Sagy v City of New York
2019 NY Slip Op 33516(U)
October 17, 2019
Supreme Court, Queens County
Docket Number: 701550/18
Judge: Kevin J. Kerrigan

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Igal Sagy a/k/a Yigal Sagy and S,Y, U.S.A. Lingerie, Inc.,
Plaintiff,
- against -

Index Number: 701550/18

Motion Date: 10/7/19

The City of New York, Ralph Guerrini and Clement Gibson,
Defendants.

Motion Seq. No.: 3

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The following papers numbered 1 to 12 read on this motion by defendants to dismiss and for sanctions; and cross-motion by plaintiff for a default judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Notice of Cross-Motion-Affirmation-Exhibits	5-7
Memorandum of Law in Support of Cross-Motion	8
Affirmation in Opposition	9-10
Reply	11-12

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendants to dismiss the complaint upon the grounds of statute of limitations, res judicata and collateral estoppel, pursuant to CPLR 3211(a)(5), lack of personal jurisdiction, pursuant to CPLR 3211(a)(8), and failure to state a cause of action, pursuant to CPLR 3211(a)(7), is granted. That branch of the motion for the imposition of sanctions against plaintiffs pursuant to 22 NYCRR §130-1.1 is denied.

Plaintiff Sagy alleges that on March 6, 2012, the City wrongfully tagged his motor vehicle for towing as a derelict vehicle and that a towing company, Jet Auto Wreckers, Inc., an independent contractor hired by the City to tow and dispose of abandoned vehicles, negligently towed his vehicle which contained $140,000 worth of merchandise and cash.

Sagy and his corporation, SY USA Lingerie, Inc., commenced an action against the City, the New York City Department of Sanitation and Department of Finance, and John Doe defendants on June 3, 2013

mental anguish. Venue of that action was transferred to the Supreme Court, Queens County, pursuant to the order of Justice Dawn Jimenez-Salta issued on May 2, 2014, and a new Index Number was issued by the Clerk of Queens County, Index No. 8915/14. Sagy thereafter retained his present counsel, Peter Sverd, who filed a notice of appearance on October 16, 2015.

Jet Auto Wreckers moved for summary judgment dismissing the complaint against it, which motion was denied pursuant to the order of this Court issued on August 21, 2017. A subsequent motion for reargument and renewal by Jet was also denied pursuant to this Court's order issued on November 3, 2017.

The City also moved for summary judgment on November 8, 2017 with a return date of the motion of December 6, 2017 in the then-existing Centralized Motion Part (CMP). The motion thereupon was adjourned to January 24, 2018 and finally to February 7, 2018. In the interim, on January 31, 2018, plaintiff, through his counsel, commenced the present action against the City and two Sanitation Department employees, Ralph Guerrini and Clement Gibson, and, on the same day, served defendants in the earlier action with a notice of cross-motion for leave to consolidate both actions, setting the return date of the cross-motion to the same return date of the City's motion for summary judgment, February 7, 2018. The motion and cross-motion were fully submitted to this Court by CMP on February 7, 2018.

This Court granted the City's motion and denied plaintiff's cross-motion pursuant to the order of this Court issued on February 23, 2018.

As this Court related in its February 23, 2018 order, plaintiff testified in his deposition that he had been given a 1996 van by an acquaintance but never registered the vehicle or obtained insurance for it. He testified that he used the van to store women's lingerie that he had tried to sell at various flea markets, along with display racks and $40,000 in cash, that he parked the van in an alley between two houses on the street where he was sleeping, with the permission of the owners of the homes, and secured it with large locks. He stated that the van was so parked for at least one month but perhaps several weeks longer, with license plates attached, and never moved.

The City's Department of Sanitation witnesses, Ralph Guerrini Charles Sanacore and Clement Gibson, explained in their depositions the procedures they used to determine if a vehicle was a derelict and the tagging and towing process. They testified that they have the discretion to either hold the vehicle for a period of time and attempt to contact the owner or to tender it to Jet for destruction. They testified that certain criteria are used to make

such determination, including the age of the vehicle and its condition. If it is relatively new and in good condition, it may be held to try to locate the owner. If it is old or has damage, it is usually destroyed. Such decision is within the discretion of the Sanitation Department. Gibson, who is the Sanitation Department's compliance agent, testified that the subject vehicle had front end damage, interior damage, broken glass and rear-end damage. He was also certain that the vehicle did not have any license plates because the paperwork that is generated for vehicles with plates is different from the paperwork he generated.

This Court dismissed the action against the City upon the ground that "the actions of its employees, inter alia, Guerrini and Gibson, were discretionary governmental acts" and, consequently, also denied plaintiff's cross-motion for consolidation. This Court also dismissed the action against the Department of Sanitation and Department of Finance, since these are not distinct entities but merely departments of the City, and therefore are not cognizable parties. The caption of the action was amended accordingly to delete the City and the Sanitation and Finance Departments as defendants. This Court notes that Mr. Sverd was served with a copy of this Court's order with notice of entry on March 1, 2018. He never moved for reargument and never filed a notice of appeal. Therefore, the order of this Court issued on February 23, 2018 dismissing the earlier action against the City and finding that plaintiff did not have a cause of action against either the City or its employees who are defendants in the present action, is final and binding, and plaintiff is barred by res judicata and collateral estoppel from relitigating the same claims in the present action.

By letter dated February 26, 2018 from the City's counsel to Mr. Sverd, the City's counsel apprised him that the summons and complaint of the present action was rejected as being improperly served. In this regard, Mr. Sverd did not file an affidavit of service of the summons and complaint but an "Admission of Service" on February 23, 2018, which was simply a photocopy of his "blue back" to the pleadings which sets forth, inter alia, his name and contact information as attorney for plaintiff, and a printed line, "Service of a copy of the within is hereby admitted", with a space thereunder for entry of a date and a signature. It is dated 2/22/18 and signed "Barbara Jamison, Clerical Associate, Corporation Counsel". Pursuant to CPLR 311(a), "Personal service upon a...governmental subdivision shall be made by delivering the summons as follows:...2. upon the city of New York, to the corporation counsel..." The Corporation Counsel is located at 100 Church Street, New York, NY. The summons and complaint, therefore, were required to have been served upon Corporation Counsel at 100 Church Street. Mr. Sverd's dropping off of the pleadings at the Corporation Counsel's Jamaica, Queens office with a clerical assistant did not constitute proper service.

Notwithstanding having been apprised of his improper service of the pleadings and the rejection thereof by the City and thus his knowledge that jurisdiction over the municipal defendants had not been acquired, and notwithstanding that summary judgment had already been awarded in favor of the City and Mr. Sverd knew that this Court had already determined that the actions of the City's employees Guerrini or Gibson were discretionary governmental acts and thus no cause of action lies against the City for the discretionary acts of its employees, Mr. Sverd filed a notice of motion for a default judgment against the City, Guerrini and Gibson in the present action on March 22, 2019. (Mr. Sverd did not file an affidavit of service of the notice of motion, and thus, it is uncertain when the motion was actually made, since the date when a motion is made is the date of service of the motion, not the date it was filed, although it could not have been made prior to the date it was filed and the date it was signed, which is March 22, 2019.) The City then cross-moved on April 16, 2019 for the imposition of sanctions for frivolous motion practice. That motion and cross-motion were marked off-calendar on the final adjourn date of May 6, 2019 for failure of plaintiff to appear at the calling of the motion calendar.

In light of this Court's decision granting summary judgment to the City, finding that the City's employees's actions were discretionary governmental acts that were not actionable, the City's counsel thereafter e-mailed Mr. Sverd a stipulation of discontinuance of the present action. Mr. Sverd declined to execute it. The City now moves for dismissal and for sanctions, and plaintiff cross-moves for, once again, a default judgment.

Mr. Sverd, in his memorandum of law in opposition, entirely ignoring the City's argument that personal jurisdiction was not effected upon defendants, merely reiterates that plaintiff is entitled to a default judgment because the City did not interpose an answer, and because plaintiff has a meritorious cause of action, which is that the City is liable for the torts of its employees and the acts of Guerrini and Gibson were ministerial acts that "subject them and the City to liability for their incorrect performance", a contention that further disregards entirely this Court's determination that their acts were discretionary, and not ministerial, and therefore not actionable as a matter of law. This Court must remind Mr. Sverd that he neither moved for reargument nor filed a notice of appeal of this Court's prior order, and, therefore, he is precluded from arguing that the acts of Guerrini and Gibson were not discretionary but ministerial acts.

As heretofore explained, service of the summons and complaint by leaving the pleadings with a clerical assistant at the Jamaica Queens office of the Corporation Counsel instead of serving them at the office of the Corporation Counsel at 100 Church Street in New

York County was improper and thus plaintiff did not acquire personal jurisdiction over defendants. Consequently, not only is plaintiff not entitled to a default judgment against defendants, since they were never served, and also since his affidavit of merit is patently without merit, but defendants are entitled to dismissal of the action for lack of personal jurisdiction, pursuant to CPLR 3211(a)(8). Mr. Sverd is entirely silent as to this branch of the City's motion.

Moreover, since it has already been determined in the prior action that the actions in deciding to tag and dispose of plaintiff's vehicle as a derelict were discretionary governmental acts that are not actionable, the causes of action asserted in the present action are barred by the doctrine of res judicata as against the City, and by collateral estoppel, as against Guerrini and Gibson, and consequently, the present action must also be dismissed pursuant to CPLR 3211(a)(5), as shall be further discussed below.

Also, the action must additionally be dismissed in its entirety, including the causes of action labeled as "conversion", upon the ground of statute of limitations, pursuant to CPLR 3211(a)(5), since plaintiff failed to commence the action within the one year and 90 day period of limitation for commencement of tort actions against the City, pursuant to General Municipal Law §50-i. The action commenced on January 31, 2018, almost four years and five months after plaintiff's causes of action accrued, was therefore untimely and must be dismissed.

Mr. Sverd's only other arguments in opposition are that the present action is timely, pursuant to CPLR 203(f), because it relates back to the earlier action which was commenced within the statute of limitations period, that the dismissal of the prior action did not bar the present action under res judicata because Guerrini and Gibbons were not parties to the earlier action and because "[t]he Court reserved a decision on the merits of the current action when it did not dismiss the action on the same rational [sic] relied upon in the former case", Mr. Sverd arguing that since the present complaint is against defendants who were not parties to the earlier action and since it asserts a cause of action for conversion against the City, which was not asserted in the earlier action, res judicata does not apply.

CPLR 203(f) provides, "Claim in amended pleading. A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." The relation-back doctrine of CPLR 203(f), therefore, only applies

occurrences, to be proved pursuant to the amended pleading." The relation-back doctrine of CPLR 203(f), therefore, only applies where a claim is sought to be interposed by way of amendment of the original, timely-commenced, complaint after the statute of limitations would have ordinarily run on that new claim. Indeed, the cases cited by Mr. Sverd in support of his argument concerning the relation-back provision of CPLR 203(f), Cady v Springbrook NY, Inc. (145 AD 3d 846 [2nd Dept 2016]), 39 College Point Corp v Transpac Capital Corp. (27 AD 3d 454 [2nd Dept 2006]) and Pendleton v City of New York (44 AD 3d 733 [2nd Dept 2007]) only concern the dismissal as untimely of a new cause of action interposed in an amended complaint. Here, plaintiff never sought to amend the original complaint to add new parties or causes of action but rather the original action was dismissed substantively on summary judgment against the City. Therefore, the present action against the City and its employees has nothing to relate back to, but is merely a separate action that was commenced years past the expiration of the one year and 90-day statute of limitations governing plaintiff's claims under General Municipal Law §50-i.

With regard to Mr. Sverd's res judicata argument, this Court, first of all, did not "reserve[] a decision on the merits of the current action when it did not dismiss the action on the same rational [sic] relied upon in the former case". This Court did not dismiss the present action in its prior order under the earlier case because the City did not move for, and could not have moved for, dismissal of the present action at that time since the present action had not yet been commenced. It was during the time between the adjournment and return date of the City's summary judgment motion that Mr. Sverd commenced the present action and cross-moved for consolidation, which cross-motion this Court denied. Therefore, this Court is at a loss to understand Mr. Sverd's argument that this Court reserved decision on the merits of this action by not dismissing it in its prior order that granted summary judgment to the City.

As to Mr. Sverd's argument that res judicata does not apply because the current action is against new parties and includes causes of action for intentional tort, as opposed to negligence, the present action includes the City as a defendant and alleges negligence against it. Therefore, the cause of action against the City sounding in negligence is clearly barred by res judicata. Mr. Sverd's argument concerning new causes of action and new defendants, therefore, has no bearing on the issue of res judicata with respect to plaintiff's duplicate negligence cause of action against the City.

With respect to plaintiff's cause of action against the City and against the individual defendants alleging conversion, the

property", "wrongfully denied Plaintiffs access to its subject van and valuable property" and "wrongfully disposed of plaintiff's subject van and valuable property". In this regard, the complaint also alleges a cause of action for conversion against Guerrini and Gibson, alleging that they "exercised dominion and control" over the van and property, that they were "not authorized" to do so, that they did not have "a superior right of dominion and control" to that of plaintiff and that their "dominion and control" "deprived" plaintiff of said property.

Thus, the cause of action denominated as "conversion" does not articulate a cause of action for conversion at all; it does not claim that the City's employees converted the property to their own use - i.e. stole the property. Plaintiff's only allegation is that they improperly tagged the vehicle as a derelict and had it towed and destroyed, which is an allegation of negligence, the same allegation that this Court interpreted the complaint in the earlier action as alleging. That plaintiff in the present action alleges conversion based on merely defendants' taking "dominion and control" over the van and its contents attendant to its removal and destruction as a derelict does not set forth an intentional tort claim separate and apart from the claim of negligence.

As an aside, this Court observes that the complaint in the earlier action was drafted by plaintiff pro se and does not set forth any specific causes of action, but merely recites the underlying facts and sets forth the items of property damage and property loss he alleges he sustained and demands a sum representing the total of those losses, and also seeks an amount of damages to compensate him for "mental anguish, loss of livelihood and stress". His counsel, after being retained, never moved to amend the complaint to set forth any defined causes of action. Apparently, his maneuver of commencing a new action against the City and its employees and seeking to consolidate it with the first was a back-door attempt to achieve what he clearly knew, and was charged with knowing, was improper and would have been denied as such, namely, amendment of the earlier complaint during the pending of the City's summary judgment motion. Such a tactic is unavailing and will not be countenanced.

Thus, this Court's prior order granting the City summary judgment upon the ground that the actions of its employees Guerrini and Gibson were not actionable because they were discretionary governmental actions has preclusive effect and bars plaintiff, under the doctrine of res judicata, from asserting in the present action, based upon the same transaction or occurrence, the same cause of action as asserted in the first action, whether couched in negligence or conversion. Even if,

arguendo, plaintiff had alleged facts to support a cause of action for conversion, since it could have been raised in the earlier action, plaintiff is now barred by res judicata from asserting it in a new action against the City based upon the same facts as the prior 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...The fact that causes of action may be stated separately, invoke different legal theories, or seek different relief will not permit relitigation of claims" (Pondview Corp. v Blatt, 95 AD 3d 980, 980 [2nd Dept 2012] [internal quotations and citations omitted]; Myers v Myers, 121 AD 3d 762 [2nd Dept 2014]).

Moreover, since the issue of governmental immunity from liability by reason of the fact that the actions of Guerrini and Gibson were discretionary governmental acts and thus not actionable has been decided, plaintiff is collaterally estopped from relitigating that issue against Guerrini and Gibson and claiming that their actions were ministerial in nature and not discretionary.

The doctrine of collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity" where the party to be collaterally estopped had a full and fair opportunity to litigate the issue in the prior proceeding (Ryan v. New York Telephone, 62 NY 2d 494, 500 [1984])(emphasis added). "New York Law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling" (Gilberg v Barbieri, 53 NY 2d 285, 291 [1981]) (internal quotations and citation omitted). Thus, "[t]he defense may be asserted by a stranger to the prior action provided that the party against whom it is being used had a full opportunity to litigate the particular issue" (Meyer v Droms, 68 AD 2d 942 [3rd Dept 1979]).

The issue of whether the acts of Guerrini and Gibson in the tagging and destruction of plaintiff's vehicle were non-actionable discretionary governmental acts was decided against plaintiff in the prior action, and the determination of that issue is dispositive of the causes of action against Guerrini and

Gibson in the present action. Plaintiff had, and does not deny that he had, a full and fair opportunity to litigate that issue in the prior action. He is now collaterally estopped from relitigating that same issue against Guerrini and Gibson in this subsequent action. Moreover, as noted with respect to the City, the additional cause of action against them in this action alleging conversion, in addition to negligence, does not state a distinct cause of action for conversion but is merely the same claim of negligence, couched in terms an intentional tort, that was dismissed pursuant to this Court's earlier determination.

For the foregoing reasons, the action must be dismissed. Accordingly, this Court need not reach and will not address the remaining issues presented.

Finally, although the actions of Mr. Sverd are borderline frivolous, this Court, in its discretion, elects not to impose sanctions pursuant to 22 NYCRR §130-1.1.

Dated: October 17, 2019

KEVIN J. KERRIGAN, J.S.C.