

Conrad v Rodgers

2014 NY Slip Op 32717(U)

October 8, 2014

Sup Ct, Suffolk County

Docket Number: 5723-2010

Judge: Peter H. Mayer

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This opinion is uncorrected and not selected for official publication.

COPYSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY**PRESENT:**Hon. PETER H. MAYER
Justice of the Supreme CourtMOTION DATE 12-17-13
ADJ. DATE 2-18-14
Mot. Seq. # 001 - MotD

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RICHARD CONRAD and LYNNE CONRAD,	:	The Sobel Law Group
	:	Attorneys for Plaintiffs
	:	464 New York Avenue, Suite 100
Plaintiff(s),	:	Huntington, New York 11743
	:	
- against -	:	Breen & Clancy, Esqs.
	:	Attorneys for Defendant
	:	1355 Motor Parkway
MICHAEL RODGERS,	:	Hauppauge, New York 11749
	:	
Defendant(s).	:	
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendant, dated November 13, 2013, and supporting papers; (2) Affirmation in Opposition by the plaintiff, dated February 5, 2014, and supporting papers; (3) Reply Affirmation by the defendant, dated February 17, 2014, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the branch of the defendant's motion (seq. #001), which seeks, inter alia, an order granting summary judgment in favor of the defendant pursuant to CPLR 3212, is hereby denied; and it is further

ORDERED that the branch of the defendant's motion which seeks an order, pursuant to CPLR 3025(b), granting leave to amend defendant's answer to include: a Seventh Affirmative Defense (action is barred by reason of execution of release); an Eighth Affirmative Defense (action is barred by CPLR 3211(a)(5) by reason of settlement and award); and a Ninth Affirmative Defense (action is barred by res judicata and collateral estoppel), is hereby granted to the extent that defendant is granted leave to amend the answer to include the proposed Seventh Affirmative Defense only; and it is further

ORDERED that the branch of the plaintiff's motion which seeks a judicial determination limiting the defendant's liability is hereby granted solely to the extent that defendant's liability is hereby limited to \$175,000, inasmuch as plaintiff concedes that \$175,000 represents the maximum amount recoverable against the defendant in this action; and it is further

ORDERED that any other requested relief not specifically addressed herein is denied; and it is further

ORDERED that counsel for the defendant shall promptly serve a copy of this Order upon counsel for the plaintiff and shall promptly thereafter file the affidavit of such service with the County Clerk.

This action arose from a motor vehicle accident that occurred on January 20, 2009, in which the vehicle operated by the plaintiff, Richard Conrad, was struck in the rear by the vehicle operated by the defendant, Michael Rodgers. Thereafter, Mr. Conrad filed suit against Mr. Rodgers for the personal injuries allegedly sustained as a result of the accident. At the time, Mr. Rodgers maintained a primary policy of insurance with Kemper Insurance Company ("Kemper"), with liability limits of \$100,000/\$300,000 and no excess coverage, while Mr. Conrad was insured under a \$250,000 Supplemental Underinsured Motorist ("SUM") policy with New York Central Mutual Fire Insurance Company ("New York Central"). During the pendency of the litigation, Kemper, on behalf of Mr. Rodgers, tendered its full \$100,000 policy as an offer to settle plaintiff's suit, which was rejected by plaintiff.

After Kemper's offer was rejected and prior to arbitration, pursuant to the terms of their SUM endorsement, plaintiffs assigned their claim against Mr. Rodgers to New York Central, which advanced to plaintiffs the \$100,000 offered by Kemper. New York Central also paid an additional \$75,000 to plaintiffs, for a total of \$175,000, as full settlement of plaintiffs' claim under their SUM policy. The defendant now seeks leave, pursuant to CPLR 3025(b), to amend his answer to include a Seventh Affirmative Defense (action is barred by reason of execution of release); an Eighth Affirmative Defense (action is barred by CPLR 3211(a)(5) by reason of settlement and award); and a Ninth Affirmative Defense (action is barred by res judicata and collateral estoppel). The defendant asks the Court, in the alternative, to declare that the defendant's liability is limited to \$100,000, the amount of his policy with Kemper.

Summary Judgment

It is well settled that the remedy of summary judgment is a drastic one and there is considerable reluctance to grant summary judgment in negligence actions (*Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue of fact or where an issue of fact is even arguable since it deprives a party of his day in court (*Id.*; see also, *Schwartz v Epstein*, 155 AD2d 524, 547 NYS2d 382 [2d Dept 1989]; *Henderson v City of New York*, 178 AD2d 129, 576 NYS2d 562 [1st Dept 1991]). Issue finding rather than issue determination is the key to the procedure (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). Since summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue, or where a material issue of fact is even "arguable," summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307, 338 NYS2d 882 [1982]); *Rotuba v Cepcos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Freeman v Easy Glider Roller Rink Inc.*, 114 AD2d 436, 494 NYS2d 351 [2d Dept

1985]). Furthermore, the proof of the party opposing the motion must be accepted as true and considered in a light most favorable to the opposing party (*Dowsey v Megerian*, 121 AD2d 497, 503 NYS2d 591 [2d Dept 1986]; *Museums at Stony Brook v The Village of Patchogue Fire Department*, 146 AD2d 572, 536 NYS2d 177 [2d Dept 1989]; *Matter of Benincasa v Garrubbo*, 141 AD2d 636, 529 N.Y.S.2d 797 [2d Dept 1988]).

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case, and failure to do so requires denial of the motion, regardless of the insufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Walden Woods Homeowners' Assn. v Friedman*, 36 AD3d 691, 828 NYS2d 188 [2d Dept 2007]; *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2d Dept 2001]; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 132, 504 NYS2d 519 [2d Dept 1986]). Here, the defendant's papers fail to make a prima facie showing of entitlement to summary judgment as a matter of law. Therefore, summary judgment in favor of the defendant is denied.

Amendment of Pleadings

In relevant part, CPLR 3025(b) provides that "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just . . ." The policy of the courts is to liberally permit amendments of pleadings unless the rights of a party are substantially prejudiced thereby (*Mitchell v New York*, 44 AD2d 852, 355 NYS2d 805 [2d Dept 1974]; *Mosley v Baker*, 59 AD2d 936, 399 NYS2d 452 [2d Dept 1977]; *Sheldon Electric Co. v Oriental Boulevard Corp.*, 56 AD2d 886, 392 NYS2d 485 [2d Dept 1977]). Leave to amend should be freely granted absent showing of prejudice or surprise to the opposing party, and the court should not examine the merits or legal sufficiency of a proposed amendment, unless it is clearly or patently insufficient on its face or, at the very least, unless a substantial question is raised as to the sufficiency or meritoriousness of the proposed pleading (see *Fisher v Ken Carter Industries, Inc.*, 127 AD2d 817, 512 NYS2d 408 [2d Dept 1987]). A determination whether to grant such leave is within the trial court's broad discretion, and the exercise of that discretion will not be lightly disturbed (*Greco v Christoffersen*, 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]).

The defendant's proposed Seventh Affirmative Defense alleges that the plaintiffs' action is barred by reason of plaintiff's execution of a release in favor plaintiff's SUM insurer, New York Central. CPLR 3211(a)(5) authorizes a party to seek dismissal of 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" (emphasis added). It is undisputed that plaintiff received \$175,000 in settlement of his personal injury action, and that, after assigning his litigation rights to New York Central, he executed a May 20, 2013 General Release after he settled his SUM Claim with New York Central. Accordingly, defendant's proposed Seventh Affirmative Defense is not clearly or patently insufficient on its face and plaintiff will not be substantially prejudiced by permitting defendant to amend his answer to include the proposed Seventh Affirmative Defense.

Defendant also seeks leave to amend his answer to include an Eighth Affirmative Defense alleging that the action is barred by CPLR 3211(a)(5) by reason of settlement and award, as well as a Ninth Affirmative Defense alleging that the action is barred by res judicata and collateral estoppel. In this regard, defendant essentially argues that because plaintiff filed an SUM claim under his SUM policy with New York Central, and because plaintiff settled that claim after he demanded arbitration, the settlement should have res judicata or collateral estoppel effect on the claims made by plaintiffs in this litigation.

The doctrine of res judicata provides that with respect to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action (*Johansen v Gillen Living Trust*, 63 AD3d 1006, 882 NYS2d 202 [2d Dept 2009]; *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 414 NYS2d 308 [1979]; see *Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 863 NYS2d 615 [2008]; *Sandhu v Mercy Med. Ctr.*, 54 AD3d 928, 864 NYS2d 124 [2d Dept 2008]; *Barbieri v Bridge Funding*, 5 AD3d 414, 772 NYS2d 610 [2d Dept 2004]). In New York, res judicata, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action or in privity with a party who was (*Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 863 NYS2d 615 [2008]).

Under the doctrine of collateral estoppel, a party is precluded from relitigating an issue which has been previously decided against him in a prior proceeding where he had a full and fair opportunity to litigate such issue (see *D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 564 NE2d 634, 563 NYS2d 24 [1990]; *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 492 NYS2d 584 [1985]; *Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 298 NYS2d 955 [1969]; *Luscher v Arrua*, 21 AD3d 1005, 801 NYS2d 379 [2d Dept 2005]). 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 (see *Kaufman v Lilly & Co.*, *supra*; *Schwartz v Public Adm'r of County of Bronx*, *supra*; *Petersen v Lysaght, Lysaght & Kramer, P.C.*, 250 AD2d 581, 672 NYS2d 398 [2d Dept 1998]).

Here, contrary to defendant's arguments, plaintiffs' settlement of the arbitration claim did not involve an award or judgment on the merits, nor did it involve litigation that would render this action a successive litigation subject to the doctrines of res judicata or collateral estoppel. In fact, counsel concedes in paragraph 9 of his affirmation, "Clearly, as no arbitration took place, there was no evidence presented and no determination made with respect to the value of the [plaintiff's] injuries." Since there was no judgment or arbitration award on the merits of plaintiff's damages, the doctrines of res judicata and collateral estoppel may not be invoked. Accordingly, the defendant's proposed Eighth and Ninth Affirmative Defenses are devoid of merit on their face. Therefore, the Court, in its discretion, hereby denies defendant's request to amend the answer to include the proposed Eighth and Ninth Affirmative Defenses (see *Greco v Christoffersen*, 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]; *Fisher v Ken Carter Industries, Inc.*, 127 AD2d 817, 512 NYS2d 408 [2d Dept 1987]).

Limitation of Liability

Defendant also asks the Court to limit his liability exposure to \$100,000, essentially because the plaintiff rejected the offer to settle the case against him for the \$100,000 coverage limit of the policy he maintained with Kemper. This request is denied. As with any case, an insured policyholder is indemnified under his or her insurance policy only up to the amount of liability coverage purchased by that insured. Thereafter, the insured is personally liable for any damages in excess of the coverage amount. By purchasing a policy from Kemper with only \$100,000 of single limit indemnity coverage, Mr. Rodgers, in effect, agreed to be personally liable for any causally related damages in excess of that policy limit. Such excess personal liability can not be vitiated merely because Kemper, on behalf of Mr. Rodgers, offered the full policy amount of \$100,000 to settle with plaintiff, who rejected that offer; however, as conceded by the plaintiff, the defendant's maximum liability exposure shall be \$175,000, the total amount paid to plaintiff by his SUM carrier.

This constitutes the Decision and Order of the Court.

Dated: October 8, 2014


PETER H. MAYER, J.S.C.

FINAL DISPOSITION

NON FINAL DISPOSITION