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| Specialized Indus. Servs. Corp. v Dave Sandel, Inc. |
| 2007 NY Slip Op 32720(U) |
| August 27, 2007 |
| Supreme Court, Suffolk County |
| Docket Number: 0005511/2007 |
| Judge: Joseph Farneti |
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SHORT FORM ORDER

INDEX NO. 5511/2007

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

SPECIALIZED INDUSTRIAL SERVICES
CORP.,

Plaintiff,

-against-

DAVE SANDEL, INC., DAVE SANDEL,
INDIVIDUALLY, LONG ISLAND CRANE &
RIGGING, INC.,

Defendants.

ORIG. RETURN DATE: APRIL 12, 2007
FINAL SUBMISSION DATE: MAY 10, 2007
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: APRIL 12, 2007
FINAL SUBMISSION DATE: MAY 10, 2007
MTN. SEQ. #: 002
CROSS-MOTION: MD

PLTF'S/PET'S ATTORNEY:
LaREDDOLA, LESTER & ASSOCIATES, LLP
600 OLD COUNTRY ROAD - SUITE 224
GARDEN CITY, NEW YORK 11530
516-745-1951

DEFT'S/RESP ATTORNEY:
BEN CARTER, ESQ.
220 ROANOKE AVENUE
RIVERHEAD, NEW YORK 11901
631-727-1666

Upon the following papers numbered 1 to 9 read on this motion TO DISMISS
AND TO DISQUALIFY ATTORNEY

Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers
4-6; Memorandum of Law 7; Answering Affidavits and supporting papers 8, 9; it is,

ORDERED that this motion by defendants for an Order, pursuant to CPLR 3211(a)(5) and (7), dismissing this action on the grounds that this action is barred by both *res judicata* and collateral estoppel, and that the Second and Fourth causes of action fail to state a cause of action, is hereby **DENIED**; and it is further

ORDERED that this cross-motion by plaintiff for an Order, pursuant to DR § 5-102, disqualifying BEN CARTER, ESQ. from representing defendants in the instant action, on the grounds that he will be called as a witness by plaintiff

and his testimony may be prejudicial to defendants; or, in the alternative, ought to testify on a defendant's behalf regarding facts that remain in dispute, is hereby **DENIED**.

The instant action, commenced in 2007, seeks to recover damages for breach of an alleged barter agreement between plaintiff and defendant DAVE SANDEL, INC. ("SANDEL, INC."). SANDEL, INC. was a commercial construction business which rented cranes and crane operators. Plaintiff is a trucking company with both trucks able to haul such machinery and a storage yard in Holbrook, New York. Under the barter agreement, plaintiff would provide trucking services to SANDEL, INC. to transport its man-lifts and equipment to construction projects throughout the New York area, and SANDEL, INC. would provide its equipment and operators to plaintiff.

The duration of the barter agreement is at issue. SANDEL, INC. alleges that the barter agreement ended in 1998, when SANDEL, INC. realized that the cost of the equipment and operators furnished to plaintiff exceeded the reasonable value of any storage charges incurred at plaintiff's storage yard. As such, SANDEL, INC. alleges that, starting in January of 1999, it began sending invoices to plaintiff for each job it did with a credit for the storage charges. SANDEL, INC. contends that in February of 2003, it moved all of its equipment out of plaintiff's yard, except for one man-lift. In contrast, plaintiff alleges that the barter agreement began in 1994 and continued through either 2003 or 2004. Plaintiff argues that at an Inquest on November 3, 2005 in a prior action involving the parties, SANDEL, INC. repudiated and unilaterally breached the barter agreement by procuring a judgment against plaintiff for the full amount of the services provided to plaintiff, without any offset for the services provided by plaintiff to SANDEL, INC. Plaintiff alleges that SANDEL, INC. fabricated invoices to support its claim, which resulted in an excessive money judgment awarded to SANDEL, INC. against plaintiff in the amount of \$412,366.98. SANDEL, INC. argues that the money judgment represented the rental charges and labor charges for the cranes furnished, as well as the value of the man-lift, less the storage charges owed by SANDEL, INC.

In the prior action, entitled "DAVE SANDEL, INC. v. SPECIALIZED INDUSTRIAL SERVICES CORP.," a default judgment was granted against the defendant (the plaintiff herein), and an Inquest was held on November 3, 2005.

Plaintiff did not appear at the Inquest, alleging that its prior attorney never informed it of the date. The judgment after Inquest, entered on November 14, 2005, was vacated by Order dated January 27, 2006 (Werner, J.). That Order was then appealed to the Appellate Division, and by decision and Order dated December 26, 2006, the Appellate Division reversed the Order on the law and denied the motion to vacate the judgment and for leave to serve a late answer (*Dave Sandel, Inc. v Specialized Indus. Servs. Corp.*, 35 AD3d 790 [2006]). The Appellate Division found that the defendant (the plaintiff herein) failed to proffer a reasonable excuse for its default given the history of neglect on the part of its prior attorney. The Court held:

Under the circumstances presented in this case, the defendant's purported continued belief that its prior attorney was handling this case for it was unreasonable and, thus, does not excuse its default. Moreover, where, as here, there is a pattern of default and neglect, the negligence of the attorney is properly imputed to the client.

(*Dave Sandel, Inc. v Specialized Indus. Servs. Corp.*, 35 AD3d 790, 791 [citations omitted]).

The defendants herein now move to dismiss the instant action on the grounds that the action is barred by both *res judicata* and collateral estoppel, and that the Second and Fourth causes of action fail to state a cause of action. The Court will address each of defendants' arguments *seriatim*.

New York law analyzes *res judicata* questions using a transactional approach. Once a claim has been adjudicated, all other claims arising out of the same transaction or series of transactions are barred. This is true even if the new allegations are based upon different theories or seek a different remedy (see *O'Brien v City of Syracuse*, 54 NY2d 353 [1981]; *Allstate v. Williams*, 2006 NY Slip Op 3774 [2006]). It is well-settled that if the party against whom *res judicata* is invoked had a full and fair opportunity to litigate the claim in a prior proceeding based on the same transaction, but did not raise it therein, he will be barred from raising it in a subsequent action (*Browning Ave. Realty Corp. v Rubin*, 207 AD2d 263 [1994]). Generally, a set of facts will be deemed a single "transaction" for *res*

judicata purposes if the facts are closely related in time, space, motivation, or origin, such that treating them as a unit would be convenient for trial and would conform to the parties expectations (see *Smith v Russell Sage Coll.*, 54 NY2d 185 [1981]). Notably, in order to apply the preclusive effects of *res judicata*, the original action must have been decided on the merits, not upon default (see *Miller Mfg. Co. v Zeiler*, 45 NY2d 956 [1978]; *Espinoza v Concordia Intl. Forwarding Corp.*, 32 AD3d 326 [2006]; *Brandenberg v Primus Assocs.*, 304 AD2d 694 [2003]).

In order to invoke the doctrine of collateral estoppel, two well-settled requirements must be satisfied: "First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449 [1985]). The policies underlying its application are avoiding relitigation of a decided issue and the possibility of an inconsistent result (see *Buechel v Bain*, 97 NY2d 295 [2001]; *Altegra Credit Co. v. Tin Chu*, 2006 NY Slip Op 3826 [2006]).

In the instant matter, the Court finds that the doctrines of *res judicata* and collateral estoppel do not bar the instant action or the claims raised herein. Initially, the Court notes that the judgment issued in the prior action of the parties was granted upon default, and therefore the issues raised therein by way of complaint and counterclaim were not decided on the merits. As such, it cannot be said that plaintiff had a full and fair opportunity to litigate its claims in the prior action. Further, the Court notes that the default in the prior action was premised upon a pattern of neglect on the part of plaintiff's former attorney, which neglect was imputed to plaintiff. Moreover, plaintiff alleges that SANDEL, INC. first repudiated the parties' barter agreement at the Inquest conducted on November 3, 2005, when SANDEL, INC. sought a judgment against plaintiff for the full amount of services provided to plaintiff, without inclusion of any setoff for the services plaintiff provided to SANDEL, INC. In view of the foregoing, the Court finds that the doctrines of *res judicata* and collateral estoppel do not preclude the instant action or the claims raised herein, and therefore that branch defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(5) is denied.

Next, regarding that branch of defendants' motion to dismiss the Second and Fourth causes of action pursuant to CPLR 3211(a)(7), failure to state a cause of action, the aforementioned causes of action must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true (*see Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). Upon favorably viewing the facts alleged as amplified and supplemented by plaintiff's opposing submissions (*Ossining Union Free School Dist. v Anderson LaRocca*, 73 NY2d 417 [1989]), and affording plaintiff "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), without expressing opinion as to whether it can ultimately establish the truth of its allegations before the trier of fact, the Court finds that the Second and Fourth causes of action are legally sufficient. As such, this branch of defendants' motion is also denied.

With regard to plaintiff's cross-motion to disqualify defendants' counsel, Disciplinary Rule 5-102 of New York's Code of Professional Responsibility provides that when a lawyer learns or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of his client, the lawyer shall not serve as an advocate on issues of fact before the tribunal (22 NYCRR § 1200.21). Courts, in determining whether a party's lawyer, at its adversary's instance, should be disqualified during litigation, must also consider such factors as the party's valued right to choose its own counsel, and the fairness and effect in the particular factual setting of granting disqualification or continuing representation (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437 [1987]).

Further, disqualification of counsel may be required only when it is likely that the testimony to be given by the witness is necessary, and that such testimony is or may be prejudicial to the client (*see S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, *supra*; *Goldberger v Eisner*, 21 AD3d 401 [2005]; *Daniel Gale Assoc. v George*, 8 AD3d 608 [2004]). A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, *supra*; *Matter of Porter*, 35 AD3d 477 [2006]).

After reviewing the papers submitted, and balancing the aforementioned factors, the Court finds that disqualification of Mr. Carter is not warranted herein. Particularly, the Court finds that Mr. Carter is not a necessary witness in this action. The gravamen of plaintiff's complaint is that SANDEL, INC. repudiated a long-standing barter agreement of the parties when, at the Inquest on November 3, 2005, it relied on invoices which indicated the full value of the services rendered to plaintiff by SANDEL, INC. Plaintiff vehemently contests the validity of the invoices, which ultimately served as the basis for SANDEL, INC.'s money judgment against plaintiff. An affidavit of CANDY VANDERPOOL, a bookkeeper for SANDEL, INC., reveals that she was asked in or about August of 2003 to reprint the invoices at issue. Ms. Vanderpool, who also worked for Mr. Carter, is now deceased. Therefore, plaintiff seeks to question Mr. Carter about the reprinting of the invoices. However, at Inquest, Mr. Sandel testified that his secretary, LAURA BAUMAN, prepared and mailed all of the invoices in question contemporaneously with the services rendered. As such, Ms. Bauman has personal knowledge of the original dollar amounts contained in the invoices at the time they were generated. Therefore, the information plaintiff seeks as to the validity of the invoices can be obtained through the testimony of Ms. Bauman.

In addition, Mr. Carter represents to the Court that he has no personal knowledge of any facts which would advance either the plaintiff's or defendants' positions, particularly regarding the reprinting of the invoices in 2003. Mr. Carter further represents that the invoices were not reprinted in his office. Moreover, Mr. Carter submits that he did not represent either party when DAVE SANDEL sold his shares of stock in SANDEL, INC. to BRADLEY ALLEN in 2004; that he merely prepared the promissory note and an agreement whereby Mr. Sandel reserved his right to prosecute three lawsuits, one of which was the prior action involving these parties; and that he was not involved in the negotiations for the purchase of SANDEL, INC. by Mr. Allen. In view of the foregoing, plaintiff's cross-motion to disqualify Mr. Carter is denied.

The foregoing constitutes the decision and Order of the Court.

Dated: August 27, 2007


HON. JOSEPH FARNETI
Acting Justice Supreme Court