Matter of Shapiro v Hayes
2015 NY Slip Op 30093(U)
January 26, 2015
Supreme Court, New York County
Docket Number: 651230/2014
Judge: Shirley Werner Kornreich

SHIRLEY WERNER KORNREICH
J.S.C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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In the Matter of an Article 75 Proceeding

STEVEN G. SHAPIRO AND PETER LEWIT,

Petitioners,

-against-

Index No. 651230/2014
Action 1

DECISION & ORDER

DANIEL B. HAYES,

Respondent.

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In the Matter of an Article 75 Proceeding

STEVEN G. SHAPIRO AND PETER LEWIT,

Petitioners,

-against-

Index No.: 650293/2014
Action 2

DANIEL B. HAYES,

Respondent.

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HON. SHIRLEY WERNER KORNREICH, J:

Motion Sequence 002 and 003 in the first entitled action (Action 1) and Motion Sequence 003 in the second entitled action (Action 2) are consolidated for disposition.

Motions before the Court

Respondent Daniel B. Hayes moves in both actions:[1] 1) to confirm the December 27, 2013 partial final award of an arbitration panel (Partial Award, Action 2, Doc 5); 2) for a judgment in

[1] The papers submitted on Hayes' Motion Sequence 002 in Action 1 are identical to those submitted on his Motion Sequence 003 in Action 2.

his favor on the Partial Award in the amount of $1,225,174 or, alternatively, remanding the matter to arbitration for clarification; 3) to enter a full or partial satisfaction of this court's judgment against Hayes in Action 1, issued on May 27, 2014 and entered on June 11, 2014 (Final Award Judgment, Action 1, Doc 15); 4) to enjoin petitioners from filing any further process or legal proceeding involving the parties in this or any state without prior leave of court; 5) to award Hayes reasonable legal fees and costs payable by petitioners for frivolous conduct; and 6) for such other and further relief as the court deems just and proper. Petitioners Steven G. Shapiro and Peter Lewit (collectively, petitioners) oppose the prongs of the motion that they did not concede in their opposing papers.[2]

In Action 1, petitioners move (Motion Seq 003) to: 1) enforce a purported settlement agreement contained in a transcript, dated July 18 2014 (Transcript, Action 1, Doc 49); 2) to enjoin Hayes from disparaging Petitioners, representing that the Actions were not settled, and violating the purported settlement; and 3) imposing sanctions on Hayes and his counsel.[3] Hayes opposes.

Background

This is the latest round in actions that have been characterized by untoward behavior by members of the New York bar. The parties are former law partners of the firm Davis Shapiro Lewit & Hayes, LLP (Firm), who are involved in a battle royal over its spoils. Hayes was expelled

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[2] Hayes' motions are moot to the extent that they seek to: 1) quash restraining notices and subpoenas issued by petitioners or, alternatively, stay their enforcement; and 2) to require petitioners to provide a list of those who were served with restraining notices and subpoenas. In opposition to the motion, petitioner Shapiro submitted an affidavit in which he admitted that the subpoenas Hayes sought to quash were withdrawn because they "may have been defective." Action 1, Doc 33, ¶¶ 17 & 18. Subsequently, Shapiro and Lewit gave Hayes the names of the persons and entities that had been served with the subpoenas and restraining notices. Action 1, Doc 49, Transcript, dated July 18, 2014 (Transcript), p 12.

[3] Petitioners submitted an identical motion in Action 2 (Motion Seq 004), but the order to show cause was not signed.

from the Firm in November of 2012. The dispute was, and is, subject to an arbitration clause in the Firm's January 1, 2005 partnership agreement (partnership agreement). Action 2, Doc 4. Section 9.07 of the partnership agreement contains a broad arbitration clause, which requires arbitration of "[a]ny disputes arising out of or relating to this Agreement" (Arbitration Clause).

A panel of the American Arbitration Association (AAA) rendered the Partial Award on December 27, 2013. Action 2, Doc 5. It was confirmed in a judgment by this court on March 24, 2014, and entered by the Clerk on March 28, 2014 (Partial Award Judgment) [Action 2, Doc 29].

On April 9, 2014, the panel issued a final award in favor of petitioners in the amount of $59,279.03 (Final Award), with interest from the date of the award. Action 1, Doc 7. On April 21, 2014, petitioners moved to confirm it. Action 1, Doc 1. On May 27, 2014, this court granted the petition on default and signed the Final Award Judgment. Action 1, Doc 12. On June 11, 2014, the Clerk entered judgment on it in favor of petitioners and against Hayes, in the amount of $60,199.89. Action 1, Doc 15. On June 18, 2014, petitioners served Hayes, by e-filing, with notice of entry of the Final Award Judgment. Action 1, Doc 16.

The amount of the Final Award Judgment equaled what the panel found Hayes owed the Firm ***on April 9, 2014***, plus interest from that date calculated by the Clerk. Hayes says that on September 23, 2013, before the Final Award and entry of the Final Award Judgment, he had given the Firm a check for $47,254.70 (Check), which reduced the amount he owed to $12,945.19 ($60,199.89 - $47,254.70). Action 2, Docs 40 & 32, ¶30. Hayes did not file a notice of appeal from the Final Award Judgment and his time to do so has expired. CPLR 5513. Shapiro says he never cashed the Check.

The current dispute involves, *inter alia*, money subsequently received by petitioners' new firm, Davis Shapiro Lewit Grabel Leven Granderson & Blake, LLP (Successor Firm), as a result

of its 10% ownership in an entity called Prodege, LLC (Prodege Interest). The parties agree that Prodege was founded by Hayes' brother and one of Hayes' friends and became a client and asset of the firm. Action 2, Doc 32, ¶10 & Action 1, Doc 57, ¶14.

Although the Partial Award stated that the Firm owned the Prodege Interest, it also reflects that petitioners argued before the panel that Hayes was not entitled to anything from the Prodege Interest "***until there is a sale or disposition of the Firm's interest, which admittedly has not occurred yet.***" *Id.* Action 2, Doc 5. Petitioners' post-hearing brief to the panel admitted that the Prodege Interest was Hayes' Originated Asset, a term defined in the partnership agreement, and that Hayes would be entitled to 25% of the Firm's cash receipts attributable to a future sale, disposition or other realization of the Prodege Interest.[4] Action 2, Doc 35. Hayes argued before the panel that the Prodege Interest should be transferred to him, subject to the Firm's right to future distributions. Action 2, Doc 5.

The Partial Award made a finding of fact that the Prodege Interest was an Originated Asset, a term defined in §9.01(i) of the partnership agreement, that Hayes had brought to the Firm. *Id.* It ruled that, in accordance with §8.05(c) of the agreement, when Hayes departed he was entitled to 25% of "cash receipts" received by the Firm attributable to the "sale, disposition or other realization" of Originated Assets, which were to be payable within 30 days of receipt. *Id.*[5]

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[4] Claimants' [petitioners'] Post-Hearing Brief, p 21 ("Hayes is entitled to 25% of the Firm's cash receipts after Hayes' departure from the Firm attributable to the sale, disposition or other realization of Prodege, Hayes' only Originated Asset."). Action 2, Doc 35.

[5] One of the arbitrators partially dissented. Interestingly, in his dissent, he confirmed that the panel was leaving Hayes with a 25% interest in Prodege. Action 2, Doc 5. Further, he opined that it was unfair that Hayes was receiving only 25% of "a client that had been recognized as his from the outset" and that petitioners' decision to expel Hayes from the Firm was "nothing more than an attempt to gain control over an asset as to which, had [Hayes] remained a partner, [he] would have reaped the vast majority of the compensatory benefit when the value in Prodege was realized." *Id.* The dissenter added that petitioners "were able to reverse this outcome, and gain leverage over"

A ***partial disposition*** of 60% of the Prodege Interest occurred on May 1, 2014, in which the Successor Firm received $5,141,496.11. Action 2, Doc 32, ¶¶ 4-6 & Transcript, pp 11-12. The partial disposition was received by the Successor Firm ***after*** the panel rendered its Partial Award, which dealt with the Prodege Interest, ***after*** the Partial Award Judgment was entered, in March 2014, and ***after*** the panel issued the Final Award on April 9, 2014. Action 2, Docs 5 & 29. Neither Petitioners nor their Successor Firm shared the partial distribution with Hayes.

On May 30, 2014, Hayes' attorney wrote a letter to petitioners' attorneys (Demand Letter) stating that Hayes' 25% share of the partial distribution, minus the principal amount of the Final Award Judgment, was due to be paid to him on May 31, 2014 (30 days after May 1, 2014). Action 2, Doc 36. The Demand Letter calculated the amount due as $1,226,095 (25% of $5,141,496.11 paid by Prodege - $59.279.03 Final Award Judgment without interest). Compare Action 2, Docs 29 & 36. The Demand Letter did not mention a deduction for the Check.

On June 5, 2014, the Successor Firm filed a complaint (CA Complaint) against Hayes in the Los Angeles County Superior Court (CA Action), seeking a declaratory judgment declaring that Hayes is not entitled to receive any payment in connection with the Prodege Interest.[6] Action 2, Doc 33. The CA Complaint alleges that the Partial Award and Final Award, as confirmed by judgments of this court, determined all of Hayes' rights under the partnership agreement. *Id*, ¶14. Alternatively, the CA Complaint alleges that Hayes originated only half of the Prodege Interest

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Hayes by expelling him. *Id*. Petitioners now contend that the Partial Award does not entitle Hayes even to 25% of a "sale, disposition or other realization" derived from the Prodege Interest. See Petitioners' Memorandum of Law, Action 1, Doc 46, p 17 ("Petitioners contended, and still contend, that Mr. Hayes is entitled to nothing.").

[6] Case Number BC547802.

and that the amount Hayes demanded should be reduced by legal fees incurred in the arbitration and in the "negotiation and consummation of a transaction" regarding the [Successor Firm's] Prodege Interest." *Id*, ¶15.

On or about July 7, 2014, using the caption in Action 1, petitioners served New York information subpoenas and restraining notices, for the most part, in ***California***, seeking to enforce the Final Award Judgment against Hayes. Action 2, Docs 37 & 53 (Tab 1). In response to Hayes' motions, petitioners withdrew the subpoenas and restraining notices and gave Hayes a list of the persons and entities served. Transcript, pp 8-11 & Action 2, Doc 53. More than 200 restraining notices and information subpoenas were served upon Hayes' bank, his new law partners, and his clients. Action 2, Docs 32, ¶¶23-26 & 53 (Tab 1). Most of the subpoenas and restraining notices were served outside of New York State, beyond the subpoena power of this court. Action 2, Docs 37 & 53 (Tab 1). In addition, petitioners did not give Hayes notice that they had served restraining notices, which violated CPLR 5222 & 5222-a. Action 2, Doc 32, ¶¶23-26.

This is not the first time that it has been brought to the court's attention that petitioners had abused process in this manner. In a prior decision issued on May 19, 2014, in another action between Hayes and petitioners, this court issued a decision describing petitioners' improper service of New York subpoenas beyond the jurisdiction of this court, without notice to Hayes, in violation of the CPLR. Action 1, Doc 28, pp 8-9.[7] Petitioners are lawyers practicing in New York. There is no excuse for their conduct, particularly when this court had already admonished them for the same behavior months before. Petitioners blatantly have ignored the jurisdictional limit of this court when issuing process as officers of the court and have done so without notifying Hayes, embarrassing and prejudicing him and his new firm.

[7] The decision was filed under seal.

On July 18, 2014, this court held oral argument on the instant motions. Settlement discussions ensued. Petitioners claim they reached an enforceable agreement. Hayes denies that there was a meeting of the minds, and, in the alternative, argues that the agreement was induced by petitioners fraudulent representations. Specifically, Hayes says that petitioners initially offered him 25% percent of the Prodege Interest, he accepted, and then petitioners retracted the offer based upon their representations that a transfer of the Prodege Interest would be impossible for reasons outside of their control.

Petitioners deny that they made the representations. However, the court's recollection is on all fours with the recollection of Hayes' attorney, Yoav M. Griver. He avers:

> 6. At the Court's request, the parties engaged in settlement negotiations.
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> 7. At the onset, Petitioners right out of the gate made an unsolicited offer to transfer to Mr. Hayes a portion of their shares in Prodege. The offer was presented as a way of severing all ties between the parties, and ending any further disputes between the parties in the event of another liquidity event.
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> 8. Predictably, Mr. Hayes responded favorably to the offer. However, upon Mr. Hayes giving Petitioners a positive response. Petitioners retracted that offer.
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> 9. The reasons for the retraction, provided to both this Court and Mr. Hayes were very specific. They stated that: (1) any transfer attempt would violate certain restrictions contained in a highly-confidential sale agreement; (2) that such a transfer would trigger a buy/sell provision under the terms of the TCV sale agreement (to which Danny is not a party); (3) that private capital investor. Technology Crossover Ventures ("TCV"), whose $60 million investment in acquiring a controlling stake in Prodege gave rise to the recent liquidity event, would not consent to Petitioners' transfer of shares to Danny; and (4) in any event, to even attempt such a complicated transfer would cost Petitioners at least $1 million dollars in legal fees to prepare and effectuate. Clinching the matter, Petitioners represented that these facts were not just based on their review of the cited documents ..., but had been confirmed by a corporate lawyer they had called who had examined the issue. Based on these specific representations of material fact, Mr. Hayes allowed the retraction, based on his understanding (via Petitioners) that transfer was impossible.

Action 1, Doc 60; Action 2, Doc 73 (duplicate). The court clearly recollects that this is exactly what happened.

Petitioners also claim that they did not make the representations to Hayes, but only to the court. Action 1, Doc 46, Petitioners' Memorandum of Law, p 4 ("These explanations were made directly to the Court in chambers and not to Mr. Hayes or his attorneys."). The court recollects that the statements were made to Hayes' counsel as well. While petitioners initially made the statements privately, in the robing room, the court then said that it would share the information with Hayes' counsel. Following that, what petitioners had said concerning their reason for retracting the offer to transfer part of the Prodege Interest, as described in Mr. Griver's affirmation, was discussed in my presence among counsel for all parties.

The Transcript reflects that the parties did not reach a binding settlement agreement on July 18, 2014 because material terms were left undecided. Transcript, Action 1, Doc 49, pp 30-39. There was no meeting of the minds on the definition of a "sale, disposition or other realization" in §8.05(c) of the partnership agreement; it was left to be decided in a contemplated final, written agreement. *Id.* On page 30, petitioners' attorney, Mr. Emery, said that Hayes would get 25 Percent "of all future incumbrance [sic] derived, all future proceeds derived from the stockholdings that come from a liquidation event as defined by the partnership agreement." *Id.* However, when the court interjected, "he was supposed to get 25 percent as defined by Section 8.05," Mr. Emery said,

> That is going to be further defined, since there is some equivocation and ambiguity of that, as it turns out from this proceeding and the discussions that we have had today; so that it is for the cash purchase of the shares held by the firm by any entity. And that is what it is limited to. It does not include other forms of transfer or inchoate value that is provided for the shares.

Id. The court then pressed for clarification, "The wording of 8.05(c) is a sale, disposition or other realization." *Id.* Hayes's attorney, Ms. Davis said, "Yes, exactly right." *Id.* The

court responded, "...if there needs to be a definition, that will be in the settlement agreement...." Ms. Davis then said,

> I'm not certain we are interested in trying to define each of those terms. What I think was discussed during negotiations was the exclusion of certain distributions of tax payments.

Id. Mr. Emery responded:

> To be clear, we have agreed that distributions, dividens [sic] that are not based on any transfer or sale is not included in a liquidation event. Tax payments are among those, dividens [sic] or other profit distributions are not included.

Id. Ms. Davis countered: "... 8.05(c) is clear. And it says cash receipts." *Id.* Mr. Emery disagreed, "From a liquidation event not from -- ", at which point Ms. Davis said, "It doesn't say that." *Id.* Later she said, "***Realizations includes dividends***." *Id.* She reiterated that she was not "[p]repared to define those terms." *Id.* The court said, "I would like it defined in the settlement agreement." *Id.* Ms. Davis said, "Fair enough." *Id.* However, Emery persisted in refusing to recognize distributions of dividends and profits as triggering any future payments to Hayes:

> We have always understood that, and my understanding is that there's no claim on the part of Hayes and never has been for dividens [sic] or profits that are to be distributed.

Id. When the court said that the fairest thing would be a definition, Mr. Emery responded;

> Fine. There might be – ***this is a question we'll have to resolve***.

Id.

Later on, Ms. Davis said that all of the numbers regarding what Hayes would get from the May I, 2014 Prodege distribution "were subject to verification." *Id.* However, Mr. Emery was not willing to agree to that. He said:

> Well, just to be clear, there's a confidentiality agreement which covers all of these numbers so I'm a little concerned we're going to get permission from somebody to reveal it.

Id. The court responded:

> Please, ***let's try to figure out a way to do it.***

Id.

Near the end of the Transcript, the court reiterated that the written settlement would be the final agreement:

> ***The settlement will be final. This is just an outline*** of what the settlement will be.

Id. The parties then discussed restraint of enforcement of the Final Award Judgment; requesting an adjournment of the CA Action; and a non-disparagement agreement to be "mutually worked out" pending a finalization of the terms of the settlement. *Id.* In closing, the court said, "

> And let's hope that does not fall apart.

Id.

On this record, all material terms were not decided and were left to be worked out in a future written document. Most importantly, the gravamen of the dispute now before the court -- the definition of what type of realization would trigger Hayes' future 25% entitlement to a Prodege Interest distribution – remained a point of contention.

Three days later, on July 21, 2014, Prodege's Chief Executive Officer, Charles M. Davis, wrote a letter (Prodege Letter), which demonstrated, contrary to petitioners' representations during settlement negotiations, that part or all of the Prodege Interest could be transferred to Hayes as part of a settlement:

> ... if the Davis Shapiro law firm were to transfer all or any portion of its ownership interest (Units) in Prodege, LLC to their former partner, Danny Hayes, Esq., by order of Court or otherwise, arising out of the dissolution of their relationship, Prodege LLC would recognize and honor that transfer and recognize Mr. Hayes as a substituted member with respect to such Units under its organization documents without any objection, in accordance with the terms of such organizational documents.

Action 1, Doc 51. Prodege's CEO ***did not*** mention restrictions in a confidential sale agreement. *Id.* The Prodege Letter was sent by Hayes' attorneys to petitioners' attorneys on July 25, 2014. *Id.* Hayes' lawyers asked petitioners to include a transfer of 25% of the Firm's Prodege Interest in the draft settlement agreement. *Id.*

By letter dated July 29, 2014, petitioners refused, stating that they never offered to, and would not agree to, transfer 25%. Action 1, Doc 52. However, petitioners admit in their current brief that they offered to transfer 12.5% of the Prodege Interest. Petitioners' Memorandum of Law, Action 1, Doc 46, p 5. In addition, petitioners are now arguing that Hayes cannot vacate the settlement on the ground that it was induced by petitioners' misrepresentations because he failed to exercise due diligence with respect to transferability. *Id*, p 2.

Discussion

A. Petitioners' Motion – Action 1 (Seq 003)

Petitioners' motion to enforce the settlement and enjoin Hayes from disparaging them is denied. A settlement made on the record in open court is unenforceable where material terms are left undecided and the record reflects that there was no "intention to be bound before the agreement was reduced to writing." *In re Dolgin Eldert Corp.*, 31 NY2d 1, 10-11 (1972); *Bonnette v Long Island College Hosp.*, 3 NY3d 281, 285 (2004)(enforceable settlement must contain all material terms).

The purported settlement is unenforceable because it did not contain all material terms regarding what type of transaction would trigger Hayes' future payments from the Prodege Interest, as evidenced by disagreement as to dividends and profits on the Transcript, and the parties' intention to work out those terms in a future, formal writing. The confidentiality and agreement not to disparage were to take effect immediately, pending execution of the formal agreement, but it became clear within a week, when Hayes forwarded the Prodege Letter, that the parties would not come to terms.[8]

There was no disparagement by Hayes or breach of the settlement to enjoin. The alleged disparagement by Hayes rests solely on Hayes' statements that a settlement was not achieved. Action 1, Doc 46 (Petitioners' Memorandum of Law, referring to Action 1, Doc 47 (9/19/14 Shapiro Affirmation), and Exs G, H, & I thereto, Action 1, Docs 54-56. The court agrees that there was no settlement for the reasons stated above. Hayes cannot be enjoined from breaching a non-existent settlement agreement. Further, a statement of a true fact is not disparagement.

Further, a party seeking injunctive relief must establish that the balance of equities weighs in his favor. CPLR 6301. Here, the balance of the equities is in Hayes' favor. The settlement agreement never came to fruition because three days after the July 18 court appearance, Hayes learned, contrary to what petitioners had told him, that the Prodege Interest could be transferred as part of the settlement.

As petitioners' motion is denied, sanctions are not warranted.

B. Hayes' Motions – Action 1 (Seq 002) & Action 2 (Seq 003)

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[8] Petitioners argue that their representation that it would be impossible to transfer the Prodege Interest to Hayes was merely an expression of an opinion, not a misrepresentation of fact that would warrant vacating a settlement on the ground of fraud. *Hallock v State*, 64 NY2d 224, 230 (1984)(settlements may be vacated for fraud). As a settlement was not reached, the court will not make a ruling on this issue.

Hayes' motions are granted to the extent of: 1) liberally construing them as a petition to compel arbitration; 2) compelling arbitration between the parties on the issues of the amount owed to Hayes by the Firm, Successor Firm and/or petitioners (Arbitration Respondents) on account of cash receipts they received attributable to the Prodege Interest after December 27, 2013, the date of the Partial Award; and the definition of "sale, disposition or other realization" in §8.05(c) of the partnership agreement (Prodege Arbitration Issues); 3) enjoining the petitioners and any of their law firms, partners, agents, attorneys, and/or employees from filing, without prior leave of court, any further process or legal proceedings involving the parties in Actions 1 and 2 in any state; and 4) imposing sanctions on petitioners for frivolous conduct; and in all other respects, Hayes' motions are denied or are moot.

The prong of the motions for issuance of a full or partial satisfaction of the Final Award Judgment is denied. Insofar as these prongs seek to credit the Check against the Final Award Judgment, that issue is barred by res judicata. The doctrine of res judicata applies to arbitration awards. *American Ins. Co. v Messinger*, 43 NY2d 184, 189-190 (1977). Res judicata bars claims that were or could have been litigated, in the prior action or proceeding. *Thomas v City of New York*, 239 AD2d 180 (1st Dept 1997). Hayes gave the Check to the Firm on September 13, 2013. The Final Award was rendered on April 9, 2014, was subsequently confirmed by the Final Award Judgment in May 2014 and served with notice of entry on June 18, 2014. Action 1, Docs 5, 12, 15 & 16. Hayes' did not appeal and his time to appeal has expired. CPLR 5513. As Hayes could have raised his entitlement to credit for the Check, his motion for that relief is barred by res judicata.

The opposite is true with respect to the Prodege Arbitration Issues, which were not and could not have been raised in the arbitration. The Partial Award that dealt with the Prodege Interest

was rendered on December 27, 2013, ***before*** the May 1, 2014 partial liquidation, and ***before*** Hayes' right to payment 30 days later matured, pursuant to §8.05 of the partnership agreement. During the arbitration, the parties litigated who owned the Prodege Interest and in what percentages. The Partial Award specifically stated that Hayes was not entitled to anything from the Prodege interest until a sale or liquidation, which had "***not occurred yet.***" Action 2, Doc 5. Petitioners' motion to confirm the Partial Award was made in March 2014, and this court's judgment confirming it issued the same month, all before Hayes' claim accrued.[9] Thus, Hayes' entitlement to a share of the May 1, 2014, partial liquidation was not raised, and could not have been raised, during the arbitration or on the motion to confirm the Partial Award. Nor could Hayes have appealed the issue of his entitlement to the partial liquidation on an appeal from the Partial Award Judgment because it was not raised in the arbitration or before this court. *Diarrassouba v Consolidated Edison Co.* of NY Inc., 2014 NY App. Div LEXIS 8674 (1st Dept Dec. 11, 2014)(nor)(new facts cannot be raised for first time on appeal); *Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 (1st Dept 2009)(same holding). Lastly, Hayes had no reason to raise his entitlement to 25% of a future "sale, disposition or other realization" before the panel, or on the motion to confirm the Partial Award, because petitioners admitted, and the Partial Award agreed to, Hayes' future entitlement. Action 2, Docs 5 & 35, p 21.

On the other hand, the Partial Award Judgment collaterally estops the Firm and petitioners from relitigating the following factual issues: 1) the Prodege Interest was an Originated Asset, a term defined in §9.01(i) of the partnership agreement, that Hayes brought to the Firm; and 2) in accordance with §8.05(c) of the agreement, when Hayes departed he was entitled to 25% of "cash

[9] The partial liquidation also post-dated the Final Award on April 9, 2014, which, in any event, did not address the Prodege Interest.

receipts" received by the Firm attributable to the "sale, disposition or other realization" of Originated Assets, which were to be payable within 30 days of receipt (Binding Facts). Collateral estoppel bars relitigation of issues previously decided, when the party against whom estoppel is sought had a full and fair opportunity to contest them. *Schwartz v Public Administrator*, 24 NY2d 65 (1969). The Binding Facts were actually decided by the Partial Award. The Firm and petitioners had a full and fair opportunity to contest them (and admitted them). Therefore, the Firm and petitioners are collaterally estopped from contesting the Binding Facts.[10]

The portions of Hayes' motions to confirm the Partial Award and to enter judgment on it in his favor is granted solely to the extent of construing them as a petition to compel arbitration and compelling arbitration on the Prodege Arbitration Issues. CPLR 104 provides that "[t]he civil practice law and rules shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding." While the court stated on the July 18 Transcript that the Partial Award could be sent back to the panel for clarification, upon further reflection, that is not possible.[11] Hayes' time to move to modify the Partial Award expired 90 days after it was delivered to him. CPLR 7511. However, the Arbitration Clause broadly permits arbitration of any dispute arising under the partnership agreement. The amount that Hayes is entitled to pursuant to §§ 8.05(c) and 9.01 on account of the May 1, 2014 partial liquidation of Prodege and the meaning of "sale, disposition or other liquidation" are disputes covered by the Arbitration Clause. Nor can the court confirm or enter judgment on the Partial Award because that already has occurred. Moreover, Hayes asks for a judgment in his favor in the amount of 25% of the May 1,

[10] Petitioners admitted the Binding Facts in the post-hearing brief they submitted to the arbitration panel. Action 2, Doc 35.

[11] The directives on the Transcript were not ordered by the court.

2014 partial liquidation, minus the amount of the Final Award Judgment. However, as evidenced by the Transcript, the parties were haggling over verification of the Prodege numbers. The issue of the amount petitioners owe Hayes should be decided by the arbitrators.

The court grants the prongs of Hayes' motions to enjoin petitioners from filing, without prior leave of court, any further process or legal proceedings involving the parties in Actions 1 and 2 in any state. The injunction shall extend to petitioners' law firms, partners, agents, attorneys, and/or employees. A court may enjoin vexatious litigation by a party who abuses the judicial process. *Sassower v Signorelli*, 99 AD2d 358, 359 (2d Dept 1984); *Sibersky v Winters*, 42 AD3d 402 (1st Dept 2007), citing *Winters v Gould*, 143 Misc.2d 44 (Sup Ct NY Co 1989). This is the second time in proceedings before this court that petitioners have issued subpoenas in a manner not authorized under the CPLR in an attempt to harass Hayes. Action 1, Doc 28, pp 8-9. This is especially disturbing because petitioners are members of the New York bar and officers of the court, who should heed statutory requirements. Petitioners served over 200 persons or entities, including Hayes' clients and new partners, in an obvious attempt to embarrass him. Furthermore, in the CA Complaint, the Successor Firm made allegations that contradict the Binding Facts.

In addition, the court grants Hayes' motions for sanctions. Under 22 NYCRR §130-1.1(a), "[t]he court, in its discretion, may award to any party in any civil action or proceeding . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct . . . ." Conduct is frivolous under 22 NYCRR §130-1.1(c)(1) if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." In determining whether to award costs, the court must consider the circumstances surrounding the conduct, including time available to properly investigate the legal or factual basis for the conduct. 22 NYCRR §130-1.1(c). The

imposition of costs is proper because a frivolous action wastes the court's time as well as that of opposing counsel. *CCS Communications Control Inc. v Kelly Intl. Forwarding Co.*, 166 AD2d 173 (1st Dept 1990). Sanctions are appropriate where a party has given false sworn statements that cause delay. *Birch v Carroll*, 210 AD2d 119, 120 (1st Dept 1994)(fraudulent scheme and false testimony caused substantial expense and delay); *Sanders v Copley*, 194 AD2d 85, 88 (1st Dept 1993)(false sworn testimony and affidavit on material issue). Attorneys' fees and costs may be awarded after a hearing. *Sanders v Copley, supra.*

In the course of these proceedings, petitioners made false statements about what they said to Hayes in order to enforce the purported settlement. They made arguments that were counter to the Binding Facts in the Partial Award, after having admitted the same facts before the panel. They refused to agree on the July 18 Transcript to material terms and then brought a motion to enforce a purported settlement. They misrepresented what transpired during settlement negotiations in their papers on these motions. They admitted that the subpoenas were defective after Hayes moved to quash. More egregious still, petitioners, members of the New York bar, knew from a prior decision of this court involving the same parties that they should have notified Hayes about the restraining notices and that New York subpoenas cannot be served outside the jurisdictional limits of the State. For all of the above reasons, petitioners shall pay for the reasonable attorneys' fees and costs Hayes incurred on the instant motions and in opposing petitioners' motion. The issue of the reasonable amount of such fees and costs will be referred to a Special Referee. Accordingly, it is

ORDERED that the motion (Seq 003) in Index No 651230/2014, by Steven G. Shapiro and Peter Lewit is denied; and it is further

ORDERED that Steven G. Shapiro and Peter Lewit, their law firms, partners, agents, attorneys, and/or employees are hereby enjoined from filing, without leave of this court, any further actions and proceedings involving the parties in the above-entitled Actions 1 and 2, in this court and in any other court in the United States; and it is further

ORDERED that the motion (Seq 002) in Index No 651230/2014 by Daniel Hayes and duplicate motion (Seq 003) in Index No. 650293/2014 is granted to the extent of: 1) liberally construing them as a petition to compel arbitration; 2) compelling arbitration between the parties on the Prodege Arbitration Issues as defined in Part B of the Discussion section of this opinion; 3) enjoining the petitioners and any of their law firms, partners, agents, attorneys, and/or employees from filing, without prior leave of this court, any further process or legal proceedings involving the parties in Actions 1 and 2 in any state; and 4) imposing sanctions on petitioners for frivolous conduct; and in all other respects, Hayes' motions are denied or are moot; and it is further

ORDERED the issue of the reasonable attorneys' fees and costs incurred by Hayes in connection with his motions and petitioners' motion are referred to a Special Referee to hear and report with recommendations, or, if the parties consent, to hear and determine; and Hayes shall serve a copy of this order with notice of entry, as well as a completed information sheet,[12] on the Special Referee Clerk at spref-nyef@nycourts.gov, who is directed to place this matter on the calendar of the Special Referees' part for the earliest convenient date.

Dated: January 26, 2015

ENTER:

SHIRLEY WERNER KORNREICH J.S.C.

[12] Copies are available in Rm. 119M at 60 Centre Street, New York, NY, and on the court's website by following the links to "Court Operations", "Courthouse Procedures", and "References".