SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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ODILE ALTAGRACIA MARTINEZ,

Plaintiff,

-against-

DECISION AND ORDER
Index No. 32111/2018E

JRL FOOD CORP. D/B/A KEYFOOD SUPERMARKET
And WEINBERG JEROME LLC,

Defendants.

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The following papers on Motion Seq. 1 & 2 were considered on these motions to dismiss:

PAPERS	**NUMBERED**
Motion Seq. #1	
Notice of Motion and annexed Exhibits and Affidavits	**1**
Answering Affidavits and Exhibits	**2, 3**
Reply Affirmation	**4**
Motion Seq. #2	
Notice of Motion and annexed Exhibits and Affidavits	**1**
Answering Affidavits and Exhibits	**2, 3**
Reply Affirmation	**4**

Upon the foregoing papers, it is ordered that the motions are consolidated for the purpose of disposition as follows:

This is an action in which plaintiff allegedly tripped over a storage case left in the aisle of defendant Keyfood Supermarket on August 5, 2016. On Oct. 11, 2016, plaintiff commenced an action (the first of two prior actions) against defendant JRL Food Corp. D/B/A Keyfood Supermarket ("JRL") as the operator of Fine Fare Supermarket located at 320 East Gun Hill Road in Bronx County ("Fine Fare action"). On August 16, 2017, plaintiff commenced a separate action (the second prior action) against 320 Fair Farm Food Corp. as owner/operator of Fine Fare Supermarket located at 320 East Gun Hill Road in Bronx County ("320 Fair Farm action"). Pursuant to a stipulation dated October 31, 2017, the Fine Fare action was discontinued

with prejudice against JRL ("Fine Fare stipulation"). Pursuant to a stipulation dated October 24, 2018, the 320 Fair Farm action was discontinued with prejudice ("320 Fair Farm stipulation"). The instant action was commenced on October 24, 2018. Defendant Weinberg Jerome LLC is the landlord of the premises located at 3515 Jerome Avenue in Bronx County ("Weinberg").

JRL now moves for an order to dismiss the case under CPLR 3211(a)(5) based upon a prior stipulation of discontinuance with prejudice barring the instant action. JRL next moves for dismissal pursuant to CPLR 3217 alleging that the two prior stipulations of discontinuance with prejudice act as an adjudication of the merits barring the instant claim. JRL also moves under CPLR 3211(c) that the instant motion be converted into one for summary judgment and dismissal of the complaint. Weinberg moves to dismiss on identical grounds.

In opposition to both JRL's and Weinberg's motions, plaintiff asserts that the doctrine of res judicata is inapplicable since the "pivotal foundation fact"- the alleged locations of the supermarket where plaintiff fell, are not the same. Therefore, plaintiff's claim in the instant action against JRL as operator of Key Food Supermarket has not been determined on the merits.

Weinberg submits partial opposition to JRL's motion asserting that its claims against JRL must survive as a third-party action if JRL's motion to dismiss is granted.

JRL submits partial opposition to Weinberg's motion alleging that Weinberg has not properly served JRL with its cross claims as prescribed by CPLR §3012(a). Specifically, JRL contends that since Weinberg never properly served JRL with its cross claims, there is "nothing to survive" the dismissal of the action against JRL.

Plaintiff further opposes the court converting the instant motions to motions for summary judgment under CPLR 3211(c) because no discovery has been conducted and the motions for summary judgment would therefore, be premature.

As a preliminary matter, the court declines to convert the instant motion to a motion for summary judgment pursuant to CPLR 3211(c). CPLR 3211(c) provides that the court may convert a motion to dismiss to a motion for summary judgment upon adequate notice to the parties. Whereas here, no such notice was provided to the parties and plaintiff opposed the conversion, the court declines to exercise its discretion to convert since the record does not establish that the parties "deliberately chart[ed] a summary judgment course" (*Wadiak v Pond Mgt., LLC*, 101 AD3d 474, 475 quoting *Elsky v Hearst Corp.*, 232 AD2d 310 [1st Dept 1996]; see also *Mihlovan v Grozav*, 72 NY2d 506 [1988]).

On a motion to dismiss pursuant to CPLR 3211, the pleadings are to be liberally construed and accorded the benefit of every possible favorable inference (see *Leon v Martinez*, 84 NY2d 83 [1994]; CPLR 3026). "Whether the complaint will later survive a motion for summary judgment or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2006]; *see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Pursuant to CPLR 3211(a)(5), "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the cause of action may not be maintained" because of collateral estoppel or *res judicata*.

The rationale underlying the doctrine of *res judicata* is that a party who has been given a full and fair opportunity to litigate claim should not be allowed to do so again (see *O'Connell v Corcoran*, 1 NY3d 179, 184-185 [2003]). "One linchpin of *res judicata* is an identity of parties actually litigating successive actions against each other: the doctrine applies only when a claim *between* the parties has been previously brought to a final conclusion (*City of N.Y. v Welsbach*

Elec. Corp., 9 N.Y.3d 124,127-28 [2007] quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999] [internal quotations omitted]). "Identity of parties [is] an essential element for application of the doctrine of issue preclusion or collateral estoppel" (*Brown v City of New York*, 60 NY2d 897, 898 [1983]).

It is well settled that "the fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings" (*Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 153 [1988]). Generally, stipulations of discontinuance should not be accorded "any greater scope" than what the parties intended" (*Pace v Hazel Towers, Inc.*, 183 AD2d 588, 589 [1st Dept 1992]).

Viewed within this framework, the court finds that the doctrine of *res judicata* does not bar the instant action against JRL. The Fine Fare stipulation reflects a clear understanding between the parties that the Fine Fare action was being discontinued against JRL because JRL did not operate the Fine Fair Supermarket located at 320 Gun Hill Road. The Fine Fare stipulation cannot be considered in a vacuum. The complaint and bill of particulars in the Fine Fare action clearly indicated JRL d/b/a Keyfood Supermarket was not, in the true sense of the word, a party to the Fine Fair action (see *Chadbourne & Parke LLP v Warshaw*, 287 AD2d 119 [1st Dept 2001]). Inasmuch as it is undisputed that JRL never operated its business as Fine Fair Supermarket located at 320 East Gun Hill Road, it cannot be claimed that there was a determination on the merits and consequently the doctrine of *res judicata* is inapplicable here.

The doctrine of res judicata not only applies to the party to a previous action, but it also extends to those in privity with the party (*Avilon Auto. Group v Leontiev*, 168 AD3d 78 [1st Dept 2019]). However, where as here, it is uncontroverted that Weinberg was not a party to either the Fine Fare stipulation or the 320 Fair Farm stipulation, it is also uncontroverted that it was not the intent of the parties to discontinue either action against Weinberg. Accordingly, Weinberg's motion is denied.

Although a stipulation "with prejudice" has a presumptive preclusive effect, the court has the discretion to narrowly interpret or disregard the "with prejudice" language when the interest of justice or the equities involved warrant such approach (see *Employers Fire Ins. Co. v Brookner*, 47 AD3d 754 [2d Dept 2008]). The court is mindful that "[i]n properly seeking to deny a litigant two days in court, courts must be careful not to deprive him of one" (*Landau, P.C. v LaRossa, Mitchell &* Ross, 11 NY3d 8, 14 [2008] [internal quotation marks omitted]).

CPLR 3217(c) provides, in relevant part, that a discontinuance operates as an adjudication on the merits if the party has once discontinued an action based on or including the same cause of action. "The underlying purpose of CPLR 3217 (c) is to curb the use of the discontinuance device as a means of harassment and a source of unnecessary repetitive litigation" (*Rodrigues v Samaras*, 117 AD3d 1022, 1024 [2d Dept 2014]). Here, contrary to the contentions of JRL and Weinberg, the purpose of the Fine Fare and Fair Farm stipulations was "for good cause and clearly not for harassment purposes" (*Tortorello v Carlin*, 162 AD2d 291, 292 [1st Dept 1990]), namely, the wrong parties were sued due to the mistake of fact as to which supermarket the accident occurred. Therefore, neither stipulation operated as an effective adjudication on the merits.

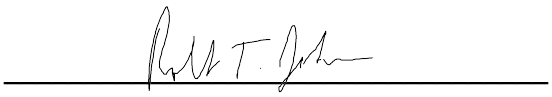
In view of the foregoing, Weinberg's request to convert its the cross claims into a third party action is denied. JRL's request to dismiss Weinberg's cross claims is similarly denied. JRL's request is denied for the additional reason that it did not advance any arguments in support of dismissal of Weinberg's cross claims in its initial moving papers. Moreover, since none of the parties proffer any basis for the granting of attorney fees, all such requests are denied.

Accordingly, it is hereby ORDERED, that the motion to dismiss by defendant JRL d/b/a Keyfood Supermarket is denied in its entirety; and it is further

ORDERED, that the motion to dismiss by defendant Weinberg Jerome LLC is similarly denied in its entirety.

This constitutes the decision and order of this court.

Dated: May 19, 2020



Robert T. Johnson, J.S.C.