SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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DANIEL PADOVANO and JOANN PADOVANO,

Plaintiffs,

v.

DESAI CHIA, INC., WINTER TUFFY CONSTRUCTION CORP., FORMALLY KNOWN AS WINTER CONSTRUCTION CORP. and PELLA CORPORATION,

Defendants.

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DCM PART 6

Present:

HON. PHILIP G. MINARDO

DECISION AND ORDER

Index No.: 10217/04

Motion No.: 004

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DESAI CHIA, INC.,

Third-Party Plaintiff,

v.

R.F. REVELEY CONSTRUCTION CORPORATION,

Third-Party Defendant.

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Index No.: A10217/04

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PELLA CORPORATION,

Second Third-Party Plaintiff,

v.

ROBERTA ARENA,

Second Third-Party Defendant.

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Index No.: B10217/04

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PELLA CORPORATION,

Third Third-Party Plaintiff,

v.

ROBERTA ARENA, 211 WEST BROADWAY CONDOMINIUM and ANDREWS BUILDING CORP.,

Third Third-Party Defendant.

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Index No.: C10217/04

The following papers numbered 1 to 7 were used on these motions on the 31st of May, 2007:

	Papers Numbered
Notice of Motion	1
Affirmation in Opposition	2
Reply Affirmation	3
Notice of Cross Motion for default (Pella)	4
Affirmation in Opposition and in Reply (Arena)	5
Reply Affirmation (Pella)	6
Supplemental Reply Affirmation (Pella)	7

Second and third third-party defendant Roberta Arena (hereinafter referred to as "ARENA") requests a dismissal of second and third third-party plaintiff Pella Corporation's (hereinafter referred to as "PELLA") complaint including any and all cross-claims pursuant to CPLR 3211 (a)(5), alleging that PELLA's claims are barred under the doctrine of collateral estoppel.

On April 23, 2001 plaintiff Daniel Padovano was cleaning the windows inside a third-floor apartment owned by defendant ARENA, located at 211 West Broadway, New York, New York. Plaintiff was standing on an inside window sill, 3 feet wide and 18 inches deep, attempting to open the bottom sash of a double hung window, when he fell through the window to the ground below sustaining multiple injuries.

Plaintiff Padovano brought two separate actions, one involving defendant ARENA (index no. 13461/01) and the instant action involving defendant PELLA, which were subsequently joined for the purpose of a joint trial. Defendant ARENA moved for summary judgment which was eventually granted on October 24, 2006 by Justice Thomas Aliotta under index no.

13461/01. While said motion was pending, ARENA was impleaded by defendant PELLA and brought into the instant action as a second and third third-party defendant on August 25, 2006. Second and third third-party defendant ARENA now seeks a dismissal of PELLA's complaint pursuant to CPLR 3211 (a)(5).

In support of the motion to dismiss, ARENA alleges that (1) the issues of Labor Law and negligence have already been decided in the Padovano action under index no. 13461/01, (2) PELLA's complaint includes the same theories of liability as Padovano's complaint, and (3) these issues have been fully and fairly litigated because the Padovano action transpired for five years with discovery and thus are barred by the doctrine of collateral estoppel. In opposition, PELLA alleges that because the two cases were not consolidated, but joined only for the purpose of a joint trial, it was not a party to the other Padovano action (index no. 13461/01) and therefore unable to serve a cross-claim against ARENA, participate in discovery in that action, or argue against ARENA's summary judgment motion. Thus, PELLA claims it was not afforded a full and fair opportunity to contest the decision in the other Padovano action (index no. 13461/01).

The doctrine of collateral estoppel 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 (Ryan v. New York Telephone Company, 62 N.Y.2d 494, 500 [1984]). To invoke the doctrine, the issue sought to be precluded must be identical to a material issue decided in the prior action or proceeding, and be decisive of 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 (Martin v. Geico Direct Insurance, 31 A.D.3d 505 [2nd Dept. 2006]). 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

[2003]). In order to determine whether the first action afforded a full and fair opportunity, a court considers "the realities of the prior litigation, including the context and other circumstances which may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him" (Ryan v. New York Telephone Company, *supra* at 501 citing People v. Plevy, 52 N.Y.2d 58, 65).

In that it is undisputed that ARENA is the owner of a single family unit exempt under the Labor Law, all causes of action brought under the Labor Law are dismissed. Accordingly, negligence is the only issue under consideration for collateral estoppel. While ARENA argues that the issue of negligence alleged in the other Padovano action (index no. 13461/01) and the instant action are identical, PELLA has not been afforded a full and fair opportunity to contest the prior determination because it was not a party to the earlier action and did not have the opportunity to depose ARENA in formulating its theory of negligence.

Accordingly, it is

ORDERED, second and third third-party plaintiff PELLA's second cause of action alleging violation of the Labor Law sections 240(1), 241(6), 202, and 200 are dismissed; and it is further

ORDERED that second and third third-party defendant ARENA's motion for dismissal pursuant to CPLR 3211 (a)(5) is denied without prejudice to move for summary judgment after the completion of discovery.

Dated: June 15, 2007 E N T E R,

S/ Philip G. Minardo
Justice of the Supreme Court