[* 1]

SHORT FORM ORDER

INDEX NO. 27848/2008

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

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

GEORGE A. CIMINELLO,

Plaintiff,

-against-

BRIAN C. SULLIVAN and ROBERT HARFORD,

Defendants.

ORIG. RETURN DATE: NOVEMBER 14, 2008
FINAL SUBMISSION DATE: DECEMBER 4, 2008
MTN. SEQ. #: 001
MOTION: MG

ORIG. RETURN DATE: NOVEMBER 20, 2008
FINAL SUBMISSION DATE: DECEMBER 4, 2008
MTN. SEQ. #: 002
CROSS-MOTION: XMG

PLTF'S/PET'S ATTORNEYS:
GRUENBERG & KELLY, P.C.
3275 VETERANS MEMORIAL HIGHWAY
SUITE B-9
RONKONKOMA, NEW YORK 11779
631-737-4110

ATTORNEYS FOR DEFENDANT BRIAN C. SULLIVAN:
BREEN & CLANCY
1355 MOTOR PARKWAY - SUITE 2
HAUPPAUGE, NEW YORK 11788
631-273-2222

ATTORNEY FOR DEFENDANT ROBERT HARFORD:
JOHN G. GRIFFIN, ESQ.
46 ROUTE 25A - SUITE 8
EAST SETAUKET, NEW YORK 11733
631-751-5000

Upon the following papers numbered 1 to 9 read on this motion and cross-motion TO DISMISS; Order to Show Cause and supporting papers 1-3; Notice of Cross-Motion and supporting papers 4-6; Affirmation in Opposition to Motion and Cross-Motion and supporting papers 7, 8; Replying Affirmation and supporting papers 9; it is,

ORDERED that this motion by defendant BRIAN C. SULLIVAN for an Order: (1) pursuant to CPLR 3211 (a) (5), dismissing the complaint under the theories of *res judicata*, collateral estoppel, and statute of limitations; and (2) imposing costs and sanctions against the plaintiff and/or his counsel, pursuant to CPLR 8303 (a) and 22 NYCRR § 130-1.1, is hereby **GRANTED** as set forth hereinafter; and it is further

ORDERED that this cross-motion by defendant ROBERT HARFORD for an Order: (1) pursuant to CPLR 3211 (a) (5), dismissing the complaint under the theories of *res judicata*, collateral estoppel, statute of limitations, and additionally, pursuant to CPLR 3211 (a) (8), on the grounds that the Court lacks jurisdiction over defendant ROBERT HARFORD; and (2) imposing costs and sanctions against the plaintiff and/or his counsel, pursuant to CPLR 8303 (a) and 22 NYCRR § 130-1.1, is hereby **GRANTED** as set forth hereinafter.

The Court has received an affirmation of counsel for plaintiff in opposition to both applications at bar.

This action was commenced on or about July 24, 2008, as a result of an incident that occurred on July 29, 2005. On that date, plaintiff alleges that he suffered personal injuries when he was doused with a plastic cup containing urine while a pedestrian on Portion Road, in Ronkonkoma, New York, that was thrown by defendant ROBERT HARFORD ("HARFORD"), while a passenger in a motor vehicle operated by defendant BRIAN C. SULLIVAN ("SULLIVAN"). Plaintiff alleges that the defendants acted in concert pursuant to a common plan to splash urine on a random victim.

SULLIVAN has now filed the instant application, by Order to Show Cause, for an Order dismissing plaintiff's complaint under the theories of *res judicata*, collateral estoppel, and statute of limitations, and imposing costs and sanctions against plaintiff and/or his counsel for the commencement of the instant action. By cross-motion, HARFORD joins in the application of SULLIVAN on identical grounds, and additionally asserts lack of jurisdiction over HARFORD.

SULLIVAN informs the Court that a prior action was commenced on September 2, 2005, entitled *George A. Ciminello v. Brian C. Sullivan, Gerard E. Sullivan and Robert Hartford*, under Index No. 21023/2005 ("original action"). SULLIVAN further informs the Court that GERARD E. SULLIVAN is the father of

BRIAN C. SULLIVAN and the owner of the motor vehicle driven by his son, but that GERARD E. SULLIVAN was not present at the time of the incident. Thereafter, plaintiff served an amended summons, naming HARFORD's mother and step-father as defendants, and asserting a cause of action based upon those adults having allegedly supplied alcohol and/or drugs to the minor defendants. SULLIVAN alleges that after discovery was completed in the original action, the action was discontinued as against HARFORD's mother and step-father.

By Order dated March 17, 2008 in the original action (R. Doyle, J.), the Court dismissed plaintiff's cause of action asserting a violation of Vehicle and Traffic Law § 388, finding that the injuries claimed did not arise out of the use and operation of a motor vehicle. As such, the vicarious liability claim against defendant GERARD E. SULLIVAN was similarly dismissed. SULLIVAN indicates that in the aforementioned Order, Justice Doyle determined that the "adduced evidence indicates that plaintiff's injuries resulted from the intentional conduct of the remaining defendants rather than mere negligent or reckless behavior." Justice Doyle noted that plaintiff had failed to plead a cause of action sounding in intentional tort, and granted plaintiff leave to apply to the Court for leave to serve and file an amended complaint. SULLIVAN alleges that plaintiff failed to serve such amended complaint. This Court notes that by decision and Order dated September 8, 2009, the Appellate Division, Second Department, affirmed the Order of March 17, 2008 insofar as appealed and cross-appealed from (*Ciminello v Sullivan*, 2009 NY Slip Op 6396 [2d Dept]). The Second Department held, among other things, that "[o]nce intentional offensive contact has been established, an actor is liable for battery, not negligence" (*Ciminello v Sullivan*, 2009 NY Slip Op 6396, at *4).

Defendants argue that the instant action asserting claims based upon the concerted action between defendants must be dismissed as time-barred under the one-year statute of limitations for intentional torts (*see* CPLR 215 [3]). In addition, defendants seek dismissal based upon *res judicata* and collateral estoppel, in that the claim asserted herein has been rendered to a final conclusion, and that plaintiff had a full and fair opportunity to litigate the claim in the original action. Furthermore, defendants seek sanctions against plaintiff and/or plaintiff's counsel, pursuant to CPLR 8303 (a) and 22 NYCRR § 130-1.1, for filing the instant action in "bad faith."

Moreover, HARFORD requests dismissal based upon lack of personal jurisdiction over him. HARFORD argues that plaintiff failed to properly

serve the summons and verified complaint upon him. The subject affidavit of service, sworn to on October 3, 2008 and filed with the Clerk of the Court on October 8, 2008, indicates that defendant HARFORD was served with the summons and verified complaint on October 1, 2008, at defendant's place of abode, by serving HARFORD's mother, Patricia Harford, a person of suitable age and discretion (*see* CPLR 308 [2]), with a follow-up mailing. By affidavit sworn to on November 11, 2008, Mrs. Harford alleges that she was at her place of employment on the date and time of service; that she first received the summons and complaint when another son, Brian Harford, gave it to her after finding it between the storm door and the front door of her residence; that the description of her is incorrect in the affidavit of service; and that they never received a copy of the summons and complaint in the mail at the residence. HARFORD has also submitted his own affidavit, as well as an affidavit of his brother, in support thereof.

In opposition to both motions, plaintiff alleges that the instant action sounds in "negligent concerted action liability," in that plaintiff argues the defendants' actions were negligent, careless, and reckless. As such, plaintiff alleges that a three-year statute of limitations applies (*see* CPLR 214). Further, plaintiff alleges that defendants filed the instant applications during a stay of the original action while the appeal of the Order of March 17, 2008 was pending, and prior to a final determination rendered in that action. Moreover, with respect to personal jurisdiction over HARFORD, plaintiff indicates that he caused HARFORD to be re-served within the applicable 120 day period, and has submitted an affidavit of service executed in connection therewith. HARFORD has not come forth to refute the propriety of the repeat service of process. Accordingly, that branch of HARFORD's motion seeking dismissal based upon lack of personal jurisdiction is **DENIED** as moot.

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*, 29 AD3d 688 [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]).

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]).

The theory of concerted action provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to participate in a common plan or design to commit a tortious act. It is essential that each defendant charged with acting in concert have acted tortiously and that one of the defendants committed an act in pursuance of the agreement which constitutes a tort (*Rastelli v Goodyear Tire & Rubber Co.*, 79 NY2d 289 [1992]).

Initially, the Court finds that *res judicata* does not act as a bar to the instant action. The Order of March 17, 2008, and resulting decision and Order of the Second Department, did not finally adjudicate the original action on the merits. However, the foregoing Orders did finally determine the issue of whether the defendants' acts were intentional or negligent, finding the acts to be intentional. Plaintiff had a full and fair opportunity to litigate this issue in the original action and to contest the determination therein. Accordingly, the Court finds that the doctrine of collateral estoppel bars plaintiff from relitigating this issue

As it has now been judicially determined that the acts herein were intentional, CPLR 215 provides a one-year statute of limitations for actions sounding in intentional tort (CPLR 215). Therefore, any action relative to this incident must have been filed within one year of July 29, 2005. Accordingly, the Court finds this action, commenced on or about July 24, 2008, to be time barred.

In view of the foregoing, this motion and cross-motion are **GRANTED** to the extent that plaintiff's complaint is dismissed. However, those branches of the instant motions seeking sanctions against plaintiff and/or plaintiff's counsel are **DENIED**. On this record, it cannot be said that the commencement of this action was in bad faith, completely without merit in law, or done solely to harass or maliciously injure defendants (*see* 22 NYCRR § 130-1.1 [c]).

The foregoing constitutes the decision and Order of the Court.

Dated: October 8, 2009

HON. JOSEPH FARNETI
Acting Justice Supreme Court