

PUBLIC INTEREST LAW CENTER  
George A. Donnelly (Pa. I.D. 321317)  
gdonnelly@pubintl.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

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF STORM LOPEZ'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT**

**I. MATTER BEFORE THE COURT**

Plaintiff Storm Lopez, by and through his attorneys, files this Memorandum of Law in Support of his Motion for Partial Summary Judgment. For the reasons set forth below, Mr. Lopez respectfully requests that the Court grant the Motion and enter judgment in favor of Mr. Lopez on his wrongful eviction claim. *See* Ex. K, Lopez Compl. at ¶¶ 43-49.

## **II. INTRODUCTION**

Plaintiff Storm Lopez brought this lawsuit against his former landlord, Defendant Michael Cage, claiming damages for wrongful eviction, conversion, and violation of the Unfair Trade Practices and Consumer Protection Law after Defendant illegally removed Mr. Lopez from his home of seventeen years and discarded a lifetime of Mr. Lopez's personal belongings. In the prior eviction proceedings between the parties, the Court of Common Pleas determined that Defendant wrongfully evicted Mr. Lopez. Collateral estoppel bars Defendant from now denying his wrongful eviction of Mr. Lopez. Accordingly, Mr. Lopez is entitled to summary judgment on this claim as a matter of law. *See Office of Disciplinary Counsel v. Kiesewetter*, 889 A.2d 47, 50 (Pa. 2005) (“[T]he doctrine of collateral estoppel precludes relitigation of an issue determined in a previous action.”). Moreover, Defendant admits he performed a self-help eviction when he had his agent change the locks on Mr. Lopez's home instead of obtaining an alias writ and having the Sheriff or Landlord-Tenant Officer serve it as required by law. Thus, there is also no genuine dispute of material fact on the wrongful eviction claim. Mr. Lopez is entitled to summary judgment on these two separate and distinct grounds.

## **III. STATEMENT OF QUESTIONS INVOLVED**

Is Mr. Lopez entitled to summary judgment on his wrongful eviction claim under the doctrine of collateral estoppel when a court has already determined that Defendant wrongfully evicted Mr. Lopez from his home?

**Suggested Answer: Yes.**

Is Mr. Lopez entitled to summary judgment on his wrongful eviction claim where there is no genuine dispute of material fact because Defendant admitted under oath to changing the locks

on Mr. Lopez's home without obtaining an alias writ and having the Sheriff or Landlord-Tenant Officer serve that writ as required by law?

**Suggested Answer: Yes.**

#### **IV. UNDISPUTED FACTS AND PROCEDURAL HISTORY**

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. Defendant remained the owner of the Property throughout the duration of Mr. Lopez's tenancy. *See* Ex. K, Lopez Compl. at ¶ 7 and Ex. L, Answer and New Matter at ¶ 7. 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. at ¶ 13 and Ex. L, Answer and New Matter at ¶ 13. Defendant then, through his attorney, filed for eviction against Mr. Lopez in November 2017. *See* Ex. B, Eviction Compl. An eviction hearing between Mr. Lopez and Defendant was held on January 2, 2018, and the Municipal Court entered a default judgment in Defendant's favor after Mr. Lopez failed to appear. *See* Ex. C., Jan. 2 Mun. Ct. Order. Defendant subsequently obtained a writ of possession on January 22, 2018.<sup>1</sup> *See* Ex. D, Writ of Possession. 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. On March 26, 2018, the Court of Common Pleas held the hearing on Mr. Lopez's motion at which both parties appeared and testified. *See, e.g.,* Ex. G, Ct. Com. Pl. Tr. Mr. Lopez stated that Defendant had illegally locked him out on January 15, 2018:

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<sup>1</sup> As described later in this memorandum, a landlord must obtain a writ of possession, then an alias writ ten days later, then have the Sheriff or Landlord-Tenant Officer serve those writs and remove the tenant in order to legally perform an eviction in Philadelphia. *See* Phila. M.C.R. Civ.P.No. 126(b); *see also* Phila. Code. § 9-1600 *et. seq.*, Prohibition Against Unlawful Eviction Practices.

MR. LOPEZ: I never got -- I was never evicted. I never got an eviction notice. That part of the paperwork was never done.

THE COURT: Well, how did you end up no longer being in the property?

MR. LOPEZ: He changed the locks one day when I went in the house. I went to the store and he changed the locks. I have a police report right here.

THE COURT: When did that happen?

MR. LOPEZ: January 15th.

THE COURT: You've been out of the property since January 15th?

*Id.* at 6: 13-25. Mr. Lopez asked the Court to restore his right of possession to the Property on account of this illegal eviction. *Id.* at 5: 1-9. During Defendant's testimony, the Court asked Defendant about Mr. Lopez's allegation, and Mr. Cage 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. 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.

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. The Court issued an order vacating the default judgment against Mr. Lopez and remanding to Municipal Court. *See* Ex. H, Ct. Com. Pl. Order. The order made clear the Court’s reason for vacating the judgment: “**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....**” *Id.* (emphasis added).

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. 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. 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.

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. 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.

Defendant filed an answer and new matter on March 19, 2019. *See, e.g.,* Ex. L, Answer and New Matter. Despite his prior sworn testimony and the prior finding in the Court of Common Pleas, Defendant now claimed that he obtained the writ of possession before changing the locks and denied the alleged wrongful eviction. *Id.* at ¶¶ 22-24, 43-49. But, during his deposition in this lawsuit, Defendant *confirmed* that he and his realtor Dennis Britto performed the lockout at the Property, not the Sheriff or Landlord-Tenant Officer:

MR. DONNELLY: Okay. Who was going to do the lockout?

MR. CAGE: The sheriff.

MR. DONNELLY: Did the sheriff do the lockout?

MR. CAGE: No.

MR. DONNELLY: Who did the lockout?

MR. CAGE: Mr. Britto changed the locks on the door after I thought Mr. Lopez had vacated the apartment.

MR. DONNELLY: Mr. Britto changed the locks?

MR. CAGE: That's correct.

MR. DONNELLY: At your direction?

MR. CAGE: Yes.

Cage Dep. Tr. at 74: 6-18. *See also Id.* at 47: 27, 48: 1-2. Defendant also changed his story on the date of the lockout, now claiming in his deposition that Mr. Britto changed the locks on February 3, *id.* at 48: 19-21, not January 15 as he testified to in the Court of Common Pleas. Cage Dep. Tr. 12: 15-16. Further, Defendant stated in his deposition that he did not recall obtaining an alias writ. *Id.* at 58: 8-9. The Municipal Court docket confirms that he never obtained this document, which is required by Philadelphia law. *See* Ex. J, Mun. Ct. Docket. The parties completed discovery at the beginning of September, and this Motion followed.

## **V. ARGUMENT**

### **a. Legal Standard**

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). 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)). The moving party has the burden of proving that there is no genuine issue of fact and any doubt as to the existence of such an issue must be resolved against that party. *Id.* That burden can also be met, and summary judgment is appropriate, when “the only defense presented [by the non-moving party] is for some reason rendered invalid.” *Matson v. Hous. Auth. of City of Pittsburgh*, 473 A.2d 632, 634 (Pa. Super. Ct. 1984).

**b. Mr. Lopez Is Entitled to Summary Judgment Because Defendant Is Collaterally Estopped from Denying the Wrongful Eviction and, Therefore, No Issue of Material Fact Exists**

Mr. Lopez moves the Court to enter judgment in his favor on his wrongful eviction claim. “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). Mr. Lopez is entitled to judgment as a matter of law because a court has already found that Defendant wrongfully evicted Mr. Lopez.

Collateral estoppel eliminates any genuine issue of material fact on Mr. Lopez’s wrongful eviction claim. When it is applied, “the doctrine of collateral estoppel precludes relitigation of an issue determined in a previous action.” *Kiesewetter*, 585 Pa. at 484, 889 A.2d at 50; *see also Pittsburgh v. Zoning Bd. of Adjustment*, 559 A.2d 896, 901 (Pa. 1989). 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). 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).

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*, 473 A.2d at 633 (granting summary judgment for plaintiff after finding the defendant was collaterally estopped from asserting its only defense). Indeed, “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.

Here, Mr. Lopez can establish that the five elements of collateral estoppel are met. It is undisputed that the Court of Common Pleas during a prior action determined that Defendant had wrongfully evicted Mr. Lopez when he failed to follow the requisite legal procedures. Based on that finding, the Court vacated the judgment against Mr. Lopez. On remand to the Municipal Court, Defendant failed to appear and Mr. Lopez secured a final default judgment in his favor. The Court of Common Pleas’ previous finding of a wrongful eviction satisfies the requirements for collateral estoppel in the present action. With Defendant’s only defense rendered invalid, Mr. Lopez is entitled to judgment as a matter of law on his wrongful eviction claim.



**i. The Finding in the Prior Action that Defendant Wrongfully Evicted Mr. Lopez Decided an Issue Identical to the One Presented by this Motion**

The issues in the prior action and the present one are identical. In the prior action, the Court of Common Pleas found that Defendant, then the plaintiff, “illegally evicted Mr. Lopez...” Ct. Com. Pl. Order. In the present action, Mr. Lopez asserts that Defendant wrongfully evicted him by performing an illegal lockout. The factual and legal issues, whether Defendant’s acts were a wrongful eviction, are exactly the same in both cases.

**ii. The Judgment in Defendant’s Prior Action against Mr. Lopez is Final**

The default judgment that Mr. Lopez secured against Defendant is a final judgment. 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). 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.”). The default judgment in the present case is final and conclusive for purposes of collateral estoppel.

### **iii. Defendant was a Party in the Prior Case**

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.

### **iv. Defendant Actually Litigated the Issue of Wrongful Eviction in the Prior Action**

This was not an ordinary default judgment. The litigation process in landlord-tenant cases can result in a procedural posture where a final judgment is by default but the parties nevertheless fully litigated the issue at hand. Here, Defendant had a full and fair opportunity to litigate the alleged wrongful eviction before the court issued its ruling in the prior action, and, in fact, *did* litigate that topic at a hearing in open court.

Although Pennsylvania law, following the Restatement (Second) of Judgments, generally does not afford collateral estoppel effect to default judgments because they are entered without a full and fair opportunity to litigate, *McGill v. Southwark Realty Co.*, 828 A.2d 430, 434–35 (Pa. Commw. Ct. 2003) (citing Comment e of the Restatement (Second) of Judgments § 27 (1982)), the case at hand presents a different and unexplored scenario for Pennsylvania courts. The *McGill* court dealt with a classic default judgment situation where one party had never participated in the action and thus could not have litigated any specific issue. But no appellate court in Pennsylvania has examined whether a case ending in default judgment presented a party with a full and fair opportunity to litigate for collateral estoppel purposes when that party *actually litigated* the relevant issue before it stopped participating in the lawsuit.

Many jurisdictions adhering to the Restatement have upheld the preclusive effect of default judgments that follow actual litigation of the relevant issue. The Third Circuit has explicitly recognized an exception to the general rule that default judgments have no preclusive

effect when parties actually litigate a matter before one side stops prosecuting or defending the action, leading to a default judgment. In *Wolstein v. Docteroff (In re Docteroff)*, the court 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 210, 213 (3d Cir. 1997). 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. 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.*

The Ninth Circuit adopted this same exception in *In re Daily*, 47 F.3d 365, 368 (9th Cir. 1995). There, the defendant had a default judgment entered against him in a RICO action and subsequently tried to relitigate the issue at his bankruptcy proceeding. In its analysis, the court noted that the previous RICO judgment entered against the defendant “was not an ordinary default judgment. Defendant did not simply decide the burden of litigation outweighed the advantages of opposing the...claim...He actively participated in the litigation...for two years before judgment was entered against him.” *Id.* The court concluded, “[T]he ‘actual litigation’ requirement may be satisfied by substantial participation in an adversary contest in which the party is afforded a reasonable opportunity to defend himself on the merits but chooses not to do so.” *Id.*

Similarly, the Eleventh Circuit has applied collateral estoppel after a default judgment. In *In re Bush*, the defendant actively participated in previous litigation while represented by

counsel, answered the complaint, filed counterclaims, and participated in discovery. 62 F.3d 1319, 1324 (11th Cir. 1995). Only after the defendant failed to appear for his deposition or attend a pre-trial conference did the Court enter judgment against him. *Id.* The 11<sup>th</sup> Circuit concluded:

Where a party has substantially participated in an action in which he had a full and fair opportunity to defend on the merits, but subsequently chooses not to do so, and even attempts to frustrate the effort to bring the action to judgment, it is not an abuse of discretion for a district court to apply the doctrine of collateral estoppel to prevent further litigation of the issues resolved by the default judgment in the prior action.

*Id.* at 1325 (Internal footnote omitted).

Furthermore, several states which follow the Restatement agree that preclusive effect can be given in cases that end in default judgment after the parties engage in actual litigation. The Massachusetts Supreme Judicial Court, for example, has recognized:

[E]ven in the case of a judgment entered by default, there may be some circumstances in which an issue may be given preclusive effect in subsequent litigation between the same parties. We can, for example, envision circumstances in which a litigant may so utilize our court system in pretrial procedures, but nonetheless be defaulted for some reason, that the principle and rationale behind collateral estoppel would apply.

*Treglia v. MacDonald*, 717 N.E.2d 249, 254 (Mass. 1999). Similarly, a New York appellate court has held “that collateral estoppel may be properly applied to default judgments where the party against whom preclusion is sought appears in the prior action, yet...abandons [the litigation], despite a full and fair opportunity to do so.” *In re Abady*, 22 A.D.3d 71, 85, (N.Y. App. Div. 2005). Finally, the Supreme Court of Montana held that a default judgment “generally carries no collateral estoppel effect,” but that an issue is “actually litigated and adjudged as shown on the face of the judgment” for the purposes of collateral estoppel where it “was effectively raised in the pleadings or through development of the evidence and argument at trial or on motion” and, “the losing party had a ‘full and fair opportunity’ procedurally, substantively,

and evidentially to contest the issue in a prior proceeding.” *Lane v. Farmers Union Ins.*, 989 P.2d 309, 316-17 (Mont. 1999).

If simply having a full and fair opportunity to litigate the issue in the prior proceeding is sufficient to estop the parties from relitigating, then certainly collateral estoppel applies where Defendant actually litigated the issue in the prior proceeding that resulted in his default judgment. Here, Defendant actively litigated the prior action. He hired an attorney, who then initiated the original suit against Mr. Lopez by filing an eviction complaint. *See* Eviction Compl. Thereafter, Defendant, with his attorney, attended the first Municipal Court hearing and had judgment entered in his favor. *See* Mun. Ct. Order. Defendant then unsuccessfully contested Mr. Lopez’s attempts to open the judgment, attending the hearing on Mr. Lopez’s appeal before the Court of Common Pleas. *See, e.g.*, Ct. Com. Pl. Tr.

At the hearing, Defendant vigorously disputed that he had wrongfully evicted Mr. Lopez, stating that he changed the locks on January 15. *Id.* at 12: 11-23. Yet the Court relied on Defendant’s *own sworn testimony* when it found that he had illegally evicted Mr. Lopez. *See* Ct. Com. Pl. Tr. at 18: 15-22; *see also* Ct. Com. Pl. Order. It was only after the Court decided the issue of the wrongful eviction against him that Defendant stopped litigating. In short, Defendant not only had a full and fair opportunity, he *actually litigated* the wrongful eviction claim in court and lost.

**v. The Finding of the Wrongful Eviction in the Prior Action Was Essential to the Judgment in Mr. Lopez’s Favor**

The issue of the wrongful eviction was essential to Mr. Lopez securing a default judgment against Defendant. An essential issue is one that is “indispensable” to the prior action. *Pilgrim Food Products Co. v. Filler Products, Inc.*, 143 A.2d 47 (Pa. 1958); *see also In re Private Rd. in Union Twp.*, 611 A.2d 1362, 1365 (Pa. Commw. Ct. 1992). That is, the issue must

be “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). 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). 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 Docteroff*, 133 F.3d at 215. The *In re Docteroff* court estopped the defendant there from challenging the dischargeability of his debt because the previous judgment entered against him dealt with the same facts related to fraud and embezzlement. *Id.* The court rejected the defendant’s arguments that such findings were not essential to the earlier judgment because they were not litigated in the context of a bankruptcy. Instead, it held that collateral estoppel “permits court[s] to accept facts established by a previous judgment...” and thus the essentiality requirement was fulfilled.

The case at hand bears all of the hallmarks of an essential finding. First, the wrongful eviction finding was “indispensable” to the final result. 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 Distribs. 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)). 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). The wrongful eviction finding was indispensable because it provided Mr. Lopez with the meritorious defense

necessary to open the default judgment entered against him and eventually secure a judgment in his own favor.

Second, the parties and the Court of Common Pleas recognized the importance and necessity of the alleged wrongful eviction as described in *Zarnecki*. Mr. Lopez and Mr. Cage addressed the question of wrongful eviction at length during the March 2018 hearing, as did the Court. 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.

Finally, as was the case in *In re Docteroff*, the wrongful eviction was a “fact[] established by a previous judgment” after Mr. Lopez later secured his own judgment against Defendant. Mr. Lopez had the judgment against him opened after the Court found he was wrongfully evicted. The Defendant had the opportunity to appeal this finding or further contest the eviction case. Instead, he stopped litigating, leaving the Court’s finding of wrongful eviction, which was the sole reason the Court opened the default judgment against Mr. Lopez, undisturbed.

In sum, Defendant is estopped from denying that he wrongfully evicted Mr. Lopez. The wrongful eviction issue decided in the prior action is identical to the claim brought here by Mr. Lopez. The judgment entered against Defendant in the prior action is final. The parties in this suit are identical to those in the previous one. Defendant actually litigated the issue of wrongful eviction. And the court’s determination that Defendant wrongfully evicted Mr. Lopez was essential to the final judgment. Since Defendant is foreclosed from asserting his only defense, this Court should grant Mr. Lopez’s motion and enter judgment in his favor.

**c. Alternatively, Mr. Lopez Is Entitled to Judgment Because Defendant Admitted That He Wrongfully Evicted Mr. Lopez during his Deposition.**

Mr. Lopez is also entitled to summary judgment on his wrongful eviction claim on a separate ground: Defendant admitted during his deposition that he did not follow the proper procedures to remove Mr. Lopez from the Property. Thus, there is no genuine dispute of any material fact on the claim. 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 after the landlord receives his writ of possession. *See* Phila. M.C.R. Civ.P.No. 126(b). Then, to physically evict the tenant, the landlord must have the Sheriff or Landlord-Tenant Officer serve the writs and perform the eviction. *Id.*; *see also* Phila. Code. § 9-1603 (“Lawful execution of judgment may be performed only by a Sheriff or court-appointed landlord and tenant officer.”). A landlord must utilize this specific, three-step legal process to regain possession of his property – evicting a tenant through any other means is an illegal self-help eviction. *See, e.g.*, Phila. Code. § 9-1600 *et. seq.*, Prohibition Against Unlawful Eviction Practices. Illegal self-help practices include “plugging, changing, adding or removing any lock or latching device to a dwelling unit or otherwise blocking access to the unit.” *Id.* at § 9-1602(1)(a).

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



While Defendant has now changed his story and claims he performed the lockout on February 3,<sup>2</sup> that is irrelevant given his admission that he had one of his agents change the locks, instead of the Sheriff, before ever obtaining an alias writ.<sup>3</sup> Defendant's actions constituted an illegal self-help eviction under Philadelphia law and Mr. Lopez is therefore entitled to judgment in his favor on the wrongful eviction claim.

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<sup>2</sup> Throughout the litigation, Defendant has given three separate dates on which he says he changed the locks at the Property. Parties cannot attempt to defeat summary judgment by creating their own dispute of material fact. *See, e.g., Montgomery v. Barrow*, 692 S.E.2d 351, 356 (Ga. 2010) (stating that self-contradictory testimony should not be considered when determining whether a dispute of material fact exists at summary judgment). And in any event, as mentioned above, the dispute of fact is not material, as Defendant's admissions constitute a wrongful eviction regardless of whether the lockout took place on January 15, February 3, or February 6.

<sup>3</sup> Pennsylvania courts have long held that the *Nanty-Glo* doctrine precludes the entry of summary judgment when a moving party relies on it or its witnesses own deposition testimony. *Penn Center House, Inc. v. Hoffman*, 553 A.2d 900, 902 (Pa. 1989) (citing *Nanty-Glo v. American Surety Co.*, 163 A. 523 (Pa. 1932)). However, a moving party may support its motion for summary judgment with admissions, in depositions or otherwise, by the opposing party. *See InfoSAGE, Inc. v. Mellon Ventures, L.P.*, 896 A.2d 616, 631 (Pa. Super. Ct. 2006).

## **VI. CONCLUSION AND RELIEF REQUESTED**

The determination in a prior action that Defendant wrongfully evicted Mr. Lopez satisfies all of the requirements of collateral estoppel and should therefore be given preclusive effect. Application of that doctrine would eliminate the only defense to Mr. Lopez's wrongful eviction claim and entitle him to judgment as a matter of law. Alternatively, Defendant's own admissions during his deposition prove that he wrongfully evicted Mr. Lopez by changing the locks himself before obtaining an alias writ and having the locks changed by the Sheriff. Mr. Lopez respectfully requests that the Court grant the present Motion and enter judgment in favor of Mr. Lopez consistent with the attached Proposed Order.

Dated: October 7, 2019

/s/ George A. Donnelly  
George A. Donnelly, Esquire  
PUBLIC INTEREST LAW CENTER  
gdonnelly@pubintl.org  
1709 Benjamin Franklin Parkway  
Philadelphia, PA 19103  
(215) 627-7100

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

*Attorneys for Plaintiff*