Neilson v Pagan
2016 NY Slip Op 30931(U)
April 18, 2016
Supreme Court, New York County
Docket Number: 652601/15
Judge: Donna M. Mills

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

----------X

WILLIAM H. NEILSON,

Plaintiff,

-against- Index No. 652601/15

WILLIAM PAGAN, Motion Seq. No. 001

Defendant.

----------X

DONNA M. MILLS, J.:

In this action for fraud arising out of a personal injury action, defendant William Pagan (Pagan) moves, pursuant to CPLR 3211, to dismiss the complaint for failure to state a cause of action, and based upon the doctrines of res judicata and collateral estoppel.

Background and Procedural History

Plaintiff William H. Neilson (Neilson) commenced this action on July 24, 2015, asserting one cause of action for fraud against Pagan arising out of a personal injury action filed by Pagan against Neilson, captioned *Pagan v Neilson*, Sup Ct, Kings County, index No. 6517/13 (hereinafter, the personal injury action).

The following facts are taken from the complaint. On March 25, 2013, Pagan was operating an electric motorized bike without any registration or license plates in the vicinity of the intersection of Fourth Avenue and 24th Street in Brooklyn (verified complaint, ¶¶ 7, 8). According to the complaint, Pagan intentionally, knowingly, and deliberately drove his bike into the passenger side of the automobile owned by Neilson (*id.*, ¶ 10).

On April 10, 2013, Pagan filed the personal injury action against Neilson, seeking damages for personal injuries, pain and suffering, and property loss as a result of Neilson's

negligence, carelessness, and reckless conduct in the operation of his motor vehicle (*id.*, ¶¶ 11-14). On December 29, 2014, Pagan agreed to settle the personal injury action for a lump sum payment of $265,000, paid by Neilson's insurer, Chubb Indemnity Insurance Company (Chubb) (*id.*, ¶¶ 15-16).

Neilson alleges that the complaint in the personal injury action contained the following misrepresentations of material fact: (1) "[o]n March 24, 2013, plaintiff, William Pagan, was lawfully riding a bicycle on Fourth Avenue in the vicinity of its intersection with 24th Street, Brooklyn, County of Kings, City and State of New York" (*id.*, ¶ 17); (2) "[o]n March 25, 2013, the motor vehicle owned and operated by the defendant, William H. Neilson[,] did violently strike the plaintiff, causing serious personal injury" (*id.*, ¶ 18); (3) "Defendant [Neilson] was negligent, reckless and careless in the operation, maintenance and control of said motor vehicle . . ." (*id.*, ¶ 20); and (4) "[s]olely as a result of the defendant's negligence, plaintiff, William Pagan, was caused to suffer severe and serious personal injuries to mind and body, and further the plaintiff was subject to great physical pain and mental anguish. Solely as a result of the defendant's negligence, plaintiff sustained a property loss" (*id.*, ¶ 22). Neilson alleges, contrary to these allegations, that Pagan intentionally drove his bike into the passenger side of Neilson's vehicle; Pagan did not have a valid driver's license, insurance or registration for his bike; Pagan was not wearing a helmet and was not traveling in a designated bike lane at the time of the accident; and Pagan was not in significant pain after the accident and the bike was not significantly damaged as a result of the accident (*id.*, ¶¶ 17, 18, 20, 22).

Additionally, Neilson alleges that Pagan made the following misrepresentations of material fact at his deposition in the personal injury action on February 21, 2014: (1) Pagan

testified that his bike was "wrecked" and "totaled" (*id.*, ¶ 23); (2) he admitted that he had been convicted of assault but could not recall any other convictions (*id.*, ¶ 24); (3) he "[t]umbled in the air a good five, or ten feet, and landed on [his] back. On [his] shoulder" (*id.*, ¶ 25); (4) the EMS workers "cut all of [his] clothes. [He] was naked in the street" (*id.*, ¶ 26); and (5) he "thought [he] was paralyzed" (*id.*, ¶ 27). Neilson claims that, as a result of Pagan's fraud, he has incurred increased insurance premiums, legal fees in defending the personal injury action, legal fees in prosecuting the instant action, and property damage to his automobile, and requests a money judgment in the amount of $50,000 against Pagan (*id.*, ¶¶ 29, 30, 31, wherefore clause).

Arguments

Pagan now moves to dismiss the complaint, arguing that the complaint fails to state a cause of action for fraud. Pagan contends that Neilson cites a series of allegations in the complaint in the personal injury action, but does not allege any of the elements of fraud, much less in sufficient detail. According to Pagan, Neilson simply seeks to relitigate the car accident case which has been settled. In addition, Pagan asserts that Neilson has suffered no injury caused by Pagan.

In addition, Pagan contends that the instant action is barred under the doctrines of res judicata and collateral estoppel, relying on a stipulation of discontinuance with prejudice in the personal injury action.[1] Pagan maintains that, as a matter of policy, allowing a defendant to relitigate the same issues would have a chilling effect on settlements.

In opposition to Pagan's motion, Neilson served and filed an amended verified

---

[1]The stipulation of discontinuance provides that "the above-entitled action . . . is discontinued with regards to defendant WILLIAM NELSON [sic] with prejudice" (Villar affirmation in support, exhibit C).

complaint,[2] and argues that he has adequately stated a cause of action for fraud against Pagan. Additionally, Neilson contends that this action should not be barred under the res judicata and collateral estoppel doctrines. As support, Neilson submits an affidavit, indicating that the attorney assigned to represent him by Chubb did not advise him that the case was going to be settled for $265,000, that he wanted the case to be decided through a verdict because he was not negligent, and that he never advised his attorney from Chubb to settle the case (Neilson aff, ¶¶ 9-11).[3] Neilson also contends that the issue of Pagan's fraud was not decided against him. Neilson also provides a copy of a general release dated December 29, 2014, which provides as follows:

> "WILLIAM PAGAN as RELEASOR, in consideration of the sum of Two Hundred Sixty Five Thousand Dollars ($265,000) received from CHUBB INDEMNITY INSURANCE COMPANY on behalf of William H. Neilson (hereinafter 'RELEASEES'), [releases and discharges] RELEASEES' heirs, executors, administrators, agents, successors, officers, shareholders, members, partners, subsidiaries, affiliates, insurers and assigns from all actions, causes of actions, suits, debts, liens, dues, sums of money, accounts, reckonings, bonds, bills, specialities, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims, and demands whatsoever, in law, admiralty or equity, which against the RELEASEES, the RELEASOR, RELEASOR'S heirs, executors, administrators, successors and assigns ever had, by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of this Release, including any and all claims arising out of RELEASOR'S incident on March 25, 2013"

(*id.*, exhibit B).

---

[2]The court notes that the allegations in the amended verified complaint are identical to the those in the verified complaint, except that the amended verified complaint alleges that Pagan's misrepresentations were made with the intent to induce reliance by Neilson, Neilson's counsel, and Chubb (*see* amended verified complaint, ¶ 32).

[3]Neilson indicates that he also hired James W. Neilson, Esq. to represent him in the personal injury action in order to protect his personal assets (Neilson aff, ¶ 10).

Discussion

Pursuant to CPLR 3211 (a) (5), a cause of action may be dismissed "because of . . . collateral estoppel . . . payment, release, [and/or] res judicata. . . ." "Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). "Generally, a stipulation of discontinuance 'with prejudice' will be given res judicata effect and will bar litigation of the same cause action" (*Mosello v First Union Bank*, 258 AD2d 631, 632 [2d Dept 1999]). "However, the language 'with prejudice' is narrowly interpreted when the interest of justice or the equities of the case warrant such an approach" (*id.*).

Here, the stipulation of discontinuance with prejudice in Pagan's personal injury action against Neilson (Villar affirmation in support, exhibit C), has no relevance to Neilson's action for fraud against Pagan. Thus, contrary to Pagan's contention, it cannot be said that the stipulation of discontinuance serves as a res judicata bar to the instant action.

Collateral estoppel "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" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). In other words, "collateral estoppel effect will only be given to matters actually litigated and determined in a prior action" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456 [1985] [internal quotation marks and citation omitted]). "An issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or even because of a *stipulation*" (*id.* at 456–457 [emphasis added]).

In this case, the issue of Pagan's fraud was not decided in the personal injury action. Moreover, even if Neilson participated in the settlement and discontinuance of Pagan's personal injury action, Neilson's participation cannot be construed to be the kind of determination, following a full and fair opportunity to litigate the issue, that would be necessary to collaterally estop Neilson from establishing fraud against Pagan (*see Singleton Mgt. v Compere*, 243 AD2d 213, 218 [1st Dept 1998] [settlement and stipulation of discontinuance entered in personal manager's breach of contract action against singing group did not have collateral estoppel effect in manager's tortious interference with contract action against competitor]).

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, "'factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . , are not entitled to such consideration'" (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]). On a CPLR 3211 (a) (7) motion, "affidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]).

In order to state a cause of action for fraudulent misrepresentation, "a plaintiff must allege 'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of

the other party on the misrepresentation or material omission, and injury'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011], quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Fraudulent concealment requires a duty to disclose material information, which arises where a fiduciary or confidential relationship exists between the parties (*Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006]; *Kaufman v Cohen*, 307 AD2d 113, 119–120 [1st Dept 2003]). Moreover, CPLR 3016 (b) requires that "the circumstances constituting the wrong shall be stated in detail." Stated otherwise, the plaintiff must "'set forth specific and detailed factual allegations that the defendant personally participated in, or had knowledge of any alleged fraud'" (*Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005], quoting *Handel v Bruder*, 209 AD2d 282, 282-283 [1st Dept 1994]).

Justifiable reliance is a required element to establish a fraud claim (PJI 3:20). "[I]n order to be actually deceived by a false representation, a party must not only believe that the representation is true, but must also be justified in taking action in reliance thereon" (*Verschell v Pike*, 85 AD2d 690, 691 [2d Dept 1981], citing *Lanzi v Brooks*, 54 AD2d 1057, 1058 [3d Dept 1976], *affd* 43 NY2d 778 [1977], *rearg denied* 44 NY2d 733 [1978]). Courts have held justifiable reliance to be lacking where the statements were made in the course of adversarial proceedings (*see Nineteen N.Y. Props. Ltd. Partnership v 535 5th Operating*, 211 AD2d 411, 412-413 [1st Dept 1995] ["The only fraud alleged is with respect to statements made in the complaint and in support of plaintiff's motion; there could be no detrimental reliance on such statements"]; *Lazich v Vittoria & Parker*, 189 AD2d 753, 754 [2d Dept 1993], *appeal dismissed* 81 NY2d 1006 [1993] ["All the statements and actions complained of were undertaken in the course of adversarial proceedings and were fully controverted. Therefore, the plaintiff cannot and has not

asserted the requisite reliance required for fraud"]).

Neilson alleges that Pagan made fraudulent misrepresentations in the complaint and at his deposition in the personal injury action in which they were adversaries (amended verified complaint, ¶¶ 17, 18, 20, 22, 23, 24, 25, 26, 27, 32; Neilson aff, ¶¶ 5-8). Based upon the above authority, Neilson could not have justifiably relied on any such statements by Pagan as a matter of law. Therefore, the complaint fails to state a cause of action for fraud and must be dismissed. Consequently, Pagan's motion to dismiss is granted.

Conclusion

Accordingly, it is hereby

ORDERED that defendant William Pagan's motion to dismiss (motion sequence number 001) is granted and the amended verified complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 4/18/16

ENTER:

J.S.C.