

Beyn v Scotto, LLC

2016 NY Slip Op 30282(U)

February 10, 2016

Supreme Court, Suffolk County

Docket Number: 12049/2014

Judge: Joseph A. Santorelli

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 7-9-15 (#02), 1-5-16(#03),
1-5-16 (#04) & 1-4-16 (#05)
SUBMIT DATE 1-28-16
Mot. Seq. # 02 - MG
X-Mot. Seq. # 03 - MD
X-Mot. Seq. # 04 - MG
Mot. Seq. # 05 - MG

COPY

-----X
EDWARD BEYN,

Plaintiff,

-against-

SCOTTO, LLC d/b/a RARE 650, and
JUSTIN LASALLA,

Defendants.

-----X

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Upon the following papers numbered 1 to 45 read on this motion for summary judgment and to amend answer; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7 (#02) & 34 - 45 (#05); Notice of Cross Motion and supporting papers 8 - 15 (#03) & 16 - 22 (#04); Answering Affidavits and supporting papers 23 - 27 (#03) & 28 - 33 (#04); Replying Affidavits and supporting papers ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

The plaintiff, Edward Beyn, in motion delineated as motion #02, moves for an order pursuant to CPLR 3212 granting partial summary judgment on the issue of liability against defendant Justin LaSalla. Defendant, Justin LaSalla, in motion delineated as motion #03, cross moves for an order denying the plaintiff's motion and directing the plaintiff to appear for a deposition. LaSalla also opposes the plaintiff's application in all respects, arguing that discovery has not been completed and that issues of fact exist which necessitate a trial. Defendant, Scotto, LLC d/b/a Rare 650, hereinafter referred to as "Scotto", in motion delineated as motion #04, cross moves for an order pursuant to CPLR 3212 granting summary judgment on the cross-claims for common law negligence against defendant Justin LaSalla. Defendant Scotto, in motion delineated as motion #05, moves for an order pursuant to CPLR 3025(b) for leave to amend its answer to add the affirmative defense of statute of limitations. Neither the plaintiff or defendant Justin LaSalla opposed the motion delineated as motion #05.

Motions for Summary Judgment

The proponent of a summary judgment motion 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

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from the case (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must “show facts sufficient to require a trial of any issue of fact” CPLR3212 [b]; *Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer*, *supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

In support of motion #02, plaintiff has submitted, inter alia, an attorney's affirmation; copies of the summons and verified complaint; copies of the verified answer of Justin LaSalla; copies of the verified answer with demands of Scotto; and copies of the certified minutes of the District Court proceeding entitled the *People of the State of New York v. Justin LaSalle* dated February 18, 2014. In opposition to motion #02 and support of cross motion #03, defendant Justin LaSalla has submitted, inter alia, an attorney's affirmation; an affidavit of Justin LaSalla; and copies of an email dated July 2, 2015. In support of plaintiff's motion #02 and support of cross motion #04, defendant Scotto has submitted, inter alia, an attorney's affirmation; copies of the verified answer with demands of Scotto; copies of the verified answer of Justin LaSalla; and copies of the certified minutes of the District Court proceeding entitled the *People of the State of New York v. Justin LaSalle* dated February 18, 2014. In opposition to cross motion #03 and further support of motion #02, plaintiff has submitted, inter alia, an attorney's affirmation; and copies of the certified minutes of the District Court proceeding entitled the *People of the State of New York v. Justin LaSalle* dated February 18, 2014. In opposition to cross motion #04 and in further support of cross motion #03, defendant Justin LaSalla has submitted, inter alia, an attorney's affirmation; and an affidavit of Justin LaSalla.

The plaintiff commenced this action against Justin LaSalla and Scotto to recover money damages for physical injuries suffered by the plaintiff and caused by defendant Justin LaSalla while at the restaurant owned and operated by defendant Scotto. The plaintiff contends that on March 7, 2013 while

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at the restaurant located at 650 Jericho turnpike, Syosset, New York, which is owned and operated by defendant Scotto, defendant Justin LaSalla assaulted the plaintiff. The plaintiff further contends that on March 24, 2013, defendant Justin LaSalla was arrested and charged with Penal Law Section 120.00, Assault in the Third Degree, a class A misdemeanor, under docket number 2013NA006612, related to the aforementioned incident. The plaintiff contends that on February 18, 2014, defendant Justin LaSalla pled guilty to the charge of Assault in the Third Degree under docket number 2013NA006612. At the time of defendant Justin LaSalla's plea and while under oath he testified that he struck the plaintiff, Edward Beyn, with the intent to cause physical injury and that he did in fact cause physical injury to the plaintiff. Plaintiff now moves for summary judgment on the issue of liability. Defendant Justin LaSalla opposes that application and argues that discovery has not been completed and that there are issues of material fact that require a trial. Defendant Justin LaSalla alleges in both his answer and in opposition that "any allegation against me for assault was in fact an act of self-defense based upon the conduct and misconduct of Plaintiff." Defendant Scotto also cross moves for summary judgment on its cross claims for common law negligence against defendant Justin LaSalla. The Court notes that defendant Justin LaSalla did not mention any allegation of self defense during his plea allocution on February 18, 2014.

The Court in *Morrow v Gallagher*, 113 AD3d 827, 828 [2nd Dept 2014], held that

Where a criminal conviction is based upon facts identical to those in issue in a related civil action, the plaintiff in the civil action can successfully invoke the doctrine of collateral estoppel to bar the convicted defendant from litigating the issue of his liability" (*McDonald v McDonald*, 193 AD2d 590, 590, 597 NYS2d 159 [1993]; see *D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664, 564 NE2d 634, 563 NYS2d 24 [1990]; *Maiello v Kirchner*, 98 AD3d 481, 482, 949 NYS2d 200 [2012]; *Blaich v Van Herwynen*, 37 AD3d 387, 388, 829 NYS2d 639 [2007]; *Lili B. v Henry F.*, 235 AD2d 512, 653 NYS2d 34 [1997]). The doctrine applies whether the conviction resulted from a plea or a trial (see *D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d at 664; *City of New York v College Point Sports Assn., Inc.*, 61 AD3d 33, 42, 876 NYS2d 409 [2009]). "The party seeking the benefit of collateral estoppel bears the burden of proving that the identical issue was necessarily decided in the prior proceeding, and is decisive of the present action" (*City of New York v College Point Sports Assn., Inc.*, 61 AD3d at 42; see *Buechel v Bain*, 97 NY2d 295, 304, 766 NE2d 914, 740 NYS2d 252 [2001], cert denied 535 US 1096, 122 S Ct 2293, 152 L Ed 2d 1051 [2002]; *D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d at 664; *Maiello v Kirchner*, 98 AD3d at 482; *Zannelli v Walker*, 27 AD3d 460, 461, 811 NYS2d 420 [2006]).

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The Court further held that “[t]he party against whom preclusion is sought bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination’ (*City of New York v College Point Sports Assn., Inc.*, 61 AD3d at 42; see *Buechel v Bain*, 97 NY2d at 304).” (*Morrow v Gallagher*, *supra* at 828-829). Additionally, the Court held that “the proof submitted by the plaintiffs in support of their motion for summary judgment, which included the transcript of the related criminal action, was sufficient to satisfy their prima facie burden of entitlement to judgment as a matter of law on the issue of liability with regard to the claims of assault”. (*Id.* at 829).

The Court in *Osborne v Rossrock Fund II, L.P.*, 82 AD3d 727, 727-728 [2nd Dept 2011], held that

Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties or those in privity with them of a cause 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” (*Goldstein v Massachusetts Mut. Life Ins. Co.*, 32 AD3d 821, 821, 820 NYS2d 852 [2006]; see *Matter of Hunter*, 4 NY3d 260, 269, 827 NE2d 269, 794 NYS2d 286 [2005]).

The Court in *Nachum v Ezagui*, 83 AD3d 1017, 1018-1019 [2nd Dept 2011], outlined the doctrine of collateral estoppel and stated that

“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 [or she] had a full and fair opportunity to litigate such issue” (*Luscher v Arrua*, 21 AD3d 1005, 1007, 801 NYS2d 379 [2005]; see *Westchester County Correction Officers Benevolent Assn., Inc. v County of Westchester*, 65 AD3d 1226, 1227, 885 NYS2d 728 [2009]; *Franklin Dev. Co., Inc. v Atlantic Mut. Ins. Co.*, 60 A.D.3d 897, 899, 876 NYS2d 103 [2009]). “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 AD3d at 1007; see *Buechel v Bain*, 97 NY2d 295, 303-304, 766 NE2d 914, 740 NYS2d 252 [2001], cert denied 535 US 1096, 122 S Ct 2293, 152 L Ed 2d 1051 [2002]; *Westchester County Correction Officers Benevolent Assn., Inc. v County of Westchester*, 65 AD3d at 1227; *Franklin Dev. Co., Inc. v Atlantic Mut. Ins. Co.*, 60 AD3d at 899). The party seeking to invoke the doctrine of collateral estoppel “bears

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the burden of establishing that the identical issue was necessarily decided in the prior action, and 'the party to be estopped bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination'" (*Leung v Suffolk Plate Glass Co., Inc.*, 78 AD3d 663, 663-664, 911 NYS2d 376 [2010], quoting *Mahler v Campagna*, 60 AD3d 1009, 1011, 876 NYS2d 143 [2009]).

Here, the evidence submitted by plaintiff and defendant Scotto demonstrated, prima facie, that the identical issues raised by plaintiff in this action, related to his assault by defendant Justin LaSalla, and were plainly within the scope of the criminal action entitled *People of the State of New York v. Justin LaSalle* under Nassau County District Court docket number 2013NA006612, where defendant Justin LaSalla plead guilty to the charge of Assault in the Third Degree on February 18, 2014. Defendant Justin LaSalla can not now raise a defense, (i.e. justification), that he did not raise in the criminal action. Defendant Justin LaSalla has failed to submit any evidence sufficient to raise a triable issue of fact that he lacked a full and fair opportunity to litigate the issues raised in the complaint.

Accordingly, the plaintiff's motion, delineated as motion #02, for an order granting summary judgment on the issue of liability is granted in all respects; and it is further

ORDERED that defendant Justin LaSalla's cross motion, delineated as motion #03, for an order denying the plaintiff's motion is denied; and it is further

ORDERED that defendant Scotto's cross motion, delineated as motion #04, for an order granting summary judgment on the cross claim for common law negligence is similarly granted; and it is further

ORDERED that the attorneys for the parties shall proceed to discovery on the issue of damages; and it is further

ORDERED that upon the completion of discovery and the filing of a Note of Issue, this action shall proceed to trial on the issue of damages.

Motion to Amend Answer

Leave to amend pleadings "shall be freely given," absent prejudice or surprise resulting directly from the delay (CPLR 3025[b]; *McCasky, Davies and Associates, Inc. v New York City Health & Hospitals Corp.*, 59 NY2d 755, 450 NE2d 240, 463 NYS2d 434 [1983]). Thus, a motion to serve an amended pleading should be granted unless the party opposing the motion demonstrates substantial prejudice resulting directly from the delay (see *Cutwright v Central Brooklyn Urban Dev. Corp.*, 127 AD2d 731, 512 NYS2d 128 [2d Dept 1987]; *Scarangelo v State*, 111 AD2d 798, 490 NYS2d 781 [2d Dept 1985]). Mere lateness is not a barrier to an amendment, and significant prejudice must be demonstrated to justify the denial of an application for an amendment (see, *Hilltop Nyack Corp. v TRMI*

Holdings, Inc., 275 A.D.2d 440, 712 NYS2d 888 [2d Dept 2000]; citing *Edenwald Contr. Co. v City of New York*, 60 NY2d 957; *O'Neal v Cohen*, 186 AD2d 639, 640). Here, the plaintiff failed to demonstrate prejudice or surprise as a result of the proposed amendment (see, *Hilltop Nyack Corp. v TRMI Holdings, Inc.*, *supra*; citing *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755). Moreover, the proposed affirmative defense is neither devoid of merit nor palpably insufficient as a matter of law (see, *Hilltop Nyack Corp. v TRMI Holdings, Inc.*, *supra*; citing *Bomar v Lane*, 265 AD2d 519). In this case, there is no evidence that the trial of this action will be delayed by the amendment, and the granting of the motion would not unduly prejudice the plaintiff or defendant Justin LaSalla (see *Caceras v Zorbas*, 74 NY2d 884, 547 NYS2d 834, 547 NE2d 89 [1989]; *Clarke v Americana House, Inc.*, 186 AD2d 530, 588 NYS2d 794 [2d Dept 1992]).

This motion by defendant Scotto, delineated as motion #05, for an order pursuant to CPLR 3025(b) granting leave to amend the verified answer to include the affirmative defense of statute of limitations is granted without opposition; and it is further

ORDERED that defendant Scotto's amended verified answer is hereby deemed filed and served upon plaintiff, and defendant Justin LaSalla.

Defendant Scotto is hereby directed to serve by regular mail a copy of this order upon the plaintiff and defendant Justin LaSalla as well as upon the Calendar Clerk of this Court within twenty days from the date of this order.

The foregoing constitutes the decision and Order of this Court.



HON. JOSEPH A. SANTORELLI
J.S.C.

Dated: February 10, 2016

___ FINAL DISPOSITION X NON-FINAL DISPOSITION