

selected as a Decision of Interest

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Tirino v. GLC Construction Inc., SMSC 44-08
Decided: September 12, 2008

Judge Howard M. Bergson

SUFFOLK COUNTY
District Court

Judge Bergson

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ORDERED that this motion to dismiss is denied.

In May 2007, plaintiffs filed a complaint against the defendant with the Suffolk County Department of Consumer Affairs (SCDOCA) concerning defendant's failure to properly perform a contract it executed with plaintiffs in May 2004 in connection with the construction of a retaining wall at their residence. Subsequently, on April 1, 2008, a hearing was held "*FOR THE PURPOSE OF LICENSE REVOCATION OR SUSPENSION OR LEVY OF FINE*" (emphasis supplied). The defendant appeared with counsel and although not parties to that proceeding, plaintiffs testified and examined witnesses. The investigator from SCDOCA handling the complaint filed by plaintiffs also testified. On April 16, 2008 the Director of SCDOCA, Charles A. Gardner, issued a determination upholding the recommendation of the Hearing Officer, James McNaught, that the complaint be dismissed. Based upon this favorable determination, defendant now seeks to dismiss the instant small claims complaint based upon principles of res judicata and collateral estoppel.

It is well established that the doctrines of res judicata and collateral estoppel are applicable to quasi-judicial determinations of administrative agencies,

(see, *Ryan v. New York Tel. Co.*, 62 NY2d 494, 499). However, inasmuch as plaintiffs were not parties to the administrative proceeding, the doctrine of *res judicata* has no application and the sole issue for this Court is whether plaintiffs are collaterally estopped from bringing this action based upon the adverse determination by SCDOCA.

In order to invoke the doctrine of collateral estoppel, it must be demonstrated that the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and whether there was a full and fair opportunity to contest this issue in the administrative tribunal (*Gilberg v. Barbieri*, 53 N.Y.2d 285, 291). Whether or not a party had a full and fair opportunity to litigate a prior determination cannot be reduced to a formula, but rather involves a practical inquiry into "the realities of litigation" (*Schwartz v. Public Adm'r of County of Bronx*, 24 NY2d 65). Some of the factors which the court should consider in determining whether a party has had his day in court include "the size of the claim, the forum of prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law, and foreseeability of future litigation" (*Gilberg v. Barbieri*, *supra*, at 292). If questions exist whether the party to be bound had a full and fair opportunity to litigate the issues raised, preclusion should be denied to allow the party such an opportunity (*Goepel v. City of New York*, 23 AD3d 344, 345).

The sole purpose of the administrative proceeding conducted by SCDOCA was to determine whether the imposition of a fine or revocation or suspension of defendant's home improvement license was warranted based upon defendant's purported willful failure to perform the contract entered into with plaintiffs by not following the manufacturers installation instructions (see, *Suffolk County Code* Â§345-9[A][5]; 345-10[A]). Other than the Investigator's testimony and their own testimony, plaintiff's were never given the opportunity to present any expert testimony on the issue of defendant's workmanship nor would plaintiffs have been entitled to any monetary compensation based upon a determination upholding the charges against the defendant. In addition, plaintiffs were not parties to that proceeding, their attendance was optional, nor can they said to have been in privity with SCDOCA as there is no mutuality of interest. Plaintiff's seek monetary damages while SCDOCA's interest is limited to imposing a penalty for a violation of any of the provisions of Chapter 345 of the Suffolk County Code.

In fact, the administrative proceeding was never intended to bar a consumer from seeking redress through the Courts. Section 345-11 (E) of the Suffolk County Code specifically states that the provisions under Chapter 345 are not be construed as relieving or lessening "the responsibility of any person licensed under the provisions hereof for any . . . damage to . . . property" and plaintiffs were specifically informed by SCDOCA that filing a complaint with them would not preclude them from seeking redress in a Court of competent jurisdiction. Further evidence of the fact that the administrative hearing is not a bar to judicial relief can also be found in section 346-3(A)(1) of the Suffolk County Code. Pursuant to that section, in order for an aggrieved consumer to be eligible for compensation from the restitution fund set up by SCDOCA, *a claimant must, inter alia, have filed a complaint with SCDOCA and provide a certified copy of a final judgment from a Court of competent jurisdiction and certify he or she has exhausted all attempts to enforce the judgment* (emphasis supplied). Based upon the foregoing, the doctrine of collateral estoppel does not apply to administrative hearings conducted before SCDOCA and therefore plaintiffs are not precluded from commencing the instant small claims action to recover damages (see, *The Municipal Hous. Auth for the City of Yonkers v. Jones*, 13 Misc.3d 141[A] [App. Term, 9th & 10th Jud. Dists.]).