IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

BARBARA R. THOMAS	)	CASE NO.: CV-2018-12-4952
	)	
Plaintiff	)	JUDGE TAMMY O'BRIEN
-vs-	)	
	)	
JOHN T. HILLYER	)	**ORDER**
	)	
Defendant	)	

- - -

This matter comes before the Court on the Motion for Summary Judgment filed by Defendant John Hillyer ("Defendant or "Hillyer"); the Motion for Summary Judgment filed by Plaintiff Barbara R. Thomas ("Plaintiff" or "Thomas"); Plaintiff's Motion for Prejudgment Interest; Plaintiff's Motion for Leave to Amend the Prayer of the Complaint; and Plaintiff's Motion to Tax Plaintiff's Doctor's Deposition Costs to Defendant. All pending Motions have been fully briefed and are ripe for Court ruling.

The Court has considered the pending Motions, the Oppositions, the Replies in Support, the facts of this matter, and applicable law. Upon due consideration, and upon a finding that Plaintiff's claims constitute compulsory claims that are barred by the doctrine of *res judicata*, the Court GRANTS Defendant's Motion for Summary Judgment. Plaintiff's Motion for Summary Judgment is, accordingly, DENIED. As Defendant's Motion for Summary Judgment is granted, Plaintiff's Motion to Tax Plaintiff's Doctor's Deposition Costs to Defendant and Motion for Prejudgment Interest are DENIED. Plaintiff's Motion for Leave to Amend the Prayer of the Complaint, to specify that the amount of recovery sought is $250,000.00, is DENIED on the basis that it is MOOT.

The Court's analysis is below.

ANALYSIS

1. Factual Background.

On June 1, 2017, Plaintiff and Defendant entered into a written Rental Agreement for one half of the duplex rental property located at 5046 Fishcreek Road, Stow, Ohio, 44224 ("the Property"). *See* Rental Agreement attached to Complaint. The term of the Rental Agreement, which is signed by Plaintiff and Defendant on behalf of RNT Properties, was from "1 June 2017 to May 2018" and "$840.00 per month" was "due on the 1st day of the month including Pet fee(s) if applicable." *Id.* Plaintiff had two dogs and, accordingly, "[a] pet fee of $40.00" was required per pet. *Id.* at ¶29.

Plaintiff alleges that, on June 15, 2017, she fell when she exited the front entrance of the Property while walking down the front steps. *See* Complaint at ¶¶8-9. *See also* Depo. of B. Thomas at 25-26. Plaintiff alleges that she fell "when a brick broke off Defendants' front porch third brick step." *See* Complaint at ¶9. Plaintiff testified at her deposition that she went out the

front door to go to her car and that, as she was walking down the steps, a "brick separated, I fell and went all kind of ways." Depo. of B. Thomas at 34. Plaintiff acknowledged at her deposition that she was not aware of any problems with the front steps and that, accordingly, she did not provide any notice to Defendant of the loose brick prior to her fall. *Id.* at 26-27. Defendant maintains that he had no notice of any alleged defect with the brick prior to Plaintiff's fall. *See* Depo. of J. Hillyer at 34.

Plaintiff commenced the instant litigation on December 4, 2018 when she filed her Complaint with the Court. Plaintiff's Complaint names Hillyer, RNT Properties, LLC, and RNT Properties as Defendants. RNT Properties, LLC and RNT Properties were dismissed without prejudice on February 11, 2019. *See* Partial Stipulated Dismissal Without Prejudice. Accordingly, Hillyer is the sole remaining Defendant in this litigation.
Plaintiff alleges in her Complaint:

> 14. Plaintiff Barbara R. Thomas states that as a direct and proximate result of Defendants' sole negligence, Breach of Ohio Statutory Landlord Duties and Breach of Defendants own Lease Contract, Plaintiff Barbara R. Thomas sustained injuries to her person and suffered pain of both her body and mind and will continue to suffer pain into the future due to the personal injuries she sustained to the left side of her body caused by her fall.
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> 15. Plaintiff Barbara R. Thomas states that as a direct and proximate result of Defendants' sole negligence, Breach of Statutory Landlord Duties and Breach of Lease Contract, Plaintiff Barbara R. Thomas was forced to seek out medical attention and Plaintiff has assumed the financial responsibilitly for these medical services and Plaintiff Barbara R. Thomas will continue to incur further such medical expenses in the future.
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> 16. Further, Plaintiff Barbara R. Thomas states that as a direct and proximate result of Defendants' sole negligence, Breach of Statutory Landlord Duties and Breach of Lease Contract, Plaintiff Barbara R. Thomas was rendered unable to participate in those activities normally incident to one of her place and state in life, and that she has sustained a loss of enjoyment of her life due to her injuries.

See Complaint at ¶¶14-16.

Defendant filed an Answer to Plaintiff's Complaint on February 11, 2019. While Defendant admits that he is the landlord of the Property and that he rented one half of the duplex to Plaintiff, commencing on June 1, 2017, he denies the material allegations of the Complaint. Among other Affirmative Defenses, Defendant argues that "Plaintiff's claims are barred in whole or in part based upon the doctrines of waiver, laches and/or estoppel." *See* Answer, Affirmative Defenses, at ¶35.

Before this litigation was commenced, and fourteen months after the alleged fall, former Defendant RNT Properties, LLC filed a Forcible Entry and Detainer Complaint against Ms. Thomas on August 24, 2018. *See* Forcible Entry and Detainer Complaint, Case No. 2018 CVG

02640, *attached to* Defendant's Motion for Summary Judgment as Exhibit A. The Forcible Entry and Detainer Complaint, which was filed in Stow Municipal Court, asserted a second cause of action for monetary damages for unpaid rent and utilities. The same Rental Agreement that is attached to Plaintiff's December 4, 2018 Complaint in this litigation was attached to the Forcible Entry and Detainer Complaint.

On November 14, 2018, and through counsel, Ms. Thomas filed an Answer to the claims of former Defendant RNT Properties, LLC. *See* Defendant's Motion for Summary Judgment at Exhibit B. While Ms. Thomas's Answer asserted numerous Affirmative Defenses, it does not mention or include a claim relating to her alleged June 15, 2017 fall. On August 14, 2019, the Stow Municipal Court entered a Stipulated Judgment Entry in favor of RNT Properties, LLC against Ms. Thomas in the amount of $3,924.00. *See* Defendant's Motion for Summary Judgment at Exhibit C.

Defendant and Plaintiff have both moved the Court for summary judgment. Defendant argues in his Motion that Plaintiff's claims are barred by the doctrine of *res judicata*. Even if Plaintiff's claims are not barred, Defendant argues that he is entitled to summary judgment as a matter of law as he lacked notice of the alleged defective condition. Plaintiff argues that she is entitled to summary judgment as a matter of law as there are no remaining issues of material fact pertaining to Defendant's negligence and recklessness.

2. <u>Standard of Review on Summary Judgment.</u>

In reviewing a motion for summary judgment, the Court must consider the following: (1) whether there is no genuine issue of material fact to be litigated; (2) whether in viewing the evidence in a light most favorable to the non-moving party it appears that reasonable minds could come to but one conclusion; and (3) whether the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996); *Wing v. Anchor Media, L.T.D.*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991). If the Court finds that the non-moving party fails to make a sufficient showing on an essential element of the case with respect to which it has the burden of proof, summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.E.2d 265 (1986).

Civ.R. 56(C) states the following, in part, in regards to summary judgment motions:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of the evidence in the pending case, and written stipulations of fact, if any timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Where a party seeks summary judgment on the ground that the nonmoving party cannot prove its case, the moving party bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. *Dresher*, 75 Ohio St.3d at 293, 662 N.E.2d 264. The *Dresher* court continued,

> the moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.

Banks v. Ross Incineration, 9th Dist. No.98CA007132 (Dec. 15, 1999).

3. <u>Analysis.</u>

Defendant argues that Plaintiff's claims in this litigation are barred pursuant to the doctrine of *res judicata*. It is Defendant's position that Plaintiff was required to bring her claims as compulsory claims in the Forcible Entry and Detainer action, *i.e.* Case No. 2018 CVG 02640 in the Stow Municipal Court, and that her claims are now barred. The Court agrees.

Civ.R. 13(A), which governs compulsory counterclaims, provides in pertinent part:

> A pleading shall state as a counterclaim any claim which at the time of servicing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

As explained by the Ninth District, "[t]he purpose of Civ.R. 13, much like the doctrine of res judicata, is to avoid multiplicity of suits by requiring in one action the litigation of all existing claims * * * no matter which party initiates the action." *Forney v. Climbing Higher Enterprises, Inc.,* 158 Ohio App.3d 338, 344, 2004-Ohio-4444, 815 N.E.2d 722. Accordingly, "if a party fails to assert a compulsory counterclaim, she is barred from litigating the counterclaim in a separate action." *Id.* The Ninth District further recognized in *Forney* that Civ.R. 13 applies for forcible entry and detainer actions. *Id.*, *citing Jemo Assoc. v. Garman*, 70 Ohio St.2d 267, 24 O.O.3d 358, 436 N.E.2d 1353, paragraph one of the syllabus; *Maduka v. Parries*, 14 Ohio App.3d 191, 192, 470 N.E.2d 464 (8th Dist. 1984).

The facts before the Court in this case are strikingly similar to those that were before the court in *Sherman v. Pearson*, 110 Ohio App.3d 70, 673 N.E.2d 643 (1st Dist. 1996). The plaintiff-appellant in *Sherman* was a tenant in the defendant-appellee's ("landlord's") apartment building and she alleged that she sustained personal injuries from a November 15, 1992 fall on the apartment's steps. After the alleged fall, but before the plaintiff-appellant commenced action for her alleged personal injuries, the landlord filed an action in the municipal court for forcible entry and detainer and for rent. Judgment was rendered against the plaintiff-appellant in the municipal court proceedings and, on August 25, 1994, the municipal court issued an entry of satisfaction of

the judgment. Approximately two month later, on November 10, 1994, the plaintiff-appellant filed a complaint against the landlord in the court of common pleas for damages caused by the fall on the stairs. Like Hillyer, the landlord in *Sherman* filed a motion for summary judgment arguing that the plaintiff-appellant's personal injury claim was a compulsory claim that should have been asserted in the forcible entry and detainer action. The trial court agreed and summary judgment was granted.

The appellate court in *Sherman* addressed the issue of "whether the personal-injury claim of the plaintiff-appellant, Adrienne Sherman, filed in the Hamilton County Court of Common Pleas, was a compulsory counterclaim which she was required to assert in the Hamilton County Municipal Court in the landlord's earlier action against her for forcible entry and detainer and rent." *Sherman*, 110 Ohio App.3d at 71-72, 673 N.E.2d 643. The court found that the personal injury claim was a compulsory counterclaim and that, as such, "the common pleas court correctly held in its written decision that, under Civ.R. 13(A), Sherman's personal injury claim was a compulsory counterclaim, and therefore summary judgment for the landlord was properly granted." *Id.* In rendering this holding, the court noted that "[t]he rental agreement upon which the landlord had earlier sued gave rise to the landlord's statutory duty to keep the common area safe [the steps], which in turn provided Sherman with a separate claim for damages based upon a breach of the Landlord and Tenant Act. Furthermore, Sherman's negligence action depends upon evidence that her landlord had tortiously breached the statutory duties that the Landlord and Tenant Act attaches to the rental agreement." *Id.* at 75. The court also noted in *Sherman* that a liberal construction of Civ.R. 13(A) in favor of compulsory counterclaims is in the best interest of judicial economy. *Id.* at 76.

Forney, 158 Ohio App.3d 338, 344, 2004-Ohio-4444, 815 N.E.2d 722, is also applicable. The plaintiff-appellant and defendant-appellee in *Forney* entered into a land sales contract for the purchase of real property located in Akron, Ohio. The parties' land contract required defendant-appellees to perform certain acts and to obtain insurance coverage on the property. The plaintiff-Appellant commenced action against the defendant-appellees alleging that they failed to perform under the terms of the parties' land contract and that she sustained damages when the property flooded. The plaintiff-appellant also alleged that the defendant-appellees knew that the property had a propensity to flood, yet failed to disclose this to her, and that they made various material misrepresentations and committed unfair, deceptive, and unconscionable acts in connection with the land sales contract.

In response to the plaintiff-appellant's complaint, the defendant-appellees in *Forney* filed an answer and pleaded *res judicata* and collateral estoppel as an affirmative defense. The defendant-appllees later filed a motion for summary judgment wherein they argued that the plaintiff-appellant's "claims were compulsory counterclaims that should have been brought when [defendant] Climbing Higher Enterprises, Inc. filed a separate action for forcible entry and detainer in the Akron Municipal Court". *Id.* at 342. In granting the defendant-appellees motion for summary judgment, the trial court found that the plaintiff-appellant's claims were barred by the doctrine of *res judicata*. The Ninth District agreed.

In affirming the lower court's granting of summary judgment and finding that the plaintiff-appellant's claims qualified as compulsory counterclaims, the Ninth District applied the *Rettig* test. "The *Rettig* test requires a showing that (1) the claim existed at the time of the first pleading

and (2) the claim ''ar[o]se out of the transaction or occurrence that is the subject matter of the opposing claim.'" *Forney* 158 Ohio App.3d at 346, 2004-Ohio-4444, 815 N.E.2d 722, *quoting Rettig Ents. v. Koehler*, 68 Ohio St.3d 274, 277, 1994-Ohio-127, 626 N.E.2d 99. The Court noted that, as the plaintiff-appellant's "claims existed at the time Climbing Higher filed an action for forcible entry and detainer in the Akron Municipal Court," clearly the first prong of the *Rettig* test was satisfied. In finding that the second prong of *Rettig* was also satisfied, the Ninth District found:

> This court also finds that appellant's claims arise out of the original transaction, specifically the land sales contract and the subject matter of that contract, namely the Thurmont property. The basis for each cause of action set forth by appellant was the landlord-tenant relationship that existed between the parties and the Thurmont property. In her complaint, appellant contended that appellees breached the terms of the land sales contract because they failed to provide insurance coverage pursuant to the contract. She also contended that appellees were negligent when the failed to inform her that the Thurmont property had a propensity for flooding and, as a direct and proximate result of appellee's failure to disclose this information, she suffered significant damages when the Thurmont property flooded on November 2, 1999. As to her claims for fraud and violations of the Consumer Sales Practices Act, appellant contended that appellees made material misrepresentations and committed unfair, deceptive, and unconscionable acts when they entered into the land sales contract with her for the sale of the Thurmont property. As each of appellant's claims is 'logically related to the opposing party's claim,' we must necessarily conclude that her claims bear a logical relationship to appellees' action for forcible entry and detainer, which involves the removal of appellant from the Thurmont property. *Rettig*, 68 Ohio St.3d 274, 626 N.E.2d 99, at paragraph two of the syllabus.
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> As appellant's claims satisfy the *Rettig* two-part test, we find that her claims were compulsory counterclaims and that she should have presented these claims when Climbing Higher initiated the forcible entry and detainer action. As appellant failed to present these claims when the action for forcible entry and detainer was pending before the Akron Municipal Court, we find that appellant is barred by the doctrine of res judicata from bringing these claims against appellees in the Summit County Court of Common Pleas. * * *

Id.

Plaintiff's claims of negligence, negligence per se, and breach of contract all arise out of the parties' original transaction, *i.e.* the June 1, 2017 Rental Agreement that was attached to the Forcible Entry & Detainer Complaint and that was also attached to Plaintiff's Complaint herein. The basis for each of Plaintiff's causes of action arose from the landlord-tenant relationship that existed between the parties and the subject property. Plaintiff alleges in her Complaint that Defendant breached his statutory duties as a landlord and the applicable written Rental Agreement. *See* Complaint at ¶12. Plaintiff further alleges that, as a direct and proximate result of Defendant's breaches of his statutory and contractual duties, she suffered personal injuries. *Id.* at ¶¶14-16. Plaintiff's negligence claim against Defendant is based upon an alleged breach of statutory duties

that Defendant owed to Plaintiff under the Landlord and Tenant act as well as the contractual terms of the Rental Agreement. Plaintiff's claims satisfy the *Rettig* two-part test as her claims were compulsory counterclaims that she should have presented in the Stow Municipal Court when the Forcible Entry and Detainer action was initiated.

Res judicata applies even though Hillyer was not a named party in the underlying Forcible Entry and Detainer action. *Res* judicata applies as Hillyer and RNT Properties, LLC and RNT Properties have a mutuality of interest and are in privity with one another. *Forney* addressed this precise issue and provided:

> we reject appellant's argument that she is not barred from suing the present defendants, John and Gloria Eden, J & G Eden, L.L.C., and the '2069 Property Trust dated 5/21/98,' because the action for forcible entry and detainer initiated in the Akron Municipal Court only involved Climbing Higher. We find that appellees are in privity with one another and that this relationship precludes appellant from filing similar actions against John and Gloria Eden individually or as partners in J & G Eden, L.L.C., and against the subject matter of the trust, the '2069 Property Trust dated 5/21/98.' The Ohio Supreme Court has explained:
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> > What constitutes privity in the context of *res judicata* is somewhat amorphous. A contractual or beneficiary relationship is not required:
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> > 'In certain situations * * * a broader definition of 'privity' is warranted. As a general matter, privity 'is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata.' *Bruszewski v. United States* (C.A.3, 1950), 181 F.2d 419, 423 (Goodrich, J., concurring)." * * *
> >
> > We find that a mutuality of interest, including an identity of desired result, creates privity [among parties of separate lawsuits].
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> *Brown v. Dayton* (2000), 89 Ohio St.3d 245, 248, 730 N.E.2d 958, quoting *Thompson v. Wing* (1994), 70 Ohio St.3d 176, 184, 637 N.E.2d 917; see, also, *Waddell v. Boldman*, **730 4th Dist. No. 01CA721, 2002-Ohio-4229, 2002 WL 1897320, at ¶ 22.
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> According to *Brown*, 'a mutuality of interest, including an identity of desired result,' may create privity. *Brown*, 89 Ohio St.3d at 248, 730 N.E.2d 958. Here, Climbing Higher is in privity with John and Gloria Eden and the '2069 Property Trust dated 5/21/98.' * * *

*Forney,*158 Ohio App.3d at 347-348, 2004-Ohio-4444, 815 N.E.2d 722.

Plaintiff alleges that Hillyer was the owner/manager of the Property and that he was responsible for the regular inspection, maintenance, management, and repair of the Property. *See* Complaint at ¶¶2-3. Plaintiff further alleges that Hillyer represented to her that the Property "was

fully repaired and fully maintained, in good and safe order and in as new condition pursuant to the lease." *Id.* at ¶5. Hillyer signed the Rental Agreement as a signatory for and on behalf of RNT Properties. The Rental Agreement at issue in the Forcible Entry and Detainer action is the same Agreement at issue herein. As in *Forney*, the Court finds that Hillyer was in privity with RNT Properties, LLC as he was acting on behalf of, or in concert with RNT Properties, LLC and that he had a "'a mutuality of interest, including an identity of desired result.'" *Forney,* 158 Ohio App.3d at 348, 2004-Ohio-4444, 815 N.E.2d 722, *quoting Brown*, 89 Ohio St.3d at 248, 730 N.E.2d 958.

The Court finds that Plaintiff's claims in this litigation constitute compulsory counterclaims that should have been presented in the Stow Municipal Court when the Forcible Entry and Detainer action was initiated. Plaintiff failed to present her claims in the Forcible Entry and Detainer action and is now barred by the doctrine of *res judicata* from bring these claims against Defendant. Defendant's Motion for Summary Judgment is, therefore, GRANTED.

CONCLUSION

WHEREFORE, as set forth above, and upon a finding that Plaintiff's claims constitute compulsory claims that are barred by the doctrine of *res judicata*, the Court GRANTS Defendant's Motion for Summary Judgment. Plaintiff's Motion for Summary Judgment is, accordingly, DENIED. As summary judgment is granted and this matter will not be proceeding to a jury trial, Plaintiff's Motion to Tax Plaintiff's Doctor's Deposition Costs to Defendant and Motion for Prejudgment Interest are DENIED. Plaintiff's Motion for Leave to Amend the Prayer of the Complaint, to specify that the amount of recovery sought is $250,000.00, is DENIED on the basis that it is MOOT.

This is a Final Appealable Order and there is no just cause for delay.

IT IS SO ORDERED.

JUDGE TAMMY O'BRIEN

CC: ATTORNEY CARL G. MCMAHON
ATTORNEY PATRICK J. GUMP

DAH