SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

HERBERT FEINBERG, Individually and as Assignee of I.A. ALLIANCE CORP.,

Plaintiff,

-against-

JEROME S. BOROS, ESQ., ROBINSON SILVERMAN, PEARCE, ARONSOHN & BERMAN, LLP, and BRYAN CAVE, LLP,

Defendants.

DECISION AND ORDER
Index No. 108498-03
Motion Sequence No. 2

Richter, J.:

In this action, plaintiff Herbert Feinberg alleges that defendants Jerome S. Boros, Esq. and his former law firm, Robinson Silverman, Pearce, Aronsohn & Berman, LLP ("Robinson Silverman") committed legal malpractice.[1] This dispute has its genesis in an arbitration proceeding between Feinberg and his former business partner Norman Katz. In a decision dated April 8, 2004, the Court granted defendants' motion to dismiss the complaint. In its decision, the Court concluded that Feinberg's complaint did not establish that defendants' alleged negligence was the proximate cause of his damages. The Court found that Feinberg failed to allege facts showing that defendants would have succeeded in ensuring that the arbitration award contained language limiting the collateral estoppel effect of the award. In particular, the Court held that the complaint lacked facts showing that Katz was, or would have been, amenable to an agreement restricting the arbitration award's collateral estoppel effect.

Feinberg now moves to vacate the judgment of dismissal and for leave to amend the

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[1] At the time of acts alleged in the complaint, Boros was of counsel to Robinson Silverman. That firm subsequently merged into defendant Bryan Cave, LLP. In this decision, "Robinson Silverman" shall refer to both firms.

complaint to add more facts showing that Katz would have been amenable to restricting the arbitration award's collateral estoppel effect.[2] It is well-settled that leave to amend should be freely granted provided there is no prejudice to the non-moving party and that the amendment is not plainly lacking in merit. C.P.L.R. § 3025[b]); *Edenwald Contr. Co. v City of New York*, 60 N.Y.2d 957 (1983); *Lambert v. Williams*, 218 A.D.2d 618 (1st Dept. 1995). The Court has reviewed the new material in the amended complaint and is satisfied that the new facts rectify the infirmities identified in the Court's original decision. The amended complaint now contains sufficient facts from which one can infer that Katz would have been amenable to an agreement limiting the estoppel effect of the arbitration award.

Defendants do not argue otherwise. Instead, defendants contend that the new complaint is legally insufficient and would be subject to dismissal for a different reason. Defendants maintain that even if Feinberg and Katz had agreed to a post-arbitration limiting agreement, Feinberg's claims against Mahoney Cohen would still have been dismissed on collateral estoppel grounds. Defendants argue that a limitation on collateral estoppel made by parties to an arbitration does not apply to a third party asserting a collateral estoppel defense in a subsequent litigation with one of the parties.[3] Thus, defendants claim that as a matter of law, Feinberg's complaint does not state a cause of action.

In *State Farm Insurance Co. v. Smith*, 277 A.D.2d 390 (2d Dept. 2000), the arbitration agreement contained a clause stating that the arbitrator's decision was to be conclusive "only as to

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[2] The fact that judgment has been entered dismissing the original complaint does not preclude Feinberg from seeking leave to amend. *See Donovan v. Rothman*, 253 A.D.2d 627 (1st Dept. 1998).

[3] Defendants advanced this argument in their original motion to dismiss; however, the Court did not reach the issue because it dismissed the complaint on other grounds.

the matters being adjudicated in said arbitration, pertaining to the parties present," and was to have no "collateral estoppel effect as to the same or similar issues in companion claims or actions arising out of the incident which is the subject of said arbitration." In a subsequent claim asserted by Kathleen Smith, one of the arbitrating parties, against State Farm, a third party, State Farm argued that Smith's claim was barred by collateral estoppel arising out of the earlier arbitration. The court disagreed and held that because of the limiting clause in the arbitration agreement, the prior arbitration decision did not preclude Smith from pursuing her claim against State Farm.

Similarly, in *Kerins v. Prudential Property & Casualty*, 185 A.D.2d 403 (3d Dept. 1992), the plaintiff sought a judgment declaring that the defendant was collaterally estopped from denying coverage based on a prior arbitration between the defendant and a different party. The appellate court affirmed the trial court's dismissal of the collateral estoppel claim on the grounds that the arbitration agreement contained a provision that the arbitration award would have no collateral estoppel effect. The court reasoned: "The intention of the two insurance companies in this case not to have collateral estoppel apply to the arbitration decision is clear because of their agreement and the explicit rules governing their arbitration process. If the arbitration decision were to be given collateral estoppel effect here it would change that expectation."

Thus, it is clear that defendants here cannot establish, as a matter of law, that if Feinberg and Katz had entered into an agreement limiting the collateral estoppel effect of the arbitration award, the Mahoney Cohen lawsuit would nevertheless have been dismissed on collateral estoppel grounds. To the contrary, based on the authority of *Smith* and *Kerins*, the Court concludes that had Feinberg and Katz entered into the limiting agreement, Mahoney Cohen would likely not have prevailed on its collateral estoppel defense to Feinberg's claims.

Despite the clear holdings of *Smith* and *Kerins*, defendants nevertheless point to *dicta* in *American Ins. Co. v. Messinger*, 43 N.Y.2d 184, 194 (1977). In that case, the court opined that arbitrating parties that "formulate their own contractual restrictions on carry-over estoppel effect . . . cannot, of course, impose similar limitations which would impair or diminish the rights of third persons." *American Ins. Co. v. Messinger*, 43 N.Y.2d at 194. Defendants argue that this language stands for the proposition that an agreement by arbitrating parties to limit collateral estoppel effect does not apply to a third party in a subsequent proceeding, and that the third-party is entitled to rely on the normal rules of collateral estoppel. The Court however, does not agree that the *Messinger dicta* supports the broad proposition that defendants urge. Nor did the courts in *Kerins* and *Smith*, both of which cite *Messinger*, view that decision in the broad manner proposed by defendants. *See also Kerins v. Prudential Property & Casualty*, 148 Misc.2d 660 (Sup. Ct. Albany Cty.)(rejecting same argument made here).

Finally, defendants argue that as a matter of law, they were not negligent in failing to advise Feinberg to seek an agreement with Katz limiting the collateral estoppel effect of the arbitration award. Defendants maintain that since the *Smith* decision was not rendered until November 2000, they could not have been negligent in late 1999 and early 2000 when their alleged failure to advise occurred. However, the *Kerins* decision was rendered in 1992, long before the alleged negligence took place.[4] Moreover, the alleged negligence here involves application of collateral estoppel principles, hardly a novel area of the law. At this early stage in the litigation, the Court cannot conclude, as a matter of law, that defendants were not negligent Accordingly, it is

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[4] The Court disagrees with defendants' contention that *Kerins* supports their position that a collateral estoppel limiting agreement does not apply to third parties.

ORDERED that plaintiff's motion to vacate the judgment and for leave to amend the complaint is granted, the judgment is vacated and the complaint attached to the moving papers is deemed filed and served; and it is further

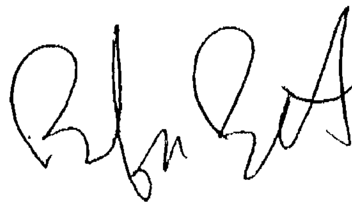
ORDERED that defendants shall file and serve an answer to the amended complaint within twenty days of the date of this decision; and it is further

ORDERED that plaintiff's motions for leave to reargue and renew are denied as moot;[5] and it is further

ORDERED that this case shall be marked active in the court system's computers, and the parties are directed to appear for a Preliminary Conference in Part 24 on October 6, 2004 at 10:30 a.m.

This constitutes the decision and order of the Court.

September 3, 2004



Justice Rosalyn Richter

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[5] *See Aikens Construction of Rome, Inc. v. Simons*, 284 A.D.2d 946 (4th Dept. 2001)