05

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LESLIE J. PURIFICACION IA Part 39
Justice

LUIS BRAVO, x

Plaintiff,

-gainst-

ATLAS CAPITAL GROUP, LLC, VESTA CONTRACTING GROUP, CORP. and TOTAL SAFETY (TSC),

Defendants.
x

Index Number 705447/16

Motion Date 02/20/2017

Motions Seq. No. 2

The following papers numbered EF8 to EF63 read on this (1) motion by Total Safety (TSC), to dismiss the complaint pursuant to CPLR 3211 (a)(5), and 3212; and (2) motion by Atlas Capital Group, LLC ("Atlas"), to dismiss the complaint pursuant to CPLR 3211 (a)(5).

	Papers Numbered
Notices of Motions - Affidavits - Exhibits.....	EF8-EF39
Answering Affidavits - Exhibits	EF53-EF59
Reply Affidavits	EF60-EF63

Upon the foregoing papers it is ordered that the motions are combined herein for disposition, and determined as follows:

Plaintiff, Luis Bravo, commenced this action under the Labor Law to recover for injuries allegedly sustained on July 27, 2013, during the course of his employment as a construction worker for contractor Legacy Builders ("Legacy"). Eastgate, the owner of the premises where the construction site was located, contracted with Legacy in connection with its renovation project to convert the hotel on the premises into residential apartments.

On the day of the accident, plaintiff was engaged in unloading deliveries of construction materials off the delivery truck. He was stacking boxes on pallets to be moved by forklift to another location, while his Legacy co-worker, Jose Cajamarca, was tasked with inserting the forklift under a pallet once it was loaded and verbal clearance was given by another Legacy employee that the pallet was ready to be moved. In a prior action against Eastgate, plaintiff averred that the pallet was only partially loaded on the front end when Cajamarca proceeded to insert the forklift into the pallet, and ultimately struck plaintiff's foot with the forklift.

As pertinent to the instant action, the prior action against Eastgate was dismissed. Plaintiff commenced the instant action against, inter alia, Atlas and TSC alleging the same causes of action as asserted against Eastgate in the prior dismissed action. TSC moves for summary judgment in its favor or to dismiss the complaint pursuant to CPLR 3211 [a][5]. Atlas also moves to dismiss the complaint on the ground that it is barred under CPLR 3211 [a][5]. The motions are opposed by plaintiff.

TSC

The branch of the motion by TSC which is for summary judgment dismissing the complaint, insofar as asserted against it is granted. "A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has supervisory control and authority over the work being done where a plaintiff is injured" (*Linkowski v. City of New York*, 33 AD3d 971, 974–975 [2d Dept 2006]; *see Walls v. Turner Constr. Co.*, 4 N.Y.3d 861, 863–864 [2005]; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317–318 [2002]; *Miano v Skyline New Homes Corp.*, 37AD3d 563 [2007]; *Chimborazo v WCL Assoc., Inc.*, 37 AD3d 394 [2d Dept 2007]). To impose liability under the labor law, the defendant must have the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (*see Linkowski v. City of New York, supra*; *Damiani v Federated Dept. Stores, Inc.*, 23 AD3d 329, 331–332 [2d Dept 2005]). It is not a defendant's title that is determinative, but the amount of control or supervision exercised (*see generally Aranda v Park E. Constr.*, 4 AD3d 315, 316 [2d Dept 2004]).

TSC made a prima facie showing that it had no supervisory control or authority over the injury-producing work in this instance. The record demonstrates that the role of TSC was only one of general supervision, which is insufficient to impose liability under Labor Law §§ 240(1) and 241(6) (*see Linkowski v City of New York, supra; Damiani v. Federated Dept. Stores, Inc., supra; Loiacono v Lehrer McGovern Bovis*, 270 AD2d 464, 465 [2d Dept 2000]). The following facts, as relevant to TSC, are undisputed: Atlas owned the project and that Atlas retained Legacy to act as the general contractor for the project. Plaintiff, a Legacy employee, was supervised exclusively by Legacy personnel, "Nelson", "Tim", "Gary" and "Gabriel". Separately, Atlas hired Vesta to perform facade repair pursuant to

Local Law 11. In turn, Vesta hired TSC to provide site safety management services for the facade work as required by the Department of Buildings. In this regard, Sean Doonan was assigned by TSC to be the licensed site safety manager reporting to Vesta. Such services entailed daily "walk-throughs" of the facade work project, making and reporting on any observed safety hazards for the protection of the public and adjoining property in compliance with Chapter 33 of the NYC Building Code. Additionally, Doonan would monitor the project for any unsafe construction conditions and practices, and report those observed safety issues to Vesta. TSC also held weekly safety meetings typically attended by Vesta employees. Significantly, Legacy supervisors and workers were not in attendance. This is clear evidence that there was no connection between the work of Vesta and the work of Legacy, and that Legacy's operations were not within the scope of TSC's services. Furthermore, TSC provided no labor or materials for the project. TSC provided no safety equipment on site; had no authority to stop work for safety reasons, and no authority to correct hazardous conditions. Ultimately, the responsibility for these safety aspect of the construction project remained soled with Vesta, and the project management for each of the trade contractors on site. Thus, the undisputed evidence indicates that plaintiff's sole and exclusive supervisors were Legacy personnel.

In opposition to TSC's prima facie showing of entitlement to judgment as a matter of law, plaintiff failed to raise a triable issue of fact as to whether TSC was a "statutory agent" for purposes of the Labor Law (see Labor Law §§ 240 [1], 241[6]; *Russin v Louis N. Picciano & Son, supra*).

Likewise, since no evidence was submitted to demonstrate that TSC had any control or supervisory role over the work of the plaintiff, so as to enable it to prevent or correct any unsafe conditions, there are no triable issues of fact as to TSC's liability on the Labor Law § 200 and common-law negligence causes of action (*see Delahaye v St. Anns School*, 40 AD3d 679, 684 [2d Dept 2007]; *Linkowski v City of New York, supra; Singh v Black Diamonds LLC*, 24 AD3d 138, 139–140 [1st Dept 2005]; *Loiacono v Lehrer McGovern Bovis, supra*).

Accordingly, the branch of the motion by TSC which is for summary judgment dismissing the complaint, insofar as asserted against it, is granted. The court, therefore, need not and does not address TSC's alternative arguments.

Atlas

Prior to commencing the instant action, the plaintiff commenced a separate action against Eastgate, the owner of the premises where the accident occurred, and a subsidiary of Atlas. In that action, the court dismissed all of the labor law claims against Eastgate, on the grounds that (1) the accident did not involve a gravity-related risk [240(1) dismissed]; (2) the

Industrial Codes cited by plaintiff were either inapplicable or too general to support a Labor Law 241 (6) claim; and (3) the general supervisory role which Eastgate played was insufficient to impose liability under Labor Law 200 (*citing Austin v Consolidated Edison, Inc.*, 79 AD3d 682 [2d Dept 2010]).

Plaintiff thereafter commenced the instant action against Atlas, the parent company of Eastgate. By the instant motion, Atlas moves to dismiss the complaint pursuant to CPLR 3211(a)(5), on the ground that the doctrine of res judicata precludes the instant action.

"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" (*Abraham v. Hermitage Ins. Co.*, 47 AD3d 855, 855 [2d Dept 2008] [emphasis added]). It used to be the rule that, even if the two actions arose out of an identical course of dealing, the second was not barred by res judicata if "[t]he requisite elements of proof and hence the evidence necessary to sustain recovery var[ied] materially" (*Smith v Kirkpatrick*, 305 NY 66, 72 [1953]). However, the Court of Appeals expressly rejected that method of analysis in *O'Brien v City of Syracuse* (54 NY2d 353 [1981]). There it held that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (54 NY2d at 357). The Court further stated: "[w]hen alternative theories are available to recover what is essentially the same relief for harm arising out of the same or related facts such as would constitute a single "factual grouping' (Restatement, Judgments 2d, § 61 [Tent Draft No. 5]), the circumstance that the theories involve materially different elements of proof will not justify presenting the claim by two different actions" (*id.* at 357-358). Whether facts are deemed to constitute a single factual grouping for res judicata purposes "depends on how the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether . . . their treatment as a unit conforms to the parties' expectations or business understanding or usage" (*Smith v Russell Sage Coll.*, 54 NY2d 185, 192-193 [1981] [internal quotation marks and citations omitted]).

Here, to the extent the claims against Atlas in the new complaint implicate events alleged to have taken place before the filing of the original complaint, res judicata applies. That is because both the original action and this action are based upon the same transaction and underlying factual circumstances. Plaintiff's original action, which asserted identical allegations against Atlas' wholly-owned subsidiary, Eastgate, arose from the same accident at the same job site as the current action.

Moreover, to establish privity the interests of the nonparty must have been represented by a party in the prior proceeding (*see Green v. Santa Fe Indus.*, 70 NY2d 244, 253 [1987]). The Court of Appeals, while noting that privity does not have a single well-defined meaning *(see Buechel v Bain*, 97 NY2d 295, 304 [2001], *cert. denied* 535 U.S. 1096 [internal quotation marks omitted]), has found that privity includes " 'those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and [those who are] co-parties to a prior action' " (*id.* at 304, *quoting Matter of Juan C. v Cortines*, 89 NY2d 659, 667 [1997]). "Corporations often are deemed to be in privity with officers or subsidiaries involved in relevant events (*Spasiano v Provident Mut. Life Ins.*, 2 AD3d 1466, 1467 [4th Dept 2003] [holding, in res judicata context, that corporation and its subsidiary were in privity]); *Felner v Mangel Stores*, 69 AD2d 36, 38-39 [4th Dept 1979] [same, officers' privity with corporation].

Atlas established in its moving papers that the same legal theories advanced by plaintiff in this action were decided in the prior action, and are determinative in the present action because the court's prior summary judgment decision foreclosed liability against *any* party under a common-law negligence or Labor Law §200 theory because the court held that the accident arose out of the means and methods of plaintiff's work, which was solely directed and controlled by plaintiff's employer, Legacy Builders. The court further dismissed plaintiff's claims under labor law sections 240(1) and 241 (6), on the grounds, that the accident did not involve a gravity-related condition, and that plaintiff did not assert a specific applicable Industrial code violation, respectively. Therefore, as the acts allegedly undertaken by Atlas, through Eastgate, were already litigated to conclusion in the first action, res judicata bars re-litigation of those same matters in this action as against Atlas (*see Toscano v 4B's Realty VIII Southampton Brick & Tile, LLC*, 84 AD3d 780, 780–781 [2d Dept 2011]; *see also O'Brien v. City of Syracuse*, 54 NY2d 353, 357 [1981]).

Plaintiff's contentions in opposition are without merit. " 'The fact that causes of action may be stated separately, invoke different legal theories, or seek different relief will not permit re-litigation of claims' " (*Pondview Corp. v Blatt*, 95 AD3d 980, 980 [2d Dept 2012], *quoting Matter of ADC Contr. & Constr., Inc. v Town of Southampton*, 50 AD3d 1025, 1026 [2d Dept 2008]). The doctrine of res judicata "operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding, as well as claims for different relief which arise out of the same factual grouping or transaction and which should have or could have been resolved in the prior proceeding" (*Koether v Generalow*, 213 AD2d 379, 380 [2d Dept 1995] [internal quotation marks omitted]; *see Luscher v Arrua*, 21 AD3d 1005, 1006–1007 [2d Dept 2005]). Furthermore, although Atlas was not named in the prior action, since they are in privity with Eastgate, whose conduct formed the basis of the plaintiff's allegations in the prior action, they are entitled to rely upon the beneficial disposition of the prior action against Eastgate (*see Bayer v City of New York*, 115 AD3d 897, 899 [2d Dept

2014;] *Perry v Costa*, 97 AD2d 655, 655–656 [3d Dept 1983]). Here, all the causes of action asserted in the complaint against Atlas were already litigated in the prior proceeding against Eastgate in its capacity as owner of the premises, and are therefore foreclosed by the doctrines of res judicata (*see Bayer v City of New York*, 115 AD3d at 899; *Toscano v 4B's Realty VIII Southampton Brick & Tile, LLC*, 84 AD3d at 781), and collateral estoppel (*see D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d at 664–665).

Significantly, as Eastgate was found not liable under the labor law, plaintiff has asserted no grounds for holding Atlas liable under the same (*cf., Dempsey v. Intercontinental Hotel Corp.*, 126 AD2d 477, 478 [1st Dept 1987] (As a general rule, a parent corporation is *not* liable for the acts of a subsidiary).

Moreover, since the acts allegedly undertaken by Atlas in its capacity as owners of the premises were already considered and determined by the court in the first action when it dismissed the prior action against Eastgate, but not Atlas, re-litigating the very same issues allows for the possibility of inconsistent findings as to those already litigated facts. Thus, the interests of conservation of resources and society's interests in consistent and accurate results for courts and the litigants also favor barring the plaintiff from re-litigating these causes of action (*see Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 153 [1988]; *Blue Sky, LLC v Jerry's Self Stor., LLC*, 145 AD3d 945, 951–52 [2d Dept 2016]).

Accordingly, the court grants Atlas' motion to dismiss the complaint pursuant to CPLR 3211[a][5], insofar as asserted against it.

Conclusion

The motion by TSC for summary judgment in its favor is granted.

The motion by Atlas to dismiss the complaint, insofar as asserted against it, is granted pursuant to CPLR 3211 [a][5].

Dated: OCT 12 2017

Hon. Leslie J. Purificacion, J.S.C.

FILED
OCT 24 2017
COUNTY CLERK
QUEENS COUNTY