

## C

Motions, Pleadings and Filings

Supreme Court, Queens County, New York.  
NEW YORK COOLING TOWERS, INC., Plaintiff,  
v.

Eric GOIDEL, Esq. and Borah Goldstein Altschuler  
Schwartz & Nahins, P.C.,  
Defendants.

July 11, 2005.

**Background:** Contractor brought action against owner of cooperative apartment building, its attorney, and his law firm, seeking to recover attorney fees incurred as a result of owner's cancellation of contract for replacement of all convector units within the building. Defendants moved to dismiss.

**Holdings:** The Supreme Court, Queens County, Peter J. Kelly, J., held that:

- (1) arbitration award in favor of contractor did not present collateral estoppel bar to contractor's action to recover attorney fees;
  - (2) contractor's allegations supported claim against attorney and his law firm;
  - (3) splitting doctrine did not preclude contractor's claim for attorney fees; and
  - (4) defendants' statements during arbitration were not immunized under principle that statements were made during course of litigation.
- Motion denied.

West Headnotes

**[1] Alternative Dispute Resolution**  **380**  
[25Tk380 Most Cited Cases](#)

(Formerly 33k82(1) Arbitration)

Although an arbitration decision can have preclusive effect on a subsequent judicial proceeding, the arbitration may only act as a bar when it is clear that the issue was actually litigated, squarely addressed, and specifically decided.

**[2] Alternative Dispute Resolution**  **386**  
[25Tk386 Most Cited Cases](#)

(Formerly 33k82(5) Arbitration)

Arbitration award in favor of contractor did not present collateral estoppel bar to contractor's action against owner of cooperative apartment building, its attorney, and his law firm, seeking to recover attorney fees incurred as a result of owner's cancellation of contract for replacement of all convector units within the building, where there was no award of attorney fees made by the arbitrators, and there was no indication in arbitrators' decision that issue of attorney fees was even addressed by the parties.

**[3] Costs**  **194.32**


[102k194.32 Most Cited Cases](#)

A prevailing party in a breach of contract proceeding is not entitled to an award of attorney fees.

**[4] Costs**  **194.25**

[102k194.25 Most Cited Cases](#)

Under exception to general rule, plaintiff may recover attorney fees when the claim is premised upon the alleged independent tortious acts of the defendant.

**[5] Alternative Dispute Resolution**  **386**  
[25Tk386 Most Cited Cases](#)

(Formerly 33k82(5) Arbitration)

Contractor's action against owner of cooperative apartment building, its attorney, and his law firm, seeking to recover attorney fees incurred as a result of owner's cancellation of contract for replacement of all convector units within the building, was not barred by arbitration and award, where there was no arbitration award either granting or denying a claim for attorney fees; rather, contractor was awarded damages for breach of contract. [McKinney's CPLR 3211\(a\)\(5\)](#).

**[6] Attorney and Client**  **26**  
[45k26 Most Cited Cases](#)

Although claims of professional malpractice against an attorney usually are barred against those not in privity, attorneys are still liable to non-clients for acts of fraud, collusion, malicious acts, or other special circumstances. [McKinney's Judiciary Law § 487](#).

**[7] Pleading**  **18**

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### [302k18 Most Cited Cases](#)

Allegations that defendant's attorneys made fraudulent claims during litigation that defendant was entitled to cancel its contract with plaintiff, colluded with defendant in bad faith to drive plaintiff out of business, counseled defendant that it could cancel contract for cause solely to generate legal fees for themselves, and failed to use reasonable care prior to recommending that defendant cancel contract stated, with sufficient particularity, claim against defendant's attorneys for attorney fees incurred in litigating breach of contract action. [McKinney's CPLR 3016\(b\)](#).

### [\[8\] Alternative Dispute Resolution](#) **380**

#### [25Tk380 Most Cited Cases](#)

(Formerly 33k82(5) Arbitration)

Splitting doctrine did not preclude contractor's causes of action seeking to recover attorney fees incurred as a result of apartment building owner's cancellation of contract for replacement of all convector units within the building, where parties did not have an agreement to arbitrate their differences, and claim was not, and could not have been, raised in arbitration.

### [\[9\] Attorney and Client](#) **26**

#### [45k26 Most Cited Cases](#)

Principle immunizing statements made during course of litigation from defamation claim did not apply to immunize statements and pleadings of building owner and its counsel from claims of fraud, collusion, and malfeasance perpetrated for self-serving purposes that resulted in legal fees to plaintiff, in plaintiff's action against building owner's counsel and his law firm.

**\*\*780** Goldstein & Alschuler, P.C., New York City ([David R. Brody](#) of counsel), for defendants.

**Gold, Stewart, Kravatz & Stone, LLP**, Westbury (Jeffrey B. Gold of counsel), for plaintiffs.

PETER J. [KELLY](#), J.

**\*220** This action has its origin in a dispute that arose between the present plaintiff New York Cooling Towers, Inc. ("Cooling Towers") and non-party Continental Owners Corp. ("Continental"). Cooling Towers and Continental entered into a contract for

the replacement of all the convector units within the 656 individual apartments in the cooperative apartment building owned by Continental.

During the installation of the convector units it became apparent that some of the units were not functioning as required and numerous apartments, particularly ones on the upper floors of the building, were not being sufficiently cooled. The parties vigorously disputed the cause of the malfunction. Continental asserted that many of the units installed at the recommendation of Cooling Towers were inappropriate and that Cooling Towers did not install a proper balancing valve system. Cooling Towers asserted that the units were selected by Continental after consultation with its building management company and the project architect. Cooling Tower claimed that the convector units were "perfectly fit for their intended use" and that balancing valves were not part of the original contract.

**\*\*781** Based upon what it perceived was a breach of the contract, Continental terminated the contract in a letter, dated December 26, 2002, sent by its then counsel to Cooling Towers. Cooling Towers responded in a letter dated January 29, 2003 and demanded arbitration of the dispute in accordance with the terms of the contract.

In a decision dated December 14, 2004, a panel of three arbitrators determined that while Cooling Towers failed to remedy the problem with the units "in a timely and appropriate manner", Continental cancelled the contract for cause without first giving the required notice and without obtaining a certification from the architect designated in the contract. As a result, the panel awarded Cooling Towers \$145,640.00 for work it completed at the premises and awarded Continental \$47,700.00 for the installation of a valve system and balancing of the system. The net outcome of the arbitration was an award to Cooling Towers of \$97,940.

Cooling Towers commenced this action against the defendants, Continental's attorney and his law firm, to recover for counsel fees incurred as a result of Continental cancelling the contract. The plaintiff asserts that the defendants fraudulently claimed **\*221**

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during the litigation that they possessed an architect's certification entitling the defendants to cancel the contract for cause, that the defendants colluded with their client in bad faith to drive the plaintiff out of business, counseled their client that they could cancel the contract for cause solely to generate legal fees for themselves and failed to use reasonable care prior to recommending their client cancel the contract.

[1] The defendants' argument that this action is barred by the principle of collateral estoppel is without merit. Although an arbitration decision can have preclusive effect on a subsequent judicial proceeding (See, *In re Claim of Ranni*, 58 N.Y.2d 715, 717, 458 N.Y.S.2d 910, 444 N.E.2d 1328; *Azevedo & Boyle Contr., Inc. v. J. Greaney Constr. Corp.*, 285 A.D.2d 571, 572, 728 N.Y.S.2d 743), the arbitration may only act as a bar "when it is clear that the issue was actually litigated, squarely addressed, and specifically decided" (*Atl. Mut. Ins. Co. v. Lauria*, 291 A.D.2d 492, 493, 739 N.Y.S.2d 394).

[2][3][4] Here, there was undisputably no award of counsel fees made by the arbitrators and no indication in their decision that the issue was even addressed by the parties. Indeed, pursuant to the rules of the American Arbitration Association, which the parties agreed in their contract to abide by, attorneys fees could only be awarded if "all parties have requested such an award or it is authorized by law or in their arbitration agreement" (Construction Industry Arbitration Rules and Mediation Procedures, R-44[d]). Customarily, New York law does not authorize counsel fees to a prevailing party in a breach of contract proceeding (See, *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 549 N.Y.S.2d 365, 548 N.E.2d 903; *Farmingdale Realty Trust v. Real Props. MLP Ltd. Pshp.*, 225 A.D.2d 656, 640 N.Y.S.2d 566), the parties' arbitration agreement is silent on the issue (See, CPLR § 7513) and it is plain from the parties submissions that the parties never agreed to submit the issue of counsel fees to the arbitration panel (See, *Stewart Tabori & Chang, Inc. v. Stewart*, 282 A.D.2d 385, 723 N.Y.S.2d 492). Moreover, where, as here, the claim for counsel fees is premised upon the claimed independent tortious acts of the defendants, collateral estoppel is not a bar to its cause of action (See, *Hermann v. Bahrami*, 236

[A.D.2d 516, 654 N.Y.S.2d 158](#)).

[5] The defendants' assertion that the plaintiff's action is barred by arbitration and award pursuant to CPLR § 3211[a][5] \*\*782 is without merit as there was no "award" either granting or denying a claim for counsel fees (See, *Central Water Heater & Sales Corp. v. Adler*, 128 A.D.2d 665, 513 N.Y.S.2d 163).

The defendants' claim that the plaintiff's complaint fails to state a cause of action is also without merit. Generally, "in the \*222 absence of a statute expressly authorizing him to do so, or unless the parties have otherwise agreed or stipulated, a civil litigant may [not] sue his adversary to recover fees paid to his attorney for legal services" (*Rahabi v. Morrison*, 81 A.D.2d 434, 437, 440 N.Y.S.2d 941; see also, *Donn v. Sowers*, 103 A.D.2d 734, 735, 477 N.Y.S.2d 197). However, this exclusion is subject to the well recognized exception which permits a cause of action where "through the wrongful act of his present adversary, a person is involved in earlier litigation with a third person in bringing or defending an action to protect his interests, he is entitled to recover the reasonable value of attorneys' fees and other expenses thereby suffered or incurred" (*Shindler v. Lamb*, 25 Misc.2d 810, 812, 211 N.Y.S.2d 762, *affd.* 10 A.D.2d 826, 200 N.Y.S.2d 346, *affd.* 9 N.Y.2d 621, 210 N.Y.S.2d 226, 172 N.E.2d 79; see also, *Hermann v. Bahrami*, *supra* at 516, 654 N.Y.S.2d 158; *Donn v. Sowers*, *supra* ).

[6] Likewise, although claims of professional malpractice against an attorney usually are barred against those not in privity (See, *Good Old Days Tavern, Inc. v. Zwirn*, 259 A.D.2d 300, 686 N.Y.S.2d 414), attorneys are still liable to non-clients for acts of "fraud, collusion, malicious acts or other special circumstances" (*Viscardi v. Lerner*, 125 A.D.2d 662, 510 N.Y.S.2d 183; *Tender Care, Inc. v. Selin*, 90 A.D.2d 547, 548, 455 N.Y.S.2d 122; see also, *Judiciary Law § 487*). Even claims of tortious interference with contractual relations based upon an attorney wrongfully inducing their client to breach a contract which are barred when the attorney was acting within the scope their authority are subject to an exclusion where the attorney's "acts were motivated by self-interest" (*Pancake v. Franzoni*, 149 A.D.2d 575, 576, 540

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[N.Y.S.2d 674](#); see also, [Lloyd I. Isler, P.C. v. Sutter](#), 160 A.D.2d 609, 610, 554 N.Y.S.2d 253).

[7] Contrary to the defendants' assertions, the plaintiff's complaint states facts with sufficient particularity (See, CPLR § 3016[b] ) to fall within the aforementioned exceptions (See, [A & M Bldg. & Condo Maint., Inc. v. Atlas Elec. of Staten Island](#), 294 A.D.2d 520, 743 N.Y.S.2d 133; [Stern v. Consumer Equities Assoc.](#), 160 A.D.2d 993, 554 N.Y.S.2d 714).

A motion to dismiss pursuant to CPLR § 3211[a][1] may only be granted where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (See, [Held v. Kaufman](#), 91 N.Y.2d 425, 430-431, 671 N.Y.S.2d 429, 694 N.E.2d 430; [Jaslow v. Pep Boys--Manny, Moe & Jack](#), 279 A.D.2d 611, 719 N.Y.S.2d 881; [Brunot v. Joe Eisenberger & Co., Inc.](#), 266 A.D.2d 421, 698 N.Y.S.2d 882). In the case at the bar, the documentary evidence fails to establish, as a matter of law, a defense to the plaintiff's claims of tortious malfeasance allegedly perpetrated by the defendants.

[8] \*223 The defendants claim that the plaintiff's causes of action for counsel fees are barred by the splitting doctrine is incorrect as the plaintiff could not have asserted its claim for attorneys fees against the defendants in the arbitration proceeding between Cooling Towers and Continental since the parties here did not have an agreement to arbitrate their differences (See, [Mionis v. Bank Julius Baer & Co.](#), 301 A.D.2d 104, 109, 749 N.Y.S.2d 497). Additionally, a claim for counsel fees against Continental was not and could not be made in the arbitration for the reasons \*\*783 stated *supra* in the court's discussion of the defendants' collateral estoppel argument.

[9] The defendants' contention that the plaintiff's entire action is barred since the statements and pleadings of Continental and its counsel are immunized under the principle that statements made during the course of litigation are non-actionable is without merit. All the cases cited for authority by the defendants involve claims for defamation based upon statements or views expressed during a prior litigation. The plaintiff's claims here concern, *inter alia*, alleged acts

of fraud, collusion, and malfeasance perpetrated for self-serving purposes that resulted in legal fees to the plaintiff. These are, as the court has held *supra*, legally cognizable causes of action and the defendants cite no authority to establish that oral and written statements proffered to support these claims, as opposed to cases involving defamation, are immunized. Indeed, the court's research indicates that the principle relied upon by the defendant is limited strictly as a defense in defamation actions (See, [Toker v. Pollak](#), 44 N.Y.2d 211, 218, 405 N.Y.S.2d 1, 376 N.E.2d 163; [Dunn v. Ladenburg Thalmann & Co.](#), 259 A.D.2d 544, 686 N.Y.S.2d 471; [Baratta v. Hubbard](#), 136 A.D.2d 467, 523 N.Y.S.2d 107) and, under certain circumstances, the privilege may be lost if it is determined it has been "abused" (See, [Halperin v. Salvan](#), 117 A.D.2d 544, 548, 499 N.Y.S.2d 55; [Youmans v. Smith](#), 153 N.Y. 214, 220, 47 N.E. 265).

Accordingly, the branches of the defendants motion to dismiss the complaint pursuant to CPLR § 3211[a] are denied.

The branch of the defendants' motion and the plaintiff's cross-motion for sanctions are denied as wholly meritless.

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