

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

BEFORE THE COURT-APPOINTED REFEREE  
IN RE THE LIQUIDATION OF THE HOME INSURANCE COMPANY  
DISPUTED CLAIMS DOCKET

In Re Liquidator Number: 2009-HICIL-46

Proof of Claim Number: CLMN380502-01

Claimant Name: Mariana Lanc

**ORDER ON THE MERITS**

Mariana Lanc has filed a proof of claim seeking to recover from Home damages for alleged malpractice and fraud by the law firm that handled her divorce. That firm, Cline, MacVean, Lewis and Sherwin, P.C. (“the insured firm”) was insured by Home. Ms. Lanc asserts that she is entitled to proceed with a dispute in this forum. The Liquidator argues that Ms. Lanc is precluded from proceeding against Home because Ms. Lanc has no third party claim against Home since prior litigation in the New York Court against the insured firm has ended and the doctrines of res judicata and collateral estoppel apply.

**RELEVANT FACTS**

Ms. Lanc was involved in a divorce proceeding begun by her then-husband in 1984. She engaged Cline, MacVean, Lewis and Sherwin, P.C. to represent her. The attorney at the insured firm responsible for the case was Michael Donnelly. Ms. Lanc alleges that she was so poorly represented by the insured firm that the settlement to which she agreed in December 1984 was a coerced settlement.

Ms. Lanc filed two lawsuits against the insured firm and Attorney Donnelly in New York courts. The first suit, referred to herein as “the malpractice action,” entitled Mariana Lanc v. Michael Donnelly and Cline, MacVean, Lewis and Sherwin, P.C., Index No. 0478/88 (Supreme Court of the State of New York, County of Rockland) was filed in 1998 and alleged malpractice. The second suit, referred to herein as “the fraud action,” entitled Mariana Lanc v. Cline, MacVean, Lewis and Sherwin, P.C., MacVean, Lewis, Sherwin & McDermott, P.C. and Michael Donnelly, Index No. 6971/91 (Supreme Court of the State of New York, County of Rockland), alleged fraud and was filed in 1991. Neither of those cases was decided in Ms. Lanc’s favor. The Supreme Court of the State of New York, County of Rockland, entered final judgment with prejudice in both the malpractice action and the fraud action by order dated October 24, 2002.

Liquidator's Section 15 Submission, Exhibit H. By order dated December 27, 2004, the Supreme Court of New York, Appellate Division, Second Department affirmed the judgment. Liquidator's Section 15 Submission, Exhibit I. By Order dated March 29, 2005, the Court of Appeals of New York denied Ms. Lanc's motion for leave to appeal. Liquidator's Rule 15 Submission, Exhibit J.

Ms. Lanc has filed a proof of claim against Home, seeking to collect from the Liquidator as insurer of the insured firm. Ms. Lanc filed a proof of claim stating that she has a third party claim against a person insured by Home. In the proof of claim and additional pleadings in this matter, Ms. Lanc has complained of the same injuries as those in the malpractice and fraud actions.

## **LEGAL ANALYSIS**

The issue before the Referee is whether Ms. Lanc can litigate her claim against Home, as insurer of the insured firm in this proceeding or whether the decisions of the New York Courts in the malpractice action and the fraud action preclude Ms. Lanc's claims.

This case is governed by the laws of New York. Accordingly, New York law determines the application of res judicata and collateral estoppel.

Res judicata describes the preclusive effect of a final judgment on the merits. Res judicata is designed to provide finality in the resolution of disputes, recognizing that considerations of judicial economy as well as fairness to the parties mandate, at some point, an end to litigation. In re Estate of Hunter, 827 N.E.2d 269, 274-75 (N.Y. 2005). Under New York law, collateral estoppel, or issue preclusion, "precludes a party from re-litigating in a subsequent action or proceeding an issue that was clearly raised in a prior action or proceeding and decided against that party." Yellow Cab of Newburgh, Inc. v. Westchester County, 72 A.D.3d 835, 836 (N.Y.App.Div. 2010).

Here, Ms. Lanc asserts that she is entitled to litigate the issues of malpractice and fraud by the insured firm with regard to the settlement in her divorce case. She does not provide a legal basis for her claims, beyond the allegations in the malpractice and fraud actions.

Under New York law, res judicata does not allow for successive litigation based upon the same transaction or incident or series of transactions if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was." Spitzer v. Applied Card Sys., Inc., 894 N.E.2d 1, 12 (N.Y. 2008). The doctrine applies to claims that actually were litigated and to claims that could have been raised in the prior litigation. If a party has been given a full, fair opportunity to litigate a claim, the party should not be allowed to litigate that claim against in the same forum or a different forum. See Estate of Hunter, 827 N.E. 2d at 274.

Res judicata precludes Ms. Lanc from re-litigating these claims in this forum. All of the elements of res judicata exist. First, Ms. Lanc was a party to the two prior actions, the malpractice action and the fraud action, against the insured firm. She had a full opportunity in those cases to litigate the issues related to her claims in those matters. Second, in both of the prior cases, the New York Supreme Court issued a final judgment. Both matters were dismissed with prejudice. Liquidator's Section 15 Submission, Exhibit H. New York courts have held that a dismissal with prejudice has preclusive effect. Aard-Vark Agency, Ltd. v. Barnett Prager, 779 N.Y.S.2d 213 (N.Y. 2004). Third, the claims Ms. Lanc seeks to litigate now arise out of the same transaction or transactions as those litigated in the malpractice action and the fraud action. The basis of Ms. Lanc's current claim is the inadequate presentation of her in the divorce proceeding by the insured firm and Attorney Donnelly. Ms. Lanc acknowledges that the claims here are the same as those in the New York actions. She asserts that her claims were wrongfully dismissed, and therefore she should be able to proceed on the same claims in this forum. Res judicata precludes her from doing so.

Turning to collateral estoppel, the New York courts have made clear how the doctrine applies. In In re Frontier Ins. Co., 73 A.D.3d 36 (N.Y. App.Div. 2010) the Supreme Court stated that the doctrine of collateral estoppel applies if the issue in the second action is identical to an issue which was raised, decided and material in the first action, and where the party against whom the estoppel is sought had a full and fair opportunity to litigate the issue in the earlier action. Id. at 41. Issues actually litigated in a prior action will be given collateral estoppel effect. Id. at 40.

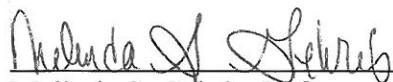
Ms. Lanc raises in this forum the same claims against the insured firm. Her claims here are identical to those raised in the first action. The New York Supreme Court dismissed her actions and she appealed the order. The decision of the Supreme Court of New York, Appellate Division, demonstrates that the claims raised here were raised in the prior litigation and decided against Ms. Lanc. The Appellate Division's decision makes clear that the issues was material to, and raised and decided in, the prior action. Collateral estoppel applies to preclude Ms. Lanc from litigating these issues again in this forum.

## CONCLUSION

For the reasons set forth above, the Referee finds that Ms. Lanc has had full and fair opportunity to litigate the issues raised in her proof of claim in matters she filed in the New York courts. Ms. Lanc's claims in this matter are precluded by res judicata and collateral estoppel.

So ordered.

11/5/11  
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Dated

  
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Melinda S. Gehris, Referee