Matos v el Gran Lo Soy
2019 NY Slip Op 33220(U)
September 9, 2019
Supreme Court, Bronx County
Docket Number: 30152/2017E
Judge: John R. Higgitt
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14
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JULIO C. MATOS,

Plaintiff,

- against -

IGLESIA EL GRAN LO SOY and HERMINIO OSTOLAZA,

Defendants.
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DECISION AND ORDER

Index No. 30152/2017E

John R. Higgitt, J.

Upon defendants' June 10, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; defendants' July 10, 2019 affirmation in "reply" and the exhibits submitted therewith; plaintiff's August 7, 2019 affirmation in opposition; defendants' August 13, 2019 affirmation in reply; and due deliberation; defendants' motion for leave to reargue and/or renew the April 3, 2019 decision and order of the undersigned denying their motion to dismiss the complaint is denied.

As is relevant here, defendants previously moved pursuant to CPLR 3211(a)(5) to dismiss the complaint under principles of issue preclusion and claim preclusion on the basis of a default judgment entered pursuant to CPLR 3215 in the related declaratory judgment action, *Progressive Casualty Ins. Co. v Garcia*, Index No. 7834/2016 (Supreme Court, Nassau County), in which plaintiff herein was named as a defendant (as Julio Matos-Soriano). The complaint in the declaratory judgment action recited facts indicating that the vehicle Progressive insured (owned by defendant Iglesia el Gran Lo Soy and operated by defendant Ostolaza) was purposely struck by a vehicle driven by plaintiff herein in a staged occurrence. The complaint in the declaratory judgment action sought declarations that that the insurance policy was null and void as to the occurrence; that Progressive had no contractual duty to defend any person under the policy in any action brought for damages for personal injury arising out of the occurrence; and

that Progressive had no duty to provide coverage for any claims for personal injury, property damage, indemnity, no-fault or uninsured motorist coverage made by anyone, or his or her assignee, in connection with the occurrence.

On September 11, 2017, the court (Peck, J.) granted Progressive's motion for a default judgment pursuant to CPLR 3215 against the majority of the defendants in the declaratory action, including plaintiff herein. On December 20, 2017, Judge Peck issued a judgment against, among others, plaintiff herein, declaring that (1) Progressive was under no obligation to provide liability coverage with respect to the subject occurrence; (2) Progressive had no duty to defend or indemnify the defaulting defendants with respect to the subject loss in any pending or future actions brought as a result of the occurrence; and (3) Progressive had no duty to provide coverage for no-fault or uninsured motorist claims made by or on behalf of the defaulting defendants.

On defendants' prior motion to dismiss the complaint, the undersigned found that the judgment was not entitled to preclusive effect because it had been entered on default and, further, that the issues in this action and the declaratory action were not identical.

Defendants assert that the undersigned "overlooked or misapprehended the doctrine of res judicata as applied to the facts of this case" and, in particular, the undersigned "overlooked the full meaning and consequences of the orders in the related declaratory judgment action" (June 10, 2019 Fallon affirmation at para. 15). Defendants assert that it "appeared" that the "crux" of the prior decision was the lack of identity between the issues in this and the declaratory actions (*see id.* at para. 21). The structure and content of the prior decision, however, make clear that the primary basis of the prior decision was the inapplicability of preclusive effect to a judgment entered on default.

Defendants also assert opaquely that a recent decision issued by Judge Mary Ann

Brigantti in a related action, brought by occupants of defendants' vehicle against, among other parties, defendants and plaintiff, constitutes a new fact warranting renewal.[1] In the related action, entitled *Rodriguez v Ostoloza*, Index No. 303207/2016, Judge Brigantti's May 16, 2019 decision and order granted, without opposition, defendants' motion to dismiss the complaint on the basis of the default judgment in the declaratory judgment action, finding that "the doctrine of res judicata is applicable here since the judg[]ment taken by default has not been vacated (*119 Rosset Corp. v Blimpy of N.Y. Corp.*, 65 AD2d 683 [1st Dept 1978])."[2]

"Under the doctrine of res judicata, a party may not litigate a claim where a judgment *on the merits* exists from a prior action between the same parties involving the same subject matter" (*In re Hunter*, 4 NY3d 260, 269 [2005] [emphasis added]; *see In re Josey v Goord*, 9 NY3d 386 [2007]). As the undersigned previously found, res judicata, or claim preclusion, "bars successive litigation based upon the same transaction or series of connected transactions if: (i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who

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[1] Defendants declined to submit the decision on their motion, instead serving a "reply" affirmation appending the decision on July 10, 2019, two days before the return date of the motion. Judge Brigantti's decision was entered (*see* CPLR 2220[a]) and uploaded to the Bronx County Clerk's website on May 20, 2019 (*see* bronxcountyclerkinfo.com, visited August 28, 2019), three weeks before defendants made this motion (*see* CPLR 2103[b][7], 2211; 22 NYCRR § 202.5-b[f][2][ii]). Accordingly, there was no reason why defendants could not timely append to the motion all documents supporting the grounds for their motion (*see Genger v Genger*, 123 AD3d 445 [1st Dept 2014]; *Lower E. Side II Assoc., L.P. v 349 E. 10th St., LLC*, 118 AD3d 607 [1st Dept 2014]).

All papers supporting a motion are to be served at the time of the service of the notice of motion (*see* 22 NYCRR § 202.8[c]), and defendants disregarded this requirement (*see Rosenman Colin Freund Lewis & Cohen v Edelman*, 165 AD2d 533 [1st Dept 1991]). Such practice is to be discouraged because it prejudices the other parties' ability to timely respond, and it hinders the court's ability to timely identify, address and adjudicate the salient issues (*see Zervos v City of Binghamton*, 26 Misc 3d 1218[A], 2009 NY Slip Op 52730[U], at *7 n 1 [Sup Ct, Broome County 2009]). "[I]t is within the court's discretion to reject … papers [that do not comply with 22 NYCRR § 202.8(c)] sua sponte" (*Moranska v Affinia Manhattan Hotel*, 2019 NY Slip Op 31624[U], at *3 n 1 [Sup Ct, NY County 2019]). Because plaintiff thereafter requested and was granted an adjournment of the motion, the court finds that plaintiff was not prejudiced by defendants' untimely "reply" affirmation and considers all papers submitted on the motion (*see* CPLR 2001; *Miller v Board of Assessors*, 91 NY2d 82 [1997]; *Tierney v Girardi*, 86 AD3d 447 [1st Dept 2011]).

[2] Defendants do not assert that Judge Brigantti's May 2019 decision constitutes law of the case.

was" (*Matter of People of the State of N.Y. v Applied Card Sys., Inc.*, 11 NY3d 105, 122 [2008], *cert den sub nom Cross Country Bank, Inc. v New York*, 555 US 1136 [2009] [internal citation and quotation marks omitted]). Critically, a judgment entered on a pleading or appearance default, however, is not on the merits, and cannot be given preclusive effect (*see Acadia Realty Ltd. Partnership v Ringel*, 129 AD3d 511 [1st Dept 2015]; *Amalgamated Bank v Helmsley-Spear, Inc.*, 109 AD3d 418 [1st Dept 2013], *affd* 25 NY3d 1098 [2015]; *Boorman v Deutsch*, 152 AD2d 48 [1st Dept 1989], *lv dismissed* 76 NY2d 889 [1990]).

The *119 Rosset Corp.* decision highlights an inconsistency in the "default judgments" to which preclusive effect is given because it is apparent, at least in the First Department, that pleading/appearance "defaults" represent a particular failing different from post-appearance litigation "defaults" (e.g., failing to oppose a motion).

In *119 Rosset Corp.*, plaintiffs failed to reply to defendants' counterclaims, and a default judgment in defendants' favor was entered thereon, which barred litigation of plaintiffs' claims.[3] Plaintiffs actively litigated the pleading default, first moving for an extension of time to respond to the counterclaim and, when that motion was denied, moving to vacate the prior order, at which time defendants successfully cross-moved for a default judgment on the counterclaim. The defendants thereafter invoked res judicata when they moved for summary judgment dismissing the complaint on the basis of the judgment in defendants' favor on the counterclaim. Thus, while the "default judgment" in *119 Rosset Corp.* was entered pursuant to CPLR 3215, it cannot be said that it was entered "on default" -- plaintiffs having challenged defendants' application for the default judgment -- and the issue of plaintiffs' "default" was, in fact, litigated on its merits. In

[3] "[New York's] permissive counterclaim rule may save from the bar of res judicata those claims for separate or different relief that could have been but were not interposed in the parties' prior action. It does not, however, permit a party to remain silent in the first action and then bring a second one on the basis of a preexisting claim for relief that would impair the rights or interests established in the first action" (*Henry Modell & Co. v Minister, Elders & Deacons of the Reformed Protestant Dutch Church*, 68 NY2d 456, 464 n 2 [1986], *rearg den* 69 NY2d 741 [1987]).

the case cited by the *119 Rosset Corp.* Court, *Spindell v Brooklyn Jewish Hosp.*, 35 AD2d 962 (2d Dept 1970), *affd* 29 NY2d 888 (1972), the plaintiff failed to oppose the defendant's motion to dismiss the complaint, which motion was granted, and the decision thereon was sufficient to bar subsequent litigation between the parties. Thus, in *Spindell*, a party who appeared in the action and therefore was given a full and fair opportunity to litigate, thereafter failed to oppose a motion, resulting in the entry of a judgment. In both *119 Rosset Corp.* and *Spindell*, an appearing, litigating party failed to take advantage of procedural opportunities available to it at some point after its initial appearance in the action.[4]

The other cases cited by defendants are similar. In *Robbins v Growney*, 229 AD2d 356, 357 (1st Dept 1996), the corporate defendant defaulted in opposing plaintiffs' motion for summary judgment in the prior action, plaintiffs obtained a "default" judgment against the corporate defendant, Supreme Court denied a motion by the corporation and one of its principals to vacate the default judgment on the basis of fraud, and no appeal was taken from the denial. When plaintiffs commenced the subsequent action against the shareholders to pierce the corporate veil on the unsatisfied judgment, defendants' affirmative defense that the judgment against the corporation was procured by fraud was barred by res judicata and collateral estoppel. In *Walston & Co. v Klein*, 44 Misc 2d 607 (Sup Ct, NY County 1964), *affd* 24 AD2d 559 (1st Dept 1965), defendant answered, counter-claimed, deposed plaintiff and thereafter, at trial, withdrew his answer and consented to entry of judgment. Defendant's subsequent motion to

[4] In this regard, it appears that res judicata is treated similarly to collateral estoppel, in the context of which such a defaulting party "has, by deliberate action, refused to defend or litigate the charge or allegation that is the subject of the preclusion request," thus invoking the "limited exception" to the general rule that a default judgment is not entitled to issue-preclusive effect (*In re Abady*, 22 AD3d 71, 83-84 [1st Dept 2005]; *see also Metro Found. Contractors, Inc. v Marco Martelli Assocs., Inc.*, 145 AD3d 526 [1st Dept 2016]). It is under these circumstances, where a party who participates in the litigation thereafter abandons the opportunity to do so and provides no explanation therefor or attempts to be relieved of his or her omission, that the party will be collaterally estopped notwithstanding his or her failure to respond (*see Windley v City of N.Y.*, 104 AD3d 597 [1st Dept 2013]).

vacate the judgment was granted; however, defendant declined to proceed when the case was again called for trial, and an inquest was taken (*see* CPLR 3215[a]). Thereafter, defendant was unsuccessful on his motion to vacate the second default, his appeal from the denial of that motion, his application for leave to appeal to the Court of Appeals, and his application to the Supreme Court of the United States for a writ of certiorari. In applying res judicata, the *Walston & Co*. Court acknowledged that "the judgment was the result not of a default but of a voluntary abandonment" (*id*. at 608-9).

That a default judgment entered pursuant to CPLR 3215 based on a failure to appear and plead is not a judgment on the merits is borne out by the body of caselaw denying the entry of a default judgment or vacating "default judgments" entered upon a default in pleading on the basis of the strong public policy favoring the disposition of actions "on their merits" (*see e.g. Li Xian v Tat Lee Supplies Co., Inc*., 126 AD3d 424 [1st Dept 2015]; *Kreppein v Linda Kleban Mgt.*, 31 AD3d 275 [1st Dept 2006]; *Guzetti v City of N.Y.*, 32 AD3d 234 [1st Dept 2006]; *PM-OK Assocs. v Britz*, 256 AD2d 151 [1st Dept 1998]; *N.Y. Tel. v Power Tech Sys., Inc*., 185 AD2d 787 [1st Dept 1992]; *Scott v Allstate Ins. Co*., 124 AD2d 481 [1st Dept 1986]). If a default judgment entered upon a pleading default was in any sense "on the merits," the hoary maxim regarding our public policy favoring resolution of actions "on their merits" would provide no justification for vacatur of such a judgment. Similarly, the Court of Appeals has held that the appropriate remedy for a party who, by his or her misbehavior, has forfeited the right to have a claim decided "on the merits" is the entry of a "default judgment" (*see CDR Créances S.A.S. v Cohen*, 23 NY3d 307 [2014]). Were CPLR 3215 default judgments to be considered dispositions on the merits, there would be no need to differentiate between the two.

The *Rodriguez* decision is thus not a new "fact" that would change the prior determination (*see* CPLR 2221[e][2]; *Espinal v City of N.Y.*, 107 AD3d 411 [1st Dept 2013]),

and does not establish that the undersigned misconstrued or misapplied the relevant facts or law. A judicial pronouncement is precedent, not fact. Furthermore, the *Rodriguez* decision does not constitute a change in the law, because the decision of a court of coordinate jurisdiction is not binding authority (*see Ballard v City of N.Y.*, 11 Misc 3d 1014 [Sup Ct, NY County 2006]). To the extent that defendants urge the undersigned to follow the *Rodriguez* decision as persuasive authority (*see Bush v City of New York*, 195 Misc 2d 882 [Sup Ct, Bronx County 2003]), for the reasons outlined above, the undersigned respectfully declines to do so.

To the extent defendants assert that the court previously made differing findings with regard to the application of each preclusive doctrine, the undersigned clearly stated in the prior decision that a judgment entered on default is not on the merits, and cannot be given preclusive effect under res judicata (*see Acadia Realty Ltd. Partnership, supra*; *Amalgamated Bank, supra*; *Boorman*, *supra*), or collateral estoppel (*see Conason v Megan Holding, LLC*, 25 NY3d 1 [2015], *rehg den* 25 NY3d 1193 [2015]; *Kaufman v Eli Lilly & Co.*, 65 NY2d 449 [1985]; *Matter of Hereford Ins. Co. v McKoy*, 160 AD3d 734 [2d Dept 2018]; *Matter of American Transit Ins. Co. v Hossain*, 100 AD3d 421 [1st Dept 2012], *lv den* 20 NY3d 859 [2013]; *Stumpf AG v Dynegy Inc.*, 32 AD3d 232 [1st Dept 2006]). As stated above and in the prior decision, a prior determination made upon an uncontested CPLR 3215 default is neither "on the merits" for res judicata purposes nor "actually litigated" for collateral estoppel purposes (*see also People v Grasso*, 54 AD3d 180 [1st Dept 2008] [addressing the application of collateral estoppel and law of the case ("intra-action res judicata")]).

In light of the court's conclusion that the default judgment entered in the prior declaratory judgment action is not entitled to res judicata effect because it was not "on the merits," defendants' argument concerning whether they were in privity with their insurer is moot.

Defendants assert that the failure to dismiss the complaint would result in injustice to

them because they would be exposed to personal liability without insurance coverage, given that they are alleged not to have been involved in the purported staging of the accident.[5] To the extent the decision herein may have left defendants at a disadvantage as compared to similarly-situated parties in related personal injury actions emanating from the same accident, the disparity may have been avoided by a motion to join the actions for discovery, trial or any other purpose (*see* CPLR 602[a]), which the court may not order sua sponte (*see DeSilva v Plot Realty, LLC*, 85 AD3d 422 [1st Dept 2011]; *In re Amy M.*, 234 AD2d 854 [3rd Dept 1996]; N.*Y. Annual Conference of Methodist Church v Nam Un Cho*, 156 AD2d 511 [2d Dept 1989], *lv dism* 75 NY2d 947 [1990]).

While the court is sympathetic to the plight of a litigant who may ultimately be left without counsel through no fault of his or her own,[6] an appeal to sympathy, alone, is an insufficient basis upon which to predicate a CPLR 3211(a)(5) dismissal of a complaint where the dismissal is not otherwise supported by the applicable legal principles (*see e.g. Johnson v New York*, 208 NY 77, 78-79 [1913]; *Matter of Goffredo v City of N.Y.*, 33 AD3d 346, 348 [1st Dept 2006], *lv den* 2007 NY App Div LEXIS 5975 [2007]; *Cruz v Latin News Impacto Newspaper*, 216 AD2d 50, 51 [1st Dept 1995]). The legal issues presented to the court must be "determined by the law as the court interprets it and not by the predilections or particular sympathies of the Judges who must interpret the law" (*Steele v Board of Educ.*, 40 NY2d 456, 466 [1976]).

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[5] Defendants did not previously make this argument and they do not explain why they failed to make this argument on the prior motion (*see LFR Collections LLC v Blan Law Offs.*, 117 AD3d 486 [1st Dept 2014]). "Renewal should not be available where a party has proceeded on one legal theory . . . and thereafter sought to move again on a different legal argument merely because he [or she] was unsuccessful upon the original application" (*Nassau County v Metropolitan Transp. Auth.*, 99 AD3d 617, 619 [1st Dept 2012] [citation and quotation marks omitted]). Likewise, "[i]t is well settled that a motion to reargue is not an appropriate vehicle for raising new questions . . . which were not previously advanced" (*People v D'Alessandro*, 13 NY3d 216, 219 [2009] [citations and quotation marks omitted]; *see also DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715 [1st Dept 2005]; *Rubinstein v Goldman*, 225 AD2d 328, 328-29 [1st Dept 1996], *lv den* 88 NY2d 815 [1996]).

[6] Defendants' insurer-appointed counsel has not yet moved to be relieved on the basis of a lack of insurance coverage (*see* CPLR 321[b][2]); however, it is assumed that this is the basis upon which defendants allude to their being unrepresented.

Furthermore, there is no indication that the defendants are without capacity or wherewithal to protect their own interests, should they ultimately find themselves without professional legal representation in this action.

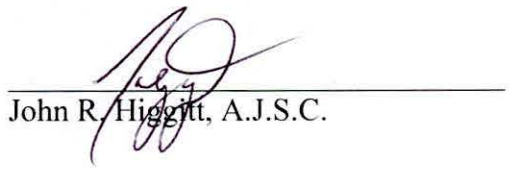
Accordingly, it is

ORDERED, that defendants' motion for leave to reargue and/or renew the April 3, 2019 decision and order of the undersigned denying their motion to dismiss the complaint is denied; and it is further

ORDERED, that the parties shall appear before the undersigned in Part 14, courtroom 407, at 2:00 p.m. on **October 25, 2019** for a preliminary conference.

This constitutes the decision and order of the court.

Dated: September 9, 2019



John R. Higgitt, A.J.S.C.