

**Lumbermens Mutual Casualty Company v 606
Restaurant Inc.**

2005 NY Slip Op 30385(U)

September 29, 2005

Supreme Court, New York County

Docket Number: 604214/02

Judge: Marcy S. Friedman

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

MARCY S. FRIEDMAN

PRESENT: _____

PART 57

0604214/2002

LUMBERMENS MUTUAL CASUALTY
VS
606 RESTAURANT

SEQ 1

AMEND

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for amend answer

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

	PAPERS NUMBERED
Notice of Motion/ <u>and cross motion</u> <u>Order to Show Cause</u> — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3, 4</u>
Replying Affidavits _____	<u>5, 6</u>
Cross-Motion: <u>Manos of Law</u>	<u>11-13</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.

FILED
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/29/05

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

LUMBERMENS MUTUAL CASUALTY
COMPANY a/s/o MICFAB'S FOODS, INC. d/b/a
McDONALDS,

Index No.: 604214/02

DECISION/ORDER

Plaintiffs,

- against -

606 RESTAURANT INC., et al.,

Defendants.

_____ x

FILED

In this subrogation action, plaintiff Lumbermens Mutual Casualty Co., the subrogee of Micfab's Foods, Inc. d/b/a McDonalds ("McDonalds"), sues 606 Restaurant Inc. ("606 Restaurant" or "606") and Broadway 207 Realty Corp. ("Broadway 207") to recover insurance proceeds paid to McDonalds for property damage sustained as a result of a fire at 607-612 West 207th Street ("subject premises") on November 25, 1999. 606 Restaurant moves to amend its answer to assert a defense of collateral estoppel and/or res judicata, and for summary judgment on the collateral estoppel defense. Broadway 207 cross-moves to amend its answer to include the same defense, and for summary judgment dismissing 606's cross-claim against Broadway 207.

McDonalds and 606 Restaurant were tenants of and operated separate restaurants at the subject premises as of the date of the fire. The premises was owned by Broadway 207. The complaint in the instant action alleges that McDonalds was damaged as a result of 606

Restaurant's negligence in operating its premises. Another tenant of the subject premises, Inwood Security Alarm, Inc., and its insurer Tower Insurance Company of New York, in its capacity as subrogee, each commenced an action ("the Inwood actions") against McDonalds, 606 Restaurant and Broadway 207 for damages sustained as a result of the fire. These actions alleged that McDonalds and 606 Restaurant caused the fire as a result of their negligence. The two actions were consolidated for trial. Prior to the trial, Inwood settled and Tower discontinued their claims against McDonalds. The Inwood plaintiffs' claims against 606 Restaurant were tried before a jury, which rendered a verdict in favor of 606. In the Inwood actions, 606 Restaurant served a cross-claim against McDonalds for contribution. This cross-claim was dismissed prior to submission of the case to the jury. It is not disputed that Lumbermens was aware of the pendency of the Inwood actions. It did not seek to join the instant action with the Inwood actions or to intervene in those actions.

606 Restaurant's proposed amended answer seeks to add a defense that this action is barred by collateral estoppel and/or res judicata. However, in moving for summary judgment, 606 argues only the applicability of the collateral estoppel doctrine.

It is well settled that the collateral estoppel doctrine bars the relitigation of issues that have been actually litigated and necessarily decided in a prior action. (Kaufman v. Eli Lilly & Co., 65 NY2d 449 [1985].) There are two requirements governing the application of collateral estoppel: (1) "the identical issue necessarily must have been decided in the prior action and be decisive of the present action"; and (2) "the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination." (Id. at 455. See also Parker v. Blauvelt Volunteer Fire Co., 93 NY2d 343 [1999].) "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. The party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination.” (Buechel v Bain, 97 NY2d 295, 304 [2001][internal citation omitted], cert denied sub nom Bain v Buechel, 535 US 1096 [2002].) As the Court of Appeals has further explained:

The doctrine, however, is a flexible one, and the enumeration of these elements is intended merely as a framework, not a substitute, for a case-by-case analysis of the facts and realities. In the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of * * * fairness to the parties, conservation of the 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* * *.

(Id. [internal citation and quotation marks omitted].)

The instant case presents many of the types of factors that have been cited by courts applying the collateral estoppel doctrine. McDonalds was represented in the Inwood actions by Chesney & Murphy, counsel retained by its liability insurer, Zurich, rather than by Lumbermens, the insurer of its property. (See Ex. G to 606’s Motion). As a party to the Inwood actions, McDonalds had the opportunity to conduct full discovery. The Inwood plaintiffs settled or discontinued their claims against McDonalds prior to the trial. They then tried the case against 606 to the jury on the theory developed by the expert, Edward Plankey, who had been retained by Lumbermens in connection with its adjustment of McDonalds’ property damage claim. During the trial, McDonalds still had pending against it a cross-claim by 606. This claim was not dismissed until the close of the evidence, prior to the submission of the case to the jury.

McDonalds appeared, at least initially, at the Inwood trial. While there is a dispute as to whether Chesney & Murphy were present on behalf of McDonalds for each day of the Inwood trial, it is undisputed that they were present on a number of occasions. Lumbermens was aware of the Inwood trial, and that a determination as to 606's negligence could result in the possible application of collateral estoppel, at least offensively, if 606 were to lose the trial. (See Letter of Michael Leavy, dated Nov.10, 2003 [Ex. B to 606's Reply Aff.].) Although McDonalds was present at the trial through Chesney & Murphy, Lumbermens apparently did not have its own counsel monitor the trial. Nor did Lumbermens take any steps to intervene in the Inwood actions or to join the instant action with the Inwood actions.

This fact pattern implicates the "policy interest that is at the heart of collateral estoppel discouraging relitigation of issues and the potential for inconsistent outcomes." (Buechel, 97 NY2d at 306.) Moreover, the identical issue that Lumbermens seeks to litigate in the instant action was decided in the Inwood actions. Contrary to Lumbermens' contention, the issue that was decided was not merely that raised by 606's cross-claim — whether McDonalds was liable to 606 for contribution. Rather, the issue that was squarely put to and decided by the jury was whether 606 was negligent. Indeed, as noted above, the Inwood plaintiffs tried their claim against 606 to the jury on the theory propounded by Lumbermens' expert. This theory, which Lumbermens again seeks to raise in the instant action, was that 606 was solely responsible for the fire as a result of pyrolysis (or heat transfer) caused by the defective installation of a grill hood in 606's restaurant.

606 Restaurant fails to demonstrate on this record, however, that the issue of 606's negligence was decided in the Inwood actions against the party or one in privity with the party,

and that the doctrine of collateral estoppel therefore applies.¹ While Lumbermens is unquestionably in privity with McDonalds and McDonalds was a party to the Inwood actions, the issue of 606's negligence was decided not against McDonalds but against the Inwood plaintiffs -- parties with which McDonalds or Lumbermens was not in privity.

Privity for collateral estoppel purposes is a broad concept which has been elucidated as follows:

In the context of collateral estoppel, privity does not have a single well-defined meaning. Rather, 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. In addressing privity, courts must carefully analyze whether the party sought to be bound and the party against whom the litigated issue was decided have a 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.

Buechel, 97 NY2d at 304-305 [internal citations and quotation marks omitted]. See generally D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659 [1990]; Green v Santa Fe Indus., 70 NY2d 244 [1987].)

606 Restaurant fails to cite, and the court's own research has not located, any case in which a party has been held to be in privity with a party against whom an issue was decided where, as here, the latter was the party's adversary in the litigation. Further, while the Inwood plaintiffs tried their case against 606 on the theory developed by the expert that McDonalds had originally retained, there is no evidence in this record that McDonalds controlled the litigation

¹Contrary to 606's contention, Justice Solomon's statement at the trial that McDonalds was "bound" (see 606's Motion, Ex. K at 18) was dictum rather than a determination of the issue.

strategy of the Inwood plaintiffs. McDonalds cannot be found to have controlled the litigation based on the Inwood plaintiffs' mere retention of the same expert.

The remaining issue is whether the collateral estoppel doctrine is applicable based on McDonalds' status as a party to the Inwood actions, or on the acts taken by McDonalds while a party. In support of its contention that the doctrine applies, 606 relies on Schwartz v Public Adm'r. of the County of Bronx (24 NY2d 65 [1969]). In that case, collateral estoppel was applied to a driver in a motor vehicle accident who had defended a passenger's negligence claims against him, and who then brought a subsequent action against the other driver, alleging that his own injuries were caused by the other driver's negligence. Finding that the driver had had a full and fair opportunity to assert his claims against the other driver in the context of the passenger's action, the Court noted that he could have interposed counterclaims or consolidated his own action with the passenger's. Significantly, in Schwartz, the driver who brought the second action had himself litigated the identical issue (the drivers' negligence) in the prior action.

In the instant case, in contrast, McDonalds did not prosecute a cross-claim against 606 for negligence. Indeed, Lumbermens specifically states that McDonalds did not have a cross-claim against 606. (See Lumbermens' Aff. In Opp., ¶ 17[B].) 606 Restaurant does not contest this assertion. Thus, the parties have litigated the collateral estoppel issue on these motions on the assumption that McDonalds did not even plead the issue of 606's negligence, and that the issue was litigated instead by the Inwood plaintiffs.

Lumbermens' failure to assert its claims in the Inwood action raises the possibility of inconsistent results which are a "blemish on a judicial system." (See Schwartz, 24 NY2d at 74.) It would therefore have been vastly preferable for Lumbermens to have intervened in or joined

this action with the Inwood actions. However, the mere opportunity to litigate a claim has never been a sufficient basis for application of the doctrine of collateral estoppel. Application of the doctrine on the facts raised on these motions would expand the doctrine articulated in Schwartz and, in effect, eliminate the long-standing requirement that the party to be estopped have litigated or been in privity with the party that litigated the identical issue and had the issue decided against it.

While the court concludes that collateral estoppel may not properly be applied on the facts raised on the instant motions, an issue exists as to whether the motions were litigated on the incorrect factual assumption that McDonalds did not assert a cross-claim against 606 Restaurant. McDonalds' answer in the Inwood actions, which is annexed to 606's motion (Ex. C), includes a cross-claim against 606 (and Broadway 207) for contribution and indemnification based on the allegation that any damages to the Inwood plaintiffs were the result of 606's (and Broadway 207's) negligence.

The parties on these motions have not addressed the issue of whether McDonalds in fact asserted this cross-claim against 606. They have therefore also not addressed, nor submitted legal authority on, the issue of whether McDonalds' failure to prosecute a pleaded negligence claim against 606 is an additional factor which, together with the other facts showing Lumbermens' clear failure to assert its claim in the Inwood actions despite ample opportunity to do so, would bar Lumbermens from now litigating the claim. In light of the important interest in avoiding relitigation of issues that may result in inconsistent results, the applicability of the collateral estoppel or res judicata doctrines should not be finally decided until these issues are addressed. 606 Restaurant will therefore be granted leave to amend its answer to assert the

defense based on these doctrines.

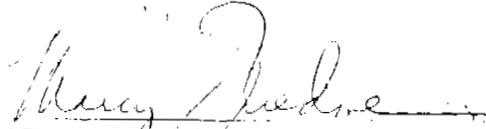
Turning to Broadway 207's cross-motion, in the Inwood actions 606 Restaurant asserted a cross-claim against Broadway 207 (and McDonalds) for indemnification, alleging that if plaintiff was caused to sustain damage as a result of the fire, such damage was caused by the negligence of Broadway 207 (and McDonalds). It is undisputed that this cross-claim was dismissed by Justice Solomon at the close of the evidence in the trial of the Inwood actions. As the identical issue was actually litigated by the same parties in the prior action, collateral estoppel applies.

It is accordingly hereby ORDERED that 606 Restaurant's motion to amend is granted to the following extent: 606 Restaurant's proposed amended answer (annexed as Exhibit I to 606's Motion to Amend), asserting a defense that this action is barred by res judicata and/or collateral estoppel, shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that Broadway 207's cross-motion is granted to the following extent: Broadway 207's answer is deemed amended to assert a defense of collateral estoppel to 606's cross-claim against Broadway 207 in the instant action; and Broadway 207 is granted summary judgment dismissing the said cross-claim based on the collateral estoppel defense.

This constitutes the decision and order of the court.

Dated: New York, New York
September 29, 2005


MARCY S. FRIEDMAN, J.S.C.