Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Yvonne T. Simpson, Charisse Simpson, Werner A. Holmes, Johnny Roldan and Diamond Development,

Plaintiffs,

-against-

Stephen Kirkland, One World Entertainment Inc., Redbook Industries Inc., Nagano Ski Japan, Five Star Inc., Paradise Theater, Mossberg Credit Adjustors Inc., Tego Calderon, Kenya Calderon Rosario, Hecho En PR Entertainment Inc., American Express, Bank of America, Capital One, Citibank, JPMorgan Chase,

Defendants.

Index No.: 25540/2008

Motion Sequence No.: 003; MG
Motion Date: 5/11/11
Submitted: 11/2/11

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Attorneys/Parties [See Rider Annexed]

Upon the following papers numbered 1 to 31 read upon this motion to dismiss; motion to compel/stay arbitration: Notice of Motion and supporting papers, 1 - 10; 11 - 23; Answering Affidavits and supporting papers, 24 - 29; Replying Affidavits and supporting papers, 30 - 31; Other, defendant's memorandum of law and letters exchanged by the parties.

Plaintiffs Yvonne Simpson, Charisse Simpson, Werner Holmes, Johnny Roland and Diamond Development commenced this action (Action No. 1) to recover for damages they allegedly sustained as a result of an alleged scheme by defendant Stephen Kirkland and his corporate affiliates, One World Entertainment, Redbrook Industries and Nadano Ski Japan, to defraud plaintiffs of their investment in a proposed musical concert featuring the entertainer Tego Calderon that was to be held at the Utopia Paradise Theater located in Bronx, New York. The complaint alleges, *inter alia*, that plaintiffs were deceived into establishing lines of credit to

provide funding for the show, that they were coerced into executing a power of attorney in favor of defendant Kirkland and that Kirkland used such power of attorney to make unauthorized cash withdrawals and credit card transactions. The complaint further alleges that defendants American Express, Bank of America, Capital One, Citibank and J.P. Morgan Chase breached their fiduciary duties in failing to detect and reject forged documents and an improperly executed power of attorney pursuant to General Obligations Law §5-1504; that the banks negligently ignored obvious signs of fraud and failed to make reasonable inquiries based on such conduct; that the banks' failure to detect, reject or inquire about such activities aided and abetted the fraud and conversion of plaintiffs' assets; and that the banks violated Section 380 of the Fair Credit Reporting Act when they transmitted negative information about plaintiffs that would not have otherwise been transmitted to the consumer reporting agencies.

Bank of America joined issue on or about March 20, 2009, asserting general denials, affirmative defenses and counterclaims based on breach of contract, *quantum meruit*, unjust enrichment and account stated. Bank of America simultaneously filed a separate action under index number 018161/2009 (Action No. 2) seeking damages for the alleged default of the line of credit it extended to Diamond Development and the alleged breach of an agreement by Yvonne Simpson personally guaranteeing the loan. On August 10, 2009, a default judgment was entered against Diamond Development and Yvonne Simpson in Action No. 2 based on their failure to answer or appear in that matter. Bank of America then informed plaintiffs of entry of the default judgment at a conference held on December 15, 2010 and the parties entered negotiations concerning whether plaintiffs would voluntarily withdraw their action as against Bank of America. By letter dated January 25, 2011, counsel for Bank of America requested that plaintiffs voluntarily discontinue their claims against it, asserting that entry of a default judgment in Action No. 2 barred continuation of those claims. The letter, which included a copy of the judgment entered against plaintiffs, also asserted that plaintiffs failed to seek vacature of the default judgment within the one-year period prescribed by CPLR §5015. The parties to the action agreed to plaintiffs' request to the adjourn their next conference until March 21, 2011, to permit plaintiffs to consider the respective defenses asserted by defendants and to discontinue, where plaintiffs deemed appropriate, their action against said defendants. Notwithstanding the adjournment, plaintiffs declined to discontinue their action against any of the defendants, including Bank of America.

Bank of America now moves for summary judgment dismissing the complaint against it on the grounds that entry of the default judgment in Action No. 2 precludes plaintiffs' from relitigating the issue of their liability for the debt and bars the instant lawsuit under the doctrine of *res judicata*. Citibank moves, pursuant to CPLR §7503, for an order permanently staying plaintiffs' action against it on the asserted basis that its loan agreement with plaintiffs included a broad arbitration provision requiring any dispute between the parties concerning plaintiffs' credit account with the bank be resolved by binding arbitration. Citibank also seeks dismissal of the claims asserted against it by Werner Holmes and Johnny Roldan, arguing that it neither shared any business relationship nor entered any credit agreement with these plaintiffs. Plaintiffs oppose the motion by Bank of America contending that Bank of America waived the defenses of

res judicata and collateral estoppel by failing to amend its pleadings to include these defenses despite knowledge of the existence of the defenses for almost one year prior to making the instant motion. Concomitantly, plaintiffs argue that they are prejudiced by Bank of America's failure to assert the defenses in a more timely manner since they have expended time and resources in preparation of the case as a result of such failure. Plaintiffs further aver that neither defense serves as a bar to their action where, as here, the final judgment was based upon default and the underlying issues were not fully litigated. The motion by Citibank is unopposed.

Contrary to plaintiffs' assertion that Bank of America waived the defenses of *res judicata* and collateral estoppel by failing to include them in its answer or asserting the defenses in a pre-answer motion (see CPLR §3018 [b]), the waiver of an unpleaded defense may be retracted and serve as a basis for an affirmative grant of relief in the absence of surprise and prejudice (see, Rogoff v. San Juan Racing Assn., 54 NY2d 883 [1981]; Kuhl v. Piatelli, 31 AD3d 1038 [3rd Dept., 2006]; Sheils v. County of Fulton, 14 AD3d 919 [3rd Dept., 2005]; Lerwick v. Kelsey, 24 AD3d 918 [3rd Dept., 2005]). Further, plaintiffs can hardly claim surprise or prejudice where, as here, they concede that the defenses were not initially available, that they were served timely notice of the commencement of Action No. 2, and that the issuance of the default judgment in Action No. 2 was the subject of ongoing negotiations between the parties wherein plaintiffs were urged to voluntarily withdraw their claim. Indeed, the mere expenditure of time and resources in preparation of a case will not constitute prejudice unless the party claiming such prejudice can show that it was hindered in the preparation of its case or was prevented from taking some measure in support of their position (see, Whalen v. Kawasaki Motors Corp., U.S.A., 92 NY2d 288, 292 [1998]; Loomis v. Civetta Corinno Constr. Corp., 54 NY2d 18 [1981]).

A default judgment which has not been vacated is conclusive for *res judicata* purposes (see, 83-17 Broadway Corp v. Debcon Financial Services, 39 AD3d 583 [2nd Dept., 2007]; Matter of Eagle Ins. Co v. Facey, 272 AD2d 399 [2nd Dept., 2000]). The principles of *res judicata* require that "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 different remedy" (O'Brien v. City of Syracuse, 54 NY2d 353, 357 [1981]). Moreover, *res judicata* extends the bar of a former judgment not only to matters actually litigated, but also to matters that might have been litigated but were not (see, Walentas v. Johnes, 126 AD2d 417 [1st Dept., 1987], *lv denied* 93 NY2d 958 [1999]; see also, Matter of A.D.C. Contr., Inc. v. Town of Southampton, 50 AD3d 1025, 1026 [2nd Dept., 2008]; Barbieri v. Bridge Funding, Inc., 5 AD3d 414 [2nd Dept., 2004]).

Here, Bank of America established its *prima facie* entitlement to summary judgment as a matter of law (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]). Specifically, Bank of America submitted evidence that a default judgment was entered against plaintiffs establishing that they breached the credit agreement and personal guarantee for the underlying debt and that they failed to seek vacatur of the judgment. Inasmuch as plaintiffs' claims against Bank of America, including those based on different legal theories or seeking alternate remedies, arose out of the same transaction or series

of transactions underlying both actions, they are barred under the doctrine of *res judicata* (see, Matter of Hunter, 4 NY3d 260 [2005]; O'Brien v. City of Syracuse, 54 NY2d 353 [1981]; Richter v. Sportsmans Props., Inc., 82 AD3d 733 [2nd Dept., 2011]; 83-17 Broadway Corp v. Debcon Financial Services, 39 AD3d 583 [2nd Dept., 2007]; Rosendale v. Citibank, N.A., 262 AD2d 628 [2nd Dept., 1999]; Se Dae Young v. Korea First Bank, 247 AD2d 237 [1st Dept., 1998]). The default judgment issued in Action No. 2 is also binding upon plaintiffs Charisse Simpson, Werner Holmes and Johnny Roland, as their alleged partnership in the underlying joint business venture places them in privity with Diamond Development and Yvonne Simpson and, therefore, their interests, if any, in disclaiming the underlying debt could have been litigated in the prior proceeding (see, Green v. Santa Fe Industries, Inc., 70 NY2d 244 [1987]; Watts v. Swiss Bank Corp., 27 NY2d 270 [1970]; Barbieri v. Bridge Funding, Inc., 5 AD3d 414 [2nd Dept., 2004]). Plaintiffs failed, in opposition, to raise any triable issues warranting denial of the motion (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Center, 64 NY2d 851 [1985]). Accordingly, the motion by Bank of America for summary judgment dismissing the complaint against it is granted.

As for the motion by Citibank seeking an order permanently staying plaintiffs' action and compelling them to arbitrate based on an arbitration provision contained in the credit agreement entered by the parties, section 8 of the agreement states, in pertinent part, as follows:

> The Corporation agrees that by opening any deposit account, Business Credit Account or Business checking Plus Account with Bank or accepting any of the services connected with such accounts, either Bank or the corporation may elect to require any dispute between us concerning the aforementioned accounts or any other Bank deposit account, Business Credit Account, or Business Checking Plus Account be resolved by arbitration. In the event of any litigation in which the Bank and the Corporation are adverse parties, the right to a trial by jury and to interpose any defense based upon Statute of Limitations or any claims of laches, and any offset or counterclaim of any nature or description is hereby waived by the Corporation. The Corporation agrees that if an attorney is used by the Bank to enforce, declare or adjudicate any of the provisions herein or any of the rights herein granted to the Bank or to obtain payment of any obligations owed to the Bank, reasonable attorney's fees hereunder unless such waiver be in writing, signed by the Bank, and then only to the extent therein set forth.

"A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, and the claim sought to be arbitrated is not barred by limitation under subdivision (b) of section 7502, the court shall direct the parties to arbitrate" (CPLR §7503 [a]). On motions to stay or to compel arbitration there are three threshold questions to be resolved by the courts: whether the parties made a valid agreement to arbitrate, whether if such an agreement was made it has been complied with, and whether the claim is timely (see, Matter of Rockland (Primiano Constr. Co., 51 NY2d 1 [1980]; Jet Blue Airways Cop. v. Stephenson, 88 AD3d 567 [1st Dept.,

2011]). Arbitration is favored in the State of New York as a means of resolving disputes and the courts will not interfere with a valid agreement to arbitrate where the thresholds have been met (see, Matter of Smith Barney Shearson v. Sacharow, 91 NY2d 39 [1997]; Dazco Heating & Air Conditioning Corp. v. C.B.C. Indus., 225 AD2d 578 [2nd Dept., 1996]).

The branch of Citibank's unopposed motion for an order staying the litigation against it and compelling plaintiffs to arbitrate their claims is granted. The record reveals that on October 6, 2008, Citibank served plaintiffs with notice of its intention to arbitrate all claims relating to the alleged debt incurred by plaintiffs under the parties' credit account agreement. On October 22, 2008, Citibank served plaintiffs with an amended notice of intent to arbitrate which specifically informed plaintiffs that they would be precluded from objecting to arbitration if they failed to seek a stay within the 20 day period required by CPLR §7503(c) (see, Matter of Allstate Ins., Co. v. Duffy, 5 AD3d 476 [2nd Dept., 2004]; Matter of Crawford v. Feldman, 199 AD2d 265 [2nd Dept., 1993]; Matter of Aetna Casualty & Surety Co. v. Jones, 188 AD2d 597 [2nd Dept., 1992]). Despite such notice, plaintiffs failed to seek the stay of the proposed arbitration or otherwise object to Citibank's request. The branch of Citibank's motion seeking dismissal of the claims by Werner Holmes and Johnny Roland also is granted, as neither plaintiff shared any contractual relationship with the bank (see, Dember Constr., Corp. v. Staten Island Mall, 56 AD2d 768 [1st Dept., 1977]). The action is severed and continued against the remaining defendants.

Based on the foregoing, it is

ORDERED that the motion (#003) by defendant Bank of America and the motion (#004) by defendant Citibank are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant Bank of America for summary judgment dismissing plaintiffs' complaint against it is granted; and it is

ORDERED that the unopposed motion by defendant Citibank for, *inter alia*, a judgment dismissing the claims by plaintiffs Werner Holmes and Johnny Roland and compelling plaintiffs Diamond Development, Yvonne Simpson and Charisse Simpson to arbitrate their claims and permanently stay litigation is granted.

Dated: 3/29/2012

HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

RIDER

Attorney for Plaintiffs:

Bruce L. Roistacher, Esq.
400 East 66th Street, Suite 20-A
New York, NY 10065

Attorney for Defendants Stephen Kirkland,
One World Entertainment Inc.
Nagano Ski Japan and Redbook Industries:

Law Office of Cesar Fernandez
2298 First Avenue, 2nd Floor
New York, NY 10035

Attorney for Defendant Five Star Inc.:

Rivkin Radler LLP
926 RexCorp Plaza
Uniondale, NY 11556

Attorney for Defendant American Express:

The Chartwell Law Offices, LLP
39 Broadway, 17th Floor
New York, NY 10006

Attorney for Defendant Bank of America:

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
3 Gannett Drive
White Plains, NY 10604

Attorney for Defendant Capital One:

Certilman Balen, Adler & Hyman, LLP
90 Merrick Avenue, 9th Floor
East Meadow, NY 11554

Attorney for Defendant Citibank:

Katz & Rychik, PC
116 John Street, 7th Floor
New York, NY 10038

Attorney for Defendant JPMorgan Chase Bank N.A.:

Stagg, Terenzi, Confusione & Wabnik, LLP
401 Franklin Avenue, Suite 300
Garden City, NY 11530