SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **IAS MOTION 63M**

Justice

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DAE HOON KIM,

Plaintiff,

- v -

NRT NEW YORK LLC d/b/a THE CORCORAN GROUP, CHARLIE ATTIAS a/k/a CHARLES ATTIAS

Defendants.

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INDEX NO. 656328/2019

MOTION DATE 10/19/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant's motion to dismiss is decided as follows:

Plaintiff commenced the instant action by the filing of a summons and complaint on October 28, 2019. The complaint alleges that defendants have failed to pay commissions on brokerage fees from sales of units at the Plaza Condominium as follows: On July 21, 2008, the parties entered into a written contract where, in exchange for use of plaintiff's mother's apartment at the Plaza Condominium, defendant would pay to plaintiff twenty percent of any commission on any "sales leads initiated" during an agreed upon time including the time he had access to the Unit, the "access period," and for a time thereafter, the "fee period", which resulted at any time in the future in a sale, purchase, or rental of a unit at the Plaza Condominium. Under the Contract, the initial "access period" was to commence on July 21, 2008 and expire on September 21, 2008 and the initial "fee period" was to be from July 21, 2008 through February 21, 2009. By agreement dated September 18, 2008, the access period was extended to November 15, 2008 and the "fee period" was extended to July 21, 2009. Corcoran executed a Referral Director Agreement ("RDA")

making Kim a subsidiary broker of Corcoran and required to place any leads through Corcoran. The RDA provides that referral agents "are not allowed to actively sell real estate either part or full time." The RDA states, in relevant part, that a 20% gross commission will be credited to the referral agent "when the Corcoran Group sales agent [Attias] has made contact with the referred customer." Plaintiff alleges that this arrangement lead to sales and rentals of numerous apartments within the building, which plaintiff was not paid a referral fee on between March 2, 2010 and September 20, 2017. By letter dated July 28, 2010, Attias offered to pay Kim and Choo "a referral fee of 10% of the gross commission paid to the Corcoran Group regarding the sale of apartment 1608 at the Plaza Condominium" in exchange for Kim and Choo relinquishing any further claims for commissions under the Contract or the RDA except for apartments 1402, 1406, 1506 and 805 with their current landlords. Plaintiff accepted the agreement but has since alleged that same is void for fraud in the inducement.

On or about March 28, 2013, plaintiff commenced an action in Supreme Court, Kings County outlining the identical facts at issue in the instant action and alleging causes of action for 1. Breach of Contract - Unit 805, 2. Breach of Contract - Sales of Other Units at the Plaza, 3.Breach of Contract - Rental of Units at the Plaza, 4. Accounting 5. Unjust Enrichment 6. Declaratory Judgment and 7. Breach of Contract - Unit 1608. On or about March 2, 2015, the Parties in the Kings County Action entered into a Stipulation of Discontinuance Without Prejudice and Consent to Arbitrate before the Real Estate Board of New York. On or about May 22, 2015, Plaintiff commenced an arbitration proceeding before the Real Estate Board of New York ("REBNY") A review of plaintiff's statement of claim again reveals identical facts and allegations as the 2013 complaint and the instant complaint. By award dated July 23, 2015, the REBNY arbitration panel

awarded Plaintiff $20,448.60 for his share of the commissions earned by Attias and Corcoran resulting from the sale of Unit 805 at the Plaza Condominium.

Based upon the above, plaintiff now asserts causes of action for 1. Breach of Contract for the period September 2010 through July 2015, 2. Breach of Contract August 2015 through August 2019, 3. Unjust Enrichment for the period September 2010 through July 2015, 4. Unjust Enrichment for the period August 2015 through August 2019, 5. Breach of Contract – Rental of Units at the Plaza, 6. Unjust Enrichment -- Rental of Units at the Plaza, and 7. Accounting.

Defendants seek dismissal of the instant action pursuant to CPLR 3211(a)(1), (5), and (7) and for sanctions under 22 NYCRR 130-1.1. Defendants specifically argue that "(a) the claims and issues raised in the Complaint were already fully and finally adjudicated on the merits between the parties and are barred by res judicata and collateral estoppel; (b) even if the claims and issues are not precluded they were unequivocally waived by the express terms of the July 28, 2010 Agreement between the parties; (c) the causes of action are duplicative and not legally cognizable; (d) the causes of action arose over a decade ago and are barred by the applicable statute of limitations; and (e) to the extent any of the causes of action can be maintained, each and every one stems from a commission dispute which was and remains subject to mandatory, binding arbitration before REBNY."

Pursuant to the doctrine of res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties, or those in privity, on the same cause of action (see *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]; *Farren v Lisogorsky*, 87 AD3d 713 [2d Dept 2011]; *Matter of Field Home–Holy Comforter v De Buono*, 238 AD2d 589 [2d Dept 1997]) Res judicata, or claim preclusion, bars relitigation of claims "where a judgment on the merits exists from a prior action between the same parties involving the same subject matter"

(*Matter of Hunter*, 4 NY3d 260, 269[2005]). " [O]nce 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' " (*Xiao Yang Chen v Fischer*, 6 NY3d 94 [2005], quoting O'Brien v City of Syracuse, 54 NY2d 353, 357 [1981]). Res judicata precludes re-litigation of all claims which were raised, or could have been raised, in the prior action. Similarly, collateral estoppel prevents "a party from re-litigating in a subsequent action…an issue which was clearly raised in a prior action or proceeding and decided against that party…whether or not the tribunals or causes of action are the same." *Chiara v. Town of New Castle*, 61 A.D. 3d 915 (2009) (quoting *Ryan*, 62 N.Y. 2d at 500). Arbitration awards in New York are afforded the same preclusive effect as disputes decided by the courts. "The doctrines of res judicata and collateral estoppel are applicable to arbitration awards." *Waverly Mews Corp. v. Waverly Stores Associates*, 741 N.Y.S.2d 826, 827 (1st Dept. 2002).

Here, the stipulation discontinuing the Kings County action specifically states " The dispute set forth in the Amended Complaint (the "Dispute") shall be submitted by Plaintiff to arbitration before the Real Estate Board of New York, Inc. (REBNY") to be arbitrated in accordance REBNY's rules. The parties consent to REBNY' jurisdiction over parties hereto and over the subject matter of the complaint. Any decision concerning the Dispute rendered by REBNY shall be final and binding upon the parties and the Court shall retain jurisdiction solely to enforce any such decision. In addition, the arbitration agreement entered into by the parties specifically states that "pursuant to the applicable provisions of the Civil Practice Law and Rules, all causes of action, controversies, claims and demands whatsoever, now pending and existing between the said parties, as aforesaid, are hereby submitted to said arbitrators to decide the same with all reasonable dispatch, the decision of said arbitrators to be final." As discussed above, the

claims asserted by plaintiff in the Kings County action, the REBNY Arbitration and the instant action are functionally identical, except that the instant action also contains claims for referral fees allegedly earned after the arbitration. As there exists a prior judgment, on the merits, between the parties to this action, arising out of the identical facts, plaintiff's claims asserted in the 2015 arbitration are barred by res judicata and the additional claims asserted in this action are barred by collateral estoppel.

Were the claims not barred as above, plaintiff's claims are also barred by the July 2010 Agreement wherein plaintiff expressly waived any referral fees in exchange for a ten percent referral fee paid on the sale of unit 1608 except for transactions involving the Corcoran Defendants and Units 1402, 1406, 1506, and 805. Plaintiff argues that said agreement is void as plaintiff was fraudulently induced into entering into said agreement. Plaintiff specifically argues that "Attias knowingly misrepresented the contacts he had made in order to deceive Kim and his mother so that he would not have to pay them their agreed upon share of his brokerage fees." Plaintiff further argues that, "because of the fiduciary duty Attias owed to Kim, it is Defendants' burden to show that the July 2010 Agreement was not obtained fraudulently" see *Matter of Aoki v. Aoki*, 27 N.Y.3d 32, 39-40 (2016). However, plaintiff's argument that said agreement is void is itself time barred as an action for rescission "must be brought either within six years from the commission of the fraud, or within two years from the discovery of the fraud or from when the fraud could have been discovered with reasonable diligence." *AXA Equitable Life Ins. Co. v. Malen*, 117 A.D.3d 645 (1st Dept. 2014). As the alleged fraud occurred in 2010 and plaintiff discovered said fraud, at the latest, prior to the filing of the Kings Supreme action, any argument that the agreement was the product of fraud cannot be raised here.

As defendants have established their entitlement to dismissal of this action, the Court declines to consider defendant's additional contentions.

The Court declines to award defendant costs and sanctions at this time.

ORDERED that defendant's motion is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

11/24/2020
DATE

LAURENCE L. LOVE, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE