

**Ceja v Friedland**

2007 NY Slip Op 31837(U)

June 18, 2007

Supreme Court, Queens County

Docket Number: 0002672/2004

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14  
Justice

	x	Index Number <u>2672</u> 2004
OSCAR CEJA		
- against -		Motion Date <u>March 27,</u> 2007
LAWRENCE FRIEDLAND, et al.		Motion Cal. Number <u>12</u>
	x	Motion Seq. No. <u>2</u>

The following papers numbered 1 to 36 read on this motion by plaintiff for an order granting partial summary judgment on the issue of liability on the Labor Law § 240(1) claim against defendants Blue Woods Management Group, Inc., and Columbia Condominium on the grounds of collateral estoppel. Defendants Columbia Condominium and Blue Woods Management Group, Inc. cross-move for an order granting summary judgment dismissing the complaint. Defendant York Restoration Corp. cross-moves for an order granting summary judgment dismissing all cross claims by defendants Blue Woods Management Group, Inc. and Columbia Condominium, and in the alternative granting leave to file a late motion for summary judgment and granting summary judgment on its indemnification claims against these co-defendants.

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Upon the foregoing papers the motion and the cross motions are determined as follows:

Plaintiff Oscar Ceja and Ricardo Nunez were both employed by Rockledge Scaffolding Corp, and they each sustained personal injuries on July 12, 2003, when a portion of the sidewalk shed they were in the process of dismantling collapsed, causing them to fall some 20 feet. The sidewalk shed was constructed in 2000 alongside a building known as 275 West 96<sup>th</sup> Street, in Manhattan. It is undisputed that Mr. Ceja and Mr. Nunez were not provided with any safety devices. Defendant Columbia Condominium (Columbia) is the owner of the building and defendant Blue Woods Management Group, Inc. (Blue Woods) is its managing agent. On July 20, 2001 Columbia entered into a contract with York Restoration Corp. (York) to perform exterior masonry restoration and repair work to the building's facade.

Ricardo Nunez commenced an action in the Supreme Court, Bronx County against Blue Woods, Donald E. Wilson, York and Columbia (Index No. 23398/03) to recover damages for personal injuries he sustained in this accident. That court, in a decision and order dated August 26, 2005, granted Mr. Nunez' motion for partial summary judgment on his Labor Law § 240(1) claims against Blue Woods and Columbia, and denied the motion as to York, as an issue of fact existed as to York's responsibility for the accident, and as to whether York was a general contractor, within the meaning of the Labor Law. The court also determined that Mr. Nunez' request for summary judgment on his other Labor Law claims were moot. York's motion for summary judgment dismissing the complaint and all cross claims was denied, and Blue Wood's cross motion to dismiss the complaint and the cross claims for indemnification were denied.

Mr. Nunez apparently discontinued his claims against York. On September 7, 2006 a jury trial was held in the Bronx County action on Wilson, Blue Woods and Columbia's cross claims against York for contractual indemnification. The sole question presented to the jury was "Did the accident of July 12, 2003 involving Rockledge Scaffolding's employee Ricardo Nunez arise out of, directly or indirectly, result from or relate to the work performed by defendant York Restoration Corp. pursuant to its contract with Columbia Condominium, dated July 20, 2001?" The jury returned a unanimous verdict, answering this question in the negative, and the court stated on the record that the cross claimants were not, as a matter of law, entitled to indemnification from York.

Oscar Ceja commenced this action on November 30, 2004 and the note of issue was filed on July 14, 2006. Mr. Ceja now moves for summary judgment on his Labor Law § 240(1) claims against Columbia and Blue Woods on the ground of collateral estoppel. It is asserted that as his injuries arise out of the same accident as

that of Mr. Nunez, and as the issue of these defendants' liability has already been determined in the Nunez action, these defendants are precluded from relitigating this issue in this action. Defendants Columbia and Blue Woods, in opposition, assert that based on the jury verdict in that action on the cross claims for indemnification, collateral estoppel is inapplicable here. Defendants assert that "factual changes" regarding the type of work that was being performed at the time of the accident raise new questions as to whether Mr. Ceja was engaged in an activity enumerated under Labor Law § 240(1) at the time of the accident; whether Columbia and Blue Woods are proper parties to this action, as they are not the owner of the sidewalk shed; whether the work performed by Mr. Ceja involved any alteration of the premises; and whether changes in the law which were not raised at the time of the Bronx County summary judgment decision, affecting "completed work" would preclude liability under Labor Law § 240.

Defendants Columbia and Blue Woods raise the identical arguments in their cross motion to dismiss the complaint and all cross claims. The 120-day period for serving a motion for summary judgment expired on November 11, 2006. This cross motion was served on February 14, 2007, which was 214 days from the filing of the note of issue, and 94 days after the expiration of the 120-day period. Defendants' claim that their cross motion is timely, therefore, is rejected. In Brill v City of New York, (2 NY3d 648, 652 [2004]), the Court of Appeals held that CPLR 3212(a) permitted a late summary judgment motion upon the showing of good cause, which "requires . . . a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy . . . No excuse at all, or a perfunctory excuse, cannot be 'good cause'" (see also, Miceli v State Farm Mut. Auto. Ins. Co., 3 NY3d 725, 726, 727 [2004]). The Appellate Division, Second Department, in applying Brill to late cross motions has taken two different approaches. In Thompson v Leben Home for Adults, (17 AD3d 347 [2005]) the court stated that "in the absence of such a 'good cause' showing, the court has no discretion to entertain even a meritorious, non-prejudicial [cross] motion for summary judgment." However, the Appellate Division, Second Department has also stated that a cross motion for summary judgment made after the expiration of the statutory 120-day period may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief "nearly identical" to that sought by the cross motion (see Grande v Peteroy, \_\_\_ AD3d \_\_\_, 833 NYS2d 615 [2007]; Fahrenholz v Security Mut. Ins. Co., 32 AD3d 1326, [2006]; Bressingham v Jamaica Hosp. Med. Ctr., 17 AD3d 496, 497 [2005]; see Altschuler v Gramatan Mgt., Inc., 27 AD3d 304 [2006]). An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross

motion (CPLR 3212[b]). The court's search of the record, however, is limited to those causes of action or issues that are the subject of the timely motion (see Dunham v Hilco Constr. Co., Inc., 89 NY2d 425, 429-430 [1996]; Filannino v Triborough Bridge & Tunnel Auth., 34 AD3d 280 [2006]; Baseball Off. of Commr. v Marsh & McLennan, Inc., 295 AD2d 73,82 [2002]).

Here, plaintiff seeks partial summary judgment on the issue of liability, on the grounds of collateral estoppel based on the Nunez summary judgment order, while defendants Columbia and Blue Woods' cross-move for summary judgment dismissing the complaint based upon the jury's verdict in the Bronx County indemnification trial. Since defendants Columbia and Blue Woods' cross motion does not seek relief nearly identical to the relief sought by the plaintiff, and as they have not established good cause for their late cross motion, the cross motion is denied as untimely.

Defendant York's cross motion for an order granting summary judgment dismissing all cross claims by defendants Blue Woods and Columbia is untimely. The 120-day period for serving a motion for summary judgment expired on November 12, 2006. This cross motion was served on February 14, 2007, which was 214 days after the filing of the note of issue, and 94 days expiration of the 120-day limit set forth in CPLR 3212(a). Defendant York's cross motion is based upon the jury verdict in the Bronx County action, which was rendered on September 7, 2006. Counsel asserts that as his law firm did not represent York in the indemnification trial, he was unable to obtain a copy of said transcript, prior to being served with the transcript as an exhibit on January 24, 2007. Counsel has failed to establish that any efforts were made to obtain either a copy of the verdict sheet or the trial transcript on behalf of his client York prior to the expiration of the 120-day period. The court, therefore, finds that as defendant York has failed to establish good cause for the delay, this cross motion is denied as untimely.

Turning now to plaintiff's motion, the doctrine of collateral estoppel may be invoked here. Under the doctrine of collateral estoppel, a party is precluded from relitigating an issue which has been previously decided against him in a prior proceeding where he had a full and fair opportunity to litigate such issue (see D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659 [1990]; Kaufman v Lilly & Co., 65 NY2d 449, 455 [1985]; Schwartz v Public Administrator of County of Bronx, 24 NY2d 65, 69 [1969]). The two elements that must be satisfied to invoke the doctrine of collateral estoppel are that (1) the identical issue was decided in the prior action and is decisive in the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior issue (see Kaufman v Lilly & Co., supra at 455; Schwartz v Public Administrator of County of

Bronx, supra at 71; Luscher v Arrua, 21 AD3d 1005 [2005]). As a general rule, once a claim is brought to its final conclusion, it cannot thereafter be relitigated (see Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343 [1999 ]; Matter of Reilly v Reid, 45 NY2d 24, 28 [1978]; Carreras v Weinreb, 33 AD3d 953 [2006]). The policy against relitigation of adjudicated disputes is strong enough to bar a second action or proceeding even when further investigation indicates that the prior determination was erroneously made, whether due to the parties' oversight or court error (Matter of Reilly v Reid, supra at 28; Matter of Allstate Ins. Co. v Williams, 29 AD3d 688 [2006]).

Here, plaintiff's accident arises out of the same facts and circumstances as the Nunez accident, as they were both employees of Rockledge and were standing on the same area of the sidewalk shed when it collapsed on July 12, 2003. Mr. Ceja and Mr. Nunez each asserted claims under Labor Law § 240(1) in their respective actions against defendants Columbia and Blue Woods. The Bronx County court in the Nunez action determined that under the provisions of Labor Law § 240(1), these defendants were liable for the accident. Columbia and Blue Woods had a full and fair opportunity to contest Mr. Nunez' motion for summary judgment and they submitted opposition to that motion.

Defendants' assertion that there has been a change in the facts and the law since the Bronx County decision and order of August 26, 2005 is rejected. The facts, as presented to the Bronx County court in 2005, have not changed. The jury in the indemnification trial was only required to determine whether York had any liability for the accident under the theory of contractual indemnification. The jury did not address the issue of whether Columbia and Blue Woods were liable for the accident as this issue had already been determined. To the extent that Columbia and Blue Woods assert that the jury verdict as to York affected the outcome of the Nunez summary judgment motion, it is noted that subsequent to the verdict of September 7, 2006 these defendants did not seek to reargue or renew the August 26, 2005 order and did not seek to perfect an appeal from that order. Moreover, during the course of the indemnification trial, these defendants admitted and represented to the jury that Nunez was engaged in a protected activity under Labor Law § 240(1) at the time of his injury and that they had been found liable for his injuries.

The court further finds that there has been no change in the law since the Bronx County court determined Nunez' motion for summary judgment on the issue of liability. Defendants seek to rely on Beehner v Eckerd Corp., (3 NY3d 751 [2004]), which was decided on November 30, 2004. In Beehner the court found that the retrieving of a serial number and other information after the work was completed was not a covered activity, and thus there was a

bright line separating the enumerated and nonenumerated work" (Id. at 752). A review of the motion papers submitted in the Nunez summary judgment motion, which are submitted as exhibits here, reveals that the defendants' opposing papers are dated March 7, 2005, some three months after the Beehner decision, and that defendants made no mention of Beehner. The Bronx County court did not render its decision until August 2005, some ten months after Beehner was decided.

The Court of Appeals has also recognized that whether particular work falls within the scope of construction, demolition, repair, or excavation protected by the Labor Law depends on a "confluence of factors" and the full "context of the work." (Prats v Port Auth. of NY & N.J., 100 NY2d 878, 883 [2003]). This test requires an inquiry into whether the work (a) fell "into a separate phase easily distinguishable from other parts" of a larger restoration and repair project and occurred after it was completed, or (b) was "ongoing and contemporaneous" with other work that formed part of a single restoration and repair project (see Prats v Port Auth. of NY & N.J., supra at 881; Lijo v City of New York, 31 AD3d 503 [2006]). In granting summary judgment to Mr. Nunez, the Bronx County court determined that the work performed fell within the scope of Labor Law § 240(1), and the evidence presented at the indemnification trial regarding York's actions does not give rise to any new facts as regards the accident.

In view of the foregoing, plaintiff Oscar Ceja's motion for partial summary judgment on his Labor Law § 240(1) cause of action against defendants Columbia and Blue Woods on the issue of liability is granted. The defendants' cross motions are denied as they are untimely.

Dated: June 18, 2007

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J.S.C.