SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

JAMES HARRIS,

Plaintiff,

-against-

MORRIS ARNIE LANG and/or
MORRIS ARNIE LANG d/b/a REALTY MANAGEMENT,

Defendants.

NOTICE OF MOTION

Index No.: 29028/2007

MOTION BY:	Loscalzo &Loscalzo, P.C., attorneys for Defendants
DATE, TIME & PLACE:	April 15, 2008, at 9:30 A.M., at an IAS Part of the Supreme Court for Kings County located at 360 Adams Street, Brooklyn, New York 11201.
SUPPORTING PAPERS:	Affirmation in Support of Anthony Loscalzo, dated March 20, 2008, and all annexed Exhibits.
RELIEF DEMANDED:	Order, pursuant to CPLR § 3211(a)(5) dismissing Plaintiff's complaint based on principles of res judicata or, in the alternative, due to expiration of Plaintiff's time to bring suit, and for such other and further relief as this Court may deem just and proper.
ANSWERING AFFIDAVITS:	If any, are to be served upon the undersigned within Seven (7) days before the return date of this motion.

DATED: NEW YORK, NEW YORK
March 20, 2008

Yours, etc.,

Loscalzo &Loscalzo, P.C.
Attorneys for Defendants

BY: _____
Anthony J. Loscalzo
14 East 4th Street
New York, New York 10012
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TO: Sanford A. Kutner
Attorney for Plaintiff
#6 Tara Place
Metairie, LA 70002

SUPREME COURT OF THE STATE OF NEW YORK
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JAMES HARRIS,

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Defendants.

AFFIRMATION IN SUPPORT OF MOTION

Index No.: 29028/2007

Anthony J. Loscalzo, an attorney duly admitted to practice law in the courts of the State of New York, affirms the following to be true under the penalties of perjury:

1. I am a member of the law firm of Loscalzo &Loscalzo, P.C., the attorneys for Defendants herein, and I am fully familiar with all of the facts and circumstances of this action.

2. I make this Affirmation in Support of Defendants' motion for an Order pursuant to CPLR § 3211(a) dismissing Plaintiff's complaint because the action is *res judicata* or, in the alternative, dismissing Plaintiff's complaint because it is timed barred due to expiration of the statute of limitations.

RELEVANT FACTS AND PROCEDURAL HISTORY

3. On November 14, 2006, Plaintiff, through his attorney, commenced an action in Civil Court of the City of New York, Kings County, against the Defendants Morris Arnie Lang and/or Morris Arnie Lang d/b/a Realty Management and/or Lang Percussion, and Juan Uberia (hereinafter, "Lawsuit #1"). The nature of Lawsuit #1 was cited as "assault, battery, and intentional affliction of emotional distress" and sought damages in the amount of $24,999.99 (see annexed EXHIBIT A, Summons and Verified Complaint for Lawsuit #1).

4. In Lawsuit #1, Plaintiff complained that Juan Uribe, whom Plaintiff identified as affiliated with the other Defendants in the capacity of an employee, agent, tenant, and/or contractor, engaged in the following acts: (a) Juan exposed himself to Plaintiff on December 19, 2003; and (b) on March 12, 2004, Juan grabbed Plaintiff's penis after dropping a match on the floor (see EXHIBIT A).

5. On April 3, 2007, both parties to Lawsuit #1 entered into a Stipulation of Dismissal, which was filed with the court on April 5, 2007 (see annexed EXHIBIT B). In this duly executed Stipulation, the parties agreed that the action was to be "discontinued, with prejudice and without costs to either party as against each other."

6. Four months after discontinuing Lawsuit #1, with prejudice, Plaintiff commenced the subject action in this Court, on August 6, 2007, against Morris Arnie Lang and/or Morris Arnie Lang d/b/a Realty Management, and seeking relief in the amount of $25,000.00 (hereinafter, "Lawsuit #2"). Although Plaintiff crafted the claim in Lawsuit #2 as one based on an alleged breach of contract, the actions complained of are exactly the same as those in Lawsuit #1; i.e., that Juan Uberia exposed himself to Plaintiff on December 19, 2003, and that Juan Uberia grabbed Plaintiff's penis on March 12, 2004 (see annexed EXHIBIT C).

LEGAL ARGUMENTS

THE STIPULATION OF DISCONTINUANCE ON PLAINTIFF'S FIRST CLAIM IS ACCORDED *RES JUDICATA* EFFECT AND CONSEQUENTLY, PLAINTIFF IS BARRED FROM BRINGING THE SUBJECT CLAIM

7. The present Lawsuit #2 should be dismissed in accordance with CPLR 3211(a)(5) on ground that the action may not be maintained because of the *res judicata* effect given to the prior Lawsuit #1.

8. The prior Lawsuit #1, which was for intentional tort arising from the exact set of

facts as the current breach of contract action, was discontinued, with prejudice, in a duly executed stipulation between the parties and filed with the court (see EXHIBIT B).

9. First, it is recognized in New York jurisprudence that stipulations of discontinuance with prejudice are to be accorded *res judicata* effect (State v. Seaport Manor A.C.F., 19 AD3d 609, 610 [2d Dep't 2005]; Southampton Acres Homeowners Ass'n, Inc. v. Riddle, 299 AD2d 334, 335 [2d Dep't 2002]; React Service, Inc. v. Rindos, 243 AD2d 550, 550 [2d Dep't 1997]; Forte v. Kaneka America Corp., 110 AD2d 81, 81 [2d Dep't 1985]).

10. In analyzing this issue with the provision of CPLR 3217(c) in perspective, the court in Forte explained that ordinarily, discontinuance of an action is not a decision on the merits, hence, it would not estop plaintiff from maintaining another action for the same cause, unless the discontinuance recites that the claim is discontinued or settled on the merits (Forte, 110 AD2d at 85, citing 7 Carmody-Wait 2d, NY Prac §47:24, p 388). The court further explained that a stipulation or order of discontinuance is *res judicata* on future litigations of the same action if it specifies that it is on the merits, or "with prejudice", or by the use of any other equivalent terminology (Forte, 110 AD2d at 85, referencing to Professor Siegel's Practice Commentaries, McKinney's Cons Laws of NY, Book 7B CPLR C3217:15, p 1017).

11. Here, the express language of the Stipulation of Dismissal between Plaintiff and Defendants in Lawsuit #1 recites that the action was thereby "discontinued, with prejudice and without costs to either party as against the other" (EXHIBIT B). Clearly then, by the terminology employed in the stipulation, the parties intended the discontinuation of the action to have *res judicata* effect so as to bar any subsequent actions premised on the same set of facts or transactions.

12. Second, New York follows the transactional approach to *res judicata* issues, and

it is well settled that 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 NY2d 353, 357 [1981]; Seaport Manor A.C.F., 19 AD3d at 610; Ebanks v. 547 West 147th Street Housing Development Fund Corp., 37 AD3d 290, 291 [1st Dep't 2007]; Fifty CPW Tenants Corp. v. Epstein, 16 AD3d 292, 293 [1st Dep't 2005]; Nottenberg v. Walber 985 Co., 160 AD2d 574, 575 [1st Dep't 1990]).

13. Furthermore, the doctrine of *res judicata* bars both, claims that were actually litigated and those relevant issues that could have been litigated (Nottenberg, 160 AD2d at 575; Forte, 110 AD2d at 85).

14. Here, both of Plaintiff's claims, Lawsuits #1 and #2, arose out of the following alleged occurrences: (a) that Juan Uribe exposed himself to Plaintiff, and (b) that Juan Uribe grabbed his penis (compare EXHIBITS A and C). Lawsuit #1, which sought relief based on some theories of intentional tort, was discontinued with prejudice by stipulation on April 3, 2007. Lawsuit #2 was brought against the same Defendants, excluding Juan Uribe, four months later seeking the same remedy, but his time on a theory of breach of contract, presumably, breach of an implied contract between the parties.

15. Following New York transactional approach to issues of *res judicata*, it is clear that both Lawsuits #1 and #2 arose out of the same transactions, i.e., the alleged acts of Juan Uribe. Despite the fact that Plaintiff now intends to have a second bite at the apple by labeling his action as one for breach of contract, it is obvious that the nature of Lawsuit #2 stems from exactly the same acts complained of and forming the basis of Lawsuit #1. Therefore, Lawsuits #1 and #2 are one and the same, and because Lawsuit #1 was discontinued with prejudice, it has a consequential *res judicata* effect on Lawsuit #2, which should be dismissed as having already

settled and concluded.

16. To illustrate this situation, the case of Dubose is instructive (Dubose v. North General Hosp., 18 Misc.3d 1133[A] [Sup Ct NY County 2008]). Dubose was a medical malpractice action where plaintiffs, after having settled the action, commenced a second action based on breach of contract alleging the same facts and harm as in the first action for malpractice. There, the court ruled that plaintiffs were barred from maintaining the breach of contract action by the settlement and by principles of *res judicata* because both cases stemmed from the same surgical procedure.

17. Likewise, Plaintiff in the case at bar is barred by the Stipulation and by principles of *res judicata* from bringing this subject claim, which stems from exactly the same allegedly offensive conduct of Juan Uribe that were brought in Lawsuit #1.

18. It is therefore respectfully submitted that Plaintiff's complaint be dismissed on the basis of *res judicata.*

PLAINTIFF'S COMPLAINT IS TIME BARRED

19. Where tort and contract theories are both available to a plaintiff, the conflict as to which statute of limitations is applicable is determined by the nature of the cause of action, and not by the form in which the action is framed. That is, the governing factor is the nature of the act which gives rise to the injury rather than the legal theory upon which redress is sought (Smith v. White Tower Management Corp., 129 NYS2d 545, 548–49 [Sup Ct NY County 1954]). For instance, in a suit to recover for personal injuries based on contractual obligations by railway company to passenger due to some defect in the vehicle, the Court of Appeals determined that the negligence statute of limitations of three years was applicable (Webber v. Herkimer and Mohawk Street R.R. Co., 109 NY 311, 314 [1888]); a breach of contract action to recover

damages for loss of services and medical expenses was governed by the three-year statute of limitations (Mamunes v. Williamsburgh General Hospital, 28 AD2d 998, 998 [2d Dep't 1967]); the contractual liability of a bus company to passenger who sustained personal injuries while riding the bus was subject to the three-year limitation for tort actions (Loehr v. East Side Omnibus Corp., 259 AD 200, 203 [1st Dep't 1940]); and a breach of contract action by hotel guest against innkeeper for assault and battery committed by an employee was subject to the statute of limitations for assault and battery (Manning v. 1234 Corp., 174 Misc 36, 38 [Sup Ct NY County 1940]).

20. Here, Plaintiff's complaint is premised on two factual accounts: (a) that Juan Uribe exposed himself to Plaintiff on December 19, 2003, and (b) that Juan Uribe grabbed Plaintiff's penis on March 12, 2004 (EXHIBIT C). The cause of action was commenced on August 6, 2007, by filing of a summons and complaint with this Court. Plaintiff frames this cause of action in the form of a breach of contract against Defendants, Morris Arnie Lang and/or Morris Arnie Lang d/b/a Realty Management. Presumably, the nature of Plaintiff's complaint is that of an implied contractual liability in Defendant's capacity as "the landlord" and the duties owed to Plaintiff, the alleged "tenant."[1] From Plaintiff's complaint in Lawsuit #1, it is alleged that Juan Uribe is affiliated with Defendants in the capacity of "either an employee, agent, tenant, and/or contractor" (EXHIBIT A).

21. Therefore, presumably, Plaintiff's breach of contract claim against Defendants must be premised on the implied contractual obligation of Defendants in providing a safe place for Plaintiff to conduct his business or, in the alternative and assuming Juan Uribe to be

[1] Although these facts are secondary to the current CPLR 3211 motion, it should be noted that Defendants maintain that they are not the "landlord" and that the premises on which these events occurred is not a residential place as alleged in Plaintiff's complaint, wherein Plaintiff described himself as having "resided" there. Defendants leased the premises for business purposes and had subleased a portion of the space to Plaintiff to be used as a studio for his music business. In this vein, Defendants take issue with Plaintiff's account of the facts in his complaint.

Defendants' agent, the claim must be premised on Defendants vicarious liability based on the doctrine of *respondeat superior* for Juan's actions. Nevertheless, regardless of the manner in which Plaintiff attempts of frame his breach of contract claim against Defendants, the controlling fact is that Plaintiff's claims arose out of Juan's actions, which can be described in legal terms as those of assault and battery.

22. Assuming Juan to be Defendants' agent, then the doctrine of *respondent superior* would hold Defendants vicariously liable for Juan's actions of assault and battery. New York CPLR § 215(3) states that actions to recover damages for assault or battery are to be commenced within one year from the date of accrual (McKinney's CLPR 2005 Ed.).

23. Here, it is noted that the alleged indecent exposure occurred on December 19, 2003, and that the alleged battery (i.e., Juan grabbing Plaintiff's penis) occurred on March 12, 2004. Plaintiff commenced the subject complaint on August 6, 2007, over three years after the last alleged incident. Clearly then, Plaintiff's claim against Defendants based on vicarious liability for Juan's actions is barred by CPLR § 215(3) because it is brought beyond the one-year limitation period (see e.g., Manning, 174 Misc at 38 [holding that plaintiff's breach of contract claim against hotel for assault and battery by hotel's employee is governed by the statute of limitations for assault cases]).

24. Assuming, on the other hand, that Plaintiff's claim is premised on Defendants' implied contractual obligation to provide a safe place for Plaintiff to conduct his business, then it is an action sounding in tort and Defendants' alleged liability must rest in negligence. That is, assuming that Plaintiff's allegation is that Defendants failed to reasonably protect Plaintiff from the tortious acts of others. Then, CPLR § 214(5) provides that such actions must be commenced within three years from the date of accrual. Here, the last incident complained of occurred on

March 12, 2004, and action was commenced on August 6, 2007. Clearly then, Plaintiff's cause of action based on the alleged negligence of Defendants expired almost five months before the complaint was filed with this Court (see e.g., Loehr, 259 AD at 203 [holding that bus company's failure to protect plaintiff from injury by other bus riders and failure to deliver her safely to her destination is governed by the statute of limitations for negligence, even though the claim is brought as one for breach of contract]; Smith, 129 NYS2d at 549 [declaring that restaurant's liability for assault committed by other patrons against plaintiff is based on its contractual duty to use all reasonable means to protect plaintiff, which is governed by the statute of limitations for negligence claims]).

25. Evidently, it is immaterial whether the action is regarded as one for breach of contract or one of negligence. Regardless of the manner in which the claim is framed, the applicability of the statute of limitations is governed by the nature of the act which causes the injury rather than upon the legal theory upon which redress is sought (Gautieri v. New Rochelle Hospital Ass'n, 4 AD2d 874, 874 [2d Dep't 1957]; Smith, 129 NYS2d at 548). Here, based on the nature of the acts complained of, Defendants can only be (a) vicariously liable for Juan's actions, governed by a one-year statute of limitations; or (b) liable in negligence for failure to reasonably provide Plaintiff with a safe place to conduct his business, which is governed by a three-year statute of limitations. Whichever legal theory Plaintiff decides to pursue, his claim is barred by the statute of limitations as it is brought over three years from the date of accrual.

26. Therefore, it is respectfully submitted that Plaintiff's complaint be dismissed as barred by the applicable statute of limitations.

WHEREFORE, it is respectfully requested that this Court issue an Order granting Defendant's motion and dismissing Plaintiff's complaint in its entirety, and directing such other

and further relief as the Court may deem just and proper.

Dated: New York, New York
March 20, 2008

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ANTHONY J. LOSCALZO