Horowitz v Union Turnpike Assoc.
2016 NY Slip Op 30194(U)
February 2, 2016
Supreme Court, New York County
Docket Number: 160130/13
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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CHERYL HOROWITZ and PAUL HOROWITZ,

Plaintiffs,

Index No. 160130/13

- against -

UNION TURNPIKE ASSOCIATES, DAVID ESHAGHIAN and SOMERSET MANAGEMENT, LTD.,

Defendants.

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UNION TURNPIKE ASSOCIATES, DAVID ESHAGHIAN and SOMERSET MANAGEMENT, LTD.,

Third-Party Plaintiffs,

- against -

OPTICAL SHOPS OF AMERICA, INC., d/b/a FACTORY EYEGLASS OUTLET,

Third-Party Defendants.

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MILLS, J.:

Third-party defendant Optical Shops of America, Inc. d/b/a Factory Eyeglass Outlet (Optical) moves for summary judgment dismissing the third-party complaint, mainly on the ground of res judicata. Alternatively, Optical moves to change venue from New York County to Nassau County.

Defendants/third-party plaintiffs are Union Turnpike Associates (Union), David Eshaghian, and Somerset Management, Ltd. (Somerset). Union and Eshaghian have the same attorney and submit joint opposition to the motion. The papers do not mention Somerset.

Union, identified in the lease as the property owner, leased commercial space to Optical. Plaintiff came out of Optical's shop and fell on the sidewalk. In April 2013, alleging personal injury, plaintiff and her husband brought an action in the Supreme Court of the State of New York, Queens County, against Optical, Union, and one Ebrahim I. Eshaghian (the Queens County action, Index No. 701211/13). Somerset was not a party. Optical moved to dismiss the Queens County action. By court order dated September 4, 2013, Justice Roger N. Rosengarten granted the motion and dismissed the claims against Optical.

Justice Rosengarten's order stated the following. Optical moves to dismiss or, in the alternative, to change venue to Nassau County. Optical's lease "makes clear" that the owners, not the tenants, "have a nondelegable duty to maintain and repair adjacent public sidewalks; tenants owe no duty to pedestrians in that regard" (order, at 1). Plaintiffs argue that the motion is premature because discovery has not taken place and Optical may have information relevant to the issue of duty. This argument is "unpersuasive and without any basis in the record" (*id.*). Plaintiffs allude "that Optical may have made a special use of the sidewalk that would impose a duty, but offer no actual support for such an allegation - or in fact clearly make such allegation - and information of such use contributing to the fall would certainly be known to them" (*id.*).

The complaint was dismissed as against Optical. The court stated that Union was served with the motion and did not oppose. The court further noted that, although Optical would have no further interest in a transfer to another county, the plaintiffs acknowledged that the case should not have been brought in Queens County. Therefore, the case was being transferred to Nassau County Supreme Court.

Optical alleges that plaintiffs then abandoned the Queens County action. Plaintiffs

commenced the instant action on October 31, 2013 naming as defendants Union, David Eshaghian, and Somerset. Defendants commenced a third-party action against Optical, alleging a first cause of action sounding in common-law indemnification, a second sounding in contribution, a third sounding in contractual indemnification, and a fourth sounding in breach of promise to procure insurance.

Optical argues that the Queens County decision is res judicata and bars the third-party action. The doctrine of res judicata directs that, "as to the parties in a litigation and those in privity with them, 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" (*UBS Sec. LLC v Highland Capital Mgt., L.P.*, 86 AD3d 469, 473-474 [1st Dept 2011] [citation and internal quotation marks omitted]). Upon the conclusion of a claim, all other claims arising out of the same transaction or groups of transactions are barred, even if a different remedy is sought or the claims are based on different theories (*O'Brien v City of Syracuse,* 54 NY2d 353, 357 [1981]). The concept of res judicata embraces not only those matters which are actually litigated before a court but also those which could have been litigated (*Lot 1555 Corp. v Nahzi,* 79 AD3d 580, 581 [1st Dept 2010]). A matter which could have been litigated is one so similar to the matter already litigated that a different judgment would destroy or impair rights or interests established by the first litigation (*id.*; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Benjamin*, 1 AD3d 39, 47 [1st Dept 2003]).

The Owner argues against that the lease makes Optical responsible for the sidewalk in front of its store. However, the Queens County decided that the lease did not make Optical responsible for the sidewalk. The Owner also states that Optical may have control over the

sidewalk and that Optical may have altered the sidewalk after plaintiff had her accident. The Owner's evidence for these allegations is that plaintiff alleged that she caught her foot on something on the sidewalk in front of Optical's shop, yet examination of the location showed no defects and the Owner did no work on the sidewalk. The assertion that Optical altered the sidewalk is conjecture for which no valid evidence exists. Even if the Owner was making a valid argument about Optical's control over the sidewalk or its obligations under the lease, under res judicata the Queens County judgment cannot be challenged. The correctness of a judgment has no bearing on its preclusive effect (*Griffin v Long Is. R.R. Co.*, 102 NY 449, 452-453 [1886]; *Ellis v Abbey & Ellis,* 294 AD2d 168, 169 [1st Dept 2002]; *see also Insurance Co. of State of Pa. v HSBC Bank USA,* 10 NY3d 32, 40 n 4 [2008]). The Queens County judgment decided the issues raised by the Owner and those issues cannot be relitigated.

One cannot be held liable for negligence unless one has a duty towards the injured party (*532 Madison Ave. Gourmet Foods v Finlandia Ctr., Inc.*, 96 NY2d 280, 289 [2001]). A person with control over property has a duty to maintain it safely (*Gronski v County of Monroe,* 18 NY3d 374, 379 [2011]). The court decided that Optical had no duty and that signifies that it had no control and that it was not liable. In addition, the issue of control could have been raised in the Queens County action. Raising the issue again would go against the principles of res judicata, because of the risk that a different judgment might issue and a different judgment about Optical's control might mean that Optical bore liability for the accident.

The attorney for the defendants/third-party plaintiffs states that Union was not served with the complaint in the Queens County action. An attorney affirmation is not probative of such an assertion, which must be made by a person with personal knowledge. Optical's reply papers

attach an affidavit showing that Union was served with the complaint in the Queens County action. Also, an argument based on lack of jurisdiction to render the judgment must be made to the court which rendered the judgment (CPLR 5015 [a]). Therefore, the court disregards the assertion.

Since Optical is not liable for the accident, it has no common-law or contractual obligation to indemnify the Owner. The lease provides that the tenant must indemnify the owner for liabilities incurred as a result of the tenant's negligence or wrongful conduct. The decision in the Queens County action means that Optical was not at fault.

In the lease, the tenant agreed to obtain insurance in favor of the owner in regard to claims for injury occurring in or upon the demised premises. Optical submits an affidavit by a claims specialist for Optical's insurance company and a copy of Optical's insurance policy. The specialist states that the insurance policy provides additional insured coverage for Union with respect to liability arising out of the demised premises. Optical says that the sidewalk is public property and is not part of the demised premises. The Owner does not deny this assertion or the assertion that appropriate insurance was purchased.

In conclusion, it is

ORDERED that the motion for summary judgment to dismiss the third-party action by third-party defendant Optical Shops of America, Inc., d/b/a Factory Eyeglass Outlet is granted and the third-party action is hereby dismissed.

Dated: 2/2/16

ENTER:

J.S.C.