

<b>Field v BDO USA, LLP</b>
2017 NY Slip Op 32537(U)
July 10, 2017
Supreme Court, New York County
Docket Number: 600010/2012
Judge: Saliann Scarpulla
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA  
Justice

PART 39

Index Number : 600010/2012  
FIELD, DENIS M.  
vs.  
BDO USA LLP  
SEQUENCE NUMBER : 004  
PRELIMINARY INJUNCTION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is *decided in accordance with the accompanying memorandum decision*

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

Dated: 7/10/17

*Saliann Scarpulla* s.c.  
**HON. SALIANN SCARPULLA**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMM. DIV. PART 39

-----X  
DENIS M. FIELD,

Petitioner,

- against -

BDO USA, LLP,

Respondent.  
-----X

Index No. 600010/2012  
**DECISION & ORDER**

(Motion Seq. 004)

**SALIANN SCARPULLA, J.:**

By this motion, respondent BDO USA, LLP (BDO) moves, pursuant to CPLR Article 63, for a preliminary injunction restraining the petitioner, Denis M. Field (Field), from taking any action to file, prosecute or seek any form of enforcement relating to a Florida arbitration demand and/or a Florida state court action on the ground that they are impermissible collateral attacks on a 2012 New York arbitration award in BDO’s favor, which has been confirmed by rulings of this court and the Appellate Division, First Department.

**Background**

Field was a partner at BDO, and the Chief Executive Officer (CEO) until 2003. Along with two other partners, Field was the driving force behind a practice within BDO that developed, marketed, sold and implemented tax shelters for high net worth individuals. After a dispute arose, in part from the tax shelters, Field agreed to resign as BDO’s CEO in exchange for, inter alia, certain severance and pension payments.

Following a series of additional disputes that ended up in arbitration and litigation in this court,<sup>1</sup> the parties entered into a “Settlement Agreement and Mutual Release” dated December 11, 2004 (the Settlement Agreement). The Settlement Agreement provided for certain severance and pension payments to Field. In addition, section 4 (a) of the Settlement agreement, entitled “Indemnification,” provides:

“Upon execution of this Agreement, BDO covenants and agrees to indemnify, defend and hold Field harmless for any claims, actions, causes of actions, demands, losses, liabilities, lawsuits, damages, settlements, and/or judgments (“Claim”) (including, but not limited to reasonable attorneys’ fees and costs associated with the retention of counsel, consultants, experts, and/or any other support services that may be reasonably necessary in connection therewith) arising from or in any way relating to Field’s employment with, service to, or relationship with BDO to the extent required by New York and federal law (“Defense Costs”), . . .”

(Samowitz affirmation, Ex. 6 at 4). Three days later, the parties executed an amendment to the Settlement Agreement, which, as is relevant to the instant dispute, provided that any dispute between the parties would be arbitrated subject to expedited alternative dispute resolution (ADR) to be decided by “an experienced commercial litigator at a top 50 law firm in the United States,” that the arbitrator would accept written submissions from the parties and then hold a “non-evidentiary hearing,” and that his or her award would be binding and not subject to appeal.

Commencing sometime in 2005, the Internal Revenue Service (IRS) began investigating the tax shelter activities of Field and BDO, both within BDO and at other accounting and law firms. On March 4, 2010, Field and others were indicted by a federal

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<sup>1</sup> *Matter of BDO Seidman v Denis M. Field*, Sup Ct, New York County, Index No. 601279/2010

grand jury in New York for tax evasion, criminal conspiracy and mail fraud (*U.S. v Daugerdas, et al.*, Case No. S3v09-CR-0581, SD NY).

Sometime in 2007, BDO took the position that it had no obligation to pay Field's legal fees in defense of the government's investigation, because it believed that Field had engaged in improper behavior contrary to BDO's best interests. Specifically, BDO alleged that it discovered a 2001 draft memorandum written by the law firm of Skadden Arps Slate Meager & Flom (Skadden), which had been hired by BDO to review the practices and procedures of its tax solutions business. The Skadden draft memorandum identified possible legal concerns and negative IRS reactions to those practices and procedures. BDO contended that Field wrongfully concealed the Skadden memorandum, and then extensively edited the memorandum to remove the possible legal concerns and negative IRS reactions before presenting it to BDO's board.

The parties signed a document entitled "Interim Agreement and Undertaking" on January 1, 2008, although that agreement is not part of the record in this case. Between March 1, 2005 and December 31, 2009, BDO paid more than \$1.4 million in legal fees and defense costs associated with the government's investigation of Field. By letter dated February 3, 2010, BDO's General Counsel advised Field that BDO would no longer advance defense costs to Field effective January 1, 2010, in accordance with the Interim Agreement and Undertaking.

On April 26, 2010, Field's counsel sent BDO a letter demand for arbitration against BDO, contending that it was in breach of section 4 (a) of the Settlement Agreement for failing to fund the legal costs incurred by Field in defending himself

against the criminal indictment. The demand sought immediate payment of \$264,088.16, his legal costs incurred for the first three months of 2010 as well as a declaration that BDO is required to pay Field's reasonable defense costs going forward.

BDO commenced litigation in this court on May 26, 2010 seeking to reform the amendment to the Settlement Agreement to ensure that the arbitration hearing would include an evidentiary hearing with live testimony, subject to cross examination. This court (Kapnick, J.) declined to do so by order dated July 12, 2010, and that order was affirmed by the Appellate Division on December 21, 2010 (*Matter of BDO USA, LLP v Field*, 79 AD3d 604 [1<sup>st</sup> Dept 2010]).

After a three-month criminal trial held between March and May 2011, a twelve-person jury concluded that Field had committed multiple felonies while a BDO partner. Field successfully moved for a new trial due to juror misconduct during voir dire. Shortly thereafter, BDO entered a "Deferred Prosecution Agreement" with the United States, agreeing to pay \$50 million to the government to settle its claims against BDO over the tax shelters. On October 31, 2013, Field was acquitted of all charges in the retrial of the criminal case.

Meanwhile, back on April 4, 2012, Field's lawyer in the arbitration proceeding suggested Kenneth M. Kramer, Esq. (Kramer) of JAMS to be the arbitrator, and BDO agreed. After his appointment, Kramer consulted with the parties and agreed to accept lengthy pre- and post-hearing briefs, along with multiple affidavits and exhibits. On June 25, 2012, Kramer conducted a non-evidentiary hearing on the arbitration, issuing an award on July 17, 2012 in favor of BDO (the Award).

The Award found that the indemnification provision of the Settlement Agreement was governed by New York Partnership Law, and that, under Section 40 (2) of the Partnership Law, the partnership “must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper course of its business . . .” (Award at 4). Therefore, arbitrator Kramer held that:

“to be successful on his claim for indemnity [Field] must allege and prove by a preponderance of the evidence that the work he did relating to the tax shelters was ordinary and proper. Other than argument in his Reply Letter Memorandum quibbling with BDO’s recitation of the alleged misconduct, and his assertion that the BDO partnership benefitted royally from the sale of the tax shelter advice he has not sought to do so. Therefore, I find that [Field] has not satisfied his burden of proof by a preponderance of the evidence. I further find . . . that the obligation to pay defense costs is no broader than the obligation to indemnify.”

(*id.*, at 4-5).

On October 12, 2012, Field, acting pro se, filed a petition to vacate/modify the Award in this court under the present index number. Field challenged the Award on several grounds, including manifest disregard for the law. By order dated July 19, 2013, this court (Kapnick, J.) granted BDO’s motion to dismiss the petition. On August 23, 2013, Justice Kapnick amended her July 19<sup>th</sup> order to clarify that the Award was being confirmed.

In March 2014, Field filed a motion in this special proceeding to renew his petition to vacate the Award on the ground of fraud. Field argued to the court that, in 2013 and during his criminal re-trial, he discovered crucial deposition testimony of Leland Graul (Graul) taken in 2011. Graul, who was a member of BDO’s risk

management committee, allegedly testified that the committee had been shown a copy of the Skadden draft memorandum in 2000 or 2001.

By order dated November 20, 2014, I denied Field's motion because Field had not proved that the Award was procured by fraud. I found, among other things, that "the subject testimony merely provides that at a risk management committee meeting in 2000 or 2001, a copy of a memorandum prepared by Skadden was passed around, which Graul only skimmed." On June 11, 2015, the Appellate Division affirmed both Justice Kapnick's July 22, 2013 order dismissing the petition and my November 20, 2014 order denying Field's motion to renew his petition to vacate the Award (*Matter of Field v BDO USA, LLP*, 129 AD3d 497 [1<sup>st</sup> Dept 2015]).

On June 27, 2016, Field served a new demand for arbitration in Florida, and a complaint against BDO in Florida's 15<sup>th</sup> Judicial Circuit in Palm Beach County, Case No. 502016CA007190XXXXMB, seeking to compel arbitration of his claim against BDO for indemnification of his legal fees and defense costs amounting to \$5,506,275, pursuant to the Settlement Agreement. After Field's Florida counsel refused to withdraw the demand, BDO filed this motion. On December 28, 2016, the 15<sup>th</sup> Judicial Circuit in Palm Beach County granted BDO's motion to dismiss the Florida action and denied Field's motion for an injunction prohibiting BDO from proceeding with this motion for a preliminary injunction in this action.

## Discussion

Both sides agree that the issues raised by this motion are governed by the Federal Arbitration Act (FAA), 9 USC §§ 1 et seq. Field contends that the FAA gives the Florida arbitrator the sole power to decide to what extent the Award affects the Florida arbitration. According to BDO, the Florida arbitration is an impermissible collateral attack on the Award, as confirmed by this court and the Appellate Division, and, as such, this court has the power to enjoin the Florida arbitration.

Under the FAA, “most disputes between parties to a binding arbitration agreement are ‘arbitrable,’ meaning that they are to be decided by the arbitrators, not the courts” (*Citigroup, Inc. v Abu Dhabi Inv. Auth.*, 776 F3d 126, 129 [2d Cir 2015], citing *Howsam v Dean Witter Reynolds, Inc.*, 537 US 79, 83-84 [2002]). The one exception to this general rule is questions of arbitrability, such as whether the parties are bound by an arbitration clause or whether that clause applies to a particular type of controversy (*id.*). “[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability” (*Moses H. Cone Mem. Hosp. v Mercury Constr. Corp.*, 460 US 1, 24-25 [1983]).

In *National Union Fire Ins. Co. of Pittsburgh, P.A. v Belco Petroleum Corp.* (88 F3d 129 [2d Cir 1996]) (*Belco*), the Second Circuit held that the preclusive effect of a prior arbitration award that had been confirmed by a state court was to be decided by the arbitrators, not the court. The Second Circuit reasoned that claim preclusion was not a question of arbitrability, because it was a legal defense to the claims, and, as such, was

“itself a component of the dispute on the merits” (*id.* at 135). This reasoning was again recently followed by the Second Circuit in *Citigroup, Inc. v Abu Dhabi Investment Auth.*, 776 F3d 126, *supra* (*Abu Dhabi Investment*), in holding that a federal district court had no power to enjoin a second arbitration between the parties to a contractual dispute based on what one party asserts is the claim-preclusive effect of a prior federal judgment confirming the result of the parties’ earlier arbitration.

Case law interpreting Article 75 of the CPLR reaches the same result. “The effect, if any, to be given to an earlier arbitration award in subsequent arbitration proceedings is a matter for determination in [the arbitration] forum” (*Matter of City School Dist. of City of Tonawanda v Tonawanda Educ. Assn.*, 63 NY2d 846, 848 [1984]; *see also Board of Educ. of Patchogue-Medford Union Free School Dist. v Patchogue-Medford Congress of Teachers*, 48 NY2d 812, 813 [1979]; *Matter of Progressive N. Ins. Co. v Sentry Ins. A Mut. Co.*, 51 AD3d 800, 801 [2d Dept 2008]; *Rabinovich v Shchegol*, 251 AD2d 25 [1<sup>st</sup> Dept 1998]; *Matter of Port Auth. of N.Y. & N.J. v Port Auth. Police Sergeants Benevolent Assn.*, 225 AD2d 503 [1<sup>st</sup> Dept 1996]).

In support of its request for injunctive relief, BDO relies on *Oppenheimer & Co. Inc. v Pitch*, 129 AD3d 621 [1st Dept 2015] (*Oppenheimer*). In that case, customers of Oppenheimer & Co., Inc. were awarded approximately \$2.5 million in damages in a hard-fought arbitration proceeding. More than ten months later, and after the award was paid, the customers commenced a second arbitration against Oppenheimer, contending that the firm had failed to produce certain “smoking gun” evidence during the first arbitration, which would have resulted in a much higher award in the first arbitration.

The First Department ruled that “the question of whether [the] second arbitration proceeding is an impermissible collateral attack of an arbitration award in the first arbitration proceeding is not a question of arbitrability, but is a legal question to be determined by the court” (*Oppenheimer*, 129 AD2d at 622).

In so holding, the First Department relied on *Prime Charter v Kapchan* (287 AD2d 419 [1st Dept 2001]) (*Prime Charter*). This case also involved a dispute between a customer and a brokerage firm over securities transactions that was subject to arbitration. After the customer’s motion to amend her claim to allege that one of the brokers was unlicensed was denied as untimely by the arbitrator, the customer commenced a second arbitration to void the transaction on this ground. The First Department ruled that the second arbitration was “a preemptive collateral attack on any future award issued” in the first arbitration (*id.* at 419). The First Department also relied on *Decker v Merrill Lynch, Pierce, Fenner and Smith, Inc.* (205 F3d 906 [6<sup>th</sup> Cir 2000]) (*Decker*). In *Decker*, an investor, in whose favor an arbitration award had been entered against Merrill Lynch in a securities arbitration, brought a lawsuit and commenced a second arbitration, asserting tort and contract claims based on Merrill Lynch’s alleged interference with the arbitrators during the first arbitration. The district court dismissed the lawsuit and enjoined the second arbitration because both were an impermissible collateral attack on the first arbitration (*id.* at 910).

The objections raised against the second arbitration in *Oppenheimer*, *Decker* and *Prime Charter* were not affirmative defenses based on *res judicata* or claim preclusion. In those cases, the second arbitration involved claims that directly challenged either

conduct by one party or rulings by the arbitrators in a pending or completed arbitration proceeding, which the courts ruled was a collateral attack on the first arbitration.

Here, the Florida arbitration is not a collateral attack on the Award. Field is no longer arguing that the Award was procured by fraud or misconduct by the parties or the arbitrator, or by the arbitrator's manifest disregard of the law. Rather he contends that the Award and subsequent litigation in New York is not a bar to the current demand for arbitration, because BDO's duty to indemnify Field was not triggered until Field's acquittal on October 31, 2013. Field further contends that the Award and subsequent litigation in this court was about Field's right to advancement of his defense costs, and that the Florida arbitration raises an independent claim for indemnification, which first accrued upon this acquittal.

BDO flatly rejects this argument, contending that Field's new arbitration is seeking recovery of the exact same legal fees, under the same indemnification agreement, and that Field's claim during the first arbitration was always indemnity, and not advancement of legal fees. BDO argues that this issue has already been fully and finally determined by the Award and subsequent rulings of this court and the Appellate Division, and that Field may not relitigate his right to indemnity a second time in a different arbitral forum. This is the very essence of a collateral estoppel or *res judicata* defense, which is "designed to prevent the relitigation by the same parties of the same claims or issues". (*Matter of Venes v Community School Bd. of Dist. 26*, 43 NY2d 520, 524 [1978]).

I am sympathetic to BDO's request that I enjoin Field from continuing to press his claim for legal fees. Field's claim to payment of his legal fees under the indemnification

provision of the Settlement Agreement was wholly rejected by the arbitrator in 2012. Field then twice sought to vacate or modify the Award in this court, first in 2012, and then again in 2014. In his first attempt to vacate the Award Field argued, among other things, that the arbitrator had misinterpreted the indemnification provisions. In the second proceeding, Field argued that the Award was procured by fraud. Field's attempts to vacate the Award failed, in both this court and the First Department.

Undaunted, Field has now served a new demand for arbitration. Field's latest arbitration demand, brought in Florida rather than New York, appears to raise the same issues that the arbitrator squarely addressed and dismissed in the Award, and/or issues that Field could have, but did not, raise in the New York arbitration. Nevertheless, the issue of whether this latest Florida arbitration is precluded by *res judicata* or collateral estoppel is an issue that must be decided by the arbitrator in Florida in accordance with the FAA's broad federal policy favoring arbitration.

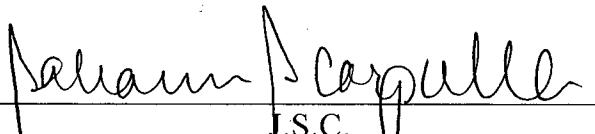
For the foregoing reasons, it is hereby

**ORDERED** that respondent's motion for a preliminary injunction is denied; and it is further

**ORDERED** that the temporary restraining order issued by this court on July 28, 2016, and continued on August 16, 2016, enjoining petitioner Denis M. Field from taking any action to further prosecute the Florida arbitration is hereby vacated.

Dated: July 10, 2017

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**HON. SALIANN SCARPULLA**