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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Gische Justice

PART 10

Jerzy Dabrowski, et al

- v -

Oak Incorp., et al

INDEX NO. 106778/07 108

MOTION DATE #04

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

Conference 11/13/08 @ 9:30 am

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: SEP 22 2008

JUDITH J. GISCHE, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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Jerzy Dabrowski, Sebastian Gajewski and Bogan Cwalina, *individually and o/b/o all other persons similarly situated who were* employed by ABAX Incorporated *and/or any other entities affiliated with or controlled by* ABAX Incorporated

Plaintiffs,

-against-

ABAX Incorporated *and any related corporate entities*, **John Bleckman** *and* **Edward Monaco**, *individually and* **John Doe Holding Companies 1- 20**,

Defendants.

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DECISION/ ORDER
Index No.: 106778-07
Seq. No.: 004

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Abax's OSC RR w/exhs	1
Pltff's opp w/LRA affirm, affid TN (as exh), exhs	2
Abax's reply w/JML affirm, exhs (w/missing p. 12 inserted)	3
Pltff's reply w/LRA affirm, exhs	4
Answer	5
Arbitration decision in Abax v. Local 339	6

Upon the foregoing papers, the decision and order of the court is as follows:

This is a putative class action lawsuit arising from claims by the plaintiffs (individually "Dabrowski," "Gajewski," and "Cwalina") that defendants failed to pay them prevailing wages and benefits while they worked on a number of public works projects.

Defendant ABAX Incorporated ("ABAX"), plaintiffs' employer, was the general contractor on these projects. Defendants John Bleckman and Edward Monaco are officers and directors of ABAX ("individuals").

ABAX and the individuals previously moved to dismiss the plaintiffs' complaint on the basis that they had failed to state a cause of action and that plaintiffs claims were too individualized for a class action ("prior motion"). CPLR § 3211 (a) (7). That prior motion was denied for the reasons stated in this court's decision and order dated May 5, 2008 and entered May 12, 2008 (the "prior decision"). The defendants were directed to answer the complaint. Instead, they brought this motion to renew the court's prior decision on the basis that plaintiffs' claims are barred by the doctrine of collateral estoppel[1]. Defendants are not seeking renewal of their motion insofar as the issues of numerosity or non-commonality are concerned.

Defendants' motion to renew their prior motions is denied. There are no "new" facts that were unknown to the defendants when they brought the prior motion. In any event, for the following reasons, the "new" facts they rely upon would not lead the court to change its prior decision.

Discussion

Defendants maintain that there is a now a decision by an arbitrator that is decisive of the plaintiffs' claims in this case, and therefore, collaterally estops them from proceeding with this action. The arbitration decision was made in connection with a prevailing wage and benefits dispute among ABAX and the United States Service

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[1]Defendants have since answered the complaint and the preliminary conference was held.

Workers of America, Local 339, SEIU, AFL-CIO, CLC and related funds ("Local 399"). The arbitrator rendered an award that is favorable to ABAX.

The dispute was submitted to the arbitrator in October 2007. The hearing took place on February 5, 2008, and the arbitrator made his decision on April 28, 2008. Defendants' prior motions before this court were also brought in October 2007. The motions were sub judice while the arbitration hearing was proceeding. At no time did ABAX notify the court that there was an arbitration taking place or that the defendants believed it had any relationship to the issues at bar. It was only after this court rendered its decision denying ABAX's motion to dismiss the complaint that ABAX brought this information to the court's attention by bringing this motion to renew.

In justifying why they did not sooner bring the pending arbitration to the court's attention, defendants argue that until the arbitrator's decision was known, there was nothing to report. Once he had made his decision, however, this was a "new" fact that for the court to consider.

Generally, a motion to renew is based upon the discovery of material facts which existed at the time the prior motion was made but were not then known to the party and for that reason not disclosed to the court. Foley v. Roche, 68 AD2d 558, 567 (1st Dept. 1979). An event that takes place after the prior order is made is not considered newly discovered evidence that would support a motion to renew. Donnelly v. Donnell, 114 A.D.2d 671 (3rd Dept 1985).

Whether the defendants should have disclosed the pending arbitration is beyond cavil. Had this information been provided on the prior motion, the court could have decided at that time whether or not to proceed to decide the motion before it or to

wait for a decision by the arbitrators. By failing to disclose the pending arbitration, there is at least an appearance of forum shopping.

Moving beyond the issue of whether defendants should have disclosed the arbitration action, it is insufficient for a moving party to merely set forth new facts. The new facts relied upon on a motion to renew must lead the court to change its prior determination. Weintraub v. Half Hollow Central School District, 82 AD2d 802 (2nd Dept 1981).

The court disagrees with ABAX that the arbitration's decision is relevant, let alone decisive of the issues before this court to decide. Not only is there no unity of parties between this action and the arbitration, but the disputes to be decided by the court are different than those that were the subject of the arbitration. 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 a 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. Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500 (1984). The burden is on the party asserting the doctrine to establish that: 1) the identical issue was necessarily decided in the prior action and is decisive in the present one, and 2) that the party to be precluded had a full and fair opportunity to contest the prior determination. Ryan v. New York Tel. Co., *supra*, at 500-501. Collateral estoppel effect will only be given to issues "actually litigated and determined" in the prior action or proceeding. In re Chatham Towers, Inc., 39 A.D.3d 308 (1st Dept 2007). The doctrine applies to awards in arbitration as well. Acevedo v. Holton, 239 A.D.2d 194 (1st Dept 1997).

The plaintiffs in this action were not involved in the arbitration. They contend, and defendants do not refute that, the plaintiffs only learned of the arbitrator's award when defendants brought this motion. Although Dabrowski joined Local 399 in 2005 and Cwalina joined in 2001, Gajewski was not, apparently, ever a member of Local 339. Furthermore, the CBA at issue before the arbitrator was in effect through July 2004, before either of the named plaintiffs joined the union. Thus, the defendants have not proved that the union fully litigated the plaintiffs' claims in this case before the arbitrator at the arbitration. Nor is there any requirement that the plaintiffs first try to enforce the terms of the CBA, or exhaust their remedies under that agreement, before they can bring a plenary action to enforce, as third party beneficiaries, the public works contracts they claim were breached by the employer. Wysocki, et al. v. Kel -Tech Construction Co., Inc., et al., Index No. 603591/03, Supreme Ct, N.Y. Co. (*n.o.r.) aff'd* 46 AD3d 251 (1st Dept 2007). There is, therefore, no identity of parties in this action and the arbitration. Moreover, these plaintiffs did not have a fair opportunity to fully litigate the matter now before the court to decide.

The issues in the arbitration are not identical to those that have to be decided in this action. Here, each named plaintiff is a carpenter by trade. The putative class, however, is broader, consisting of a variety of private sector laborers, including iron workers, hazardous material workers, painters, etc. who worked for ABAX between May 2001 and the present . These workers were employed on public works projects throughout New York City and in the State of New Jersey.

Plaintiffs contend that they worked on public works projects in excess of 40 hours a week, but they were paid a flat rate of $26 an hour, regardless of the number of

hours they actually were on the job. Article 13 of the Local 399 CBA sets forth the minimum wage that ABAX can pay a Local 399 union represented employee. That wage ($16.00 per hour) is, however, for a 40 hour work week. The employee is entitled to paid overtime for hours worked in excess of 40 hours in any given week. The dispute before the arbitrator did not involve unpaid overtime, per se, but whether ABAX was required to pay the higher, section 220 prevailing wage, or the lower section 230 wage applicable to building service employees.

At the arbitration, the union took the position that the higher wages should have been paid. ABAX took the position that the lower, section 230 wages were all they were required to pay under an April 24, 1997 contract between ABAX and Local 399 for lead paint abatement on certain HPD projects in the five boroughs of New York City.

The arbitrator agreed with ABAX and found that ABAX had not underpaid its workers on those projects. To support his decision, the arbitrator cites to an audit of ABAX by the Comptroller of the City of New York in 2003. He states that the Comptroller had reviewed "documents and information for over 10 HPD projects and found no violation for paying Section 230 Wages and Benefits for said HPD Work." The projects are not identified. Moreover, although the audit is not among the papers provided to the court, defendants refer to the audit in correspondence, stating that "my client has been informed by the Comptroller's Office that these underpayments will not constitute a violation if payment is made to the employees . . . [and] upon payment to the three employees in accordance with the audit, the matter will be closed without any violation being recorded." Thus, there is even an issue of whether the arbitrators' decision comports with the evidence he had before him. Although the court does not

have to decide whether the arbitrator exceeded his authority, the court notes that there is no private right of action under New York State Labor Law § 220. Any claimed violation under the statute, that prevailing wages have not been paid, have to be heard and decided by the City Comptroller - not by a private arbitrator. Labor Law § 220 (8); Pesantz v. Boyle Environmental Services, Inc., 251 AD 2d 11 (1st Dept 1998).

Here, plaintiffs are asserting a common law action for the underpayment of wages and benefits in connection with a contract for a publicly financed project. Pesantz v. Boyle Environmental Services, Inc., 251 AD2d 11 (1st Dept 1998); Pajaczek et al v. Cema Construction Corp., 18 Misc 3d 1140 (A) (N.Y. Sup 2008). That issue was not before the arbitrator to decide, nor does his award resolve that dispute.

Although plaintiffs argue that Local 399 is not a recognized union, and therefore on that basis alone, without jurisdiction to establish wage and benefit rates or trade classifications for its members employed on public works projects, the court does not decide that dispute. It is sufficient, for the purposes of this motion, that plaintiff more broadly show that there are other unions (for example, Mason Tenders Local 78) that classify lead paint abatement within the same category as "asbestos handler," and that according to the City Comptroller's "Prevailing Wage Schedules" the hourly wage for an "asbestos handler" was $21.45 per hour for the period July 2000 through July 2001 and $18.00 per hour for the period July 1996 through July 1997. Since, by statute, an employer on a public works project is required to pay the "prevailing wage," plaintiff has a colorable claim that they were misclassified and/or underpaid.

While plaintiffs have provided the court with evidence of the VENDEX contracts involved, defendants have not presented any documentary proof to support a claim that

the public works projects ABAX had with HPD were only with Local 339, or that across the board these contracts were for section 230, not section 220 wages. The July 1996 "addendum" the defendants have provided, showing that certain projects were for section 230, not section 220 wages, is wholly inconclusive. The court notes that plaintiffs' claims date back to 2001 and the addendum pre-dates their claims.

The defendants have neither proved there are "new" facts that were unknown to them when they brought the prior motion, or that the facts, even if they were unknown, and therefore, "new" would lead the court to change its decision. The arbitrator's award is not decisive of the issues in this case, and therefore the doctrine of collateral estoppel does not bar plaintiffs from proceeding with their claims in this court.

A compliance conference is scheduled for **November 13, 2008 at 9:30 a.m. in Part 10.**

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: September 23, 2008
New York, New York

So Ordered:

Hon. Judith J. Gische, J.S.C.