

<b>Suponya v Demarillac</b>
2016 NY Slip Op 30462(U)
March 18, 2016
Supreme Court, New York County
Docket Number: 150730/2013
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Carol R. Edmead
Justice

PART 35

Suponya, Anna
-v-
Sr. Louise Demarillac

INDEX NO. 150730/2013
MOTION DATE 2/8/16
MOTION SEQ. NO. 002

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

Motion sequence 002 and 003 are consolidated and decided as follows:

In this action for personal injuries, third-party defendant/second third-party defendant/third third-party defendant, SLCE Architects, LLP i/s/h/a Schuman, Lichtenstein, Claman, Efron Architects ("SLCE") moves by separate motions to dismiss the second and third third-party complaints as asserted against it (Motion seq. 002 and 003 respectively) on the grounds of law of the case, res judicata, and collateral estoppel, and for attorneys' fees and costs.

Factual Background

It is alleged that in June of 1999, defendant/third party plaintiff St. Vincent's Housing Development Fund Company, Inc. ("St. Vincent's") retained SLCE to perform architectural services related to a project known as Castleton Manor Senior Housing, also known as Sister Elizabeth Boyle Manor. The infant plaintiff allegedly fell from a stairway at the Project in December 2011.

Consequently, plaintiffs commenced this action against, inter alia, St. Vincent's and Stanan Management ("Stanan").

In turn, in September 2014, St. Vincent's and Stanan commenced a third party action for contribution and/or indemnification against SLCE and Monadnock Construction, Inc. ("Monadnock") (the "First third party action").

Dated: 3/18/16

\_\_\_\_\_, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

On November 25, 2015, SLCE filed a pre-answer motion to dismiss St. Vincent's and Stanan's third party action,<sup>1</sup> on the ground that third-party plaintiffs failed to comply with a condition precedent to suit against an architect where more than ten (10) years elapsed from the time the professional performance had ceased, in failing to "give written notice of such claim" to the architect and alleging same in the complaint in accordance with CPLR §214-D.

Thereafter, on December 2, 2014, Monadnock answered third party complaint and cross-claimed against SLCE. On December 23, 2015, Monadnock amended its answer in response to amended pleadings served against it.

By order dated January 20, 2015, this Court granted the motion, without opposition, and dismissed the third party complaint against SLCE "with prejudice."

St. Vincent's and Stanan then served a Notice of Claim against SLCE on February 12, 2015; on or about June 30, 2015, Monadnock also filed a Notice of Claim against SLCE.

St. Vincent's and Stanan commenced their second third party complaint, and Monadnock filed a third third-party complaint, both against SLCE and alleging compliance with CPLR 214-D.

In support of dismissal, SLCE contends that St. Vincent's and Stanan's second third party complaint, and Monadnock's third third-party complaint assert allegations that are identical to the claims that were alleged in St. Vincent's and Stanan's initial third-party complaint the Court previously dismissed.

As to St. Vincent's and Stanan, SLCE contends that they voluntarily did not oppose SLCE's prior motion to dismiss and were provided a full and fair opportunity to do so. Nor did St. Vincent's and Stanan appeal or move to vacate the Court's dismissal order. SLCE further contends that St. Vincent's and Stanan raise identical issues against SLCE in the first third party complaint, which involved the same allegations in their instant second third party complaint.

As to Monadnock, SLCE contends that Monadnock's claims against SLCE in the instant third third party action are identical to the claims previously asserted by St. Vincent and Stanan. Monadnock was also provided a full and fair opportunity to litigate against the dismissal motion, and did not appeal or seek to vacate the dismissal order. Monadnock cannot now seek to re-litigate both the same claims and the same issues already decided in favor of SLCE. Since Monadnock's third third party complaint contains claims identical to those alleged in the original third-party complaint, such claims are also barred.

In opposition, Monadnock argues that SLCE's prior motion was aimed at Stanan, without reference to Monadnock, who had not yet answered or filed claims against SLCE. Monadnock had not yet been brought into the case or provided with discovery to determine what role and/or liability SLCE had in the lawsuit. And, the issue of SLCE's liability was not raised or resolved in the prior motion practice, or brought to final conclusion. Further, attorneys fees are unwarranted as Monadnock has not acted maliciously or frivolously.

St. Vincent and Stanan Management Corp. also oppose the motion, arguing that dismissal is unwarranted. The issue presented in the prior motion, *i.e.*, non-compliance with the service of notice requirements of CPLR 214-D, is not present in the third third-party action. The prior third

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<sup>1</sup> SLCE's motion was returnable on December 16, 2014, and on December 10, 2014, adjourned to January 15, 2015 on consent between SLCE and St. Vincent's and Stanan.

third party complaint was dismissed not on the merits, but on procedural grounds which were subsequently resolved when a Notice of Claim was served upon SLCE pursuant to CPLR 214-D. The notice of claim was not served because there was no information that would have informed counsel for third party plaintiff as to when SLCE's work was completed. And, the previous dismissal was not on the merits, nor intended as such. Thus, there is no identity of issue or similarity of circumstance that would warrant granting the prior dismissal preclusive effect under the law of the case doctrine. And, *res judicata* does not apply as St. Vincent and Stanan had no opportunity to have their indemnity and contribution claims (in the second third part complaint) addressed, as the prior motion raised procedural pre-requisites which St. Vincent and Stanan were not required to contest. Thus, there was no final judgment on the merits of such claims. And, nothing in the prior order suggests that the indemnity and contribution claims were necessarily decided for collateral estoppel to apply.

SLCE replies that Monadnock was a party to this matter before SLCE's motion was finally submitted after a stipulation to adjourn was reached between SLCE and St. Vincent and Stanan. Monadnock's cross-claims would necessarily be dismissed upon dismissal of the third party complaint. Thus, Monadnock should have exercised its opportunity to oppose SLCE's motion. As to St. Vincent and Stanan, they presented no new evidence for the exception to the law of the case doctrine. A dismissal with prejudice constitutes a final determination on the merits, and St. Vincent and Stanan had the opportunity to litigate their claims in the prior proceeding. St. Vincent and Stanan cannot now seek to amend the order to reflect a dismissal without prejudice.

#### *Discussion*

*Res judicata*, or claim preclusion, is invoked when parties seek to relitigate entire causes of action between them and applies to matters which were actually litigated or could have been litigated in the earlier action (*DaimlerChrysler Corp. v Spitzer* 6 Misc3d 228, 782 NYS2d 610 [Supreme Court, Albany County 2004]; see *Hyman v Hillelson*, 79 AD2d 725, 726, affd 55 NY2d 624). Pursuant to the doctrine of *res judicata*, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357; see also, *Smith v Russell Sage Coll.*, 54 NY2d 185; *Matter of Reilly v Reid*, 45 NY2d 24; *Feigen v Advance Capital Mgt. Corp.*, 146 AD2d 556, 558; Restatement [Second] of Judgments § 24). In order for the doctrine of *res judicata* to apply, the party to be precluded in the current action must have been a party to the prior action where the claim at issue was litigated or could have been litigated.

Collateral estoppel, or issue preclusion, is invoked when the cause of action in the second proceeding is different from that in the first and applies to a prior determination of an issue which was actually and necessarily decided in the earlier case (*DaimlerChrysler Corp. v Spitzer, supra*). It is confined to the point actually determined and applies only to issues which were actually litigated, not to those which could have been litigated (*id.*). In order for the doctrine of collateral estoppel to apply, two requirements must be satisfied: the party seeking the benefit of the doctrine must prove that the identical issue was decided in the prior action and is decisive in the current action, and that the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination (*DaimlerChrysler Corp. v Spitzer*). "[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identity and decisiveness of

the issue" (*Ryan, supra* 62 NY2d at 501; *Capital Telephone Co., Inc. v Pattersonville Telephone Co., Inc.*, 56 NY2d 11, 18; *Schwartz v Public Admin.*, 24 NY2d 65, 73). The opponent, on the other hand, has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the administrative hearing (*Ryan, supra* 62 NY2d at 501; *Capital Telephone, supra* 56 N.Y.2d at 18).

The law of the case doctrine, a creature of judicial craftsmanship, addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation prior to final judgment of the case (*People v Evans*, 94 NY2d 499 [2000]). In "determining whether law of the case applies, the procedural posture and evidentiary burdens of the litigants must be considered" (*Feinberg v. Boros*, 99 A.D.3d 219951 NYS2d 110 [1<sup>st</sup> Dept 2012]). "The doctrine of law of the case contemplates that the parties had a full and fair opportunity to litigate when the initial determination was made. When applied, the doctrine precludes parties or their privies from relitigating an issue that has already been decided (*Chanice v. Federal Exp. Corp.*, 118 AD3d 634, 989 NYS2d 468 [1<sup>st</sup> Dept 2014] (internal citations omitted)).

As to St. Vincent's and Stanan, and based on the procedural history of this matter, and case law cited above, SLCE failed to establish the applicability of the doctrines of collateral estoppel, *res judicata*, and law of the case to St. Vincent's and Stanan's contribution and indemnification claims against SLCE in the second third-party complaint. Although St. Vincent's and Stanan were parties to the previously dismissed third party action, and had a full and fair opportunity to contest the dismissal of the third party complaint, the merits of their contribution and indemnification claims were not raised or decided by the Court. The issue raised by SLCE involved a pre-condition to suit bar, and notably, did not involve the merits of the indemnification and contribution claims. And, although the dismissal was with prejudice, such dismissal was premised upon the sole ground raised by SLCE, *i.e.*, the failure of St. Vincent's and Stanan to serve, and allege service of, the Notice of Claim.

As to Monadnock, SLCE failed to establish the applicability of the doctrines of collateral estoppel, *res judicata*, and law of the case to Monadnock's contribution and indemnification claims against SLCE in the third third-party complaint. Based on the procedural history of this matter, caselaw cited and reasoning above, and notwithstanding that SLCE's motion was adjourned to a date after Monadnock appeared and amended its answer in this action, the Court finds that Monadnock did not have a full and fair opportunity to litigate its contribution and indemnification cross claims against SLCE. Nor were contribution and indemnification issues raised or decided by the Court. Thus, collateral estoppel, *res judicata* and law of the case doctrines do not apply to bar Monadnock's third third party complaint against SLCE.

Consequently, SLCE's application for attorneys' fees is denied as lacking in merit.

#### *Conclusion*

Based on the foregoing, it is hereby

ORDERED that the motions (sequence 002 and 003) by third-party defendant/second third-party defendant/third third-party defendant, SLCE Architects, LLP i/s/h/a Schuman, Lichtenstein, Claman, Efron Architects to dismiss the second and third third-party complaints as

asserted against it, and for attorneys' fees and costs are denied; and it is further  
ORDERED that SLCE Architects, LLP i/s/h/a Schuman, Lichtenstein, Claman, Efron  
Architects shall serve a copy of this order with notice of entry upon all parties within 20 days of  
entry.

This constitutes the decision and order of the Court.

Dated 3/18/14 ENTER: *Carol R. Edmead*, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
J.S.C.

Check if appropriate:  DO NOT POST  REFERENCE