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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KAREN S. SMITH Justice PART 62

Index Number : 121683/2002
CAPSHAW, DEIRDRE
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum decision

FILED
JUN 10 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6-9-09

HON. KAREN SMITH J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - I.A.S. PART 62

----------X

DEIDRE CAPSHAW,

Plaintiff,

Index No. 121683/02

-against-

Decision and Order

THE CITY OF NEW YORK, BOARD OF EDUCATION OF THE CITY OF NEW YORK, DANIEL J. RYAN and WILLIAM RESTREPO

Defendants.

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HON. KAREN S. SMITH

The defendants City of New York's ("City") and Board of Education of the City of New York's ("Board")[1] (together referred to as "defendants") motion to amend the pleadings to assert the affirmative defenses of *res judicata* and collateral estoppel, and to dismiss all claims pursuant to CPLR § 3212 or pursuant to CPLR § 3211(a)(5), based on a prior stipulation of settlement, which, defendants claim, bars plaintiff from re-litigating her claims, is granted in part and denied in part, for the reasons stated more fully below.

By this action, plaintiff sues defendants for injuries she claims she sustained as a result of the defendants' negligence. Specifically, plaintiff alleges that she was injured on April 8, 2002 when she fell off of a cement "platform"[2], which defendant Board did not remove when the classroom was converted from a locker room to a classroom, as plaintiff was re-arranging tables and chairs in her classroom in MS54 Booker T. Washington located on West 103rd Street in Manhattan.

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[1] Since the events which have led to this lawsuit, the Board of Education of the City of New York has been reorganized and renamed "the Department of Education." For the purposes of this decision, however, the Court will refer to the entity as the "Board of Education."

[2] Throughout these proceedings the object plaintiff is alleged to have fallen off of is referred to by various persons and in various documents submitted with the parties' papers as a "hump," a "step" and a "platform." Whatever the nomenclature, there is no dispute, that it was a raised surface approximately four feet long and four inches high and, as such, was clearly visible.

On April 8, 2002, after this alleged accident occurred, and allegedly as a result of the accident, plaintiff left school and went home. On or about April 20, 2002, plaintiff filed an Occurrence Report with the school, informing them, for the first time, about her accident and requesting that she be provided with line of duty compensation for the time she was out of work.[3] On June 6, 2002, plaintiff filed a Notice of Claim with the City and the Board claiming that she suffered bodily injuries as a result of the April 8, 2002 accident and demanding $3,000,000.

On June 9, 2002, plaintiff filed a grievance pursuant to the collective bargaining agreement ("CBA") between her union, Local 2 of the United Federation of Teachers, and the Board of Education ("BOE"), in which she alleged that the Board had violated the CBA by failing to respond to her request for line of duty compensation. On June 12, 2002, plaintiff was sent a letter from the principal of the school informing her that there was no position for her in the school commencing in September 2002. On June 17, 2002, plaintiff was sent a letter from the Board's District Office advising her that she could bring a representative to the grievance hearing "...who is not a lawyer."

The Step 2 grievance hearing was held on June 26, 2002. The issue at the hearing was clearly delineated:

> Pursuant to Articles 22, 20, 17 & 21 of the agreement, the Union contends that the District has not made a determination of the grievant's line of duty request. The remedy sought is for approval of the line of duty claim in order to make the grievant "whole."

Plaintiff was represented at the hearing by her union representative. The hearing officer, Elliot Levy, upheld the denial of "line of duty" benefits to the plaintiff, finding:

> The whole incident seems suspicious. The grievant claimed she fell before the start of the school day. She then left the school and neither returned nor informed school personnel as to the incident, her status, or her intentions. The grievance is denied.

It appears from the hearing officer's decision that he relied primarily on the results of an investigation conducted by the principal of the school where plaintiff worked, Lawrence Lynch,

[3] "Line of duty" compensation entitles a teacher to monetary compensation and full medical benefits when a determination has been made that a teacher was injured in the line of duty.

who reported her injury to be "suspicious," and on statements made by, David Getz, the interim acting assistant principal, that he called plaintiff numerous times to find out her status and that she was either never at home or refused to answer her phone. Neither Lynch nor Getz were present at the hearing and, as such, were not subject to cross-examination. In paragraph 36 of the affirmation of defendant City's attorney, she confirms that the basis for the denial of the plaintiff's grievance was Principal Lynch's investigation and his finding that plaintiff had been absent without excuse and had improperly failed to respond to phone calls regarding her whereabouts.

On September 5, 2002, plaintiff filed a request for a Step 3 grievance of her denial of line of duty compensation and filed an Appeal and Review to contest the unsatisfactory rating she had received from her principal for the 2001/2002 school year. On or about September 18, 2002, plaintiff commenced the instant action by filing of a summons and complaint. On October 3, 2002, plaintiff served the summons and complaint on defendants. On November 13, 2002, the Step 3 grievance was held, at which time, plaintiff entered into a Stipulation of Settlement with the Board settling the grievance. Pursuant to the terms of the stipulation, the Board agreed to compensate plaintiff for twenty days of absences during the period of April 8, 2002 through June 26, 2002, and further agreed to reverse plaintiff's unsatisfactory rating for the 2001-2002 school year. The stipulation further provided:

> This settlement is non precedential and the parties agree that it will not be used in any other proceeding or forum except one to enforce its terms.

The parties commenced jury selection in this action on June 16, 2008 at which time the defendants raised the question for the first time that they intended to assert the defenses of *res judicata* and *collateral estoppel* claiming that they had just discovered the file containing the records of plaintiff's grievance.[4] On June 18, 2008, after the jurors were sworn in, defendants showed plaintiff's counsel motion papers seeking to amend the answer to assert the defenses of *res judicata* and collateral estoppel. J.H.O. Ira Gammerman (the judicial hearing officer in charge of assigning cases for trial in New York County Supreme Court), adjourned the trial to September 15, 2008, ostensibly because there was no judge available to try the case. After the

[4] In paragraph 66 of defendant City's attorney's affirmation in support of the motion, the City admits that by June 17, 2008, the Deputy Director and Supervising Attorney of the Office of Labor Relations and Collective Bargaining for the Board located the records of plaintiff's June 26, 2002 administrative hearing.

second jury was selected on September 15, 2008, the City again raised the issue of amending their complaint with J.H.O. Gammerman. Between June 18th, when the first jury was disbanded and September 15th, when the second jury selection commenced, defendant City did not file its motion.

As a result of defendant City's claims about the case being barred by *res judicata* and collateral estoppel, J.H.O. Gammerman disbanded the jury and sent the lawyers to the Administrative Judge presiding that day, Justice Joan Lobis, for her to make a determination as to whether the City should be permitted at such a late date to move to amend their answer and to seek dismissal pursuant to CPLR § 3212. After discussing whether the City intended to raise the motion as a motion *in limine* before the trial judge or a substantive motion prior to trial, the following colloquy took place between Justice Lobis and the City's attorney, Marty Hirst.

The Court:	Counsel you have 30 days to make the motion. I'll notify Judge Smith.
Ms. Hirst:	Irrespective of Brill?
The Court:	At this point, irrespective of Brill.

(June 18, 2008 transcript of the proceedings, p. 12, lines 12-14). On December 4, 2008 the parties came before this Court by Order to Show Cause, filed by plaintiff, seeking to preclude defendants from making their motion on the basis that they had failed to comply with Justice Lobis's order by not filing their papers within the thirty days. This Court held a hearing and made a determination that defendants had timely served their motion papers in accordance with Justice Lobis's order (albeit it at the eleventh hour), but as they had not served their memorandum of law timely, the Court would not consider their memorandum of law.

As Justice Lobis ruled that this motion was not barred by *Brill,* this Court must consider the motion. Upon consideration, the Court grants defendants' motion to amend their answer to assert as affirmative defenses *res judicata* and collateral estoppel on the basis that plaintiff allegedly misrepresented that she had not been through a grievance procedure and defendant's inability to obtain said records until after the first jury selection had begun, although the Court does find it strange that in preparation for trial, defendants did not confer with the former principal, Lawrence Lynch, who knew of plaintiff's grievance hearing. However, as the right to amend is liberally granted, and given the history of this case with its delays, it is best for the litigants that the substantive issues be resolved.

It is undisputed that "the doctrines of *res judicata* and collateral estoppel are applicable to the quasi-judicial determinations of administrative agencies." (*Ryan v New York Telephone Co.*., 62 NY2d 494, 499 [1984]). "These doctrines are asserted to give conclusive effect of such agency determinations . . . when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law." (*Id.*) In deciding whether an action is barred by *res judicata,* this State has adopted the transactional analysis approach: "[O]nce 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." (*Pauk v Trustees of the City University of New York*, 111 AD2d 17, 19 [1st Dept 1985]). Similarly, collateral estoppel, "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 . . . , whether or not the tribunals or the causes of action are the same." (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999], *citing Ryan v New York Telephone Co., supra* at 500). The doctrine of collateral estoppel only applies "if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action." (*Ryan v New York Telephone Co., supra* at 500-1). The proponent of collateral estoppel has the burden of demonstrating that the issues in both forums are identical and that the decision in the first forum was decisive, while the opponent of the doctrine has the burden of demonstrating that the plaintiff was not afforded a full and fair opportunity to litigate the material issue in the earlier action or proceeding." (*Ryan v New York Telephone Co., supra* at 501).

In the instant case, this Court finds that neither *res judicata* nor collateral estoppel bars the instant action, as defendants have not met their burden of demonstrating either that the decision in the first forum was either identical or that it was decisive. The one thing which is clear about the decision in the Step 2 grievance, is that plaintiff's claim that her injury was caused by her fall from the cement platform in her classroom, was not resolved.[5] The hearing officer merely found the claim to be "suspicious" and addressed the majority of his decision to

[5] In order to fully address the substantive issues raised in this motion, the Court does not address the question as to whether the stipulation of settlement in which plaintiff withdrew her grievance, renders the Step 2 decision by hearing officer Levy, which serves as the basis for defendants' assertion of the bar of *res judicata* and/or collateral estoppel, void.

the issue of plaintiff's failure to timely notify the Board of the accident, and her failure to respond to inquiries as to her intention to return to work. On its face, it appears that her grievance was denied because of her unexcused absences, not on a definitive determination that her injuries were not caused by the presence of the cement platform. Had such a definitive determination been made, there is no question that the instant action would be barred by collateral estoppel, as such a determination would be conclusive on the issue of causation in this negligence action, irrespective of the fact that the issue of the City's alleged negligence for failing to remove the cement platform was not before the hearing officer in the administrative hearing. (*C.f.*, *Kenny v New York City Transit Authority*, 275 AD2d 639 [1st Dept 2000] [tie vote by Board on issue of claimant's entitlement to line of duty benefits did not constitute a final determination as to the cause of disabling injuries, making collateral estoppel inapplicable his subsequent tort action]).

Similarly, *res judicata* does not operate as a bar in the instant case, both because the issue of the City's negligence was not subsumed by the issues raised in the administrative hearing, (*c.f., Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343 [1999]), and because the claim as to what caused her injury was not "brought to a final conclusion." (*Pauk v Trustees of the City University of New York*, 111 AD2d 17 [1st Dept 1985]). In addition, the Court finds that plaintiff, as the opponent of this motion, has met her burden of demonstrating that she did not receive a full and fair opportunity to litigate the issues at the prior proceeding, beginning with the express directive that she was prohibited from bringing a lawyer to represent her at the hearing, and supported by the fact that the evidence relied on by the hearing officer was almost exclusively hearsay and, more importantly, that the key witnesses whose evidence was relied upon to reach the decision were not present at the hearing and, thus, not subject to cross-examination.

Defendants' argument that plaintiff should be barred from bringing this action as her injury was due to her own actions of standing on the platform, while moving chairs and tables, is unavailing as such claim merely goes to the issue of plaintiff's comparative negligence, which must be resolved at trial.

The Court rejects defendants' further claim that the instant action is barred by the November 13, 2003 Stipulation of Settlement. "Settlement agreements are considered contracts,

. . . and must therefore be construed according to general principals of contract law." (*Red Ball Interior Demolition Corp. v Palmadess*, 173 F3d 481, 484 [2nd Cir. 1999]). As such, "courts must take care not to alter or go beyond the express terms of the agreement itself." (*Id.*). The stipulation in the instant case is unlike the stipulation in *Mazurkiewicz v NYC Health and Hospitals Corp.*, (585 FSupp2d 491 [SDNY 2008]), which released the administrative agency from "any and all claims, whether at law, in equity, or in any proceeding arising by virtue of the HHC Personnel Rules and Regulations or by the collective bargaining agreements . . . which they may now have, which they have had heretofore, or which they may have in the future in connection with the underlying dispute raised in [the grievance]." The stipulation here merely recited that in exchange for plaintiff withdrawing her grievance and the Board paying her for twenty absences and rescinding her unsatisfactory rating, the settlement would "not be used in any other forum." The clear import of the language, and the absence of any other limiting language, as was present in *Mazurkiewicz,* cannot be overcome by a self-serving affidavit of the Board's Deputy Director and Supervising Attorney of the Office of Labor Relations and Collective Bargaining providing his interpretation of the meaning of such stipulations. At best, the plaintiff gave up her rights to pursue the grievance or, arguably, to file an Article 78 proceeding challenging the grievance. The absence of any language precluding her from bringing any action "at law " relating to issues arising out of her claims at the grievance procedure, especially as the Board had been served with the summons and complaint in the instant action more than a month prior to the parties entering into the stipulation, makes the defendants' claim in this regard, unsupportable.[6]

As the defendant City's failure to file this motion between the disbanding of the first jury on June 18, 2008 and the picking of the second jury in the case on September 15, 2008, and because defendant City's eleventh hour attempt to interpose these defenses caused the second jury to be disbanded on September 15, 2008, the Court, *sua sponte*, sanctions the defendant City

[6] It should be noted that the defendants' claim that the Stipulation of Settlement precludes plaintiff's action because it explicitly states it is non-precedential, could just as easily - if supported by law - be used to argue that defendants should be precluded from using it against plaintiff in this action. The express terms of the Stipulation limit its future use to actions to enforce its terms, but the Stipulation only expressly resolved the administrative "line of duty" grievance, not negligence on the part of defendants. As such, defendants should likely be barred from using it against plaintiff here, where those issues are not relevant. However, as none of the parties address this issue, and as the defendants' motion is denied on other grounds, the Court need not and does not resolve it in disposing of this motion.

and awards plaintiff costs in an amount to be determined by this Court, for all costs, including but not limited to attorneys fees, incurred as a result of the September 15, 2008 jury selection.

Accordingly, it is

ORDERED that defendants' motion to amend the action to include the affirmative defenses of *res judicata* and collateral estoppel is granted; it is further

ORDERED, that defendants' motion for summary judgment dismissing all claims pursuant to CPLR § 3212, as being barred by *res judicata* and collateral estoppel is denied; it is further

ORDERED, that defendants' motion to dismiss based on CPLR §3211(a)(5), as a result of the November 13, 2003 Stipulation of Settlement is denied; it is further

ORDERED that defendants pay plaintiff, in an amount to be determined by the Court, the plaintiff's costs associated with September 15, 2008 jury selection, the date for said hearing to be arranged by phone with all parties on the line, to be initiated by plaintiff's counsel; it is further

ORDERED, that defendant shall serve a copy of this order with notice of entry within twenty (20) days of entry on plaintiff and on the Clerk of Trial Support (60 Center Street); it is further

ORDERED that upon receipt of said decision and order with notice of entry, the Clerk shall place this action on the appropriate trial calendar.

This constitutes the decision and order of the court.

Dated: June 5, 2009
New York, New York

Enter:

KAREN S. SMITH, J.S.C.