

Lennard v Mendik Realty Corp.

2014 NY Slip Op 31838(U)

July 7, 2014

Supreme Court, New York County

Docket Number: 125942/2002

Judge: Margaret A. Chan

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

PRESENT: MARGARET A. CHAN
J.S.C.
Justice

PART 52

Index Number : 125942/2002
LENNARD, MARGO
vs.
MENDIK REALTY
SEQUENCE NUMBER : 005
COMPEL RESPONSE/INTERROGATORY

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

The following papers, numbered 1 to 3, were read on this motion to/for compel

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

**MOTION DETERMINED PURQUANT TO
AWARDED DECISION AND ORDER**

FILED
JUL 16 2014
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/7/14

[Signature]
MARGARET A. CHAN, J.S.C.
J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

PRESENT: Hon. Margaret A. Chan
Justice

PART 52
INDEX 125942/2002

MARGO LENNARD,
Plaintiff,

- v -

MENDIK REALTY CORP., 330 WEST 34TH
STREET ASSOCIATES, and VORNADO REALTY
TRUST,
Defendants.

MENDIK REALTY CORP., 330 WEST 34TH
STREET ASSOCIATES, and VORNADO REALTY
TRUST,
Third-Party Plaintiffs,

- v -

CITY OF NEW YORK,
Third-Party Defendant.

FILED
JUL 16 2014
NEW YORK
COUNTY CLERK'S OFFICE

There are two motions before the court. Motion sequence #005 is Mendik Realty Corp., 330 West 34th Street Associates, and Vornado Realty Trust's (collectively, Mendik) joint motion to compel, to which plaintiff submitted opposition and Mendik replied. Motion sequence #006 is the City of New York's (the City) motion for leave to amend its answer to assert the affirmative defenses of collateral estoppel and Workers' Compensation. Should amendment be granted, the City seeks dismissal of the third-party action against it. As to motion sequence #006, plaintiff submitted opposition and Mendik partially opposed the motion. The decision on the motions is as follows:

A brief history on this matter's last twelve years of litigation is relevant here. Plaintiff tripped and fell in a restroom of an office space being rented by the City on March 21, 2001. Plaintiff was employed and working for the City at the time of her fall. Plaintiff brought suit against the owners of the building and managers of the premises (Mendik). Mendik sued the City as a third-party defendant. In 2005, by order of another Supreme Court Justice, this court denied Mendik's motion for summary judgment and granted Mendik's motion for a conditional order of indemnification as against the City (*see Lennard v Mendik Realty Corp. et al*, Index 125942/02, J. Feinman, August 24, 2005). On appeal, the First Department reversed the decision on the law and dismissed the complaint (*see Lennard v Mendik Realty Corp.*, 33 AD3d 527 [1st Dept 2006]). The Court of Appeals, however, reversed the First Department's decision finding that summary judgment was not appropriate and remitted the matter to the First Department for consideration of the issues raised, but not decided on the appeal (*see Lennard*

v Mendik Realty Corp., 8 NY3d 909 [2007]). Thereafter the First Department unanimously affirmed this court's original order and held that this court properly denied summary judgment and "properly granted defendants' motion for conditional contractual indemnification as against the City to the extent of directing it to indemnify defendants for any liability arising out of the accident that was not the result of defendants' own negligence" (see *Lennard v Mendik Realty Corp.*, 43 AD3d 279 [1st Dept 2007]). After the First Department's 2007 decision, this action laid dormant for years as it was marked off calendar in this court. In 2011, the action was returned to the active calendar. Compliance conferences were held in 2012 and a further deposition of plaintiff was held on December 3, 2012, which is the subject of the instant motion to compel.

Motion Sequence #005

Mendik moved to continue plaintiff's deposition concerning areas that were objected to by her attorney during the deposition in December 2012. The nature of those questions had to do with a car accident that plaintiff was involved in subsequent to the subject accident. Mendik sought to ask plaintiff questions about her injuries from that accident and the ownership of the car that was involved. Mendik also seeks further authorizations for medical records demanded at the deposition.

Plaintiff submitted opposition to Mendik's motion to compel. Plaintiff stated that Mendik's motion should be denied in light of the lengthy litigation and because plaintiff provided all the relevant and necessary information during the deposition such as the circumstances of her subsequent accident, her injuries and what treatment she received. Plaintiff's opposition also provided proof that all authorizations that were demanded after the December 3rd deposition in writing by the City were provided the next month.

Plaintiff has already waited long enough to proceed to trial after the filing of her note of issue in 2005. As all relevant and material discovery has been provided, no further deposition testimony of plaintiff is required at this late juncture. Mendik's request for further authorizations and a vocational rehabilitation examination is denied. All discovery produced at trial must comply with this court's Uniform Rule Section 202.17, which governs the exchange of medical reports in personal injury actions and the evidence that may be adduced at trial (<http://www.nycourts.gov/rules/trialcourts/202.shtml>).

Motion Sequence #006

The City moved to amend its answer to assert the affirmative defenses of collateral estoppel and Worker's Compensation and, upon the granting of that leave, the City sought to dismiss the action with prejudice against it. After the instant accident, plaintiff applied for Disability Retirement with the New York City Employees Retirement System (NYCERS), which was denied in 2002. NYCERS made a determination "that the documentary and clinical evidence fail[ed] o [sic] substantiate that [plaintiff] is disabled from performing her duties" (City Aff, Exh B, p 12). The City argued that the NYCERS'

determination collaterally estopps plaintiff's claims in the instant tort action. Moreover, the City argued that the Worker's Compensation Board made a finding in June 2004 that plaintiff was partially permanently disabled, but that she did not suffer from a grave injury or total disability to permit suit against the City as a third-party (*see Worker's Compensation Law § 11*).

Plaintiff submitted opposition and argued that the City's motion was styled as a motion to amend, but, in fact, was a dispositive motion for summary judgment that was untimely made. Further, plaintiff pointed to her award for Social Security disability benefits to establish, at a minimum, that a question of fact concerning the extent of plaintiff's injury exists. Mendik submitted partial opposition joining the City's request to dismiss the plaintiff's claims, but agreed with plaintiff that an issue of fact remains as to whether plaintiff has suffered a grave injury. Further, Mendik referred this court to the law of this case establishing that City must contractually indemnify it for "any liability arising out of the accident that was not the result of [Mendik's] own negligence" pursuant to the First Department's decision (*see Lennard v Mendik Realty Corp.*, 43 AD3d 279 [1st Dept 2007]).

Pursuant to CPLR 3025, a motion to amend the pleadings may be made at any time with the court's discretion. In the absence of surprise or prejudice, it is an abuse of discretion as a matter of law for a trial court to deny leave to amend an answer even after trial (*see Lapont v Savvas CAB Corp.*, 244 AD2d 208 [1st Dept 1997]). The leave shall be freely given, and the court may consider just terms that may include the granting of costs or continuances (*see CPLR 3025(b)*). The City here seeks to add two affirmative defenses: (1) collateral estoppel related to the decision made by NYCERS, and (2) Worker's Compensation as a complete defense to the third-party action. These defenses are not surprising to plaintiff as she initiated the request for Disability Retirement with NYCERS and there is no dispute that plaintiff was employed by the City and at work at the time of her accident (*see Murray v City of New York*, 43 NY2d 400, 406 [1977]).

As to collateral estoppel, CPLR § 3211(e) states that the defense of collateral estoppel is waived unless raised either in a responsive pleading or in a motion made before service of the responsive pleading is required (*see CPLR § 3211(e)*). However, the statutory direction contained in CPLR 3025(b) to grant leave to amend freely has been held to apply to defenses deemed 'waived' pursuant to CPLR 3211(e) (*see Giacamazzo v Moreno*, 94 AD2d 369, 373 [1st Dept 1983]; *A.J. Pegno Constr. Corp. v City of New York*, 95 AD2d 655, 656 [1st Dept 1983]). A trial court's failure to grant motions to amend to include a defense deemed waived pursuant to CPLR § 3211(e) may be an abuse of discretion as a matter of law (*see McCaskey, Davies and Associates, Inc. v New York City Health & Hospital Corporation*, 59 NY2d 755, 757 [1983]). Furthermore, a waiver of a defense does not happen until such defense is ignored "to the point of final disposition itself" (*Murray v City of New York, supra* at 407). Amendment is only impermissible when there is "prejudice or surprise resulting directly from the delay" (*id*; CPLR 3025; *Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]). Specifically, the prejudice necessary would have to show "some special right lost in the interim, some change of position

or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add” (*Jacobson v Croman*, 107 AD3d 644 [1st Dept 2013] quoting *A.J. Pegno Constr. Corp. v City of New York* at 656). There is no surprise here resulting from the delay other than the dilatory conduct of the City itself. The lengthy history of this matter makes amendment now frustrating in light of the time and efforts the parties must have made during the appeals of this matter to the First Department and Court of Appeals, to say nothing of the time and effort of those courts to make their decisions as well. Therefore, the motion is granted to the extent that leave is granted and the answer is deemed amended.¹

Turning to the branch of the motion seeking dismissal on collateral estoppel grounds, it is denied. Collateral estoppel prevents a party from relitigating an issue where it already had a fair opportunity to fully litigate the same issue in a prior proceeding (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]). Collateral estoppel may only be invoked where “the identical issue necessarily must have been decided in the prior action and be decisive of the present action,” and that “the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination” (*id* at 455). The party seeking the benefit of collateral estoppel bears the burden of demonstrating such an identity of issues (*id*). While the collateral estoppel doctrine is applicable to give finality to decisions made by quasi-judicial administrative agencies (*see Ryan v New York Tel. Co.*, 62 NY2d 494 [1984]; *Jeffreys v Griffin*, 301 AD2d 232 [1st Dept 2002]), it not applicable here as the issues in the NYCERS administrative action are not identical to the those in the instant personal injury tort action.

The City and plaintiff both cited to *Brugman v City of New York*, 102 AD2d 413 (1st Dept 1984) *aff’d* 64 NY2d 1011 (1985) to support their contention that collateral estoppel applies or not, respectively. In that matter plaintiff was a housing authority employee who alleged that he fell over a tree stump and sought accidental disability retirement from NYCERS as a result of his injuries. NYCERS denied his accidental disability retirement request and its decision was confirmed during a subsequent Article 78 proceeding. The First Department stated “the same factual question is common to the administrative proceeding and [the tort action]. Did plaintiff fall over a tree stump and thus sustain the injuries of which he complains?” (*id* at 415). Further, that court noted that the NYCERS determination “turned on whether the injury suffered resulted from plaintiff’s ordinary work or resulted from an external, unexpected and unusual event” (*id* at 416). The underlying NYCERS decision in *Brugman* assessed the factual issue of causation.

¹ This court considered charging the City costs but ultimately rejected doing so as the main issue on appeal related to plaintiff’s claims against Mendik. Therefore, even if the City had interposed these defenses sooner there might have still been a lengthy appellate practice.

[* 6]

In the instant matter, the issue before NYCERS was whether or not plaintiff was disabled from performing her duties in furtherance of her job with the City. Plaintiff's application here to NYCERS was for disability retirement, not accidental disability retirement as was the case in *Brugman*. The issue presented in this tort action is whether the defendants were negligent and if so, what are the extent of plaintiff's damages. The City's argument that plaintiff is "precluded from making a claim that she is disabled and/or that her alleged injuries resulted from the subject alleged incident" is a far stretch (City Aff, p 14, para 29) as there was simply no factual issue regarding the accident itself presented to NYCERS on plaintiff's disability claim. Therefore, the City's motion to dismiss the action based on collateral estoppel is denied.

Addressing the City's newly asserted defense of Workers' Compensation, the City as a third-party defendant argued that it need not indemnify Mendik as the injuries plaintiff suffered are not enumerated in Workers' Compensation Law § 11 that prohibits third-party indemnification of contribution claims against employers. The City points out that plaintiff in her bill of particulars, and as determined by the Workers' Compensation Board (Pltf's Aff, Exh B, p 1), suffered a permanent partial disability but not a "grave injury" and therefore, contribution cannot be sought as against the City. Mendik argued that the appellate decisions here have already determined the issue of indemnification (*see Lennard v Mendik Realty Corp.*, 8 NY3d 909 [2007]; *Lennard v Mendik Realty Corp.*, 43 AD3d 279 [1st Dept 2007]). As the Workers' Compensation defense is newly interposed, the appellate courts did not have the occasion to rule on it. Therefore, this court shall consider it here.

Workers' Compensation Law § 11 states:

An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

Plaintiff argued that there is an issue of fact as to whether plaintiff's brain injury may constitute a grave injury. However, such a question is a matter of law where the test to be applied is whether plaintiff has suffered a "permanent total disability" making her unemployable "in any capacity" (*Rubeis v Aqua Club Inc.*, 3 NY3d 408, 417 [2004]). The First Department recently decided that a brain injury that gave way to a "grave injury" was where plaintiff required 24-hour-a-day supervision

in the care of a nursing facility, could not offer testimony in the action, and had a court-appointed guardian (see *Tzic v Kasampas*, 93 AD3d 438 [1st Dept 2012]; see also *Chelli v Banle Associates*, 22 AD3d 781 [2d Dept 2005][neuropsychologist testified plaintiff was permanently and totally disabled and court found as a matter of law there was a grave injury]; *Schuler v Kings Plaza Shopping Center and Marina, Inc.*, 294 AD2d 556 [2d Dept 2002][there was no grave injury found when plaintiff could manage a limited social agenda and was able to, among other things, dress and feed himself and handle simple arithmetic]). In support of its motion, the City argued plaintiff failed to allege that she suffered a grave injury and that her bill of particulars even stated that the injuries created a permanent partial disability- which was consistent with the NYCERS' determination and that of the Workers' Compensation medical board. The City failed to annex any medical records to support its contention. Plaintiff argued that there are medical findings that suggest that plaintiff suffered a total disability that may be considered a grave injury (Pltf's Opp, Exh G [Page 13 of Dr. Greenwald's March 2011 report states plaintiff is "permanently and totally disabled with regards to return to work in any capacity"]). Therefore, as it is unsettled if plaintiff suffered a "grave injury," the City's motion to dismiss based on its newly interposed defense of Worker's Compensation is denied.

The City's remaining arguments as to the indemnification provisions of the lease between Mendik and the City are improperly raised now. The City argued that the lease itself did not expressly contain a provision where the City agreed to indemnify Mendik for workplace injuries of its own employees. However, the First Department stated:

the motion court properly granted defendants' motion for conditional contractual indemnification as against the City to the extent of directing it to indemnify defendants for any liability arising out of the accident that was not the result of defendants' own negligence. This ruling is in accord with General Obligations Law § 5-321, prohibiting indemnification of a party for his/her active negligence (see *Tormey v City of New York*, 302 AD2d 277 [2003]), as well as with the provisions of article 23 of the amended and restated lease, pursuant to which the City was required to indemnify defendants for all claims except those caused by defendants' own negligence.

(*Lennard v Mendik Realty Corp.*, 43 AD3d 279 [1st Dept 2007]). Therefore, this court is foreclosed upon ruling on the applicability of the indemnification provisions of the lease as it is now the law of the case (see *Eastside Exhibition Corp. v 210 East 86th Street Corp.*, — NYS2d —, 2014 WL 2590129 [1st Dept 2014]).

Accordingly, it is hereby

ORDERED, Mendik Realty Corp., 330 West 34th Street Associates, and Vornado Realty Trust's joint motion to compel (motion sequence #005) is denied, and it is further

ORDERED the City of New York's motion for leave to amend and to dismiss (motion sequence #006) is granted to the extent that leave is granted and the answer is deemed amended to include the defenses of collateral estoppel and Workers' Compensation. The branch of the City's motion seeking dismissal on these newly interposed defenses is denied.

This constitutes the decision and order of the court.

Dated: July 7, 2014

MARGARET A. CHAN
J.S.C.



Margaret A. Chan , J.S.C.

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