SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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DRAGOS FIRESCU

Plaintiff,

- v -

WARREN DIAMOND,

Defendant.

INDEX NO. 650301/2021

MOTION DATE 02/09/2022

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

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HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 118

were read on this motion to/for DISMISS.

Upon the foregoing documents and for the reasons set forth on the record (7.28.22), Dragos Firescu's motion to dismiss Warren Diamond's counterclaim for breach of the October Purchase Agreement (hereinafter defined) must be granted. Warren Diamond had a full and fair opportunity to litigate this issue and as such he is collaterally estopped from litigating it again (*Kaufman v Eli Lilly and Co.*, 65 NY2d 449, 455-456 [1985]).

The Tribunal (hereinafter defined) after the Arbitration (hereinafter defined) found in the Final Award (hereinafter defined) that (i) the August Agreement (hereinafter defined) whereby Warren Diamond allegedly acquired Scott Diamond's[1] membership interest in JCD (hereinafter defined) was a forgery, (ii) the evidence demonstrated that Mr. Firescu did not know that the August Agreement was a forgery, (iii) Warren Diamond's sale of Scott Diamond's interest in JCD

[1] Warren Diamond is Scott Diamond's father.

(hereinafter defined) to Mr. Firescu pursuant to the October Purchase Agreement was inclusive of Scott Diamond's capital account, (iv) Mr. Firescu is not liable to Scott Diamond, and (v) Warren Diamond is liable to Scott Diamond, among other things, for the balance in Scott Diamond's capital account as shown on JSD's books (*Diamond v Diamond*, 190 AD3d 519 [1st Dept 2021]; NYSCEF Doc. No. 97). Because the Final Award set forth that the capital account was sold to Mr. Firescu and that Warren Diamond and not Mr. Firescu is liable to Scott Diamond for the amount that was in Scott Diamond's account, the issue of whether Mr. Firescu is liable pursuant to the October Purchase Agreement to pay out the amount in Scott Diamond's account has been determined and the counterclaim is barred by collateral estoppel.

The Relevant Facts and Circumstances

Reference is made herein to (i) a certain Agreement (the **August Agreement;** NYSCEF Doc. No. 88) dated August 16, 2011, purportedly between Warren Diamond and Scott Diamond by which, among other things, Scott Diamond allegedly agreed that if he failed to pay Warren Diamond for monies advanced for Scott Diamond's capital contribution in JSD his 21% membership interest of JSD would be deemed automatically sold or transferred to Warren Diamond, (ii) a certain Purchase Agreement (the **October Purchase Agreement;** NYSCEF Doc. No. 86) dated October 11, 2016, by and between Mr. Firescu and Warren Diamond whereby Mr. Firescu purchased Scott Diamond's 21% membership interest in JSD from Warren Diamond, and (iii) a Final Award (the **Final Award;** NYSCEF Doc. No. 87) dated July 15, 2019 and issued by a Commercial Arbitration Tribunal of the American Arbitration Association (the **Tribunal**) resolving (x) an arbitration by Scott Diamond, Nacirema Management Associates, LLC (**Nacirema**), and American Cali Mgmt, LLC (**American Cali**) against Warren Diamond,

Mr. Firescu, and Richard Monteforte and against Jerome JSD Holdings, LLC (**JSD**) and Jerome Avenue Storage Associates, LLC (**Storage Associates**) as nominal respondents, and (y) a third-party arbitration by Warren Diamond against David Brown (the **Arbitration**).

As of June 2016, Mr. Firescu, Warren Diamond, Scott Diamond, Mr. Monteforte, Mr. Brown, and Matthew Mongelli were members in JSD, which was the sole member of Storage Associates. Storage Associates had a management agreement with Nacirema, which was controlled by Scott Diamond and in which Warren Diamond had an ownership interest. In June 2016, Mr. Firescu purchased Warren Diamond and Mr. Monteforte's membership interests in JSD as part of an effort to purchase at least a majority interest in JSD. Warren Diamond subsequently represented to Mr. Firescu that he had the right to sell Scott Diamond's membership interest in JSD based on Scott Diamond's breach of the August Agreement. The August Agreement was however determined to be a forgery by the Tribunal. Warren Diamond and Mr. Firescu entered into the October Purchase Agreement whereby Mr. Firescu purchased Scott Diamond's membership interest in JSD. Pursuant to the October Purchase Agreement, Warren Diamond represented and warranted:

> Seller [Warren Diamond] hereby indemnifies Purchaser [Mr. Firescu] and the Company [JSD] from and against any causes of action, which may be brought against the Purchaser and/or the Company by Scott, as a result of the aforesaid August 16, 2011 Agreement [the August Agreement] between Scott and Warren and the transfer of the 21% membership interest to Warren due to Scott's non-payment. Warren will engage and pay counsel on behalf of Purchaser and the Company in connection with any such action. In connection with the foregoing, the parties agree that the $521,336.20 currently in Scott's loan account (which Warren claims should be transferred to Warren due to Scott's default under the August 16, 2011 Agreement) shall remain in said account pending an agreement between Scott and Warren, or Court Order, both of which shall in no way violate or cause any breach of the Company's Operating Agreement dated August 16, 2011, and all amendments thereto. In the event Scott should recover a judgment against Purchaser and/or the Company which would require the transfer of the

> 21% Membership Interest back to Scott, the initial $400,000 paid to Seller hereunder as well as any other payments Purchaser may make as against the Note shall be credited as against the monies owed to Seller by Purchaser under a certain Purchase Agreement and Note dated June 15, 2016. In that even, such shall be credited as a lump sum pre-payment of principal on the 'front end' of said note so as to reduce the total principal and interest owed. Furthermore, in the event any action by Scott should serve to prevent a sale or refinance of the property owned by the Company, *i.e.*, through a lis pendens or injunction, payment of the balance of the purchase price hereunder shall be held in abeyance, until 60 days after such injunction or lis pendens is removed

(NYSCEF Doc. No. 86, ¶ 6 [e]).

Scott Diamond commenced an arbitration against Mr. Firescu, Warren Diamond, and Mr. Monteforte in December 2016. This arbitration was discontinued without prejudice to renew. In December 2017, Scott Diamond commenced the Arbitration, alleging, among other things, that Warren Diamond had misappropriated Scott Diamond's membership interest in JSD and that the sale of that interest to Mr. Firescu should be unwound. The Tribunal found in the Final Award, among other things, based on the preponderance of the evidence that Scott Diamond did not sign the August Agreement that Warren Diamond relied on to seize and sell Scott's membership interest in JSD (NYSCEF Doc. No. 87, at 6). The Tribunal also found that the evidence did not support a finding that Mr. Firescu knew that the August Agreement was a forgery, but that he knew that litigation would surely follow the sale of Scott Diamond's membership interest by Warren Diamond and sought to protect himself accordingly (*id.*, at 9). The Tribunal additionally found that the sale of Scott Diamond's interest to Mr. Firescu pursuant to the October Purchase Agreement was inclusive of Scott Diamond's capital account at JSD:

> On October 11, 2016, Firescu and Warren agreed on a purchase price of $2,000,000.00 for Scott's interest inclusive of his capital account

(id.). In other words, the $521,663.20 in that account that forms the basis for this counterclaim is the very amount that the Tribunal found belonged to Scott Diamond which was transferred to Mr. Firescu.

The Tribunal found that Mr. Firescu was not liable to Scott Diamond (*id.*). The Tribunal did find, however, that Warren Diamond was liable to Scott Diamond for, among other things, the amount shown on JSD's books as the balance of Scott Diamond's account, which the Tribunal found was $521,663.20 (*id.*, at 8).

Warren Diamond moved to vacate the Final Award and Scott Diamond cross-moved to confirm it. The court (McShan, J.) vacated paragraphs 1 and 6 of the Final Award and remanded the matter to a different arbitration panel for proceedings on Scott Diamond's claims for damages for the sale of his interest in JSD. By decision and order dated January 14, 2021, the Appellate Division reversed, reinstated the Final Award in full, and directed entry of judgment to confirm the Final Award (*Diamond*, 190 AD3d at 519; NYSCEF Doc. No. 97).

Mr. Firescu sued Warren Diamond, alleging that he breached (i) an indemnification agreement signed in connection with Mr. Firescu's purchase of Warren Diamond's membership interest in JSD, and (ii) the October Purchase Agreement by failing to indemnify Mr. Firescu for fees incurred in connection with the Arbitration. Warren Diamond filed an answer with a counterclaim, alleging that Mr. Firescu breached the October Purchase Agreement by failing to pay the $521,336.20 that remained in Scott Diamond's JSD account. Warren Diamond alleges

that those funds should be paid either directly to Scott Diamond or to Warren Diamond to then pay to Scott Diamond.

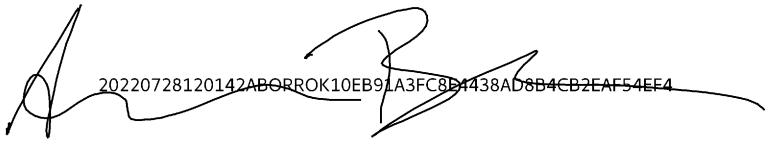
Discussion

Pursuant to CPLR 3211(a)(5), a party may move to dismiss where the claim cannot be maintained because of, among other things, collateral estoppel. The doctrine of collateral estoppel precludes a party from relitigating 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 (*Martinez v New York City Transit Authority*, 203 AD3d 87, 91 [1st Dept 2022], *citing Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). Collateral estoppel precludes the litigation of factual issues that were necessarily decided in a prior action against the same party (*Bauhouse Group I, Inc. v Kalikow*, 190 AD3d 401, 402 [1st Dept 2021]). Arbitration awards may be given preclusive effect and afforded collateral estoppel effect in a subsequent judicial action (*Humphries v City University of New York*, 146 AD3d 427, 427 [1st Dept 2017]).

The Final Award, which has been confirmed by the Appellate Division, precludes the counterclaim here. Warren Diamond cannot argue that Mr. Firescu is in breach of the October Purchase Agreement for failure to pay the amount in Scott Diamond's account with JSD. The Tribunal found that Warren Diamond sold Scott Diamond's account with his membership interest pursuant to the October Purchase Agreement. It does not matter that the parties agreed pursuant to the October Purchase Agreement that the money would remain in Scott Diamond's account until an agreement was reached or a court order directed what to do with the money. The Final Award makes it clear that the money in that account was sold to Mr. Firescu by

Warren Diamond. The Final Award also makes clear that Mr. Firescu is not liable to Scott Diamond for that money, but rather that Warren Diamond is liable to Scott Diamond for the amount of money that was in Scott Diamond's account. Warren Diamond's counterclaim essentially seeks to relitigate liability for the money in Scott Diamond's account. This matter was squarely before the Tribunal and Warren Diamond had a full and fair opportunity to be heard on the issue. He is not entitled to a second bite at the apple and is collaterally estopped from litigating the matter. The counterclaim must be dismissed.

It is hereby ORDERED that Mr. Firescu's motion to dismiss Warren Diamond's counterclaim is granted.



7/28/2022
DATE

ANDREW BORROK, JSC

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE