Garcia v CPS 1 Realty
2016 NY Slip Op 30364(U)
February 29, 2016
Supreme Court, Suffolk County
Docket Number: 08020/2011
Judge: Jr., Andrew G. Tarantino
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SUPREME COURT - PART 50
COUNTY OF SUFFOLK - STATE OF NEW YORK

COPY

PRESENT
HON. ANDREW G. TARANTINO, JR.
A.J.S.C.

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WALTER GARCIA,
Plaintiff(s)

-against-

CPS 1 REALTY, LP, CPS 1, LLC, CPS 1 REALTY GP, LLC, EL-AD PROPERTIES NY, LLC, EL-AD 52, LLC, THE EL-AD GROUP, LTD., 49 EAST 21, LLC, FAIRMONT HOTEL MANAGEMENT LP, AND TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,
Defendant(s).

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CPS 1 REALTY, LP, CPS 1, LLC, EL-AD PROPERTIES NY, LLC AND THE EL-AD GROUP, LTD.,
Third-Party Plaintiffs,

-against-

NOVA DEVELOPMENT GROUP, INC.,
Third-Party Defendant.

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NOVA DEVELOPMENT GROUP, INC.,
Second Third-Party Plaintiff,

-against-

ATLANTIC-HEYDT CORPORATION,
Second Third-Party Defendant.

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Index No. **08020/2011**

Motion seq. **008: MD**
Orig. Date: 9/30/2014
Adj. Date: 3/2/2016

Motion seq. **009: XmotD**
Orig. Date: 10/28/2014
Adj. Date: 3/2/2016

Motion seq. **010: XMotD**
Orig. Date: 11/12/14
Adj. Date: 3/2/2016

ORDER DENYING PRECLUSION AND OTHER RELIEF

Plaintiff:	Walter Garcia Alan Shapey, Esq.
Defendant:	CPS 1 Realty LP, by McGaw, Alventosa & Zajac Appellate Counsel: Christopher Simone Shaub, Ahmuty, Citrin & Spratt
Third-party Defendant	Nova Development Group Baxter, Smith & Shapiro
Second third-party Defendant	Atlantic-Heydt Corp. Gladstein, Keane & Flomenhaft

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Upon consideration of the notice of motion by the defendant CPS 1 Realty, LP [1] for an order precluding all parties from litigating, eliciting evidence of or otherwise attempting to establish that the subject accident occurred elsewhere and in any manner other than as determined by the prior orders of the Supreme Court, Suffolk County (Leis, J.), dated January 26, 2012 (so ordered transcript dated March 2, 2012), and May 23, 2013 (so ordered transcript dated June 6, 2013), the supporting affirmation and exhibits, the notice of cross-motion for an order denying CPS 1 Realty, LP's motion or alternatively, granting Nova Development Group, Inc. judgment against Atlantic-Heydt Corporation on its claims for common law indemnity, the supporting affirmation and exhibits, the amended notice of cross-motion for that same relief, the supporting affirmation and exhibits, CPS 1's Realty, LP's affidavit in reply and in opposition with supporting exhibits dated October 21, 2014, the reply affirmation of Nova Development Group, Inc. with exhibits dated November 12, 2014, the affirmation in opposition to motion and cross motion on behalf of Atlantic-Heydt Corporation with exhibit dated December 12, 2014, and the reply affirmation of Nova Development Group, Inc. dated December 16, 2014, it is hereby

ORDERED that the order dated August 13, 2015, disposing of motion sequences 008 through 010 is vacated; and it is further

ORDERED that the motion of CPS 1 Realty, LP ["CPS 1"], to preclude evidence at the apportionment trial as to the manner and location of the subject accident is denied; and it is further

ORDERED that so much of the cross-motion of Nova Development Group, Inc. seeking denial of the motion to preclude is granted; and it is further

ORDERED that so much of the cross-motion of Nova Development Group, Inc. seeking a judgment against Atlantic-Heydt Corporation for common law indemnity is denied.

On May 2, 2006, the plaintiff Walter Garcia ["the plaintiff" or "Garcia"], an asbestos handler employed by third-party defendant Nova Development Group ["Nova"], was removing asbestos caulking from windows during a renovation project at the Plaza Hotel in Manhattan. According to the plaintiff's testimony at his examination before trial, Garcia was standing on a scaffold when he fell while climbing over the safety railing as he was attempting to reach the next window. In doing so, the plaintiff hit a section of pipe and landed on a roof ledge, which was 2 to 3 feet below the scaffold work platform. The scaffolding was erected by second third-party defendant Atlantic-Heydt Corporation ["Atlantic-Heydt"]. CPS 1 was the owner of the subject premises and construction manager of the project. Nova was the contractor hired to provide asbestos abatement and hazardous material removal services. The action, originally commenced in Supreme Court, Bronx County, was transferred to Suffolk County in 2011 on Nova's motion to change venue.

Well before the completion of discovery, Nova moved to dismiss the third party complaint or alternatively, for summary judgment dismissing the third party complaint (motion sequence

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[1] By stipulation dated October 26, 2012, all other defendants were discontinued from the action.

001). The three bases for Nova's dismissal motion included that 1) CPS 1's cause of action for common-law indemnification was barred by Worker's Compensation Law §11 in that the plaintiff did not sustain a "grave injury"; 2) the Labor Law §200 cause of action was barred by the applicable statute of limitations; and 3) CPS 1's cause of action predicated on contractual indemnity should be dismissed due to CPS 1's violation of notice requirements in the subject contract.

Shortly thereafter in August, 2011, the plaintiff cross moved for partial summary judgment on his Labor Law §240 (1) claim against CPS 1. At that point in the litigation only the plaintiff's deposition had been conducted. The plaintiff contended that in order to perform his assigned task he had to step from the scaffold to a small roof that was below the window, and that the accident occurred as he was transitioning from the scaffold to the roof deck. The scaffold moved, causing the plaintiff to lose his balance and fall sustaining the injuries for which he now sues. Garcia claimed that he was directed by Nova supervisor, Wojciech Kowalczyk ["Kowalczyk"], to climb over the scaffold guardrail to perform caulking at the nearby window. The plaintiff asserted entitlement to judgment on liability under Labor Law §240 (1) because he was engaged in a covered activity and was injured due to the owner's failure to provide him proper protection from a gravity-related risk.

CPS 1 opposed the plaintiff's cross-motion arguing, inter alia, that at the time the plaintiff served his cross-motion, very limited discovery had taken place. When the cross motion was made, only the plaintiff had been deposed. CPS 1 also argued that the "other parties", presumably Nova, were in possession of an accident report prepared by a site safety specialist which was marked for identification at the plaintiff's examination before trial but had not yet been exchanged, that appeared to contradict the plaintiff's version of the accident. At the time of the plaintiff's cross motion, CPS 1 was not yet in possession of a copy of the subject report.

Before the Court had issued a decision on the first two motions, Nova noticed a second motion for summary judgment seeking dismissal of CPS 1's contractual indemnification cause of action in the third party complaint (motion sequence 003), on the basis that Nova was not negligent, nor did it provide any defective safety equipment which caused, created or in any way contributed to the plaintiff's accident--the trigger to any obligation on Nova's part to indemnify CPS 1 under the subject contract. [2]

On January 26, 2012, the then assigned Justice (Leis, J.), orally denied Nova's respective dismissal and summary judgment motions (sequences 001 and 003), and granted the plaintiff's cross-motion for summary judgment against CPS 1 based upon CPS 1's liability as owner pursuant to Labor Law § 240 (1). The transcript was so-ordered on March 2, 2012. A note of issue filed on December 14, 2012, was vacated on April 5, 2012, to allow for additional discovery including the

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[2] In an affirmation in opposition to Nova's initial dismissal motion, the attorney for CPS 1 stipulated to withdraw the first cause of action in the third party complaint based on common law indemnity, as well as the second cause of action for violation of Labor Law §200.

depositions of Nova and Atlantic-Heydt. The deposition of a site safety expert, Joseph Accetta, [3] was also still outstanding.

In January, 2013, after the outstanding depositions had been conducted, CPS 1 moved for leave to renew plaintiff's prior cross motion for summary judgment to the extent that the March 2, 2012, order granted summary judgment in plaintiff's favor on the New York State Labor Law §240 cause of action, and upon renewal, vacating Justice Leis's prior order, and denying plaintiff's application for summary judgment in its entirety. The basis of CPS 1's motion was that recent discovery raised triable issues of fact that called the plaintiff's credibility into question as to how and where the accident occurred. In seeking renewal, CPS 1 argued that the deposition testimony of Nova's Wojciech Kowalczyk, Atlantic-Heydt's Hugh Kieran Ennis, and site safety expert Joseph Accetta, raised material issues of fact regarding not only how and where the accident occurred, but whether the scaffold, or the scaffold railing was set up correctly.

Notably, Kowalczyk testified that the plaintiff came to him after the accident and indicated that he had slipped on the scaffold. According to Kowalczyk, the plaintiff never said anything about climbing over the scaffold railing or about the scaffold moving.

Nova also submitted an affirmation in support of CPS 1's motion to renew. The affirmation discussed an accident report which stated that the plaintiff fell on stairs after he had stopped for lunch. The site safety supervisor, Accetta, had identified this document at his deposition and testified that he prepared the report. He also testified that he "probably" got the information for the report from the plaintiff; however, Accetta did not specifically recall the conversation. Nova argued that since it was just as likely that the plaintiff's injury could have been caused by something other than the alleged L.L. §240 (1) violation, such as falling down steps, any determination by the trier of fact as to the cause of the accident would be based upon sheer speculation.

Notably, in CPS 1's "Affirmation In Reply To Plaintiff's Affirmation In Opposition To Motion For Leave To Renew" dated March 22, 2013, CPS 1's attorney argued in further support of his renewal motion:

> "While plaintiff claims that his accident occurred when the scaffold railing moved as he was climbing over it because he was required to leave the scaffold to perform his job duties, there is now evidence upon which a jury could reach an entirely different conclusion. Notably, as pointed out in the affirmation in support of the motion, the deposition of NOVA's witness, along with the deposition testimony of non-party witness Joseph Accetta, establishes that there was absolutely no reason for the plaintiff to climb off the scaffold to do his job....Similarly, while the plaintiff contends that proper scaffolds had not yet been set up in the particular area in question, the recent deposition testimony

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[3] The surname "Accetta" has been variously spelled throughout the motion papers. For the sake of consistency, this Court will adopt the spelling "Accetta" as the correct version.

> constitutes evidence that in fact proper scaffolding had in fact been set up in the area, such that there was no need for the plaintiff to leave the scaffold at any time during the course of his work....Likewise, the accident report in question, which has now been authenticated, and identified by Mr. Accetta as an accident report that he prepared, in the ordinary course of business, clearly indicates that the plaintiff fell while walking down steps."

On renewal of the order granting partial summary judgment in favor of the plaintiff on liability, CPS 1 argued that the accident report and the testimony of Accetta, Kowalczyk, and Ennis raised numerous and significant triable issues of fact precluding summary judgment in the plaintiff's favor on his §240 claim, not the least of which was whether the plaintiff's own actions constituted the sole proximate cause of the accident.

On May 23, 2013, during an oral argument of CPS 1's renewal motion, Justice Leis denied CPS 1's motion, concluding that the accident report would not be admissible since Accetta, the maker of the report, testified only that he "probably" obtained the conflicting information about the accident from the plaintiff. Justice Leis also concluded that Kowalczyk's testimony was not inconsistent with the plaintiff's version of the accident. The transcript denying the renewal motion was so-ordered on June 6, 2013. On July 2, 2013, Justice Leis referred a motion for summary judgment dismissing Nova's second third party complaint and all cross-claims and counterclaims for contractual and common-law indemnification by Atlantic- Heydt to the Calendar Control Part for further proceedings. Ultimately, so much of Atlantic-Heydt's motion that sought to dismiss Nova's contractual indemnification claim was granted, and the motion was otherwise denied (Baisley, J.) (motion sequence 007).

CPS 1 took an appeal from Justice Leis's order denying renewal. Ultimately, CPS 1 moved to withdraw its appeal, which motion was granted by order of the Appellate Division Second Judicial Department, on November 21, 2013. Therefore, any appeal by CPS 1 from the final judgment will bring up for review Justice Leis's prior orders granting partial summary judgment and denying renewal of the order granting that relief, respectively (*see* CPLR 5501[a][1]; *see generally*, Siegel, N.Y. PRAC. § 530 at 910 [4th ed.]).

An apportionment trial before the Hon. W. Gerard Asher was commenced on May 12, 2014. It ended in a mistrial based on a dispute between the attorneys for CPS 1 and Nova that the trial judge regretted it could not resolve: whether Justice Leis's findings in granting Garcia partial summary judgment vis-à-vis his §240 claim, became the law of the case, and could not be re-litigated at the apportionment trial insofar as the cross claims for contribution and common law and contractual indemnity were concerned. CPS 1's attorney argued that if on the apportionment trial the parties are permitted to go into an accident report stating that the plaintiff fell on a staircase while going down to lunch, thereby undoubtedly defeating CPS 1's contractual indemnification claim against Nova, such testimony would be contrary to Justice Leis's grant of partial summary judgment on Garcia's §240 claim. In declaring a mistrial, Justice Asher stated that only Justice Leis should determine the ramifications of the partial grant of summary judgment vis-à-vis the

apportionment claims. [4]

After the mistrial on the issue of fault apportionment, the matter was assigned to this Court strictly for a damages trial. The damages trial commenced on July 20, 2015, and concluded with a verdict in the plaintiff's favor in excess of $6 million dollars, on August 10, 2015.

Prior to this Court being assigned to try the damages portion of the case, CPS 1 moved to preclude any evidence at the fault apportionment trial that contradicted the version of the accident that formed the basis for Justice Leis's decision granting partial summary judgment in the plaintiff's favor (motion sequence 008). In other words, CPS 1 sought to preclude Nova and Atlantic-Heydt from attempting to prove that the accident happened anywhere or in any manner other than on the scaffold as testified to by the plaintiff at his examination before trial. Nova cross moved for an order denying the requested preclusion and alternatively, again sought summary judgment for common law indemnification against Atlantic-Heydt (motion sequences 009 and 010).

During the damages trial motions 008 through 010 were pending. Believing, mistakenly, that the issues presented in these motions had been rendered academic by the damages trial, this Court denied all three motions as moot on August 13, 2015. The Court vacates the order dated August 13, 2015, and now considers, as CPS 1 asserts, whether Justice Leis's order granting the plaintiff liability pursuant to §240 is the law of the case as to the factual basis for where and how the accident occurred for purposes of apportioning liability among CPS 1, Nova, and Atlantic-Heydt.

Regarding motion sequences 009 and 010 (amended notice of cross-motion), Nova's argument is that the issue decided on the prior motion was solely the plaintiff's entitlement to summary judgment on his Labor Law §240 claim against CPS 1. The plaintiff's motion was not even brought against Nova and, more importantly, there was never any discussion with, much less a determination by, Justice Leis of CPS 1's entitlement to contractual or common law indemnity as against Nova. Nova argues that the order granting summary judgment in the plaintiff's favor does not in any way require preclusion of testimony regarding the evidence in the apportionment trial which will ultimately determine the indemnity claims. Alternatively, if this Court were to extend the law of the case doctrine to include factual findings as to how the accident happened, then Nova argues it would be entitled to common law indemnification against Atlantic-Heydt as it is undisputed that Atlantic-Heydt erected the scaffold.

The law of the case doctrine addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation before final judgment (*People v. Evans*, 94 N.Y.2d 499, 502, 706 N.Y.S.2d 678, 727 N.E.2d 1232 [2000]). The law of the case doctrine is part of a larger family of kindred concepts, which includes *res judicata* (claim preclusion) and collateral estoppel (issue preclusion). *Id.* "These doctrines, broadly speaking, are designed to limit

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[4] The attorneys for CPS 1, Nova and Atlantic-Heydt advised this Court that after the mistrial before Justice Asher, Justice Leis declined their invitation to decide motion sequences 008 through 010.

relitigation of issues. Like claim preclusion and issue preclusion, preclusion under the law of the case contemplates that the parties had a full and fair opportunity to litigate the initial determination". *Id. citing Arizona v. California*, 460 U.S. 605, 619, 103 S.Ct. 1382, 75 L.Ed.2d 318; *People v. Guerra*, 65 N.Y.2d 60, 63, 489 N.Y.S.2d 718, 478 N.E.2d 1319; *Sales v. State Farm Fire & Cas. Co.*, 902 F.2d 933, 936 [11th Cir.1990]).

However, law of the case rests on a foundation that distinguishes it from issue and claim preclusion. Whereas the latter concepts are rigid rules of limitation, law of the case is a judicially crafted policy that "expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power" (*People v. Evans*, 94 N.Y.2d 499, 503, 727 N.E.2d 1232, 1235 [2000], *citing Messenger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152). As such, law of the case is necessarily amorphous" in that it "directs a court's discretion," but does not restrict its authority (*see, Arizona v. California*, 460 U.S. at 618, 103 S.Ct. 1382, 75 L.Ed.2d 318).

Pursuant to the doctrine of law of the case, judicial determinations made during the course of a litigation before final judgment is entered may have preclusive effect provided that the parties had a full and fair opportunity to litigate the initial determination (*see Purpura v. Purpura*, 21 A.D.3d 542, 799 N.Y.S.2d 916; *Stone v. Stone*, 19 A.D.3d 404, 795 N.Y.S.2d 893; *Engel v. Eichler*, 300 A.D.2d 622, 623, 753 N.Y.S.2d 109).

CPS 1 argues that the grant of summary judgment on §240 liability establishes the law of the case as to the issues essential to that determination, citing 28 N.Y. JUR. 2D, *Courts and Judges*, § 269; *Dukett v. Wilson*, 31 A.D.3d 865, 868, 818 N.Y.S.2d 337, 340 (3d Dept. 2006). According to CPS 1, Justice Leis's finding of how the accident occurred-while plaintiff was stepping over the scaffold railing-was "essential" to its granting of summary judgment on the plaintiff's Labor Law §240 claim. Justice Leis could not have granted the plaintiff judgment on liability under § 240 (1) without making factual determinations to support its finding.

There is a fatal flaw to CPS 1's argument regarding application of law of the case: that is, in order for the law of the case to be binding on the Court and the parties in a litigation, the parties must have had a full and fair opportunity to litigate the issues to which one party seeks to bind another. Here, on plaintiff's summary judgment cross motion, neither Nova nor Atlantic-Heydt had a full and fair opportunity to contest how and where the accident occurred. First, the Garcia's summary judgment motion was solely against CPS 1 as owner, not against Nova, the plaintiff's employer, or against Atlantic-Heydt, a subcontractor on the project. Second, as so eloquently, albeit unsuccessfully, set out in CPS 1's renewal motion and reply, the plaintiff's cross motion was made before the defendants' and non-party depositions were even taken and before discovery was complete. Specifically, the motion was granted before the plaintiff's supervisor testified that the plaintiff reported to him that he slipped on the scaffold, and before the site safety expert testified that he prepared an accident report that detailed the plaintiff as having fallen on a staircase.

While this Court is not unmindful that "a court should not ordinarily reconsider, disturb or overrule an order in the same action of another court of co-ordinate jurisdiction" (*Matter of Dondi v. Jones*, 40 N.Y.2d 8, 15, 386 N.Y.S.2d 4, 351 N.E.2d 650), law of the case is necessarily "amorphous" in that it "directs a court's discretion," but does not restrict its authority (*see, Arizona*

v. California, 460 U.S. at 618, 103 S.Ct. 1382, 75 L.Ed.2d 318).

As a Court of coordinate jurisdiction, this Court should not and will not alter Justice Leis's decision that CPS 1 is strictly liable to the plaintiff notwithstanding that a significant amount of discovery had yet to be completed when partial summary judgment was granted. Nevertheless, insofar as the apportionment /indemnification trial is concerned, over which this Court will preside, the Court exercises its discretion to allow evidence of the location of and manner in which the accident occurred insofar as there are clearly issues of fact, the resolution of which will determine CPS 1's contractual indemnity claim against Nova, and Nova's common law indemnity claim against Atlantic-Heydt.

Accordingly, the order dated August 13, 2015, disposing of motion sequences 008 through 010 is vacated. CPS 1's motion to preclude evidence at the apportionment trial as to the manner and location of the subject accident is denied. So much of Nova's cross motion seeking denial of CPS 1's motion to preclude is granted. So much of Nova's cross-motion seeking a judgment against Atlantic-Heydt for common law indemnity is denied.

This constitutes the decision of the Court.

Dated: 2.29.2016

ANDREW G. TARANTINO, JR., A.J.S.C.

___ FINAL DISPOSITION **XX__NON-FINAL DISPOSITION**