

Acosta v Giuffre

2005 NY Slip Op 30322(U)

August 24, 2005

Supreme Court, Kings County

Docket Number: 47414/02

Judge: Diana A. Johnson

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 17 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of August , 2005.

P R E S E N T:

HON. DIANA JOHNSON,

Justice.

-----X

RICHARD ACOSTA,

Index No. 47414/02

Plaintiff,

- against -

JOHN GIUFFRE, BLOCKBUSTER, INC., et ano.,

Defendants.

-----X

The following papers numbered 1 to 15 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____ 1-6 _____
Opposing Affidavits (Affirmations) _____	_____ 7 _____
Reply Affidavits (Affirmations) _____	_____ 8-11 _____
_____ Affidavit (Affirmation) _____	_____ _____
Other Papers <u>Giuffre Memo. Law; Blckbstr Memo. Law; Pl's Exhibits; Pl's Memo. Law</u> _____	_____ 12-15 _____

Upon the foregoing papers, defendants John Giuffre (Giuffre) and Bay Ridge Toyota, Inc. a/k/a Bay Ridge Motor Sales, Inc. (Toyota) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing plaintiff's complaint as against them. Defendant Blockbuster, Inc. (Blockbuster) moves, pursuant to CPLR 3212, for an order granting

summary judgment dismissing plaintiff's complaint as against it. Plaintiff Richard Acosta cross-moves for an order granting him summary judgment on the issue of liability as against defendants.

Background

This is an action alleging claims for, *inter alia*, discrimination, malicious prosecution, unlawful arrest and unlawful imprisonment. In his complaint, plaintiff alleges that he was unjustifiably fired by Toyota on December 3, 2001 for purportedly stealing and using a Blockbuster video membership card owned by Giuffre (the vice-president of Toyota).

Plaintiff alleges three causes of action in his verified complaint. He claims in his first cause of action, that Giuffre "intentionally and with gross recklessness and without probable cause" caused his arrest when defendant "intentionally and/or recklessly wrongfully identified plaintiff on a video tape, which was illegally provided to him by co-defendant Blockbuster, Inc." In his second cause of action, plaintiff alleges that Blockbuster is liable for damages resulting from his arrest since it violated State law "by allowing video tapes subject to privacy laws" to be provided to Giuffre as Toyota's agent "without a warrant based on probable cause" and provided statements to police which it knew were false. In his third cause of action, Acosta claims that Toyota knew that Giuffre engaged in discriminatory conduct towards plaintiff due to plaintiff's national origin; that Toyota, notwithstanding such knowledge, failed to investigate the various charges brought by Giuffre against plaintiff; and, as a result, caused his allegedly illegal arrest, unlawful detention and false imprisonment.

A criminal court complaint was filed against Acosta for petty larceny, criminal possession of stolen property in the fifth degree and criminal impersonation in the second degree on October 30, 2001. Plaintiff was arrested on November 28, 2001. The charges were later dismissed on speedy trial grounds.

Thereafter, plaintiff filed a union grievance with respect to his employment termination. On December 16, 2004, following several arbitration hearings, an arbitrator found that plaintiff was terminated from his employment for just cause as specified in the Collective Bargaining Agreement (CBA) since plaintiff was involved in a “crime involving employment.” The arbitrator also found that neither Giuffre nor Toyota discriminated or maintained any vendetta against plaintiff and that any acrimony or malice among the parties following an earlier, unrelated arbitration award to plaintiff had passed as the parties had “let bygones be bygones” and sought to move forward. The arbitrator concluded that Toyota was “entitled to summarily discharge” plaintiff on the basis of plaintiff’s actions.

Defendants Giuffre and Toyota’s Motion

Defendants Giuffre and Toyota argue in their motion that the causes of action brought by plaintiff are identical to or arise from the same claims litigated in the union arbitration brought by plaintiff against his employer. In support of their motion, they append a copy of the summons, verified complaint, arbitration transcript and the arbitrator’s decision. They maintain that plaintiff had a full and fair opportunity to litigate these claims, as well as the question of probable cause at the arbitration hearing. Defendants, therefore, contend

that plaintiff is precluded from continuing to litigate his claims in this action based on the doctrines of res judicata and collateral estoppel.

They also point out that the arbitrator: (1) found that there was “sufficient circumstantial evidence...that [Acosta] intended to use and did use Giuffre’s Blockbuster Card without permission”; (2) credited the testimony of Det. Cavanaugh and Lt. Mulvaney, who conducted the investigation and interview of plaintiff, and held that Acosta’s offered alibi at the hearing was “incredible and unsubstantiated”; (3) held that Acosta “was involved in ‘[a] crime involving employment’ and therefore the Employer was entitled to ‘summarily discharge[]’ him without notice”; (4) held, regarding plaintiff’s claims for attorneys’ fees and the cost of having to defend himself in the criminal action, that it was “not persuasive that [Acosta] expended \$25,000 defending the subsequent State criminal case against him”; and (5) held, regarding the issue of discrimination, that Toyota effectively rebutted Acosta’s claims of discriminatory treatment.

Defendant Blockbuster’s Motion

Defendant Blockbuster similarly argues in its motion for summary judgment that plaintiff’s verified complaint should be dismissed based on the doctrines of res judicata and/or collateral estoppel since the allegations contained in plaintiff’s complaint were already adjudicated by an arbitrator. Blockbuster also maintains that General Business Law (GBL) §§ 670-675, upon which plaintiff relies to bring a claim against Blockbuster, do not provide any protection for the release of the surveillance video images in question. Moreover, Blockbuster alleges that it was justified in releasing the images and information at issue as

it had the permission of the account holder, John Giuffre, and said release was at the request of the New York City Police Department and effected in the ordinary course of Blockbuster's business of debt collection. Blockbuster argues that the GBL allows it to disclose personally identifiable information such as that provided by the surveillance tape, when Blockbuster is involved in debt collection. It notes that the investigation into the theft of Giuffre's video store membership card commenced when Blockbuster sent a letter to Giuffre advising him of delinquent charges on his account. According to Blockbuster, Giuffre disputed the charges and requested that it investigate the use of his card.

Plaintiff's Cross Motion and Opposition to Defendants' Motions

In support of his own cross motion for summary judgment and in opposition to defendants' motions, plaintiff alleges that his criminal case was dismissed in Criminal Court based on the failure of Toyota, Giuffre and Blockbuster to pursue the case and that said dismissal was on the merits. He claims that no probable cause existed to arrest him and that the issues in this action and those decided by the arbitrator are not identical, and, thus, res judicata does not apply. He alleges that a tape of an April 1999 meeting with shop steward Steven Fallo, Giuffre and general manager Michael Ianello will show that he was subjected to discrimination and malice.

Plaintiff further alleges, inter alia, that the arbitrator did not consider whether there was just cause for Acosta's termination; that the arbitrator did not follow rules or procedures as set forth in the CBA; that the arbitration was unfair as the union did not present his position adequately; that there was a two minute difference between the alleged store video

footage of plaintiff and the time stamp on the receipt; and that Giuffre was the only identifying witness for the alleged theft.

Opposition to Plaintiff's Cross Motion

Defendants Giuffre and Toyota oppose plaintiff's cross motion and note that the arbitrator found that there was no discriminatory treatment by either Giuffre or Toyota against plaintiff and that plaintiff's alibi was not credible. Giuffre and Toyota contend that the arbitrator held that there was probable cause for plaintiff's arrest since the arbitrator expressly found that "[t]here was sufficient circumstantial evidence... that [plaintiff] clearly intended to use and did use Giuffre's Blockbuster Card without permission." They assert that the key elements to maintain the claims of false arrest, false imprisonment and malicious prosecution were discussed and resolved at the arbitration hearing. They note that plaintiff's counsel replaced the union counsel at the arbitration and had a full and fair opportunity to examine the witnesses, including the defendants in this litigation.

Giuffre and Toyota further assert that plaintiff's speedy trial dismissal is not the equivalent of a finding of lack of probable cause, as a pretrial dismissal does not constitute an adjudication on the merits. They observe that while plaintiff contends that the arbitration hearings failed to adhere to rules or laws, plaintiff has made no attempt to appeal or vacate the award. Giuffre and Toyota note that plaintiff tries to elicit evidence of an alleged tape of an April 1999 meeting with shop steward Steven Fallo, Giuffre and general manager, Michael Ianelli, so as to show discrimination against plaintiff (as he was the only one of the four individuals involved in a fight at work who was fired, albeit he was subsequently

reinstated) by attempting to present as evidence an unsworn transcript of a tape which has never been authenticated and which the arbitrator precluded from the hearings.

As regards the two minute difference between the alleged store video footage of plaintiff and the time stamp on the receipt, defendants note that this same issue was raised at the arbitration and that the investigating police officers already explained at the hearings that the time stamp on the video machine was over a minute faster than the time stamp on the paper receipt. Concerning the issue of false arrest and plaintiff's allegation that his arrest was improper since Giuffre was the sole identifying witness for his alleged crime, defendants observe that the arbitrator specifically credited the testimony taken from the investigating police officers and detailed the care and effort expended by P.O. Cavanaugh in investigating the alleged identity theft. The arbitrator also noted that P.O. Cavanaugh is experienced in identity theft cases. Defendants point out that, contrary to plaintiff's assertions, Lt. Mulvaney was examined under oath at the hearings and provided evidence tending to show that plaintiff committed the identity theft.

Plaintiff's Replies

Acosta maintains in his reply as regards Blockbuster, that he is seeking summary judgment as against Blockbuster for its supplying the surveillance tape to the Police Department without first obtaining a grand jury subpoena or judicial order in violation of the General Business Law.

In reply to Guiffre and Toyota's contention that the doctrine of collateral estoppel is applicable herein, plaintiff contends that the only issue decided by the arbitrator is that the CBA was not violated. He argues that the fact that the arbitrator opined about matters (issues of probable cause and malice) having nothing to do with the collective bargaining agreement does not warrant the granting of summary judgment to defendants. Plaintiff maintains that, despite the fact that he had his own counsel, the union had control over the arbitration and there was a constant threat that the grievance would be withdrawn if the direction of the union was not followed.

In his Supplemental Reply Affirmation, plaintiff annexes a waiver and release that he claims the Union forced plaintiff to sign in order to proceed with the arbitration and which he contends he signed under protest.

Discussion

It is well settled that the doctrines of res judicata and collateral estoppel apply to arbitration awards (*Luppo v Waldbaum*, 131 AD2d 443 [1987]; see *Azevedo & Boyd Contracting, Inc., v J. Greaney Const. Corp.*, 285 AD2d 571 [2001]). Further, it is clear that where a broad commercial arbitration clause exists, arbitration of statutory discrimination claims is permissible (see *Fletcher v Kiddler, Peabody & Co.*, 81 NY2d 623 [1994]; *South Huntingtown Jewish Center, Inc. v Heyman*, 282 AD2d 648 [2001]; *DeSapio v Josephthal & Co., Inc.*, 143 Misc 2d 611 [1989]). A party seeking to impose the doctrine of collateral estoppel has the burden of demonstrating that the issues in the present action are identical to the issues decided by the arbitrator, while the party attempting to defeat the application of

collateral estoppel has the burden of establishing the absence of a full and fair opportunity to contest these issues in the arbitration hearing (*see Kane v City of New York*, 287 AD2d 600 [2001]). In order to invoke the doctrine of collateral estoppel, or issue preclusion, there “must be an identity of issues 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” (*Schwartz v Public Administrator*, 24 NY2d 65, 70 [1969]; *Ott v Barash*, 109 AD2d 254 [1985]; *Manitou Sand & Gravel Co., Inc. v Town of Ogden*, 81 AD2d 1019 [1981]). Res judicata, or claim preclusion, is invoked when parties seek to relitigate entire causes of action and applies to matters which were actually litigated or could have been litigated in the earlier action. Once a claim is brought to a final conclusion, all claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking different remedies (*Fogel v Oelmann*, 7 AD3d 485 [2004]). For the doctrine of res judicata operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding, as well as claims for different relief which arise out of the same transaction and which should have or could have been resolved in the prior proceeding (*CRK Contracting of Suffolk, Inc. v Brown & Associates, Inc.*, 260 AD2d 530 [1999]; *see O’Connell v Corcoran*, 1 NY3d 179 [2003]). Moreover, the failure to prosecute an appeal bars further litigation of the same facts raised in the prior proceeding (*see Cruz v Kamlis Dresses & Sportswear*, 238 AD2d 103 [1997]).

The instant action is grounded on the same transaction or series of transactions as the arbitration. Plaintiff specifies three causes of action in his current action. All three causes

of action revolve around plaintiff's November 28, 2001 arrest due to his alleged theft of Giuffre's wallet and his alleged illegal use of Giuffre's video card, which resulted in his dismissal from employment. The issue presented to the arbitrator was whether Toyota violated the collective bargaining agreement (which agreement permitted summary discharge when the employee was involved in any crime involving employment) when it terminated plaintiff's employment. The key elements to maintain the claims of false arrest, false imprisonment, discrimination and malicious prosecution were discussed at the arbitration and ruled on by the arbitrator. Plaintiff's counsel replaced the union counsel and, as noted by the arbitrator at the beginning of his opinion, the parties had a full opportunity to be heard, offer evidence, testimony, argument and to examine and cross-examine witnesses.

Here, Giuffre and Toyota made out a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any triable issues of fact (*Prince v Di Benedetto*, 189 AD2d 757 [1993]). In this regard, the court notes that movants submitted the full transcript of the arbitration hearings, together with the arbitrator's decision, evidencing the discussion and resolution of issues pertinent to plaintiff's present claims. Indeed, the arbitrator found sufficient evidence that plaintiff engaged in a crime involving employment so as to justify plaintiff's summary dismissal from employment. Thus, the burden of proof shifted to plaintiff, who failed to establish the existence of material issues of fact which require a trial of the action (*id.*). In view of the foregoing, defendants

Giuffre and Toyota's motion for summary judgment, based on the doctrines of res judicata and collateral estoppel, is granted.

As regards Blockbuster's motion for summary judgment, GBL 673 (3) (c) provides that "a video tape service provider may disclose personally identifiable information concerning any consumer to any person if the disclosure is incident to the ordinary course of business of the video tape provider." GBL 672 (2) includes in its definition of "ordinary course of business," debt collection activities. Here, Blockbuster has shown that it disclosed personally identifiable information while conducting its debt collecting activities in conformance with the statute, by demonstrating that it conducted an investigation of certain charges, at the request of its customer with relation to a billing dispute. Consequently, Blockbuster has set forth a prima facie showing of entitlement to summary judgment as to this issue. Plaintiff again fails to establish the existence of questions of fact requiring a trial (*Prince v Di Benedetto*, 189 AD2d 757 [1993]). Hence, Blockbuster's motion for summary judgment as regards its violation of the GBL is granted. Blockbuster's motion is also granted on the basis of collateral estoppel and res judicata as regards the remaining claims and issues.

In light of the foregoing, plaintiff's cross motion for summary judgment is denied.

The foregoing constitutes the decision, order, and judgment the court.

E N T E R,


J. S. C.