

PUBLIC INTEREST LAW CENTER  
George A. Donnelly (Pa. I.D. 321317)  
gdonnelly@pubintlaw.org  
1709 Benjamin Franklin Parkway  
Philadelphia, PA 19103  
(215) 627-7100

Attorneys for Plaintiff

KLEHR HARRISON HARVEY  
BRANZBURG LLP  
Augusta M. O'Neill (Pa. I.D. 316307)  
aoneill@klehr.com  
1835 Market Street, Suite 1400  
Philadelphia, PA 19103  
(215) 569-2700

STORM LOPEZ,

Plaintiff,

v.

MICHAEL CAGE,

Defendant.

COURT OF COMMON PLEAS  
PHILADELPHIA COUNTY  
CIVIL DIVISION  
OCTOBER TERM, 2018  
NO. 181001174

**PLAINTIFF STORM LOPEZ'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiff Storm Lopez, by and through his attorneys, respectfully submits this Motion for Partial Summary Judgment, and in support avers the following:

**UNDISPUTED FACTS AND PROCEDURAL HISTORY**

1. In 2001, Mr. Lopez moved into an apartment at 326 N. Preston Street, Philadelphia, PA 19104 (the "Property") owned by Defendant and the two entered into a written lease. *See Ex. A, Residential Lease.*
2. Defendant remained the owner of the Property throughout the duration of Mr. Lopez's tenancy. *See Ex. K, Lopez Compl. and Ex. L, Answer and New Matter at ¶ 7.*

3. In September 2017, Defendant told Mr. Lopez that he intended to sell the Property and that he had 30 days to leave. *See* Ex. K, Lopez Compl. and Ex. L, Answer and New Matter at ¶ 13.

4. Defendant then filed for an eviction against Mr. Lopez in November 2017. *See* Ex. B, Eviction Compl.

5. An eviction hearing between Mr. Lopez and Defendant was held on January 2, 2018, but Mr. Lopez did not appear at that hearing, and as a result the Municipal Court entered a default judgment against Mr. Lopez. *See* Ex. C., Jan. 2 Mun. Ct. Order.

6. Defendant subsequently obtained a writ of possession on January 22, 2018. *See* Ex. D, Writ of Possession.

7. After the Municipal Court denied Mr. Lopez's petition to open default judgment, he appealed to the Court of Common Pleas and was granted a hearing. *See* Ex. E, Mun. Ct. Docket; *see also* Ex. F, Ct. Com. Pl. Docket.

8. On March 26, 2018, the Court of Common Pleas held the hearing on Mr. Lopez's motion where Mr. Lopez stated that Defendant had illegally locked him out on January 15, 2018 and asked the Court to restore his right of possession to the Property on that basis. *See* Ex. G, Ct. Com. Pl. Tr. at 5: 1-9 6: 13-25.

9. The Court asked Defendant about Mr. Lopez's allegation, and the Defendant confirmed that he had indeed changed the locks on January 15:

THE COURT: And did you, at some point, change the locks?

MR. CAGE: I did.

THE COURT: When?

MR. CAGE: I changed the locks on or around January 15<sup>th</sup>.

THE COURT: And by what right did you change the locks?

MR. CAGE: Well, I talked to my attorney, and my attorney advised me –

THE COURT: Well, you don't want to tell this court what you and your lawyer said to each other.

*Id.* at 12: 11-23.

10. Later in the hearing, the Court, addressing Defendant, inquired about the writ of possession:

THE COURT: But what you were not within your rights to do was to admittedly evict him before you had a writ of possession.

MR. CAGE: I did have a writ of possession.

THE COURT: Well, sir, not according to the time frame that you gave me. You admitted to ejecting him before you had a writ.

MR. CAGE: I received the writ of possession, it appears, January 22<sup>nd</sup>.

...

THE COURT: Yes. And you testified that you changed the locks on January 15th.

MR. CAGE: Okay. I'm not exactly sure of the --

THE COURT: You can't do that.

MR. CAGE: -- when I changed the locks.

THE COURT: Because he now has a claim against you for his -- for his possessions that you got rid of, and what I'm -- so I'm granting the emergency motion to reenter.

*Id.* at 16: 16-25, 17: 1-17.

11. At the conclusion of the hearing, the Court explicitly found that Defendant had illegally evicted Mr. Lopez: "And I am finding, based on the testimony that was in front of me, that you improperly evicted him because you evicted him before you had a writ of possession.".

*Id.* at 18: 19-22.

12. The Court issued an order vacating the default judgment against Mr. Lopez and remanding to Municipal Court: "Having found that respondent Cage illegally evicted Mr. Lopez before he obtained a writ of possession, and having found that Mr. Lopez timely filed his appeal and asserted a meritorious defense, the judgment below is vacated." *See Ex. H, Ct. Com. Pl. Order.*

13. Upon remand, the Municipal Court scheduled a new hearing on the merits of Defendant's eviction complaint against Mr. Lopez for June 5, 2018. *See* Mun. Ct. Docket.

14. Mr. Lopez appeared at that hearing, but Defendant did not and the Municipal Court entered a default judgment against Defendant. *See* Ex. I, June 5 Mun. Ct. Order.

15. Defendant never sought to open that judgment or continue the litigation by any other means. *See* Ex. J, Cage Dep. Tr. at 71: 2-11.

16. Mr. Lopez filed the complaint in the instant action on October 10, 2018, seeking relief on the wrongful eviction claim at issue in the present motion, as well as counts of conversion and violation of the Unfair Trade Practices and Consumer Protection Law. *See, e.g.*, Ex. K, Lopez Compl.

17. In the complaint, Mr. Lopez alleged that Defendant or his agents illegally changed the locks to the Property on January 15, 2018. *Id.* at ¶¶ 22-24.

18. Defendant filed an answer and new matter on March 19, 2019. *See, e.g.*, Ex. L, Answer and New Matter.

19. Despite his prior sworn testimony and the prior finding in the Court of Common Pleas, Defendant claimed that he obtained the writ of possession before changing the locks and denied the alleged wrongful eviction. *Id.* at ¶¶ 22-24, 43-49.

20. During his deposition in this lawsuit, Defendant confirmed that he had his realtor, Dennis Britto, perform the lockout at the Property instead of the Sheriff or Landlord-Tenant Officer. Cage Dep. Tr. at 74: 6-18. *See also* *Id.* at 47: 27, 48: 1-2.

21. He also changed his story on the date of the lockout, saying that Mr. Britto changed the locks on February 3, not January 15. *Id.* at 48: 19-21.

22. Further, Defendant stated in his deposition that he did not recall obtaining an alias writ, *id.* at 58: 8-9, and the Municipal Court docket confirms that he never received this document. *See* Ex. J, Mun. Ct. Docket.

## **ARGUMENT**

23. Pennsylvania Rule of Civil Procedure 1035.2 provides that any party may move for summary judgment “whenever there is no genuine issue of any material fact as to a necessary element of the cause of action, or defense which could be established by additional discovery or expert report.” *See* Pa. R.C.P. No. 1035.2(1).

24. Accordingly, a court “shall enter judgment whenever” those criteria are met and “when the right to judgment is clear and free of doubt.” *Barnish v. KWI Bldg. Co.*, 980 A.2d 535, 543 (Pa. 2009) (quoting *Toy v. Metro. Life Ins. Co.*, 928 A.2d 186, 194 (Pa. 2007)).

25. “An eviction is an act by a landlord or a third person that interferes with a tenant's possessory right to the demised premises. If that act is wrongful, the tenant may sue for damages in trespass or assumpsit.” *Kuriger v. Cramer*, 498 A.2d 1331, 1338 (Pa. Super. Ct. 1985).

26. Mr. Lopez is entitled to judgment as a matter of law because a court has already found that Defendant wrongfully evicted Mr. Lopez, and thus the doctrine of collateral estoppel precludes Defendant from disputing the wrongful eviction in the present action.

27. When it is applied, “the doctrine of collateral estoppel precludes relitigation of an issue determined in a previous action.” *Office of Disciplinary Counsel v. Kiesewetter*, 889 A.2d 47, 50 (Pa. 2005).

28. Pennsylvania courts have adopted the Restatement (Second) of Judgments § 27 to describe collateral estoppel as “foreclos[ing] re-litigation in a later action, of an issue of fact or

law which was actually litigated and which was necessary to the original judgment.” *See Clark v. Tourtman*, 502 A.2d 137, 139 (Pa. 1985); *see also Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 511 at fn. 30 (Pa. 2016).

29. In particular, collateral estoppel is applicable where:

(1) [T]he issue decided in the prior case is identical to the one presented in the later action; (2) there was a final adjudication on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and (5) the determination in the prior proceeding was essential to the judgment.

*Taylor*, 147 A.3d at 511 (quoting *Kiesewetter*, 889 A.2d at 50-51).

30. Moreover, the doctrine of collateral estoppel can be used offensively on a motion for summary judgment on the issue of liability. *See, e.g., Matson v. Hous. Auth. of City of Pittsburgh*, 473 A.2d 632, 634 (Pa. Super. Ct. 1984) (granting summary judgment for plaintiff after finding the defendant was collaterally estopped from asserting its only defense), and “when properly applied, the doctrine eliminates all issues of material fact and entitles the moving party to judgment as a matter of law.” *Id.* at 634.

31. All of the elements of collateral estoppel are met in this case.

32. First, the finding of a wrongful eviction in the prior action is identical, both factually and legally, to the present claim on which Mr. Lopez moves for summary judgment.

33. Second, the default judgment that Mr. Lopez secured against Defendant is a final judgment.

34. A final judgment for the purposes of collateral estoppel includes “any prior adjudication of an issue in another action that is sufficiently firm to be accorded conclusive effect.” *Commonwealth v. Holder*, 805 A.2d 499, 503 (Pa. 2002); *Commonwealth v. States*, 891

A.2d 737, 743 (Pa. Super. Ct. 2005), *aff'd*, 938 A.2d 1016 (Pa. 2007); *Commonwealth v. Wiley*, No. 1479 WDA 2012, 2013 WL 11256808, at \*4 (Pa. Super. Ct. July 9, 2013); *Commonwealth v. Brockington-Winchester*, 205 A.3d 1279, 1284 (Pa. Super. Ct. 2019).

35. It is well-established that default judgments are conclusive and put an end to litigation. *See Fox v. Gabler*, 626 A.2d 1141, 1143 (Pa. 1993) ("[W]e long ago concluded that the default judgment is...quite as conclusive as one rendered on a verdict after litigation insofar as a defaulting [party] is concerned.") (quoting *Zimmer v. Zimmer*, 326 A.2d 318, 320 (Pa. Super. Ct. 1974)); *Smith v. Litton Loan Servicing, LP.*, 2005 U.S. Dist. LEXIS 1815, at \*26 (E.D. Pa. Feb. 4, 2005) (finding that a default judgment was "a final determination by a state court.").

36. The default judgment in the present case is thus final and conclusive for purposes of collateral estoppel.

37. Third, Defendant was a party in the prior action—he was the plaintiff, and the issue of the wrongful eviction was determined in that action. See Eviction Compl; see also Ct. Com. Pl. Order.

38. Fourth, Defendant had a full and fair opportunity and, indeed, actually litigated the issue of wrongful eviction in the prior action.

39. While the general rule under the Restatement (Second) of Judgments, which Pennsylvania follows, states that default judgments do not give parties a full and fair opportunity to litigate, *see, e.g., McGill v. Southwark Realty Co.*, 828 A.2d 430, 434–35 (Pa. Commw. Ct. 2003), the current case presents a scenario not yet examined by Pennsylvania appellate courts.

40. Here, Defendant did litigate the wrongful eviction issue and actively participated in the eviction suit he initiated for months before giving up and having default entered against him.

41. Many jurisdictions adhering to the Restatement have upheld the preclusive effect of default judgments that follow actual litigation of the relevant issue. *See Wolstein v. Docterooff (In re Docterooff)*, 133 F.3d 210 (3d Cir. 1997); *In re Daily*, 47 F.3d 365, 368 (9th Cir. 1995); *In re Bush*, 62 F.3d 1319, 1324 (11th Cir. 1995); *In re Jordana*, 216 F.3d 1087 (10th Cir. 2000); *Treglia v. MacDonald*, 717 N.E.2d 249, 254 (Mass. 1999); *Lane v. Farmers Union Ins.*, 989 P.2d 309, 316-17 (Mont. 1999); *In re Abady*, 22 A.D.3d 71, 85, (N.Y. App. Div. 2005).

42. In *In re Docterooff*, the Third Circuit found that a defendant had a full and fair opportunity to litigate an issue where a district court had entered a default judgment against the defendant for noncompliance with discovery orders. 133 F.3d at 213.

43. After the defendant filed for bankruptcy, automatically staying the damages trial in plaintiff's suit against him, the plaintiff filed an adversary action arguing that the defendant was collaterally estopped from denying the alleged fraud and embezzlement. *Id.* at 214.

44. In ruling in favor of the plaintiff and finding the defendant collaterally estopped from denying the fraud, the Third Circuit emphasized defendant's substantial participation in the prior lawsuit—filing an answer, noticing depositions, engaging lawyers, filing papers with the court, and corresponding with opposing counsel – before defendant stopped litigating the case. *Id.*

45. Furthermore, several states following the Restatement have also adopted this exception to the general rule and found that preclusive effect should be given to issues litigated before entry of the default judgment.

46. The Massachusetts Supreme Judicial Court, for example, has recognized that “even in the case of a judgment entered by default, there may be some circumstances in which an issue may be given preclusive effect...[including] circumstances in which a litigant may so utilize

our court system in pretrial procedures, but nonetheless be defaulted for some reason.” *Treglia*, 717 N.E.2d at 254.

47. Here, Defendant not only had a full and fair opportunity to litigate, he actually litigated the prior action.

48. Defendant hired an attorney and initiated the eviction complaint against Mr. Lopez.

49. He attended several court hearings and originally had judgment entered in his favor.

50. Defendant then vigorously contested Mr. Lopez’s attempts to open the original default entered against Mr. Lopez.

51. Only after the Court of Common Pleas found that Mr. Lopez was wrongfully evicted and vacated the judgment of the Municipal Court did Defendant stop litigating, leading to the subsequent default judgment against him.

52. In short, there is no question that Defendant not only had a full and fair opportunity, he actually litigated the wrongful eviction claim in court and lost.

53. Fifth, and finally, the wrongful eviction finding by the Court of Common Pleas in the prior action was essential to the judgment in Mr. Lopez’s favor.

54. An essential issue is one that is “indispensable” to the prior action and “material or necessary to adjudicate the cause of action.” *Schoepple v. Lower Saucon Twp. Zoning Hearing Bd.*, 624 A.2d 699, 706 (Pa. Commw. Ct. 1993).

55. Courts determine the requisite materiality by inquiring “whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment.” *Zarnecki v. Shepegi*, 532 A.2d 873, 879 (Pa. Super. Ct. 1987).

56. In the context of a default judgment, courts have found that “[c]ollateral estoppel is applicable if the facts established by the previous judgment” are identical to the facts that would establish a claim in the present action. *In re Docterooff*, 133 F.3d at 215.

57. The case at hand bears all of the hallmarks of an essential finding.

58. The wrongful eviction finding was “indispensable” to the final result because, in order to have the default judgment against him opened up, Mr. Lopez needed to assert a meritorious defense that “if proved at trial would justify...relief.” *See Smith v. Morell Beer Distrib. Inc.*, 29 A.3d 23, 26 (Pa. Super. Ct. 2011) (quoting *Provident Credit Corp. v. Young*, 446 A.2d 257, 262 (Pa. Super. Ct. 1982)).

59. The Court explicitly found that the illegal eviction gave Mr. Lopez a meritorious defense: “**Having found that respondent Cage illegally evicted Mr. Lopez before he obtained a writ of possession, and having found that Mr. Lopez timely filed his appeal and asserted a meritorious defense, the judgment below is vacated.**” Ct. Com. Pl. Order (emphasis added).

60. Second, the parties and the Court of Common Pleas recognized the importance and necessity of the alleged wrongful eviction as described in *Zarnecki*.

61. Mr. Lopez and Mr. Cage addressed the question of wrongful eviction at length during the March 2018 hearing, as did the Court.

62. After Mr. Lopez testified about how he was locked out of the Property on January 15, the Court directly asked Defendant about the actions he took to lock Mr. Lopez out, and found the issue necessary to its decision to vacate the judgment against Mr. Lopez. Ct. Com. Pl. Tr. at 16: 16-25, 17: 1-12; *see also* Ct. Com. Pl. Order.

63. The wrongful eviction was a “fact[] established by a previous judgment” after Mr. Lopez later secured his own judgment against Defendant.

64. Mr. Lopez had the judgment against him opened after the Court found he was wrongfully evicted.

65. The Defendant had the opportunity to appeal this finding or further contest the eviction case.

66. Instead, he gave up, leaving the Court’s finding of wrongful eviction, which was the sole reason the Court opened the default judgment against Mr. Lopez, undisturbed.

67. In sum, Defendant is estopped from denying that he wrongfully evicted Mr. Lopez, and thus Mr. Lopez is entitled to judgment as a matter of law on his wrongful eviction claim.

68. Mr. Lopez has a second, independent reason why he is entitled to judgment as a matter of law: Defendant has admitted to wrongfully evicting Mr. Lopez by failing to follow the established legal procedures.

69. Philadelphia law is clear that after obtaining a judgment for possession, a landlord may not remove a tenant until he obtains both (1) a writ of possession issued ten or more days after the judgment, and (2) an alias writ, which can be issued eleven days the landlord receives his writ of possession. *See* Phila. M.C.R. Civ.P.No. 126(b).

70. Moreover, enforcement of an alias writ (meaning the actual eviction event) may only be performed by a Sheriff’s deputy or the Philadelphia Landlord-Tenant Officer. *Id.*; *see also* Phila. Code. § 9-1603.

71. Defendant admits he failed to follow the proper legal procedure before he evicted Mr. Lopez by changing the locks on the Property.

72. Defendant stated in his deposition that he did not recall obtaining an alias writ, Cage Dep. Tr. at 58: 8-9, and the Municipal Court docket confirms that he never received this document. *See* Mun. Ct. Docket at.

73. He also admitted that his realtor “changed the locks on the door,” not the Sheriff or Landlord-Tenant Officer as required by law. Cage Dep. Tr. at 74: 6-18; *see also id.* at 47: 27, 48: 1-2.

74. Because Defendant admits that failed to obtain an alias writ and have the Sheriff or Landlord-Tenant Officer perform the eviction, as required by law, it is undisputed that Mr. Lopez was wrongfully evicted and is entitled to summary judgment.

**RELIEF REQUESTED**

74. Mr. Lopez respectfully requests that the Court grant the present Motion and enter judgment in favor of Mr. Lopez and against Mr. Cage on the claim of wrongful eviction.

RESPECTFULLY SUBMITTED:

Dated: October 7, 2019

/s/ George A. Donnelly \_\_\_\_\_  
George A. Donnelly, Esquire  
PUBLIC INTEREST LAW CENTER  
1709 Benjamin Franklin Parkway, 2nd Floor  
Philadelphia, PA 19103

Augusta M. O'Neill, Esquire  
KLEHR HARRISON HARVEY  
BRANZBURG LLP  
1835 Market Street, Suite 1400  
Philadelphia, PA 19103

*Attorneys for Plaintiff*

