Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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ANSELMO DOS SANTOS and DIANE DASILVA,

Index No: 9645/05
Motion Date: 1/10/07
Motion Cal. No: 10

Plaintiffs,

-against-

BOBBIE J. ROWSER, as Administrator of the Estate of CURTIS ROWSER a/k/a CURTIS JAMES ROWSER,

Defendants.

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The following papers numbered 1 to 8 read on this motion for an order (a) pursuant to CPLR 3025(b), permitting defendant to amend the Answer sworn to on June 29, 2006 to assert the affirmative defenses of collateral estoppel and res judicata as against plaintiff Anselmo Dos Santos based upon the fact that the defendant was not aware of the applicability of the defense at the time that the answer was served; and (b) pursuant to CPLR 3211(a)(5) and 3212, for summary judgment solely as against the plaintiff Anselmo Dos Santos, on the ground that he is collaterally estopped from re-litigating the issue of liability and proximate cause as it was determined at the prior DMV fatality hearing that he violated Section 1142(a) of the vehicle and traffic law and that said violation was the proximate cause of the accident.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition-Exhibits	5 - 6
Affirmation in Reply.....	7 - 8

Upon the foregoing papers, it is ordered that the motion is resolved as follows:

This is an action for personal injuries arising from an automobile accident on May 1, 2002, between the vehicle operated by plaintiff Anselmo Dos Santos ("plaintiff") and the motorcycle operated by Curtis Rowser a/k/a Curtis James Rowser, Jr. ("decedent"), who was killed as a result of the accident and for whom defendant Bobbie J. Rowser was appointed as the representative of his estate. On April 20, 2003, a hearing was held, pursuant to section 510 of the Vehicle and Traffic Law of the State of New York, to investigate the fatal accident, which resulted in a finding that plaintiff violated section 1142(a) of the Vehicle and Traffic Law by failing to yield the right of way. Defendant, who advised her counsel of the hearing on June 29, 2006, now moves for an order granting leave to amend the answer to assert the affirmative defenses of collateral estoppel and res judicata as against plaintiff Anselmo Dos Santos, and for

summary judgment solely as against that plaintiff, on the ground that he is collaterally estopped from re-litigating the issue of liability and proximate cause.

Defendant's Request for Leave to Amend its Answer

It is well settled that leave to amend or supplement pleadings "shall be freely given," unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment. Adams v. Jamaica Hosp., 258 A.D.2d 604 (2nd Dept.1999); East Patchogue Contr. Co. v. Magesty Sec. Corp., 181 A.D.2d 714 (2nd Dept. 1992); Nissenbaum v. Ferazzoli, 171 A.D.2d 654 (2nd Dept. 1991). See McCaskey, Davies & Assocs. v. New York City Health & Hosps.Corp., 59 N.Y.2d 755 (1983); CPLR 3025(b). "'A court hearing a motion for leave to amend will not examine the merits of the proposed amendment "unless the insufficiency or lack of merit is clear and free from doubt. In cases where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave should be denied' (citations omitted)." Ricca v. Valenti, 24 A.D.3d 647 (2nd Dept. 2005). Here, defendant demonstrated that the proposed amendment has merit (see, Maloney Carpentry, Inc. v. Budnik , __ A.D.3d__, 2007 WL 466086 (2nd Dept. 2007; Bajanov v. Grossman, 36 A.D.3d 572 (2nd Dept. 2007), and as there can be no prejudice or surprise to plaintiff, the application is granted.

Defendant's Request for Summary Judgment

Defendant seeks summary judgment in her favor on the theory that the determination following the April 20, 2003 fatality hearing held by the Department of Motor Vehicles, pursuant to section 510 of the Vehicle and Traffic Law, which resulted in a finding that plaintiff violated section 1142(a) of the Vehicle and Traffic Law by failing to yield the right of way, estops plaintiff from re-litigating the issue of liability and proximate cause. "It is well settled that under the transactional approach adopted by New York in res judicata jurisprudence, '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). Pursuant to this approach, the doctrine bars not only claims that were actually litigated but also claims that could have been litigated, if they arose from the same transaction or series of transactions." Marinelli Associates v. Helmsley-Noyes Co., Inc., 265 A.D.2d 1, 5 (1st Dept. 2000); see, also, Fogel v. Oelmann, 7 A.D.3d 485 (2nd Dept. 2004); MacGregor-Phillips v. MacGregor, 273 A.D.2d 206 (2nd Dept. 2000). Moreover, "collateral estoppel, a corollary to the doctrine of res judicata, 'precludes a party from re-litigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same' (citation omitted). The two basic requirements of the doctrine are that the party seeking to invoke collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action, and the party to be precluded from re-litigating the issue must have had a full and fair opportunity to contest the prior determination (citations omitted)." CRK Contracting of Suffolk, Inc. v. Jeffrey M. Brown & Associates, Inc. 260 A.D.2d 530 (2nd Dept. 1999); see, also, Harley v. Adler, 7 A.D.3d 570 (2nd Dept. 2004); Lozada v.

GBE Contracting Corp., 295 A.D.2d 482 (2nd Dept. 2002).

The principles of res judicata and collateral estoppel apply to the quasijudicial determinations of administrative agencies. Ryan v. New York Tel. Co., 62 N.Y.2d 494 (1984); Timm v. Van Buskirk, 17 A.D.3d 686 (2nd Dept. 2005); Jensen v. Zoning Bd. of Appeals of Village of Old Westbury, 130 A.D.2d 549 (2nd Dept.1987). "Collateral estoppel, or issue preclusion, gives conclusive effect to an administrative agency's quasi-judicial determination when two basic conditions are met: (1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest this issue in the administrative tribunal (citations omitted). The proponent of collateral estoppel must show identity of the issue, while the opponent must demonstrate the absence of a full and fair opportunity to litigate." Jeffreys v. Griffin, 1 N.Y.3d 34, 39 (2003).

Courts of this State, however, have refused, as a matter of law, to apply these principles to the precise administrative agency proceeding at issue. In Rice v. Massalone, 160 A.D.2d 861 (2nd Dept.1990), as in this case, the Department of Motor Vehicles conducted a hearing to inquire into a fatal accident in which a motorcycle collided with a car and the motorcyclist was killed. The Administrative Law Judge found that the driver of the car had violated the Vehicle and Traffic Law by failing to yield the right of way. The Appellate Division, Second Department, rejected arguments that res judicata and collateral estoppel precluded re-litigation of the liability issue, stating:

> On appeal, the plaintiffs contend that the trial court erred in refusing to admit the findings of the Administrative Law Judge on the theory of collateral estoppel. The requirements for the application of collateral estoppel are that (1) the issue with respect to which preclusion is sought must be identical with the issue decided in the prior proceeding, (2) the issue was necessarily decided in the prior proceeding, and (3) the litigant who will be held precluded in the present proceeding had a full and fair opportunity to litigate the issue in the prior proceeding (citations omitted) At bar, the defendant did not have a full and fair opportunity to litigate the issue of her alleged violation of Vehicle and Traffic Law § 1140(a). Although two attorneys appeared for the defendant at the hearing, the incentive to litigate was not as compelling at the hearing as it was at the trial. At stake at the hearing was the defendant's guilt or innocence of a traffic infraction, while the issue at the trial was the defendant's potential liability for over $2,000,000. Only two witnesses testified at the hearing whereas several additional eyewitnesses to the accident testified at trial. Thus, the trial court properly refused to apply the doctrine of collateral estoppel to the determination of the Administrative Law Judge (citation omitted).

That determination compels a denial of defendant's motion for summary judgment dismissing the

complaint.

Conclusion

Based upon the foregoing, that prong of defendant's motion for leave to amend the answer is granted, and that prong of the motion for an order granting summary judgment in her favor and dismissing the complaint is denied.

Dated: March 13, 2007

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J.S.C.