Antonelli v Trans World Entertainment Corp.
2010 NY Slip Op 34100(U)
October 1, 2010
Supreme Court, New York County
Docket Number: 112160/09
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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KEN ANTONELLI,

Plaintiff,

-against-

TRANS WORLD ENTERTAINMENT CORPORATION, ROBERT HIGGINS and JOHN SULLIVAN,

Defendants.

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DECISION/ORDER
Index No. 112160/09
Motion Seq. No. 001

BARBARA R. KAPNICK, J.:

In this action, plaintiff Ken Antonelli ("Antonelli") seeks to recover damages under the terms of a written agreement, which was guaranteed, in part, by defendant Trans World Entertainment Corporation ("Trans World").

Background

Antonelli was employed as President and Chief Executive Officer of Icon Entertainment LLC ("Icon" or the "Company"), a recording "label" and record "distributor", pursuant to a written agreement dated September 1, 2005, which contained a Severance Agreement (the "Agreement"). Consistent with the provisions contained therein, the term of plaintiff's employment was to continue until August 31, 2010 unless it was terminated earlier.

Trans World is the principal of Icon, and, according to plaintiff, maintains absolute control over Icon. Defendant Robert Higgins ("Higgins") and John Sullivan ("Sullivan") are both

employed by Trans World. Plaintiff was allegedly also a minority member of Icon.

The Agreement provides, in relevant part, as follows:

4. *Termination of Agreement.*

4.1 The following shall give rise to termination prior to expiry of the Term:

* * *

(c) Failure of Funding of Company by Parent (Trans World Entertainment, "TWE", or any successor to TWE undertaking the financing role currently undertaken by TWE). By way of clarification, "Failure of Funding" hereunder shall include (i) a failure by TWE to make capital contributions to the Company consistent with the requirements of implementing the Business Plan during the Term, up to a maximum investment requirement from Parent of $3,000,000 or (ii) during the period ending August 31, 2008 only, the winding up, dissolution or liquidation of the Company for any reason.

* * *

4.2 If your employment hereunder is terminated for any of the reasons above, you shall be entitled to receive:

* * *

(c) If for "Failure of Funding" (as defined above): (i) all monies due to and/or accrued thru the date of "Failure of Funding" termination, and (ii) your Base Salary, payable in equal monthly installments in accordance with the Company's normal payroll policy as in effect from time to time, and all Health Benefits, through the end of the Term (i.e., the Expiry date per Paragraph 1 above).

* * *

Your base salary for the above shall be that which was in effect just prior to the time a notice of

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termination is given, and "accrual" shall refer to any benefits (including health, disability and 401 (k) or awards, including both cash, bonus and stock components) which, pursuant to the terms of any applicable plans, have been earned, vested or are payable, but which have not yet been paid to you. All payments to be made to you under this Agreement will be subject to required withholding of federal, state, and local income and employment taxes.

Any payments provided to you pursuant to 4,2 above shall not be subject to any obligation or mitigation on your part, but, with regard to payments, if any, made by Company in respect to post-termination periods pursuant to 4.2(c) or (d) above, Company may set-off against any such monies or benefits (x) any monies owed by you to Company at the time of termination and (y) any monies which you earn and receive from, or comparable benefits made available to you by, a third party, for your services as an agent, consultant or employee, during the period in which you are receiving such 4.2(c) or (d) monies. In such regard, you agree to inform Company of any such third party monies so received and comparable benefits made available to you. By way of example, if you are terminated under 4.1(d), the Company is paying your salary at the rate of $350,000 per annum, and you find other employment paying $300,000 per annum, you shall inform Company and the Company salary continuation obligation hereunder shall be reduced to $50,000 per annum.

Defendant Sullivan signed the Agreement on behalf of Trans World, in his capacity as Executive Vice President and Chief Financial Officer of Trans World, "but only to the extent of guaranteeing the obligations in Paragraph 4.2(c) above and, to the extent its consent or approval is required, hereby consenting to and approving the Company's obligation in Section 3.2."

According to the Complaint, in October 2007, defendant Higgins stated to plaintiff that Trans World had ceased funding Icon. Thereafter, in November 2007, Sullivan allegedly stated to plaintiff that "the company [wa]s over and that [Trans World] would no longer fund past this round of funding."

Plaintiff, however, claims that Trans World continued funding Icon, but only to the extent of allowing Icon to make the payment of limited obligations and general overhead expenses. According to plaintiff, no business transactions, which would have rendered Icon an ongoing business, were approved by Sullivan, Higgins and/or Trans World during the period from January 1, 2008 through August 31, 2008. Specifically, plaintiff claims that no funds were made available to develop or look for new talent or to properly fund the existing talent, and all of his proposals regarding specific new artists were rejected.

Plaintiff claims that defendants' sole efforts were to wind-down Icon, but that the defendants refused to admit they were doing so until after August 31, 2008, in order to defeat his rights to severance under the Agreement.

Finally, plaintiff claims that Higgins and Sullivan subsequently damaged his reputation in the music industry by

falsely telling third parties and creditors that Antonelli was the "owner of Icon" and that he was the person to contact "so that they could be paid."

Plaintiff thereafter filed and served a Demand for Arbitration against Icon and Trans World.

Trans World commenced a proceeding in this Court under Index No. 603642/08 to stay the arbitration. By Decision dated March 19, 2009, the Hon. Bernard J. Fried granted a permanent stay of the arbitration against Trans World, finding that Antonelli had failed to demonstrate that Trans World, which signed the Agreement in a limited fashion only, explicitly agreed to arbitrate the claims at issue.

The arbitration thus proceeded against Icon only, which did not appear or interpose any defenses, and on September 30, 2009 the Arbitrator rendered a Final Award in favor of Antonelli in the total sum of $713,773.27 (i.e., $661,770.78 in severance, based upon Antonelli's base salary of $350,000 per annum, plus his Health Benefits of $18,773.04 per year, pro-rated for the period of November 15, 2008 to and including August 31, 2010, attorneys' fees in the total amount of $41,998.01, and costs and expenses in the amount of $10,004.48).

The Arbitrator found, *inter alia*, as follows:

> Upon careful review of the evidence, arguments, and cited law, the Arbitrator finds that Respondent effectively commenced the process of "winding up" Icon in or about January 2008. At that time Icon started closing down and, as a practical matter, began the process of ceasing to be an ongoing business concern. Accordingly, in failing to pay Claimant severance, Respondent breached the Agreement.
>
> The Arbitrator, however, finds that Claimant's claim in tort is without merit. Although Respondent's actions may have ultimately impacted on Claimant's reputation, its conduct is quite dissimilar from the claims asserted in *Singer v. Jefferies & Co.*, 160 A.D.2d 216, 553 N.Y.S.2d 346 (1st. Dep't 1990), the case relied upon by Claimant. In *Singer*, plaintiff alleged that his reputation was injured when his employer involved him in criminal wrongdoing - an insider trading scheme. Here, on the other hand, although the manner of the winding up may have injured third parties and, consequently, Claimant's reputation, it does not rise to the requisite level of maliciousness and/or reckless inflicting of damage that would constitute a tort. In any event, Claimant could have resigned his position when he realized that Icon was winding up the business and thus avoided much of the fallout from Icon's actions; instead, Claimant chose to remain with the company until he was formally discharged on or about November 14, 2008.

In October 2009, Antonelli moved to confirm the Award (under Index No. 114149/09). The petition was granted *on default* by Decision/Order of the Hon. Richard F. Braun dated October 26, 2009, and Antonelli subsequently entered judgment against Icon.

Plaintiff thereafter commenced the instant action seeking to recover damages for: (i) breach of contract, based on Trans World's failure to pay the severance due to plaintiff in accordance with

its guarantee (first cause of action); (ii) "breach of the covenant of unfair [sic.] dealing" based on defendants' alleged conspiracy to conceal that Icon was in the process of "winding-up" or "liquidation" since in or about October 2007 (second cause of action); (iii) wrongful and tortious impairment and interference with plaintiff's business relationships (third cause of action); (iv) prima facie tort (fourth cause of action); (v) destruction of plaintiff's reputation in the music industry (fifth cause of action); and (vi) libel (sixth cause of action).

Defendants now move for an order pursuant to CPLR 3211(a)(5) and (7) dismissing the Complaint in its entirety.

Discussion

It is well settled that in determining a motion to dismiss, "the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference." *Rivietz v. Wolohojian*, 38 AD3d 301 (1st Dep't 2007)(internal citation omitted).

First cause of action - breach of contract

Defendants argue that the first cause of action must be dismissed on the grounds that: (i) Trans World is not bound by the Arbitration Award or the confirming Judgment, since Icon did not appear in the Arbitration or present a defense and Trans World was

not a party to the Arbitration Proceeding; and (ii) the Complaint fails to state a claim for breach of contract against Trans World pursuant to Section 4.2(c) of the Agreement, because the Complaint does not allege a single step taken consistent with "winding down" the business.

Plaintiff argues that the Arbitrator already determined that Icon defaulted in its obligation to pay plaintiff his severance, and that because defendant Trans World was in privity with Icon, it has no defense to its obligation to pay that amount under its guarantee.[1]

In *Firedoor Corp. of Am. v. Merlin Indus.*, 86 AD2d 577 (1st Dep't 1982), also relied upon by the defendants, the Court held that "[g]enerally, a judgment entered against a principal upon default is only prima facie evidence against the surety. The latter remains at liberty to contest its own liability by

[1] This Court finds defendants' reliance on the case of *Aetna Cas. & Sur. Co. v. City of New York*, 160 AD2d 561 (1st Dep't 1990) to be misplaced. First, the discussion therein of a "default determination" refers to the City's determination that one of the contractors had defaulted under its contract with the City, not that one party prevailed simply because the other did not appear. Secondly, the guarantors in *Aetna Cas. & Sur. Co.*, were not found to be bound by any of the Court's prior determinations because they were not parties to any of those proceedings, which is different than the situation in the instant case, where Trans World was a named party in the arbitration, but did not have to participate after it successfully moved to stay the arbitration proceeding with respect to itself.

establishing affirmatively that the principal was not liable. (citation omitted)."

However, in *NPS Corp. v. Continental Group*, 183 AD2d 666, 667 (1st Dep't 1992), the First Department held that "even if the guarantor . . . did not agree to arbitrate, by guaranteeing the liability of a principal . . . who has done so, the guarantor implicitly agrees, for purposes of later determining its liability, to be bound by the resolution reached in arbitration."

In the instant case, the Arbitrator, in a twelve page decision, found that in failing to pay plaintiff's severance, Icon breached Section 4.2(c) of the Agreement, which defendant Trans World guaranteed. Therefore, the fact that Trans World was not obligated to participate in the arbitration or the subsequent proceeding to confirm the Award is not dispositive and the motion to dismiss plaintiff's first cause of action is denied.[2]

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[2] Even assuming arguendo that the Arbitration Award was not controlling here, defendants' motion to dismiss still fails since the Complaint states a breach of contract claim, pursuant to Section 4.2(c) of the Agreement. The Complaint alleges that Icon began "winding up" its operations in January 2008, thereby triggering Section 4.1(c)(ii) and 4.2(c) of the Agreement and providing plaintiff with a basis for enforcing defendant's severance obligation.

Additionally, while it seems that the breach of contract claim turns on when Icon began its "winding up" process, that issue is not before the Court at this early stage in the litigation.

Second through fourth causes of action

Defendants argue that plaintiff's other claims are barred by the doctrine of collateral estoppel, because the Arbitrator dismissed Antonelli's tort claims, which were based on the same allegations, and in any event, do not state a cause of action as a matter of law.

Plaintiff argues that he is not collaterally estopped from asserting tort claims against the individual defendants, since said claims are outside the individual defendants' corporate duties, and were not part of the arbitration.

Plaintiff also argues that his second cause of action for breach of the covenant of unfair dealing is mischaracterized by defendants' counsel as one of plaintiff's "tort" claims. He asserts that the Arbitration Award found that Icon had breached this covenant and as such was contractually obligated to pay plaintiff's severance. Moreover, plaintiff claims that since Trans World controlled Icon, the defendants were liable for Icon's conduct and this cause of action should not be dismissed.

The doctrine of collateral estoppel, or issue preclusion,

> "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party ..., whether or

> not the tribunals or causes of action are the same" (citations omitted). The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action (citation omitted). "[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding" (citation omitted).

Parker v. Blauvelt Volunteer Fire Co., 93 NY2d 343, 349 (1999).

It is beyond dispute that "[t]he doctrines of res judicata and collateral estoppel are applicable to arbitration awards." *Waverly Mews Corp. v. Waverly Stores Assocs.*, 294 AD2d 130, 132 (1st Dep't 2002). Determinations made in arbitration bar "any subsequent litigation involving the same parties and the same subject matter." *Mayers v. D'Agostino et al.*, 87 AD2d 519, 522 (1st Dep't 1982).

With respect to plaintiff's second cause of action, plaintiff specifically alleged in his Demand for Arbitration Before JAMS that respondents breached "the covenant of fair dealing." The Arbitration Award, however, did not grant plaintiff relief based on this ground.

Moreover, neither the Complaint, nor plaintiff's opposition papers allege that plaintiff did not have a full and fair opportunity to be heard on this issue. Thus, based on the principle of collateral estoppel, the plaintiff is now precluded from relitigating this issue and the second cause of action is dismissed.[3]

Plaintiff is likewise estopped from relitigating the third and fourth causes of action for wrongful and tortious impairment and interference with plaintiff's business relationships and for prima facie tort, since the Arbitrator already found plaintiff's claims in tort to be "without merit." The facts discussed in the Arbitration Award are identical to those alleged in the instant Complaint, and plaintiff has failed to meet its burden of establishing the absence of a full and fair opportunity to litigate these issues in the prior proceeding.

To the extent that the third and fourth causes of action are alleged against the defendants in their individual capacity and those claims were not addressed at arbitration, the plaintiff is not collaterally estopped from litigating those issues here. *See Miller v. Lanzisera*, 273 AD2d 866, 868 (4th Dep't 2000).

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[3] Plaintiff conceded during oral argument that the second cause of action must be dismissed against the two individual defendants.

Plaintiff is granted leave to replead these two claims against the individual defendants with greater specificity, should plaintiff choose to do so.

Fifth cause of action

Defendants argue that the fifth cause of action for destruction of plaintiff's reputation in the music industry must be dismissed because it fails to identify the theory under which plaintiff seeks to recover.

Since plaintiff did not specifically oppose this argument in his opposition papers, plaintiff's fifth cause of action will be dismissed for failure to state a cause of action.

Sixth cause of action

Finally, defendants argue that the sixth cause of action for libel must be dismissed because the Complaint fails to set forth the particular words complained of, fails to state the time, place and manner of the allegedly false statements and to whom such statements were made and fails to allege special damages.

The Court finds that the sixth cause of action should also be dismissed with leave to replead with greater specificity, if deemed appropriate by plaintiff.

Plaintiff shall have 30 days to serve his Amended Complaint as directed herein.

Defendants shall have 30 days to serve their Answer or otherwise move with respect to the Amended Complaint.

Counsel for all parties shall appear for a conference in IA Part 39, 60 Centre Street - Room 208 on January 12, 2011 at 9:30 A.M. to schedule discovery.

This constitutes the decision and order of this Court.

Dated: Oct. 1 , 2010

BARBARA R. KAPNICK

J.S.C.

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J.S.C.