

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE PETER J. KELLY**
Justice

IAS PART 16

YURA DAVIDOV,

INDEX NO. 19030/2000

Plaintiff,

MOTION

- against -

DATE July 11, 2006

ADS PROPERTIES CO., INC., CLIFFORD
STEELE and HOME DEPOT, INC.,

MOTION

CAL. NO. 4

Defendants.

The following papers numbered 1 to 8 read on this motion by the defendant Home Depot, Inc. for summary judgment dismissing the plaintiff's complaint.

	<u>PAPERS NUMBERED</u>
Notice of Motion/Affid(s)-Exhibits-Memo of Law.....	1 - 5
Affid(s) in Opp.....	6
Replying Affidavits-Memo of Law.....	7 - 8

Upon the foregoing papers the motion is determined as follows:

The plaintiff commenced this action on August 11, 2000 and asserted claims of negligence and violations of the Labor Law against the defendants ADS Properties Co., Inc. and Clifford Steele. In the same complaint the plaintiff put forward claims of negligence, strict products liability and breach of warranty against the defendant Home Depot, Inc. ("Home Depot"). On August 27, 2004, the plaintiff commenced an action in the United States District Court for the Southern District of New York against the Louisville Ladder Group, LLC. ("Louisville Ladder") wherein he asserted claims of negligence, strict products liability and breach of warranty.

Both actions stem from an accident that occurred on November 3, 1999. On that date, the plaintiff was injured in a fall from a ladder that was designed and manufactured by the defendant Louisville Ladder and sold by the defendant Home Depot. This court granted the motion by the defendants ADS Properties Co., Inc. and Clifford Steele for summary judgment and dismissed the plaintiff's claims against these defendants. By order of Justice Alan LeVine, dated October 20, 2004, the trial of

this action was stayed pending the resolution of Louisville Ladder's motion for summary judgment in the federal court action. This action was again stayed by this court, in an order dated June 6, 2005, until resolution of the appellate process in the federal action.

By order dated August 27, 2004, United States District Court Judge Louis D. Stanton granted a motion in limine by Louisville Ladder to preclude the plaintiff from offering the testimony of his expert on the plaintiff's sole theory of how the allegedly defective ladder caused the accident. In sum, that court concluded, in an oral decision, that the expert's opinion that the "only reasonable cause" of the accident was the right rear leg of the A-frame ladder lifting off the ground could not be proffered as the plaintiff expressly testified at his deposition that all four legs of the ladder remained on the ground. The court held that the expert's opinion was not admissible since it lacked the requisite evidentiary foundation in the record. The plaintiff's oral motion for reconsideration was granted and after a hearing, the court adhered to its original decision. The plaintiff appealed this decision and the United States Court of Appeals for the Second Circuit affirmed the determination.

Now, in this action, Home Depot moves to dismiss the plaintiff's complaint arguing he is collaterally estopped from contending an allegedly defective ladder in this case was the proximate cause of his accident on the basis of the aforementioned federal court decision.

The doctrine of collateral estoppel prevents a party from relitigating an issue that was "raised, necessarily decided and material in the first action", provided the party had a full and fair opportunity to litigate the issue (See, Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343, 349; Ryan v New York Tel Co., 62 NY2d 494, 500; Sclafani v Story Book Homes, Inc., 294 AD2d 559). The doctrine is an equitable defense "grounded in the facts and realities of a particular litigation, rather than rigid rules" (Buechel v Bain, 97 NY2d 295, 303). "[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identity and decisiveness of the issue, while the burden rests on the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding" (Ryan v New York Tel Co., supra at 501).

In the present case, the Home Depot demonstrated, prima facie, its entitlement to judgment as a matter of law. The issues raised and the causes of action asserted in the federal court litigation are identical to those raised here. Moreover, both actions arise out of the same occurrence and involve the same allegedly defective ladder. Contrary to the plaintiff's assertion, the decision by Judge Louis D. Stanton in the federal court is decisive of the issues raised in this case. Judge Stanton dismissed, on summary judgment, all three causes of action against Louisville Ladder, which are the same claims made against Home

Depot here, on the basis that the plaintiff failed to demonstrate that the alleged defect in the ladder was the proximate cause of the accident.

In opposition to the motion, the plaintiff failed to establish that he was not afforded a full and fair opportunity to litigate the issue of the alleged defective condition of the ladder in the federal court. Whether a party has had a full and fair opportunity to contest the prior decision "'requires consideration of the realities of the litigation' . . . [and] the fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings" (Staatsburg Water Co. v Staatsburg Fire Dist., 72 NY2d 147, 153, quoting Gilberg v Barbieri, 53 NY2d 285, 292; see also, Altegra Credit Co. v Tin Chu, 29 AD3d 718; Chambers v City of New York, 309 AD2d 81).

Here, the plaintiff had a full opportunity to establish the defectiveness of the ladder and failed to proffer sufficient evidence to sustain his claims (See, Bank v Brooklyn Law School, 297 AD2d 770). He was represented by counsel and litigated the matter thoroughly by opposing at least two motions that dealt with the merits of his claim, made a motion to reconsider and completed an appeal of one of these decisions. It would be patently unfair to Home Depot, the vendor of the ladder, to require it to litigate this action when the plaintiff had the opportunity and failed to demonstrate that the designer and manufacturer of the ladder created a defective product. Moreover, the plaintiff did not establish how his expert's opinion would be admissible in this court.

The plaintiff's attempt to establish that differing procedural standards in the federal courts and New York State courts preclude summary judgment is unavailing. Preclusive effect may be given to determinations made by non-judicial and quasi-judicial tribunals with differing standards of review provided that the procedures employed were substantially similar (See, Dimacopoulos v Consort Dev. Corp., 158 AD2d 658; Langdon v WEN Management Co., 147 AD2d 450; Frybergh v Kouffman, 145 AD2d 529). Here, the plaintiff has failed to prove that the standards on a motion for summary judgment in the federal court are so dissimilar from those employed in New York State courts that collateral estoppel may not be invoked.

The plaintiff's reliance on Daubert v Merrill Dow Pharmaceuticals, 509 US 579 and Frye v United States, 293 F. 1013 is misplaced. Initially, neither Judge Stanton nor the Second Circuit Court of Appeals cited or relied on either of these cases for authority in their decisions. Daubert and Frye establish the standards in the federal and New York State courts, respectively, for the determination of the

introduction into evidence of novel scientific evidence (See, Zito v Zabarsky, 28 AD3d 42, 44 n.1). Here, the federal court was not presented with a novel scientific theory by the plaintiff to establish the existence of a defective condition in the ladder. Judge Stanton simply precluded the plaintiff from proffering his theory as to the defective nature of the ladder based upon a lack of record evidence to support the opinion of his expert. Indeed, Judge Stanton and the Second Circuit Court of Appeals noted in their decisions that the plaintiff's testimony concerning how the accident occurred contradicted the opinion the expert intended to proffer. The necessity that an expert's opinion must be supported by facts in the record or personally known to the expert is a most basic legal doctrine common to both the federal and New York State courts (See, Romano v Stanley, 90 NY2d 444; Fed Rules Evid rule 702, 703).

Accordingly, the defendant's motion for summary judgment is granted and the plaintiff's complaint is dismissed.

Dated: August 31, 2006

Peter J. Kelly, J.S.C.