SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART I

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JULIAN SWAIN, GFINET INC. AND GFI SECURITIES LLC,

Plaintiffs,

- against -

GARBAN-INTERCAPITAL MANAGEMENT SERVICES LIMITED and GARBAN INTERCAPITAL SERVICES LLC,

Defendants.

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Index No.: 600456/01

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DECISION AND ORDER

HON. MARTIN SHULMAN, J.S.C.:

Procedural History of the Litigation

At the inception of this litigation, Julian Swain ("Swain"), GFINet Inc. and GFI Securities, L.L.C. (collectively "GFI" or "plaintiffs") had initially moved by order to show cause ("OSC") for preliminary injunctive relief (CPLR §7502[c]) in aid of arbitration at the National Association of Securities Dealers ("NASD") with Garban Corporates, L.L.C. ("Garban-US") to maintain the *status quo* otherwise plaintiffs claimed any potential arbitration award in its favor would be rendered ineffectual. In a companion declaratory judgment action filed concomitantly with the Article 75 proceeding, plaintiffs had also moved by OSC seeking preliminary injunctive relief (CPLR §6301) against a United Kingdom corporation, Garban-Intercapital Management Services. Ltd. ("Garban-UK") and Garban-Intercapital Services, L.L.C. (collectively "Garban", or "defendants"),

non-NASD members, to enjoin Garban and any of its group companies from interfering with Swain's employment at GFI and/or otherwise enforcing certain restrictive covenants contained in a terminated employment contract entered into between Swain and Garban-UK. In a Decision and Order issued on February 8, 2001,[1] this Court vacated temporary restraining orders issued, *ex parte*, denied plaintiffs' applications for a preliminary injunction in this action (CPLR §6301), denied CPLR §7502(c) injunctive relief in a related Article 75 proceeding under Index No.: 01/102097 and dismissed that proceeding.

In the earlier Decision and Order, this Court noted the following:

> ...Moreover, in this context, there remains a real question as to whether New York is the proper forum to resolve this Contract dispute. The application of the doctrine of *forum non conveniens*:
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> > ...should turn on considerations of justice, fairness, and convenience and not solely on the residence of one of the parties. Although such residence is, of course, an important factor to be considered, *forum non conveniens* relief should be granted when it plainly appears that New York is the inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties. The great advantage of the doctrine– its flexibility based on the facts and circumstances of a particular case– is severely , if not undercut when our courts are prevented from applying it solely because one of the parties is a New York resident or corporation.
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> Silver v. Great American Insurance Company, 29 N.Y.2d 356, 361, 328 N.Y.S.2d 398 (1972).
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> As previously discussed, we are confronted with a UK

[1] The parties' respective views of the facts and controlling principles of law were fully discussed in this Court's earlier Decision and Order and will not be repeated.

> contract between UK citizens governed by UK law. GFI and... [Garban-US], New York corporations, are not parties to that Contract. But for Swain's new-found residence and employment in New York, none of the real parties in interest have a substantial nexus to New York. While the defendants have not cross-moved for this relief, one does not have to be clairvoyant to anticipate that a request for such relief will eventually be sought, particularly, when this doctrine was indirectly invoked in ... [defendants' counsel's] affirmation in opposition to the plaintiffs'... request for preliminary injunctions and in support of defendants'... cross-motion for interim injunctive relief to enforce the restrictive covenants pending a resolution in the UK court. (Bracketed matter added).

Current Round of Motion Practice

By notice of motion dated February 15, 2001, Garban, *inter alia*, moved to dismiss the complaint grounded on the doctrine of forum *non conveniens* or, alternatively, stay the action pending the conclusion of the lawsuit in England. (GFI apparently insisted that Garban interpose an answer, proceed with discovery and otherwise actively defend the instant declaratory judgment action.) Plaintiffs oppose the motion and cross-move to amend their complaint. [2] Both the motion and cross-

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[2] The complaint in the underlying declaratory judgment action recites six causes of action seeking: (1) a declaration that certain post-employment restrictive covenants contained in a negotiated letter agreement dated October 28, 1999 supplementing and superceding certain terms and conditions of employment recited in an executed employment contract (collectively, "the Agreement") between Swain and Garban-UK are unreasonably broad, prevent Swain from earning a living and are unenforceable as a matter of law and public policy; (2) a declaration that Swain has not breached the Agreement; (3) a declaration that GFI or any of its affiliates has not tortiously interfered with the Agreement, unfairly competed with Garban-UK or any of its affiliates by hiring Swain or violated Garban's rights, *vis a vis*, Swain; (4) monetary damages because Garban, with knowledge of Swain's employment and contractual relationship with GFI, has tortiously interfered, and continues to interfere, with Swain's employment and contractual relationship with GFI by threatening to bring injunction proceedings against Swain [in England] relying on the Agreement's unenforceable, post-employment termination restrictions and had tortiously interfered, and continues to interfere, with Swain's employment and contractual and other relations with GFI "...by means that are unfair, otherwise improper,

motion are consolidated herein for disposition.

The UK Litigation and Plaintiffs' Interim Actions

After the issuance of this Court's Decision and Order, the UK litigation ensued on February 9, 2001. Garban-UK, *inter alia*, sought injunctions to enforce the restrictive covenants contained in the Agreement, damages for Swain's breach of the agreement, *i.e.*, Swain's failure to complete his term of employment through and including December 31, 2001, Swain's repayment of a sign-on bonus of £250,000 (roughly $400,000 U.S.) pursuant to Clause 3.7 of the Agreement, interest and other relief. Garban-UK also applied for temporary restraining orders/preliminary injunctions pending a "speedy (but full) trial." As more fully set forth in the affidavit of John Hugh Robert Manners, Esq., (Garban's UK's counsel, in support of Garban's motion to dismiss the case at bar) Swain agreed to certain undertakings, *viz.*, preliminary injunctive relief, and it was ordered that the UK trial be bifurcated. The first bench trial [3] was scheduled for March 5, 2001, before the Honorable Mr. Justice McCombe in the UK High Court of Justice– Queen's Bench Division.

In the interim, plaintiffs applied to the NASD for the same preliminary injunctive relief in aid of arbitration that this Court denied in its February 8th Decision and Order,

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without legal justification and with malice."; (5) monetary damages because Garban has breached, and continues to breach, its financial obligations to Swain as set forth in the Agreement; and (6) monetary damages because Garban has engaged in unfair competition by threatening frivolous litigation and interfering with Swain's employment and contractual relationship with GFI based upon the Agreement's unenforceable, post-employment termination restrictions.

[3] As noted in ¶¶ 8-10 of the Manners Affidavit, the first trial was to solely consider issues of liability and whether permanent injunctions should issue to enforce the restrictive covenants of the Agreement. The second trial would assess monetary damages derived from the court's conclusions rendered after the first trial.

including a stay of the UK trial. Defendants then moved by OSC to stay the NASD from issuing any orders and/or proceeding with the arbitration between plaintiffs and Garban-US. Plaintiff cross-moved for sanctions and the OSC and cross motion were referred to the Hon. Charles Ramos for disposition. After hearing oral argument and considering the respective papers of the parties, Justice Ramos issued a bench decision granting defendants motion for a stay. The decretal paragraphs of Justice Ramos' signed order entered on March 28, 2001, (Exhibit E to Hall Aff. in support of motion to dismiss) recited the following:

> ...it is
> ORDERED, that the motion of the defendants/Respondents [Garban] is hereby granted and the cross-motion of Plaintiffs/Petitioners [Swain and GFI] is hereby denied; and it is further
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> ORDERED, that Plaintiffs/Petitioners and any person or entity representing or acting in concert with them are stayed from pursuing further the NASD Arbitration, including their motion for preliminary injunction in aid of arbitration, pending the resolution of the London Action; and it is further
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> ORDERED, that Plaintiffs/Petitioners, and any person or entity representing or acting in concert with them, may not seek to stay the London Action in any court, arbitration or other forum, except the High Court of Justice, Queens Bench Division, United Kingdom; and it is further
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> ORDERED, that this Order shall be binding on Plaintiffs/Petitioners and any person or entity representing or acting in concert with them.

It is unnecessary to delineate the respective positions of the parties, summarize the substantive contents of the voluminous documentation filed with the UK High Court of Justice or narrate the colloquy between respective UK counsel and said Court during varied court sessions prior to the March 5th trial date.

Suffice it to say, on March 2, 2001, UK counsel, on behalf of Swain, "...formally conceded all issues of fact and law [as to liability and the granting of injunctive relief to enforce the restrictive covenants of the Agreement] and withdrew his defen[s]e in the First Trial." (bracketed matter added) (*see*, Manners Aff. at ¶17 and portions of the transcript of the March 2nd court session before the Honorable Mr. Justice McCombe of the UK High Court of Justice annexed as Exhibit 1 thereto). Nonetheless, Swain was afforded an opportunity to identify any issue of fact(s) not embodied in his concession of total liability to Garban-UK for breaching the Agreement and to file such application by March 19, 2001. According to Garban's UK counsel:

> ...the Defendant [Swain] did not avail himself of this "liberty to apply" by the deadline of 19 March 2001 or at all. Consequently the concession of all the issues of fact and law was and remains total and without exceptions whatsoever. Following the concession, there is no factual basis outstanding on which Swain can assert any counterclaim against any of the Claimants [Garban] . The time limit for an appeal has now expired. (Bracketed matter added).

Manners Aff. in support of motion to dismiss at ¶19.

In the **same** UK action, the parties then undertook various procedural actions to ready themselves for the second trial which will solely dispose of the issues of fact and law as to monetary damages.

The Proposed Amended Complaint

The proposed amended complaint pleads four (4) causes of action: (1) Garban has tortiously interfered with certain business relationships between GFI and Swain and its customers; (2) Garban[-UK] has breached its financial obligations to Swain under the

Agreement[4] ; (3) motivated by malice, Garban has engaged in unfair competition and committed unlawful acts to harm GFI and its business relationships; and (4) possessing knowledge of certain brokers' employment and contractual relationships with GFI, Garban is attempting to interfere with those relationships with GFI.

Respective Arguments

As noted earlier, Garban followed through on *gratis dictum* set out in this Court's February 8th Decision and Order by moving to dismiss plaintiffs' initial claims on forum *non conveniens* grounds. As a result of Swain's concession on the "eve" of the bifurcated trial in the UK action, Defendants obtained a judgment of total liability under the Agreement and injunctive relief to enforce its post-termination restrictive covenants. Thus, Garban now invokes the doctrines of *res judicata* and collateral estoppel to bar plaintiffs from continuing to prosecute their original claims and from proposing GFI's new claims. Garban acknowledges that GFI is not a party to the UK action. Nonetheless, defendants argue that there exists an identity of interest between GFI and Swain in the ongoing UK action and in the case at bar so that GFI's proposed claims are not independent of the Swain's contractual dispute with Garban-UK but rather are derivative of that dispute. Thus, Garban contends that these doctrines are equally applicable to GFI which would render the prosecution of the original complaint and proposed amended claims (particularly, the proposed Second Cause of Action) futile.

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[4] Unlike the six (6) causes of action in the complaint, the proposed First, Third and Fourth Causes of Action obviously made no reference to the Agreement and/or post-termination restrictive covenants therein. The proposed Second Cause of Action repleads the Fifth Cause of Action in the original complaint and presumably will be considered during the damages phase of the UK action.

As to the latter, defendants also claim that the proposed First, Third and Fourth Causes of action, as pleaded, are fatally defective as a matter of law (*e.g.*, insufficiently pleaded allegations of fact to establish the elements of: (a) a claim for tortious interference with GFI's current and future "business relationships" and/or contractual relationships; (b) a claim for tortious interference with the employment of brokers at GFI; and (c) a claim for unfair competition). (*See*, arguments and supporting case law in defendants' reply memorandum of law at pp. 19-26.)

Plaintiffs contrarily reject defendants' contention that New York is an inconvenient forum and that they are barred from prosecuting this declaratory judgment action because the doctrine of *res judicata* is inapplicable to GFI (*inter alia*, GFI is not a party in the UK action). Plaintiffs further argue that the court must liberally construe the proposed pleadings in a favorable light and deem the allegations contained therein to be true [5], and further argue that the proposed amended complaint contains adequately pleaded allegations to foreclose dismissal under CPLR §3211 (*see*, plaintiffs' reply memorandum of law at pp. 7-17). Plaintiffs pointedly claim Swain's Fifth Cause of Action and the proposed Second Cause of Action seek money damages for Garban-UK's breaches of the Agreement (brokerage commissions owed, etc.) and are wholly unrelated to Swain's concession of liability and acceptance of injunctive relief prior to the "First Trial" and, if anything, could conceivably be considered during the "Second Trial" on damages. For this reason, plaintiffs argue, the doctrine of *res judicata* has no

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[5] Interestingly, plaintiffs implicitly concede that the proposed claims contain allegations of tortious acts that may have occurred; yet, possess no information necessary to support these proposed claims. Plaintiffs are willing to await discovery "...to obtain more particulars of the tortious acts." (Plaintiffs' reply memorandum of law at pp. 5-6).

effect on these claims.

Discussion

With the exception of Fifth Cause of Action in the original complaint, now repleaded as the Second Cause of Action in the proposed amended complaint, plaintiffs have not included the original complaint's other five (5) causes of actions in the proposed pleading. It is evident that such claims are deemed withdrawn and abandoned as a result of Swain's concession of liability under the Agreement, including Garban-UK's entitlement to injunctive relief to enforce the post-termination restrictive covenants. Swain's concession virtually gutted five (5) out of the six (6) causes of action set forth in the complaint (*see*, Footnote 1, *supra*). Swain's surviving Fifth Cause of Action for alleged monetary damages due him under the Agreement (*i.e.*, commissions, etc.) will most likely be considered during the second trial in the UK action as possible set-offs against damages purportedly due Garban-UK . Apparently recognizing that for all intents and purposes, plaintiffs' complaint underlying this declaratory judgment action has gasped its last breath, plaintiffs attempted to resuscitate the instant action by filing their cross-motion on April 3, 2001 (approximately one (1) month after Swain's total concession of liability under the Agreement) to amend the complaint now claiming it is not about Swain, but rather about GFI. Put differently, the proposed amended complaint shifts its focus from Swain to GFI as the wronged party, whereas the original complaint portrayed Swain as the dominant victim.

Leave to Amend

Leave to amend pleadings should be freely given in the absence of prejudice to

the opposing party. CPLR §3025 (b); Mathiesen v. Mead, 168 A.D.2d 736 (3rd Dept., 1990). A court must examine the underlying merit of a proposed amended pleading so as to avoid wasting judicial resources on unmeritorious actions. *Id.* at 757. *See also*, Seider v. Skala, 168 A.D.2d 355 (1st Dept., 1990) citing to East Asiatic Company v. Corash, 34 A.D.2d 432 (1st Dept., 1970). In this context, this Court is guided by the following principles:

> On a motion to dismiss [a complaint], the court is not called upon to determine the truth of the allegations (*see, 219 Broadway Corp. v. Alexander's Inc.*, 46 NY2d 506,509). Rather the complaint should be liberally construed in favor of the plaintiff (*see, Foley v. D'Agostino*, 21 AD2d 60, 65-66) solely to determine whether the pleading states a cause of action cognizable at law (*see, Guggenheimer v. Ginzburg*, 43 NY2d 268, 275).

Eastern Consolidated Properties, Inc., v. Lucas, et al., ___A.D.2d___, N.Y.L.J., July 30, 2001, p. 22, c. 3 (1st Dept.).

The proposed First, Third and Fourth Causes of Action are barren of any factual content to support the claims pleaded. To illustrate, the First Cause of Action conclusorily pleads a claim of Garban's tortious interference with current and future "business relationships" between GFI, Swain and its customers. Support for this claim apparently rests on this pleaded allegation, "Prior to Swain's hiring by GFI, Garban made repeated written and verbal threats to prevent Swain from earning a living and to "declare war" on GFI by imposing its overwhelming financial Girth of GFI, a small company in comparison." (Proposed Amended Complaint at ¶ 19; *Id.*, at ¶22) (*see*, plaintiffs' reply memorandum of law at p. 7). Without any additional facts, these allegations are conclusorily restated in GFI's counsel's affirmation in support of the

cross-motion for leave to amend (Levin Aff. at ¶8). As stated earlier, the pleaded allegation contained in ¶18 of the Proposed Amended Complaint contain no facts. Moreover, the conclusory allegations pleaded in ¶¶ 20 through 24 of the Proposed Amended Complaint are on "information and belief" and lack legally sufficient factual content. Conceivably, plaintiffs could have ventured a "save" by proffering an affidavit by an individual with personal knowledge of the facts to amplify the pleadings (*cf.*, Eastern Consolidated, Properties, Inc., *supra*). "...When seeking leave to amend a pleading, it is incumbent upon a movant to make 'some evidentiary showing that the claim can be supported'... " Mathiesen, *supra*, at 737. Not single affidavit accompanies the plaintiffs' supporting papers. " '...[P]laintiffs' mere contentions ... [of various tortious and malicious acts to harm GFI and Swain]...offered with no factual basis to support the allegations...[are palpably] insufficient to state...cause[s] of action for tortious interference with contractual relations'...[, unfair competition and interference with brokers' employment relations with GFI]". (Bracketed matter added). Wootton USA, et al., v. LeBoeuf, Lamb, Greene, & MacRae et al., 243 A.D.2d 168,183 (1st Dept., 1998).

Except for the proposed Second Cause of Action which is identical to the pleaded allegations contained in the existing Fifth Cause of Action of the original complaint, the proposed amended complaint is devoid of merit. Accordingly, the plaintiffs' cross-motion for leave to amend the complaint is denied.

***Res Judicata* and Collateral Estoppel**

To round out this discussion, assume, *arguendo*, that this Court determined that plaintiffs sufficiently pleaded their claims in the proposed amended complaint and there

was joinder of issue, nevertheless, this Court would still have barred the plaintiffs from prosecuting the claims therein grounded on the doctrine of *res judicata*. To understand this discussion, a brief review of the case law addressing the doctrine of *res judicata* is helpful.

"Under New York's transactional-analysis approach to res judicata, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred even if based upon different theories or if seeking a different remedy' (O'Brien v. City of Syracuse, 54 N.Y.2d 353,357, 445 N.Y.S.2d 687, 429 N.E.2d 1158; Ouziel v. Coyle, 165 A.D.2d 869, 869, 560 N.Y.S.2d 338)..." Joem International, Ltd. v. Swedwall, Inc., 215 A.D.2d 530 (2d Dept., 1995). " ' It is fundamental that a judgment in a prior action is binding not only on parties to that action, but on those in privity with them'...i.e., those whose with interests that were represented in the prior proceeding...or who controlled the conduct of the prior action to further their own interests..." Castellano, et al., v. City of New York, et al., 251 A.D.2d 194 (1st Dept., 1998); Prospect Owners Corp. v. Tudor Realty Services Corp., et al., 260 A.D.2d 299 (1st Dept., 1999); *see also*, All Terrain Properties, Inc., v. Hoy, 265 A.D.2d 87, 95-96 (1st Dept., 2000).

By not including the original complaint's First Through Fourth and Sixth Causes of Action in the proposed amended complaint, plaintiffs sought to plead independent claims against Garban. But, the First, Third and Fourth Causes of Action in the proposed amended complaint are not independent actions but are purported, collateral claims clearly derivative of the same series of transactions underlying the Agreement dispute between Swain and Garban-UK in the UK action. Moreover, GFI, as Swain's

employer and an admitted underwriter of Swain's litigation costs, was, and is, clearly in privity with Swain and had, and continues to have, a financial interest in the outcome of the UK action. Thus, all of GFI's proposed claims would have also been barred by *res judicata*.[6]

Concerning the doctrine of collateral estoppel, the Court of Appeals in Schwartz v. Public Administrator of Bronx County, 24 N.Y.2d 65, 71 (1969), succinctly abridged the two prerequisites of collateral estoppel (*i.e.*, issue preclusion):

> New York law has now reached the point where there are but two necessary requirements for the invocation of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must been have been a full and fair opportunity to contest the decision now said to be controlling.

It differs from *res judicata (i.e.*, claim preclusion) in that it does not affect an issue which might have been, but, in fact, had not been, resolved in the first action. Rather it affects an issue actually decided in the earlier action. Nor is issue preclusion limited to successive lawsuits involving the same cause of action. "...It has [also] been observed that since the consequences of a determination that a party is collaterally estopped from litigating a particular issue are great, strict requirements for application of the doctrine must be satisfied to insure that a party not be precluded from obtaining one full hearing on his or her claim...The question as to whether a party had a full and fair

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[6] As noted, *supra*, In the UK action, Garban-UK has obtained a judgment against Swain as to liability under the Agreement and injunctive relief. Parenthetically, it seems to this Court that Swain, through its employer, GFI (seemingly a stranger to the prior adjudication), attempted to collaterally attack this judgment by pleading "independent" claims that Garban did, and continues to, tortiously interfere with GFI's business, employee and/or customer relationships and such claims could have been made in the UK action during the first trial.

opportunity to litigate a prior determination involves a practical inquiry into the realities of litigation...Collateral estoppel effect will only be given to matters 'actually litigated and determined' in a prior action. Preclusive effect will not be given if the particular issue... was not '*actually litigated squarely addressed and specifically decided*'..." (Emphasis added). Singleton Management, Inc. v. Compere, 243 A.D.2d 213,217 (1st Dept., 1998). *See also*, Color by Pergament, Inc. v. O'Henry's Film Works, Inc., et al., 278 A.D.2d 92, 93-94 (1st Dept., 2000).

A careful analysis of the record of the UK action (Exhibit 1 to Manners Affidavit in support of motion to dismiss) reveals that Swain's claim for monetary damages as set forth in his Fifth Cause of Action arising under the Agreement has not yet been litigated on the merits. As a result of the bifurcation, issues of fact and law referable to Garban-UK's claims for damages and Swain's claimed entitlement to set-offs, etc., must await the outcome of the second trial. Thus, defendants' reliance on the doctrine of collateral estoppel and, and for that matter, res judicata, to bar the prosecution of this claim is misplaced.

Forum *Non Conveniens*

Notwithstanding the foregoing analysis, this Court grants Garban's motion to dismiss Swain's surviving claim and the entire action on the ground of forum *non conveniens*. As this Court observed in its February 8th Decision and Order, "...the defendant[ ]...[is a] citizen[ ] and resident[ ] of a foreign jurisdiction, most of the business dealings in connection with the subject agreement were conducted in London, the agreement itself was executed in London, the parties were to perform in London,

the bulk of the witnesses and the evidence that defendant[ ] would need to defend the action are located in London, the action is governed by English Law, and England is [and has been] an available alternative forum for the action..." (Bracketed matter added). Blueye Navigation v. Den Norske Bank, 239 A.D.2d 192 (1st Dept., 1997); Brooke Group Ltd., et al., v. JCH Syndicate 488 et al., 214 A.D.2d 486 (1st Dept., 1995).

This constitutes the Decision and Order of this Court. Courtesy copies of same have been mailed to counsel for the parties.

DATED: New York, New York
August 14, 2001

HON. MARTIN SHULMAN, J.S.C.