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Res Judicata - Re-visiting a Ghost from Semesters Past

I can't speak for other attorneys, but civil procedure was not the high point of my law school experience. On those occasions when the class discussion turned to an arcane legal doctrine, such as res judicata, my mind tended to drift elsewhere.

Since law school, I'm afraid, my recollection of the doctrine of res judicata had grown even murkier. The fact is, as a medical malpractice defense attorney for almost ten years, res judicata, that conceptual ghost of law school semesters past, was rarely a significant presence in my practice.

With a little effort, most of us can still recall that the Common Law doctrine of res judicata (literally "the thing has been judged), acts to prevent a party from re-litigating a matter in which a judgement on the merits has been entered. In this way, once an issue has been litigated and a final judgement entered, the parties are ensured of repose and tranquility (two states of being not often associated with law).

I was drawn back to this ghost from the past as a result of research I recently conducted for a motion. Somewhat to my surprise, my research illustrated the continued relevance of res judicata in the context of medical malpractice actions. Specifically, my research focused on two separate bodies of case law which are relevant not only to medical malpractice attorneys, but to practitioners in any legal field.

The first body of case law involved dismissal of a prior action for failure to comply with court discovery orders. The body of case law concerned the preclusive effect of the entry of a judgement in an action for medical services on any subsequent action for medical malpractice.

Although the doctrine of res judicata generally acts to prevent a party from resurrecting an old claim, certain statutory exceptions to the doctrine may apply, permitting a party to re-litigate a claim.

CLPR section 205 (a) provides a mechanism for a plaintiff to commence a new action based upon the same transaction or occurrence, or series of transactions or occurrences, within six months after termination of the prior action, provided that the new action would have been timely commenced at the time the prior action was commenced and that service upon the defendant is affected within the same six month period.

The fact pattern in my own case concerned a collection action initiated by a physician/surgeon in District Court for non-payment of medical services. The defendant (patient), then acting *pro se*, served an Answer in the collection action and along with the Answer, asserted a counter-claim, alleging medical malpractice. The District Court ultimately dismissed the defendant's (patient's) claim as a consequence of his repeated failure to comply with Court orders for discovery.

The same plaintiff then obtained an attorney and within six months of the dismissal of the District Court action, brought a new action in Supreme Court. This action, sounding in medical malpractice, involved the same physician and concerned the same surgery as the counter-claim. Service upon the physician was made within the required six months, pursuant to CPLR 205 (a).

After reviewing the Summons and Complaint, I researched the issues to determine the basis for a motion to dismiss plaintiff's "new" complaint in Supreme Court.

Although CPLR 205 (a), may permit a plaintiff to commence a new action, involving the same parties and circumstances, certain exceptions apply there as well.

Under CPLR 205 (a), commencement of such a timely new claim is permissible, with essentially <u>four</u> exceptions:

<u>Commencement of the New Claim is Impermissible:</u>

1) Where the prior action was terminated by a voluntary discontinuance;
2) Where plaintiff failed to obtain personal jurisdiction over the defendant;
3) Where the prior complaint was dismissed for a neglect to prosecute; and
4) Where a final judgement on the merits has been entered in the prior action.

Given the facts in my case, the third and fourth exceptions to CPLR 205 (a), were the most applicable. Research regarding each of these exceptions provided a wealth of interesting information concerning the role and effect of res judicata in medical malpractice and other legal actions.

As indicated above, the third exception to CPLR 205 (a) involves dismissal of the prior complaint for neglect to prosecute, within the meaning of CPLR 3126.

The New York State Court of Appeals addressed the issue of the preclusive effect of a prior dismissal for neglect to prosecute on a subsequent claim for malpractice in <u>Andrea v. Arnone</u>, 5 N.Y. 3d 514, 2005 Slip Op. 07862. In <u>Andrea</u>, the Court held that a plaintiff was not entitled to commence a new action pursuant to CPLR 205(a)" where "the statute of limitations had expired" and where the "previous action was dismissed for their failure to comply with discovery orders".

Specifically, the Court opined:

"Our decisions make clear that the 'neglect to prosecute' exception in CPLR 205 (a) applies not only where the dismissal of the prior action is for "want of prosecution", pursuant to CPLR 3126, but whenever neglect to prosecute is in fact the basis for the dismissal."

Other recent cases have held similarly, see Kihl v. Pfeffer, 94 N.Y. 2d 118, and Williams v. Yu, 207 A.D. 2d 442.

The clear implication of the holding in Andrea and these other cases is that a plaintiff whose dilatory actions are judged to be tantamount to a neglect to prosecute, pursuant to CPLR 3126, will be precluded from re-litigating the same claim, as an exception to CPLR 205 (a). Obviously, this body of case law seemed to fit my fact pattern like a glove. The statute of limitations had lapsed by the time plaintiff commenced the "new" action in Supreme Court. The dismissal was granted after the defendant (patient) had failed to comply with several Court orders for discovery.

Having gathered sufficient case law regarding the third exception to CPLR 205 (a), I moved on to the next potential issue in my case.

The fourth exception to CPLR 205 (a), precludes a plaintiff from commencing a new claim where a final judgement on the merits has been entered on the prior claim. Research on this exception revealed an especially lengthy legal lineage.

My research indicated that since the Victorian era, New York state has consistently applied a rule that a judgment in favor of a physician for services rendered bars a subsequent action for medical malpractice, See Gates v. Preston, 41 N.Y. 113 (1869). Gates, and a subsequent case, Blair v. Bartlett, 75 N.Y. 150 (1878), supported the position that "a judgement in favor of a physician and surgeon for his professional services, rendered by a court of competent jurisdiction, in an action in which the defendant appeared and answered..., is a bar to an action for malpractice by that defendant against that physician.", See Blair v. Burnett, supra.

In a succession of cases since then, the Appellate Division, Second Department, has reiterated its long-standing reliance on the standard articulated in Gates and Blair.

In Tantillo v. Giglio, 156 A.D. 2d 664 (2nd Dept. 1989), the Court held that a default judgement rendered against a patient in a dentist's suit to recover fees for services rendered barred the patient's subsequent suit for malpractice in connection with the same services.

In Hunt v. Godesky, 189 A.D. 2d 854 (2nd Dept. 1993), the Court, citing Gates, Blair and Tantillo, held that a judicial determination entered upon the default of a party, which fixes a value on the professional services rendered, is a bar to any subsequent action for malpractice by the defaulting defendant against that professional for malpractice in rendering those services.

In Eagle Insurance Co. v. Facey, 272 A.D. 2d 399(2nd Dept. 2000), the Court addressed this

issue in yet another context. The case involved an insurer's petition to stay an arbitration of an insured's uninsured motorist claim. In that matter, the Court opined: "[The] Doctrine of res judicata is applicable to an order or judgment taken by default which has not been vacated, as well as to issues which were or could have been raised in the prior proceeding."

Recently, the Court applied this principle to a landlord tenant action for breach of a commercial lease. In Licini v. Graceland Florist, Inc., 32 A.D. 3d 825, (2nd Dept. 2006), the Court held: "[The} Doctrine of res judicata operates to preclude renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief that arise out of [the] same factual grouping or transaction and should have or could have been resolved in the prior proceeding."

It appears that in a medical malpractice context, the Court will bar an action for medical malpractice by a plaintiff who previously defaulted in an action to recover fees for medical services. The rationale for barring such claims hearkens back to the holdings in Gates and Blair. Essentially, the legal rationale is that a plaintiff may not claim that medical services were harmful (i.e. without value), where they were a party to litigation which determined that such services had a precise value, which was previously incorporated in a final judgment.

Fortunately, in my case, a judgement in the collection action had been entered several months prior to the commencement of the Supreme Court claim. On the basis of my research, I prepared a motion to dismiss plaintiff's Supreme Court claim, based on the doctrine of Res Judicata. I cited both the prior dismissal for neglect to prosecute exception and the entry of a final judgement from a prior action exception to CPLR 205 (a) in support of the motion.

Although I am still awaiting the Court's decision on the motion, my research was a reminder that sometimes a visit with a ghost from the past can be especially enlightening.