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| Dominguez v Century 21 Dept. Stores, LLC |
| 2014 NY Slip Op 30760(U) |
| February 4, 2014 |
| Sup Ct, Bronx County |
| Docket Number: 306206/2009 |
| Judge: Betty Owen Stinson |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 8

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FRANCISCO DOMINGUEZ and ALTAGRACIA
DOMINGUEZ,

Plaintiffs,

INDEX № 306206/2009

-against-

DECISION/ORDER

CENTURY 21 DEPARTMENT STORES, LLC;
H & J MANAGEMENT, INC., d/b/a QUIZNOS
and HIP HOP NY, INC.,

Defendants.

-----X
TRIBECA VENTURE, LLC,

Defendant/ Third Party Plaintiff

Third Party

-against-

Index No. 83700/2010

HIP HOP NEW YORK, INC., and H & J MANAGEMENT,
INC. T/A QUIZNOS SUBS,

Third Pary Defendants.

-----X
TRIBECA VENTURE, LLC.,

Defendant/Third Party Plaintiff/
Second Third Party Plaintiff,

Second Third Party
Index No. 83889/2013

-against-

QIP HOLDER, LLC, d/b/a QUIZNOS SUB,
Second Third Party Defendant.

-----X

HON. BETTY OWEN STINSON:

This motion by defendant/second third party defendant QIP HOLDER, LLC, sued herein as QIP HOLDER, LLC, d/b/a QUIZNOS SUB, (“QIP”) for dismissal of the second third party action is granted and the second third party action is dismissed.

Plaintiffs in the main action, Francisco Dominguez and his wife in a derivative capacity,

alleged that he was injured due to a negligently maintained sidewalk in January 2009. Plaintiffs commenced an action with Index Number 306206/2009 in July 2009 (Action 1) against the abutting building's owner, Tribeca Venture, LLC ("Tribeca"), and two other entities, Century 21 Department Stores, LLC, ("Century 21") and QIP, the alleged franchisor of a Quiznos Sub restaurant. Plaintiffs also commenced a second action in December 2009 with Index Number 310003/2009 (Action 2) naming H & J Management, Inc., d/b/a Quiznos ("H&J") and Hip Hop NY, Inc., ("Hip Hop"), alleged lessees of the subject building, as party defendants. Apparently, neither H&J nor Hip Hop answered the complaint. Shortly thereafter, in January 2010, Tribeca, the building owner, commenced a third party action against those two alleged lessees.

On May 20, 2010, QIP moved for dismissal of Action 1 against it and served co-defendant Tribeca with a copy of the motion on the same day. Tribeca did not oppose the motion and neither did plaintiffs. Five days later, on May 25, 2010, Tribeca and the plaintiffs stipulated to a discontinuance of the action against Tribeca "without prejudice". The stipulation was entered on June 11, 2010.

On November 8, 2010, this court granted QIP's unopposed motion to dismiss it as a party defendant in Action 1 based on a sworn affidavit asserting, among other things, that QIP had no ownership interest in the subject property where plaintiff Dominguez was allegedly injured. That decision was entered on November 30, 2010, leaving Century 21 as the only remaining defendant in Action 1.

In the meantime, on November 11, 2010, plaintiffs had moved before Supreme Court Justice Laura Douglas to consolidate Actions 1 and 2 and for default judgments against H&J and Hip Hop. Plaintiffs' motion still named Tribeca as a defendant in the caption of Action 1, in spite

of plaintiffs' prior stipulation of discontinuance against that defendant five months earlier. Justice Douglas granted the motion for consolidation on December 22, 2010 "to the extent" of allowing the full consolidated primary caption to name as defendants Century 21, H&J and Hip Hop, and eliminating both Tribeca and QIP in accordance with plaintiffs' stipulation of discontinuance against Tribeca and the dismissal of QIP from Action 1. That branch of the motion for default judgments against H&J and Hip Hop in Action 2 was referred to this court per Justice Douglas' Order, and was denied by order dated July 5, 2011 based on plaintiffs' failure to provide proof of the facts constituting the claim.

Court records reflect no other activity in the case until May 6, 2013 when Tribeca purportedly commenced the above captioned second third party action against QIP alleging that, as franchisor, QIP had an obligation to inspect and control the subject premises occupied by H&J, its alleged franchisee. The second third party complaint asserts that, if plaintiffs were to recover a judgment against Tribeca, Tribeca would be entitled to contribution and/or indemnification from QIP.

QIP then immediately made the instant motion in lieu of an answer for dismissal of this second third party action, arguing that the second third party action was barred by collateral estoppel, *res judicata* and law of the case. The motion was submitted on December 2, 2013. In opposition to QIP's motion, Tribeca argued that it is not bound by this court's dismissal of QIP as a party defendant in the main action. Tribeca argued it was not a party to the suit at the time this court rendered its decision and, consequently, collateral estoppel or *res judicata* are inapplicable to this situation. Tribeca argued further that this court's decision did not address cross-claims against QIP. Tribeca did not say whether Tribeca actually asserted any cross-claims

in its answer to the main complaint, and failed to provide this court with a copy of its answer to show whether there were any such cross-claims. Tribeca conceded that the mere existence of a franchise agreement is not enough to impose vicarious liability on a franchisor, but argued discovery is necessary to determine whether QIP exercised such day-to-day control over the franchisee's operation of the premises, that liability "may attach".

Prior to this court's addressing the motion, a settlement before trial between plaintiffs and Tribeca took place on January 6, 2014 "per defendant" as reflected in court records. The appearances show only the names of plaintiffs' and Tribeca's attorneys. According to the Clerk's notation, this settlement disposed of the main action. Court records do not show the terms of the settlement nor whether any other defendants were involved.

As a preliminary matter, Tribeca's purported second third party action against QIP is a nullity. Tribeca was not a *defendant* allowed to commence a third party action in May 2013. Civil Practice Law and Rules ("CPLR") § 1007, as to when third party practice is allowed, states that "[a]fter the service of his answer, a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant" Only a *party* may bring in a new party in a third party action (*id.*). Tribeca ceased to be a party when it stipulated with plaintiffs to be discontinued as a defendant in June 2010.

Even if Tribeca had been a defendant in the action at the time it commenced its purported second third party action, the action would be barred both by law of the case and by collateral estoppel. The doctrine of collateral estoppel is applicable where there is an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there was a full and fair opportunity to contest the decision now said to be controlling (*Shanley v Callanan*

Industries, Inc., 54 NY2d 52 [1981]). The decision dismissing QIP from the lawsuit as having no liability to the plaintiffs is the issue now said to be controlling in this case. Tribeca was served with QIP's motion for dismissal and chose not to oppose it, along with plaintiff and all other defendants. Shortly thereafter, Tribeca stipulated with plaintiffs to be discontinued as a defendant. Plaintiffs never moved to restore Tribeca as a named defendant. Although Tribeca was no longer a party to the lawsuit at the time the decision to dismiss QIP was *rendered*, Tribeca had every opportunity to contest the motion before stipulating with plaintiffs to have the action discontinued against it "without prejudice".

Not being a party to the suit at the time QIP was dismissed from the main action did not insulate Tribeca from that judgment. A third party *defendant* acquires any defenses against the plaintiff in the main action that the defendant/third party plaintiff may have had available to him, whether asserted or not (CPLR § 1008). A third-party *defendant* is not even bound by judgments removing those defenses and rendered before he was impleaded (*see* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR § 1008). None of this, however, applies to a defendant/third party *plaintiff* such as Tribeca purports to be.

This constitutes the decision and order of the court.

Dated: February 4th, 2014
Bronx, New York



BETTY OWEN STINSON, J. S.C.