

Santos v Townsend Ave. Enters. L.P.

2019 NY Slip Op 31834(U)

May 24, 2019

Supreme Court, Bronx County

Docket Number: 301185/2016

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

LUIS SANTOS,

INDEX NUMBER: 301185/2016

Plaintiff,

-against-

Present:
HON. ALISON Y. TUITT
Justice

TOWNSEND AVENUE ENTERPRISES LIMITED
PARTNERSHIP, TOWNSEND AVENUE
ENTERPRISE, TOWNSEND AVENUE ENTERPRISES,
THE MOUNT HOPE HOUSING COMPANY, INC.,
ISAAC RAWL and BROWN RADIANCE,

Defendants.

The following papers numbered 1 to 6,

Read on this Defendants' Motion to Amend Answer and Dismissal and Plaintiff's Motion for Summary Judgment and to Strike Defendants' Answer

On Calendar of 2/20/19

Notices of Motion-Exhibits and Affirmation 1, 2

Affirmations in Opposition 3, 4

Reply Affirmations 5, 6

Upon the foregoing papers, defendants' motion to amend the answer and to dismiss the action and plaintiff's motion for summary judgment on the issue of liability and to strike defendants' answer are consolidated for purposes of this decision. For the reasons set forth herein, defendants' motion is granted and plaintiff's motion is denied.

The within action arises from an accident on April 23, 2013 on the corner of 175th Avenue and Jerome Avenue, Bronx, New York. Plaintiff testified that he tripped and fell on a broken sidewalk. Defendants owned the premises abutting the sidewalk where plaintiff allegedly fell. Plaintiff alleges that defendants were

negligent in allowing portions of the sidewalk to become and remain in a dangerous, defective, cracked, holey, uneven, chipped, depressed, raised, unsmooth, loose and unsafe condition; permitting or allowing improper construction, maintenance and repair of the sidewalk; failing to warn of the dangerous conditions; failing to place barricades around the dangerous conditions; and, failing to comply with applicable laws, statutes, regulations and ordinances. Plaintiff submits the report and affidavit of Irvin S. Lowenstein, his expert sidewalk consultant, who opines that the condition plaintiff identified is a tripping hazard and violated New York City Administrative Code §19-152 duties and obligations of property owner with respect to sidewalks and lots. Plaintiff moves for summary judgment on the issue of liability on the grounds that the condition created a vertical grade differential in excess of ½ inch and the condition existed for a time period before plaintiff's accident. Plaintiff also seeks to strike defendants' Answer for failing to appear for court-ordered depositions. Defendants move to amend their answer to assert affirmative defenses of res judicata and collateral estoppel. Defendants further move to dismiss the action on the grounds that there was a prior action involving the same defendant and the same claims.

Defendants recently became aware that plaintiff had previously started an action against the same parties involving the same incident and allegations in Supreme Court, Bronx County, Index No. 303248/2013. Plaintiff's current counsel represented him in that prior action. As in this case, plaintiff claimed that on April 21, 2013 while walking on the sidewalk abutting the premises located at 1735 Townsend Avenue, Bronx, New York, he was caused to fall because the sidewalk was in a "dangerous, defective, hazardous, unsafe, cracked, uneven, holey, chipped, depressed, raised, unsmooth, and loose condition". It was further alleged that defendants were negligent in permitting or allowing improper construction, maintenance and repair of the sidewalk; failing to warn of the dangerous conditions; failing to place barricades around the dangerous conditions; and, failing to comply with applicable laws, statutes, regulations and ordinances. In the prior 2013 case, plaintiff was precluded from testifying at trial for failing to appear for court-ordered depositions and independent medical examinations, and by decision and Order dated April 7, 2016, Justice Betty Stinson dismissed the action. Plaintiff did not move to reargue that decision, nor did he appeal the decision. In this action, together with their answer, defendants served on plaintiff a demand for information regarding any prior actions or claims and in their response, plaintiff's counsel responded to "Prior and Subsequent Claims/Lawsuit" as "Not applicable", notwithstanding that they represented plaintiff in the prior action.

Pursuant to CPLR 3025(b), a party may amend her pleading at any time by leave of court or by stipulation of all parties; leave shall be freely given upon such terms as may be just; and, any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading. It is the policy of this State is to freely grant leave to amend pleadings in the absence of prejudice or surprise, and further providing that the amendment is not plainly and clearly lacking in good faith and merit. See, Fohey v. Ontario County, 44 N.Y.2d 934 (1978); Prote Contracting. Co., Inc. v. Board of Education of the City of New York, 672 N.Y.S.2d 109 (1st Dept. 1998); Stroock & Stroock & Lavan v. Beltramini, 550 N.Y.S.2d 337 (1st Dept. 1990); Thompson v. Cooper, 806 N.Y.S.2d 32 (1st Dept. 2005). Defendants here have made the requisite showing to amend their answer.

The First Department has consistently held that the commencement of an action where a prior action was dismissed or resolved which involved the same facts and circumstances, the action is barred under the doctrines of res judicata and collateral estoppel. See, Conte v. City of New York, 741 N.Y.S.2d 403 (1st Dept. 2002); Pahmer v. Touche Ross and Co., 707 N.Y.S.2d 825 (1st Dept. 2000); Prospect Owners Corp. v. Tudor Realty Services Corp., 689 N.Y.S.2d (1st Dept. 1999). The doctrine of res judicata holds that, as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action. Gramatan Home Investors Corp. v. Lopez, 46 N.Y.2d 481,485 (1979). “This principle, so necessary to conserve judicial resources by discouraging redundant litigation, is grounded on the premise that once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again.” Id. Since res judicata precludes re-litigation of issues actually litigated and resolved in a prior proceeding, the party seeking to invoke the doctrine of res judicata must demonstrate that the critical issue in a subsequent action was decided in the prior action and that the party against whom estoppel is sought was afforded a full and fair opportunity to contest such issue. Sweeney v. New York City Dept. of Health and Mental Hygiene , 935 N.Y.S.2d 511 (1st Dept. 2012). Here, it is clear that the instant action is a replica of the 2013 action that was previously dismissed. It involves the same parties and the same claims. That plaintiff added to additional corporate defendants in this action does not warrant a different result. Those parties are all inter-related defendant corporations that owned and/or managed the subject premises where plaintiff allegedly sustained his injuries.

It is also well-established that “a judgment based upon a violation of a preclusion order is a determination on the merits.” Tejada v. 750 Gerard Properties Corp., 707 N.Y.S.2d 174 (1st Dept. 2000); Cruz v. Kamlis Dresses & Sportswear Co., 654 N.Y.S.2d 778 (1st Dept. 1997); Strange v. Montefiore Hospital and Medical Center, 59 N.Y.2d 737 (1983). See also, Kinberg v. Schwartzapfel, Novick, Truwosky, Marcus, PC, 24 N.Y.S.2d 614 (1st Dept. 2016)(“The order dismissing plaintiff’s prior action based upon her violation of the preclusion order is entitled to preclusive effect in this subsequent action.”); Santoli v. 475 Ninth Ave. Associates, LLC, 833 N.Y.S.2d 40 (1st Dept. 2007)(A violation of a conditional preclusion order was a determination on the merits).

Accordingly, defendants’ motion to dismiss the action is granted and the action is dismissed. Plaintiff’s motion for partial summary judgment on the issue of liability and to strike defendants’ answer is denied.

This constitutes the decision and Order of this Court.

Dated: 5/24/19

A handwritten signature in black ink, appearing to read "Alison Y. Tuitt", is written over a horizontal line.

Hon. Alison Y. Tuitt