

**PARKER MADISON PARTNERS Plaintiff,
v.
AIRBNB, INC., Defendant.**

INDEX NO. 155490/2018

**SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY PART IAS MOTION
39EFM**

**RECEIVED: April 26, 2019
April 25, 2019**

NYSCEF DOC. NO. 33

PRESENT: HON. SALIANN SCARPULLA Justice

MOTION DATE 03/27/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

In this action to recover damages for deceptive trade practices and unfair competition, defendant Airbnb, Inc. ("Airbnb") moves, pursuant to CPLR § 3211(a) (5) and (7), to dismiss the putative class action complaint filed by plaintiff Parker Madison Partners ("Parker Madison").

Parker Madison is a New York company engaged "in the business of facilitating residential rentals for which it receives commissions based on a percentage of the rent." The complaint first describes New York state requirements for licensed real estate brokers and then asserts that Parker Madison is a licensed real estate broker that has "expended considerable time and money to acquire and maintain its license."¹

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The complaint states that Airbnb facilitates "tens of thousands" of rental transactions daily in New York City and that it deducts and retains a 3% commission on the revenue from the rentals completed through its website. According to Parker Madison, Airbnb's rental transactions on New York properties meet the legal definition of "real estate broker" under New York Real Property Law ("NYRPL") § 440 yet Airbnb does not have a New York real estate broker's license.

Parker Madison states that brokers are required to provide disclosures, pursuant to New York State Disclosure Form ("DOS 1735-a"), regarding the nature of their agency relationship with consumers. Parker Madison alleges that Airbnb neither executes nor asks its members to execute a DOS 1735-a. The complaint posits that because Airbnb does not comply with New York's regulatory

scheme for brokers, it is able to overrun the marketplace with its substantial resources and compete for revenue reserved for real estate brokers like Parker Madison.

The complaint alleges that Parker Madison, in its role as a residential building manager/exclusive broker, "has had units advertised and rented through Airbnb without his knowledge or authorization." Further the complaint alleges that, due to Airbnb's offers of services that brokers like Parker Madison are authorized to provide, Airbnb diverts business away from Parker Madison and other class members. And, the complaint states that Airbnb generates billions of dollars while incurring zero of the costs and burdens that Parker Madison and class members incur in order to operate as New York real estate brokers.

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Parker Madison states that studies show that Airbnb has a "profound impact" on the supply of units available for leasing, harming Parker Madison and class members. Parker Madison demands that Airbnb comply with the laws pertaining to brokers.

Federal Court Action

This action is not the first brought by Parker Madison against Airbnb. On November 17, 2016, Parker Madison filed a putative class action (the "First Federal Complaint") in the United States District Court for the Southern District of New York seeking injunctive and declaratory relief under the NYRPL (the "Federal Action"). In the Federal Action Parker Madison included a claim under New York General Business Law ("GBL"). Both causes of action were based on Parker Madison's allegation that Airbnb operates as an unlicensed real estate broker in violation of the NYRPL.

Parker Madison moved for summary judgment in the Federal Action and, at a preliminary conference before Judge Vernon Broderick in the Southern District, counsel for Airbnb: 1) argued that Parker Madison's First Federal Complaint should be dismissed because Parker Madison lacked standing and RPL § 440 does not permit injunctive relief; and 2) expressed its intent to file a motion to dismiss on these grounds. As a result, Judge Broderick stayed briefing on the summary judgment motion and set up a briefing schedule on the motion to dismiss.

Parker Madison then filed an amended complaint in the Southern District on December 26, 2016 (the "Second Federal Complaint") which retained the claim under GBL § 349 (for deceptive business practices) and replaced the claim under the NYRPL

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with a claim for unfair competition. Airbnb moved to dismiss the Second Federal Complaint based on lack of standing and failure to state a claim.

On September 29, 2017, Judge Broderick dismissed, without leave to amend, the Second Federal Complaint. Judge Broderick found that Parker Madison lacked Article III standing because it failed to establish injury-in-fact. *Parker Madison Partners v. Airbnb, Inc.*, 283 F.Supp.3d 174, 181-182 (S.D.N.Y. 2017) (the "SDNY Decision").² In the SDNY decision Judge Broderick found that Parker Madison

[did] not allege any actual injury tied to Airbnb's actions. Rather, Plaintiff's allegations consist of conclusory statements and untethered assertions culminating in the claim that Airbnb's continued

operation would have 'severe repercussions to the commercial space reserved for licensed real estate brokers and render the protections of RPL § 440... meaningless.

Id. at 180.

Moreover, Judge Broderick opined that

Plaintiff's general allegations of 'damage to their business,' 'threats to their industry, and the professional standards' of that industry, and 'substantial lost revenues' - not directly tied to injury suffered by Plaintiff - do not establish any cognizable injury as they do 'not include a single example' or give any details whatsoever as to any actual injury to Plaintiff connected to Airbnb's activities.

Id. at 181. The SDNY Decision also stated that despite Parker Madison having the opportunity to point to specific facts in support of its own injury or that of the putative

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class - other than Airbnb's alleged violation of the NYRPL - it failed to do so and that failure was fatal to its claims. *Id.*

Parker Madison did not appeal the SDNY Decision. However, on October 23, 2017, Parker Madison sent a letter to Judge Broderick requesting the court to "reopen this case to give Plaintiff the opportunity to amend its complaint." Judge Broderick denied Parker Madison's request in a memorandum endorsement dated May 1, 2018.

Having been rebuffed in federal court, one month later, on June 11, 2018, Parker Madison filed its class action complaint in this court, on behalf of itself and "[a]ll licensed real estate brokers and real estate brokerage companies currently licensed in the State of New York who operate in and derive revenue from the residential real estate market," asserting causes of action for deceptive trade practices and unfair competition.

Airbnb now moves to dismiss the complaint based on collateral estoppel and for failure to state a cause of action.

Discussion

CPLR § 3211(a)(5) requires dismissal of an action when it "may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds."

Collateral estoppel, a narrower category of res judicata, "precludes a party from relitigating 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." *Ryan v. New York Tel. Co.*, [62 N.Y.2d 494](#),

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500 (1984) (citations omitted). To invoke the doctrine of collateral estoppel, two requirements are necessary: 1) "there must be identity of parties, and identity of issues that were decided in the prior action and decisive of the present action"; and 2) "there must have been a full and fair opportunity to

contest the decision now said to be controlling." [In re Peyton, 166 A.D.3d 120](#), 132 (1st Dept. 2018) (citations omitted).

A defendant asserting collateral estoppel "must demonstrate that the decisive issue was necessarily decided in the prior action against [the] party" it seeks to preclude in the new action. [Beuchel v. Bain, 97 N.Y.2d 295](#), 304 (2001). Then the "party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination." *Id.* Here, plainly there is an identity of parties. Thus, the only issues to examine are whether there is an identity of issues in this action and the Federal Action, and whether Parker Madison had a fair opportunity to be heard in the Federal Action.

A. Identity of Issues

Airbnb argues that Parker Madison's failure to establish that it was injured by Airbnb was "necessarily decided" in the Federal Action and is determinative of the action before me. In opposition, Parker Madison contends that the issue here is not the same as in the Federal Action. Parker Madison posits that in the Federal Action the issue decided was whether the Second Federal Complaint sufficiently alleged facts to establish injury for Article III standing, whereas the issue in this Court is whether the complaint sufficiently alleges facts to state a cause of action.

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Parker Madison's claims in the present action are substantially identical to its claims in the Federal Action. Moreover, contrary to Parker Madison's assertion, almost all of the allegations in the complaint here were also made in the Federal Action. The only apparently new allegation is that Parker Madison "has had units advertised and rented through Airbnb without his [sic] knowledge or authorization." No units are identified nor does Parker Madison allege any injury resulting from this allegation. Indeed, Parker Madison's allegations here, as in the Second Federal Complaint, remain general and conclusory.³ Significantly, any "new" allegations here do not remedy the defects in the Second Federal Complaint regarding the establishment of injury.

Parker Madison's failure to establish injury-in-fact, based on the same allegations as asserted in this action, was plainly decided by Judge Broderick in the Federal Action. That the issue of injury-in-fact in the Federal Action was decided in the context of Article III standing does not change that conclusion. "[W]here a question of fact material to the merits has been decided by and is essential to a judgment for defendant . . . such determination is conclusive upon the parties in a subsequent action either for the same or a different cause of action." [Cartesian Broadcasting Network, Inc. v. Robeco USA, 10 Misc.3d 1060\(A\)](#) at *2 (Sup. Ct. N.Y. Cty. June 6, 2005), *aff'd*, [43 A.D.3d 311](#), 311-312 (1st Dept. 2007) (upholding lower court's dismissal of plaintiff's complaint based on collateral estoppel).

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In the SDNY Decision Judge Broderick stated that in order to have standing, Parker Madison was required to "establish 'first, that it has sustained an 'injury in fact' [and] second, that the injury was in some sense caused by [Airbnb's] action or omission." [Parker Madison Partners](#), 283 F.Supp.3d at 179 (citations omitted). Judge Broderick then found that Parker Madison lacked standing is because it failed to "establish any cognizable injury as they [did] 'not include a single example' or give any details whatsoever as to any actual injury to [Parker Madison] connected to Airbnb's activities." *Id.* at 181.

Here, injury is an element of both claims asserted in the complaint - violation of GBL § 349 and unfair competition. See *Stutman v. Chemical Bank*, [95 N.Y.2d 24](#), 29 (2000) (stating that a "plaintiff under section 349 must prove.... that the plaintiff suffered injury as a result of the deceptive act"); *Julie Research Labs. v. General Resistance*, [25 A.D.2d 634](#), 634 (1st Dept. 1966) (finding that plaintiff's cause of action for unfair competition failed because the complaint did not allege that plaintiff sustained any unlawful business injury); Restatement (Third) of Unfair Competition § 1 (1995) (an element of a claim for unfair competition is that defendant "causes harm to the commercial relations" of plaintiff). Thus, a question of fact material to the merits (*i.e.* injury) was decided by the federal court and was essential to its judgment for Airbnb based on lack of jurisdiction.⁴ Accordingly, this determination by the federal court

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precludes Parker Madison's claims, both of which require establishing injury, in this state court action. See *Cartesian Broadcasting Network, Inc.*, 43 A.D.3d at 312.

B. Full and Fair Opportunity to Contest the Decision

Parker Madison argues that even if I find an identity of issues that were decided in the Federal Action, collateral estoppel is still be inapplicable because Parker Madison did not have a full and fair opportunity to litigate the issue of injury in the Federal Action. Parker Madison contends that it did not have a prior opportunity "to remedy what the federal court deemed to be a pleading deficiency regarding injury."

Parker Madison submitted two complaints in the Federal Action. The SDNY Decision noted that although Parker Madison had the opportunity to highlight facts in support of its injury, it failed to do so. Parker Madison's request to submit a third complaint in the Federal Action was denied because it did not show "good cause for its failure to address or adequately plead standing in its [Second Federal Complaint]." Instead of appealing the denial of its request to submit a third complaint in the Federal Action, Parker Madison filed this state court action approximately one month later.

In light of the foregoing, Parker Madison cannot show that it was denied a full and fair opportunity to litigate the issue of injury in the prior Federal Action. See *Wang v. Simon, Eisenberg & Baum, LLP*, [165 A.D.3d 546](#), 436-437 (1st Dept. 2018) (plaintiff

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claimed that he did not have a full and fair opportunity to litigate his claims in federal court but failed to point to any evidence that he was unable to present to the federal courts); *Williams v. New York City Transit Authority*, No. 505636/16, 2019 WL 1549176, at *2 (2d Dept. Apr. 10, 2019); *Miller v. Falco*, [170 A.D.3d 707](#), 707 (2d Dept. 2019).

Where, as here, "the parties in the State and Federal proceedings are identical and where the merits of the plaintiff's claims were decided by the Federal Court after the plaintiff was afforded a full and fair opportunity to litigate, collateral estoppel precludes relitigation of the claims." *Browning Ave. Realty Corp. v. Rubin*, [207 A.D.2d 263](#), 266 (1st Dept. 1994) (holding that the state court complaint should be dismissed because the federal court specifically resolved the same issues). Parker Madison may not bring its identical claims to state court to re-litigate the unfavorable outcome it received in federal court. See *Sanders v. Grenadier Realty, Inc.*, [102 A.D.3d 460](#), 461 (1st Dept. 2013) (precluding re-litigation of issues underlying state claim on collateral estoppel grounds where identical issues were addressed by federal court even though federal court declined to exercise jurisdiction over the state claims).

For the foregoing reasons I dismiss Parker Madison's complaint as barred by collateral estoppel. See *Pinnacle Consultants v. Leucadia Nat'l Corp.*, [94 N.Y.2d 426](#), 431-432 (2000) (finding that issues had been raised and decided against plaintiff in previous federal action and, as a result, dismissing shareholder derivative action on basis of collateral estoppel).⁵

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In accordance with the foregoing, it is

ORDERED that defendant Airbnb, Inc.'s motion to dismiss the complaint filed by plaintiff Parker Madison Partners is granted, with prejudice, and the complaint is dismissed in its entirety against defendant Airbnb, Inc.; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

4/25/2019
DATE

/s/
SALIANN SCARPULLA, J.S.C.

Footnotes:

- ¹ Parker Madison's president, Samuel Irlander, has a brokers' license in his own name and Parker Madison serves as his brokerage.
- ² The SDNY Decision noted that because it found that Parker Madison lacked standing, it did not reach Airbnb's Rule 12(b)(6) failure to state a claim arguments nor its "statutory standing" arguments.
- ³ The complaint is replete with general allegations. For example, Parker Madison claims that Airbnb "redirected a significant amount of the business in the residential real estate market to itself and away from the Plaintiff" without providing any specific details.
- ⁴ Parker Madison argues that dismissals for lack of standing, like the Federal Action, are not judgments on the merits that require claim preclusion and cited to *Wells Fargo Bank, N.A. v. Ullah*, No. 13 Civ. 0485 (JPO), 2014 WL 470883, at *4 n.4 (SDNY Feb. 6, 2014). The *Wells Fargo* case, however, is inapposite as the present action hinges on issue rather than claim preclusion. And, there is case law holding that collateral estoppel applies where a question of fact material to the merits was decided by and essential to a judgment in defendant's favor due to lack of jurisdiction. See *Cartesian Broadcasting Network, Inc.*, 43 A.D.3d at 311-312.
- ⁵ Because I am dismissing on the grounds of collateral estoppel, I do not address Airbnb's arguments for dismissal based on failure to state a claim.
