White v Kelly
2010 NY Slip Op 32902(U)
September 17, 2010
Supreme Court, Queens County
Docket Number: 25728/09
Judge: Patricia P. Satterfield
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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

--X

MARIE D. WHITE,

Plaintiff,

-against-

PAUL KELLY and ANNE LISA REBELLO,

Defendants.

--X

Index No: 25728/09
Motion Date: 4/28/10
Motion Cal. No: 28
Motion Seq. No: 1

The following papers numbered 1 to 10 read on this motion by defendants, for an order amending their answer and upon amendment, dismissing plaintiff's action, pursuant to CPLR §§ 3211(a)(5) and 3211(e), and CPLR § 3212, on the basis the claim is barred by the doctrines of res judicata and collateral estoppel, dismissing the complaint on the basis that there are no material issues of fact regarding the liability of defendants.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits..	1 - 4
Affirmation in Opposition-Exhibits...	5 - 7
Reply Affirmation..	8 - 10

Upon the foregoing papers, it hereby is ordered that the motion is disposed of as follows:

This is an action commenced by plaintiff for personal injuries allegedly sustained as a result of a motor vehicle accident occurring on the westbound section of the Grand Central Parkway at its intersection with Little Neck Parkway on August 15, 2007. The pleadings were filed on September 16, 2009, and defendants interposed an answer on November 2, 2009. Prior to the commencement of this action, plaintiff filed a claim with the American Arbitration Association for Uninsured Motorist Arbitration based upon a police report which indicated that vehicle #1 left the scene and lists vehicle #2 as the vehicle owned and operated by defendants Rebello and Kelly, respectively. The report states, in pertinent part:

> Driver of veh.2 states while traveling w/b GCP in center lane, veh 1 attempted to change lanes from right to center and hit veh 2, causing

> her to hit veh 3. Driver of veh 3 states while traveling w/b GCP in left lane veh 2 hit his car causing him to hit guard rail.[1]

Thereafter, State Farm filed a petition to stay the arbitration entitled, *In the matter of the Application of State Farm Insurance Company v. Marie D. White and Christopher Robinson and Geico Indemnity Company, Paul G. Kelly and Lisa Anne Rebello*, which was pending under Index No. 22248/09. Thereafter, the matter was set down for a Framed Issue Hearing before the Honorable F. Dana Winslow to determine "whether (1) there was physical contact with a phantom vehicle, (2) whether this was a non-accident or accident and (3) whether State Farm's disclaimer was valid." The hearing was held on September 9, 2009, at which plaintiff and defendant Kelly testified. According to defendant Kelly's testimony, plaintiff's vehicle was traveling in the center lane and defendants' vehicle was traveling in the far left lane, when plaintiff's vehicle impacted their vehicle. Plaintiff testified that an unknown vehicle was traveling behind defendants' vehicle in the center lane, and when the unknown vehicle attempted to change lanes from the center lane to the left lane, in which plaintiff was traveling westbound, it came into contact with plaintiff's vehicle. As a result, plaintiff testified that the impact caused her vehicle and defendants' vehicle to veer into the guardrail. Plaintiff also asserts that her vehicle came into contact with defendants' vehicle when they both hit the guardrail, but later testified that defendants' vehicle made contact with her vehicle prior to going into the wall. At some point, plaintiff also testified that the unknown vehicle that came into contact with her was, indeed, defendants' vehicle.

At the conclusion of testimony, Justice Winslow made the following findings, and stated, in pertinent part:

> In this particular case, there was going to be another part that was going to be considered, but the main thrust of this case was to determine whether or not there was a demonstration that there existed a phantom vehicle. [] It's the Court's determination that based upon the testimony, that there was no proof that there was. There may or may not have been. I don't know, we weren't there, but there was no proof sufficient to rise to the level of this being a vehicle that came in contact with you that led to further contact with defendant Kelly's vehicle.
>
> Therefore, it's my finding that this case is concluded, and that there was no proof shown that there was a phantom vehicle.

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[1] Although a version of the alleged circumstances of the accident is missing from the moving and responding affirmations of counsel, this Court was able to discern from the record that the circumstances stated in the police report seems to deviate from the allegations of the parties.

Consequently, the Court signed a Judgment on November 6, 2009, ordering and adjudging, inter alia, the following:

> [A]fter hearing, upon the finding of this Court that the respondent, Marie D. White, offered insufficient proof that there was a third vehicle and upon the credible testimony of additional respondent, Paul Kelly, it is the finding of this Court that there was no physical contact with a hit and run vehicle and that the respondent, Marie D. White, who was traveling in the middle lane struck the additional respondent, Paul Kelly, who was traveling in the left most lane[.]

It is upon the foregoing that defendants move for an order amending their answer and upon amendment, dismissing plaintiff's action, pursuant to CPLR §§ 3211(a)(5) and 3211(e), and CPLR § 3212, on the basis the claim is barred by the doctrines of res judicata and collateral estoppel, dismissing the complaint on the basis that there are no material issues of fact regarding the liability of defendants.

CPLR § 3211(a)(5) provides that a party may move for judgment dismissing one or more causes of action on the ground that "the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds." However, CPLR 3211(e), entitled, "Number, time and waiver of objections; motion to plead over," further provides, in pertinent part, the following:

> At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading.

Defendants seek leave to amend their pleadings, which were served on November 2, 2009, to include the affirmative defenses of res judicata and collateral estoppel, upon the ground that this action is barred.

"[T]he doctrine of res judicata operates to preclude the reconsideration of claims actually litigated and resolved in a prior proceeding, as well as claims for different relief against the same party which arise out of the same factual grouping or transaction, and which should have or could have been resolved in the prior proceeding (citations omitted). The doctrine of collateral estoppel bars relitigation of an issue which has necessarily been decided in a prior action and is determinative of the issues disputed in the present action, provided that there was a full and fair opportunity to contest the decision now alleged to be controlling. Mahler v. Campagna, 60 A.D.3d 1009 (2nd Dept.

2009); City of New York v. College Point Sports Ass'n, Inc., 61 A.D.3d 33 (2nd Dept. 2009); Luscher ex rel. Luscher v. Arrua, 21 A.D.3d 1005 (2nd Dept. 2005). "'Once 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 on different theories or if seeking a different remedy'(O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 429 N.E.2d 1158)." Fitzgerald v. Hudson Nat. Golf Club, 35 A.D.3d 533 (2nd Dept. 2006); see, also, East End Property Co. # 1, LLC v. Town Bd.of Town of Brookhaven, 56 A.D.3d 773 (2nd Dept. 2008).

The doctrine is "'intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it' (Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455, 492 N.Y.S.2d 584, 482 N.E.2d 63). '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' (Luscher v. Arrua, 21 A.D.3d at 1007, 801 N.Y.S.2d 379; see Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455, 492 N.Y.S.2d 584, 482 N.E.2d 63)." Franklin Development Co., Inc. v. Atlantic Mut. Ins.,, 60 A.D.3d 897 (2nd Dept. 2009); Chiara v. Town of New Castle, 61 A.D.3d 915 (2nd Dept. 2009); Fischer v. Sadov Realty Corp., 34 A.D.3d 632 (2nd Dept. 2006); In re Noble, 31 A.D.3d 643 (2nd Dept. 2006); Luscher ex rel. Luscher v. Arrua, supra. "[Once] the party invoking the doctrine discharges his or her burden in that regard, the party to be estopped bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination." Buechel v. Bain, 97 N.Y.2d 295, 304 (2001); Mahler v. Campagna, supra, 60 A.D.3d at 1011 (2nd Dept. 2009); G. Rama Const. Enterprises, Inc. v. 80-82 Guernsey, 43 A.D.3d 863, 865 (2nd Dept. 2007).

Here, defendants seek summary judgment on the ground that the instant action is barred by res judicata and collateral estoppel, as they contend that the Framed Issue Hearing held on September 9, 2009, before Justice Winslow, was determinative of the claims now asserted by plaintiff in the instant action. According to defendant Kelly's testimony at the aforementioned hearing, plaintiff's vehicle was traveling in the center lane and defendants' vehicle was traveling in the far left lane, when plaintiff's vehicle impacted their vehicle. Inapposite to these contentions, it appears that plaintiff's theory of the case is that an unknown vehicle was traveling behind defendants' vehicle in the center lane and came into contact with both her vehicle, traveling in the far left lane, and defendants' vehicle. After the hearing, Justice Winslow made the findings that plaintiff offered insufficient proof that there was no hit and run third vehicle and plaintiff, who was traveling in the center lane, struck defendants' vehicle, who was traveling in the far left lane. Defendant contends that based upon these findings, "the issue of liability as between plaintiff and defendants has already been decided in the related case []." They further contend that they "were found to have no liability for the happening on the accident []. Thus as a matter of law it has already been established that defendants [] bear no responsibility for this accident and the complaint against them should be dismissed." Defendants lastly state:

> At the hearing of 9-9-09, liability of the two drivers involved in this accident was litigated arising out fo the same motor vehicle accident against the same parties, decided by judgment of the Honorable Justice Winslow [] and all parties had a full and fair opportunity to litigate the issue.

Thus, based upon this hearing and subsequent judgment, which defendants proffer in support of their position, defendants assert that they are entitled to summary judgment on the basis of issue preclusion. However, notwithstanding defendants' contentions to the contrary, neither res judicata nor collateral estoppel may serve as a bar to this action.

Summary judgment should be granted where there are no triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). Here, defendants failed, in the first instance, to discharge their burden of demonstrating that there are no triable issues of fact to be determined in this case. Indeed, defendants' classification of the Framed Issue Hearing and ensuing judgment of the Court as a dismissal and adjudication of the instant issues entitling them to estoppel, is simply not supported by the record. Although Justice Winslow made determinations that are dispositive of certain issues, such as the absence of a third phantom vehicle, the lane in which each party was traveling and that plaintiff's vehicle came into contact with defendants' vehicle, these determinations were made for the purposes of determining "whether (1) there was physical contact with a phantom vehicle, (2) whether this was a non-accident or accident and (3) whether State Farm's disclaimer was valid." The Honorable Justice, did not, and indeed was not charged with the responsibility at the underlying hearing, to make determinations as to liability, fault or the respective negligence, if any, of the parties. The query was limited to whether there was an accident, in the first instance, and whether there was a third phantom vehicle involved, as contended by plaintiff, to resolve the petition that State Farm filed to permanently stay arbitration, which was filed after plaintiff filed a claim for Uninsured Motorist Arbitration.

Defendants' moving papers are deficient in demonstrating a prima facie case for judgment in its favor based upon issue preclusion. Thus, under these circumstances, as defendant has failed to make a prima facie showing entitling it to summary judgment, it is not necessary for this Court to consider the sufficiency of plaintiff's opposition papers. See, generally, Roth v. Zelig, 64 A.D.3d 558 (2nd Dept. 2009); Saunders v. 551 Galaxy Realty Corp., 64 A.D.3d 564 (2nd Dept. 2009); Bruk v. Razag, Inc., 60 A.D.3d 715 (2nd Dept. 2009); Taylor v. Rochdale Village, Inc., 60 A.D.3d 930 (2nd Dept. 2009); Pearson v. Parkside Ltd. Liability Co., 27 A.D.3d 539, 540 (2nd Dept. 2006). "Only after the defendant has satisfied its threshold burden will the court examine the sufficiency of the plaintiff's opposition (citations omitted)." Doherty v. Smithtown Cent. School Dist., 49 A.D.3d 801 (2nd Dept. 2008); see, also, Gregg v. Key Food Supermarket, supra; Seabury v. County of Dutchess, 38 A.D.3d 752 (2nd Dept. 2007); Yioves v. T.J. Maxx, Inc., 29 A.D.3d 572 (2nd Dept. 2006).

Accordingly, defendants' motion for an order amending their answer and upon amendment, dismissing plaintiff's action, pursuant to CPLR §§ 3211(a)(5) and 3211(e), and CPLR § 3212, on the grounds that the claim is barred by the doctrines of res judicata and collateral estoppel, and dismissing the complaint on the ground that there are no material issues of fact regarding the liability of defendants, is denied.

Dated: September 17, 2010

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J.S.C.