

Vassenelli v City of Syracuse
2015 NY Slip Op 32833(U)
February 26, 2015
Supreme Court, Onondaga County
Docket Number: 2014EF97
Judge: Hugh A. Gilbert
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At a Term of Supreme Court held in
and for the County of Onondaga,
in the City of Watertown, New York.

PRESENT: HONORABLE HUGH A. GILBERT
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

NICHOLAS L. VASSENELLI,

Plaintiff,

MEMORANDUM
DECISION AND ORDER

Index No. 2014EF97
RJI No. 33-14-0960

-vs-

THE CITY OF SYRACUSE, STEPHANIE A. MINER,
in her individual and official capacity as Mayor of The
City of Syracuse, FRANK L. FOWLER, in his individual
and official capacity as Chief of Police for The City
of Syracuse, JUDY CULETON, in her individual capacity
as former Director of the Human Resources Division of
the Syracuse Police Department, MATTHEW DRISCOLL,
in his individual capacity as former Mayor of The City of
Syracuse, GARY MIGUEL, in his individual capacity as
former Chief of Police for The City of Syracuse, SERGEANT
RICHARD PERRIN, in his individual and official capacity,
POMCO GROUP a/k/a POMCO, INC., individually and as
an agent for The City of Syracuse, SHARON MILLER, in
her individual capacity as a former agent of the City of
Syracuse and SHARON ERIKSSON, in her individual
capacity as a former agent of the City of Syracuse,
DAVID BARRETTE, in his individual and official capacity
as a Deputy Chief of the City of Syracuse Police
Department, SERGEANT MICHAEL MOUREY, in his
individual and official capacity as the employee in charge
of the Medical Section of the City of Syracuse Police
Department; PMA MANAGEMENT CORP.; CAROL WAHL;
and JOHN DOE(S) and JANE DOE(S),

Defendants.

Defendants Pomco Group, a/k/a Pomco, Inc., and Sharon Miller moved to dismiss the lawsuit against them which was commenced on February 2, 2014. An Amended Complaint was filed on August 18, 2014. They refer to a November 24, 2010 action commenced by Plaintiff in the United States District Court for the Northern District of New York with the most recent amendment thereof September 29, 2011. These Defendants outline in extensive detail the role of POMCO with respect to the plan of the City of Syracuse to pay claims on behalf of its former police officer for an injury pursuant to General Municipal Law §207-c. That statute is entitled "Payment of Salary, Wages, Medical and Hospital Expenses of Policemen with Injuries or Illness Incurred in the Performance of Duties".

This Court concurs that Plaintiff claims that his right to benefits under this Section 207-c have been impaired or deprived by a vast conspiracy between all Defendants. This Court recognizes that Section 207-c is intended to compensate specified municipal employees for injuries incurred in the performance of special work related to the nature of heightened risks and duties, in contrast to the more generalized and comprehensive protections provided by the Workers' Compensation Law. It is a remedial statute to be liberally construed in favor of the injured employees. **White vs. County of Cortland**, 97 NY2d 336, 339 (2002). The Plaintiff complained that although he qualified under the statute he is not receiving the appropriate financial benefits thereunder.

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Defendants generally assert that the Plaintiff's claims are barred by the doctrines of res judicata and/or collateral estoppel and that the Amended Complaint fails to state a cause of action. Defendants also seek dismissal pursuant to CPLR §3211(a)(4) because the Federal Court action is still pending.

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We do not disagree with Defendant that the doctrine of res judicata bars future litigation between the same parties on the same cause of action where there is a final judgment. *Hodes vs. Axelrod*, 70 NY2d 364 (1987). Here, however, the Federal Court declined to exercise jurisdiction over the State law claims and dismissed them without prejudice. Since the Federal Court did not make determination as to the merits of Plaintiff's pendent State Law causes of action, they are not barred by the doctrine of res judicata and may be asserted in this action. *Van Hof vs. Town of Warwick*, 249 AD2d 382 (1998); *Stylianou vs. Incorporated Village of Old Field*, 23 AD3d 454 (2005). "When it is made clear that the Federal dismissal does not include the State Court cause of action, res judicata does not apply." *Travelers Indemnity vs. Sarkisian*, 139 AD2d 27, 30 (1988) (citation omitted).

As to collateral estoppel, there must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and second, there must have been a full and fair opportunity to contest the

Decision now said to be controlling. **Vincent vs. Thompson**, 50 AD2d 211, 217 (1975). Although it is evident that a number of issues now raised herein were decided in the Federal Court action, nevertheless, we cannot conclude that Plaintiff's entire Complaint must be dismissed upon the claim that he is collaterally estopped from raising all issues in this action. Such a finding is fact specific with regard to each cause of action and is not sufficiently addressed for the Court to make an all inclusive ruling. We find that it is sufficiently addressed with regard to the eighth through the twelfth causes of action. We will therefore address Defendants' motion to dismiss for failure to state a cause of action by reviewing each cause of action separately.

The first two causes of action assume some contractual relationship between the parties. A contract is an agreement upon sufficient consideration to do, or not to do, a particular thing and involves an expression of intention that the promisor will conduct himself in a specified way or bring about a specified result in the future. **Elias vs. Serota**, 103 AD2d 410, 414-415 (1984). A lay person's understanding of estoppel could be that of a legal bar to alleging or denying a fact of one's own previous actions or words to the contrary. The first cause of action for promissory and/or equitable estoppel relates to providing Plaintiff with Section 207(c) benefits. The administrative duties provided by these Defendants are based upon a contractual relationship with the City of Syracuse and not with Plaintiff.

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There can be no promissory estoppel or breach of contract. Similarly, for equitable estoppel, there is absent the requisite misrepresentation by these Defendants upon which Plaintiff justifiably relied. **Greene vs. Abbott Laboratories**, 148 AD2d 403, 405 (1989).

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In the third and fourth causes of action, the Plaintiff asserts the tort of negligence. It is generally accepted that negligence is a lack of ordinary care. **Castillo vs. Carver Federal Sav. & Loan Assn.**, 125 AD2d 287, 288 (1986). Negligence is a failure to exercise that degree of care which a reasonably prudent person would have exercised under the same circumstances. **Rotz vs. City of New York**, 143 AD2d 301, 304-305 (1988). To establish a prima facie case of negligence, a Plaintiff must demonstrate (1) that the Defendant owed him a duty of reasonable care, (2) a breach of that duty, and (3) a resulting injury proximately caused by the breach. **Siegel vs. Hofstra University**, 154 AD2d 449, 450 (1989).
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This Court cannot discern any duty owed by these Defendants to Plaintiff by reason of their contract with the City of Syracuse.

Any suggested exceptions which permit the disregard of this contractual relationship and creation of a third-party negligence action fall far short of judicial guidelines. Before liability can be imposed on a Defendant for his or her conduct, it must be demonstrated that the Defendant owes a duty of care to the

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Plaintiff and that there was a breach of that duty. ***Blye vs. Manhattan and Bronx Surface Tr.***, 124 AD2d 106, 108 (1987), appeal dismissed 70 NY2d 742 (1987).

Policy reasons dictate against extending the tort liability of contractors to a third party. ***Andreaccio vs. Unique Parking Corp.***, 158 AD2d 222, 228 (1989). There

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are no facts as alleged by Plaintiff which would demonstrate the existence of a relationship between the parties sufficiently approaching privity to support these causes of action. ***Credit Alliance Corporation vs. Arthur Anderson & Co.***, 63 NY2d 536, 553 (1985). This is not a claim of a negligently prepared report upon which Plaintiff relied. ***Ossining Union Free School District vs. Anderson LaRocca Anderson***, 73 NY2d 417, 425 (1989). Nor is this an instance where Defendants launched a force or instrument of harm, and the Plaintiff detrimentally relied on the continued performance of the contracting party's duties and where the contracting party has entirely displaced the other party's duty to man the premises safety. ***Espinal vs. Melville Snow Contractors, Inc.***, 98 NY2d 136, 140 (2002).

The fifth cause of action is based upon general, not specific, assertions of fraud involving submission of, "for example", erroneous documents to third-party medical providers, thereby deceiving these medical providers.

Defendants note that there is no representation asserted to have been made to Plaintiff. The essential elements of a cause of action to recover damages for common law fraud are that the Defendant knowingly uttered a falsehood intending

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to deprive the Plaintiff of a benefit and that Plaintiff was thereby deceived and damaged. **Zeid vs. Kaldawi**, 147 AD2d 636, 638 (1989). There is no statement by one of these Defendants to Plaintiff upon which he relied. **Mergler vs. Crystal Properties Associates, Ltd**, 179 AD2d 177, 182 (1992). In order to plead a prima facie cause of action of fraud, a Plaintiff must allege each of the elements of fraud with particularity and must support each element with an allegation of fact. **Fink vs. Citizens Mortgage Banking Ltd**, 148 AD2d 578 (1989). Absent reliance by Plaintiff upon a representation by a Defendant, there is no actionable fraud. **Bernstein vs. Clermont Co.**, 166 AD2d 247, 248 (1990). We find that this cause of action must be dismissed.

The sixth cause of action is not applicable to the facts pled. Plaintiff is a retired, disabled police officer of the City of Syracuse receiving financial and medical benefits from or through that municipality. Defendants are independent contractors retained by the City to provide certain services to the City. General Business Law §349 is available to a Plaintiff who alleges deceptive acts or practice directed toward consumers. **Blue Cross vs. Philip Morris**, 3 NY3d 200, 205-206 (2004). This Court respectfully disagrees that Plaintiff and other police officers are consumers of Defendants. To constitute a violation of General Business Law §349 the alleged conduct must satisfy a threshold requirement that is consumer oriented in that Defendant's acts or practices have a broad impact on consumers at large.

Canario vs. Gunn and Prudential Long Island Realty, 300 AD2d 332, 333 (2002). The statute is not available for a private contract dispute, but is for the conduct that affects consumers at large. *Security Mutual Life Insurance Company vs. DiPasquale*, 283 AD2d 182 (2001). As to General Business Law §350, we note the absence of any allegation of advertising.

With respect to the seventh cause of action, these Defendants point out to this Court that the tort of intentional infliction of emotional distress has four elements: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress, (3) a causal connection between the conduct and injury; and (4) severe emotional distress. *Howell vs. New York Post Co.*, 81 NY2d 115, 121 (1993). Liability is predicated on the basis of extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society. *Freihofer vs. Hearst Corporation*, 65 NY2d 135, 143 (1985). This Complaint, even when supplemented by discovery and opposition papers to this motion, does not describe any conduct remotely approaching the standard of behavior necessary to establish such a claim, to be so extreme and outrageous as to exceed all bounds of decency or to be utterly intolerable in civilized society. *Burlew v.s. American Mutual Insurance Company*, 63 NY2d 412, 417 (1984).

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With respect to negligent infliction of emotional distress, we have previously touched upon the necessity that there be a breach by a Defendant of a duty of due care owed the Plaintiff. **Lynch vs. Bay Ridge Obstetrical & Gynecological Assoc.**, 134 AD2d 240, 243 (1987). We have denied such a duty exists herein, and further state that this is not a “zone of danger” factual pattern, **Bovsun vs. Sanperi**, 61 NY2d 219, 228-229 (1984), nor any semblance of the transmission of false information directly to Plaintiff. **Sceusa vs. Mastor**, 135 AD2d 117, 120-21 (1988), nor a traumatic event that caused the Plaintiff to fear for his own safety, **Ford vs. Village Imports, Ltd**, 92 AD2d 717, 718 (1983).

The eighth cause of action asserts that the lawsuit filed in the United States District Court involved, among other laws, the Americans with Disabilities Act. Plaintiff further asserts that this lawsuit was aggressively litigated, a statement with which this Court concurs and was part of the reason for applying collateral estoppel herein. Plaintiff further asserts that Defendants have subjected Plaintiff to retaliation for instituting and litigating that Federal lawsuit, thus violating the anti-retaliation provisions of the Americans with Disabilities Act. These Defendants present sound defenses with regard to any such claims requiring Plaintiff’s employment. With regard to the availability of any non-employment claims, these Defendants cite Judge Hurd’s consideration thereof as collateral estoppel, administrative filing requirements prior to instituting any lawsuit, and a lack of

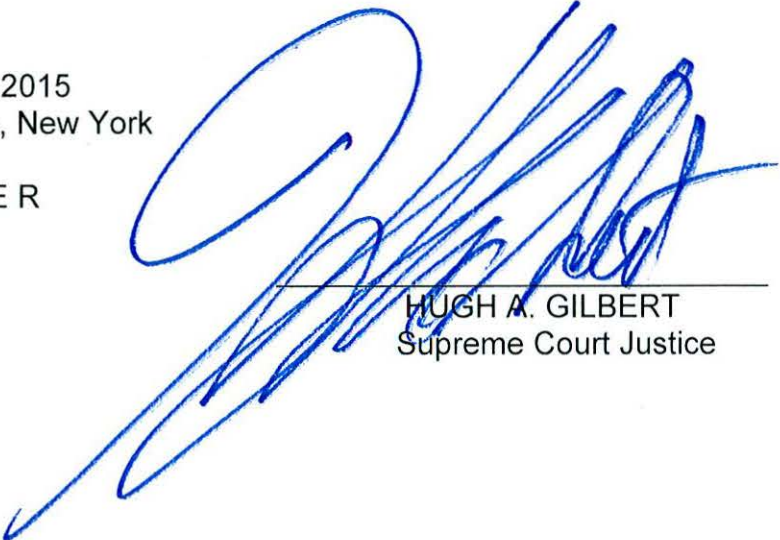
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demonstration of what Plaintiff might have been qualified to do. This Court finds these arguments persuasive. The remaining causes of action appear to have been thoroughly discussed and ruled upon in the Federal action so as to satisfy the collateral estoppel requirements as well of being identical issues decided against Plaintiff in that prior proceeding where he had a full and fair opportunity to litigate each such point. **Kaufman vs. Eli Lilly & Co.**, 65 NY2d 449, 455-456 (1985).

THEREFORE, it is

ORDERED, ADJUDGED AND DECREED that the motion by Defendants Pomco Group, a/k/a Pomco, Inc., and Sharon Miller to dismiss the Amended Complaint is granted.

Dated: February 26, 2015
at Watertown, New York

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HUGH A. GILBERT
Supreme Court Justice