VERMONT SUPERIOR COURT
Rutland Unit
83 Center Street
Rutland VT 05701
802-775-4394
www.vermontjudiciary.org

CIVIL DIVISION
Case No. 21-CV-01886

Tanglewood Development Corporation and Mitchell Broder, Plaintiffs/Counterclaim Defendants v. Third Branch Investment Co., LLC and Lang Durfee, Defendants/Counterclaim Plaintiffs	DECISION ON MOTIONS

RULING ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND TO AMEND

This is an action for dissolution and breach of fiduciary duties involving disputes among the members of an LLC created for the purpose of residential real estate development. Together, Plaintiffs Tanglewood Development Corporation and Mitchell Broder own 75% of Vistas 5 LLC, and are represented by Matthew D. Anderson, Esq. Defendant Third Branch Investment Co., LLC holds a 25% share of Vistas 5, and Defendant Lang Durfee is the sole member of Third Branch. Defendants are represented by Navah C. Spero, Esq. Plaintiffs' Complaint asserts claims for dissolution, breach of fiduciary duty, and oppression against Defendants, and Defendants have filed counterclaims for breach of fiduciary duty and oppression. Pursuant to Rule 56 of the Vermont Rules of Civil Procedure, Plaintiffs have moved for partial summary judgment, arguing that the counterclaims are barred by res judicata, based on the resolution of a prior action between the parties. After Defendants asserted that Plaintiffs had waived any such affirmative defense by failing to state it in their answer to the counterclaims, Plaintiffs also moved to amend their answer. Defendants oppose both motions. For the reasons discussed below, Plaintiffs' motion to amend is GRANTED and the motion for partial summary judgment is DENIED.

Factual and Procedural Background

The following relevant facts are not in dispute. Vistas 5 LLC was formed around January 2015. According to its operating agreement, the business purpose of Vistas 5 is "to engage in the development, construction, marketing and sale of the remaining undeveloped VISTAS condominium units." At present, there are three members of Vistas 5: Tanglewood, Broder, and Third Branch. The business operation of Vistas 5 and relationships among the company's members have not gone smoothly. In August 2018, Tanglewood, Broder, and then-member Eldon Thompson filed an action against Third Branch and Durfee in the Windsor Civil Division asserting claims for dissolution and breach of fiduciary duty. *See Tanglewood Dev. Corp, v.*

Third Branch Inv. Co., Docket No. 358-8-18 Wrcv (Vt. Super Ct. 2018). In November 2018, before Third Branch and Durfee's time to answer the complaint had run, the parties settled the 2018 case at mediation with a signed settlement agreement.[1] On December 31, 2018, the parties' Stipulation to Dismiss with prejudice was signed by the Windsor court, and the action was dismissed.

Discussion

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). "When a defendant moves for summary judgment, it satisfies its legal burden by presenting at least one legally sufficient defense that would bar the plaintiff's claim." *Nesti v. Vt. Agency of Transp.*, 2023 VT 1, ¶ 36 (quotation omitted). The same principles apply when counterclaim defendants, such as Tanglewood and Broder, move for summary judgment as to the claims asserted against them by counterclaim plaintiffs, like Third Branch and Durfee.

Plaintiffs contend that Defendants' counterclaims asserted in this action are barred by the doctrine of res judicata, or claim preclusion. Under Rule 8(c) of the Vermont Rules of Civil Procedure, res judicata is an affirmative defense that must be specifically plead in a party's answer to the complaint. Here, Plaintiffs failed to do so, and accordingly, the res judicata defense is waived. *R. Brown & Sons, Inc. v. Credit All. Corp.*, 144 Vt. 142, 145- 46 (1984) ("Affirmative defenses not specifically pled in response to a preceding pleading are waived."). Recognizing this, Plaintiffs have moved to amend their answer to assert res judicata as an affirmative defense. Defendants oppose the motion, arguing that it would be unduly prejudicial to permit an amendment more than a year after the filing of the answer. Plaintiffs respond that Defendants were aware that they would be relying on such a defense and that no prejudice will result from the amendment.

The Court is mindful of our Supreme Court's instruction that "trial courts are to be liberal in permitting amendments to the pleadings." *Lillicrap v. Martin*, 156 Vt. 165, 170 (1989) (citing V.R.C.P. 15(a)). "[T]he purpose of Rule 15 is to facilitate the disposition of litigation on the merits and to subordinate the importance of pleadings." *Id*. at 170-71 (quotation omitted). Although there has been no explanation for Plaintiffs' failure to plead a defense that has been "long known" to the parties, the Court nevertheless determines that Plaintiffs' interest in presenting the defense on its merits outweighs any resulting prejudice to Defendants, which can be addressed by permitting additional discovery, if necessary. Accordingly, Plaintiffs' motion to amend their Answer to include the affirmative defense of res judicata is GRANTED.

Turning to the summary judgment motion, Plaintiffs contend that all of Defendants' counterclaims arising out of conduct that occurred prior to the Windsor Civil Division's December 31, 2018 Dismissal Order are barred by the doctrine of res judicata, because the 2018

[1] According to the docket entries, the parties filed several stipulated motions to enlarge Defendants' time to respond to the Complaint, which were granted by the trial court. *See Tanglewood Dev. Corp, v. Third Branch Inv. Co.*, Docket No. 358-8-18 Wrcv, Docket Entries (Vt. Super Ct. 2018).

Dismissal Order with prejudice represents an adjudication on the merits of such claims. Defendants argue that res judicata does not apply because any claims they might have asserted were not covered by the parties' Settlement Agreement or the Dismissal Order, and additionally their current counterclaims arise out of different facts and circumstances from the claims asserted against them by Plaintiffs in the 2018 action. The Court does not find Plaintiffs' novel reliance on the claim preclusion doctrine persuasive, and therefore denies the motion for summary judgment.[2]

"Claim preclusion, also referred to as res judicata, bars the litigation of a claim or defense if there exists a final judgment in former litigation in which the parties, subject matter and causes of action are identical or substantially identical." *Sutton v. Purzycki*, 2022 VT 56, ¶ 21 (quotation omitted). "Claim preclusion does not require that the claim was actually litigated in an earlier action; rather, the doctrine bars parties from litigating claims or causes of action that were or should have been raised in previous litigation." *Iannarone v. Limoggio*, 2011 VT 91, ¶ 14 (quotation omitted). Here, there is no dispute that Defendants' counterclaims were "not actually litigated" in the 2018 action, so the Court inquires "instead whether [they] should have been raised there." *Sutton*, 2022 VT 56, ¶ 22.

As the Supreme Court has observed, "in order for claim preclusion to apply, it has to have been possible for the claim to be brought in the previous case." *Id*. ¶ 30 n.2. In this case, Plaintiffs' reliance on claim preclusion is misplaced; Defendants never had the opportunity to assert their claims in the 2018 action because they never filed an answer. *See In re Burns*, 2022 VT 37, ¶ 16 ("Claim preclusion does not bar a litigant from doing in the present what he had no opportunity to do in the past." (quotation omitted)). Rather, by stipulation of the parties, Defendants' time to answer the complaint was extended several times while the parties attended mediation, until ultimately the case settled and the Dismissal Order was issued. Thus, Defendants were never required to file a responsive pleading in the 2018 case, and therefore claim preclusion does not apply. *See, e.g., Mut. Fire, Marine & Inland Ins. Co. v. Adler*, 726 F. Supp. 478, 482 (S.D.N.Y. 1989) (rejecting claim preclusion argument based on prior action between the parties because "the procedural stage at which [defendant] would be required to file an answer was never reached" in the first action, "and therefore the occasion never arose for [defendant] to bring any counterclaims"); *cf. Cold Springs Farm Dev., Inc. v. Ball*, 163 Vt. 466, 473 (1995) ("Claim preclusion applies to compulsory counterclaims, not permissive ones." (citing 6 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1420, at 156 (1990))); *Restatement (Second) of Judgments* § 22, cmt. a (noting that the preclusive effect of compulsory counterclaim "provisions may not apply when no answer or other responsive pleading is filed").

Plaintiffs' arguments that claim preclusion bars the counterclaims despite the fact that they were never asserted in the 2018 action are not persuasive. As Defendants point out, claim preclusion is typically invoked to prevent a *plaintiff* from reasserting claims that were previously litigated or dismissed with prejudice, or that should have been brought as part of an earlier

[2] The Court prefers to use the term "claim preclusion" rather than "res judicata," "because it is the more precise term. Res judicata refers both to claim preclusion and issue preclusion." *In re Burns 12 Weston St. NOV*, 2022 VT 37 ¶ 12 n.2.

action. *See, e.g.*, *Faulkner v. Caledonia County Fair Ass'n*, 2004 VT 123, ¶ 12 (noting a trend in the law of claim preclusion toward a broader approach "requiring a plaintiff to address in one lawsuit all injuries emanating from all or any part of the transaction, or series of connected transactions, out of which the action arose." (quotation omitted)). Here, however, Plaintiffs seek to preclude Defendants from asserting counterclaims that were not previously litigated. As a result, the cases Plaintiffs rely on are largely inapposite and irrelevant to the factual circumstances presented in the instant case.

Nor does Plaintiffs' repeated assertion that the 2018 Dismissal Order "with prejudice" operates as an adjudication on the merits materially advance their cause. As Justice Robinson observed in *Cenlar*, "[t]his statement of black-letter law does little to advance the analysis." *Cenlar FSB v. Malenfant*, 2016 VT 93, ¶ 21 (noting that dispositive questions remain for the court, such as "[w]hat, exactly, was adjudicated in the first . . . action?"). In the 2018 case, the only claims dismissed with prejudice were Plaintiffs'. As discussed above, Defendants were never required to file a responsive pleading asserting any counterclaims, and the procedural stage for them to do so was never reached. Further, the parties stipulated to dismissal of the 2018 action in their Settlement Agreement, apparently reached through mediation in November 2018. "A dismissal with prejudice arising out of an agreement of the parties is an adjudication of all matters contemplated in the agreement, and a court order which memorializes this agreement bars further proceedings." *Nemaizer v. Baker*, 793 F.2d 58, 61 (2d Cir. 1986). If Plaintiffs had wanted to preclude Defendants from asserting any claims they may have had against them up to that point, they could have bargained for such a term and included a general release in the Settlement Agreement. However, no such release was obtained, and the Settlement Agreement is silent as to any claims Defendants may have had against Plaintiffs. Accordingly, the 2018 Dismissal Order cannot be construed to include such claims. *See Nemaizer*, 793 F.2d at 60 ("A dismissal with prejudice has the effect of a final adjudication on the merits favorable to defendant and bars future suits brought by plaintiff upon the same cause of action."); *Berrios v. State Univ. of N.Y. at Stony Brook*, 518 F. Supp. 2d 409, 415 (E.D.N.Y. 2007) ("Where a settlement agreement accompanies a dismissal, the preclusive effect of the settlement is measured by the intent of the parties to the settlement." (quotation omitted)).

In short, Plaintiffs have failed to demonstrate that they are entitled to judgment as a matter of law on Defendants' counterclaims based on the doctrine of claim preclusion, and their motion for summary judgment on such claims is denied.

Order

For the foregoing reasons, Plaintiffs' motion to amend their answer to assert res judicata as an affirmative defense is GRANTED and their motion for partial summary judgment is DENIED. Plaintiffs shall file their amended Answer within 7 days of the date of this Order.

Defendants shall have the opportunity to engage in discovery regarding the new affirmative defense if they wish to do so. The deadlines for any such discovery will be addressed in connection with the Court's forthcoming decisions on the discovery motions that are currently pending.

Electronically signed on April 27, 2023 at 4:15 PM pursuant to V.R.E.F. 9(d).

Megan J. Shafritz
Superior Court Judge