IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

BELFINT, LYONS and SHUMAN	:	
	:	
Plaintiff,	:	
v.	:	C.A. No. 01C-04-046
	:	
POTTS WELDING & BOILER REPAIR, CO., INC.,	:	
	:	
Defendant/Counterclaim Plaintiff	:	
v.	:	
	:	
BELFINT, LYONS and SHUMAN,	:	
	:	
Counterclaim Defendant.	:	

Date Submitted: June 26, 2006
Date Decided: August 28, 2006

Upon Consideration of Plaintiff/Counterclaim Defendant's Motion to Dismiss.
DENIED.

Mark L. Reardon, Esquire, Elzufon Austin Reardon Tarlov & Mondell, P.A., Wilmington, Delaware, Attorney for Plaintiff/Counterclaim Defendant Belfint, Lyons and Shuman.

John P. McShea, Esquire, McShea Tecce, P.C., Philadelphia, PA; Peter Ladig, Esquire, The Bayard Firm, Wilmington, Delaware, Attorneys for Defendant/Counterclaim Plaintiff Potts Welding & Boiler Repair Co.

SCOTT, J.

INTRODUCTION

Before the Court is Plaintiff and Counterclaim Defendant Belfint Lyons & Shuman's ("BLS") Motion to Dismiss the Counterclaim for failure to state a claim upon which relief can be granted. BLS contends that Potts Welding & Boiler Repair, Co., Inc.'s ("Potts") counterclaim should be dismissed based on the doctrine of collateral estoppel. Since the issues previously decided by the American Arbitration Association are not identical to the issues of fact in the present case BLS's Motion is **DENIED.**

FACTS

On July 23, 1999, Larre Jones ("Jones") became President and CEO of Potts pursuant to a seven-year Employment Agreement. The Employment Agreement contained a mandatory arbitration clause and provided that Potts could terminate Jones for "cause" upon 60 days' prior notice. In early 2000, Potts discovered that Jones had been stealing large sums of money from Potts throughout the years to pay for personal expenditures and his gambling habit. To mitigate the losses being suffered due to Jones' mismanagement of the company Potts terminated Jones on November 3, 2000.

On May 7, 2001, Jones filed a demand for arbitration with the American Arbitration Assocation (hereinafter, "Arbitration Proceeding").

He sought redress from Potts and St. John Holdings, Inc. ("St. John") (hereinafter "Respondents") for allegedly violating his July 23, 1999 Employment Agreement and the Delaware Wage Payment & Collection Act, 19 *Del. C.* § 1101 et seq. Respondents filed a counterclaim against Jones claiming that he had been rightfully terminated for violating the Employment Agreement and breaching his fiduciary duties. The parties disputed whether Jones resigned or was fired from Potts' employment on November 3, 2000.

The Arbitrators issued an Opinion and Partial Final Award on August 22, 2002. The opinion included the fact that Gregg Russell ("Russell") and Michael Quigg ("Quigg") came to believe Potts' inventory, at the time of St. John's acquisition had been fraudulently and materially overstated and Jones was directly responsible for these alleged misrepresentations. However, it was noted in a footnote that the parties were actively involved in resolving the contested acquisition/merger claims in another forum. Ultimately, the Arbitrators found that: 1) Jones did not voluntarily resign from Potts on November 3, 2000; 2) Respondents had breached the Employment Agreement by failing to provide Jones notice of his termination; 3) Respondents did not have cause to dismiss Jones; 4) The decision to reduce Jones' weekly compensation did not violate Jones' employment contract;

and 5) Jones' willful conversion of the loan proceeds from the key man insurance policy with Prudential on August 31, 2001 provided a clear basis for the termination of his employment contract. With respect to the conversion of insurance proceeds the panel noted that it was important to point out the difference between Jones' admitted conduct in this instance and Respondents' contested allegations of Jones' fraud and misrepresentation at the time of the acquisition.

PARTIES' CONTENTIONS

BLS asserts that Potts' counterclaim should be dismissed because it is barred by the doctrine of collateral estoppel. Specifically, BLS contends that Potts asserted that Jones had misstated inventory and the financial condition of Potts both at the time of the merger and after the merger, converted assets of Potts for his personal use while CEO after the merger, and converted a life insurance policy owned by Potts to his own use after he was terminated from Potts at the Arbitration Proceeding. Thus, BLS argues that the arbitration ruling collaterally estops Potts from re-litigating these issues.

Contrary to BLS' contention, Potts alleges that the issue before the arbitration panel was not whether Jones' pre-merger conduct was material to the merger or whether BLS had breached its duties to Potts. Rather, the issue was whether Jones' employment was properly terminated pursuant to

the Employment Agreement. Potts counters that collateral estoppel is, therefore, inapplicable as BLS cannot prove that the issues in this case are identical to issues decided in the arbitration and that Potts had a full and fair opportunity to litigate the relevant issues.

STANDARD OF REVIEW

In assessing the merits of a motion to dismiss for failure to state a claim pursuant to Superior Court Civil Rule 12(b)(6), all well-pleaded facts in the complaint are assumed to be true.[1] "A complaint[,] attacked by a motion to dismiss for failure to state a claim[,] will not be dismissed unless it is clearly without merit, which may be either a matter of law or of fact."[2] Likewise, a complaint will not be dismissed for failure to state a claim unless "[i]t appears to a certainty that, under no set of facts which could be proved to support the claim asserted, would the plaintiff be entitled to relief."[3] That is to say, the test for sufficiency is a broad one. It is measured by whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible to proof under the complaint.[4] If the plaintiff may recover, the motion must be denied. Similarly, when a defendant who attacks a complaint for failure to state a claim upon which relief could be

[1] *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, 372 A.2d 168, 169 (Del. 1976).
[2] *Diamond State Telephone Co. v. University of Del.*, 269 A.2d 52, 58 (Del. 1970).
[3] *Id*.
[4] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978); *Klein v. Sunbeam Corp*., 94 A.2d 385, 391 (Del. 1952).

granted, and who moves to dismiss the complaint, offers affidavits, depositions, or other supporting documentation, in addition to pleadings, the motion will be considered a motion for summary judgment.[5] Here, the parties have relied upon the opinion of the Arbitration Proceeding, and other matters outside the pleadings. Therefore, the motion will be considered a motion for summary judgment.

The Court's function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of fact exist.[6] Summary judgment will be granted if, after viewing the record in a light most favorable to the non-moving party, no genuine issues of material fact exist and the party is entitled to judgment as a matter of law.[7] If, however, the record indicates there is a material fact in dispute, or if judgment as a matter of law is not appropriate, then summary judgment will not be granted.[8]

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[5] *Venables v. Smith*, 2003 WL 1903779, at *2 (Del. Super.); *Shultz v. Delaware Trust Co*., 360 A.2d 576, 578 (Del. Super. Ct. 1976).
[6] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc*., 312 A.2d 322, 325 (Del. Super. Ct. 1973). *See also* Super. Ct. Civ. R. 56.
[7] *Id*.
[8] *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

DISCUSSION

The doctrine of collateral estoppel precludes a redetermination of facts actually litigated and determined in a prior proceeding.[9] To decide whether collateral estoppel applies to bar consideration of an issue, a court must determine whether: "(1) the issue previously decided is identical with the one presented in the action in question; (2) the prior action has been adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action."[10] The first and fourth factors are disputed in the present case.

The issues presented in the arbitration panel and in this case are not the same. In the case before the arbitration panel, the question of fact essential to the judgment was whether the Respondents had breached the Employment Agreement by terminating Jones on November 3, 2000. The arbitration panel decided that the Respondents had breached the Employment Agreement by not providing Jones with 60 days' notice prior to the termination. While the arbitrators may have acknowledged that Russell and Quigg believed Jones' actions were fraudulent at the time of the merger,

[9] *James v. Tandy Corp.*, 1984 WL 8256, at *4 (Del. Ch.).
[10] *Betts v. Townsends, Inc.*, 765 A.2d 531, 535 (Del. 2000).

they did not focus on the evidence that would either establish or refute this. Rather, they focused on the fact that Russell and Quigg never confronted Jones or called a meeting of the Potts Board of Directors to confront Jones about their contentions, as required by Paragraph 9(c) of the Employment Agreement.[11] The panel further noted in a footnote that the parties were actively involved in resolving the claim that Potts' inventory, at the time of St. John's acquisition had been fraudulently and materially overstated and Jones was directly responsible for the alleged misrepresentations, in another forum.

The issue before this Court is not whether Respondents violated Jones' July 23, 1999 Employment Agreement and the Delaware Wage Payment & Collection Act, 19 *Del. C.* § 1101 et. seq. Rather, the present issue involves whether BLS breached its duty of care as accountants to Potts. It cannot be said that the professional negligence and breach of contract claims in this case are identical to the issues decided in the employment arbitration because the arbitration panel did not consider whether BLS

[11] Paragraph 9(c) of the Employment Agreement reads in pertinent part:

> Upon sixty (60) days' prior written notice from the Company for "cause," which for purposes hereof shall mean that (i) Employee has been found guilty of committing a felony, or (ii) in the reasonable judgment of the Board and St. John's, Employee has been grossly negligent or has committed willful misconduct (including self-dealing) in carrying out his duties hereunder, has breached his fiduciary duties of good faith and care to the Company or has breached any material provision of this Agreement, and in any such case the Company has been materially harmed as a result;

breached its duties to Potts under the American Institute of Certified Public Accountants ("AICPA") Professional Standards and the Statements on Standards for Accounting and Review Service ("SSARS"). The Court cannot find that the issue sought to be precluded by BLS in this action is the same as the issue involved in arbitration nor can it find that the issue was actually litigated. Therefore, BLS's motion fails.

CONCLUSION

Based on the foregoing, BLS's Motion is **DENIED.**

IT IS SO ORDERED.

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Judge Calvin L. Scott, Jr.