

Dirico v Katsaros

2008 NY Slip Op 30841(U)

March 17, 2008

Supreme Court, Suffolk County

Docket Number: 0022336/2003

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4-27-07
ADJ. DATE 9-28-07
Mot. Seq. # 005 - MG
006 - XMG

-----X
MARY F. DIRICO, :
 :
 : Plaintiff, :
 :
 : - against - :
 :
 ELENI KATSAROS, J.D. POSILICO, INC., :
 PETER SCALAMANDRE & SONS, INC., :
 J.D. POSILICO & SCALAMANDRE JOINT :
 VENTURE and ELDOR CONTRACTING, CORP., :
 :
 : Defendants. :

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-----X
J.D. POSILICO, INC., PETER SCALAMANDRE :
& SONS, INC. and J.D. POSILICO & :
SCALAMANDRE JOINT VENTURE, :
 :
 : Third-Party Plaintiffs, :

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- against - :
 :
 ELDOR CONTRACTING CORP., :
 :
 : Third-Party Defendant. :
-----X

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Upon the following papers numbered 1 to 34 read on this motion and cross motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers 16 - 21; Answering Affidavits and supporting papers 22 - 27; Replying Affidavits and supporting papers 31 - 34; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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ORDERED that this motion (#005) by defendant/third party defendant Eldor Contracting Corp. and this cross motion (#006) by defendants/third-party plaintiffs J. D. Posillico, Inc., Peter Scalamandre & Sons, Inc., and J. D. Posillico & Scalamandre Joint Venture, for an order dismissing the amended complaint, and all claims and cross claims against them, are granted; and it is

ORDERED that the action is severed and the first and fourth causes of action shall continue as to defendant Eleni Katsaros (*see Holt v Holt*, 262 AD2d 530, 692 NYS2d 451 [2d Dept 1999]); and it is further

ORDERED that movants shall serve a copy of this Order with Notice of Entry upon counsel for plaintiff and co-defendants pursuant to CPLR 2103(b)(1),(2) or (3) within forty (40) days of the date herein and thereafter file the affidavit of service with the Clerk of the Court.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a two vehicle accident which occurred on Shelter Rock Road at or near its intersection with the South Service Road of the Long Island Expressway, Village of North Hills, New York on February 27, 2001. The accident allegedly happened when the vehicle operated by Eleni Katsaros (hereinafter "Katsaros") came into contact with the vehicle operated by plaintiff Mary Dirico (hereinafter "Dirico") and owned by Mrs. Dirico's husband, non-party Frank Dirico. By way of background, defendants/third-party plaintiffs J. D. Posillico, Inc., Peter Scalamandre & Sons, Inc., J. D. Posillico & Scalamandre Joint Venture (hereinafter "the Posillico defendants"), and defendant/third-party defendant Eldor Contracting Corp (hereinafter "Eldor") were involved in some aspects of a major construction project with the New York State Department of Transportation which involved the demolition of the old Shelter Rock Road bridges and construction of new Shelter Rock Road bridges over the expressway and the Northern State Parkway. The gravamen of the amended complaint against the Posillico defendants and Eldor is that these defendants negligently performed their duties by allowing the traffic lights at the intersection to become or remain in a dangerous and/or defective condition, which in turn, caused the accident and resulted in the plaintiff's injuries and property damage.

Parenthetically, the Court notes that this action is one of four related lawsuits which were consolidated for the purposes of joint trial by prior order dated November 1, 2004 of the Supreme Court (Burke, J.). In the action entitled, *Katsaros v Dirico* bearing index No. 01-25328, plaintiff Katsaros asserted, inter alia, that the Posillico defendants and Eldor negligently performed their duties by allowing the traffic lights at the intersection to become or remain in a dangerous and/or defective condition, which in turn caused the accident and resulted in the plaintiff's injuries and property damage.

By order dated December 4, 2006 (Doyle, J.), this Court granted a cross motion by Eldor for summary judgment in action No. 01-25328 and dismissed the second amended complaint against it finding, inter alia, that Eldor's contractual obligations ran only to J. D. Posillico & Scalamandre Joint Venture ("the Joint Venture") and not to plaintiff Katsaros or any third parties, and that Eldor neither created nor had actual or constructive notice of the alleged condition.

By that order, the Court also dismissed the third-party complaint of the Posillico defendants against Eldor, as well as, the cross claims of the Diricos against Eldor finding, inter alia, that Eldor did not assume a duty enforceable by plaintiff or defendants Dirico; that Eldor did not owe third-party plaintiffs a duty of care

independent of its specific contractual obligations; that Eldor neither caused the allegedly defective traffic light, if it existed at all; that there was no evidence of any negligence or malfeasance on the part of Eldor and that, even if the traffic light was defective, it did not affect Mrs. Dirico's actions and, therefore, was not the proximate cause of the accident.

Upon searching the record, the Court also granted the Posillico defendants summary judgment and dismissed the claims by Katsaros and Dirico against them, finding, inter alia, that they were similarly situated parties to Eldor as far as the issue of proximate cause was concerned; that the Posillico defendants did not assume a duty of care to plaintiff enforceable by plaintiff or the Diricos; and that there was no evidence before the court that the Posillico defendants created an allegedly defective condition of the traffic lights, or that the controllers were even defective. Additionally, the causes of action which sounded in serious personal injuries and economic loss were dismissed as unopposed. The claim by Katsaros for property damage against defendants Dirico, however, was severed and continued for trial.

According to the computerized information maintained by the Court, action No. 01-25328 was settled before trial on February 9, 2007. These motions, previously denominated motions #001 and #002, and then #003 and #004, were randomly assigned to the undersigned after recusals by orders dated August 7, 2007 (Tanenbaum, J.) and September 14, 2007 (Doyle, J.).

Eldor now moves for an order pursuant to CPLR 3212 granting it summary judgment dismissing all claims against it on the basis that it bears no liability for the accident and on the basis that the claims against it are barred by the doctrine of collateral estoppel. The Posillico defendants cross move for an order pursuant to CPLR 3212 granting them summary judgment dismissing all claims against them on the basis that they bear no liability for the accident, and on the basis that the claims against them are barred by the doctrine of collateral estoppel.

Under the doctrines of res judicata or collateral estoppel, a final adjudication of a claim on the merits by a court of competent jurisdiction precludes relitigation of that claim by the parties and those in privity with them (see *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 690 NYS2d 478 [1999]; *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 414 NYS2d 308 [1979]). Collateral estoppel, a corollary to the doctrine of res judicata, "precludes a party from relitigating 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" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500, 478 NYS2d 823 [1984] citations omitted; see e.g. *Carter v Gospel Temple Church of God*, 19 AD3d 353, 796 NYS2d 417 [2d Dept 2005]).

Two basic requirements must be met before collateral estoppel can be invoked. First, it must be demonstrated that "the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action" (*City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 128, 848 NYS2d 551 [2007]). Second, the party to be precluded from relitigating the issue must have had "a full and fair opportunity to contest the prior determination" (*Buechel v Bain*, 97 NY2d 295, 303-304, 740 NYS2d 252 [2001], citation omitted; see also *Augustine v Sugrue*, 8 AD3d 517, 779 NYS2d 515 [2d Dept 2004], *lv app den* 9 NY3d 805, 842 NYS2d 780 [2007]). The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the

party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action (*see e.g. Ryan v New York Tel. Co.*, 62 NY2d 494, *supra*; *Augustine v Sugrue*, 8 AD3d 517, *supra*).

In support of its motion, Eldor submits, inter alia, the pleadings, the transcripts of the deposition testimony given by Katsaros, Dirico, Laurence Buttacy (hereinafter “Buttacy”) on behalf of Eldor, and Dennis McCarthy (hereinafter “McCarthy”) on behalf of the Joint Venture. In support of the cross motion, the Posillico defendants submit, among other things, the affirmation of counsel.

Katsaros testified that she was proceeding eastbound in her vehicle on the south service road of the expressway on February 27, 2001; that the accident occurred at the service road’s intersection with Shelter Rock Road which is controlled by a traffic light; that she first observed the light when she was approximately 200 feet from the intersection, and it was green for traffic moving in her direction of travel until she entered the intersection that while her view was partially blocked by a ramp, she also saw a Cadillac coming off a turn from the ramp as it headed north; that she was traveling about 35 mph and about one second elapsed from the time she saw the other car until the impact; that at the moment of impact, her vehicle was almost completely through the intersection; and that she was not aware of any malfunction with the traffic lights at the intersection.

Dirico testified at her deposition given in 2002 that she was operating a white Cadillac which was involved in the accident; that she was traveling westbound on the parkway and came to an exit ramp which turns onto northbound Shelter Rock Road; that when she first approached the intersection, she observed that the control signal for traffic in her direction was red; that after she brought her vehicle to a stop, she made a right turn after the light turned green and was then involved in the accident; that she did not see Katsaros’ vehicle at any time prior to the accident, and she was not aware of any problems with the traffic lights; that the accident happened at approximately 2:00 p.m; that she stopped for a red light at the intersection, and then proceeded after it turned green; that she “[a]lmost lightly” stopped and that she “fainted” after proceeding; that when she regained consciousness, she was surrounded by emergency personnel; and that after the accident occurred, she never informed anyone that the subject traffic light was not working correctly.

Buttacy testified that he is an electrical foreman employed by Eldor and was familiar with the roadway construction at the intersection during February, 2001; that at the time, demolition of the old Northern State overpass was taking place and a new overpass was being constructed; that the Joint Venture hired Eldor to perform the electrical work in connection with the traffic lights at the intersection; that he first arrived at the job site the morning of the accident at about 7 a.m. and had been there until about one hour before the accident occurred; that each time he was there, he did not observe any problems with the lights; that at about 2:50 p.m., however, he received a call that one of the traffic signals controlling the exit ramp from the west bound parkway onto Shelter Rock Road was in a steady red position; that to his knowledge, the traffic controller had been operating properly just prior to this incident and no one from Eldor had tampered with it; that he also found no physical evidence that any wiring had been altered to cause a change in the lighting sequence; that it was his opinion that the light remained red because someone at the State’s Hauppauge “INFORM” Office had intentionally made a program change and that it had not been “stuck” in the red position; that the signal processor did not malfunction and a timing conflict did not occur because the controller would have gone into a “flash” mode; and that he was not aware of any complaints with respect to

the traffic controllers within the week prior to the accident.

McCarthy testified at his deposition on behalf of J. D. Posillico, Inc. (hereinafter “Posillico”) and the Joint Venture, and stated that he was employed as a project engineer by Posillico; that he oversaw the construction of the Shelter Rock Road expressway and the parkway overpasses; that Eldor was hired as a subcontractor by the Joint Venture and was responsible on a day-to-day basis for the maintenance of the traffic controllers at the site from February 26, 2001 until March, 2001; that Eldor was unable to complete its permanent traffic signal work at the intersection because the State had delayed the demolition of the parkway; that there was one temporary light at the “get off ramp” at the intersection of the westbound exit of the parkway and Shelter Rock Road; that on the other side of Shelter Rock Road, there was a “get on ramp” for westbound traffic; that at this time, the westbound Northern State Parkway was routinely closed from 9 p.m. to 5 a.m. and, upon the conclusion of work, the temporary lights were put back on their regular timer system; that the temporary lights at the “get off ramp” of the parkway and Shelter Rock Road had to be manually switched on and off by Eldor, however, someone from Eldor was only required to be physically present at the site when the Northern State Parkway was being shut down; that the parkway was shut down for work the evening of February 26, 2001; that he opined that someone on behalf of Eldor had reset the control signal at 5:00 a.m. on February 27, 2001, because if this had not been done, traffic would have backed up very quickly and he would have received a complaint; and that he did not know if there were signs prohibiting a right turn with a red signal at the off ramp from the west bound Northern State Parkway.

Eldor and the Posillico each have made a prima facie showing of entitlement to judgment as a matter of law demonstrating that the instant litigation against them is barred by the doctrine of collateral estoppel based upon the prior determination of the Court dated December 4, 2006 (Doyle, J.) (see *Hibbert v Avwontom*, 35 AD3d 813, 826 NYS2d 441 [2d Dept 2006]; *Carter v Gospel Temple Church of God in Christ*, 19 AD3d 353, *supra*). The issues raised in the related action, *Katsaros v Dirico*, were identical of the Diricos’ causes of action against moving defendants, and that determination was adverse to plaintiff.

In opposition to these motions, plaintiff submits, inter alia, the affirmation of counsel and an unauthenticated copy of police accident report, Form MV-104A. At the outset, the police accident report relied on by plaintiff is plainly inadmissible and has not been considered by the Court in making this determination (see *Mooney v Osowiecky*, 235 AD2d 603, 651 NYS2d 713 [3d Dept 1997], *app after rem* 256 AD2d 603, 651 NYS2d 661 [3d Dept 1998]). By her submissions, plaintiff failed to raise a triable issue of fact that she did not have a full and fair opportunity to litigate the issue of the alleged negligence on the part of moving defendants (see *Martin v Geico Direct Ins.*, 31 AD3d 505, 818 NYS2d 265 [2d Dept 2006]; *Carter v Gospel Temple Church of God in Christ*, 19 AD3d 353, *supra*; *Lobel v Allstate Ins. Co.*, 269 AD2d 502, 704 NYS2d 488 [2d Dept 2000]; *c.f. Augustine v Sugrue*, 8 AD3d 517, *supra*). Plaintiff’s opposition, consisting of counsel’s affirmation without personal knowledge of the facts (see *Matter of Ziomek*, 40 AD3d 774, 833 NYS2d 906 [2d Dept 2007]) does not address the collateral estoppel effect of the December 4, 2006 order.

In any event, the record reflects that plaintiff appeared in the related action, *Katsaros v Dirico*, and submitted opposition papers in response to Eldor’s summary judgment motion. Accordingly, the second cause of action against the Posillico defendants and the third cause of action against Eldor are dismissed. The fourth cause of action in the amended complaint, which is for property damage to plaintiff’s vehicle, is

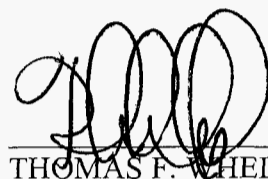
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dismissed solely as to Eldor and the Posillico defendants.

As Katsaros, Eldor and the Posillico defendants were parties to the related action, *Katsaros v Dirico*, their cross claims against the each other, and the third-party action by the Posillico defendants against Eldor sounding solely in contribution and indemnification are also dismissed as a matter of law (*see Zehnick v Meadowbrook II Assocs.*, 20 AD3d 793, 799 NYS2d 604 [2005], *lv dismissed in part, denied in part* 5 NY3d 873, 808 NYS2d 136 [2005]; *Carter v Gospel Temple Church of God in Christ*, 19 AD3d 353, *supra*). The first and the fourth causes of action in the amended complaint against Katsaros, however, are severed and continued for trial (*see* CPLR 3212[e][1]).

Accordingly, the motion and cross motion are decided as herein indicated. This constitutes the Order and decision of the Court.

DATED: 3/17/08



THOMAS F. WHELAN, J.S.C.