Res Judicata and Collateral Estoppel in Divorce Actions
By Joel R. Brandes

Issues related to the doctrine of res judicata are frequently involved in matrimonial actions and can result in disastrous consequences if overlooked by counsel. For example, in Boronow v Boronow, 71 N.Y.2d 284, 525 N.Y.S.2d 179 (1988) a former wife who was a party to a concluded matrimonial action, and had a full and fair opportunity to contest property issues was barred by res judicata from a subsequent plenary action concerning title to the marital home which could have been, but was not, raised in the prior action. The Court of Appeals held that the courts and the parties should ordinarily be able to plan for the resolution of all issues relating to the marriage relationship in a single action. However, in Chen v. Fischer, 6 N.Y.3d 94, 810 N.Y.S.2d 96 (2005), it distinguished Boronow and held that a wife's subsequent personal injury action for intentional infliction of emotional distress and assault and battery was not barred by res judicata, although the allegations in the personal injury action were "virtually identical" to those in her counterclaim for divorce, and arose out of the same transaction or series of transactions. It reasoned that an interspousal tort action does not form a convenient trial unit with a divorce proceeding, and it would not be within the parties' reasonable expectations that the two would be tried together.

The doctrine of res judicata prevents a party from re-litigating a claim once a court has issued a final judgment on the merits of that claim. Bayer v. City of New York, 115 A.D.3d 897, 983 N.Y.S.2d 61 (2d Dep't 2014). The predicate for its operation is that (1) the judgment must be a final judgment, and (2) that due process must have been observed. Res judicata has been limited to the parties and their privies. A judgment in

one action is conclusive in a later one, as to any matters actually litigated in it, and as to any that might have been litigated, when the two causes of action have such a measure of identity that a different judgment in the second action would destroy or impair rights or interests established by the first action. The test is whether the substance of the rights or interests established in the first action will be destroyed or impaired by the prosecution of the second. It is not conclusive to the same extent when the two causes of action are different, not in form only but in the rights and interests affected. The estoppel is limited to the point actually determined. Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp., 250 N.Y. 304, 165 N.E. 456 (1929).

The doctrine of res judicata “operates to preclude … claims for different relief which arise out of the same factual grouping or transaction and which should have or could have been resolved in the prior proceeding. ” In determining whether a factual grouping constitutes a transaction for res judicata purposes, a court must apply a pragmatic test and analyze how the facts are related as to time, space, origin or motivation, whether they form a convenient trial unit and whether treating them as a unit conforms to the parties' expectations or business understanding. See Chen v. Fischer, 6 N.Y.3d 94, 810 N.Y.S.2d 96 (2005); Smith v. Russell Sage Coll., 54 N.Y.2d 185, 445 N.Y.S.2d 68 (1981). 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 N.Y.2d 353, 357, 445 N.Y.S.2d 687(1981).

A judgment does not operate as an estoppel in a subsequent action between the parties as to immaterial or unessential facts, even though put in issue by the pleadings

and directly decided. It is final only as to facts litigated and decided, which have such a relation to the issue that their determination was necessary to the determination of that issue. Rudd v Cornell, 171 N.Y. 114, 63 N.E. 823 (1902).

Collateral estoppel, a narrower doctrine, is based upon the notion that a party, or one in privity with a party, should not be permitted to relitigate an issue decided against it. Two requirements must be satisfied. First, the party seeking the benefit of collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action. Kaufman v. Lilly & Co., 65 N.Y.2d 449, 492 N.Y.S.2d 584 (1985). Second, the party to be precluded from relitigating an issue must have had a full and fair opportunity to contest the prior determination. D'Arata v New York Cent. Mut. Fire Ins. Co., 76 N.Y.2d 659, 664, 563 N.Y.S.2d 24 (1990). The party opposing the estoppel must demonstrate the absence of a full and fair opportunity to contest the prior determination. Nappy v. Nappy, 100 A.D.3d 843, 955 N.Y.S.2d 102 (2d Dep't 2012).

Collateral estoppel or issue preclusion operates so that the record itself, rather than the prior judgment, stands as a barrier to relitigation of issues determined or which could have been determined in the first proceeding. Like res judicata, collateral estoppel requires a final judgment on the merits. Collateral Estoppel will apply to matters actually litigated, and to all matters necessarily established by the prior judgment even if they were not litigated. Statter v. Statter, 2 N.Y.2d 668, 163 N.Y.S.2d 13 (1957).

Collateral estoppel allows the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment on a different cause of action in which the same issue was necessarily raised and decided. The identity of the issue which has necessarily been decided in the prior action is controlling. The issue must

have been material to the first action and essential to the decision, and it must be the point actually to be determined in the second action such that a different judgment in the second would destroy or impair rights or interests established by the first. A determination whether the first action genuinely provided a full and fair opportunity requires consideration of "the 'realities of the [prior] litigation,' including the context and other circumstances which … may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him." Ryan v. New York Telephone Co., 62 N.Y.2d 494, 478 N.Y.S.2d 823 (1984). Among the specific factors to be considered are the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation. Gilberg v. Barbieri, 53 N.Y.2d 285, 441 N.Y.S.2d 49 (1981).

In Statter v Statter, 2 N.Y.2d 668, 163 N.Y.S.2d 13 (1957) the husband obtained a judgment of separation against the wife, and the decision contained a finding that the husband and wife were validly married. The separation judgment was held to be res judicata in the subsequent annulment action commenced by the wife. The Court of Appeals observed that the subject of the second action was the validity or invalidity of the marriage and a judgment of separation establishes the existence of a valid and subsisting marriage between the parties. The validity of the marriage was "comprehended and involved in the thing… decided." It was "necessarily implied in the former decision." It followed that res judicata barred a second trial on the issue of the marriage's validity. This was true even though it was not in controversy in the first

action.

An order entered on a motion is ordinarily entitled to the same res judicata and collateral estoppel treatment as a judgment as long as the other requisites of those doctrines are met. Vavolizza v. Krieger, 33 N.Y.2d 351, 352 N.Y.S.2d 919 (1974).

When is a judgment or order a final judgment on the merits? CPLR 5013 provides that a judgment dismissing a cause of action before the close of the proponent's evidence is not a dismissal on the merits unless it specifies otherwise. A judgment dismissing a cause of action after the close of the proponent's evidence is a dismissal on the merits unless it specifies otherwise. However, CPLR 3216 allows the court to dismiss on the merits for failure to prosecute and changes the rule that there can be no dismissal on merits until the close of the plaintiff's case. Headley v Noto, 22 N.Y.2d 1, 290 N.Y.S.2d 726 (1968)

A dismissal “with prejudice” generally signifies that the court intended to dismiss the action on the merits, that is, to bring the action to a final conclusion against the plaintiff. The words “with prejudice” are used interchangeably with the phrase “on the merits” to indicate the same preclusive effect. Yonkers Contr. Co. v. Port Auth. Trans–Hudson Corp., 93 N.Y.2d 375, 690 N.Y.S.2d 512 (1999).

CPLR 5013 does not require that the prior judgment contain the precise words “on the merits” in order to be given res judicata effect. It suffices if it appears from the judgment that the dismissal was on the merits. See Strange v Montefiore Hosp. and Medical Center, 59 N.Y.2d 737, 463 N.Y.S.2d 429 (1983).

A dismissal for lack of standing is not a dismissal on the merits, Alco Gravure, Inc. v. Knapp Foundation, 64 N.Y.2d 458, 490 N.Y.S.2d 116 (1985), nor is a dismissal based upon a party's failure to appear. S*ee,* Greenberg v. De Hart, 4 NY2d 511, 176 N.Y.S.2d 344 (1958). A default judgment is not a final judgment on the merits. Maybaum v. Maybaum, 89 A.D.3d 692, 933 N.Y.S.2d 43 (2d Dep't 2011).

A court has discretion to specify whether its order dismissing a claim is to have res judicata effect. Where a dismissal is specifically "on the merits" or "with prejudice," the circumstances must warrant barring the litigant from further pursuit of his claim for those phrases to be given preclusive effect. See Art Guild Gallery v. Charmack, 107 AD2d 777, 484 N.Y.S.2d 614 (2d Dept.,1985).

A court may dismiss a claim with prejudice where it finds that exceptional circumstances or an unreasonable neglect to prosecute warrants this extreme sanction. See Jones v. Maphey, 50 NY2d 971, 431 N.Y.S.2d 466 (1980); Matter of Stacey O. v Donald P., 137 A.D.2d 965, 525 N.Y.S.2d 385 (3 Dept., 1988). "Exceptional circumstances" warranting the exercise of the court's power to dismiss the subsequent action on the merits before completion of plaintiff's proof were found where a preclusion order in a prior action foreclosing proof of the cause of action was in effect and the only purpose of new litigation was to circumvent the preclusion order. Palmer v. Fox, 28 A.D.2d 968, 283 N.Y.S.2d 216 [1967], aff'd 22 N.Y.2d 667, 291 N.Y.S.2d 361 [1968]).

In State of New York Mortgage Agency v. Massarelli 167 A.D.3d 1296, 89 N.Y.S.3d 768 (3 Dept. 2018) the Appellate Division held that where there were no exceptional circumstances or unreasonable neglect to prosecute, a judgment dismissing the action with prejudice would not be given preclusive effect. The phrase

"with prejudice," in the order dismissing the mortgage foreclosure action, meant no more than the purported assignee was precluded from commencing a new mortgage foreclosure action until it could establish standing to do so, and was not barred by res judicata. Nothing in the record suggested that Supreme Court perceived "exceptional circumstances or an unreasonable neglect to prosecute" that would warrant such an "extreme sanction."

Conclusion

The words "on the merits" and "without prejudice" do not always mean what they appear to mean. Where a dismissal is specifically "on the merits" or "with prejudice," the circumstances must warrant barring the litigant from further pursuit of his claim for those phrases to be given preclusive effect.

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