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

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HARVEY GLADSTEIN, Index No.: 152121/2015

Plaintiff, **DECISION & ORDER**

-against-

THOMAS F. KEANE and SUSAN KEANE,

Defendants.

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JENNIFER G. SCHECTER, J.:

This action, commenced in 2015, concerned defendants' liability to plaintiff on a $180,000 promissory note (Dkt. 4)[1] and on, among other things, Gladstein's obligations pursuant to the Purchase Agreement (Dkt 24). Though the Purchase Agreement contained a broad arbitration clause applicable to all disputes "relating to" it (*see id.* at 14)--after defendants asserted a setoff defense based, in part, on the contract--the parties charted their course and chose to litigate instead of arbitrate related disputes.

Significantly, at the 11th hour just before trial, defendants sought leave to amend their answer to assert a mutual-mistake defense. Defendants maintained, relying on a September 25, 2012 memo prepared by Mark Rosman, that part of the consideration for the Note was "Rent and Sales Tax on New Auto and Janie's Friend's 'Artwork' etc totalling $30,000," which artwork was either taken by Gladstein when he left the firm or belonged to Keane under the Purchase Agreement, and therefore, its value should not

[1] References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF). Defined terms in this decision have the same meaning as those contained in the May 16, 2018 Decision and Judgment (Dkt. 170), which was issued after a bench trial.

have been included in the amount of the Note (Dkt. 155 at ¶¶ 6, 9; Dkt. 157). At trial and again on reargument, the court denied the amendment both as untimely and as lacking in merit (Dkt. 171).

After the bench trial, during which the parties had a full and fair opportunity to be heard on all issues properly presented related to the Purchase Agreement, on May 16, 2018, the court issued the Judgment awarding plaintiff $174,000 along with interest and attorneys' fees (Dkt. 170).[2]

On July 12, 2018, Keane commenced a commercial arbitration against Gladstein concerning the "law practice purchase" based on the Purchase Agreement (*see* Dkt. 225 at 2). Gladstein then made this motion to stay the arbitration and for sanctions, urging that Keane waived arbitration by proceeding with his Purchase-Agreement related setoff defense in this forum and that his claims are barred by res judicata. The court immediately granted a temporary restraining order preventing the arbitral proceedings from going forward and, given the clear frivolity of the arbitration, afforded Keane--an attorney who should be fully familiar with settled law governing waiver of arbitration and claim preclusion--an opportunity to withdraw the arbitration and avoid any potential sanctions (*see* Dkt. 233).

Keane declined to do so arguing that his arbitration "involves an issue of fact which was not decided at trial" though it was raised as a defense to the Note and rejected on procedural and legal grounds (*see* Dkt. 235). In opposition to the motion, moreover,

[2] A judgment was entered on May 24, 2018 (Dkt. 175).

he explains that he sees "why someone would think that [he] was using arbitration as a vehicle to re-litigate the issues" and acknowledges that a full history of the "artwork" issue was set forth in his earlier motion to amend. Because the issue was excluded from the trial and is now being raised as an affirmative claim that Gladstein violated the "artwork provision in the Purchase Agreement"--in a different context than mutual mistake--Keane maintains that he can now exercise his right to arbitration (Dkt. 236 at ¶¶ 2-4, 14).

Gladstein's motion is granted. Because Keane's claims are barred by res judicata, the arbitration is permanently stayed and, pursuant to 22 NYCRR 130-1.1, Gladstein is awarded reimbursement for actual expenses *reasonably* incurred and *reasonable* attorneys' fees related to the frivolous arbitration.

It is well settled that the "right to arbitration may be modified, waived or abandoned" (*Cusimano v Schnurr*, 26 NY3d 391, 400 [2015]). "The question of whether [parties] waived their right to arbitrate by their litigation-related conduct is for the court to decide" (*Skyline Steel, LLC v PilePro LLC*, 139 AD3d 646, 647 [1st Dept 2016]). A litigant who fails to seek to arbitrate a claim and, instead, fully litigates a claim on the merits, cannot later change his mind and insist the claim be arbitrated (*JSBarkats PLLC v Response Sci. Inc.*, 149 AD3d 652 [1st Dept 2017] [defendants' "participation in the lawsuit, in both state and federal court, for approximately 11 months before moving to compel arbitration manifested an affirmative acceptance of the judicial forum" and constituted a waiver of arbitration]); *see Sherrill v Grayco Builders, Inc.*, 64 NY2d 261,

272 [1985]). Once "waived, the right to arbitrate cannot be regained" (*Waldman v Mosdos Bobov, Inc.*, 72 AD3d 983, 984 [1st Dept 2010]). By raising issues related to compliance with the Purchase Agreement--including the amounts, if any, that Gladstein was obligated to pay Keane and the Firm--in this forum as opposed to proceeding with arbitration, Keane waived his right to arbitrate.

Additionally, Keane's claim that he is entitled to value based on the artwork, which was raised before this court, is precluded by res judicata regardless of how Keane seeks to recast it. "Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action. As a general rule, 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 a different remedy" (*Landau v LaRossa, Mitchell & Ross*, 11 NY3d 8, 12 [2008] [emphasis added], quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]; *see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981] ["This State has adopted the ***transactional analysis*** approach in deciding res judicata issues ... (After the) proceeding (is) brought to a final conclusion, ***no other claim may be predicated upon the same incidents***"] [emphasis added]). This "rule applies not only to claims actually litigated ***but also to claims that could have been raised in the prior litigation***" (*Matter of Hunter*, 4 NY3d 260, 269 [2005] [emphasis added]; *see Veleron Holding, B.V. v Morgan Stanley*, 151 AD3d 597, 598 [1st Dept 2017] ["transactions upon which plaintiff's claim of fraud are premised were the subject of prior claims adjudicated in federal court" thus

action was barred by res judicata"]; *Elias v Rothschild*, 29 AD3d 448 [1st Dept 2006] [explaining that "claims can arise out of the same transaction or series of transactions even if there are variations in the facts alleged, or different relief is sought and even when several legal theories depend on different shadings of the facts, or would emphasize different elements of the facts or would call for different measures of liability or different kinds of relief"]).

It is clear that Keane's artwork claim arises from the same transactions addressed at trial. Keane tried to attack the amount of the Note based on the artwork and was unable to do so not only because he waited too long but because his defense was decided to be without merit. If Keane wanted to make any affirmative claims related to the Purchase Agreement, he had plenty of time to properly raise them in advance of trial in this action in the forum that he chose to litigate other issues related to amounts Gladstein potentially owed pursuant to the Purchase Agreement. He did not do so. He cannot now litigate or relitigate issues that he either could have properly pursued or were rejected or that would effectively undermine determinations made after trial (namely, that Keane owed $174,000 on the Note and was not entitled to reduce that amount by the value of the artwork and that Gladstein did not owe Keane any money based on the Purchase Agreement and the Employment Agreement). Thus, even though Keane may not have asserted the precise claim concerning the artwork that he now seeks to arbitrate, that such claim arises from the Purchase Agreement (and, moreover, according to defendants is related to the value of the Note) means that it is barred (*see Advest, Inc. v Wachtel*, 253

AD2d 659, 661 [1st Dept 1998] ["respondents' waiver encompassed not only the claims that they had actually asserted in the Connecticut Superior Court, but also all other potential claims arising out of the same transaction"]). To be sure, that Keane was denied leave to amend a related, meritless claim concerning the artwork is of no moment. Even if the denial was purely due to lack of timeliness, res judicata would still apply with equal force (*see Veleron Holding, B.V. v Morgan Stanley*, Index No. 652944/2014, Dkt. 321 [Sup Ct, NY County] [8/2/16 Tr. at 16-17, 48] [plaintiff did not seek to assert claim in prior action because deadline for leave to amend had elapsed], *affd* 151 AD3d at 598 [res judicata applied because plaintiff had enough information to timely assert claim in prior action but chose not to do so]).

Consequently, the arbitration is frivolous and plaintiff is awarded reasonable attorneys' fees incurred in responding to the arbitration demand and in making this motion (*see* 22 NYCRR 130-1.1[a] and [c][1] ["conduct is frivolous 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"]; *see Todtman, Young, Tunick, Nachamie, Hendler, Spizz & Drogin, P.C. v Richardson*, 247 AD2d 318, 318-19 [1st Dept 1998] [sanctioning party for making frivolous arguments in connection with arbitration]; *Mate Picnic v Seatrain Lines, Inc.*, 189 AD2d 622, 623 [1st Dept 1993] [sanctioning party for refusing to withdraw case after being warned that res judicata applied]).

Accordingly, it is

ORDERED that plaintiff's motion to permanently stay the arbitration commenced by Mr. Keane is granted and that arbitration is permanently stayed; and it is further

ORDERED that plaintiff's motion for sanctions is granted and, within one week of entry of this order, plaintiff's counsel shall e-file and submit records for the amounts billed for responding to the arbitration demand and for making this motion accompanied by an affidavit explaining why such amounts are reasonable, and within one week thereafter, Mr. Keane shall e-file and submit an affirmation setting forth any objections to the reasonableness of plaintiff's counsel's fees, and the court will set a hearing on fees *if necessary* after reviewing the submissions. Hard copies of the submissions related to attorneys' fees must be delivered to the Part Clerk (60 Centre Street, Room 228) the day after they are e-filed.

Dated: October 9, 2018

ENTER:

Jennifer G. Schecter, J.S.C.