

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

EUGENE J. RADER,	:	MARCH TERM, 2000
	:	
Plaintiff	:	No. 1199
	:	
v.	:	COMMERCE PROGRAM
	:	
TRAVELERS INDEMNITY COMPANY	:	
OF ILLINOIS, ET AL.,	:	
	:	
Defendants	:	Control No. 072434

OPINION

Presently before this court is the Motion for Judgment on the Pleadings (“Motion”) of defendants, William B. Strine, Walter M. Strine, and Walter M. Strine, Jr., individually and trading and doing business as Commonwealth Real Estate Investors and as Media Real Estate Company (collectively the “Strine defendants”).

For the reasons set forth, this court is granting the Motion, in part, as to the following counts in the Complaint: Count VI (Breach of Contract), Count VIII (Unjust Enrichment), Count IX (Constructive Eviction), Count X (Promissory Estoppel), finding that these counts are barred by the res judicata effect of the judgment entered in Media Real Estate Company v. Rader, Court of Common Pleas of Delaware County, docket no. 98-14623. However, the Motion is denied as to Count VII, which purports to state a claim for a violation of the Unfair Trade Practices and Consumer Protection Law (“UTP/CPL”), codified at 73 P.S. §§ 201-1 et seq., and Count XI (Punitive Damages).¹

¹It is unclear whether plaintiff will be able to maintain his claim under the UTP/CPL, but the court cannot now dismiss this claim since it appears to be separate from the confessed judgment and plaintiff may not have been able to assert it in a petition to open. Further, the

BACKGROUND

This action arises out of a fire loss which occurred on March 14, 1998, destroying the Hoagie Hut – the Media, Pennsylvania delicatessen business of plaintiff, Eugene J. Rader (“Rader”). The Strine defendants represent the lessor and owner of the premises. The original lease between plaintiff and the Strine defendants was for a term of nine years, beginning January 1, 1998 through December 31, 1997. Compl., ¶ 12. See also, Compl., Exhibit A. The lease term was extended an additional five years, beginning January 1, 1998 and ending December 31, 2003. Compl., ¶ 13. See also, Compl., Exhibit B.

On account of the fire, the premises and its contents were destroyed and rendered untenable and unusable. Compl., ¶ 17. The Strine defendants purportedly refused to rebuild or replace the building on the premises, but maintained that it was Rader’s obligation to rebuild or replace the building under the lease’s terms. Compl. & Answer, ¶¶ 59-61. The Strine defendants also demanded that plaintiff make monthly rental payments after the fire, though plaintiff maintains that the rental obligations had abated by reason of the fire. Compl. & Answer, ¶¶ 62-63.

On October 9, 1998, Media Real Estate Company, as agent for Commonwealth Real Estate Investors, confessed judgment for the rental payments, interest and attorney fees, as well as, possession of the property in the Court of Common Pleas of Delaware County at docket no. 98-14623 (“Delaware County Action”). Answer, ¶ 65. See also, Defs. Motion for Judgment on Pleadings, Exhibit D.

[footnote 1 cont’d:]

claim for punitive damages, while it is not able to stand as an independent cause of action, Nix v. Temple Univ. of the Commw. Sys. of Higher Educ., 408 Pa.Super. 369, 380, 596 A.2d 1132, 1138 (1991), is not dismissed but is tied to plaintiff’s UTP/CPL claim.

Thereafter, the Strine defendants did rebuild the building and rented it to another tenant. Answer, ¶ 65.

In his Complaint, plaintiff asserts six counts against the Strine defendants, including: breach of contract (count VI); Unfair Trade Practices and Consumer Protection Law, 73 P.S. § 201-1 et seq. (count VII); unjust enrichment (count VIII); constructive eviction (count IX); promissory estoppel (count X); and punitive damages (count XI).

The Strine defendants have now filed a Motion for Judgment on the Pleadings, on the grounds that plaintiff's claims against them are barred by the doctrine of res judicata on account of the Delaware County Action.²

LEGAL STANDARD

Rule 1034 of the Pennsylvania Rules of Civil Procedure ["Pa.R.C.P."] provides that "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." Pa.R.C.P. 1034(a). On a motion for judgment on the pleadings, which is similar to a demurrer, the court accepts as true all well-pleaded facts of the non-moving party, but only those facts specifically admitted by the nonmoving PARTY may be considered against him. Mellon Bank v. National Union Ins. Company of Pittsburgh, 2001 WL 79985, at *2 (Pa.Super.Ct. Jan. 31, 2001). However, "neither party will be deemed to have admitted conclusions of law." Id. See also,

²Travelers Indemnity Company of Illinois, an additional defendant, was the Hoagie Hut's insurer. This court previously granted Travelers' Preliminary Objections in part, dismissing Counts II, IV and V of the Complaint. See Eugene J. Rader v. Travelers Indemnity Company of Illinois, et al., March Term, 2000, No. 1199 (C.P. Phila. Sept. 25, 2000)(Herron, J.) The remaining claims against Travelers are for breach of fiduciary duty (count I) and bad faith, 42 Pa.C.S.A. § 8371 (count III), and these claims are not subject to the present motion.

Flamer v. New Jersey Transit Corp., 414 Pa.Super. 350, 355, 607 A.2d 260, 262 (1992)(“While a trial court cannot accept the conclusions of law of either party when ruling on a motion for judgment on the pleadings, it is certainly free to reach those same conclusions independently.”)(citations omitted).

In ruling on a motion for judgment on the pleadings, the court should confine itself to the pleadings, such as the complaint, answer, reply to new matter and any documents or exhibits properly attached to them. Kelly v. Nationwide Ins. Co., 414 Pa.Super. 6, 10, 606 A.2d 470, 471 (1992). See also, Kotovosky v. Ski Liberty Operating Corp., 412 Pa.Super. 442, 445, 603 A.2d 663, 664 (1992). Such a motion may only be granted in cases where no material facts are at issue and the law is so clear that a trial would be a fruitless exercise. Ridge v. State Employees Retirement Board, 690 A.2d 1312, 1314 n.5 (Pa.Comm. Ct. 1997)(citations omitted).

DISCUSSION

In their motion, the Strine defendants assert that the plaintiff’s claims are barred by the doctrine of res judicata since the plaintiff never moved to strike or open the confessed judgment of the Delaware County Action which was entered in favor of the landlord as a result of plaintiff’s purported breach of the lease. In support of their motion, the Strine defendants rely upon Magee v. J.G. Wentworth & Co., Inc., 761 A.2d 159 (Pa.Super.Ct. 2000) and Romah v. Romah, 411 Pa.Super. 12, 600 A.2d 978 (1991) for the proposition that a litigant, who has failed to file a petition to open or strike off a confessed judgment, may not make a collateral attack on the confessed judgment through a subsequent action. This court agrees that these cases are controlling and finds that the majority of plaintiff’s claims are barred by the doctrine of res judicata.

Under the doctrine of res judicata, a final judgment on the merits by a court of competent

jurisdiction will bar any future suit between the parties or their privies in connection with the same cause of action. Yamulla Trucking & Excavating Co., Inc. v. Justofin, 771 A.2d 782, 784 (Pa.Super.Ct. 2001)(citations omitted). The purposes behind the doctrine, which bars the re-litigation of issues that either were raised or could have been raised in the prior proceeding, are to conserve limited judicial resources, establish certainty and respect for court judgments, and protect the party relying upon the judgment from vexatious litigation. Id. To effectuate these purposes, the doctrine must be liberally construed and applied without technical restriction. Id. In applying the doctrine of res judicata, the concurrence of the following four conditions are required: (1) identity of issues; (2) identity of causes of action; (3) identity of persons and parties to the action; and (4) identity of the quality or capacity of the parties suing or sued. Id. See also, Mintz v. Carlton House Partners, Ltd., 407 Pa.Super. 464, 475, 595 A.2d 1240, 1246 (1991).

In Magee, plaintiff, a permanently disabled worker, settled a worker's compensation claim and was to receive monthly payments from a lifetime annuity issued by an insurance company. 761 A.2d at 160. Plaintiff assigned his rights to receive part of the annuity to J.G. Wentworth S.S.C. Limited Partnership ("Wentworth") in exchange for a lump sum payment. The insurance company, obligated to pay the annuity, invoked an anti-assignment clause in its contract with plaintiff and Wentworth confessed judgment against plaintiff since it had not received anything in exchange for the lump sum payment. Id. Rather than responding through a petition to open or strike off the confessed judgment, plaintiff, over one year later, initiated a class action alleging a violation of Pennsylvania's usury law and the federal Truth-in-Lending Act. Id. On the basis of these violations, plaintiff specifically sought to open or strike the confessed judgment and demanded damages and equitable relief on behalf of himself and the class. Id. Wentworth filed preliminary objections, asserting, *inter alia*, that plaintiff's claims were barred by res

judicata and constituted an impermissible collateral attack on the confessed judgment. Id. The trial court sustained the objections and dismissed the complaint. Id.

The appellate court affirmed this ruling, finding that the claims raised in the action were all subject to disposition in the confession of judgment proceedings and could have been raised as defenses or counterclaims even though plaintiff had failed to present the claims in a single petition to strike or open the judgment as required by the Rule 2959 of the Pennsylvania Rules of Civil Procedure. Id. at 161-62. As recognized by the Magee court, Rule 2959 provides, in pertinent part, that:

(a) Relief from a judgment by confession *shall* be sought by petition. . . . [A]ll grounds for relief whether to strike off or to open it must be asserted in a *single* petition.

* * *

(b) If the petition states prima facie grounds for relief the court shall issue a rule to show cause and may grant a stay of proceedings. After being served with a copy of the petition the plaintiff shall file an answer on or before the return day of the rule. . . .

(c) A party waives all defenses and objections which are not included in the petition or answer. . . .

Id. (citing Pa.R.C.P. 2959)(emphasis added). Further, the court stated that “[w]e will not permit litigants to challenge judgments by confession through subsequent litigation when the Rules provide mandatory procedures that are to apply within the context of confessed judgment proceedings.” Id. at 162. Additionally, the court found that the addition of parties through the putative class did not affect the consequences of the doctrine of res judicata as between Magee and Wentworth. Id. at 162 n.1. See also, Romah, 411 Pa.Super. at 18-19, 600 A.2d at 980-81 (holding that mortgagor’s claims seeking relief from allegedly excessive attorney fees and interest paid on mortgage were barred by res judicata even though mortgagor failed to file a petition to open or strike off the confessed judgment because the issues in the

second action were encompassed by the earlier confession of judgment action).

One case which is distinguishable from the present case is Hopewell Estates, Inc. v. Kent, 435 Pa.Super. 471, 646 A.2d 1192 (1994). In Hopewell, a landowner brought an action for professional negligence against a surveyor and engineering firm, subsequent to filing a petition to open a confessed judgment while that petition was pending,. Id. at 475, 646 A.2d at 1194. The petition to open was denied and the surveyor and engineering firm filed motions for summary judgment in the second action on the grounds of res judicata and collateral estoppel. Id. The trial court granted the motions, finding that the issue of professional negligence could have been raised in the prior proceedings. Id. The appellate court reversed, finding that the issue for professional malpractice had not been litigated in the previous proceedings to open the confessed judgment and could not have been asserted as a claim in the prior proceedings. Id. at 478-79, 646 A.2d at 1195. The court reasoned that while the two actions had facts in common, res judicata will not bar the subsequent action which involves entirely separate causes of action and entirely different relief. Id. at 477, 646 A.2d at 1195.

Here, the gravamen of plaintiff's claims against the Strine defendants arises from their alleged failure to repair or rebuild the premises after the fire, in breach of their lease obligations and contrary to William B. Strine's representations. Further, plaintiff primarily alleges that the premises remained untenable and defendants were not entitled to rent from the plaintiff; that defendants had been unjustly enriched by receiving insurance proceeds but failed to rebuild the premises; and that plaintiff had been constructively evicted by these defendants' refusal to rebuild the premises and interfered with plaintiff's attempts to rebuild. See Compl., Counts VI, VIII, IX, X and XI. These claims seek to indirectly attack the confessed judgment of the Delaware County Action and arise out of the same operative facts

as that action. The confessed judgment is clearly based on the plaintiff's breach of his rental obligations under the lease. See Motion, Exhibit D. Plaintiff did have an opportunity to assert his claims in a petition to open or strike off the confessed judgment but failed to do so. Additionally, the fact that the named defendant in the confessed judgment proceeding was Media Real Estate Company, as agent for Commonwealth Real Estate Investors, does not affect the res judicata effect of that action to the present case. Clearly, the same defendant is named here and William B. Strine, Walter M. Strine and Walter M. Strine, Jr. are considered to be privies to Media Real Estate Company. Plaintiff explicitly refers to them collectively. Compl., ¶ 7. Like Magee and Romah, plaintiff is not now allowed to challenge the confessed judgment, albeit indirectly, through subsequent litigation. The only claim which appears separate from the confessed judgment is the claim for a violation of the UTP/CPL under Count VII of the Complaint. Therefore, this count is not dismissed.

CONCLUSION

For the reasons stated, this court is granting, in part, the Strine defendants' Motion for Judgment on the Pleadings, and dismissing Counts VI, VIII, IX, and X of the Complaint. A contemporaneous Order will issue with this Opinion.

BY THE COURT,

JOHN W. HERRON, J.

Dated: October 25, 2001

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

EUGENE J. RADER,	:	MARCH TERM, 2000
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Plaintiff	:	No. 1199
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v.	:	COMMERCE PROGRAM
	:	
TRAVELERS INDEMNITY COMPANY	:	
OF ILLINOIS, ET AL.,	:	
	:	
Defendants	:	Control No. 072434

ORDER

AND NOW, this 25th day of October, 2001, upon consideration of the Motion for Judgment on the Pleadings ("Motion") of defendants, William B. Strine, Walter M. Strine and Walter M. Strine, Jr., individually and trading and doing business as Commonwealth Real Estate Investors and as Media Real Estate Company (collectively the "Strine defendants"), plaintiff's opposition thereto, all other matters of record and in accord with the Opinion being filed contemporaneously with this Opinion, it is hereby **ORDERED** that the Motion is **Granted**, in part, and **Denied**, in part. Counts VI (Breach of Contract), VIII (Unjust Enrichment), IX (Constructive Eviction), and X (Promissory Estoppel) of the Complaint are hereby **Dismissed**. The other counts against the Strine defendants remain.

BY THE COURT,

JOHN W. HERRON, J.