

**Romagnolo v 1900 Hempstead Turnpike, LLC**

2017 NY Slip Op 33402(U)

August 10, 2017

Supreme Court, Nassau County

Docket Number: Index No. 608208-16

Judge: Jerome C. Murphy

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**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**PRESENT:**

**HON. JEROME C. MURPHY,  
Justice.**

**DANIEL ROMAGNOLO, JR.,**

**Plaintiff,**

**- against -**

**1900 HEMPSTEAD TURNPIKE, LLC,**

**Defendant.**

**TRIAL/IAS PART 18**

**Index No.: 608208-16**

**Motion Date: 5/30/17**

**Sequence No.: 001**

**MD**

**DECISION AND ORDER**

The following papers were read on this motion:

Notice of Motion, Affirmation and Exhibits.....	1
Affirmation in Opposition and Exhibits.....	2
Reply Affirmation in Support.....	3
Affirmation in Sub-Reply and Exhibit.....	4

**PRELIMINARY STATEMENT**

Defendant brings this application for an order: (1) pursuant to CPLR § 3211(a)(4), dismissing plaintiff's complaint on the grounds that there is currently another action pending wherein plaintiff is seeking the identical relief sought within the instant matter; (2) pursuant to CPLR § 3211(a)(5), dismissing plaintiff's complaint on the grounds that plaintiff's complaint is barred by the doctrine of collateral estoppel; and (3) pursuant to CPLR § 3211(a)(7) on the grounds that plaintiff has failed to state a claim against defendant; and (4) together with such other and further relief as this Court may deem just and proper. Opposition by plaintiff has been submitted to this application.

## BACKGROUND

Briefly, this action arises out of a trip and fall accident which occurred on December 12, 2013 at the premises located at 1900 Hempstead Turnpike, East Meadow, New York 11554. The crux of plaintiff's claim is that while the plaintiff was traversing the defendant's parking lot from his vehicle to the stores in defendant's strip mall, he was caused to trip and fall upon a dilapidated, improperly installed, improperly maintained, hazardous and concealed "speed bump" (Motion, Ex. F, ¶10).

It is undisputed herein that the plaintiff initially commenced an identical action on or about February 21, 2014 bearing an Index No. 1754/2014 (herein referred to as the "First Action"). However, during the course of said litigation, the complaint in the First Action was dismissed by Order of this Court (Parga, J.). Specifically, on June 13, 2016, this Court, at "So-Ordered" proceedings held for the purposes of conducting a "Certification Conference" in the First Action, ruled as follows:

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COURT: That's enough. I heard enough from both sides. Thank you. At this junction, the Court grants defendant's motion for a dismissal pursuant to CPLR 3126. The Court finds that plaintiff's conduct with regard to directions to provide authorizations to be willful and contumacious and the plaintiff's complaint is dismissed.

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(Motion, Ex. D, p. 10)

As a result of the above dismissal, on October 25, 2016, plaintiff's counsel filed a Notice of Appeal. Pursuant to an Order of the Appellate Division, Second Department, dated May 3, 2017, the Court, on its own motion, pursuant to CPLR 5701, dismissed the appeal (Sur-Reply, Ex. 4). In view of that, the prior action no longer is open.

Meanwhile, on October 24, 2016, the plaintiff commenced this (second) action seeking identical relief and mirroring the identical subject matter, allegations and parties as those advanced in the plaintiff's First Action, *supra*. This was within three (3) years of the date of the accident and

within the statute of limitation period.

Upon the instant motion, the defendant asserts three principal bases for his entitlement to an Order dismissing the plaintiff's instant complaint. One, pursuant to CPLR 3211(a)(4), there is currently another action pending seeking identical relief based upon the exact same subject matter and against the same parties. Two, pursuant to CPLR 3211(a)(5) and based upon the doctrine of collateral estoppel, plaintiff's first complaint was dismissed after the plaintiff's counsel appeared in the prior action and had, by deliberate action, refused to litigate the charges or allegations that are the subject of the preclusion request. Lastly, pursuant to CPLR 3211 (a)(7), the plaintiff's complaint fails to state a cause of action upon which relief can be awarded.

#### DISCUSSION

The law is clear. "Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same" (*Mazzei v. Kyriacou*, 139 AD3d 823, 824 [2<sup>nd</sup> Dept. 2016] quoting *DAIJ, Inc. v. Roth*, 85 AD3d 959, 959 [2<sup>nd</sup> Dept. 2011]; see CPLR 3211[a][4]; *Whitney v. Whitney*, 57 NY2d 731, 732 [1982]). It is not necessary that the precise legal theories presented in the first action also be presented in the second action as long as the relief sought is the same or substantially the same (see, *Cherico, Cherico & Assoc. v. Midollo*, 67 AD3d 622, 622 [2<sup>nd</sup> Dept. 2009]).

Here, this Court finds that the Appellate Division's Decision and Order (dismissing the plaintiff's appeal of this Court's [Parga, J.] prior Decision and Order in the First Action) renders the defendant's instant argument that an un-perfected and "open" notice of appeal constitutes "pending litigation", entirely moot (see generally, *Malay v. City of Syracuse*, 25 NY3d 323 [2015]).

The defendant's claim that this action should be dismissed on the grounds that the First

Action – identical to this matter in all respects– has previously been dismissed by this Court and therefore the plaintiff is precluded from asserting the claims in this matter, is meritless. “Collateral estoppel applies if the identical issue sought to be precluded was necessarily decided in an earlier action, at which the party opposing preclusion had a full and fair opportunity to contest the issue” (*Wax ex rel. Wax v. 716 Realty, LLC*, 151 AD3d 902 [2<sup>nd</sup> Dept. 2017] [internal quotation omitted]). In addition, CPLR Rule 5013 entitled “Effect of judgment dismissing claim” reads, in full, as follows:

A judgment dismissing a cause of action before the close of the proponent's evidence is not a dismissal on the merits unless it specifies otherwise, but a judgment dismissing a cause of action after the close of the proponent's evidence is a dismissal on the merits unless it specifies otherwise.

Indeed, “[w]here a plaintiff's noncompliance with a disclosure order does not result in a dismissal with prejudice, or an order of preclusion or summary judgment in favor of defendant so as to effectively close plaintiff's proof, dismissal resulting from the noncompliance is not a merits determination so as to bar commencement of a second action” (*Maitland v. Trojan Elec. & Mach. Co.*, 65 NY2d 614, 615–616 [1985]; *see, Aguilar v. Jacoby*, 34 AD3d 706, 707 [2<sup>nd</sup> Dept. 2006]).

Accordingly, this Court finds that the prior Decision and Order of this Court (Parga, J.) granting the defendant's motion to dismiss the plaintiff's First Action pursuant to CPLR 3126, does not preclude, under doctrine of collateral estoppel, this action by the plaintiff seeking to recover damages for the identical claims (*see, Daulise v. Sottile*, 40 AD3d 801 [2<sup>nd</sup> Dept. 2007]). By its terms, it granted only the relief sought pursuant to CPLR 3126, namely, to strike the complaint. Therefore, there is no merit to the defendant's contention herein that the dismissal of the First Action was on the merits because the Order issued by this Court on June 13, 2016 was tantamount to an order of preclusion which effectively closed the plaintiffs' proof (*Maitland v. Trojan Elec. & Mach. Co.*, *supra* at 615-616; *Aguilar v. Jacoby*, *supra* at 707).

Finally, the defendant's claim that the plaintiff's complaint should be dismissed for failure to state a cause of action is also meritless. The law is settled. On a motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see, Leon v. Martinez*, 84 NY2d 83, 87 [1994]; *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]; *Breytman v. Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2<sup>nd</sup> Dept. 2008]). However, bare legal conclusions are not presumed to be true (*see, Parola, Gross & Marino, P.C. v. Susskind*, 43 AD3d 1020, 1021 [2<sup>nd</sup> Dept. 2007]; *Mayer v. Sanders*, 264 AD2d 827, 828 [2<sup>nd</sup> Dept. 1999]).

Thus, viewed in the light most favorable to the plaintiff, this Court finds that the complaint herein alleges a cognizable cause of action, asserting that the defendant, *inter alia*, improperly installed and maintained the hazardous and concealed "speed bump" in its parking lot causing the plaintiff to trip and fall and sustain serious personal injuries.

Accordingly, the defendant's instant motion for an Order dismissing the plaintiff's complaint is denied in its entirety.

The parties' remaining contentions have been considered and do not warrant discussion.

To the extent that requested relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York  
August 10, 2017

**ENTERED**  
AUG 18 2017  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE

ENTER:

  
JEROME C. MURPHY  
J.S.C.