

Johnson v Cremoux

2022 NY Slip Op 34528(U)

September 23, 2022

Supreme Court, Kings County

Docket Number: Index No. 500451/2018

Judge: Lisa S. Ottley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS - PART 24

-----x
ANTHONY JOHNSON,

Plaintiff,

Index # 500451/2018

-against-

ORDER

Motion Seq. #9

GERARD CREMOUX, CATHERINE CREMOUX
and SCOTT BAVOSA CONSTRUCTION CORP.,

Defendants.

-----x
GERARD CREMOUX and CATHERINE CREMOUX,

Third-Party Plaintiff,

-against -

SCOTT BAVOSA CONSTRUCTION CORP.,

Third-Party Defendant.
-----x

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for Summary Judgment, submitted on May 10, 2022.

Papers	Numbered
Notice of Motion and Affirmation	1&2 [Exh. 1-5]
Affirmation/Affidavit in Opposition.....	4
Reply Affirmations.....	
Memoranda of Law.....	3

Defendants/Third-party plaintiffs, Gerard Cremoux and Catherine Cremoux, hereinafter, "Cremoux" move pursuant to CPLR §3025, amending their Answer to include the affirmative defenses of collateral estoppel and res judicata; and upon amendment, an order pursuant to CPLR 3211(a)(5) dismissing plaintiff's cause of action pursuant to Labor Law §200 and common law negligence, as it relates to the defendant/third-party plaintiffs; an order pursuant to CPLR 3211(a)(7) dismissing the plaintiff's complaint for failure to state a cause of

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action pursuant to Labor Law §200 or common law negligence as based on a condition of the premises or supervision and control over plaintiff's work; or in the alternative, granting defendants/third-party defendants' motion, pursuant to CPLR §2221 for re-argument of their motion for summary judgment dismissing plaintiff's cause of action pursuant to Labor Law §200 and common law negligence.

BACKGROUND

On January 9, 2018, the plaintiff commenced this action by filing a summons and complaint with the Kings County Clerk's office. The Cremoux's joined issue by their joint verified answer dated February 7, 2018. The complaint was based on personal injuries allegedly sustained by the plaintiff on November 3, 2016, while the plaintiff was performing construction work in the residence owned by the Cremoux's. *While performing his duties, plaintiff was caused to be injured by a portable saw that was allegedly missing a protective guard.* The plaintiff's causes of action against the defendants are pursuant to common law negligence and violations of Labor Law §§ 200, 240, and 241(6) for failure to provide sufficient safety devices.

The Cremoux's verified answer included several affirmative defenses, including but not limited to, comparative negligence and homeowners' exemption. The Cremoux's also commenced a third-party action by filing a summons and complaint on March 29, 2018, against the plaintiff's employer, Scott Bavosa Construction Corp., (hereinafter "Bavosa"). Bavosa's third-party answer, filed on September 7, 2018, included counterclaims for indemnification and contribution.

A note of issue was filed on April 22, 2021. The Cremoux's cross-moved pursuant to CPLR §3212 for (1) an order granting summary judgment in their favor and dismissing the complaint; (2) finding the plaintiff suffered a "grave injury," and (3) for a conditional order of common law indemnity, including past and future defense costs and attorney's fees. On January 22, 2022, the court issued a decision on the defendants/third-party plaintiffs' motion in part dismissing plaintiff's Labor Law §240 and §241(6) cause of action and denied dismissal of the plaintiff's Labor Law §200 and indemnity claims.

Leave to Amend

Defendants/Third-Party plaintiffs move for an order pursuant to CPLR 3025, to amend their answer to include the affirmative defenses of collateral estoppel and res judicata. Plaintiff opposes the amendment on the grounds that the doctrines of res judicata and collateral estoppel do not apply to this case. Defendants/third-party plaintiffs argue that this court's order dated January 4, 2022, gives rise to the defenses of res judicata and collateral estoppel, which were not available when the defendants interposed their answer, and

therefore, pursuant to CPLR §3025 leave to amend should be freely given absent prejudice or surprise.

Leave to amend is subject to the discretion of the court. See, Lennon v. 56th and Park (NY) Owner, LLC, 199 A.D.3d 64, 153 N.Y.S.3d 535 (2nd Dept., 2021). In the case at bar, the plaintiff's motion decided on January 4, 2022, moved for an order granting summary judgment on the issue of liability against defendants Gerard and Catherine Cremoux on his Labor Law §241(6) claim, holding the plaintiff free from comparative negligence, and holding as a matter of law that plaintiff suffered a "grave injury" within the meaning of New York State Workers' Compensation Law §11. The Cremoux's filed a cross-motion seeking dismissal of plaintiff's Labor Law §§241(6), 240(1) and 200 claims and the third-party cause of action for common-law indemnity, which this court deemed untimely because it was not responsive to plaintiff's timely motion for summary judgment as to plaintiff's Labor Law §§240(1) and 200 claims and failed to offer an excuse for the delay in filing the cross-motion. The court addressed those issues which were raised in the respective motions, denying plaintiff's motion on the issue of liability and finding that plaintiff's injuries constitute a grave injury as a matter of law. Defendants/third-party plaintiff's cross-motion was granted in their favor dismissing plaintiff's Labor Law §241(6) cause of action and denied as to Labor Law §200 and indemnity claims, due to the untimeliness of the cross-motion and failure to demonstrate good cause for the delay in making the cross-motion. See, Vitale v. Astoria Energy II, LLC, 138 A.D.3d 981, 30 N.Y.S.3d 213 (2nd Dept., 2016).

In considering whether res judicata and collateral estoppel should be applied to a case, it is the identity of the issue which has necessarily been decided in a prior action or proceeding that determine whether the doctrines of res judicata or collateral estoppel are applicable. Here, the identical issue was not decided by the court on the previous motions for summary judgment. As discussed above, the issues decided were Labor Law §§241(6) and 240(1). Res judicata principles prohibit a party from seeking to re-litigate a claim "where a judgment on the merits exists from a prior action between the parties involving the same subject matter. See, In re Hunter, 4 N.Y.3d 260, 794 N.Y.S.2d 286 (2005). Collateral estoppel applies more narrowly to the attempted re-litigation of "identical issue which were "necessarily...decided" in a prior action. See, Kaufman v. Eli Lilly and Co., 65 N.Y.2d 449, 492 N.Y.S.2d 584 (1983). This court's decision did not consider nor address the merits of the plaintiff's Labor Law §200 claims, therefore, dismissal of the claims based upon an amended Answer pursuant to CPLR §3025 would not be warranted. See, Motors Insurance Corp. v. Mautone, 41 A.D.3d 800, 839 N.Y.S.2d 507 (2nd Dept., 2007), citing, Jackson Heights Care Center, LLC v. Bloch, 39 A.D.3d 477, 833 N.Y.S.2d 581.

Therefore, the part of defendants/third-party plaintiff's motion to amend their answer to include res judicata and collateral estoppel as defenses, and dismissal of the plaintiff's complaint on those two defenses based upon a decision rendered by this court on January 4,

2022, is hereby denied. The court does not find the doctrines of res judicata and collateral estoppel applicable.

Dismissal for Failure to State A Cause of Action

Next, this court will address the defendant/third-party plaintiff's request for an order pursuant to CPLR 3211(a)(7) dismissing plaintiff's complaint on the grounds that the complaint fails to state a cause of action pursuant to Labor Law §200 or common law negligence as based on a condition of the premises or supervision and control over plaintiff's work. On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the complaint liberal construction, accept the allegations as true, and provide the plaintiff the benefit of every possible favorable inference. See, *Lewis & Murphy Realty, Inc. v. Colletti*, 187 A.D.3d 731, 130 N.Y.S.3d 350 (2nd Dept., 2020), citing, *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972; *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 401 N.Y.S.2d 182.

In opposition to defendants/third-party plaintiffs' motion, plaintiff argues the following: "Cases involving Labor Law §200 fall into broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed...[W]hen the manner of work is at issue, no liability will attach to the owner solely because [he or she] may have had notice of the allegedly unsafe manner in which work was performed. Rather, when a claim arises out of the alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law §200 unless it is shown that the party to be charged had the *authority* to supervise or control the performance of work." Plaintiff argues that "the Cremoux's have not met their burden to establish that they did not have the authority to supervise or control Anthony Johnson's work, and thus dismissal pursuant to CPLR 3211(a)(7) is equally as inappropriate as a grant of summary judgment would have been." This court disagrees. Here, the defendant/third-party plaintiff demonstrated, *prima facie*, that the Cremoux's did not direct or control the plaintiff's work. There is nothing in the record to support, as indicated in this court's prior decision, that the defendant/third-party plaintiff had the authority to supervise or control the performance of plaintiff's work, nor did the defendant/owner have actual or constructive knowledge of a dangerous condition on the premises. See, *Salgado v. Rubin*, 183 A.D.3d 617, 123 N.Y.S.3d 153 (2nd Dept., 2020).

Accordingly, the defendant/third-party plaintiff's motion is granted pursuant to CPLR §3211(a)(7) dismissing plaintiff's complaint on the grounds that the complaint fails to state a cause of action pursuant to Labor Law §200 or common law negligence as based on a condition of the premises or supervision and control over plaintiff's work.

The alternative relief sought for re-argument and renewal, and upon re-argument /renewal for dismissal of the cause of action pursuant to Labor Law §200 and common law negligence is deemed moot.

This constitutes the order of this Court.

Dated: Brooklyn, New York
September 23, 2022



HON. LISA S. OTTLEY, J.S.C.

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