| **City of New York v Welsbach Electric Corp.** |
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| 2005 NY Slip Op 30107(U) |
| March 7, 2005 |
| Supreme Court, New York County |
| Docket Number: 0403335/2003 |
| Judge: Diane A. Lebedeff |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: DIANE A. LEBEDEFF PART 8

0403335/2003

CITY OF NEW YORK
VS
WELSBACH ELECTRICAL

SEQ 1

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE 12/13/04

MOTION SEQ. NO. ______

MOTION CAL. NO. 15

The following papers, numbered 1 to ______ were read on this motion to/for ______

| | PAPERS NUMBERED |
|---|---|
| Amended Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... | 1-6 |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~

Motion is decided in accordance with the accompanying memorandum decision.

FILED

MAR 0 8 2005

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: MAR 0 7 2005

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[*2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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THE CITY OF NEW YORK,

Plaintiff,

-against-

WELSBACH ELECTRIC CORP. and INSURANCE COMPANY OF NORTH AMERICA,

Defendants.

Index No. 403335/03
Mot. Seq. No. 001

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**DIANE A. LEBEDEFF, J.:**

In this action, plaintiff The City of New York (the "City") seeks indemnification or contribution from defendants, for a judgment it paid in two consolidated personal injury actions, which were jointly tried, entitled: (1) *Ellen Angerome v. City of New York, L.K. Comstock & Company, J.W.P. Welsbach Corp. and John Malin*, and (2) *Shannon Angerome, an infant over the age of 14 years, by her parent and natural guardian, Victor Angerome, and Victor Angerome, individually*, Index No. 7728/94 (together, the *Angerome* action). In the present motion, defendant Welsbach Electric Corp. ("Welsbach") moves for summary judgment dismissing the complaint, on the grounds of, *inter alia*, res judicata or collateral estoppel.

*Background*

According to the facts established at trial in the *Angerome* action, an accident occurred on October 11, 1993, wherein a vehicle driven by Ellen Angerome ("Ellen"), in

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which Shannon Angerome ("Shannon") was a passenger, collided with a vehicle driven by John Malin ("Malin"). Both Ellen and Shannon were injured. The plaintiffs in the *Angerome* action claimed that the accident was caused by a malfunction in the traffic lights at the intersection, allowing for a "green green" situation, in which both vehicles appeared to have the right of way. While Malin cross-claimed for contribution in the *Angerome* action, the City brought no cross claims against Welsbach.

Welsbach and the City were parties to a contract to maintain and repair traffic signals. In their complaint, the *Angerome* plaintiffs alleged that Welsbach was negligent in its repair and maintenance of the traffic signals at the intersection where the accident occurred. Welsbach moved in the *Angerome* action for summary judgment dismissing the complaint and all cross claims as to it, arguing that it owed no duty in tort or contract to members of the general public to perform its contractual duties under its contract with the City, and that it had, in fact, competently performed those duties.

In the August 25, 1997 order granting Welsbach summary judgment, in which the complaint and all cross claims brought against Welsbach were dismissed, the court stated that:

> "[d]efendant, Welsbach Electric Corp. s/h/a J.P.W. Welsbach Electric Corp., does not owe a duty in tort or contract to members of the general public to perform its duties under its contract to defendant, the City of New York. (*see, Eaves Brooks Costume v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220 [1990]; *Ayala v. Kaester*, 224 A.D.2d 266 [1st Dept. 1996]; *Pizzaro v. City of New York*, 188 A.D.2d 591, 594 [2d Dept. 1992]; *Francois v. City of New York*, 161 A.D.2d 319 [1st Dept. 1990]). Accordingly, plaintiff's complaint and all cross claims are dismissed as against defendant, Welsbach Electric Corp. s/h/a J.P.W. Welsbach Electric Corp." (exhibit G to Welsbach's summary judgment motion, tab 9).

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The order was entered on September 30, 1997.

The *Angerome* action was tried in Supreme Court, Queens County. On October 13, 2000, the jury found the City 100% liable for the accident and for the plaintiffs' injuries. Ellen was awarded $6,950,700, and Shannon was awarded $2,702,530. The amounts of the awards were reduced to $3,500,00 and $500,000, respectively, by order of the Appellate Division, Second Department (*see Angerome v. City of New York*, 300 A.D.2d 423 [2d Dept. 2002]).

*Nature of Motion*

In the present action, the City seeks either contractual and/or common-law indemnification or contribution from Welsbach, on the ground that Welsbach's failure to maintain and repair the traffic signal was the cause of the accident underlying the *Angerome* action. Welsbach maintains that the court's order in *Angerome* completely exonerated Welsbach from all fault in the occurrence of the accident, and because the jury's verdict found the City 100% actively negligent, again exonerated Welsbach from all responsibility. As a result, Welsbach argues that the present action is barred by the doctrines of either res judicata or collateral estoppel, because the issues of the City's negligence, and Welsbach's lack of negligence for the accident, have been finally resolved.

Welsbach also argues that, if res judicata and/or collateral estoppel do not apply, it cannot be required to indemnify the City, because the City was found to be 100% liable in the *Angerome* trial, and, further, because the contractual indemnification provision is void under General Obligations Law (GOL) § 5-322.1. Welsbach also contends that the City's

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claim for contribution is barred by the court's order in *Angerome*, because all cross claims for contribution were dismissed at that time, establishing Welsbach's lack of negligence. Lastly, Welsbach questions the validity of the City's claim for contribution in light of CPLR 1401.

*Discussion*

*A. Res Judicata*

"Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action" (*Parker v. Blauvelt Volunteer Fire Company, Inc.*, 93 N.Y.2d 343, 347 [1999]; *see also Matter of Reilly v. Reid*, 45 N.Y.2d 24 [1978]). "As a general rule, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy' [citations omitted]" (*Parker v. Blauvelt Volunteer Fire Company, Inc., supra*, 93 N.Y.2d at 347; *O'Brien v. City of Syracuse*, 54 N.Y.2d 353 [1981]). This doctrine has been described as the "transactional analysis approach" (*O'Brien v. City of Syracuse, supra*, 54 N.Y.2d at 357).

The City's present action is not barred by the doctrine of res judicata. Despite Welsbach's protestations to the contrary, the court is convinced that the City raised no cross claims against Welsbach in the *Angerome* action,[1] and that the issues raised by the

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Welsbach attempts to cobble together a cross claim by the City out of statements made at various times in the *Angerome* action by the plaintiffs' attorneys, which appear to have been made in error, or without sufficient knowledge of the case. In any event, these statements are wholly inadequate in the absence of any formal pleading.

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City in the present action were not part of the *Angerome* litigation. Further, the City's present claims were not part of the "transaction" at issue in the *Angerome* action for purposes of res judicata, despite the fact that the City was a defendant in that action.

The language set forth above in the relevant case law indicates that the transaction at issue must be one between parties to the litigation (*see e.g.*, *Parker v. Blauvelt Volunteer Fire Company, Inc.*, *supra*, 93 N.Y.2d at 347) ("a valid final judgment bars future actions *between the same parties* on the same cause of action [emphasis added]"). While the entire *Angerome* action arose out of a motor vehicle accident, no action or cross claim existed between the City and Welsbach in the *Angerome* action, no transaction as between these two parties was ever raised, and the City cannot be said to be seeking a second chance to litigate against Welsbach in the present action. "In properly seeking to deny a litigant two 'days in court', courts must be careful not to deprive him of one" (*Matter of Reilly v. Reid*, *supra*, 45 N.Y.2d at 28). The City should not be denied its first day in court as against Welsbach merely because both parties were originally named as defendants in the *Angerome* action.

Welsbach raises the possibility that the equivalent of a "mandatory cross claim rule" might apply to the present situation, requiring the City to have brought the present claims in the earlier litigation. It has been noted that New York has no mandatory counterclaim rule (*see Santiago v. Lalani*, 256 A.D.2d 397 [2d Dept. 1998]). However, an exception to this rule states that "'a party is not free to remain silent in an action in which he is the defendant and then bring a second action seeking relief inconsistent with the judgment in the first action by asserting what is simply a new legal theory' [citation

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omitted]"; *id.* at 399). Therefore, defenses which could have been raised against a plaintiff by a defendant in an initial action will not be permitted in a second action (*id.*).

Welsbach does not provide any precedent which would require mandatory cross claims. However, if the law regarding the lack of a mandatory cross claim rule were consistent with the above language, it would not aid Welsbach. The City did not bring any action against Welsbach in the *Angerome* action, and therefore, is not seeking any relief on a different theory. The issues of indemnification and contribution have never been addressed, much less decided, and claims based on these theories are not barred by the doctrine of res judicata.

*B. Collateral Estoppel*

"Collateral estoppel, or issue preclusion, 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party ... [citation omitted]' whether or not the tribunals or causes of action are the same" (*Parker v. Blauvelt Volunteer Fire Company, Inc.*, *supra*, 93 N.Y.2d at 349; *see also Triboro Fastener & Chemical Products Corp. v. Lee*, 236 A.D.2d 603 [2d Dept. 1997]). "The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action" (*Parker v. Blauvelt Volunteer Fire Company, Inc.*, *supra*, 93 N.Y.2d at 349).

Welsbach theorizes that collateral estoppel bars the present action for indemnification and contribution because (1) the issue of its own complete lack of fault in

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the occurrence of the accident was resolved in the summary judgment motion, and (2) the City was found to be 100% actively liable at trial, and so, cannot seek either contribution or indemnification from Welsbach. Under both alleged findings, Welsbach claims that it was completely exonerated from any fault or responsibility for the accident.

An inspection of both the order in the summary judgment motion, and the jury verdict, show the fallacy in Welsbach's reasoning. The summary judgment order in the *Angerome* action in no way addressed Welsbach's actual fault or contribution, if any, to the motor vehicle accident, although Welsbach apparently argued its lack of fault in its motion papers. The order dealt solely with Welsbach's lack of tort duty to the *Angerome* plaintiffs, based on the rule that Welsbach did not "owe a duty in tort or contract to members of the general public to perform its duties under its contract to defendant, the City of New York" (order, ex. G, Welsbach's summary judgment motion, tab 9). As the decision dealt only with the issue of the "duty" owed to plaintiffs, the issue of whether Welsbach's actions contributed or caused the accident were never addressed. Therefore, this issue was not "necessarily decided" (*see Parker v. Blauvelt Volunteer Fire Company, Inc.*, *supra*, 93 N.Y.2d at 349).[2]

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[2] Welsbach offers a number of decisions in which it obtained summary judgment on the same ground as was determinative in the *Angerome* action, as proof that the summary judgment order in *Angerome* determined the issue of actual fault. However, these decisions significantly differ from that herein, in that they also addressed the issue of whether Welsbach contributed to the happening of the accident, and decide, as a matter of law, that Welsbach was not negligent.

Nor was the City's "active" negligence decided in the *Angerome* trial, and the issue of the City's liability vis-a-vis Welsbach was never raised before the jury. The City and Malin were the only defendants remaining in the action when it went to trial. Therefore, the only issue in which the City was involved at trial was that of its negligence with regard to the *Angerome* plaintiffs. The jury verdict determined that, as among the *Angerome* plaintiffs, Malin, and the City, all fault for the accident had to be laid at the City's door. This decision did not include any finding that Welsbach was without fault in the accident, and does not preclude further inquiry into the subject. Again, the question of whether Welsbach's actions contributed or caused the accident was never reached, and so, was not "necessarily decided."

In support of its argument for collateral estoppel, Welsbach turns to *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136 (2002). In *Espinal*, the Court of Appeals delineated three exceptions to the general rule that no tort duty to third parties will arise from a contractor's breach of contract. One of the exceptions is where the contractor "launches a force or instrument of harm" (*id.* at 141). In the case of *Davilmar v. City of New York*, 7 A.D.3d 559 (2d Dept. 2004), the Court found that the negligent repair of a traffic light might meet this exception.

Based on these cases, Welsbach argues that, in finding that Welsbach owed no tort duty to the *Angerome* plaintiffs, the *Angerome* court must necessarily have determined that Welsbach had not launched "a force or instrument of harm," and so, was without fault in the accident. There is no merit in this argument.

There is no indication that the court in *Angerome* was presented with, or aware of, the so-called *Espinal* "exception" which Welsbach now puts forth. There is no indication that the *Angerome* court based its decision on case law preceding *Espinal* upon which the *Espinal* Court relied. It would be pure speculation to assume that the *Angerome* court meant anything by its decision other than what it said: that Welsbach owed no tort duty to the *Angerome* plaintiffs. As such, *Espinal* does not serve to collaterally estop the City from bringing its present claims.

Finally, Welsbach suggests that the dismissal of the cross claim brought by Malin in the *Angerome* action indicates that the *Angerome* court was making a determination that only the City could be held liable for the injuries sustained by the *Angerome* plaintiffs. No explanation was given by the court for the dismissal of this claim.

Collateral estoppel on a specific issue cannot be granted where "[i]t is not clear from the decision ... whether the trial court specifically and necessarily decided that issue" (*GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965, 967 [1985]). As it is not clear from the *Angerome* decision why Malin's cross claim was dismissed, this court will not preclude the City from pursuing this action based on speculation as to the *Angerome* court's intent.

*C. Indemnification*

"Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and, thus its liability is purely vicarious" (*Taeschner v. M & M Restorations, Ltd.*, 295 A.D.2d 598, 600 [2d Dept. 2002]). Common-law

indemnification is obtained from the "actively negligent" party (*Tapia v. 126 First Avenue, LLC*, 282 A.D.2d 220 [1st Dept. 2001]).

Since Welsbach was not involved in the *Angerome* trial, its causal role in the accident has not yet been established. The finding of 100% liability on the City's part in the trial of the action does not rule out the possibility that the City was passively negligent, or that it was only vicariously liable for the plaintiff's injuries. Thus, its claim for common-law indemnification is valid, and will not be dismissed.

The contract between the City and Welsbach contains an indemnification clause which reads:

> "The Contractor shall be solely responsible for all physical injuries or death to its agents, servants, or employees or to any other person or damage to, or loss of, any property sustained during its operations or work on the project under this agreement resulting from any acts of omission or commission or error in judgment of any of its officers, trustees, employees, agents, servants, or independent Contractors, and shall hold harmless and indemnify the City from liability to any and all claims for damages on account of such injuries or death to any such person on account of any neglect, fault or default of the Contractor ... ." (Amended Notice of Motion, ex. E).

Welsbach argues that the grant of summary judgment in the *Angerome* action "constitutes a ruling that Welsbach was without negligence or fault relative to the occurrence that caused the Angerome plaintiffs' damages," and that the ruling held that "Welsbach fully complied in all respects with its contractual obligations to the City" (Welsbach's memorandum of law, at 24-25).

Once again, Welsbach's argument is based on a faulty interpretation of the findings in the *Angerome* action. There has been no ruling that Welsbach is without fault, or that it fully complied with its contractual obligations to the City. The cause of action is valid on

its face.

Nor can Welsbach rely on GOL § 5-322.1. This section provides, as here applicable, that a contractual provision which requires a subcontractor to hold harmless the contractor for the contractor's own negligence is void as against public policy (*see Cavanaugh v. 4518 Associates*, 9 A.D.3d 14, 20 [1st Dept. 2004]) ("General Obligations Law § 5-322.1 was enacted to void indemnification agreements that seek to exempt the indemnitee from liability based on negligence, irrespective of whether that negligence is wholly or only partially the cause of the injury"; *see also Spoto v. S.D.R Construction, Inc.*, 226 A.D.2d 202 [1st Dept. 1996]).

The provision in question does not attempt to make Welsbach liable for the City's negligence, but only Welsbach's. Since the issue of whether the City was actively or only vicariously liable for the injuries suffered by the *Angerome* plaintiffs, the applicability of the contractual indemnification provision has yet to be determined, and will not here be dismissed.

*D. Contribution*

"Contribution is available where 'two or more tortfeasors combine to cause an injury' and is determined 'in accordance with the relative culpability of each such person' (citation omitted)" (*Godoy v. Abamaster of Miami, Inc.*, 302 A.D.2d 57, 61 [2d Dept. 2003]). Welsbach's argument that it has already been found to lack any culpability for the *Angerome* accident has already been discussed, and need not be addressed again. Welsbach next argues that no claim can arise because CPLR states that a claim for

contribution may only lie where "two or more persons who are subject to liability for damages for the same personal injury," and Welsbach is not subject to liability to the *Angerome* plaintiffs, as a result of the grant of summary judgment to Welsbach. However, the Court of Appeals has held that "a defendant may seek contribution from a third party even if the injured plaintiff has no direct right of recovery against that party, either because of a procedural bar or because of a substantive legal rule" (*Raquet v. Braun*, 90 N.Y.2d 177, 182 [1997]). The Court continued, "[a] contribution claim can be made even when the contributor has no duty to the injured plaintiff" (*id.*). Therefore, CPLR 1401 does not bar the City's cross claim for contribution, even though the *Angerome* plaintiffs no longer had a direct right of recovery from Welsbach.

*Conclusion*

In conclusion, this court finds that the doctrines of res judicata and collateral estoppel do not bar the present action, and that the City has stated causes of action for contractual indemnification, common-law indemnification, and contribution against Welsbach.

Accordingly, defendant Welsbach Electric Corp.'s motion for summary judgment dismissing the complaint is denied.

This decision constitutes the order of the court.

Dated: March 7, 2005

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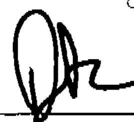

J.S.C.