Samuels v Consolidated Edison Co. of N.Y., Inc.
2016 NY Slip Op 32845(U)
August 16, 2016
Supreme Court, New York County
Docket Number: 107142/04
Judge: Nancy M. Bannon

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
----------X

WILLIAM C. SAMUELS

Plaintiff

Index No. 107142/04

v

DECISION AND ORDER

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Defendant.

[And Two Third-Party Actions]
----------X

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for injury to property, the defendant Consolidated Edison Company of New York, Inc. (Con Ed), moves pursuant to CPLR 4533-b to set off, from its own liability as determined by a jury, the sum of $1.1 million that was recovered by the plaintiff from other parties in an unrelated action. The motion, although denominated as one pursuant to CPLR 4533-b, is in actuality one for leave to reargue Con Ed's prior motion pursuant to CPLR 4404(a) for judgment as a matter of law dismissing the complaint. The motion is denied as without merit, since the court has not misapprehended or overlooked any issue of law or fact. See CPLR 2221(d). In any event, even if Con Ed's application were deemed a proper CPLR 4533-b motion, Con Ed has not demonstrated entitlement to relief under that statute

inasmuch as a jury, in finding for the plaintiff, has already determined the the damages awarded in this action were not the same as the damages awarded in the prior action and, thus, that there is no basis for any set-off.

II. BACKGROUND

On July 9, 2003, the plaintiff commenced an action (the Fradkoff action) against architects Alex R. Fradkoff and Howard R. Goldin, as well as contractor Leithlong Construction (Leithlong), alleging architectural malpractice, breach of contract, unjust enrichment, and negligence, and seeking damages for allegedly improper design and construction in relation to the renovation of the plaintiff's townhouse, with particular reference to the upper floors. That matter was settled on October 3, 2007, for the total sum of $1.3 million, with Goldin and his corporation contributing $1 million and Leithlong contributing $100,000.

On May 7, 2004, while the Fradkoff action was pending, the plaintiff commenced the instant action against Con Ed, alleging that Con Ed's negligent maintenance of its facilities and conveyances caused significant flooding that damaged the basement and a structural wall at his property. Plaintiff thus sought additional damages in the sum of $500,000 from Con Ed. Con Ed impleaded Fradkoff, Goldin, and Leithlong, seeking contribution,

among other things. In an order dated October 17, 2008, the Supreme Court (Gische, J.), granted Goldin and Leithlong's motion to dismiss the third-party complaint against them, concluding that documentary evidence, consisting of the settlement agreement in the Fradkoff action, provided a complete defense to the third-party action. Since the motion was not directed to the plaintiff, he did not submit papers in connection with that motion. The court concluded that the settlement agreement "released . . . Goldin and Leithlong from any and all claims asserted in the main action, namely, plaintiff's damages arising out of the flooding and resulting damage in the basement of the premises." The court noted that Con Ed had argued, contrary to the position it now urges, that the damages recovered in the Fradkoff action were different than those sought by plaintiff in this action. It nonetheless rejected Con Ed's argument, concluding that "the plain language of the settlement agreement makes it clear that the damages pertaining therein are one and the same as those alleged in the underlying complaint." No appeal was taken from that order.

On June 11, 2010, the court (Gische, J.) granted Con Ed's oral application to dismiss the complaint against it in this action. In the so-ordered transcript memorializing both the oral argument and the court's determination, Con Ed argued for the first time that the damages recovered by plaintiff in the

Fradkoff action and those sought in this action were one and the same, while plaintiff maintained that none of the damages recovered in the Fradkoff action compensated him for damages now sought from Con Ed, which arose from water infiltration in the basement and damage to a structural wall. Plaintiff argued that the $1.3 million settlement of the Fradkoff action was a "carve out" of the full measure of damages, which were allegedly caused by different defendants to different portions of the subject premises. The court concluded that Goldin and Leithlong's payments were for "identical damages that [plaintiff is] claiming in this action," and that since plaintiff recovered the entirety of his damages, he could not proceed against Con Ed.

In a decision and order dated June 28, 2012, the Appellate Division, First Department, reversed the order dated June 11, 2010, holding that Con Ed's oral application was actually a late motion for summary judgment, and that the Supreme Court should not have entertained it. See Samuels v Consolidated Edison Co. of N.Y., Inc., 96 AD3d 685 (1st Dept 2012).

Con Ed thereafter moved pursuant to CPLR 3211(a) to dismiss the complaint, arguing that, since plaintiff sought only $500,000 from it in this action, while he had already collected $1.3 million in settling the Fradkoff action, and, in its view, the damages sought were the same, plaintiff had already recovered all potential damages, excusing Con Ed from liability.

In an order dated April 11, 2014, the Supreme Court (Silver, J.) denied the motion, concluding that, however characterized, the motion was a late successive motion for summary judgment, and that the Appellate Division had already determined that such a late motion could not be entertained. In an order dated December 23, 2014, the court (Silver, J.) denied Con Ed's motion for leave to reargue.

The action proceeded to a jury trial before this court. In a motion dated October 27, 2015, denominated as one in limine, Con Ed moved to preclude plaintiff from adducing proof of damages against it, arguing that the law of the case doctrine barred plaintiff from seeking any such damages, inasmuch as it had already been determined, in the order dated June 11, 2010, that the proceeds of the settlement in the Fradkoff action were the same damages sought by plaintiff against Con Ed in this action. This court denied the motion, concluding that, inasmuch as the order dated June 11, 2010, was reversed, that order, and all conclusions of law set forth therein, were nullities, and that, contrary to the reasoning undergirding that order, it was for the jury to decide whether the damages sought and recovered in the Fradkoff action arose from different incidents and were incurred by different portions of plaintiff's property than those sought in the instant action against Con Ed.

After plaintiff's opening, Con Ed moved pursuant to CPLR

4401 for judgment as a matter of law, on the same ground, and this court denied the motion.

Con Ed again moved pursuant to CPLR 4401 at the close of plaintiff's case, on the same ground, and this court again denied the motion.

At trial, Con Ed adduced no evidence in its defense. This court granted the motions of the remaining third-party defendants pursuant to CPLR 4401 for judgment as a matter of law, since Con Ed, as the third-party plaintiff, adduced no evidence in support of its third-party claims. The jury awarded plaintiff the sum of $477,514.42. Con Ed then moved pursuant to CPLR 4404(a) for judgment as a matter of law dismissing the complaint, again relying on the law of the case doctrine. This court denied the motion.

III. DISCUSSION

Con Ed now seeks, for the seventh time, to invoke the law of the case doctrine so as to give force and effect to the order dated June 11, 2010, in which the motion court concluded that the damages sought in the Fradkoff action were the same as those sought here. Con Ed denominates its motion as one pursuant to CPLR 4533-b to set off the $1.1 million recovered from Goldin and Leithlong in the Fradkoff action. The motion is, however, actually a motion for leave to reargue Con Ed's motion pursuant

to CPLR 4404(a), as it invokes the same argument as a basis for the same ultimate relief (see CPLR 2221[d]; Basile v Wiggs, 117 AD3d 766 (2nd Dept 2014); Lux v R & R Mobile Home Park, 291 AD2d 482 [2nd Dept 2002]), and may be denied on that ground, since this court did not overlook or misapprehend any issues of law or fact in denying Con Ed's motion pursuant to CPLR 4404(a).

To the extent that Con Ed's motion may be deemed a proper motion for a set-off pursuant to CPLR 4533-b, the court rejects Con Ed's argument that application of the law of the case doctrine mandates such a set-off. Con Ed evinces a fundamental misunderstanding of the doctrine of law of the case. Upon reversal, the order dated June 11, 2010, and any reasoning upon which it was premised, became a nullity and of no effect. See Matter of City of New York, 216 NY 489, 493 (1916); Amo v Little Rapids Corp., 268 AD2d 712, 718 (3rd Dept 2000); Kramer v J. J. G. Trucking Corp., 47 AD2d 647 (2nd Dept 1975). "The law of the case doctrine is a rule of comity and convenience which states that ordinarily a court of coordinate jurisdiction should not disregard an earlier decision on the same question in the same case." Abe v New York Univ., 139 AD3d 416, 416 (1st Dept 2016), quoting Tenzer, Greenblatt, Fallon & Kaplan v Capri Jewelry, 128 AD2d 467, 469 (1st Dept 1987). The doctrine "applies only to issues decided, directly or by implication, at an earlier stage of the action." Metropolitan Package Store Assn. v Koch, 89 AD2d

317, 321-322 (3rd Dept 1982). Where the earlier decision is reversed on appeal, there remains no issue that has been finally determined in that decision by a court of coordinate jurisdiction that may either be adopted or disregarded, and the doctrine is inapplicable to that decision (see Hunter Roberts Constr. Group, LLC v Travelers Indem. Co., 2015 NY Slip Op 32062[U], *25 [Sup Ct, NY County 2015]), regardless of the grounds for reversal.

Moreover, Goldin and Leithlong's motion to dismiss the third-party complaint was directed only to Con Ed's third-party complaint, and the conclusions set forth in the order dated June 11, 2010, were articulated solely in the context of that motion. That motion was determined solely on the contents of the settlement agreement, without a hearing, and without any evidence adduced as to the distinctions between the claims asserted in the two actions. Thus, when the motion court first addressed the consequences of the settlement agreement in the context of Goldin and Leithlong's motion, plaintiff did not have a full and fair opportunity to address the issue of whether the damages sought in the Fradkoff action were identical to those sought here. See Roddy v Nederlander Producing Co. of Am., Inc., 15 NY3d 944, 946 (2010).

This court, in determining the four separate trial motions herein described, was thus writing on a blank slate in regard to the issue of the identity of the damages sought in the two

actions, concluding that there had been no prior binding determination that the damages sought in the two actions were identical, and that such would be an issue for the jury to decide.

To the extent that Con Ed argues that the reasoning in the order dated June 11, 2010, is persuasive, and that this court should have adopted it notwithstanding the procedural posture in which its contentions were presented, as well as its appellate history, the court rejects the argument. It was clear both from the pleadings in the Fradkoff action and this action, and from the evidence adduced at trial in this action, that the damages recovered in the Fradkoff action arose from different incidents and were incurred by different portions of plaintiff's property than those involved in the instant action.

Indeed, the jury in this case was presented with detailed contracts, invoices, and other proof delineating which incident caused damage to which particular portion of plaintiff's townhouse, when each incident occurred, and which party or entity was responsible for each incident, and rationally concluded, based on that evidence, that Con Ed's negligence caused flood damage to the townhouse basement and a structural wall. In so finding, the jury impliedly concluded that Con Ed's negligence constituted an occurrence discrete and apart from any negligence and malpractice alleged in the Fradkoff action. Con Ed was given

the opportunity to refute that evidence and demonstrate the identity of the damages in this action and the Fradkoff action, but declined to avail itself of that opportunity, electing to adduce no evidence whatsoever in that regard other than the settlement agreement in the Fradkoff action. For these reasons, Con Ed's present arguments are unavailing.

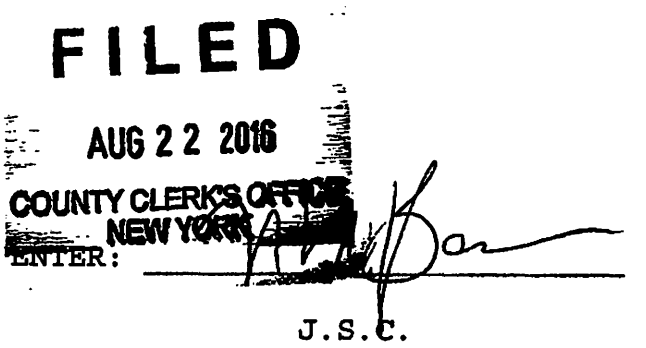
IV. CONCLUSION

Accordingly, it is

ORDERED that the motion of defendant Consolidated Edison Company of New York, Inc., is denied.

This constitutes the Decision and Order of the court.

Dated: August 16, 2016



J.S.C.