

Mushell v City of New York

2021 NY Slip Op 32096(U)

October 26, 2021

Supreme Court, New York County

Docket Number: Index No. 101782/2012

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 52

Justice

-----X

ROCHELLE MUSHELL

Plaintiff,

- v -

THE CITY OF NEW YORK,

Defendant.

-----X

INDEX NO. 101782/2012
MOTION DATE N/A
MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for AMEND CAPTION/PLEADINGS.

This action arises of injuries allegedly sustained as a result of a trip and fall. Defendant, the City of New York (City), moves to amend its answer to include the affirmative defense of collateral estoppel and to dismiss the complaint pursuant to CPLR 3211(a)(5). Plaintiff opposes the instant motion. For the reasons set forth below, the City’s motion is granted in its entirety.

Background

Plaintiff alleges that on January 26, 2011, she was “caused to trip and fall” on an alleged defective condition of the “sidewalk, tree grate and/or tree appurtenance” in front of 445 West 59th Street, an address located between Ninth and Tenth Avenues, in the City, County, and State of New York. The property abutting that location is known as the City University of New York – John Jay College of Criminal Justice and is owned by the New York State Dormitory Authority (hereinafter “the State”).

Prior to serving her notice of claim on the City, on or about April 15, 2011, plaintiff filed a complaint under Claim Number 119718 against the State, the owner of the building abutting the sidewalk where plaintiff alleges that she fell, in the New York State Court of Claims.

Plaintiff alleged the same facts as are recited in the notice of claim and complaint against the City. The description of the alleged defect in the complaint against the State is identical to that given in the notice of claim and complaint served on the City.

The action proceeded to trial in the Court of Claims. Plaintiff proved that part of one side of a tree grate around a tree next to an alleged State-owned facility, John Jay College of Criminal Justice, was raised to some degree in relation to an adjacent part of the grate. Plaintiff also proved that she caught her toe and tripped on that raised part of the grate, which was lightly covered with snow, when she sought to walk across the grate in order to enter her car on the passenger side. The slight raise appeared to have been caused by a tree root.

Following the trial on the issue of liability in the Court of Claims before the Hon. Thomas H. Scuccimarra, a Judge of the Court of Claims, on May 1, 2012, Judge Scuccimarra ordered and adjudged that plaintiff's claim against the State be dismissed. *See* NYSCEF Docs. 14, 15. In its decision, the Court found that the height differential was not a dangerous condition, and that the condition, "in this Court's view, is too trivial to be actionable." *Id.*

Amend the Answer

Pursuant to CPLR 3025 (b), "[a] party may amend his or her pleading, . . . , at any time by leave of court . . . [and] [l]eave shall be freely given upon such terms as may be just including the granting of costs and continuances." The Court of Appeals recognizes that "[a]s a general rule, 'leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court.'" *Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] (internal citation omitted).

Here, the Court finds that plaintiff has not sufficiently identified any prejudice by this late amendment. Rather, it appears that plaintiff was in the best position to know of the possibility of this affirmative defense as it was in possession of the entire decision rendered by the Court of Claims and did not disclose the same to the City. Accordingly, the portion of the City's motion that seeks to amend its answer to include the affirmative defense of collateral estoppel is granted.

Collateral Estoppel

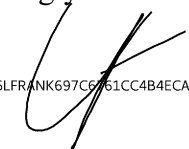
Collateral estoppel, or issue preclusion, precludes a party from relitigating issues that were clearly decided in a prior proceeding. (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999] internal citations omitted). The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action. *Id.* "The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456 [1985]).

The issues plaintiff attempts to relitigate in this action was already decided against her in the prior Court of Claims action, and plaintiff had a "full and fair opportunity to contest the prior determination." (*Kaufman*, 65 NY2d 449, 455 [1985]); *Parker*, 93 NY2d at 350. In *Parker*, the plaintiff was barred from relitigating issues where in a prior Article 78 proceeding plaintiff "raised the very same legal and factual issues" that formed the basis of his current action. *Id.* "Inasmuch as plaintiffs had a full and fair opportunity to litigate these issues in the federal action, they are collaterally estopped from relitigating the issues in this action." (*Kirsh v City of New York*, 2 AD3d 353, 354 [1st Dept 2003]).

Here, the Court of Claims clearly found against the plaintiff on the main issue of this case, that is whether the alleged defect was actionable in tort. The Court of Claims found it was not. Accordingly, plaintiffs are collaterally estopped from relitigating identical issues in this action as those fully and fairly adjudicated and dismissed on the merits in the prior Court of Claims action. The Court has reviewed plaintiff's remaining contentions and finds them unavailing. Accordingly, it is hereby

ORDERED that defendant's motion is granted, and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

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10/26/2021
DATE

LYLE E. FRANK, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE