SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS KAHN, III **PART** 32

Acting Justice

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JESSICA DENSON

Plaintiff,

- v -

DONALD J. TRUMP FOR PRESIDENT, INC.,

Defendant.

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INDEX NO. 101616/2017

MOTION DATE

MOTION SEQ. NO. 011

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 011) 249-273 were read on this motion to/for SUMMARY JUDGMENT.

Upon the foregoing documents, the motion is determined as follows:

Plaintiff commenced this action claiming *inter alia* that she endured a hostile work environment, experienced sex discrimination, and faced retaliation related to her employment with Defendant, Donald J. Trump for President, Inc., a corporate entity formed to facilitate Donald J. Trump's 2016 presidential campaign. Plaintiff is the former Director of Hispanic Engagement for Defendant.

Central to this litigation are the non-disclosure and non-disparagement provisions ("NDAs") contained within the employment agreement that Plaintiff executed as a condition of her employment. Among other things, these provisions prohibited Plaintiff from disclosing, disseminating or publishing any confidential information unfavorable to Donald J. Trump, his family or his businesses. Further, the agreement provided Plaintiff could not demean or disparage Trump, his family or his businesses publicly. At the sole election of Defendant, any dispute arising under or relating to the NDAs was to be resolved by binding arbitration.

Defendant filed a demand to arbitrate the issues of whether Plaintiff breached the NDAs and for awards of damages. Defendant filed a motion in this proceeding to compel arbitration which Justice Arlene Bluth denied by order dated August 9, 2018. Justice Bluth found that the arbitration provision could not be interpreted to apply to Plaintiff's affirmative state law claims arising out of her employment. While the motion was *sub judice*, Plaintiff commenced another action against Defendant in United States District Court for the Southern District of New York wherein she sought a declaration that the NDAs were void and unenforceable as against public policy. Plaintiff claims that after she commenced the New York State action, Defendant retaliated against her by bringing an arbitration proceeding wherein Defendant sought determination of its claims that Plaintiff breached the NDAs through disclosure of confidential information and making disparaging statements in connection with this lawsuit.

Defendant moved again to compel arbitration, this time in the District Court, and to dismiss Plaintiff's complaint. By order dated August 30, 2018, Judge Jesse M. Furman granted Defendant's motion finding that the parties had agreed to proceed with binding arbitration and that the validity of the agreement was an issue to be resolved by the arbitrator (*see Denson v Donald J. Trump for President, Inc.*, ____F Supp3d____, 2018 U.S.

Dist. LEXIS 148395 [SDNY 2018]). That Court found its determination was not inconsistent with Justice Bluth's ruling since the federal court claims did not arise out of her employment, but out of the agreement.

After arbitration, at which Plaintiff only tacitly participated, the arbitrator concluded, among other things, that the validity of the NDAs was an issue that was properly before him and found those provisions enforceable. Plaintiff's motion in this action to vacate that award that was denied by Justice Bluth (*see Denson v Donald J. Trump for President, Inc.*, ____Misc3d____, 2019 NY Slip Op 30611[U] [Sup Ct. NY Cty 2019]). The Appellate Division, First Department reversed Justice Bluth and vacated the arbitration award holding that it was "partly made in violation of public policy, and otherwise in excess of the arbitrator's authority" (*see Denson v Donald J. Trump for President, Inc.*, 180 AD3d 446 [1st Dept 2020]). Specifically, the Appellate Division found that while the demand to arbitrate was limited to Plaintiff's statements made in connection with this state action, the arbitration award was made in the context of the federal action in which she sought a declaration that the non-disparagement agreement was unenforceable (*id.* at 454). The balance of the award was based upon certain Twitter posts and statements on a GoFundMe page that were irrelevant since they occurred after the date of the demand to arbitrate and clearly fell outside the scope of the arbitration as set forth by Defendant.

In reaching its conclusion, the Appellate Division, First Department reasoned as follows:

> By concluding that the allegations in the federal action are tantamount to disclosure of confidential information violative of the NDA, the arbitrator improperly punished plaintiff for availing herself of a judicial forum. Defendant is hard-pressed to explain how plaintiff could have pursued her rights without setting forth necessary factual statements for the federal court to consider (*id.*).

Thereafter, Plaintiff commenced a class action suit against Defendant in New York State Supreme Court which sought a declaratory judgment on behalf of all class members that the employment agreement containing the NDA was void. It further sought an injunction prohibiting enforcement of the NDA. That action was removed to federal court (*see Denson v Donald J. Trump for President, Inc.*, 20-CV-4737 (PGG) [SDNY 2020]). In that action, Judge Paul G. Gardephe denied Defendant's motion to dismiss and granted Plaintiff's motion for summary judgment to the extent that the NDAs within the employment agreement were declared invalid and unenforceable as to Plaintiff. Judge Gardephe held that neither the non-disclosure nor the non-disparagement clauses were sufficiently definite to be enforceable (*see Denson v Donald J. Trump for President, Inc.*, ____F Supp3d____, 2021 U.S. Dist. LEXIS 61270 [SDNY 2021]). In declining to "Blue-Pencil" or pare down the scope of the NDAs, Judge Gardephe noted:

> Moreover, the Campaign's past efforts to enforce the non-disclosure and non-disparagement provisions demonstrate that it is not operating in good faith to protect what it has identified as legitimate interests. The evidence before the Court instead demonstrates that the Campaign has repeatedly sought to enforce the non-disclosure and non-disparagement provisions to suppress speech that it finds detrimental to its interests (*id.* at *48).

While the above motion was *sub judice* this Court granted Plaintiff's motion to amend her complaint to include a cause of action for retaliation pursuant to Section 8-107[7] of New York City Human Rights Law based upon Defendant's action in bringing the arbitration and attempting to enforce the award therein.

Now, Plaintiff moves for summary judgment on her retaliation cause of action on the basis that this claim has been determined as a matter of law in Plaintiff's favor by the Appellate Division, First Department

and in the federal court relying on the doctrines of *res judicata* [claim preclusion] and collateral estoppel [issue preclusion].

"The preclusive effect of a judgment is determined by two related but distinct concepts—issue preclusion and claim preclusion—which collectively comprise the doctrine of '*res judicata*'" (*Paramount Pictures Corp., v Allianz Risk Transfer AG*, 31 NY3d 64, 72 [2018]). Under the principle of *res judicata*, a final judgment on the merits of a claim precludes re-litigation by a party, and those in privity with that party, of that claim and all claims arising out of the same transaction, or series of transactions, even if based upon different theories or if seeking different remedies (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *Schwartzreich v E.P.C. Carting Co.*, 246 AD2d 439 [1st Dept 1998]; *see also Sclafani v Story Book Homes, Inc.*, 294 AD2d 559 [2d Dept 2002]; *Winkler v Weiss*, 294 AD2d 428 [2d Dept 2002]). In other words, the "transactional analysis" of *res judicata* adhered to in this state "preclude[s] the litigation of matters that could have or should have been raised in a prior proceeding arising from the same, 'factual grouping'" (*Board of Managers of Windridge Condos. One v Horn*, 234 AD2d 249 [2d Dept 1996]). Ultimately, application of *res judicata* requires the claim sought to be resolved thereby to have been "reasonably and plainly comprehended to be within the scope" of the prior dispute (*see Kim v NRT New York LLC.*, ___AD3d___, 2021 NY Slip Op 05291 [1st Dept 2021]).

The doctrine of collateral estoppel prevents a party from relitigating an issue that was "raised, necessarily decided and material in the first action", provided the party had a full and fair opportunity to litigate the issue (*see Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]; *Ryan v New York Tel Co.*, 62 NY2d 494, 500 [1984]; *Sclafani v Story Book Homes, Inc.*, supra). The doctrine is an equitable defense "grounded in the facts and realities of a particular litigation, rather than rigid rules" (*Buechel v Bain*, 97 NY2d 295, 303 [2001]). "[T]he burden rests upon the proponent of collateral estoppel to demonstrate the identicality and decisiveness of the 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" (*Ryan v New York Tel Co.*, supra at 501).

The preclusive effect of these doctrines may operate based upon issues resolved in an earlier arbitration proceeding (*see Mahler v Campagna*, 60 AD3d 1009 [2d Dept 2009]; *see also Rembrandt Ind. v Hodges Intl.*, 38 NY2d 502, 504 [1976]; *Lopez v Parke Rose Mgt. Sys.*, 138 AD2d 575, 577 [2d Dept 1988]) as well as determinations of previous state appellate and federal courts (*see Milone v City University of New York*, 153 AD3d 807, 808-809 [2d Dept 2017]; *see also Buechel v Bain*, supra; *Emmons v Broome County*, 180 AD3d 1213 [3d Dept 2020]).

Plaintiff posits the decisions of the Appellate Division, First Department in *Denson v Donald J. Trump for President, Inc.*, 180 AD3d 446 [1st Dept 2020] and Judge Gardephe in *Denson v Donald J. Trump for President, Inc.*, ____F Supp3d___, 2021 U.S. Dist. LEXIS 61270 [SDNY 2021] satisfy the requisites of both doctrines. To establish *prima facie* the applicability of these principles, Plaintiff relies on the Appellate Division, First Department's finding that "the arbitrator improperly punished Plaintiff for availing herself of a judicial forum" as well as Judge Gardephe's notations that Defendant was "not operating in good faith to protect what it has identified as legitimate interests" and that Defendant "has repeatedly sought to enforce the non-disclosure and non-disparagement provisions to suppress speech that it finds detrimental to its interests"

With respect to *res judicata*, it cannot by any measure be concluded that the substantive issues underlying Plaintiff's New York City Human Rights Law §8-107[7] were comprehended to be within the scope of either proceeding. Moreover, neither court made a holding that Defendant violated each and every element

under that statute.[1] In vacating the arbitration award, the Appellate Division concluded the arbitrator, not Defendant, penalized Plaintiff for the allegations she made in the federal action. Indeed, regarding Plaintiff's accusation that Defendant used the arbitration proceeding as a litigation tactic, the Appellate Division expressly eschewed making a factual analysis of Defendant's "motives in demanding arbitration" as it would be "contrary to established law that a strong public policy justifying the vacatur of an arbitration award must be apparent from the face of the award, without extended factual inquiry". The holding by Judge Gardephe that the NDAs were invalid and unenforceable as to Plaintiff was based upon a determination the NDAs were not sufficiently definite. The comment that Defendant acted in "bad faith" was, at most, dicta.

Concerning collateral estoppel, neither the Appellate Division nor Judge Gardephe necessarily decided the issue of retaliation, either in whole or in part, when coming to their conclusions (*see generally Bauhouse Group I, Inc., v Kalikow*, 190 AD3d 401, 402 [1st Dept 2021]). In any event, the disparate nature of the prior proceedings and the matter before this Court demonstrates Defendant was not afforded a full and fair opportunity to litigate Plaintiff's retaliation claim under New York City Human Rights Law §8-107[7] (*see generally Simmons v Trans Express Inc.*, 37 NY3d 107, 112 [2021]).

Plaintiff's argument that the other evidence proffered in support of the motion supports summary judgment on the retaliation claim is without merit. As to whether Plaintiff's "employer engaged in conduct which was reasonably likely to deter Plaintiff from engaging in a protected activity," the submitted evidence consists of unsworn, unsigned excerpts of testimony from Michael Cohen, Donald J. Trump's former personal attorney, before the Committee on Oversight and Reform of the United States House of Representatives. The transcript does not indicate that Cohen was offering testimony on behalf of Defendant, as opposed to the Trump Organization, or even whether he had any involvement with the day-to-day operations of Defendant. At best, the statements are nothing more than personal opinions. Plaintiff's reliance on Defendant's arbitration demand as self-evident proof of conduct which was reasonably likely to deter Plaintiff is also unavailing. Defendant's right to proceed to arbitration was agreed to by both parties, and this Court as well as the District Court both endorsed Defendant's choice to proceed to arbitration. In sum, the submitted evidence does not demonstrate *prime facie* every element of Plaintiff's retaliation cause of action (*see generally Sandiford v City of New York Dept. of Educ.*, 22 NY3d 914, 916-917 [2013]).

Accordingly, Plaintiff's motion for summary judgment is denied.

10/26/2021
DATE

FRANCIS KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III J.S.C.

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

[1] In order to establish a claim of retaliation under New York City Human Rights Law §8-107[7], Plaintiff must show that (1) she engaged in a protected activity as that term is defined under the NYCHRL; (2) her employer was aware that she participated in such activity; (3) her employer engaged in conduct which was reasonably likely to deter a person from engaging in that protected activity; and (4) there is causal connection between the protected activity and the alleged retaliatory conduct (*see eg Bilitch v New York City Health & Hospitals Corp.*, 194 AD3d 999 [2d Dept 2021]).