Short Form Order



NEW YORK SUPREME COURT - QUEENS COUNTY

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

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Alice Lucas,

Plaintiff,

- against -

The City of New York,

Defendants.

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Index Number: 705927/18

Motion Date: 3/15/21

Motion Seq. No.: 2

The following papers numbered E43-E60 & E63-E64 read on this motion by The City of New York to amend its answer and to dismiss the complaint.

| | Papers Numbered |
|---|---|
| Notice of Motion-Affirmation-Exhibits | E43-60 |
| Affirmation in Opposition | E63 |
| Reply | E64 |

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

Motion by the City, pursuant to CPLR 3025, for leave to amend its answer to include the affirmative defense of collateral estoppel, and upon amendment, to dismiss the complaint pursuant to CPLR 3211(a)(5) upon the grounds of collateral estoppel and law of the case is denied.

Plaintiff allegedly sustained injuries when she fell outside of the Resorts World Casino New York City located at 110-00 Rockaway Boulevard in Queens County on a walkway leading to the lost-and-found security office on November 15, 2017.

Former defendants Genting New York LLC and Resorts World Casino New York City (collectively the Casino), moved for summary judgment dismissing the complaint and cross-claims against them, and the City cross-moved for summary judgment dismissing the complaint and cross-claims against it. Pursuant to the order of this Court issued on August 12, 2020, the motion was granted, the cross-motion was denied and the caption of the action was amended deleting the Casino defendants from the caption.

The Casino defendants' motion was granted upon the finding by this Court that plaintiff could not identify any defect or condition that could have caused her to fall. This Court stated, inter alia, "Since plaintiff does not know what caused her to fall

and did not identify any dangerous or defective condition, there is no issue of any dangerous condition that caused her fall of which the Casino could have had actual or constructive notice. Thus, plaintiff's inability to identify the cause of her injury is fatal to her cause of action (see Louman v. Town of Greenburgh, 60 AD 3d 915[2nd Dept 2009])."

The City's cross-motion for summary judgment upon the same ground was denied, not substantively, but procedurally, because it was not properly a cross-motion, but rather was, in reality, a motion-in-chief labeled as a cross-motion, and, as such, was untimely under CPLR 3212(a) and thus was denied outright.

The City now seeks to get around its untimely motion for summary judgment by the maneuver of seeking amendment of its answer to include the affirmative defense of collateral estoppel and, based upon such affirmative defense, to move under subsection (5) of CPLR 3211(a) for dismissal.

Pursuant to CPLR 3211(e), a motion for dismissal upon the ground of collateral estoppel, pursuant to CPLR 3211(a)(5), must be raised "before service of the responsive pleading is required" and "is waived unless raised either by such motion or in the responsive pleading." Since a motion pursuant to CPLR 3211(a)(5) is a pre-answer motion, it may not be made now, after the City has interposed its answer. Amendment of a pleading relates back to the date of the original pleading (counsel's awareness of which principle is demonstrated by counsel's redundant request for leave to amend the answer "nunc pro tunc"). Therefore, amending the answer to include an affirmative defense of collateral estoppel is irrelevant and unavailing for the City with respect to its instant motion. Since it has interposed an answer, the City could not move under CPLR 3211(a)(5), even if it were allowed to amend its answer to include an affirmative defense of collateral estoppel, but could only move post-answer for summary judgment pursuant to CPLR 3212, upon the basis of its collateral estoppel affirmative defense in its answer. However, the City is precluded from so moving again, not only because such a motion would, as its previous one, be untimely, but also because it would be in derogation of the rule against successive summary judgment motions. It is well settled in the Second Department that it is improper to make successive motions for summary judgment based upon facts or arguments which could have been submitted on the original motion (see Kornblum v. Blank Rome Tenzer Greenblatt, LLP, 39 AD 3d 482 [2nd Dept 2007]; Williams v. City of White Plains, 6 A.D.3d 609 [2d Dept. 2004]; Capuano v. Platzner Int'l Group, Ltd., 5 A.D.3d 620, 621 [2d Dept. 2004]; Klein v. Auerbach, 1 A.D.3d 317 [2d Dept. 2003]).

The instant motion is an attempt by the City to extricate itself from its failure to move in a timely fashion for summary

judgment by seeking to make an improper pre-answer motion for dismissal under CPLR 3211(a)(5) after it has interposed its answer, which is a not-too-subtle back-door attempt to make, essentially, a successive, and even more untimely, motion for summary judgment upon the same ground that was the basis of its prior motion for summary judgment.

In any event, there is no basis for the defense of collateral estoppel based upon this Court's granting of the former co-defendants' motion for summary judgment because, as the Court of Appeals has explained, "[Although] [t]he law of the case doctrine is part of a larger family of kindred concepts, which includes... collateral estoppel (issue preclusion)...[which] doctrines, broadly speaking, are designed to limit relitigation of issues... [a]s distinguished from...claim preclusion, however, law of the case addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation before final judgment...while collateral estoppel precludes relitigating an issue decided in a prior action..." (People v. Evans, 94 N.Y.2d 499, 502 [2000]). Therefore, collateral estoppel does not apply to the present matter. Consequently, since the City does not have a viable defense based upon collateral estoppel, there is no basis under CPLR 3025 to allow amendment of its answer to include such affirmative defense.

Furthermore, that branch of the motion for dismissal upon the "law of the case" principle, bundled with the collateral estoppel defense under the banner of a CPLR 3211(a)(5) pre-answer motion to dismiss, must also be denied, for an additional, and more essential reason. First of all, this Court does agree with the City that although the prior order of this Court is not yet a final one since plaintiff filed a notice of appeal that has not yet been determined, it remains the law of the case until such time that it is reversed or modified. However, whether or not this Court's prior determination concerning plaintiff's inability to identify the cause of her claimed accident is currently the law of the case, there is no basis in the CPLR for a motion to dismiss upon the ground of "law of the case". It is not the equivalent of collateral estoppel, as has been noted, and thus a motion based upon "law of the case" does not lie under CPLR 3211(a)(5). The City does not identify any other subsection of CPLR 3211(a), or any other provision of the CPLR, and this Court notes that there are, in fact, no such sections or provisions, under which such a pre-trial motion for dismissal is allowable. Rather, the only opportunity for the City to move for dismissal based upon the law of the case doctrine is by way of a motion in limine before the trial Justice at the time of trial of the case, not by way of another pre-trial motion to this Court. Such a motion, moreover, would not properly be a motion for dismissal, but rather a motion for a directed verdict upon the ground that the issue has been determined and may not be litigated and, therefore, the plaintiff cannot establish a

prima facie case.

The City's motion, therefore, is not cognizable and, accordingly is denied.

Dated: March 17, 2021

KEVIN J. KERRIGAN, J.S.C.

**FILED**

**3/17/2021**
**11:24 AM**

**COUNTY CLERK**
**QUEENS COUNTY**