

**Rojas v Romanoff**

2019 NY Slip Op 34015(U)

September 16, 2019

Supreme Court, Bronx County

Docket Number: 24579/2019E

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 14

-----X  
ROJAS, ANGEL

Index No. 24579/2019E

- against -

Hon. JOHN R. HIGGITT,

ROMANOFF, RICHARD, et ano.

A.J.S.C.

The following papers numbered 2 to 10 and 12 to 14 in the NYSCEF System were read on this motion for **DISMISSAL**, noticed on July 16, 2019 and duly submitted as No. 24 on the Motion Calendar of July 30, 2019

	<u>NYSCEF Doc. Nos.</u>
Notice of Motion – Exhibits and Affidavits Annexed	2-10
Notice of Cross-Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	12-13
Replying Affidavit and Exhibits	14
Filed Papers	
Memoranda of Law	
Stipulations	

Upon the foregoing papers, defendants' motion for an order dismissing the complaint under principles of collateral estoppel or res judicata is denied, in accordance with the annexed decision and order.

Dated: 09/16/2019

Hon.   
JOHN R. HIGGITT, A.J.S.C.

**Check one:**

- Case Disposed in Entirety
- Case Still Active

**Motion is:**

- Granted  GIP
- Denied  Other

**Check if appropriate:**

- Schedule Appearance
- Fiduciary Appointment
- Referee Appointment
- Settle Order
- Submit Order

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

-----X  
ANGEL ROJAS,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 24579/2019E

RICHARD ROMANOFF and NEBRASKALAND, INC.,

Defendants.

-----X

John R. Higgitt, J.

Upon defendants' June 27, 2019 notice of motion and the affirmation and exhibits submitted in support thereof; plaintiff's July 25, 2019 affirmation in opposition; defendants' July 29, 2019 affirmation in reply; and due deliberation; defendants' motion for an order dismissing the complaint under principles of collateral estoppel or res judicata is denied.

In this action, plaintiff alleges that the vehicle owned by defendant Nebraskaland, Inc. and driven by defendant Romanoff was negligently operated, causing a collision between defendants' vehicle and plaintiff's motorcycle.

Defendants move pursuant to CPLR 3211(a)(5) to dismiss the complaint under principles of issue preclusion or claim preclusion on the basis of a default judgment entered in a declaratory judgment action, *Nationwide Agribusiness Insurance Company v Rojas*, Index No. 607259/2017 (Supreme Court, Nassau County), in which plaintiff herein was named as a defendant. The complaint in the declaratory judgment action recited facts indicating that the vehicle Nationwide insured (defendants' vehicle) did not strike plaintiffs' motorcycle. The complaint in the declaratory judgment action sought declarations that Nationwide had no duty to provide coverage for any claims for personal injury, property damage, indemnity, no-fault or uninsured motor coverage made by anyone, or his or her assignee, in connection with the occurrence; that

any injury to plaintiff did not arise from the use or operation of a Nationwide insured vehicle; and that plaintiff's injuries were caused solely by plaintiff's reckless operation of his motorcycle.

The court (Parga, J.) granted Nationwide a default judgment pursuant to CPLR 3215 against, among other parties, plaintiff, declaring that (1) Nationwide was under no obligation to provide liability coverage with respect to the subject occurrence; and (2) Nationwide had no duty to provide coverage for no-fault or uninsured motorist claims made by or on behalf of the defaulting parties. Notably, plaintiff's default in the declaratory judgment action was a pleading default: plaintiff neither answered the declaratory judgment complaint nor appeared in that action.

“Collateral estoppel precludes a party from relitigating an issue which has previously been decided against [him or her] in a proceeding in which [he or she] had a fair opportunity to fully litigate the point” (*In re of Dunn*, 24 NY3d 699, 704 [2015] [quotation marks omitted]). The application of collateral estoppel requires that the issues in the prior litigation were actually litigated and decided (*see Conason v Megan Holding LLC*, 25 NY3d 1 [2015]), and an issue is not “actually litigated” if, as here, the prior judgment was entered on the defendant's default in appearing in the prior action (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449 [1985]; *Matter of Hereford Ins. Co. v McKoy*, 160 AD3d 734 [2d Dept 2018]; *Matter of Am. Transit Ins. Co. v Hossain*, 100 AD3d 421 [1st Dept 2012]; *Stumpf AG v Dynegy Inc.*, 32 AD3d 232 [1st Dept 2006]). While a prior judgment granted on default may be granted preclusive effect “where the party against whom preclusion is sought appears in the prior action, yet willfully and deliberately refuses to participate in those litigation proceedings, or abandons them, despite a full and fair opportunity to do so” (*Miller v Falco*, 2019 NY Slip Op 01589, at \*1 [2d Dept 2019]), plaintiff herein was guilty of no such conduct in the declaratory judgment action.

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 was” (*Matter of People of the State of N.Y. v Applied Card Sys., Inc.*, 11 NY3d 105, 122 [2008] [internal citation and quotation marks omitted; emphasis added]). Res judicata applies not only to claims actually litigated in the prior litigation but claims that could have been raised therein (*see Avilon Auto. Grp. v Leontiev*, 168 AD3d 78 [1st Dept 2019]). A judgment entered on a pleading 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]).

Here, the default judgment in the declaratory judgment action was entered on plaintiff Rojas’ failure to answer the complaint or appear in the action. Moreover, even if the default judgment was otherwise subject to res judicata (*see Parker v Hoefler*, 2 NY2d 612 [1957], *cert den* 355 US 833 [1957]), the claims in the declaratory judgment action and in the present action do not “have such a measure of identity that a different judgment in [this] action would destroy or impair rights or interests established by the [the declaratory judgment action]” (*Robbins v Growney*, 229 AD2d 356, 357 [1st Dept 1996]). The declaratory judgment action resolved insurance coverage claims made against the defendants’ insurance policy; the present action is focused on negligence claims against the defendant tortfeasors.


Accordingly, it is

ORDERED, that defendants’ motion to dismiss the complaint is denied; and it is further

ORDERED, that the Clerk of the Court shall issue a case scheduling order on November  
1, 2019.

This constitutes the decision and order of the court.

Dated: September 16, 2019

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