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| <b>Notaro v IDS USA Inc.</b>                                                                                                                                                                                                                                     |
| 2011 NY Slip Op 34222(U)                                                                                                                                                                                                                                         |
| October 6, 2011                                                                                                                                                                                                                                                  |
| Supreme Court, Queens County                                                                                                                                                                                                                                     |
| Docket Number: 17086/10                                                                                                                                                                                                                                          |
| Judge: Orin R. Kitzes                                                                                                                                                                                                                                            |
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**Short Form Order****NEW YORK SUPREME COURT -QUEENS COUNTY****PRESENT: ORIN R. KITZES****PART 17****Justice**

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**PHILIP NOTARO, JR.,****Plaintiff,****Index No.: 17086/10****Motion Date: 8/3/11****Motion Cal. No.: 35****-against-****Mot. Seq. 3**

**IDS USA INC., IDS FREIGHT SERVICES  
USA LLC, F/K/A AGI LOGISTICS USA  
LLC AND IDS FREIGHT SERVICEA INC,  
F/K/A AGI LOGISTICS, INC.,**

**Defendants.**

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The following papers numbered 1 to 8 read on this motion by defendant **IDS USA, INC.**, defendant **IDS FREIGHT SERVICES USA, LLC**, and **IDS FREIGHT SERVICES, INC.** for, *inter alia*, an order dismissing the complaint against them pursuant to CPLR 3211(a)(1), (5), and (7)

**PAPERS  
NUMBERED**

|                                                |     |
|------------------------------------------------|-----|
| Notice of Motion - Affidavits - Exhibits ..... | 1   |
| Answering Affidavits - Exhibits .....          | 2-3 |
| Reply Affidavits .....                         | 4   |
| Memoranda of Law .....                         | 5-8 |

Upon the foregoing papers it is ordered that the branch of the motion which is for an order dismissing the complaint pursuant to CPLR 3211(a) (5) is granted. Those branches of the motion which are for an order dismissing the complaint pursuant to CPLR 3211(a)(1) and (7) are denied as academic. The branch of the motion which is for sanctions is denied.

Plaintiff Philip Notaro, Jr. alleges the following: In 1994, he and Steven Moses organized Dependable Air Freight & Forwarding Co. LLC., a broker of air freight and freight forwarding services, each taking a 50% ownership interest. In or about 2000, Moses and Richard Sapienza became owners or principals of Improved Packing and Consolidation Corp, which was the predecessor in interest to Impac Logistics Services. Dependable competed with Improved Packing, and to regulate Moses' conflict of interest, Dependable, Moses, Sapienza, Improved Packing, and Notaro entered into an agreement dated August 10, 2000. Pursuant to the 2000

agreement, Dependable had the right to an exclusive freight forwarding relationship with Improved Packing, Sapienza, Moses, and their affiliated companies, and Dependable also received exclusive rights to certain customers. In or about 2007, Moses and Sapienza became co-presidents of IDS USA, and conflict between Notaro, on the one hand, and Sapienza and Moses, on the other, occurred when IDS USA began to take Dependable's customers.

The claims asserted here by plaintiff Notaro (breach of contract and tortious interference with contract) are basically the same as those that he asserted in 2007 against the defendants in the Superior Court of New Jersey in Notaro v. Impac Logistic Services, LLC (Docket No. L-5933-07), which was consolidated with Moses v. Notaro (Docket No. L-3270-08). In the New Jersey action, Notaro alleged, *inter alia*, that IDS USA had by reason of an asset purchase contract become a party to and had then breached the August 10, 2000 agreement executed by himself, Dependable, Sapienza, Moses, and Improved Packing. Notaro contended that Impac Logistics was a successor to Improved Packing and that after the asset purchase agreement, IDS USA was a "mere continuation" of and legal successor to Impac Logistics. Notaro pleaded alternatively that if IDS USA had not become a party to the 2000 agreement, then IDS USA and its affiliates had interfered with Notaro's contractual rights.

On July 6, 2010, IDS USA and related parties moved for summary judgment dismissing the complaint against them in the New Jersey action, and on July 16, 2010, Notaro moved for partial summary judgment on his complaint. On September 3, 2010, the New Jersey court orally granted the motion for summary judgment made by IDS USA and its affiliates and orally denied Notaro's motion for partial summary judgment. On November 26, 2010, the New Jersey court rendered a written order and opinion denying Notaro's motion for partial summary judgment, and on November 29, 2010 the New Jersey court rendered a written order and opinion granting the motion for summary judgment made by IDS USA and its affiliates. The New Jersey court found that Notaro had failed to prove that Impac Logistics was a successor to Improved Packing, a signatory to the 2000 agreement, and had also failed to prove that IDS USA was a successor to Impac Logistics. The New Jersey court also found that the 2000 agreement was terminable at will and that the defendants had not committed tortious interference with contract.

According to the plaintiff's attorney, Notaro could not immediately appeal the summary judgment orders of the New Jersey court because under the law of that state no appeal can be taken while outstanding counterclaims remain for trial. The counterclaims were scheduled for trial on July 11, 2011. The plaintiff's attorney acknowledges: "Following that trial, an appeal by Notaro of Judge Baber's initial grant of summary judgment in favor of defendants would be possible."

"The full faith and credit clause of the Federal Constitution requires the courts of each State to give to the judgments of other States the same conclusive effect between the parties as such judgments are given in the States in which they are rendered \*\*\*." (Schultz v Boy Scouts of

America, Inc., 65 NY2d 189, 204.) New Jersey courts follow the doctrine of collateral estoppel regarding issues determined by final judgments. (See, Hernandez v. Region Nine Housing Corp., 146 N.J. 645.) A New Jersey court will apply the doctrine of collateral estoppel where “(1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.” (Olivieri v Y.M.F. Carpet, Inc., 186 N.J. 511, 521; see, Schultz v Boy Scouts of America, Inc., *supra*, 204.) An additional criterion under New Jersey law is that the party to be precluded must have had a full and fair opportunity to litigate the issue in the prior action. (See, Schultz v Boy Scouts of America, Inc., *supra*.)

The party seeking to invoke the doctrine of collateral estoppel has the burden of demonstrating the identity of the issue, and the opponent has the burden of showing the absence of a full and fair opportunity to litigate the issue in the prior action. (Gadani v DeBrino Caulking Associates, Inc., 86 AD3d 689; Gersten v 56 7th Ave. LLC, -AD3d-, 928 NYS.2d 515.) Under New Jersey law, the doctrine of collateral estoppel “will not be applied when it is not fair to do so.” (Kozlowski v Smith, 475 A2d 663.)

In the case at bar, the defendants successfully carried their burden of demonstrating that the issues determined in the New Jersey action are identical to the issues presented in this action. In regard to the first cause of action asserted here, the New Jersey court has already determined IDS USA was not bound by the terms of the 2000 agreement because (1) Impac Logistics was not a successor to Improved Packing and IDS USA was not a successor of Impac Logistics and (2), even if IDS USA was a successor, the 2000 agreement had terminated no later than January 2008. In regard to the second cause of action asserted here, the New Jersey court has already decided that IDS USA did not tortiously interfere with the 2000 agreement. In regard to the third cause of action, the New Jersey court has already decided that IDS USA was not bound under the 2000 agreement.

The plaintiff does not deny that there is an identity of issues between those raised in the New Jersey action and those raised here, and he seeks to avoid the application of the doctrine of collateral estoppel solely on the ground that he did not have a full and fair opportunity to litigate in New Jersey.

There is no merit in Notaro’s arguments. First, he had a fair opportunity to conduct discovery, and if his adversaries did not comply with their discovery obligations or otherwise abused the discovery process, he had an opportunity to seek sanctions. Second, Notaro alleges that in August 2009, the New Jersey judge issued a case management order requiring the conclusion of discovery by December 31, 2009, but that summer Notaro’s attorneys made a motion for

permission to withdraw because of disputes over the direction of the litigation and the fees owed by Notaro. The New Jersey judge granted the motion to withdraw and did not stay the action. According to Notaro, he had to proceed pro se for almost two months, causing him to miss deposing key witnesses. However, Notaro had approximately two years to conduct discovery in the New Jersey action, and his allegations made here that he needed further discovery were not adequately substantiated. Where a party fails to identify any undiscovered essential fact relevant to his case or fails to show that discovery could have led to a different result, he cannot successfully argue that he was denied a full and fair opportunity to litigate an issue for collateral estoppel purposes. (*See, U.S. v Sandoz Pharmaceuticals Corp.*, 894 F2d 825.) Notaro, who apparently has substantial assets, did not explain why it took him two months to hire new attorneys. In any event, his new attorneys made a motion to extend the discovery deadline which the court denied.

The Court notes finally that the scheduled date for the trial of the counterclaims pending in the New Jersey action has already past, presumably the counterclaims have been determined, and Notaro can now appeal the summary judgment orders of the New Jersey court. The “circumstances do not justify affording him an opportunity to relitigate” here. (*See, Schultz v Boy Scouts of America, Inc.*, *supra*, 204.)

**DATED: October 6, 2011**

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**ORIN R. KITZES, J.S.C.**