

**Matter of Shapiro v Hayes**

2016 NY Slip Op 30643(U)

April 13, 2016

Supreme Court, New York County

Docket Number: 651230/2014

Judge: Shirley Werner Kornreich

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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,

Index No.: 651230/2014

-against-

**DECISION & ORDER**

DANIEL B. HAYES,

Respondent.

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HON. SHIRLEY WERNER KORNREICH, J:

Motion Sequences 006 and 007 in the above-entitled action and Motion Sequences 007 and 008 in the action filed under Index No. 650293/2014 are consolidated for disposition.<sup>1</sup>

This is yet another round of litigation arising from the bitter break-up of the law firm, Davis, Shapiro, Lewit & Hayes, LLP (Firm). Petitioners Steven G. Shapiro and Peter Lewit (collectively, petitioners) and their new law firm (New Firm)<sup>2</sup> move for leave to assert claims against respondent Daniel B. Hayes in connection with a declaratory judgment action that was filed against the New Firm by Danny Wimmer Presents, LLC (Wimmer Co.) on November 24, 2015, in California Superior Court (CA Action). Motion Seq 007 (Index No 651230/2014) & Motion Seq 008 (Index No 650293/2014). Petitioners also move for leave to bring arbitration claims against Hayes, their former partner, pursuant to the arbitration clause in the Firm's Partnership Agreement, for his allegedly unauthorized termination of the Firm's membership

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<sup>1</sup> The papers submitted in both Index Numbers are identical and the actions were consolidated under the Index Number for this action on January 28, 2016.

<sup>2</sup> The New Firm is called Davis Shapiro Grabel Granderson & Blake, LLP.

interest in the Wimmer Co. (Membership). Seq 006 (Ind. No. 651230/2014) & Seq. 007 (Index No 650293/2014).

### *Background*

In November 2012, petitioners expelled Hayes as a partner of the Firm. The Firm had offices in California and New York. Pursuant to the terms of the Firm's Partnership Agreement, the parties arbitrated the division of assets among Hayes and petitioners before a panel of the American Arbitration Association. On December 27, 2013, the panel issued a partial final award (Partial Award). Dkt 5. On April 9, 2014, the arbitration panel rendered a final award (Final Award, with Partial Award, Awards) that determined the parties' rights in the Partnership, and ruled that all claims and counterclaims submitted in the arbitration, as well as all those not referenced in the Awards, were denied. Dkt 7. On June 11, 2014, this court entered a judgment on the Final Award (Judgment). Dkt 15. Sadly, it was not over.

After the Judgment was entered, a dispute arose over a post-Judgment liquidation event involving the Firm's interest in an entity known as "Prodege" (Prodege Interest). Ultimately, this court issued a decision and order, dated January 26, 2015 (Prior Decision), ruling that the post-arbitration liquidation of the Prodege Interest was not determined by the arbitrators and should go back to them. Dkt 68. The arbitrators did not determine the issue because the Prodege liquidation event occurred on May 1, 2014, after the panel issued the Final Award. *Id.* However, the Partial Award had recognized that Hayes would be entitled to a distribution in the event of a sale, disposition or other realization relating to the Prodege Interest, which had not occurred yet. Dkt 5. Due to the conduct of petitioners during the proceedings, which are chronicled in the Prior Decision, this court found that petitioners had harassed Hayes to the point that they, and the New

Firm, should be enjoined from bringing litigation against him without leave of court, and awarded Hayes attorneys' fees as a sanction.<sup>3</sup> The Prior Decision was affirmed on appeal.<sup>4</sup>

The Wimmer Co. was founded by Hayes' long-time friend Danny Wimmer. Wimmer was a Firm client from 2009 to 2012 and received rent-free office space and parking from the Firm from 2010 to 2012. 10/16/15 Lewit Affidavit (Lewit Aff), Dkt 179, ¶4. In 2011, the Firm made a \$25,000 investment in the Wimmer Co. and became a member, pursuant to an operating agreement, dated March 31, 2011 (Wimmer Operating Agreement). Dkt 181. Hayes' brother, Mark Horowitz, also is a member of the Wimmer Co. *Id.* Section 14 of the Wimmer Operating Agreement provided that no member could withdraw capital from the Wimmer Co. without the prior written consent of the Manager, who was Wimmer. *Id.*, §§ 14 & 18. Hayes signed the Operating Agreement on behalf of the Firm. 8/10/15 Hayes Declaration (Hayes Dec), Dkt 218, ¶6.

At the time the Firm invested, Wimmer Co. was planning to produce a second music festival in Florida called "Welcome to Rockville," in May 2011. *Id.* According to Hayes, petitioners became concerned about the Firm's cash flow soon after they invested in Wimmer Co. Hayes Dec, ¶6. In June and September 2011, Wimmer Co. paid the Firm approximately \$31,000 in two separate checks, one labeled "Return of Capital" and the other marked "7.5 Split of Net Profit re: Welcome to Rockville May 2011 Danny Hayes". Hayes Declaration, Dkt 218, ¶ 8 & Exh D. Petitioners do not dispute that the checks were so marked or that the Firm cashed them.

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<sup>3</sup> References to "Dkt" followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing System. In January 2016, Hayes was awarded approximately \$117,000 in attorneys' fees as a sanction. Dkt 229. According to petitioners' moving papers, they have not paid Hayes the fees. Petitioners' 12/8/15 Memorandum of Law, Dkt 199, p 1.

<sup>4</sup> *Matter of Shapiro v Hayes*, 133 AD3d 468 (1st Dept 2015).

*Id.* However, Petitioners say that all of the Wimmer Co. members received a return of their investment, so they believed the Firm was still a member.

In November 2011, Hayes sent email correspondence to petitioners discussing the Firm's re-investing \$25,000 in Wimmer Co. for future concerts, using money which Hayes offered to lend to the Firm. Hayes Dec, Ex E. Lewit was against it. *Id.* Hayes avers that petitioners decided not to re-invest. Hayes Dec, ¶¶ 9-12.

On January 1, 2012, the Wimmer Operating Agreement was amended (Wimmer Amendment) by a writing signed by Hayes, in which he acknowledged on the Firm's behalf that its investment had been returned in 2011 and it was withdrawing as a member of Wimmer Co. Dkt 205. Hayes also signed a letter, dated January 1, 2012, acknowledging that the Firm had given up its Membership (Acknowledgement). Dkt 206.

Petitioners produced documents during discovery *in the arbitration* that demonstrated that they knew the Firm had given up its Wimmer Co. Membership. On September 5, 2012, Hayes advised the Firm's accountant in an email that the "firm invested in this business. got our capital back plus a profit. we [sic] are no longer involved as owners." Dkt 191. The bates stamp on the email to the accountant indicates that *it was produced by petitioners during in the arbitration*. *Id.* On September 14, 2012, the Firm received a revised 2011 K-1 relating to its interest in the Wimmer Co. (Revised K-1), which reflected that its interest started the year at 14.3% and ended with 0%. Dkt 132. The bates-stamp on the K-1 demonstrates that *petitioners produced it in the arbitration*. *Id.* Prior to that, on September 13, 2012, the Firm received a draft 2011 K-1 that showed it ending the year with a 14.3% interest in Wimmer Co., a document also produced *in the arbitration* with *petitioners'* bates stamp. Dkt 133. In a September 27, 2012, email chain between Hayes and petitioners, Hayes explained that because the Firm decided not to reinvest in the Wimmer Co.,

there would eventually be an amended operating agreement. Dkt 134. The email chain was *produced by petitioners in the arbitration*, as evidenced by the bates stamp. *Id.* There are no bates stamps on the Wimmer Amendment and the Acknowledgement. Dkt 185 & 206.

Petitioners now claim that, until 2015, they believed that the Firm was still a member of Wimmer Co. According to petitioners, in February 2015, one of their partners read a news article, which reported that the Wimmer Co. had received a significant investment from the United Auburn Indian Community Development Corp. and that Mr. Hayes had been appointed the Wimmer Co.'s CEO. Lewit Aff, ¶8. Lewit avers that his counsel wrote to the Wimmer Co. to demand the Firm's share of the money. *Id.* In June 2015, the Wimmer Co. responded with a letter stating that the Firm was no longer a member. *Id.*, ¶10. Annexed to the response was the Wimmer Amendment and the Acknowledgement, which Lewit avers he had never before seen, although they were responsive to one of petitioners' document requests in the arbitration. *Id.*

What is clear is that, during the arbitration, the parties heavily fought over the Prodege Interest, an asset brought to the Firm by Hayes, but nobody fought over the Firm's interest in the Wimmer Co., which, therefore, was not mentioned in the Awards.<sup>5</sup> Petitioners' explanation is that Hayes did not claim that the Wimmer Co. Membership was his "Originated Asset," i.e., an asset brought to the Firm by Hayes. However, the arbitration was not limited to a division of Originated Assets. It was a final accounting of the Partnership.

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<sup>5</sup> Petitioners requested documents in the arbitration about Wimmer and waivers for investments with clients. Petitioners' arbitration document request number 43 asked Hayes to produce all documents and communications with Wimmer and the Wimmer Co. relating to the treatment of legal fees payable to the Firm, contributions to the Firm's rent associated with Wimmer's use of office space, or "any other exchange of consideration." Dkt 224. Petitioners' request number 53 asked for all documents and communication "concerning any investments made by Hayes in connection with persons or entities represented by the Firm, including but not limited to any conflict waivers or waivers obtained from clients." *Id.*

In November 2015, the Wimmer Co. commenced the CA Action against the New Firm seeking a declaration that it is not a member of the Wimmer Co.; a declaration that the Firm's investment in the Wimmer Co. was void because it violated California Professional Conduct Rule 3-300 (Conduct Rule);<sup>6</sup> and a declaration that the New Firm must return the profit it earned from the Wimmer Co. investment, with interest; and attorneys' fees, pursuant to the Wimmer Operating Agreement. Dkt 219. The New Firm filed a cross-complaint (i.e., what would be called a counterclaim in New York) against the Wimmer Co., Wimmer and Hayes' brother seeking, *inter alia*, a declaration that the New Firm has a 14.3% Membership interest. Dkt 220.

Petitioners, in the instant proceeding, want permission to reopen the arbitration on the grounds that Hayes allegedly terminated the Firm's Membership in the Wimmer Co. without their consent, and petitioners allegedly could not have discovered it until 2015, when the Wimmer Co. denied that the Firm was a member and sent the Wimmer Amendment and Acknowledgement. Petitioners 12/18/15 Memorandum of Law, Dkt 199, p 2. These allegations fly in the face of clear documentary evidence and, to the court's consternation, are made by attorneys to a court. At best, petitioners are seeking this relief out of pique over the Prior Decision, which held that the Prodege realization could not have been raised by Hayes in the arbitration. Given the abundance of proof demonstrating that petitioners were aware of the Wimmer issue before and during arbitration, they could have raised it there. It is not at all like the Prodege Interest, which the arbitrators divided, while noting Hayes' right to distributions in the event of a future event that had not occurred. Petitioners claim for the Wimmer Co. Membership relates to an asset they allege the Firm owns and they allegedly believed the Firm owned when the arbitration took place, even though they had

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<sup>6</sup> The Conduct Rule prohibits attorneys from transacting business with a client without fair terms, full written disclosure, advice to consult independent counsel and time to do so, and written consent of the client, i.e., a waiver, which petitioners had requested in discovery in the arbitration.

in their possession emails from Hayes saying that the Firm was no longer involved in the Wimmer Co. and that there would be an amended operating agreement. They also possessed a final K-1 showing the Firm's investment as 0% at the end of 2011. Even if Hayes did not produce the Wimmer Amendment and Acknowledgement, the documents *petitioners* produced *for the arbitration* memorialized Hayes' and the Wimmer Co.'s position that the Firm was no longer a member.

#### *Discussion*

A court should stay arbitration if it may be rendered academic by a pending litigation. *Conway Stores, Inc. v Interstate Fire & Cas. Co.*, 16 AD3d 364 (2d Dept 2005). Additionally, arbitration should be stayed where there is a triable issue of fact as to a threshold contention. *Empire Mut. Ins. Co. v Zelin*, 120 AD2d 365 (1st Dept 1986).

The pending CA Action will determine the New Firm's claim that it is still a member of the Wimmer Co. If the New Firm prevails, an arbitration to determine whether Hayes improperly disposed of the Firm's Membership will be academic. Whether the Membership is extant is a threshold issue that should be determined before petitioners arbitrate against Hayes concerning his allegedly unauthorized disposal of it. Furthermore, the Wimmer Co. is a necessary party to determine petitioners' claim that the New Firm is still a member and the Wimmer Co. is not bound by the arbitration clause in the Firm's Partnership Agreement. Finally, the California court has more expertise with the Conduct Rule.

Moreover, the court finds that petitioners are using the request for arbitration to further harass Hayes and his new employer concerning an issue that is barred by the Judgment confirming the Final Award. The doctrine of *res judicata* applies to arbitration awards and bars relitigation of issues that could have been raised in a prior proceeding involving the same parties that has resulted

in a final judgment. *American Ins. Co. v Messinger*, 43 NY2d 184 (1977); *Thomas v City of New York*, 239 AD2d 180 (1st Dept 1997). The Federal Arbitration Act (FAA)<sup>7</sup> applies to arbitration agreements that involve activity in interstate commerce; here, the Firm practiced law in New York and California. *Cusimano v Schnurr*, 26 NY3d 391, 400 (2015). Although it is true that under the FAA the arbitrators decide whether *res judicata* applies to a judgment confirming an arbitration award [*Citigroup, Inc. v Abu Dhabi Inv Auth.*, 776 F.3d 126, 131 (2d Cir 2015)], the issue before this court is petitioners' conduct. It was precisely to avoid further harassment that the court enjoined petitioners and their New Firm from suing Hayes without leave of court. This court's decision to prevent petitioners from asserting claims barred by *res judicata* rests on the equitable power to prevent abuse of the judicial system. *Capogrosso v Kansas*, 60 AD3d 522 (1st Dept 2009); citing *Sassower v Signorelli*, 99 AD2d 358, 359 (2d Dept 1984). Thus, the court bars arbitration rather than sending the *res judicata* issue to the arbitrators. Petitioners voluntarily sought to embroil Hayes' new employer, the Wimmer Co., in their latest salvo.<sup>8</sup> They shall reap what they have sown.<sup>9</sup>

In like manner, the motion to assert claims against Hayes in the CA Action is denied. Petitioners and the New Firm seek to join Hayes to assert claims against him for indemnification; breach of fiduciary duty; and conspiracy with the Wimmer Co. to deprive the Firm of its Membership. Petitioners Memorandum of Law, Dkt 199, pp 6-7. The court is prohibiting arbitration of petitioners' claims against Hayes for allegedly disposing of the Firm's Membership without consent, i.e., the breach of fiduciary duty and conspiracy claims, because they would be

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<sup>7</sup> 9 USC §2 et seq.

<sup>8</sup> In a similar ploy, petitioners previously subpoenaed California clients of Hayes' former law firm, violating a court order, harassing the clients and embarrassing Hayes and his new firm.

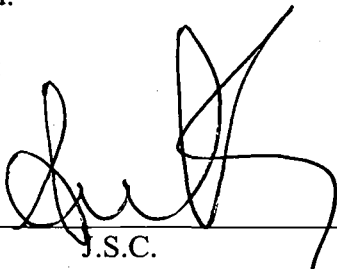
<sup>9</sup> "[F]or whatsoever a man soweth, that shall he also reap." *Galatians* 6:7.

barred by *res judicata* and to assert them now would be harassment. The claim over for indemnification, in the event that the Wimmer Co. obtains a judgment for violation of the Conduct Rule, is the only claim that could not have been raised in the arbitration. It would be covered by the arbitration clause in the Partnership Agreement.<sup>10</sup> Therefore, it should not be part of the CA Action.<sup>11</sup> Accordingly, it is

ORDERED that Motion Sequences 006 and 007 in Index No. 651230/2014 and Motion Sequences 007 and 008 in Index No. 650293/2014 are denied.

Dated: April 13, 2006

ENTER:



J.S.C.

**SHIRLEY WERNER KORNREICH**  
J.S.C.

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<sup>10</sup> When parties expressly agree to arbitrate their disputes, courts enforce their agreement and compel arbitration. *Gomez v Brill Sec., Inc.*, 95 AD3d 32 (1st Dept 2012). In the event that the Wimmer Co. obtains a judgment against petitioners, they would be entitled to indemnification only if they can prove that they were held liable solely because Hayes violated the Conduct Rule, and petitioners did not. Otherwise, the whole Firm, including petitioners were at fault, and petitioners would not be entitled to indemnification under New York law, which governs the Firm's Partnership Agreement. *Lehr Assoc. Consulting Engrs., LLP v Dailin AC*, 133 AD3d 533, 534 (1st Dept 2015) (indemnification not available where plaintiff failed to show it was without fault); *Trustees of Columbia University v Mitchell/Giurgola Associates*, 109 AD2d 449 (1st Dept. 1985) (party who participated in wrongdoing cannot receive benefits of common law indemnification).

<sup>11</sup> It should be noted that under both New York and California Law, a cause of action for indemnity accrues and the statute of limitations commences to run at the time the indemnity claimant suffers loss or damage by paying the underlying claim. *Jocer Enterprises, Inc. v Price*, 183 Cal App 4th 559, 574 (Cal App 2d Dist 2010); *Tedesco v A.P. Green Indus., Inc.*, 8 NY3d 243, 247 (2007).