Davis v C&C Lift Truck Inc.
2016 NY Slip Op 32058(U)
September 9, 2016
Supreme Court, Bronx County
Docket Number: 301625/14
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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KHADIJA S. DAVIS,

Plaintiff(s),

DECISION AND ORDER

Index No: 301625/14

- against -

C&C LIFT TRUCK INC., PATRICK A. BURKE, CAB EAST LLC, AND MORGAN J. PINE.,

Defendant(s).

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In this action for negligence in the operation of motor vehicles, defendants CAB EAST LLC (Cab East) and MORGAN J. PINE (Pine) move seeking an order pursuant to CPLR § 3211(a)(5) dismissing the instant action on grounds that an order previously issued by this Court conclusively resolved the issue of Cab East and Pine's liability for the instant accident, thereby barring the this action under the doctrines of collateral estoppel and res judicata. Defendants C&C LIFT TRUCK INC. (C&C) and PATRICK A. BURKE (Burke) separately move seeking an order granting them summary judgment pursuant to CPLR § 3212, thereby dismissing the complaint, on grounds identical to those asserted by Cab East and Pine. Plaintiff solely opposes Cab East and Pine's motion[1]

[1] Insofar as C&C and Burke submit a reply to their motion it is clear that plaintiff did oppose this motion but that those papers were either not submitted to the Court or did not make it into the Court's file. Nevertheless, given this record, where

asserting that because the only issue resolved by this Court's prior order was the issue of plaintiff's liability as a defendant in another action, neither res judicata nor collateral estoppel bar this action.

For the reasons that follow hereinafter, the instant motions are decided together in this Decision and Order and are granted.

The instant action is for negligence in the operation of motor vehicles. The complaint alleges the following: On July 22, 2011, plaintiff was involved in a motor vehicle accident on the Cross Bronx Expressway near the exit for the Sheridan Expressway, Bronx, NY. Specifically, plaintiff alleges that as she operated a motor vehicle owned by nonparty Kathleen Nesbitt (Nesbitt), her vehicle came into contact with two vehicles - one owned by C&C and operated by Burke, the other owned by Cab East and operated by Pine. It is alleged that defendants were negligent in the maintenance and operation of their vehicles and that said negligence caused the accident and plaintiff's injuries.

Cab East and Pine's Motion for Dismissal Pursuant to CPLR § 3211(a)(5)

Cab East and Pine's motion seeking to dismiss this action pursuant to CPLR § 3211(a)(5) is granted. Specifically, Cab East and Pine's lack of liability for the instant accident was

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the applicability of res judicata as a bar to this action is abundantly clear, it is hard to fathom how plaintiff's opposition - had it been considered - would merit a different result.

previously adjudicated by this Court in its decision dated June 17, 2014, wherein the Court - in an action titled *Billups, et al. v Pine, et al.* (Index No. 300180/13 [Civ Ct 2013]) - granted Cab East, Pine, C&C and Burke in that action summary judgment, thereby, dismissing the complaint against them and all cross claims asserted against them. Accordingly, since the issue of Cab East and Pine's liability is dispositive here, was dispositive in *Billups*, was previously decided, and plaintiff - a defendant in *Billups* - was given a fair opportunity to contest the issue of Cab East, Pine, C&C, and Burke's liability in the other action, this action is barred by res judicata.

The doctrine of res judicata precludes a party or his privies from re-litigating issues of fact and law decided in a prior proceeding. The doctrine holds 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

(*Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481, 485 [1979]). Thus, res judicata precludes renewal of issues actually litigated and resolved in a prior proceeding (*id.* at 485; *Luscher v Arrua*, 21 AD3d 1005, 1006-1007 [2d Dept 2005]; *Koether v Generalow*, 213 AD2d 379, 380 [2d Dept 1995]; *New York Site Development Corporation v New York State Department of Environmental Conservation*, 217 AD2d 699, 700 [2d Dept 1995]). It also precludes litigation of claims

for different relief which arise from the same facts or transaction, which should or could have been resolved in the prior proceeding even if they weren't (*Luscher* at 1006-1007; *Koether* at 380). The party seeking to avail himself of the doctrine must demonstrate that the issue sought to be litigated was critical and decided in a prior action and that the party against whom the doctrine is being asserted had a full and fair opportunity to contest the issue (*Luscher* at 1007; *New York Site Development Corporation* at 700). As Justice Cardozo aptly noted

> [a] judgment in one action is conclusive in a later one not only as to any matters actually litigated therein, but also as to any that might have been so litigated, when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first. It is not conclusive, however, to the same extent when the two causes of action are different, not in form only, but in the rights and interests affected. The estoppel is limited in such circumstances to the point actually determined (internal citations omitted)

Schuylkill Fuel Corporation v B. & C. Nieberg Realty Corporation, Inc., 250 NY 304, 306-307 [1929]).

It is well settled that res judicata operates to bar an action and, thus, is only applicable when the prior action were resolved on the merits and that "[w]here a dismissal does not involve a determination on the merits, the doctrine of res judicata does not apply (*Djoganopoulos v Polkes*, 67 AD3d 726, 727 [2d Dept 2009];

Maitland v Trojan Elec. & Mach. Co., 65 NY2d 614, 615 [1985]).

In support of the instant motion, Cab East and Pine submit the amended complaint in *Billups*. The complaint establishes the following: On July 22, 2011, Billups and Green were involved in a motor vehicle accident on the Cross Bronx Expressway near its intersection with the Sheridan Expressway, Bronx, NY. Specifically, Billups and Green - passengers in a vehicle owned by Nesbitt and operated by plaintiff in this action - were involved in a multi-vehicle collision when their vehicle came into contact with two others. With respect to the other vehicles, one was owned by C&C and operated by Burke and the other was owned by Cab East and operated by Pine. Billups and Green alleged that all defendants (one of which was the plaintiff herein) were negligent in the maintenance and operation of their vehicles and that said negligence caused the accident and the injuries sustained by Billups and Green.

Cab East and Pine also submit a copy of plaintiff's answer in the *Billups* action, wherein as a defendant she interposed a cross-claim against Cab East, Pine, C&C, and Burke for contribution. Thus, plaintiff asserted that Billups and Green's injuries in *Billups* were caused, in whole or in part, by the culpable conducts of the other defendants.

Cab East and Pine also submit the motion for summary judgment they made in the *Billups* action wherein they asserted that the

instant accident occurred when while stopped, the Cab East/Pine vehicle was rear-ended by the Nesbitt/plaintiff vehicle, which propelled the Cab East/Pine vehicle into the rear of the C&C/Burke vehicle which was also stopped. As such, Cab East and Pine argued that they bore no liability for the accident.

Cab East and Pine also submit the motion for summary judgment made by C&C and Burke in *Billups* wherein they sought summary judgment. Specifically, C&C and Burke asserted that because the instant accident occurred when while stopped, the C&C/Burke vehicle was rear-ended by the Cab East/Pine vehicle after the Cab East/Pine vehicle had been rear-ended by the Nesbitt/plaintiff vehicle, C&C and Burke bore no liability for the instant accident.

Cab East and Pine also submit the instant plaintiff's opposition to the motions made by the defendants in the *Billups* case, wherein she opposed summary judgment on grounds that it was her vehicle which, while stopped, was rear-ended by the Cab East/Pine vehicle and propelled into the rear of the C&C/Burke vehicle. Plaintiff, thus, by affidavit stated that she was not liable for the instant accident.

Lastly, Cab East and Pine submit a copy of this Court's Decision and Order in *Billups*, dated June 17, 2014, wherein Ruiz, J. granted summary judgment in favor of Cab East, Pine, C&C, and Burke. The Court construed plaintiff's opposition as indicating that she was the third vehicle in the chain collision, rather than

the second, as she averred, and held that the fact that plaintiff was rear-ended and propelled into the rear of the Cab East/Pine vehicle did not cast Cab East, Pine, C&C, or Burke in liability. The Court, thus, dismissed the complaint and all cross-claims asserted against the foregoing defendants.

Based on the foregoing, Cab East and Pine establish entitlement to dismissal of the complaint in this action on grounds that it is barred by res judicata. Res judicata precludes renewal of issues actually litigated and resolved in a prior proceeding (*Gramatan Home Investors Corp.* at 485; *Luscher* at 1006-1007; *Koether* at 380; *New York Site Development Corporation* at 700), as well as litigation of claims for different relief which arise from the same facts or transaction, which should or could have been resolved in the prior proceeding even if they weren't (*Luscher* at 1006-1007; *Koether* at 380). The party seeking to avail himself of the doctrine must demonstrate that the issue sought to be litigated was critical and decided in a prior action and that the party against whom the doctrine is being asserted had a full and fair opportunity to contest the issue (*Luscher* at 1007; *New York Site Development Corporation* at 700).

Here, plaintiff, Cab East and Pine were defendants in *Billups* and were sued therein for their alleged negligence resulting in the same motor vehicle accident upon which this case is premised. Further, upon motion by Cab East and Pine in *Billups*, this Court

granted them summary judgment, concluding that they bore no liability for the instant accident. Clearly, the issue of Cab East and Pine's liability in *Billups* was critical and indeed dispositive. Unquestionably, the very same issue is critical and dispositive in this action. Lastly, plaintiff in this action had a full and fair opportunity to litigate the issue of Cab East and Pine's liability in *Billups* and in fact opposed Cab East and Pine's motion in that action. Nevertheless, the Court ruled in favor of Cab East and Pine, dismissing all cross-claims asserted against them, including the cross-claim for contribution asserted by the instant plaintiff as a defendant in *Billups*. Accordingly, res judicata bars the re-litigation of Cab East and Pine's liability for the instant accident and the complaint must be dismissed pursuant to CPLR § 3211(a)(5).

Plaintiff's opposition - that her opposition to the motions in *Billups* was limited to her lack of liability such that res judicata does not bar avail Cab East and Pine - is unavailing. To sure, what plaintiff really asserts is that her status in *Billups* as defendant, is different than her status in this case, as a plaintiff. Accordingly, plaintiff contend that res judicata is inapplicable. As plaintiff readily concedes, the foregoing does not avail her because as early as 1967, the Court of Appeals abrogated the inapplicability of res judicata to the circumstances herein.

In *B.R. Dewitt, Inc v Hall* (19 NY2d 141 [1967]), plaintiff Dewitt sued for property damages sustained to his vehicle (a truck) in an accident with defendant Hall which occurred when Farnum was driving the truck (*id.* at 143). Dewitt then moved for summary judgment averring that res judicata required judgment in his favor insofar as in a separate action Hall had been sued by Farnum for the same accident and Hall had been found liable for the accident at issue (*id.*). Hall opposed the grant of summary judgment, arguing on appeal that the affirmative use of a prior judgment to obtain dismissal on grounds of res judicata was inappropriate because Dewitt was using it offensively (*id.*). The Court of Appeals disagreed, affirming the grant of summary judgment in Dewitt's favor and stating that

> [w]hile it is true that most of the relevant cases in this area in New York have arisen under circumstances wherein the defendant sought to use the prior adjudication against the plaintiff, there seems to be no reason in policy or precedent to prevent the offensive use of a prior judgment. In fact, there have been cases in this court that have allowed the affirmative use of a prior judgment to establish a right to recover

(*id.* at 143-144 [internal quotations marks omitted]). In fact, the real issue in *B.R. Dewitt, Inc.*, an early case wherein the law of res judicata began to evolve to that which exists today, was whether the absence of mutuality of estoppel barred the applicability of res judicata (*id.* at 144). In what has now become

prevailing law, mutuality of estoppel, meaning that "unless both parties are bound by the prior judgment, neither may use it," as grounds for res judicata, is no longer required (*id.* at 144). Accordingly, it is now settled law, that a prior judgment is conclusive on all who were parties when the same was rendered and that

> [w]here a full opportunity has been afforded to a party to the prior action and he has failed to prove his freedom from liability or to establish liability or culpability on the part of another, there is no reason for permitting him to retry these issues

(*id.* at 145 [internal quotation marks omitted]).

Schwartz v Pub. Adm'r of Bronx County (24 NY2d 65 [1969]), is also instructive and controls the outcome here. In *Schwartz*, plaintiffs sued to recover damages arising from a motor vehicle accident and defendants sought leave to interpose an amended answer to assert res judicata and collateral estoppel as affirmative defenses (*id.* at 66). Specifically, defendants contended that res judicata and collateral estoppel barred the action insofar as they and plaintiff had already been sued as defendants for the same accident in a separate action and wherein an adverse judgment had been rendered (*id.* at 69). Plaintiffs' opposed defendant's motion arguing that estoppel was unwarranted given that the parties were not adversaries in the prior action (*id.* at 71). The Court found the foregoing argument unavailing holding that the only inquiry

relevant to estoppel was whether there existed identity of an issue, decided in the prior action and decisive of the present action, and whether the party against whom estoppel was being sought had a full and fair opportunity to contest the prior decision (*id.*). Significantly, in addressing the issue raised by plaintiffs - namely, the difference status of the parties in the prior and present actions, the court stated that

> [i]n the years since Glaser was decided, whatever merit there might have been to the argument -- and there was little -- has been completely dissipated. Section 211-a of the Civil Practice Act (now CPLR 1401) which became law shortly before the Glaser decision provided for contribution between joint tortfeasors. As a result, while each defendant driver seeks complete exoneration from liability to the passenger, he also desires to hold in the other defendant. Moreover, in preparing for the trial, each defendant now has full discovery against his codefendant whether or not there is a claim between them. At the trial the codefendants have the same rights of cross-examination with respect to each other's witnesses as they have with respect to the passenger's. In every respect they are antagonists, even to the extent that evidence introduced by one codefendant may be relied upon by the other. In fact, it may rightly be said that in many cases the battle between the codefendants is more strenuous than is their attack against their supposedly main adversary, the plaintiff. The argument that it is unfair to apply the earlier judgment in the subsequent action between the codefendants, on the ground that the parties were not true adversaries, is wholly without merit

(*id.* at 71-72 [internal citations omitted]).

Here, as discussed in *Schwartz*, plaintiff as a defendant in *Billups* had a full and fair opportunity to cast the defendants in liability and in fact did so in her affidavit. That, the Court in *Billups* nevertheless ruled in favor of the defendants does not preclude the applicability of res judicata (*id.* at 70 ["Under such circumstances the judgment is held to be conclusive upon those who were parties to the action in which the judgment was rendered. Where a full opportunity has been afforded to a party to the prior action and he has failed to prove his freedom from liability, or to establish liability or culpability on the part of another, there is no reason for permitting him to retry these issues."]).

C&C and Burke's Motion for Summary Judgment

C&C and Burke's motion seeking summary judgment and dismissal of the complaint is granted insofar as they establish that this action is barred by res judicata. Specifically, as discussed at length above, the Court's grant of summary judgment to C&C and Burke in *Billups*, an action arising from the same accident alleged herein, is conclusive. Accordingly, dismissal of this action as barred by res judicata.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986];

Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish *prima facie* entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

The Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

In support of the instant motion, C&C and Burke submit the same evidence submitted by Cab East and Pine in support of their motion for dismissal. As discussed above, insofar as C&C and Burke were sued in *Billups* for the same accident herein and, thereafter, upon moving for summary judgment, were found not liable, res

judicata precludes the re-litigation of C&C and Burke's liability in this action. As noted above, here, there exist identity of parties in both actions, identity of critical issues in both actions, and plaintiff had an opportunity to and did litigate the issue of her liability and that of C&C and Burke's in *Billups* (*Luscher* at 1007; *New York Site Development Corporation* at 700).

C&C and Burke, thus, establish prima facie entitlement to summary judgment and since the instant motion is unopposed, nothing precludes summary judgment in C%C and Burke's favor. It is hereby

ORDERED that the complaint be dismissed as against all parties, with prejudice.

ORDERED that Cab East and Pine serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : September 9, 2016
Bronx, New York

BEN BARBATO, J.S.C.