

Seminerio v Landsman
2013 NY Slip Op 31344(U)
June 24, 2013
Supreme Court, New York County
Docket Number: 111272/10
Judge: Manuel J. Mendez
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

ANGELO SEMINERIO, ROCHELLE SEMINERIO and
STEPHANIE ANDACHT,

Plaintiff

INDEX NO. 111272/10

MOTION DATE 06-05-2013

- v -

MURRAY LANDSMAN and SHUN LEE PALACE
RESTAURANT, INC., d/b/a SHUN LEE PALACE
EAST RESTAURANT,

Defendant.

MOTION SEQ. NO 001
MOTION CAL. NO

The following papers, numbered 1 to 10 were read on this motion and cross motion for Summary Judgment.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	<u>3-4, 5-6, 7-8</u>
Replying Affidavits _____	<u>9, 10</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is ordered that this motion by plaintiff Angelo Seminerio for summary judgment is granted, the cross-motion by defendant Shun Lee Palace for summary judgment is denied.

Plaintiffs bring this action to recover against the defendants for injuries sustained as a result of an assault on plaintiffs by defendant Landsman while they were dining at the defendant Restaurant on March 13, 2010. Plaintiff Angelo Seminerio alleges that defendant Landsman assaulted him by punching him repeatedly in the face and eye, causing physical injury. He further alleges that defendant Restaurant is responsible for his injuries because it did nothing to prevent him from being assaulted by plaintiff.

Following the incident Plaintiffs filed and served defendants with a summons and complaint. Plaintiff Seminerio claims in its First cause of action that he was "maliciously and wantonly assaulted and battered by defendant Landsman." In his answer defendant Landsman alleged as a First Affirmative defense that he was acting in self defense and filed a First Counterclaim against Plaintiff Angelo Seminerio for Battery.

Defendant Landsman was arrested and charged with the crime of assault in the third degree. A Criminal trial was held before the Hon. Anthony Ferrara in June 2012. The prosecution presented as witnesses

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

plaintiffs, other individuals seated at their table on the date of the incident, Lisa Wong- a waitress- and Patrick Lau, her manager. At the conclusion of the trial Judge Ferrara found defendant Landsman guilty of assault in the Third Degree , sentenced him to a Conditional Discharge of one year and ordered him to pay restitution in the amount of \$10,000.

Plaintiff Angelo Seminerio now seeks summary judgment on the issue of liability in this case. Plaintiff claims that the doctrine of Collateral Estoppel prevents defendant Landsman from re-litigating issues that were fully litigated at the criminal trial. Defendant was tried and convicted of Assault in the Third Degree, which is exactly the same claim being made in this action. Plaintiff claims that there was an identity of issues which were decided in the criminal action where defendant had a full and fair opportunity to litigate.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

The doctrine of collateral estoppel is based on the notion that it is not fair to permit a party to re-litigate an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling (see Gilberg v. Barbieri, 53 N.Y. 2d 285, 423 N.E. 2d 807,441 N.Y.S. 2d 49 [1981]). Where a criminal conviction is based upon facts identical to those in issue in a related civil action, the plaintiff in the civil action can successfully invoke the doctrine of collateral estoppel to bar the convicted defendant from re-litigating the issue of his liability.(See McDonald v. McDonald, 193 A.D. 2d 590, 597 N.Y.S. 2d 159 [2nd. Dept. 1993]).

Plaintiff has demonstrated that there was a criminal conviction based upon identical facts and that defendant had a full and fair opportunity to litigate the issues in the criminal action. Defendant is precluded by the doctrine of collateral estoppel from re-litigating these very same issues in the civil action. Plaintiff Angelo Seminerio has demonstrated entitlement to Summary judgment on these issues. Accordingly, plaintiff's motion for summary judgment on liability and to

dismiss defendant's First affirmative defense and First counterclaim is granted.

Co-defendant Shun Lee Palace Restaurant (hereinafter "Shun Lee") cross-moves to dismiss all claims and cross-claims as against it, alleging that it had no duty to protect patrons from sudden and unforeseen assaults by another patron. However, at the criminal trial two of its employees testified. Lisa Wong stated that defendant complained to her about plaintiff's table being too loud and asked her to tell them not to be so loud but she didn't do that because she can't tell a customer not to speak loud (Trial Transcript p. 30 Line 8, to P. 31 Line 2), instead she told her manager Patrick Lau who did nothing (P. 32 Line 11-16). Patrick Lau was aware that defendant Landsman complained about the occupants at plaintiff's table but did nothing (P. 51 Line 10-22).

Plaintiffs and defendant Landsman oppose the motion. Plaintiff claims that the issue as to whether defendant Shun Lee is liable has not been fully litigated at the Criminal Trial, that defendant Shun Lee's witnesses have yet to be deposed and discovery is not complete with respect to this defendant. Defendant Landsman argues that there is an issue of fact as to whether defendant Shun Lee was aware of the problem and did nothing.

When no discovery has taken place the motion for summary judgment is premature (Elliot v. County of Nassau, 53 A.D. 3d 561, 862 N.Y.S. 2d 90 [2nd. Dept. 2009]; Aurora Loan Services, LLC v. Lamattina & Associates, Inc., 59 A.D. 3d 578 [2nd. Dept. 2009]), A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment. Where the state of discovery is incomplete, including the lack of any deposition, summary judgment is properly denied as premature (Ali v. Efron, 106 A.D. 3d 560, [1st. Dept. 2013]; Wilson v. Yemen Realty Corp., 74 A.D. 3d 544, 903 N.Y.S. 2d 42 [1st. Dept. 2010]).

The parties last appeared at a status conference in July of 2012. At that point there were still parties to be deposed, including defendant Shun Lee. There is still outstanding discovery, the state of discovery is incomplete, therefore defendant's motion should be denied as premature.

Accordingly, defendant Shun Lee's cross motion is denied as premature with leave to renew following completion of discovery.

Accordingly, it is ORDERED, that plaintiff's Angelo Seminerio's motion for summary judgment against defendant Murray Landsman on the issue is liability on the First Cause of action is granted, and it is further

ORDERED, that plaintiff Angelo Seminerio is granted Judgment on the issue of Liability on the First Cause of action, and it is further

ORDERED, that plaintiff's motion for Summary Judgment dismissing defendant Murray Landsman's First Affirmative defense as to plaintiff Angelo Seminerio is granted and the First Affirmative defense as to plaintiff Angelo Seminerio is stricken and dismissed, and it is further

ORDERED, that Plaintiff's motion for Summary Judgment dismissing defendant Murray Landsman's First Counter Claim is granted and the First Counter Claim is severed and dismissed, and it is further

ORDERED, that defendant Shun Lee's Cross-motion for Summary judgment dismissing plaintiff's complaint and all claims as against it is denied with leave to renew after the completion of discovery, and it is further


ORDERED, that the parties are directed to appear for a status conference in Room 210 at the courthouse located at 71 Thomas Street, on July 24, 2013 at 9:30 A.M. , and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER:

Dated: June 24, 2013

MANUEL J. MENDEZ
J.S.C.


Manuel J. Mendez
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE