

Henry v Cook

2023 NY Slip Op 34185(U)

November 27, 2023

Supreme Court, Kings County

Docket Number: Index No. 503694/2020

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27th day of November, 2023.

P R E S E N T :
HON. WAVNY TOUSSAINT
Justice.

DAMIAN T. HENRY,

Plaintiff,

-against-

TANATA COOK and LUX CREDIT
CONSULTANTS LLC,

Defendants.

Cal. No. 9

Index No.: 503694/2020

DECISION AND ORDER

The following papers numbered 1 to read herein
Notice of Motion/Order to Show Cause/
and Affidavits (Affirmations) Annexed
Cross Motion and Affidavits (Affirmation) Annexed
Answers/Opposing Affidavits (Affirmations)
Reply Affidavits (Affirmations)
Affidavit (Affirmation)
Other Papers

Papers Numbered

58-67

76-77; 79-81

Plaintiff Damien T. Henry's¹ motion (Seq. 04) pursuant to CPLR §3212 for an order: (1) granting partial summary judgment on the issue of liability as against defendant driver Tanata Cook (Cook) and defendant vehicle owner Lux Credit Consultants LLC

¹ Damien T. Henry is also referred to as "plaintiff" or "Henry".

(Lux)² and (2) dismissing defendants' affirmative defense of comparative negligence, is granted.

Plaintiff's prima facie showing that defendant Cook was responsible for causing the collision with plaintiff's vehicle, due to Cook's alleged improper lane change, was not rebutted by defendants' opposition based on the uncertified police accident report, which is hearsay and insufficient, as a matter of law, to raise a triable issue of fact (*Rosa v Gordils*, 211 AD3d 1060,1061 [2d Dep't 2023]), and the inadequate attorney affirmation from defendants' counsel, who lacked personal knowledge of the facts giving rise to the accident (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]; *Palo v Principio*, 303 AD2d 478, 478 [2d Dep't 2003]).

The opposition submitted by Lateema Nero (Nero), plaintiff in Action #2,³ is relevant here in so far as Nero contends, inter alia, the within ruling would potentially impose res judicata and collateral estoppel effect as to her claims against Henry, Cook and Lux, all parties in Action #1 and now defendants in Action #2.

It is well-settled that "[u]nder the doctrine of res judicata, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action involving the parties to a litigation and those in privity with them . . . The [doctrine] operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief

² Cook and Lux are also collectively referred to as "defendants".

³ Action #2 is captioned Lateema Nero v. Lux Credit Consultants, Damien T. Henry and Tanaya Cook (Index No. 507023/2020) and, pursuant to the 8/17/23 Consolidation Order herein, is joined for trial with the instant action.

which arise out of the same factual grouping or transaction and which should have or could have been resolved in the prior proceeding” (*Luscher v Arrua*, 21 AD3d 1005, 1006-1007 [2d Dep’t 2005]).

“Under the doctrine of collateral estoppel, a party is precluded from relitigating an issue which has been previously decided against him in a prior proceeding where he had a full and fair opportunity to litigate such issue . . . The two elements that must be satisfied to invoke the doctrine of collateral estoppel are that (1) the identical issue was decided in the prior action and is decisive in the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior issue” (*Luscher*, 21 AD3d at 1007). “Collateral estoppel is sometimes referred to as issue preclusion” (*Lennon v 56th & Park (NY) Owner, LLC*, 199 AD3d 64, 69 [2d Dep’t 2021]; *Schwartz v Public Administrator of County of Bronx*, 24 NY2d 65, 71 [1969]). “The burden of proof is upon the proponent of collateral estoppel to establish the duplicative identity of the party against whom the doctrine is sought to be applied and the issues of the two proceedings” (*Lennon*, 199 AD3d at 69). The implication is that Henry might assert res judicata or collateral estoppel offensively to bar Nero’s claims against him, arguing that only Cook and Lux are culpable for the accident, given the within ruling in this matter (Action #1).

Here, res judicata does not apply to bar Nero from litigating the issue of liability as to Henry, Cook and Lux in Action #2. Nero was not a party in Action #1 or in privity with any party in Action #1 (*Chambers v. City of New York*, 309 AD2d 81, 86 [2d Dep’t 2003]). Nero also did not affirmatively litigate any of her damage claims in Action #1 (*Albanes v. Charles*, 134 AD3d 657, 658 [2d Dep’t 2015]). Collateral estoppel also is inapplicable as

to Nero in Action #2. While the identical and decisive issue of liability has been established by the instant ruling in so far as Henry's claims against Cook and Lux are concerned, Nero cannot be considered as having fully and fairly contested the issue of their liability with her limited opposition filed herein. Nero is not a party in Action #1 (or in privity with any party therein) and did not commence, control or have a direct interest in Action #1 (*Carter v. Gospel Temple Church of God in Christ*, 19 AD3d 353, 354 [2d Dep't 2005]). Furthermore, Nero is not postured in a directly adversarial role, as that which exists between Henry, Cook and Lux in Action #1 (*Orway v White*, 14 AD2d 498, 499 [4th Dep't 1961]).

Accordingly, Nero is free to fully litigate the issue of liability regarding her claims asserted against to Henry, Cook and Lux in Action #2 (*Carter*, 19 AD3d at 354). "Where two operators of vehicles are sued, there can be a consistent verdict against both or against either one" (*Friedman v Salvati*, 11 AD2d 104, 106 [1st Dep't 1960]).

While Nero is insulated from estoppel effect in Action #2; Henry, Cook and Lux are not. Res judicata and collateral estoppel may apply to any crossclaims which may be asserted among defendants Henry, Cook and Luz in Action #2, based on the liability finding as to Cook and Lux in this matter (Action #1). "[C]odefendants in a passenger's action are adversaries as to each other. It then follows as a matter of course that the principles of res judicata are applicable in full force to any claims subsequently made by one against the other. Under the long-established principles of res judicata, the finding of negligence in the passenger's action may then be used, offensively or defensively, by either

of the former codefendants against the other in any subsequent action between them with respect to a claim growing out of the same accident” (*Orway*, 14 AD2d at 499).

Although defendants Cook and Lux have been found solely responsible for causing the collision with the vehicle driven by Henry, plaintiff in Action #1, their culpability, and that of Henry, has not yet been litigated or established in Action #2, with respect to Nero’s claims in Action #2.

Accordingly, the motion by plaintiff Henry for summary judgment on the issue of liability is granted. This action may proceed on the issue of damages

This constitutes the decision and order of the Court.

For Clerks use only

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MD

Motion Seq. 4

E N T E R



J.S.C.

**HON. WAVNY TOUSSAINT
J. S. C.**

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FILED