

**Costidis v E.L.M. Gen. Constr. Corp.**

2016 NY Slip Op 30236(U)

January 29, 2016

Supreme Court, Queens County

Docket Number: 704816/14

Judge: Allan B. Weiss

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2  
Justice

ANTHONY COSTIDIS,

Plaintiff,

-against-

Index No: 704816/14

Motion Date: 10/8/15

Motion Seq. No.: 3

E.L.M. GENERAL CONSTRUCTION CORP.  
d/b/a KELLY'S CREW, HOK GROUP INC.,  
POPULOUS ARCHITECTS PC f/k/a HOK  
SPORTS FACILITIES ARCHITECTS PC,  
POPULOUS GROUP, LLC, f/k/a  
HOKSPORTS FACILITIES GROUP INC.,  
and INTERCOUNTY PAVING ASSOCIATES  
LLC, a/k/a INTERCOUNTY PAVING  
ASSOCIATES OF NY, a/k/a INTERCOUNTY  
PAVING CO., INC.,

Motion Date: 10/30/15

Motion Seq. No.: 4

Defendants.

HOK GROUP INC., POPULOUS ARCHITECTS PC  
f/k/a HOK SPORTS FACILITIES ARCHITECTS PC,  
and POPULOUS GROUP, LLC, f/k/a  
HOK SPORTS FACILITIES GROUP INC.,

Third-party Plaintiffs,

-against-

JACK L. GORDON ARCHITECTS, P.C.,

Third-party Defendant.

**FILED**  
FEB - 7 2016  
COUNTY CLERK  
QUEENS COUNTY

Motions Seq.#3 and Seq.#4 are combined for disposition.

The following numbered papers read on the Motion Seq.#3 by defendants, INTERCOUNTY PAVING ASSOCIATES LLC, a/k/a INTERCOUNTY PAVING ASSOCIATES OF NY, a/k/a INTERCOUNTY PAVING CO., INC. (Intercounty), for leave to amended answer to assert res judicata and collateral estoppel as affirmative defenses and deeming the amended answer served on all parties, and upon granting the amendment, dismissing the complaint and all cross-claims asserted against the movants pursuant to CPLR 3211(a)(5); Cross-Motion by defendants/third party plaintiffs HOK GROUP INC., POPULOUS ARCHITECTS PC f/k/a HOK SPORTS FACILITIES ARCHITECTS PC, and POPULOUS GROUP, LLC, f/k/a HOK SPORTS FACILITIES GROUP INC. (HOK Group), for leave to amended answer to assert the affirmative defense of collateral estoppel, and upon granting the motion, for summary judgment dismissing the complaint and all cross-claims asserted against the movants; and Motion Seq.#4 by defendants, E.L.M. GENERAL CONSTRUCTION CORP., d/b/a KELLY'S CREW, for an Order dismissing the complaint and all crossclaims asserted against it pursuant to CPLR 3211(a)(5)

PAPERS  
e-FILE NUMBERED

Seq.#3 Notice of Motion-Affidavits-Exhibits .....	76	-	88
Notice of Cross-Motion-Affidavits-Exhibits.....	89	-	101
Answering Affidavits-Exhibits.....	104	-	106
Replying Affidavits.....	125	-	127
 Seq.#3 Notice of Motion-Affidavits-Exhibits .....	 108	 -	 123
Answering Affidavits-Exhibits.....	128	-	130
Replying Affidavits.....	131		

Upon the foregoing papers it is ordered that this motion and cross-motion are determined as follows:

The branch of the motion and cross-motion for leave to amend the defendants' respective answers to assert res judicata and collateral estoppel as affirmative defense is granted without opposition.

This is an action to recover for personal injuries plaintiff allegedly sustained on July 15, 2011 as plaintiff was walking from the parking lot to the entrance of Citifield Stadium. Plaintiff alleged that as he was walking on the walkway leading to the stadium he fell when he stepped off the edge of the walkway into the dirt bed located along the side of the walkway.

On September 12, 2012 the plaintiff commenced an action

(first action) Index No. 701929/12 against the City of New York, New York City Parks Department, Queens Ballpark Company LLC and Sterling Mets, LP to recover for personal injuries sustained as a result of an alleged dangerous and defective condition based upon allegations of negligent design, construction and maintenance of the walkway.

On July 10, 2014, the plaintiff commenced the instant action to recover for the personal injuries allegedly sustained in the same accident caused by the same alleged defective or dangerous condition as that alleged in the first action also based upon allegations of negligent design, construction and maintenance of the walkway.

The defendants in the first action moved for summary judgment as to liability dismissing the complaint. The motion was granted by Order dated April 13, 2015 and the action was dismissed finding that no defective condition existed and that the alleged condition was open and obvious, trivial in nature and did not constitute a trap or a nuisance.

The defendants now separately move to dismiss the complaint asserting that the plaintiff is barred from relitigating the issue of liability by the doctrines of res judicata and collateral estoppel.

The doctrine of res judicata, or claim preclusion, bars relitigation between the same parties, or those in privity with them, of causes of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding (Harris v City of New York, 121 AD3d 852, 854 [2014] quoting Abraham v Hermitage Ins. Co., 47 AD3d 855, 855 [2008]). The doctrine of res judicata does not bar the instant action inasmuch as the defendants in this action were not parties in the first action (see Farren v Lisogorsky, 87 AD3d 713, 714 [201]; Seaman v Fichet-Bauché N. Am., 176 AD2d 793, 794 [1991]).

The doctrine of collateral estoppel, or issue preclusion, "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (Curley v. Bon Aire Properties, Inc., 124 AD3d 820, 821-822 [2015] quoting Ryan v New York Tel. Co., 62 NY2d 494, 500 [1984]). The party seeking the benefit of collateral estoppel has the burden of establishing that the identical issue was necessarily decided in the prior action, that it is decisive in the present

action and that the party to be precluded from relitigating that issue had a full and fair opportunity to contest the prior determination (see D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659, 664-65 [1990]; Curley v Bon Aire Properties, Inc., supra). The party opposing application of the collateral estoppel has the burden to establish the absence of a full and fair opportunity to litigate (see Kaufman v Lilly & Co., 65 NY2d 449, 455 [1985]).

The defendants have sustained their burden of demonstrating that this action is barred by collateral estoppel.

In opposition, plaintiff contends that the motion is premature as the prior Order is not a final determination of the issue of whether a defective condition existed, thus this action should be stayed rather than dismissed.

The general rule in this state is that a pending appeal of a prior determination does not prevent the use of that prior determination to collaterally estop a party in a second action (see Matter of Amica Mut. Ins. Co., 85 AD2d 727, 728 [1981]). However, where there is "substantial doubt" that the underlying determination would be affirmed on appeal, a stay of the action sought to be dismissed might be a better course of action (see Matter of Amica Mut. Ins. Co., at 727). The plaintiff made no showing at all that affirmance of the prior order is unlikely.

Accordingly the motions Seq.#3 and #4 and the cross-motion are granted and the complaint and all cross-claims are dismissed.

Dated: January 29, 2016  
D# 53

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J.S.C.

**FILED**  
FEB - 1 2016  
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QUEENS COUNTY