

Herbert Feinberg, etc., Plaintiff-Respondent, v. Jerome S. **Boros**, Esq., et al., Defendants-Appellants.

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SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

2005 N.Y. App. Div. LEXIS 4294

April 26, 2005, Entered

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING THE RELEASE OF THE FINAL PUBLISHED VERSION.

CORE TERMS: arbitration award, collateral estoppel effect, legal malpractice, former partner, estoppel, amend

COUNSEL: Bryan Cave LLP, New York (James M. Altman of counsel), for appellants.

Storch Amini & Munves PC, New York (Steven G. Storch of counsel), for respondent.

JUDGES: Tom, J.P., Mazzarelli, Marlow, Nardelli, Sweeny, JJ.

OPINION: Order, Supreme Court, New York County (Rosalyn **Richter**, J.), entered September 9, 2004, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to vacate the order dismissing the complaint and to amend the complaint, unanimously affirmed, without costs.

In 1997, plaintiff and his former partner, Norman Katz, submitted to arbitration the issue of the final purchase price of Katz's share of the jointly owned I. Appel Corporation, thus barring litigation of plaintiff's claims against the corporation's accounting firm (*I. Appel Corp. v Mahoney Cohen & Co.*, 294 A.D.2d 196, 742 N.Y.S.2d 239 [2002]; 6 A.D.3d 279, 774 N.Y.S.2d 701 [2004], *lv denied* 4 N.Y.3d 701, 824 N.E.2d 48, 790 N.Y.S.2d 647 [2004]).

Plaintiff now seeks damages resulting from the alleged negligence of their former attorneys in failing to move to amend the arbitration award to insert [*2] language limiting the collateral estoppel effect of the award. We agree that plaintiff's pleading of his legal malpractice cause of action was sufficient to survive defendants' original CPLR 3211(a)(7) motion. From the alleged facts, accepting them as true, according them the benefit of every possible favorable inference, and evaluating them only as to whether they fit within any cognizable legal theory, one could infer that plaintiff's former partner would have been amenable to an agreement limiting the estoppel effect of the arbitration award. Defendants have not established, as a matter of law, that even if plaintiff and Katz had entered into an agreement limiting the collateral estoppel effect of the arbitration award, the Mahoney Cohen lawsuit would nonetheless have been dismissed on collateral estoppel grounds (*Matter of American Ins. Co. [Messinger - Aetna Cas. & Sur. Co.]*, 43 N.Y.2d 184, 371 N.E.2d 798, 401 N.Y.S.2d 36 [1977]; *accord Kerins v Prudential Prop. & Cas.*, 185 A.D.2d 403, 585 N.Y.S.2d 637 [1992]). In circumstances involving arbitration, the parties themselves can formulate their own contractual restrictions on the carry-over estoppel effect (*Matter of State Farm Ins. Co. v Smith*, 277 A.D.2d 390, 717 N.Y.S.2d 210 [*3] [2000]). Accordingly, plaintiff's proposed amended complaint sufficiently states a claim for legal malpractice (*Deitz v Kelleher & Flink*, 232 A.D.2d 943, 649 N.Y.S.2d 85 [1996]; *see also Tenzer, Greenblatt, Fallon & Kaplan v Ellenberg*, 199 A.D.2d 45, 604 N.Y.S.2d 947 [1993]).

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