

**IN THE CIRCUIT COURT OF CLAY COUNTY, MISSOURI
ASSOCIATE CIRCUIT**

RH)	
Plaintiff,)	
)	
vs)	Case No: [REDACTED]
)	
HG AND JG)	
)	Division: 9
)	
Defendants.)	
)	

ORDER

NOW on the 5th day of May, 2016, Plaintiff appeared by attorney and Defendant appeared by attorney, and the Court having taken up Defendant HG's Motion to Dismiss and received the argument of counsel and supplemental briefs hereby finds and orders as follows

Defendant HG's "Motion to Dismiss" argues that the Plaintiff's claim for past rent and other damages herein are barred by the affirmative defenses of collateral estoppel and/or res judicata stemming from a November 9, 2015 interlocutory default judgment entered against his co-defendant JG in *RH v HG, JG, and John/Jane Doe* Case No [REDACTED], a pending action in Division 6 of this Associate Circuit Court Since Defendant's Motion looks beyond the face of the Plaintiff's Petition for fact(s) supporting dismissal, the Court reviews this Motion under the standard for summary judgment or Rule 74 04 V A M R Under Rule 74 04(c) a "a 'defending party' may establish a right to judgment by showing (1) facts that negate any one of the claimant's elements facts, (2) that the non-movant,

after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of any one of the claimant's elements, or (3) that there is no genuine dispute as to the existence of each of the facts necessary to support the movant's properly-pleaded affirmative defense. Regardless of which of these three means is employed by the "defending party," each establishes a right to judgment as a matter of law. Where the facts underlying this right to judgment are beyond dispute, summary judgment is proper." *ITT Commercial Finance Corp vs Microsoft Word*, 854 S W 2d 371, 381 (Mo banc 1993). Here, Movant asserts in effect that there is no genuine dispute as to the existence of the facts necessary to establish the affirmative defenses of either res judicata or collateral estoppel.

The following facts are undisputed. The parties, their lease agreement or contract, the leased premises, and the transactions that have given rise to this action, are identical to that which forms the basis of the parties' claims in Case No. [REDACTED]. This Court takes judicial notice of the pleadings and the Court's orders between the parties in Case No. [REDACTED]. Plaintiff obtained an interlocutory default judgment on November 9, 2015 in Case No. [REDACTED] against Defendant JG only. The default judgment granted possession of the premises to Plaintiff and totaled \$5,819.50 which consisted of "Rent" of \$4,000.00, "Late Fees" of \$200.00, "Utilities" of \$1,184.50, "**Damages**" of **\$175.00**, P P "Service Fee" of \$35.00 and "Attorney Fee" of \$225.00. (emphasis added). The \$175.00 of damages was for property damage to a tree on the premises. On December 18, 2015, Plaintiff moved to amend his Petition to increase the amount and/or nature of the damages claimed to include property damages.

Plaintiff claims were not ascertainable at the time of the default judgment Defendant in that action opposed the amended petition arguing Plaintiff had admitted that his damages were certain, definite and ascertainable by seeking a default against Defendant JG and could not thereafter increase the damages claim On February 11, 2016, the Court in Case No [REDACTED] entered an order summarily denying Plaintiff leave to amend the petition The parties are awaiting trial on the issue of Defendant HG's liability or his defenses in Case No. [REDACTED].¹ It is undisputed that the property damages Plaintiff seeks in this action are the same property damages that were the subject of the Court's order denying his amended petition in Case No [REDACTED] There is no evidence before this Court that either Plaintiff or Defendant have sought to vacate the interlocutory default judgment still pending in the prior case

Defendant thus argues that when the Court in Case No [REDACTED] entered an order denying Plaintiff leave to amend in that action, res judicata and/or collateral estoppel thereby bars this action Defendant argues that the alleged damages were ascertainable at the time of the default judgment and the Court in that case has already ruled Plaintiff argues that his claim in Case No. [REDACTED] is a Chapter 535 statutory action and that §535 020 1 RSMO prevents him from joining a "property damages" in that case, therefore, Plaintiff must pursue these damages in this action Plaintiff admits, however, that despite §535 020 1 he did seek and obtain \$175 00 in "property damages" in the default judgment in Case No [REDACTED] Plaintiff further argues that the damages he seeks in this action were not ascertainable (or accrued) to

¹

The November 9, 2015 default judgment did not dismiss HG from Case No [REDACTED], but notes he consented only to Plaintiff regaining possession of the leased premises

Plaintiff prior to the November 9, 2015 default judgment and that it would be unfair to be denied leave to amend his petition in Case No [REDACTED] only to be then denied to pursue his damages claims in this action. This Court disagrees with Plaintiff

Initially, this Court must address Plaintiff's argument regarding application of §535.020 1 RSMO. The Court finds that Plaintiff himself joined the issue of property damages in its claim and default judgment in Case No [REDACTED]. The fact that Plaintiff elected to include property damages in that claim cannot be changed by this Court, therefore, this Court must take the interlocutory default judgment as it was entered in Case No [REDACTED]. The default judgment did grant "damages" that included "property damages" regardless of whether it should have been prohibited under §535.020 1 RSMO. There is no record that Plaintiff sought to vacate or set aside the default judgment under Rule 74.05 V A M R for violation of this statute. Based on the facts before this Court, §535.020 1 RSMO cannot serve as a reason to deny Defendant's Motion to Dismiss.

The key legal question is whether the Court's actions in Case No [REDACTED] of (1) entering a default judgment which included property damages and (2) later entering an order denying Plaintiff leave to amend his petition to seek the same property damages as he now seeks in this case combine to create grounds for res judicata or collateral estoppel to bar this action.

Res Judicata Res Judicata, or claim preclusion, cannot apply under the present facts. The Court's order in Case No [REDACTED] denying Plaintiff's Motion for leave to amend his petition is an interlocutory order within that case and thus not a final judgment for the purposes of res judicata. The default judgment entered in that case is also not a final judgment.

for the purposes of applying res judicata analysis “*Res judicata* only applies after a final judgment has been rendered” *Spino v Bhakta*, 174 S W 3d 702, 707 (Mo App 2005) In a multi-defendant case, a default judgment does not constitute a “final judgment” unless it disposes of all the parties to the cause Missouri has a long established rule set forth in §511.130 RSMO which states “When there are several defendants in a suit, and some of them appear and plead and others make default, an interlocutory judgment by default may be entered against such as make default, and the cause may proceed against the others, but only one final judgment shall be given in the action” (emphasis added) “This statute has consistently been interpreted to mean that while a default judgment may be taken against one or fewer than all of several defendants, there nevertheless can be only one “final” judgment in such action, which must dispose of all parties to the cause” *Beckman v Micelli Homes, Inc*, 45 S W 3d 533, 539 (Mo App E D 2001) The rule applies even where the Plaintiff obtained an “interlocutory order of default” that assessed damages See *Beckman*, supra, at 539 (Where a default judgment against a co-defendant assessed damages, such judgment remains an interlocutory judgment until Plaintiffs’ claims against co-defendant is disposed of.) Here, the Court’s default judgment in the previously filed action did not dispose of all the parties and remains interlocutory therefore it is not a final judgment for the purposes of res judicata application Res judicata, however, is closely related to the rule against splitting a cause of action “because both are designed to prevent a multiplicity of lawsuits” *King General Contractors, Inc v Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S W 2d 495, 500 (Mo 1991) Thus analysis as to whether this action constitutes an improper splitting of a cause of action is necessary

Splitting a Cause of Action “A cause of action which is single may not be split and filed or tried piecemeal, the penalty for which is that an adjudication on the merits in the first suit is a bar to a second suit. In general, the test for determining whether a cause of action is single and cannot be split is 1) whether separate actions brought arise out of the same act, contract or transaction, 2) or whether the parties, subject matter and evidence necessary to sustain the claim are the same in both actions. The word ‘transaction’ has a broad meaning. It has been defined as the aggregate of all the circumstances which constitute the foundation for a claim. It also includes all of the facts and circumstances out of which an injury arose.” *King General Contractors, supra*, at 500. In the present case, it is undisputed that the property damages sought in this case arise out of the same lease agreement and transaction that gave rise to Plaintiff’s claims in Case No. [REDACTED]. Likewise, it is undisputed that the parties, subject matter and evidence necessary to sustain a claim for property damages in the prior action are the same as those required in this action as both involve proof of property damage Defendants allegedly caused while in possession of the leased premises under the parties’ lease agreement. Plaintiff elected to pursue a cause of action for property damages within its claims in Case No. Case No. [REDACTED] and included the same in his request for default judgment. Therefore, the Court in that action was the proper court to decide whether Plaintiff’s new or additional property damages were ascertainable and/or whether the same should be included in that action. Plaintiff correctly notes that “in Missouri that a party can bring successive claims on the same contract for damages that have not accrued as of the time of entry of judgment in the prior action” *WEA Crestwood Plaza v Flamers Charburgers, Inc* 24 S W 3d 1, 6 (Mo App E.D 2000)

However, this case is distinguishable. In *WEA*, the “prior action” had been tried and concluded with a final judgment. Here the “prior action” is still pending and the Court was given the opportunity to allow Plaintiff to add these same damages and it denied the amended petition. Plaintiff’s remedy, if any, is to go before that Court and either seek to vacate the interlocutory default judgment or to appeal the ruling. Plaintiff’s remedy is not to split the action.

Collateral Estoppel Plaintiff’s claim herein is also barred by collateral estoppel. “[T]he law is well settled that a judgment or decree is only conclusive and operates as an estoppel as to the *issues actually litigated and settled*, and where the subsequent action is upon a different claim, the judgment in the former case is only conclusive and only bars those issues which were actually tried.” *Schmitt v Pierce*, 379 S.W.2d 548, 550 (Mo. 1964). Missouri Courts have adopted a test for determining whether collateral estoppel lies in an action:

When deciding whether the application of collateral estoppel is appropriate in a given case, we consider the following four factors: (1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action, (2) whether the prior adjudication resulted in a judgment on the merits, (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity in the prior adjudication to litigate the issue for which collateral estoppel is asserted.

SSM Health Care St Louis v Radiologic Imaging Consultants, 128 S.W.3d 534, 542 (Mo. App. E.D. 2003).

There is no dispute that there is a prior interlocutory default judgment in Case No. [REDACTED] that included property damages and that the Court in that case later denied Plaintiff leave to amend its petition to include the same property damages that are now alleged in this action. Plaintiff’s argument that these are damages that were not ascertainable or accrued until

after the default judgment was raised to the Court in Case No [REDACTED] and the motion to amend was denied on its merits. This action is identical to the other action and the issues raised are the same. Plaintiff had a full and fair opportunity to litigate her claim for additional damages on grounds that they were not ascertainable at the time. Moreover, the prior action *is still pending and the judgment is interlocutory*, therefore, Plaintiff still has opportunity to litigate the damages issues raised herein. There is no genuine issue of fact that the Court's entry of a default judgment and order denying Plaintiff leave to amend her petition in Case No [REDACTED] collaterally estop these issues from being asserted in this action.

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion to Dismiss is granted. Plaintiff's petition is hereby dismissed without prejudice. Costs are assessed against Plaintiff.

IT IS SO ORDERED.

DATE: May 17, 2016



JUDGE