

<b>Wolff v 149 E. 73rd St. Corp.</b>
2021 NY Slip Op 30493(U)
February 22, 2021
Supreme Court, New York County
Docket Number: 159992/17
Judge: Shlomo S. Hagler
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 17**

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**NORBERT WOLFF,**

**Plaintiff,**

**INDEX NO.: 159992/17**

**Seq. No.: 002**

**-against-**

**149 EAST 73<sup>RD</sup> STREET CORPORATION AND  
MAXWELL KATES, INC.,**

**DECISION & ORDER**

**Defendants.**  
-----X

**HON. SHLOMO S. HAGLER, J.S.C:**

In this action seeking redress for a violation of Labor Law Section §740 (also known as the “Whistleblower Statute”), defendants 149 East 73<sup>rd</sup> Street Corporation and Maxwell-Kates, Inc., move for an order pursuant to CPLR 3211 (a) (5), to dismiss plaintiff Norbert Wolff’s verified complaint as barred by the doctrine of collateral estoppel. Plaintiff opposes the motion.

**BACKGROUND**

Plaintiff, a former employee of defendants, alleges that he was terminated from his position as a doorman at a building located at 149 East 73<sup>rd</sup> Street, New York, New York (the Building) for reporting multiple fire code violations which allegedly occurred in the Building. Plaintiff’s employment was governed by a Collective Bargaining Agreement between plaintiff’s union and defendants. Plaintiff’s union filed a grievance letter claiming plaintiff was unjustly discharged and the matter proceeded to arbitration pursuant to the Collective Bargaining Agreement (NYSCEF Doc. No 30, 31; Collective Bargaining Agreement; Grievance Initiation Letter). At the arbitration, defendants argued that plaintiff was terminated because of repeated

acts of misconduct and insubordination, as he repeatedly reported said fire code violations directly to the Board of Directors of the Building in violation of directives that he report any alleged violations to management and not to the Board president or members (*see* NYSCEF Doc. No. 30; Opinion and Award at 3; NYSCEF Doc. No 1; complaint at 7-8, ¶¶ 17-18; 24-29). Prior to receiving a determination in the arbitration, plaintiff commenced this action alleging a cause of action for retaliatory discharge under Labor Law §740. Plaintiff's Labor Law claim alleges that defendants "retaliated against plaintiff because of his reports of fire violations" (*id.*, at 9, ¶ 26), and that defendants "had no legitimate, non-discriminatory, and/or non-retaliatory reason for terminating plaintiff" (*id.*, at 9, ¶ 30). Plaintiff also asserts a second cause of action for punitive damages on the grounds that defendants' termination of his employment was "wanton, reckless, and intentional" (*id.*, at 10 ¶ 38) and "outrageous in character, extreme in degree and intolerable" (*id.*, at 11, ¶ 40). Defendants filed a pre-answer motion to dismiss (sequence 001) on the grounds that this action is barred by the doctrine of collateral estoppel. Subsequently, defendants withdrew their motion to dismiss (sequence 001), without prejudice, to be renewed upon resolution of the arbitration.

In an undated arbitration Opinion and Award, the arbitrator denied plaintiff's grievance that he was terminated without just cause, and determined that defendants did not violate any provisions of the Collective Bargaining Agreement (NYSCEF Doc. No. 29; arbitrator's undated Opinion and Award). In the instant motion (sequence 002), defendants argue that the arbitration was resolved in their favor and the arbitration award has preclusive effect requiring dismissal of the verified complaint. Defendants contend that plaintiff cannot now claim defendants retaliated against him by terminating his employment because the arbitrator, specifically considered and ruled on the issue of whether plaintiff was terminated for just cause. In opposition, plaintiff

argues that given that the Collective Bargaining Agreement did not specifically include, reference, or incorporate his Labor Law § 740 claim, the agreement does not preclude the statutory cause of action under Labor Law § 740. Plaintiff further argues that collateral estoppel does not apply because the arbitrator did not specifically rule on or judicially determine the material question raised by his instant Labor Law § 740 claim. Moreover, plaintiff claims the instant action seeks a determination on other issues raised in its second cause of action, unrelated to the Labor Law § 740 claim (i.e. punitive and compensatory damages). The motion is decided as set forth below.

### DISCUSSION

Defendants move for an order dismissing the complaint pursuant to CPLR 3211 (a) (5), based upon the doctrine of collateral estoppel.

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Pursuant to CPLR 3211 (a) (5), a party may move for judgment dismissing one or more causes of action on the ground that the cause of action may not be maintained because of collateral estoppel and/or res judicata (*Pine Street Assoc., L.P. v Hicks*, 35 Misc3d 1231(A), 2012 NY Slip Op 50964(U) [Sup Ct, NY County, 2012]). It is well settled that the doctrine of collateral estoppel applies to arbitration awards (*Matter of American Ins. Co. (Messinger—Aetna Cas. & Sur. Co.)*, 43 NY2d 184, 189-190 [1977]). The equitable doctrine of estoppel only applies “if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action” (*Pine Street Assoc. L.P.*, 35 Misc.3d 1231, 2012 NY Slip

Op 50964(U)(A) at \*5). The proponent of collateral estoppel has the burden to demonstrate the identical and decisive issue, while the burden rests on the opponent to establish the absence of a full and fair opportunity to litigate the issue in the prior action or proceeding (*id.*). “The issue of whether a party has had a full and fair opportunity to contest the prior decision requires consideration of the realities of litigation” (*Chambers v City of New York*, 309 AD2d 81, 85 [2d Dept 2003] [internal quotation marks and citation omitted]). Under the doctrine of collateral estoppel, a party may not relitigate “in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same” (*Chiara v Town of New Castle*, 61 AD3d 915, 916 [2d Dept 2009], quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). However, “[c]ollateral estoppel applies only if (1) the issue sought to be precluded is identical to a material issue necessarily decided by the [prior tribunal] in a prior proceeding and (2) there was a full and fair opportunity to contest this issue in [that] tribunal” (*id.*) [internal quotation marks and citation omitted]; see *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455-457 [1985].

Plaintiff’s Labor Law claim is premised upon the allegations that he was terminated in retaliation for reporting fire code violations. “Labor Law § 740 creates a cause of action in favor of an employee who has suffered a ‘retaliatory personnel action’ as a consequence of, inter alia, ‘disclos[ing], or threaten[ing] to disclose to a supervisor or to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety,’ or as a consequence of ‘object[ing] to, or refus[ing] to participate in any such activity, policy or practice in violation of a law, rule or regulation’” (*Fough v August Aichhorn Ctr. for Adolescent Residential Care, Inc.*, 139 AD3d 665, 666 [2<sup>nd</sup> Dept 2016] quoting Labor Law § 740 [2] [a], [c]).

Here, because the issue of retaliation raised by the plaintiff in this action was not actually litigated in the arbitration proceeding, plaintiff cannot be collaterally estopped from litigating that issue in this action (see *Caban v New York Methodist Hosp.*, 119 AD3d 717 [2d Dept 2014]). While the arbitrator made a finding that defendants had just cause for terminating plaintiff's employment, the award was silent on the issue of retaliation. In his decision, although the arbitrator made various factual findings pertaining to plaintiff's employment, plaintiff neither raised a retaliation claim nor did the arbitrator address retaliation. Defendants cite *Humphries v City Univ. of N.Y.*, 146 AD3d 427 [1<sup>st</sup> Dept 2017]) as authority for dismissing this action. *Humphries* however is factually distinguishable on grounds that in *Humphries*, the arbitrator specifically ruled on the retaliation issue. "Preclusive effect will not be given to a prior decision if the particular issue was not actually litigated, squarely addressed, and specifically decided" (*Genger v Genger*, 87 AD3d 871, 873 [1<sup>st</sup> Dept 2011] [internal citations and quotations omitted]). Given that defendants, as the proponents of the motion to dismiss based on collateral estoppel, have not met their burden, any issue as to whether plaintiff waived his right to raise the retaliation claim because he had a full and fair opportunity to litigate that issue at the arbitration is without merit.

Accordingly, that portion of defendants' motion to the extent it seeks an order dismissing the verified complaint based upon collateral estoppel, pursuant to CPLR 3211 (a)(5) is denied.

Defendants argue as an alternative to dismissal, that the Collective Bargaining Agreement requires the parties to arbitrate any further issue, such as the instant claim of retaliation. Article VI entitled "Arbitration" states in pertinent part that "a Contract Arbitrator shall have the power to decide all differences arising between the parties to this Agreement..." (NYSCEF Doc No. 30; Collective Bargaining Agreement at 15, ¶ 1).

The Collective Bargaining Agreement contains provisions governing plaintiff's employment. While it does not specifically include within its scope retaliation claims under the Labor Law, it is clear that the union-negotiated waiver of plaintiff's right to a judicial forum to pursue the statutory claim at issue is clear and enforceable. Plaintiff must avail himself of the grievance procedure set forth in the Collective Bargaining Agreement (*see Matter of Gil v Department of Educ. of the City of N.Y.*, 146 AD3d 688 [1<sup>st</sup> Dept 2017]). Therefore, defendants' motion to the extent that it seeks an order referring this matter to mandatory arbitration on the issue of retaliation and an award of damages, if any, is granted.

### CONCLUSION

Accordingly, it is hereby

ORDERED that defendants' motion sequence 002, pursuant to CPLR 3211 (a) (5), to the extent it seeks an order dismissing the verified complaint is denied; and it is further

ORDERED that defendants' motion sequence 002, to the extent it seeks an order referring this matter to mandatory arbitration is granted; and it is further

ORDERED that all proceedings in this action are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration.

This constitutes the Decision and Order of the Court.

Dated: February 22, 2021

ENTER

  
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J.S.C.