SHORT FORM ORDER

INDEX No. 11-34977
CAL. No. 15-01930MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 3-16-16
ADJ. DATE 8-30-16
Mot. Seq. # 002 - MD

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SHAYNA INGRAM,

Plaintiff,

- against -

RICHARD J. LOBRAICO and FRED SQUARCINO,

Defendants.

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Upon the following papers numbered 1 to 18 read on this motion to dismiss and for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12 - 14 ; Replying Affidavits and supporting papers 15 - 18 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants for an order pursuant to CPLR 3211(a)(5) dismissing the complaint or, in the alternative, pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on August 6, 2010 on the Long Island Expressway (LIE) approximately one-half mile east of Exit 58 in Suffolk County, New York. The parties in this action were also involved in a related action, *Richard Lobraico, Plaintiff, against Shayna Ingram, Defendant*, Supreme Court, Suffolk County, Index No. 11-18363 (the related action). Both actions arise out of an incident in which three motor vehicles came into contact with one or another of the other vehicles involved.

After issue was joined in the related action, Lobraico, as plaintiff, moved for summary judgment on the issue of liability by notice of motion dated September 7, 2011. The plaintiff commenced this action by the filing of a summons and complaint dated November 9, 2011. By order dated March 16, 2012, the Court (Jones, J.) granted Lobraico's motion in the related action.

In her complaint, the plaintiff alleges that the motor vehicle owned by the defendant Fred Squarcino, and operated by the defendant Richard J. Lobraico (Lobraico)(collectively, the defendants) violently struck her vehicle. The defendants joined issue in this action by the service of an answer dated December 13, 2011. The defendants now move to dismiss the complaint pursuant to CPLR 3211(a)(5) on the grounds of collateral estoppel or, in the alternative, for summary judgment pursuant to CPLR 3212.

In support of their motion herein, the defendants submit, among other things, the pleadings, the transcript of Lobraico's deposition testimony, the motion papers regarding Lobraico's motion for summary judgment in the related action, and the police accident report regarding this incident. The defendants also submit the affirmation of their attorney, and a copy of the Court order dated March 16, 2011. In his affirmation, counsel for the defendants contends, among other things, that the order granting summary judgment in the related action is dispositive of the issues herein, that the plaintiff is collaterally estopped from re-litigating said issues, and that the "undisputed evidence on the record" establishes that there can be no liability on the part of the defendants.

Initially, the Court notes that the defendants have served their answer in this action. Because issue has been joined, and a motion to dismiss based on the defense of collateral estoppel is not one of the permissible grounds for a post-answer motion to dismiss (*see* CPLR 3211 [e]), this motion should have been brought under CPLR 3212. Whenever a court elects to treat such an erroneously labeled motion as a motion for summary judgment, it must provide "adequate notice" to the parties (CPLR 3211[c]) unless it appears from the parties' papers that they deliberately are charting a summary judgment course by laying bare their proof (*see* ***Rich v Lefkovits***, 56 NY2d 276, 452 NYS2d 1 [1982]; ***Schultz v Estate of Sloan***, 20 AD3d 520, 799 NYS2d 246 [2d Dept 2005]; ***Singer v Boychuk***, 194 AD2d 1049, 599 NYS2d 680 [3d Dept 1993]). Here, upon review of the papers, the Court finds that the defendants have clearly charted a summary judgment course, that the defendants' notice of motion specifically demands said relief, and that they have submitted documentary evidence and affidavits in support of their position (*see generally* ***Harris v Hallberg***, 36 AD3d 857, 828 NYS2d 579 [2d Dept 2007]). Under these circumstances, the court, in determining this motion, is free to apply the standard applicable to summary judgment motions without affording the parties notice of its intention to do so (*see* ***Mihlovan v Grozavu***, 72 NY2d 506, 534 NYS2d 656 [1988]; ***Doukas v Doukas***, 47 AD3d 753, 849 NYS2d 656 [2d Dept 2008]); ***Fuentes v Aluskewicz***, 25 AD3d 727, 808 NYS2d 739 [2d Dept 2006]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material

issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

At his deposition, Lobraico testified that he was traveling westbound on the Long Island Expressway in the motor vehicle owned by his codefendant on the day of this incident, and that he was operating said vehicle with the permission of the owner. He stated that the LIE consists of three travel lanes and one HOV lane in the westbound direction, and that he was traveling at approximately 55 to 60 miles per hour in the middle lane of travel prior to this accident. He indicated that, immediately prior to this accident, there were vehicles ahead of his vehicle in all three lanes of travel, and that the vehicle in the middle lane was approximately one to one and one-half "car lengths" ahead of his vehicle. Lobraico further testified that he first saw the plaintiff's vehicle in his rear view mirror approximately two seconds before this accident, that the plaintiff's vehicle was approaching his vehicle at over 100 miles per hour, and that he tried to move to the right side of the middle lane in the hope that the plaintiff's vehicle would be able to pass by his vehicle. He stated that his vehicle was struck in the rear, that the impact was "extremely severe," and that the impact "thrust" his vehicle into the left lane where it collided with another vehicle. He indicated that he did not change lanes prior to this accident, and that the police arrived "less that five minutes" after the accident had happened. Lobraico further testified that he was present at the deposition of the plaintiff held in this action, and that his related action was settled without the need for him to testify as to the happening of the accident.

In his affirmation, counsel for the defendants contends that the police accident report confirms Lobraico's version of the facts regarding the happening of this accident. However, it is well settled that a police officer's description of an accident is generally inadmissible hearsay. The facts in a police accident report are only admissible as to matters within the officer's own observations while carrying out his police duties (CPLR 4518[a]; ***Wynn v Motor Veh. Acc. Indem. Corp.***, 137 AD3d 779, 26 NYS3d 558 [2d Dept 2016]; ***Memenza v Cole***, 131 AD3d 1020, 16 NYS3d 287 [2d Dept 2015]). It is undisputed that the police officer who created the subject report was not present at the time of this accident. Thus, counsel's contention is without merit.

Counsel for the defendant further contends that the defendants are entitled to summary judgment "on the ground that the March 16, 2012 Order ... unequivocally establishes that no liability ... exists as against the defendants." That is, that the plaintiff is collaterally estopped from re-litigating the issue that she was the sole proximate cause of this accident. Collateral estoppel, a corollary to the doctrine of res judicata, "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (***Ryan v New York Tel. Co.***, 62 NY2d 494, 500, 478 NYS2d 823 [1984]). The two basic requirements of the doctrine are that the party seeking to invoke collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action, and that the party to be precluded from re-litigating the issue had a full and fair opportunity to contest the prior determination (***Tydings v Greenfield, Stein & Senior, LLP***, 11 NY3d 195, 868 NYS2d 563 [2008]; ***D'Arata v New York Cent. Mut. Fire Ins. Co.***, 76 NY2d 659, 563 NYS2d

24 [1990]; ***Mahler v Campagna***, 60 AD3d 1009, 876 NYS2d 143 [2d Dept 2009]). Thus, it is the defendants' burden to establish that the identical issue was necessarily decided in the prior action and that it is determinative in the present action (*see* ***Buechel v Bain***, 97 NY2d 295, 740 NYS2d 252 [2001]). Once the party invoking the doctrine discharges his or her burden in that regard, the party to be estopped bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination (*id.* at 304, 740 NYS2d at 257).

In opposition, the plaintiff submits an affidavit wherein she swears that she was the owner and operator of a Ford motor vehicle at the time of this accident, that she was traveling westbound in the middle lane of travel on the LIE at approximately 50 to 55 miles per hour, and that her vehicle was struck on the rear passenger side by Lobraico's vehicle. She states that Lobraico had "attempted to move his vehicle from the right lane into the middle lane ... initiating this three car accident," and that the impact from his vehicle caused her vehicle to spin clockwise, when it was again struck by Lobraico's vehicle at the front passenger side. She declares that she has been made aware that the defendants are seeking to dismiss her action based upon the March 16, 2011 order in the related action, and that, when she was served in the related action, she "turned the matter over to my automobile insurance carrier," which apparently assigned a law firm to handle the matter. The plaintiff further swears that she was completely unaware that the subject motion was made in the related action, that she was never afforded the opportunity to present her version of the events surrounding the accident, and that she would have furnished an affidavit setting forth her version of the facts and explaining her belief that Lobraico was "exclusively responsible for the happening of this accident."

While it may be true that the issues in this action and the related action are identical, it is determined that the plaintiff did not have a full and fair opportunity to present her case in the related action. The decision whether to apply collateral estoppel in a particular case depends upon general notions of fairness involving a practical inquiry into the realities of the litigation (***Jeffreys v Griffin***, 1 NY3d 34, 769 NYS2d 184 [2003]; ***Matter of Kaori (Omar J.—Shalette S.)***,144 AD3d 911, 42 NYS3d 168 [2d Dept 2016]). Here, the order dated March 16, 2011 indicates that Lobraico's motion was unopposed, Lobraico testified in this action that he did not give testimony in the related action, and the plaintiff swears that she was unaware that Lobraico's motion for summary judgment was pending before the Court. In his reply affirmation, counsel for the defendants correctly points to authority that the fact that the plaintiff was represented by assigned counsel in the related action does not establish that she did not have a full and fair opportunity to present her case therein (***Shanley v Callanan Indus.***, 76 AD2d 146, 431 NYS2d 147 [3d Dept 1980], *revd on other grounds* 54 NY2d 52, 444 NYS2d 585 [1981]). However, ***Shanley*** stands for the proposition that the "mere fact that Shanley had been represented ... by counsel assigned by his insurance company does not, without more, establish that he did not have a full and fair opportunity to litigate the issue" (***Shanley v Callanan Indus.***, 76 AD2d at 148, 431 NYS2d at 149). The record reveals that there are more facts supporting the plaintiff's contention that she was not afforded a full and fair opportunity to present her case in the related action than the mere fact that she was represented by assigned counsel.

In addition, the plaintiff has raised issues of fact requiring a trial of this action. Because summary judgment deprives the litigant of his or her day in court, it is considered a "drastic remedy" which should be invoked only when there is no doubt as to the absence of triable issues (***Andre v***

Pomeroy, 35 NY2d 361, 364, 362 NYS2d 131 [1974]; ***Elzer v Nassau County***, 111 AD2d 212, 489 NYS2d 246 [2d Dept 1985]). Indeed, where there is any doubt as to the existence of triable issues, or where the issue is even arguable, the Court must deny the motion (***Chilberg v Chilberg***, 13 AD3d 1089, 788 NYS2d 533 [4th Dept 2004], *rearg denied* 16 AD3d 1181, 792 NYS2d 368 [4th Dept 2005]; ***Barclay v Denckla***, 182 AD2d 658, 582 NYS2d 252 [2d Dept 1992]; ***Cohen v Herbal Concepts, Inc.***, 100 AD2d 175, 473 NYS2d 426 [1st Dept 1984], *affd* 63 NY2d 379, 482 NYS2d 457 [1984]). Here, the conflicting deposition testimony submitted reveals the existence of triable issues of fact as to how this multi-vehicle accident occurred, precluding the granting of summary judgment (***Mullen v Street Cowboy Taxi, Inc.***, 118 AD3d 681, 986 NYS2d 850 [2d Dept 2014]; ***Veltri v Solomon***, 107 AD3d 699, 966 NYS2d 490 [2d Dept 2013]).

In addition, the record reveals that there are issues of fact regarding the points of impact between the vehicles of the parties to this action, and which version of their facts is correct. The police officer filing the report of this accident notes no damage to the center rear of Lobraico's vehicle and no damage to the front of the plaintiff's vehicle. Unlike the description of the accident contained in the report, these are admissible observations of said officer while carrying out his police duties (CPLR 4518[a]; ***Wynn v Motor Veh. Acc. Indem. Corp.***, *supra*; ***Memenza v Cole***, *supra*). Accordingly, the defendants' motion is denied.

Dated: Jan. 26, 2017

W. Gerard Asher
J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**