SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON PART 55

Index Number : 110354/2004
ACADEMIC HEALTH PROFESSIONALS

VS
LESTER, C.SIDNEY
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

_____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	2-4
Replying Affidavits	5-7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order,

NB - P.C. 12/12/05 @ 11 AM at end of decision

FILED
NOV 29 2005
COUNTY CLERK'S OFFICE
NEW YORK

JANE S. SOLOMON

Dated: 11/21/05

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

GSUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55
----------X
ACADEMIC HEALTH PROFESSIONALS INSURANCE ASSOCIATION, as Subrogee of LANCE WAGNER, M.D.,

Plaintiff,

-against-

C. SIDNEY LESTER,

Defendants.
----------X

INDEX NO. 110354/04

DECISION AND ORDER

JANE S. SOLOMON, J.

In this legal malpractice action, plaintiff, Academic Health Professionals Insurance Association, as Subrogee of Lance Wagner, M.D. ("Academic"), moves pursuant to CPLR § 3212 for summary judgment. For the reasons set forth below, the motion is denied.

BACKGROUND

This is the second lawsuit arising from an underlying 1994 medical malpractice action in which Lance Wagner, M.D. ("Wagner"), an insured of Academic, was a defendant. On Wagner's behalf, Academic engaged the law firm of Lester, Hubbert and Gill ("LHG"), of which the defendant here, C. Sydney Lester ("Lester"), was a member, to represent Wagner in that action. On February 19, 1998, the action was called for trial. No one appeared on behalf of Wagner, his answer was struck, and an

inquest ordered. In that event, a judgment for $636,210 was entered against Wagner.

As Wagner's subrogee, late in the year 2000, Academic sued LHG, and its partners, including Lester, for legal malpractice. LHG, Lester and another partner appeared in the action, and a default was taken against the third partner. By a decision dated September 10, 2001, another justice of this court granted Academic partial summary judgment on the issue of liability for legal malpractice against LHG and the two appearing partners (including Lester) after they defaulted on the motion. Before the matter was reached for trial or inquest, however, on December 12, 2001, Lester filed for Chapter 7 bankruptcy protection. On April 2, 2002, Academic moved successfully to have the claims against Lester severed from the action because of his bankruptcy petition.

An inquest then was held as against the other defendants on the issue of damages and, on November 25, 2002, judgment was entered against them in the amount of $1,055,671.93. After Lester's bankruptcy petition was dismissed on June 15, 2004, Academic commenced this action against him; it has not sought to revive the earlier action as to him.

Academic bases this motion on the doctrine of collateral estoppel. Academic claims that since Lester was a

party throughout the liability phase of the first action, and since he was in privity with his former partners during the entire action, he is collaterally estopped from asserting any defenses in the present action. Since this leaves no issues of fact for the present action, Academic claims it is entitled to summary judgment. Lester argues that since the earlier summary judgment was granted on default, he did not have a full and fair opportunity to present his arguments and defenses.

On the merits, Lester states that he resigned as counsel to Wagner in mid-September 1997 "because of the dissolution of my law firm and my subsequent employment as a public defender at New York Legal Defenders Services." Significantly, he also states that he made known to Academic that he "was adamant about Wagner's liability and the exposure of" Academic in the underlying medical malpractice case. He states documents should exist in Academic's files in support of these contentions. He also submits an affidavit of the adjuster working on the Wagner case for Academic who corroborates both the resignation and the advice that the Wagner defense was tenuous.

If this analysis is correct, Academic will be unable to make out the "but for" aspect of its legal malpractice claim here.

The policy rationale underlying the doctrine of collateral estoppel is that the court's valuable resources should not be wasted by re-litigation of issues that have been necessarily decided. The Court of Appeals laid out the standard for collateral estoppel in Schwartz v Public Administrator of County of Bronx, in which the Court describes a two-part test. 24 N.Y.2d 65, 71 (1969). First, "there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling." Id. In determining whether a litigant has had his day in court, the Court of Appeals laid out several factors for consideration, including the vigor of the defense in the first action, the extent of the litigation, the competence and experience of counsel and the forseeability of future litigation. Id. at 72. Until recently, New York courts had nearly categorically applied collateral estoppel to default decisions. The recent trend has been toward applying a Schwartz "full and fair opportunity" analysis to each case. The Appellate Division, First Department, decided in Anonymous v. Anonymous, that a default judgment on a divorce had not afforded a wife the opportunity to litigate on the issue of fraud. 77 AD2d 554, 555 (1st Dept 1980). The court explained that "to invoke the doctrine

of collateral estoppel under these circumstances . . . would be unjust. As one commentator has appropriately noted, 'Even the pressures resulting from delay in the courts and the desirability of terminating as much litigation as possible without a trial do not justify utilizing the doctrine of collateral estoppel in default-judgment cases.'" Id. citing 5 Weinstein-Korn-Miller, NY Civ Prac ¶ 5011.30 at 139.

Here, a Schwartz analysis, like the one the court conducted in Anonymous, is necessary because the result of categorical application of collateral estoppel would be unjust. Although, as Academic points out, Lester was a party throughout the liability phase of the lawsuit, all of the Schwartz "fair and full opportunity" factors are missing. Lester did not assert any defense, let alone a vigorous one, and there was no "substantial litigation." Additionally, Lester, who filed for bankruptcy shortly after the default, may not have foreseen that Academic would sever him from the first action in order to sue him again. Moreover, this court cannot conclude that the default summary judgment afforded a full and fair opportunity to litigate, based upon the Schwartz factors, when the order signed by Justice Leland Degrasse does not even mention the merits of the case. The United States Supreme Court, in Cromwell v. County of Sac, 94 U.S. 351, 356 (1876), outlined the cautious approach Federal

courts must use in these circumstances. The Court explained that "a judgment by default only admits for the purpose of the action the legality of the demand or claim in suit; it does not make the allegations of the declaration or complaint evidence in an action upon a different claim." Id. The summary judgment order in the first case does not convert Academic's allegations from the earlier claim into undisputed facts in the instant case. A finding that Lester is estopped from asserting his arguments and defenses on the issue of liability would be patently unjust. Additionally, Academic argues that Lester should be collaterally estopped on both the issue of liability and the issue of damages because of his relationship with his former partners. The Court of Appeals explained in Buechel v. Bain, 97 N.Y.2d 295, 304 (2001), that "the litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, *or one in privity with a party*." (emphasis added) Id.

In the context of collateral estoppel, court explained, "privity is . . . 'an amorphous concept not easy of application' ... and 'includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and [those who are] coparties to a prior action." The

court must decide whether the parties had the sort of relationship that would justify preclusion, and "whether preclusion, with its severe consequences, would be fair under the particular circumstances. Doubts should be resolved against imposing preclusion to ensure that the party to be bound can be considered to have had a full and fair opportunity to litigate." Beuchel at 304-305.

In Beuchel, the defendants were found to have had a full and fair opportunity to litigate. Beuchel at 307. As in the case here, the law partners there were parties to the action whose rights were affected by the outcome of the decision. Id. However, in that case, the partners-in-privity had "vigorously defended the validity of the trust," allowing the court to conclude that the application of collateral estoppel was fair. Id. Lester's partners did not engage in any such vigorous defense, nor any defense at all on the issue of liability. To collaterally estopp Lester from arguing the issues of liability and damages on the basis of his relationship with his former partners would be unjust.

Accordingly, it hereby is

ORDERED that the motion to dismiss is denied; and it further is

ORDERED that counsel shall appear for a preliminary conference in part 55, room 432, 60 Centre Street, New York, NY 10007, on December 19, 2005 at 11:00 AM.

Dated: November 21, 2005

ENTER:

J.S.C

JANE S. SOLOMON

FILED

NOV 29 2005

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