. . . .

MCR 2.114(D) provides that:

The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that . . . the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and . . . the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Under MCR 2.114(E):

If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

In addition, under MCR 2.114(F): "In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages."

MCR 2.625(A)(2) provides, "if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591."

The cited statute, MCL § 600.2591 states:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court . . . shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

(2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

Plaintiff's request for costs and attorney fees is GRANTED under Section 24 of the Lease, MCR 2.114(D), MCR 2.625(A)(2), and MCL 600.2591. Defendant violated MCR 2.114(D) by filing a Counterclaim alleging claims that were already litigated to an end certain. Defendant filed an appeal, and the Court of Appeals affirmed. Defendant's Counterclaim and defenses to Plaintiff's Complaint are barred by res judicata and collateral estoppel. For this reason, Plaintiff may bring an appropriate motion for costs and actual attorney fees against Defendant based on this Opinion and Order.

D. Defendant's Motion to Amend Counterclaim and Affirmative Defenses.

Defendant has also filed a motion to amend its Counterclaim and Affirmative Defenses. Under MCR 2.118(2), "a party may amend a pleading only by leave of the court or by written consent of the adverse party." A motion to amend, however, may be denied for particularized reasons, such as: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, or (3) futility. *Weymers v Khera*, 454 Mich 639; 563 NW2d 647 (1997); *Ben P Fyke & Sons, Inc v Gunter Co*, 390 Mich 649; 213 NW2d 134 (1973).

The Court has already ruled that Defendant's defenses and claims are barred by both res judicata and collateral estoppel. As a result, any amendment is both futile and in bad faith. Defendant already had a full and fair opportunity to litigate these issues – including the alleged "new" fraud claim relating to the August 26, 2013 refund check – as this claim is simply and wholly related to Defendant's previous fraud claim regarding the square footage of the lease premises. Judge Anderson ruled on this issue, Defendant appealed, and the Court of Appeals affirmed.

Defendant's amendments entirely rehash the same issues already raised in slightly different forms. As a result, the Court finds that Defendant's proposed amendment would be futile, and Defendant's motion to amend its Counterclaim and Affirmative Defenses is, therefore, DENIED.

E. Conclusion

For all of the above reasons, the Court GRANTS Plaintiff's motion for summary disposition, and DISMISSES Defendant's Counterclaim in its entirety.

With respect to Plaintiff's Complaint, however, while Plaintiff established Defendant's liability for breach of the Lease, Plaintiff failed to attach adequate proof of how it arrived at \$61,178.03 in damages (representing the time that Defendant occupied the premises). The Court notes, however, that Defendant did not dispute the accuracy of this amount. As a result, in order to complete the file, the Court finds that Plaintiff may present an appropriate money judgment for signature, but it must be supported by a detailed affidavit supporting the amount sought.

With respect to Plaintiff's request for future damages under the lease, the Court finds that Plaintiff is entitled to a judgment for \$376,111.44 – which Defendant (again) does not dispute – but this amount is subject to any collection offset based on re-lease of the building.

This Order is a Final Order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

August 22, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge