SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX

----------x

MICHAEL ALICEA,

Plaintiff(s),

-against-

CITY OF NEW YORK,

Defendant(s).

----------x

Index No.: 31849/2017E

DECISION/ORDER

Present:
HON. MITCHELL J. DANZIGER

Recitation as Required by CPLR §2219(a): The following papers were read on this Motion for Summary Judgment:	Papers Numbered
Notice of Motion, Affirmation in Support with Exhibits. Statement of Material Facts.....	1
Affirmations in Opposition with Exhibits and Counter-Statement of Material Facts	2
Affirmation in Reply.....	3

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Motion by defendant, The City of New York ("City"), for an order pursuant to CPLR §3025(b) and (c), granting leave to amend its answer to assert affirmative defenses of res judicata, collateral estoppel and judicial estoppel and payment, deeming their amended answer served *nunc pro tunc*, and pursuant to CPLR §3212 and/or CPLR §3211(a)(5), dismissing from plaintiff's bill of particulars any claim that his alleged lost earnings were caused by the accident alleged in this action, is decided as follows:

As an initial matter, plaintiff does not oppose the portion of the City's motion seeking to amend their answer to include the affirmative defenses of res judicata, collateral estoppel and judicial estoppel and payment and deem the amended answer timely served, *nunc pro tunc*. As such, the portion of the City's motion seeking to amend their answer is granted and their amended answer is deemed served, *nunc pro tunc*, without opposition.

This action arose from a trip and fall which allegedly took place in a Department of Sanitation ("DOS") parking lot on December 7, 2016, resulting in plaintiff sustaining personal injuries including injuries to his neck, right knee, and right shoulder. At the time of his trip and fall, plaintiff was

an employee of DOS. Plaintiff is also claiming lost wages as a result of his trip and fall incident.

Prior to his trip and fall, on September 13, 2016, plaintiff was involved in a work-related motor vehicle accident, where he was allegedly rear-ended in his DOS vehicle by another car driven by a civilian. As a result of this motor vehicle accident, plaintiff claims injuries to his low back, right ankle, and right knee. Within a month after the motor vehicle accident, plaintiff returned to work on a limited basis.

After both accidents and on September 11, 2017, Lara Glass, a director of the New York City Department of Sanitation, filed and submitted a Disability Retirement application to NYCERS on behalf of plaintiff. On April 12, 2018, plaintiff was awarded a Disability Pension by NYCERS, where the board found "the incident of December 13, 2016, is an accident and the competent causal factor leading to the applicant's disabling condition." The Court notes that December 13, 2016 is not the date of either of plaintiff's accidents.

The City seeks dismissal of any lost earnings claims related to plaintiff's trip and fall incident, since his disability retirement application cited the injuries he sustained in his September 13, 2016, motor vehicle accident as the reason he cannot work. The City seeks a finding that plaintiff is estopped from claiming that he is unable to work as a sanitation worker due to his alleged trip and fall accident. The City submits that res judicata acts as a bar to the litigation of a claim or defense if there is a final judgment in the former litigation in which the parties, subject matter, and causes of action are identical.

The City contends that plaintiff applied for retirement disability solely for the motor vehicle accident injuries that took place on September 13, 2016. The City argues that plaintiff was represented by counsel and appeared for an interview in front of the NYCERS Medical Board wherein he stated that he could no longer work as a Sanitation Supervisor because of the injuries he sustained in the motor vehicle accident. The Medical Board reviewed a letter from Ms. Glass which stated that plaintiff last worked on September 13, 2016, was then placed on medical leave and was disabled as a result of a rotator cuff tear, lumbago and cervicalgia.

In opposition, plaintiff submits that the City has not met its burden of demonstrating that collateral estoppel applies to estop plaintiff's lost wages claim. Plaintiff submits he did not fill out his disability application, but rather Ms. Glass did, and that he only completed portions related to designated survivors/beneficiaries. In addition, all evidence presented to NYCERS was submitted by DOS, not plaintiff. Plaintiff did not have an attorney present at his hearing. At his

NYCERS hearing, plaintiff was not afforded the opportunity to illicit testimony, call on additional witnesses or cross-examine the doctors. Plaintiff submits that his Accidental Disability Pension award letter does not indicate which of his injuries were the basis of the decision. Further, questions of fact exist as to which accident caused his retirement since he returned to work one month after the motor vehicle accident and did not return to work after his trip and fall. His rotator cuff tear, which DOS indicates was one of the injuries that rendered him permanently disabled, was as a result of the trip and fall not the earlier motor vehicle accident. The interview portion of the Medical Board report lists injuries sustained in both accidents and the NYCERS Board references the accident date as December 13, 2016, which is neither accident date, but a combination of both.

The rules of res judicata and collateral estoppel are founded upon the belief that a party should have limited litigation and one final determination, so as to stop a party from relitigating a subsequent action in the future (*Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500 [1984]). "Among the specific factors to be considered are the nature of the forum and the importance of the claim in the prior litigation, the incentive and initiative to litigate and the actual extent of litigation, the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law and the foreseeability of future litigation" (*Id.* at 501). To establish collateral estoppel, "the burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in prior action or proceeding" (*Id.*). The prior action need not have involved formal litigation before a court; a "quasi-judicial" or administrative proceeding can give rise to judgments accorded preclusive effect. (*Allied Chem. Niagara Mohawk Power Corp.*, 72 NY2d 271 [1988]). Among "the factors bearing on whether an administrative decision is quasi-judicial are whether the procedures used in the administrative decision were sufficient both quantitatively and qualitatively, so as to permit confidence that the facts asserted were adequately tested, and that the issue was fully aired." (*Jeffreys v. Griffin*, 1 NY3d 34 [2003]). Collateral estoppel may be given to "quasi-judicial determinations of administrative agencies, when rendered pursuant to the adjudicatory authority of an agency to decide cases brought before its tribunals employing procedures substantially similar to those used in a court of law." (*Ryan v. New York Tel. Co.*, 62 NY2d 494 [1984]). Judicial estoppel is intended to prevent abuse of the judicial system where a party

obtains relief maintaining one position and later, in a different action, maintains a contrary position. (*D&L Holdings, LLC v. RCG Goldman Co. LLC*, 287 A.D.2d 65 [1st Dept. 2001]).

At the NYCERS disability hearing, 3 doctors from NYCERS, interviews the injured/disabled worker. An attorney may be present but may not speak. The injured worker cannot call additional witnesses, nor cross-examine the doctors. All of the evidence submitted is submitted by the New York City Department of Sanitation.

Although the City claims that plaintiff was "permitted to speak" during the NYCERS hearing, there are further forum differences between NYCERS Medical Board hearing and a lawsuit. In this lawsuit, plaintiff must prove a causal link between defendant's negligence and the injuries plaintiff sustained, as well as proving notice. Further, in the context of damages, a plaintiff, in his lawsuit, is permitted to show future salary/wage increase, promotional opportunities, and bonuses. To qualify for disability, plaintiff must prove only that he is "physically or mentally incapacitated for the performance of duty as the natural and proximate result of an accident, not caused by his or her own willful negligence, sustained in the performance of such uniformed sanitation service while actually a member of NYCERS shall be retired for accidental disability." (McKinney's Retirement and Social Security Law § 605-b. Moreover, while the opportunity was available to him, plaintiff did not have an attorney present during the NYCERS disability hearing.

As such, this Court finds that the process by which the NYCERS Medical Review Board comes to its decision is unlike litigation in court. The production of evidence is different, there are no witnesses, liability experts may not be called, appellate review is not possible, and while an attorney may be present, that attorney may not speak during the hearing. The Medical Review Board's proceedings are not quasi-judicial and therefore, this Court cannot find that the procedures used are "sufficient both quantitatively and qualitatively, so as to permit confidence that the facts asserted were adequately tested, and that the issue was fully aired." (*Jeffreys v. Griffin*, 1 N.Y.3d 34 [2003]). As a result, plaintiff did not have a full and fair opportunity to contest the prior determination. This finding is consistent with this Court's previous decision in *Dawes v. City of New York*, Index No., 23263/2017, wherein plaintiff moved for collateral estoppel of the NYPD Medical Board determination in that case, and this Court denied the same in favor of the City.

In addition, the car accident occurred on September 13, 2016, while the trip and fall occurred on December 7, 2016. Plaintiff's application was filed with NYCERS on behalf of on September 12, 2017, after both accidents. While the application references the September 13, 2016, accident, it lists injuries that occurred in both the car accident and the trip and fall. Moreover, after the car accident and before the trip and fall, plaintiff had started to return to work on a light duty basis. According to the Medical Board Report for plaintiff's disability application, the incident of December 13, 2016, was the causal factor that led to plaintiff's disability. However, it is unclear which accident was the causal factor, as December 13, 2016, is not one of plaintiff's accident dates. The Medical Board's decision does not indicate what injuries were taken into account nor does it state where the disability came from. As such, there is a question of fact as to which accident and which injuries were used to by the Medical Board to make its determination. As such, the Court finds that plaintiff should not be collaterally estopped from claiming that the trip and fall accident contributed to his inability to work.

While the doctrine of judicial estoppel applies to rulings that are not denominated as judgments, and plaintiff offers no argument in response, it would be premature to decide on this issue while questions of fact still exist. (*D&L Holdings, LLC v. RCG Goldman Co. LLC*, 287 A.D.2d 65, 71 [1st Dept. 2001]). "[T]he doctrine of judicial estoppel is intended to prevent abuses of the judicial system by which a party obtains relief by maintaining one position, and later, in a different action, maintains a contrary position." (*Id.*). If a party assumes a certain position in a legal proceeding and succeeds, he cannot assume a contrary position for a subsequent legal proceeding. (*Jones Lang Wootton USA v. LeBoeuf, Lamb, Greene & MacRae*, 243 A.D.2d 168, 177 [1st Dept. 1998], quoting *Davis v. Wakelee*, 156 U.S. 680, 689 [1895]). Judicial estoppel is imposed to estop parties from using contrary positions because the judicial system "cannot tolerate this 'playing "fast and loose with the courts."'" (*Environmental Concern, Inc. v. Larchwood Constr. Corp.*, 101 A.D.2d 591, 594 [2d Dept. 1984], quoting *Scarano v. Central R. Co. of N.J.*, 203 F2d 510, 513 [3d Cir. 1953]). However, plaintiff does not offer two different positions, as he claimed disability after the car accident but did return to work on a limited basis. Plaintiff never returned to work after the trip and fall accident. Lastly, plaintiff's application for disability retirement references injuries from both accidents.

Based on the foregoing, the motion is granted in part and denied in part. The portion of the City's motion seeking leave to amend is granted without opposition and the City's proposed

amended answer is deemed timely served *nunc pro tunc*. The portion of the City's motion seeking dismissal of plaintiff's claims for lost earnings is denied. The plaintiff is directed to serve a copy of this order, with notice of entry, upon the parties within 30 days of the entry date.

This constitutes the decision and order of the Court.

Dated: 8/11/22
Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.