Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Present: Hon.Timothy J. Dufficy **IAS PART 35**
Justice

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RONEN COHEN,

Plaintiff, **Index No. 16398/12**

-against- **Motion Date: 3/11/13**

RONI ALCOBI, DAVID ZARBIB, AND JOHN DOE, **Motion Cal. No.: 22**

Mot. Seq.: 1

Defendants.

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The following papers numbered 1 to 11 read on this motion by defendants **DAVID ZERBIB AND RONI ALCOBI** for an order pursuant to CPLR 3211 to dismiss the complaint as against them, for an order pursuant to CPLR 6514(b) to cancel the Notice of Pendency and to award the defendants attorney's fees and costs; and the cross-motion by plaintiff for an order pursuant to CPLR 3212(e) and CPLR 3212(c) granting partial summary judgment in his favor and for an order pursuant to CPLR 1024 to amend the caption to reflect that Asher Taub, Esq., is the named "John Doe".

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1 - 4
Notice of Cross Motion - Affidavits-Exhibits	5 - 9
Reply Affidavits	10 - 11

Upon the foregoing papers it is ordered that the motion is granted and the cross-motion is denied.

The plaintiff seeks to quiet title and set aside an alleged fraudulent deed and conveyance of real property. Between 2006 and 2007, defendant David Zerbib loaned the plaintiff a total of $500,000. It is alleged that on March 13, 2008, the plaintiff executed a deed transferring a property he owned, located at 248-07 Jamaica Avenue, Queens, NY 11426, to Zerbib's wife, defendant Roni Alcobi, as collateral for the $500,000 debt. The

plaintiff alleges that his signature on a deed transferring a property to defendant Roni Alcobi was forged.

Based upon a provision in their contract, the parties went to arbitration before plaintiff's Rabbi on September 27- 28, 2008. On October 5, 2008, the Arbitrator issued a ruling. The preamble to the Arbitration Ruling noted that the arbitrator heard oral argument from both parties, and that both parties "agreed that the borrower" mortgaged the subject property to the "lender" as security for a loan of $500,000. The Arbitration Ruling states at paragraph B, that the subject property is "officially registered to David Zerbib", and further provides for how both parties should try and sell the property so that the plaintiff can repay his debt to defendant Zerbib.

It is also alleged by defendant Zarbib that at the time the plaintiff transferred the subject property to him, the plaintiff had handed him the key to the property and instructed the tenants to pay their rent to David Zerbib from that point on. Defendant Zerbib has been collecting rent from the tenants since March 13, 2008, allegedly without any objection from the plaintiff. Furthermore, from March 13, 2008 to date, defendant Zerbib has been paying the mortgage on the subject property.

On August 6, 2012, the plaintiff filed a Summons and Complaint and served it upon the defendants shortly thereafter. The plaintiff seeks a declaration and rescission/nullification of the deed, an accounting of rents and damages in an amount to be determined at trial. The defendants move to dismiss the Complaint, based upon alleged evidence that the plaintiff, in fact, signed the deed, and that the transaction was witnessed and notarized by an attorney, and on the ground of res adjudicata, based upon the resolution of the dispute in arbitration. The plaintiff opposes the motion and cross-moves to vacate the arbitration award.

"Res judicata serves to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the same factual grouping' or transaction', and which should have or could have been resolved in the prior proceeding". (*Braunstein v Braunstein,* 114 AD2d 46, 53 [2d Dept 1985]; *see also Breslin Realty Development Corp. v. Shaw,* 72 AD3d 258, 263 [2d Dept 2010].)

"The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in the prior action or proceeding, and decided against that party or those in privity, whether or not the tribunals or causes of action are the same." (*Breslin Realty Development Corp. v. Shaw,* 72 AD3d at 263.) For collateral estoppel to apply, "three criteria must be met: (1) the issue must actually have been litigated and determined by a valid and final judgment in a separate action, (2) that determination must have been essential to the judgment and (3) either the party to be precluded had a full and fair opportunity to litigate the issue in the prior proceeding or other circumstances do not justify affording him an opportunity to relitigate it" (s*ee Cudar v Cudar,* 98 AD3d 27, 31 [2d Dept 2012] [quoting *Braunstein v Braunstein,* 114 AD2d at 52–53]; *Ippolito v TJC Development, LLC,* 83 AD3d 57, 71 [2d Dept 2011].)

"The doctrines of res judicata and collateral estoppel apply to arbitration awards with the same force and effect as they apply to judgments of a court." (*Id.* at 72 [quoting *Mahler v Campagna,* 60 AD3d 1009, 1011 [2d Dept 2009]; *see also Matter of Falzone [New York Cent. Mut. Fire Ins. Co.],* 15 NY3d 530, 534–535 [2010].) "Where there has been a final determination on the merits, an arbitration award, even one never confirmed, may serve as the basis for the defense of collateral estoppel in a subsequent action." (*Acevedo v Holton,* 239 AD2d 194, 195 [1st Dept 1997]; *see also Pinnacle Environment Systems, Inc. v Cannon Building of Troy Associates,* 305 AD2d 897, 898 [3d Dept 2003]; *McMenemy v Goord,* 273 A.D.2d 665, 667 [3d Dept 2000]; *County of Rockland v. Aetna Casualty & Surety Company,* 129 AD2d 606, 607 [2d Dept 1987] ["The fact that the prior determination was an unconfirmed arbitration award and not a judicial determination does not lessen its collateral estoppel effect"].)

In circumstances when the parties agree to submit their dispute to an arbitrator, courts generally play a limited role. Courts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies (*Matter of New York State Correctional Officers & Police Benevolent Assn v State of New York*, 94 NY2d 321, 326 [1999]). A court cannot examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes its interpretation would be the better one (Id). Indeed, even in circumstances where an arbitrator makes errors of law or fact,

courts will not assume the role of overseers to conform the award to their sense of justice (*see Matter of Sprinzen [Nomberg],* 46 NY2d 623, 629-631 [1979]; *see also, United Paperworkers Intl. Union v Misco, Inc.,* 484 US 29, 38 [1987]; *International Bhd. of Elec. Workers v Niagara Mohawk Power Corp.,* 143 F3d 704, 714 [1998]).

Despite this deference, courts may vacate arbitral awards in some limited circumstances. A court may vacate an award when it violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on an arbitrator's power under CPLR 7511 (b) (1) (*Matter of Board of Educ. v Arlington Teachers Assn.,* 78 NY2d 33, 37 [1991]).

In this case, the plaintiff argues that his claims against defendant Roni Alcobi and Asher Taub, Esq. cannot be barred because they were not parties to the arbitration. In order for res judicata to come into play, it is necessary that "the party opposing preclusion must have had a full and fair opportunity to litigate th[e] claim in the prior proceeding" (*Marinelli v Helmsley-Noyes,* 265 AD2d 1 [2000], citing *Browning Ave. Realty Corp. v Rubin,* 207 AD2d 263, 264-265, *lv denied* 85 NY2d 804 [1994]). However, this does not mean that it is necessary that the party seeking to invoke res judicata have been a party in the prior action. It is well settled that a defendant who was not a party to a prior proceeding may nevertheless assert res judicata "where [its] liability ... is altogether dependent upon the culpability of one exonerated in a prior suit" (*Good Health Dairy Prods. Corp. v Emery,* 275 NY 14, 17-18 [citation omitted]; *Matter of Joy Co. v Hudacs,* 199 AD2d 858, 860 [" '[a] person not a party to a prior action, but only derivatively or vicariously liable for the conduct of another, may invoke the *res judicata* effect of a prior judgment on the merits in that action in favor of the one primarily liable' "], quoting *New Paltz Cent. School Dist. v Reliance Ins. Co.,* 97 AD2d 566, 567 []. Here, most of the causes of action now sought to be interposed are the very same claims that were raised in the arbitration against David Zerbib.

The plaintiff also argues that the claims now brought by him against Roni Alcobi and Asher Taub, Esq. must be permitted to stand because he could not bring them in the arbitration, where Roni Alcobi and Asher Taub, Esq were not parties. However, these claims, too, are based on Roni Alcobi and Asher Taub, Esq.'s alleged liability for precisely the same acts of David Zerbib that gave rise to the other claims (*see, Giacomazzo v Moreno,* 94 AD2d 369 [1983]). "When alternative theories are available to recover what is essentially

the same relief for harm arising out of the same or related facts such as would constitute a single 'factual grouping' [citation omitted], the circumstance that the theories involve materially different elements of proof will not justify presenting the claim by two different actions" (*O'Brien v City of Syracuse,* 54 NY2d 353, 357-358 [1981]). While the character of these two claims might appear more distinct from the claims raised in the arbitration than the claims previously discussed, this court finds that, under transactional analysis, they are also barred by res judicata. The underlying factual setting is identical, involving the precise claims of forgery that underlie all of the other claims. The fundamental gravamen of the wrong is precisely the same (*see Sterrer v Calestine,* 57 NY2d 1030, *affg* 89 AD2d 601 [1982]; *cf., Singleton Mgt. v Compere,* 243 AD2d 213).

"Courts are bound by an arbitrator's factual findings, interpretation of the contract and judgment concerning remedies," and a court may not "examine the merits of an arbitration award and substitute its judgment for that of the arbitrator simply because it believes that its interpretation would be the better one" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v. State of New York,* supra; *see Matter of Falzone* [*New York Cent. Mut. Fire Ins. Co.*], 15 NY3d 530, 534 [2010]; *Matter of New York City Tr. Auth. v. Transport Workers' Union of Am., Local 100, AFL–CIO,* 6 NY3d 332, 336 [2005]; *Wien & Malkin LLP v. Helmsley–Spear, Inc.,* 6 NY3d 471, 479–480, *cert. denied* 548 US 940 [2006]; *Matter of Miro Leisure Corp. v Prudence Orla, Inc.,* 83 AD3d 945 [2011]). Indeed, even where an arbitrator makes errors of law or fact, "courts will not assume the role of overseers to conform the award to their sense of justice" (*Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York,* 94 NY2d at 326; *see Wien & Malkin LLP v. Helmsley–Spear, Inc.,* 6 N.Y.3d at 479–480). Therefore, since an arbitrator has already ruled on the status of the property, and has found that plaintiff transferred the property to defendant, the doctrine of res judicata precludes this court from re-examining this issue.

The branch of the motion which is to vacate the Notice of Pendency is granted, in light of the court's decision dismissing the Complaint (*see Abdulayev v Yadgarov*, 105 AD3d 877 [2013]).

The plaintiff's cross-motion to vacate the arbitration award is made more than 90 days after the award was delivered to him and is therefore untimely (*see* CPLR 7511 [a]; *Werner Enters. Co. v New York City Law Dept.*, 281 AD2d 253 [2001]). In any event, while Article 75 of the CPLR provides a mechanism by which a party may obtain judicial confirmation of an arbitration award, the failure to have an award confirmed is not a ground for vacating the award (*see* CPLR 7510; 7511 [b] [1]).

The plaintiff also claims that he seeks vacatur under CPLR 7511(b)(1)(iv). This argument is unavailing, as well as unpreserved, since subparagraph (iv) is "failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection." The plaintiff participated in the arbitration without objection as to the procedure employed. Accordingly, the branch of the cross-motion which is to vacate the arbitration award is denied.

The branch of the cross-motion to amend the caption to substitute Asher Taub, Esq., in place and stead of "John Doe", pursuant to CPLR 1024, is denied, as academic, in light of the Court's decision dismissing the complaint.

Dated: June 4, 2013

TIMOTHY J. DUFFICY, J.S.C.