Chamba v City of New York
2017 NY Slip Op 31982(U)
September 6, 2017
Supreme Court, Queens County
Docket Number: 8743/14
Judge: Howard G. Lane

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA PART 6**
Justice

MANUEL ALEJANDRO CHAMBA,

Plaintiff,

-against-

THE CITY OF NEW YORK, JAMAL-ABDUL NASIR and JIMMY G. HARTOFILIS,

Defendants.

Index No: 8743/14

Motion Date: May 3, 2017

Motion Cal. No.: 31

Motion Seq. No.: 3

The following papers read on this motion by defendant Jimmy G. Hartofilis for an order granting leave to amend his answer in order to assert the affirmative defense of collateral estoppel, pursuant to CPLR3025(b), and for an order dismissing the complaint and all cross claims based upon the doctrine of collateral estoppel; and in the alternative, for an order granting summary judgment dismissing the complaint and all cross claims on the grounds that no liability exists with regard to this defendant.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Opposing Affirmation.....	5-6
Reply Affirmation.....	7-8

Upon the foregoing papers the motion is determined as follows:

Plaintiff Manuel Alejandro Chamba commenced this action on June 5, 2014, to recover damages for personal injuries allegedly sustained on April 23, 2013, when, while working inside New Parmir Body Shop, located at 35-01 126th Street, Queens, New

York, he was struck by a vehicle operated by defendant Jamal-Abdul Nasir. Plaintiff alleges in his complaint that defendant Nasir was the owner and operator of a 1992 Toyota Corolla, and defendant Jimmy G. Hartofilis was the operator of a 1998 Mercedes Benz; that there was contact between the two (2) vehicles; that Mr. Nasir's vehicle veered off to the left, crossed over the opposite lanes of traffic, mounted the sidewalk and entered New Pamir Auto Body, striking three (3) pedestrians, including the plaintiff, and two (2) unoccupied vehicles parked in the body shop. As a result of said accident, both of Mr. Chamba's legs were amputated.

All of the defendants have served their respective answers. Defendant Hartofilis' prior motion for summary judgment dismissing the complaint and all cross claims, was denied as premature, pursuant to an order dated August 20, 2015.

The note of issue was filed in this action on November 13, 2015. The within action was stayed, pending the completion of discovery, pursuant to a "so-ordered" stipulation dated January 13, 2016, and further "so-ordered" stipulations dated May 3, 2016 and September 13, 2016. Said stay was lifted pursuant to a "so-ordered" stipulation dated December 15, 2016, and the court directed that motions for summary judgment be made returnable no later than March 13, 2017.

Mr. Chamba appeared at a 50-h hearing on March 12, 2015, and testified that he did not have any recollection of the accident, or of any other events that took place on the day of the accident. Mr. Nasir and Mr. Hartofilis were deposed on April 6, 2016 and a witness for the City of New York was deposed on August 2, 2016. Plaintiff's action against defendant The City of New York was dismissed pursuant to an order of this court dated May 31, 2017.

Juan Castro, a pedestrian who was working in the auto body shop and struck by the Nasir vehicle was fatally injured. A motor vehicle fatality hearing was conducted on January 7, 2016, by the Department of Motor Vehicles (DMV), before an administrative law judge (ALJ), pursuant to Vehicle and Traffic Law (VTL) §510(3). Mr. Nasir and Mr. Hartofilis, respondents in said administrative proceeding, as well as Detective Walter Bowden, a member of the New York Police Department's Highway District Collision Investigation Squad, testified at said hearing. At the beginning of the hearing, the ALJ stated that the purpose of hearing was "to determine whether the surviving drivers caused, contributed to, or made worse the accident" and that it was not an adversarial proceeding or an examination before trial (Tr 4).

The ALJ received eight (8) documents into evidence and issued a written determination, dated "January 13, 2015"[sic], stating, in pertinent part, that Mr. Nasir "has not given a satisfactory explanation for his failure to exercise due care to avoid striking the decedent and two other pedestrians"; and found him to be "in violation of Vehicle and Traffic Law (VTL) Section 1146 (a), failure to use due care to avoid hitting a pedestrian, VTL Section 1128(d), driving over a double yellow line, VTL Section 1128(a) moving from lane unsafely, and VTL Section 1225-a driving on and across a sidewalk. These violations were the direct cause of this collision and warrant action against the license and/or driving privileges of Respondent Nasir." She found that Mr. Hartofilis "was neither grossly negligent nor in violation of any of the provisions of the Vehicle and Traffic Law (including failure to exercise due care) which caused or contributed to this unfortunate accident." The ALJ determined that based upon said violations of the VTL, Mr. Nasir's New York State license and/or driving privileges were revoked, effective 14 days after the date of said order, and closed the case with respect to Mr. Hartofilis.

Leave to serve an amended answer should be freely granted unless the amendment sought is palpably improper, insufficient as a matter of law, or unless surprise directly results from delay in serving such amendment (*Hunt v Godesky*, 189 AD2d 854 [2d Dept 1993]; *Degradi v Coney Island Medical Group*, 172 AD2d 582 [2d Dept 1991]). Here, defendant's delay in seeking leave to amend his answer was due to the stay that was in effect, and the request for summary judgment dismissing the complaint is timely, as the original return date of the motion was March 8, 2017. Plaintiff's counsel's claims that plaintiff could not have possibly anticipated that the defendant would use the January 7, 2016 DMV fatality hearing as a basis for a motion for summary judgment, is without merit.

As regards the affirmative defense of collateral estoppel, the Court of Appeals in *ABN AMRO Bank, N.V. v MBIA Inc*., (17 NY3d 208, 226 [2011]) stated as follows: "The doctrine of collateral estoppel (or issue preclusion) is rooted in principles of fairness. It is well settled that the doctrine "may be invoked in a subsequent action or proceeding to prevent a party from relitigating an [identical] issue decided against that party in a prior adjudication" (*Staatsburg Water Co. v Staatsburg Fire Dist*., 72 NY2d 147, 152-153[1988]). In *Capital Tel. Co. v Pattersonville Tel. Co.* (56 NY2d 11 [1982]), we reaffirmed the principle that collateral estoppel applies to an administrative proceeding (*id.* at 17). In the context of administrative agency determinations, we have recognized that the doctrine of collateral estoppel "is applied more flexibly, and additional factors must be considered by the court" (*Allied Chem. v Niagara Mohawk Power Corp*., 72 NY2d 271, 276 [1988]). "These additional requirements are often summed up in the beguilingly simple prerequisite that the administrative decision be 'quasi- [10] judicial' in

character" (*id., citing Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]).

"An administrative decision is quasi-judicial in character when it is " ' "rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law" ' " (*Matter of Jason B. v Novello,* 12 NY3d 107, 113 [2009], *quoting Ryan*, 62 NY2d at 499). Thus, for collateral estoppel to be triggered, not only must the identity of the issue decided in the prior action or proceeding have been the same, but also "there must have been a full and fair opportunity to contest the decision now said to be controlling" (*Gilberg v Barbieri*, 53 NY2d 285, 291[1981], *quoting Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 71 [1969]; *see also Capital Tel. Co.*, 56 NY2d at 17).

Mr. Chamba's counsel's appearance at the VTL hearing was noted in the ALJ's determination, as Thomas P. O'Malley, Esq., Lipsig, Shapey, Manus & Movermar, PC, "Attorney for Witness Alexandro Chamba". At the hearing, the ALJ stated on the record that an attorney representing one of the witnesses was present and requested that counsel state their name, appearance and who they were representing, and requested counsel's card. The transcript of the hearing indicates that the response to the ALJ request was inaudible (Tr 3).

The ALJ stated that she would "conduct an inquiry of each witness. When I'm finished I'll ask for any areas of inquiry that you might wish me to explore, and if relevant I'll engage in questions calculated to elicit that information" (Tr 4). Counsel for Mr. Nasir and counsel for Mr. Hartofilis were permitted to participate in the hearing, on a very limited basis. Sufficient evidence exists to establish that Mr. Chamba was not a party to the VTL hearing and was not present at said hearing, and that although his counsel was present, he did not participate in the hearing. Moreover, the ALJ did not decide any issue against Mr. Chamba that could be binding on him in this action. Therefore, the court finds that as the doctrine of collateral estoppel is inapplicable here, that branch of defendant Hartofilis' motion which seeks leave to amend his answer in order to add the affirmative defense of collateral estoppel, and for summary judgment based upon collateral estoppel, is denied.

"A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident" (*Gobin v Delgado*, 142 AD3d 1134, 1135-1136 [2d Dept 2016], *quoting Boulos v Lerner-Harrington*, 124 AD3d 709, 709 [2d Dept 2015]; *see Estate of Cook v Gomez*, 138 AD3d 675 [2d Dept 2016]; *Baulete v L & N Car Serv., Inc.*, 134 AD3d 753 [2d Dept

2015]). In determining a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party (*see Boulos v Lerner-Harrington*, 124 AD3d at 709-710 [2d Dept 2015]).

"[A] violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se" (*Pena v Spade*, 145 AD3d 791, 792 [2d Dept 2016], *quoting Barbieri v Vokoun*, 72 AD3d 853, 856 [2d Dept 2010]). However, "[t]here can be more than one proximate cause of an accident (*see Lopez v Reyes-Flores*, 52 AD3d 785, 786 [2d 2008]; *see also Baulete v L & N Car Serv., Inc.*, 134 AD3d 753, 754 [2d Dept 2008]), and "[g]enerally, it is for the trier of fact to determine the issue of proximate cause" (*Kalland v Hungry Harbor Assoc., LLC*, 84 AD3d 889, 889 [2d Dept 2011]; *see Howard v Poseidon Pools*, 72 NY2d 972, 974 [1988]).

Here, in support of his motion for summary judgment, defendant Hartofilis has submitted copies of the transcript of VTL hearing and documents submitted into evidence at said hearing; the AJL's determination; and copies of each defendants' deposition testimony. Mr. Hartofilis and Mr. Nasir at the VTL hearing and at their depositions, presented conflicting testimony as to the facts surrounding the accident. Therefore, as defendant Hartofilis has failed to establish that he was not negligent, the motion for summary judgment is denied. In view of the movant's failure to meet his prima facie burden, the court need not review the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853[1985]).

In view of the foregoing, defendant Hartofilis' motion for leave to amend his answer and for summary judgment dismissing the complaint is denied in its entirety.

Dated: September 6, 2017

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Howard G. Lane, J.S.C.