

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IA Part 15
Justice

ROBERT AUGUSTINE x

Plaintiff,

Index
Number 13376/01

Motion
Date March 4, 2003

- against -

Motion
Cal. Number 1

JOHN N. SUGRUE, GEORGE J. EYTZINGER
and ANDREW W. NOVAK

Defendants.

x

The following papers numbered 1 to 10 read on this motion by the defendant JOHN N. SUGRUE for an Order granting summary judgment dismissing plaintiff ROBERT AUGUSTINE's complaint against JOHN N. SUGRUE and all cross-claims on the ground that plaintiff's claim is barred by the doctrine of collateral estoppel.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Defendant's Memorandum of Law.....	5
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Upon the foregoing papers it is ordered that the motion is decided as follows:

The operative facts are as follows. This action was commenced by plaintiff Robert Augustine, a passenger in the vehicle driven by defendant-driver John N. Sugrue to recover damages for personal injuries allegedly sustained as a result of a three-car chain-reaction motor vehicle accident which allegedly occurred on or about January 6, 2000 on Woodhaven Boulevard in the County of Queens. The vehicles in that occurrence were allegedly driven by defendants John N. Sugrue, George J. Eytzinger and Andrew W. Novak. Driver Sugrue commenced a separate action seeking to recover damages for personal injuries allegedly arising out of the same occurrence against drivers George J. Eytzinger and Andrew W. Novak under index number 10350/00. On September 19, 2001, this Court granted an application for consolidation by defendant Andrew W.

Novak to the extent of ordering a joint trial of the two separate actions. On July 18, 2002, in the related action under index number 10350/00, defendant Novak moved for summary judgment, and plaintiff-driver Sugrue cross-moved for summary judgment on the issue of liability as against defendant George J. Eytzinger. Plaintiff Augustine herein, although not a party to that related action, submitted opposition papers to plaintiff Sugrue's cross-motion, urging that there were issues of fact which precluded an award of summary judgment in favor of plaintiff-driver Sugrue in that action. On November 21, 2002, this Court granted defendant Novak's motion for summary judgment dismissing the claims and cross-claims against him, and granted plaintiff-driver Sugrue's cross-motion for summary judgment, finding that the plaintiff-driver Sugrue's vehicle was stopped when it was struck in the rear, and that the opposition papers submitted by the parties had failed to rebut the presumption of negligence.

The instant application raises a novel issue of the applicability of the doctrine of collateral estoppel to multiparty motor-vehicle actions, namely whether the action of counsel for plaintiff-passenger Augustine in this action, in submitting opposition to the motion for summary judgment by plaintiff-driver Sugrue in the related action arising out of the same facts in which plaintiff Augustine was not a named party, justifies the conclusion that plaintiff Augustine herein had a full and fair opportunity to litigate the issue of Sugrue's negligence for purposes of invoking collateral estoppel in favor of defendant-driver Sugrue herein.

For the reasons which follow, considerations of fairness and the policies underlying the doctrine of collateral estoppel warrant this Court's conclusion that, because plaintiff Augustine had as full and fair an opportunity in the first action to litigate the issues sought to be determinative in the instant action as any nominal party would have had in that action, collateral estoppel bars the instant litigation against defendant Sugrue.

Where it can fairly be said that a party has had a full opportunity to litigate a particular issue, she cannot reasonably demand a second chance to do so. (See generally, Siegel, *New York Practice*, Third Edition, §457, at 736; *Gilberg v Barbieri*, 53 N.Y.2d 285, 291 [1981]; *Schwartz v Public Administrator*, 24 N.Y.2d 65, 69 [1968]). Collateral estoppel is a doctrine intended to reduce litigation and conserve the resources of the court and litigants, and it is based upon the general notion that it is not fair to permit a party to re-litigate an issue that has already been decided against it. (See, *Gilberg v Barbieri*, *supra*, at 291; *Schwartz v Public Administrator*, *supra*, at 71; *Koch v Consolidated Edison Co.*, 62 N.Y.2d 548, 554-555 [1984], *cert denied* 469 U.S. 1210 [1985]; *Ryan v New York Tel. Co.*, 62 N.Y.2d 494, 500-501 [1984]). New York law recognizes two necessary elements for the invocation of the doctrine of collateral estoppel: an identity of

issue which has necessarily been decided in the prior action which is decisive in the present one, and additionally, there must have been a full and fair opportunity to contest the decision now said to be controlling. (See, *Gilberg v Barbieri*, supra, at 291; *Schwartz v Public Administrator*, supra, at 71; *Koch v Consolidated Edison Co.*, supra at 554-555; *Ryan v New York Tel. Co.*, supra at 500-501). Collateral estoppel may not be raised where the party sought to be estopped has not had a full and complete opportunity to be heard. (See, e.g., *Willsey v. Strawway*, 44 Misc.2d 601 [Sup. Ct. Chemung Co. 1963]).

In *Schwartz v Public Administrator*, supra, the Court of Appeals set forth the guiding criteria for determining whether there has been a full and fair opportunity to be heard:

A decision whether or not the plaintiff drivers had a full and fair opportunity to establish their nonnegligence in the prior action requires an exploration of the various elements which make up the realities of litigation. A comprehensive list of the various factors which should enter into a determination whether a party has had his day in court would include such considerations as the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation.

(See, *Schwartz v. Public Administrator*, supra at 72; *Gilberg v. Barbieri*, supra at 292; *Ryan v. New York Tel. Co.*, supra at 501).

The burden of demonstrating that the issue in the present action was identical and necessarily decided in the prior action rests upon the moving party, and the burden of establishing that she did not have a full and fair opportunity to be heard on the issue in the prior action rests on the party resisting the application of collateral estoppel. (See, *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449 [1985]; *Mathieu v. Estate of Lewis*, 285 A.D.2d 631 [2d Dept. 2001]; *D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 N.Y.2d 659, 664 [1990]; *B.R. DeWitt, Inc. V. Albert Hall*, 19 N.Y.2d 141 [1967]). This apportionment comports, on the one hand, with the burden generally imposed on the moving party to make a *prima facie* demonstration of entitlement to summary judgment, (see, e.g., *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065, 1067 [1979]), and, on the other hand, with the burden placed on the opposing party to establish the necessity for a trial. (See, *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Zoldas v. Louise Cab Corp.*, 108 A.D.2d 378, 383 [1st Dept. 1985])

Under ordinary circumstances, where the driver of one vehicle is victorious as a plaintiff in action number one, and the

passenger in the same vehicle sues that driver in a second action, the driver of that vehicle cannot estop passenger number one in the second action, even though the driver won in the first action because, as Professor Siegel aptly notes, the passenger "was not a party to the first action and cannot be visited with any negative consequence coming out of it". (See Siegel, *New York Practice, supra*, §468, Example "C" at p. 756). The underlying reason for that rule is that the imposition of collateral estoppel against a non-party would deny that person a hearing and raise issues of due process. (See, Siegel, *supra* §458, at p. 736; *Schwartz v. Public Administrator, supra*). A nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation. (See, *D'Arata v New York Cent. Mut. Fire Ins. Co., supra* at 664). This constitutes a form of privity. There is no indication of privity between the parties in the case at bar. However, the facts demonstrate that plaintiff Augustine nonetheless had a full and fair opportunity to litigate the determinative issue in the prior action. Plaintiff Augustine, while not a party to the related action, or in privity with a party therein, officiously submitted opposition papers vigorously opposing plaintiff Sugrue's cross-motion for summary judgment in the related action. In its decision in that action, this Court held that, (notwithstanding Augustine's urgings to the contrary), plaintiff Sugrue had established his entitlement to summary judgment as against co-defendant-driver George J. Eytzinger, and granted summary judgment in favor of plaintiff-driver Sugrue.

Sugrue, now cast as a defendant herein, seeks to impose the doctrine of collateral estoppel to dismiss plaintiff Augustine's claim, arguing first that this Court's award of summary judgment in the related action necessarily determined a lack of liability on Sugrue's part with respect to this occurrence, and second, that, in submitting opposition, plaintiff Augustine, while not a party, had a full and fair opportunity to litigate the issue in the related action. Plaintiff Augustine, opposing the application of collateral estoppel, cites favorably the case of *Willsey v. Strawway, supra*, in which a court of coordinate jurisdiction held that the party against whom the doctrine was asserted did not control the litigation or "have her day in court", (i.e., have a full and fair opportunity), by merely appearing at trial as a material witness, with her attorney, who examined several witnesses. (*Willsey v. Strawway, supra* at 606). Under the facts and circumstances attendant in that case, the court held that simply appearing as a witness and having one's attorney question witnesses, within the context of the litigation as a whole, constituted "insufficient participation in the prior lawsuit". (*Willsey v. Strawway, supra*).

Initially, the Court notes that the requirement for

establishing issue identity, to wit, that the issue has been "actually litigated" in the first proceeding, has been satisfied here. (See, *Kaufman v. Lilly & Co.*, *supra* at 456-457 [citing Restatement 2d of Judgments § 27]). Generally, for "a question to have been actually litigated" so as to satisfy the identity requirement, it "must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding." (See, *See, D'Arata v New York Cent. Mut. Fire Ins. Co.*, *supra* at 667; *Matter of Halyalkar v. Board of Regents*, 72 N.Y.2d 261, 268 [1988]; Restatement, Judgments 2d, at § 27, comments d, e.) The Court's decision granting plaintiff Sugrue's cross-motion for summary judgment in his favor as against defendant, Eytzinger in the related action, necessarily included a finding of a lack of negligence on the part of the plaintiff-driver Sugrue. The Court therein noted that "the moving papers...including the deposition testimony...establish that the car driven by plaintiff, John N. Sugrue, was stopped when struck in the rear by defendant, George J. Eytzinger". A rear-end collision into a stopped automobile creates a *prima facie* case of negligence on the part of the operator of the moving vehicle and imposes a duty on him or her to explain how the accident occurred. (See, *Mendiolaza v. Novinski*, 268 A.D.2d 462 [2d Dept. 2000]; *Leal v. Wolff*, 224 A.D.2d 392 [2d Dept. 1996]). When such a rear-end collision occurs, the injured occupants of the front vehicle are entitled to summary judgment on liability, unless the driver of the following vehicle can provide a non-negligent explanation, in evidentiary form, for the collision. (*Leal v. Wolff*, *supra*; *Barba v. Best Sec. Corp.*, *supra*; *Mascitti v. Greene*, *supra*; *Cohen v. Terranella*, *supra*; *Silberman v. Surrey Cadillac Limousine Serv.*, 109 A.D.2d 833 [2d Dept. 1985]). If, as was the case with regard to plaintiff Sugrue's cross-motion, the operator of the moving vehicle does not proffer evidence to rebut the inference of negligence, the driver of the lead vehicle may be awarded summary judgment on the issue of liability. (*Leal v. Wolff*, *supra*; *Barile v. Lazzarini*, 222 A.D.2d 635 [2d Dept. 1995]). Thus, the Court's finding necessarily included a determination that defendant Eytzinger was negligent as a matter of law, and that plaintiff Sugrue was not. Thus the movant has met his threshold burden of establishing the identity of an issue actually litigated.

With respect to the "full and fair opportunity" test, the facts of this case are distinguishable from *Willsey v. Strawway*, *supra*, insofar as the determinative issue sought to be used herein in a preclusive fashion was decided, not by a plenary trial, but on paper in the course of motion practice. The papers submitted by Augustine in connection with plaintiff Sugrue's cross-motion for summary judgment on the issue of liability as against defendant, Eytzinger, the third car in this three-car occurrence, were submitted and considered by this Court in rendering its decision. The facts in this case clearly demonstrate that the litigants in this action were in an adversarial posture in the related action.

In that regard, Augustine had the same opportunity to be heard, and to participate in the adjudication of the operative issue, as would any named party. Augustine was not precluded from litigating the question of Sugrue's negligence, or denied his "day in court on that issue". (Cf., *Brooks v. Horning*, 27 A.D.2d 874 [3d. Dept. 1967]). Plaintiff Augustine participated in precisely the same manner as would any party, through the submission of written papers and memoranda containing his factual and legal arguments in opposition to the liability finding in favor of Sugrue. There is no assertion that the forum in this action offers the plaintiff any procedural opportunity with regard to the presentation and determination of the issue that was not available in the related action, or that consideration in this forum could likely result in the issue being differently determined. (See, Restatement, Judgments 2d, §§ 28, 29). Nor is there any dispute as to the similarity of fora, the vigor of the defense, or the fact that the imposition of collateral estoppel would reduce contention and dispute in the instant case. (Cf. *Gilberg v. Barbieri*, *supra* at 294). In sum, plaintiff Augustine has not met its burden of establishing that it lacked a full and fair opportunity to litigate previously the issue sought to be given collateral estoppel effect herein.

Accordingly, the Court finds that both requisite criteria, identity and decisiveness of the issues, and opportunity for a full and fair hearing, have been satisfied, and holds that collateral estoppel bars plaintiff Augustine from re-litigating herein the issue of defendant Sugrue's liability. This outcome also furthers the policies underlying the doctrine of collateral estoppel of avoiding re-litigation of a decided issue and the possibility of an incongruous result. Plaintiff Augustine did not seek to assert collateral estoppel as to the Court's finding of liability against defendant Eytinger in the related action, therefore, the Court does not reach that issue. (See, *Koch v Consolidated Edison Co.*, *supra*.)

Accordingly, defendant JOHN N. SUGRUE's motion for summary judgment is granted, and the complaint and all cross-claims and counterclaims against him are dismissed.

Dated: April 30, 2003

JANICE A. TAYLOR, J.S.C.