Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LESLIE J. PURIFICACION IA Part 39
Justice

F. M x

Plantiff,

-against-

M.S.F., ETAL,
x

Index
Number 720575 2019

Motion
Date August 10, 2020

Motion Seq. Nos. 1, 2, 3

The following numbered papers were read on this order to show cause by petitioner, M.F., (Seq. 1) seeking to grant her petition, and, among other things, vacate an arbitration award, dated September 13, 2019, pursuant to CPLR 7511; and two motions seeking to dismiss the petition, pursuant to CPLR 3211 (a) (4) and 404 (a), made by respondent, H.F. (Seq. 2), and respondents, M.S.F. and N.F. (Seq. 3).

	Papers Numbered
Order to Show Cause - Affirmation - Exhibits	E9-E19
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Upon the foregoing papers, it is ordered that the instant application, and two motions, are determined as follows:

This is a proceeding seeking to, among other things, vacate an arbitration award, pursuant to CPLR 7511. The subject arbitration award was granted in the Supreme Court, Bronx County, under Index No. 31054/2019E, in the "Matter of the Application of H.F. for an Order and Judgment pursuant to Art. 75 of the CPLR confirming an Arbitration Award v. Y.D.F., M.F., and C.W." Petitioner, herein, commenced this court proceeding on or about December 5, 2019 by the filing of a petition to vacate the arbitration award, which filing occurred approximately ten weeks after the filing of a petition, on September 19, 2019, to confirm the arbitration award in the Bronx matter.

H.F. is a 96-year-old male who suffers from dementia, requiring round-the-clock care. He has been the husband of M.F. for 72 years, is father of M.S.F., Y.D.F., and C.W., and the grandfather of N.F. Petitioner, M.F. claims that her husband does not have "legal capacity," and provides several examples of same. She also alleges that M.S.F. and N.F. have sought to improperly exert control over H.F.'s and her lives by, among other things, cancelling credit cards, changing locks, taking over investment accounts, and removing funds from bank accounts, all, she learned later, pursuant to a "power of attorney" from H.F., dated January 18, 2018, in N.F.'s name. M.F. contends that she later received a call from a Rabbi Tendler, known to her to be M.S.F.'s Rabbi, to attend a "discussion" in an attempt to resolve the existing family disputes. She showed up on or about July 24, 2019, and was "surprised" to find that what was occurring was an arbitration before a Beis Din. M.F. refused to sign an "Arbitration Agreement," claims she did not take part in the arbitration, and, at the conclusion, was not advised that the arbitration would continue on a subsequent date. In August, she received an "interim arbitration award," and on September 23, 2019, received a "Binding Final Arbitration Award," dated September 13, 2019.

Petitioner commenced this proceeding to, among other things, vacate the arbitration award; declare the January 18, 2018 power of attorney invalid; and consolidate this matter, in Queens County, with the previously filed Bronx matter. There is no argument that the Bronx matter was instituted prior to this Queens proceeding, and involved the same facts, parties, and documents contested in the instant proceeding. In fact, at the time this order to show cause, and the two motions, were made, motions in the Bronx action had already been submitted, and were pending, seeking the obverse of the relief sought in the instant Queens application.

Further, prior to the date of submission of the instant application and motions, J. Tuitt, in the Supreme, Bronx action, rendered a decision, on February 28, 2020, determining, as relevant to the instant request for relief brought by Petitioner, M.F., that the Bronx action case file was to be sealed, pursuant to 22 NYCRR 216.1; that H.F.'s durable power of attorney, appointing N.T.F. as his attorney-in-fact, was legally executed and was, and is, valid and has full force and effect ; that H.F.'s motion to confirm the arbitration award was granted; that M.F.'s motion to transfer the matter to Queens County was denied; and that H.F.'s motion to retain jurisdiction in the Bronx was granted. Additionally, on May 12, 2020, in deciding a motion to consolidate, made by H.F. in the Bronx action, J. Tuitt determined that the "motion to consolidate is denied as moot as petition to vacate final arbitration award was denied and petition was dismissed." The Court noted that M.F. and C.W., respondents in the Bronx action, appeared in opposition to, and in support of, the separate Bronx motions. M.F.'s submitted affidavits set forth the entirety of her claims as she has submitted them herein, in support of her Queens application. C.W. propounded the same opposition and argument to the Bronx motions as appear, by M.F., in support of the instant Queens application.

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' (*Ryan v. New York Tel. Co.*, 62 NY2d 494, 500 [1984]; *see Napoli v Breaking Media, Inc.*, – AD3d –, 2020 NY Slip Op. 05907 [2d Dept 2020]; *Broder v Pallotta & Assoc. Dev., Inc.*, 186 AD3d 1189 [2d Dept 2020]). The party seeking to invoke collateral estoppel has the burden of showing the identity of issues, while the party attempting to avoid the application of the doctrine must establish the lack of a full and fair opportunity to litigate (*see Matter of Dunn*, 24 NY3d 699 [2015]; *Astoria Landing, Inc. v New York City Council*, 186 AD3d 1593 [2d Dept 2020]). "Collateral estoppel comes into play when four conditions are fulfilled: (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" (*FC Notes SVC, LLC v United General Title Ins. Co.*, 146 AD3d 935, 936 [2017], quoting *Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015]). Further, under the doctrine of stare decisis, "once a court has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision" (*People v Bing*, 76 NY2d 331, 337-338 [1990]; *see Village of Kiryas Joel v County of Orange*, 144 AD3d 695 [2d Dept 2016]; *Jiannaras v Alfant*, 124 AD3d 582 [2d Dept 2015]).

It is readily apparent that the instant motion by M.F. involves the same parties and identical issues as in the Bronx action, and that the respondents, including M.F. in that action had, and exercised, a "full and fair opportunity to litigate those issues. While counsel for M.F. observed, in opposition to the aforementioned Bronx motions, that she did not cross-move to vacate the arbitration award because she did not want to "submit to the improper venue" of that County, counsel also gave the Court permission to "accept these opposition papers as a constructive cross application to vacate the award" should her motion to transfer be denied. Such motion was denied, and the record of J. Tuitt's decision included mention of such opposition papers in her determination confirming the arbitration award. Therefore, M.F. has failed to demonstrate that she did not have the opportunity to fully participate in such Bronx action. As such, the relief sought by M.F. in this instant Queens proceeding, was previously denied by the Bronx Court in that proceeding, and the doctrine of issue preclusion prescribes that such motion be denied.

H.F. (Seq. 2) and M.S.F. and N.F. (Seq. 3) seek to dismiss plaintiff's petition pursuant to CPLR 3211 (a) (4), which provides that a court may dismiss an action where "there is another action pending between the same parties for the same cause of action." Such section "vests the court with broad discretion in considering whether to dismiss an action" on that ground (*Whitney v Whitney*, 57 NY2d 731, 732 [1982]; *see JPMorgan Chase Bank, N. A. v Luxama*, 172 AD3d 1341 [2d Dept 2019]; *Mason ESC, LLC v Michael Anthony Contr. Corp.*, 172 AD3d 1195 [2d Dept 2019]). Said statute is applicable where there exists in the two actions a substantial identity of the parties and the causes of action (*see Feldman*

v Harari, 183 AD3d 629 [2d Dept 2020]), and requires that the actions be "sufficiently similar" (*Monsalvo v Air Dock Sys.*, 37 AD3d 567, 567 [2d Dept 2007]; *see Cooper v Bao Thao*, 162 AD3d 980 [2d Dept 2018]). The critical element is that both suits arise out of the same suvject matter or series of alleged wrongs (*see Sokoloff v Schor*, 175 AD3d 568 [2d Dept 2019]; *State Farm Fire & Cas. Co. v Jewsbury*, 169 AD3d 949 [2d Dept 2019]). Here, the Bronx action and the Queens action contained virtually the same named parties; the same series of "alleged wrongs;' and the same, if diametrically opposite, requests for relief.

In the case at bar, at the time the Queens petition was "commenced" (*see Reckson Assoc. Realty Corp. v Blasland, Bouck & Lee*, 230 AD2d 723 [2d Dept 1996], there was existing "another action pending," *i.e.*, the Bronx petition. As previously noted, the Bronx proceeding's court file has been "sealed," presumably pursuant to 22 NYCRR 216.1. The information gathered from counsel for the parties herein, in the form of copies of some of the decisions of J. Tuitt in the Bronx matter, demonstrated that judgments were granted/ordered in that action, but failed to reveal whether judgments were entered thereon. Therefore, this Court cannot ascertain whether there has been a final resolution of the Bronx action.

However, with regard to the instant petition, whether a final judgment has been entered in the Bronx action or not, the relief sought herein has been denied to petitioner in the earlier-filed Bronx action, and is, therefore, no longer viable, pursuant to CPLR 3211 (a) (4). As such, the motions by H.F., and by M.S.F. and N.F. are granted, and M.F.'s petition is dismissed.

Petitioner's remaining contentions and arguments are either without merit, or need not be addressed in light of the foregoing determination.

Accordingly, M.F.'s motion is denied in its entirety. The two motions, by H.F. and by M.S.F. and N.F., are granted.

Dated: 2/11/21

Hon. Leslie J. Purificacion, J.S.C.

FILED

2/17/2021
12:53 PM

COUNTY CLERK
QUEENS COUNTY

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