SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MATTHEW F. COOPER PART 52
Justice

Michael Hurtenstein

- v -

NY Cyrk Property LLC

INDEX NO. 101016/09

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 4 were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

RECEIVED
JUN 03 2009
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

MOTION IS DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

FILED
JUN 10 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/2/09

MATTHEW F. COOPER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

----------X

MICHAEL HIRTENSTEIN

Petitioner,

-against-

ONE YORK PROPERTY, LLC,

Respondent.

----------X

Index No. 101016/2009
Mot. Seq. No. 001

DECISION AND ORDER

For the Petitioner (co-counsel)
Peter James Johnson, Jr., Esq.
Leahey & Johnson, P.C.
120 Wall Street
New York, NY 10005
(212) 269-7308

For the Petitioner (co-counsel)
Alyne I. Diamond, Esq.
Seligson Rothman & Rothman
29 W. 39th Street, 10th Floor
New York, NY 10001
(212) 966-9980

For the Respondent
Steven J. Shore, Esq.
Ganfer & Shore
360 Lexington Avenue, 14th Floor
New York, NY 10017
(212) 922-9250

Papers and exhibits considered in review of the motions and cross-motions:

Order to Show Cause:	1
Affidavit in Opposition	2
Memorandum of Law in Opposition	3
Reply Affirmation in Support	4

Matthew F. Cooper, J.

This special proceeding brought by petitioner, Michael Hirtenstein, is one of several legal actions between the parties resulting from the failed purchase of new-construction condominium units. Hirtenstein and the respondent, One York Property, LLC ("One York"), entered into a Purchase Agreement for the sale and construction of multiple apartment units in respondent's building being constructed at 1 York Street, New York, NY. Petitioner now moves by Order to Show Cause to vacate respondent's demand for arbitration and to impose a stay of arbitration.

Facts

Petitioner originally contracted with respondent for the purchase and construction of three

apartments to be combined into one "Unit." Four subsequent riders were entered into by the parties for the purchase of additional apartments to be combined with the Unit and for extensive construction upgrades; the fourth and final rider having been entered into on February 28, 2008. The Purchase Agreement includes a liquidated damages clause which permits the respondent to cancel the contract upon the occurrence of a defined Event of Default and petitioner's failure to cure within thirty days. The clause provides that if petitioner does not cure the default, respondent is entitled to retain the initial deposit as liquidated damages and the parties are to be released from further liability and obligations under the agreement.[1]

In the Spring of 2008, petitioner objected to the quality and type of construction work performed and the charges being invoiced by One York's general contractor, Bovis Lend Lease ("Bovis") for the construction upgrades. In letters and e-mails, petitioner complained that he was being charged "exorbitant" sums of money for work that was never authorized, never performed, or performed improperly. In a letter to the respondent dated July 3, 2008, petitioner demanded all work on the Unit cease, other than that required to obtain a Temporary Certificate of Occupancy ("TCO"). As a result of this dispute, petitioner refused to replenish the Net Renovation Account as required by paragraph 2.5.1 of the Fourth Rider.

On July 25, 2008, the Department of Buildings of the City of New York ("DOB") issued

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[1] The Purchase Agreement states:

> 13.2 If the default is not cured within such 30 days, the Agreement shall be deemed canceled, and Sponsor shall have the right to retain, as and for liquidated damages, the entire Deposit and any interest earned on Deposit. Upon cancellation of this Agreement, Purchaser and Sponsor will be released and discharged of all further liability and obligations hereunder and under the Plan.

(Purchase Agreement ¶ 13.2)

a TCO for the Unit and in accordance with the Agreement, One York then scheduled a closing on the unit for August 21, 2008. Petitioner refused to close based on his assertion that the TCO should not have been issued as the building did not meet the statutory standards for the granting of a TCO. Respondent notified petitioner on August 22, 2008, of his default on the purchase agreement for failure to close on the property and that he had thirty days to cure such default. By a court stipulation dated September 24, 2008, the cure date was extended to October 10, 2008. By a letter dated October 10, 2008, respondent notified petitioner that his failure to cure by continuing to refuse to close had resulted in the cancellation of the Purchase Agreement and that respondent intended to retain petitioner's deposit as liquidated damages. Also on this date, petitioner's attorney sent a letter to the respondent notifying it that petitioner was exercising his right of rescission of the Purchase Agreement.

Prior to the October 10 letters, petitioner had moved by Order to Show Cause to stay the closing on the Unit, to preliminary enjoin and restrain respondent from canceling or enforcing the Purchase Agreement or releasing the deposit as liquidated damages, and to extend petitioner's time to cure the default. In addition to One York, DOB, which had granted the TCO, was named as a party. One York cross-moved to dismiss the complaint or in the alternative to compel arbitration. The Honorable Paul Feinman of this court denied petitioner's requests for injunctive relief and dismissed the claims as against One York. In his written decision, Justice Feinman stated as follows:

> [W]here the subject of the petition concerns the quality of the work that has been done in order to obtain the TCO, any argument concerning the poor quality is for the City to address. **Thereafter, claims by petitioner concerning the quality of the work are to be resolved through arbitration, as set forth in the Fourth Rider of the purchase agreement.**

Hirtenstein v. One York Property, LLC and Dept. of Buildings of the City of New York, Sup Ct, New York County, November 12, 2008, Index No. 112972/08 (emphasis added). Subsequent to Justice Feinman's decision, this court, finding that petitioner had failed to exhaust his administrative remedies, dismissed the remainder of the action as against DOB. *Hirtenstein v. One York Property, LLC and Dept. of Buildings of the City of New York*, Sup Ct, New York County, February 9, 2009, Index No. 112972/08.

On January 8, 2009, respondent filed an arbitration demand with JAMS, a frequently used alternative dispute resolution service, for claims of breach of contract and attorneys fees arising from the construction dispute. In its Statement of Claim justifying arbitration, respondent stated that petitioner's dissatisfaction with the construction, his refusal to replenish the Net Renovation Account, and his failure to close on the Unit amounted to a breach of contract that left him owing $1,607,243.03 for separately contracted construction upgrades performed and invoiced by Bovis and structural engineer DeSimone. Respondent asserts that pursuant to the Fourth Rider, submitting this dispute to binding arbitration is the appropriate and contractually required remedy. Petitioner now seeks a permanent stay of arbitration and argues that respondent's only remedy for a default on the Purchase Agreement is liquidated damages.

The arbitration clause of the Fourth Rider, which is at the heart of the dispute, states as follows:

> 2.5.2 If Purchaser claims that **any line item on any invoice does not reflect work performed properly** as certified by Bovis Lend Lease and Sponsor based on approved plans and specifications and previously agreed amounts to any contractor or professional, **then, in that instance only, Purchaser shall not be obligated to pay the amount of such line item(s) ("Disputed Amount") within such 10 day period, provided Purchaser delivers to Sponsor written objection** ("Written Objection") of such

disputed amount within such 10 day period.

2.5.3 **If Sponsor and Purchaser cannot resolve the payment of the Disputed Amount** within 3 days of Sponsor's receipt of the Written Objection. . . **Sponsor and Purchaser agree to submit to binding arbitration.**

(Forth Rider, emphasis added). The crux of petitioner's argument for granting the relief sought is that the claims respondent seeks to arbitrate are not for the resolution of a dispute over line items, but rather are for claims of a wholesale breach of contract and attorneys fees. Since the Fourth Rider limits arbitration to those claims arising out of a dispute of a line item, petitioner contends that the breach of contract claim is outside the scope of the arbitration clause and liquidated damages are the sole remedy for petitioner's default.

The respondent counters that petitioner is barred by collateral estoppel from rearguing this issue as Justice Feinman, in his decision dated November 12, 2008, previously found that the Purchase Agreement and riders require that subsequent disputes "concerning the quality of the work are to be resolved through arbitration." *Hirtenstein*, Index No. 112972/08. Respondent further asserts that even if this application is not barred by collateral estoppel, the arbitration should not be stayed since contracts containing arbitration clauses are treated as separate from the body of the contract, and the agreement to pay for additional construction upgrades arose prior to the termination of the Purchase Agreement, and thus was a separate and district obligation that survived the cancellation.

Analysis

At the outset, it must be noted that the role of a court when presented with a motion to stay arbitration is limited to determining three threshold questions: the validity of the agreement to arbitrate between the parties, whether the agreement was complied with, and whether the

claim sought to be arbitrated would be barred by the statute of limitations had it been asserted. *Matter of County of Rockland (Primiano Constr. Co.)*, 51 NY2d 1, 7 (1980); *Cooper v. Bruckner*, 21 AD3d 758, 759 (2005).

The statute of limitations is satisfied here as petitioner brought this petition to stay arbitration within twenty days of being served with the demand for arbitration as required by CPLR 7503(c). The issue of the underlying validity of the arbitration clause has not been contested and based on all evidence is valid.

The question as to whether the parties complied with a valid arbitration agreement, and therefore whether the requested stay of arbitration should be granted, however, inherently requires the court to determine whether the scope of the arbitration clause encompasses the particular matter at issue before referring the case to the arbitrator. *Sisters of St. John the Baptist, Providence Rest Convent v. Geraghty Constructor,* 67 NY2d 997, 999 (1986) (finding that "[i]t is of course for the court in the first instance to determine whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement."); *Rockland*, 51 NY2d at 7 (holding that "if the court concludes that, while the parties may have made a valid agreement to arbitrate, the particular agreement that they made was of limited or restricted scope and the particular claim sought to be arbitrated is outside that scope, there will likewise be a stay of arbitration or a denial of the motion to compel arbitration."); *see Gangel v. De Groot*, 41 NY2d 840 (1977) (interpreting the scope of the arbitration agreement as limited to disputes regarding the "execution" of an insurance policy). In deciding whether a stay of arbitration is permissible based on the argument that the dispute is outside the scope of the arbitration clause, "a court must determine only whether there is a

reasonable relationship between the subject matter of the dispute and the general subject matter of the [arbitration clause]." *Matter of City of White Plains v. Professional Firefighters Assn., Local 274 I.A.F.F.*, 298 AD2d 456 (2d Dept 2001).

In this case, there is an additional issue presented. That issue is whether petitioner is collaterally estopped, as a result of Justice Feinman's decision, from litigating the issue of the scope and applicability of the arbitration clause. Once the question of collateral estoppel is decided, the court will then rule on the scope of the arbitration clause and determine whether the underlying dispute bears a reasonable relationship between the subject matter of the arbitration clause.

I. Collateral Estoppel

The doctrine of collateral estoppel applies so as to preclude the relitigation of an issue which was decided in a previous action. *Seaman v. Fichet-Bauche North America, Inc.*, 176 AD2d 793, 794 (1st Dept 1991). The necessary elements of this doctrine are "first, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination." *Juan C. v. Cortines*, 89 NY2d 659, 667 (1997), *quoting Kaufman v. Eli Lilly & Co.*, 65 NY2d 449 (1985). The party asserting collateral estoppel has the burden to demonstrate that the issue in question is identical and decisive, while the opponent must demonstrate that it lacked a full and fair opportunity to litigate the issue. *Alamo v. McDaniel,* 44 AD3d 149,154 (1st Dept 2007).

In all cases where collateral estoppel is sought, especially in those concerning the

interpretation of contractual agreements, the inquiry of fundamental concern is "whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results." *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 NY2d 147, 153 (1988). However, the rules and considerations governing the doctrine of collateral estoppel may vary in degree of importance depending on the nature of the proceeding. *Id.* The decisive test in establishing whether a judgment in one action is conclusive in a subsequent one "as to any matters actually litigated therein, but also as to any that might have been so litigated," is whether the substance of the rights or interests established in the first action will be destroyed or impaired by the prosecution of the second. *Schuykill Fuel Corp. v. B&C Nieberg Realty Corp.*, 250 NY 304, 308 (1929); *Mintzer v. Carl M. Loeb, Rhoades & Co.*, 10 AD2d 27, 29-30 (1st Dept 1960); *see also Cromwell v. County of Sac*, 94 US 351 (1876).

The issue of the scope of the arbitration clause is determinative in the instant action and was before the court in the prior action in which Justice Feinman rendered his decision. Although the petitioner did not seek a stay of arbitration in the prior action, the arbitration clause was at issue as respondent argued in the alternative to compel arbitration. While Justice Feinman did not have occasion to issue an order compelling arbitration, he nevertheless reviewed the arbitration clause in the Purchase Agreement and determined that future claims by the petitioner concerning "the quality of work" are to be resolved through arbitration.

A finding that the issue of arbitration was squarely brought before Justice Feinman and determined by him is supported by the fact that petitioner's Affirmation in Opposition to One

York's Cross Motion in the prior action dedicated three pages to persuading the court of the limited scope of the arbitration clause. The colloquy between Justice Feinman and petitioner's attorney at oral argument also indicates that the applicability of the arbitration clause to the dispute over the charges for the construction upgrades was something that was not only discussed, but in fact was conceded, by petitioner. The record reads as follows:

> MS. DIAMOND (Attorney for petitioner): It's no secret that there's been issues concerning construction on this apartment. My client has engaged the sponsor for multiple millions - - several millions of dollars for upgrades for the apartment. And there have been controversies over those upgrades, the quality of the upgrades, the bills that my client is being charged for those upgrades.
>
> THE COURT: Right.
>
> MS. DIAMOND: That's been going - -
>
> THE COURT: That's all subject to a mandatory arbitration clause. I don't think anybody disputes that.
>
> MS. DIAMOND: We're not disputing that.

Based on the foregoing, this court finds that respondent has met its burden of establishing that the scope of the arbitration clause was raised in the prior proceeding and determined by the prior decision. If petitioner wished to dispute Justice Feinman's interpretation of the arbitration clause, he was compelled to proceed by way of a motion to reargue or by an appeal rather than seeking to raise the issue anew before this court.

The petitioner, additionally, has failed to meet his burden of establishing that he lacked a

full and fair opportunity to litigate the issue in the prior proceeding. "The question as to whether a party had a full and fair opportunity to litigate a prior determination involves a practical inquiry into the realities of litigation." *Gilberg v. Barbieri,* 53 NY2d 285, 292 (1981); *Singleton Management, Inc. v. Compere*, 243 AD2d 213, 217(1st Dept 1998). Preclusive effect will not be given to a particular issue if it was not "actually litigated, squarely addressed and specifically decided" in the prior action. *Ross v. Medical Liability Mutual Insurance,* 75 NY2d 825, 826 (1990); *Kaufman,* 65 NY2d at 449. A claim has not actually been litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading, or a stipulation. *Kaufman,* 65 NY2d at 456-457. Not only was the scope of this arbitration clause interpreted and decided in the prior decision, the petitioner unequivocally addressed this issue in its papers and in oral argument before Justice Feinman. The petitioner's argument was, however, ultimately rejected by the court as evidenced by its interpretation of the arbitration clause as permitting arbitration for any dispute concerning the "quality of work" preformed.

An additional reason for invoking the doctrine of collateral estoppel here is to avoid the potential for conflicting determinations varying the rights of the parties under the Purchase Agreement. In his decision, Justice Feinman unequivocally stated that "claims by petitioner concerning the quality of work are to be resolved through arbitration, as set forth in the Fourth Rider of the Purchase Agreement." Petitioner's attempt to have this court revisit the issue and reinterpret the terms of the Purchase Agreement must fail as a "former judgment will be conclusive as to the meaning of those terms and their effect." *Schuykill Fuel Corp.*, 250 NY at 309. Were this court to reconsider the interpretation of the arbitration clause in the Fourth Rider, the rights and interests of the parties established under the contract and previously interpreted by

Justice Feinman could be altered if an alternative interpretation were reached. Public policy demands that inconsistent results be avoided and contractual interpretations maintain some semblance of consistency such that parties may conclusively rely on the terms. *Staatsburg Water Co.*, 72 NY2d at 153; *Buechel v. Bain*, 97 NY2d 295, 303 (2001).

Judge Benjamin Cardozo's analysis in *Schuykill Fuel Corp.* is also instructive for its treatment of a contract clause that had previously been interpreted and decided. In that case, plaintiffs brought an action against the defendants where the same contract provisions had already been litigated. The first court having decided that the contract called for joint liability, Judge Cardozo declared that "[t]he defendants may not now be heard to claim that it is several." 250 NY at 306. He concluded that "as often as an attempt is made to enforce the written contract according to its terms, the former judgment will be conclusive as to the meaning of those terms and their effect" and "the writing with its execution stands admitted in meaning and effect as it has already been adjudicated." *Id.* at 309.

Like the contractual terms in *Schuykill*, the issue of the scope of the arbitration clause here was previously determined to concern future "quality of work" disputes. Petitioner's attempt to reargue this interpretation fails as the decision in the prior proceeding involving these parties is conclusive as to the terms and effect of the arbitration clause. *See In re Penn Central Transp. Co.*, 354 F Supp 759, 769 (EDPA 1972) ("[t]he doctrine of collateral estoppel does, of course, preclude reconsideration of any issue of law or fact that was litigated and determined in the previous actions").

II. Interpretation of the Arbitration Clause

Even assuming, *arguendo*, that Justice Feinman's prior decision was not preclusive on

the matter, this court would still interpret the clause in the same manner and would find that the subject matter of the dispute is within the scope of and bearing a reasonable relationship to the subject matter of the arbitration clause of the Fourth Rider.

i. Scope of Arbitration

Paragraphs 2.5.2 and 2.5.3 of the Fourth Rider state that the parties agree to submit to binding arbitration claims by the petitioner that "any line item on any invoice does not reflect work performed properly." When "reviewing a narrow [arbitration] clause, the court must determine whether the dispute is over an issue that 'is on its face within the purview of the clause,' or over a collateral issue that is somehow connected to the main agreement that contains the arbitration clause." *Gerling Global Reinsurance Corp. v. Home Ins. Co.*, 302 AD2d 118, 126 (1st Dept 2002), *quoting Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F3d 218, 224 (2d Cir 2001). "It is well settled that a party cannot be compelled to submit to arbitration unless the agreement to arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute." *Matter of American Centennial Ins. Co. v. Williams,* 233 AD2d 320, 320 (2d Dept 1996). The burden rests with the party seeking arbitration, the respondent in this case, "to demonstrate a 'clear and unequivocal' agreement to arbitrate" the asserted claim. *Gerling Global Reinsurance Corp.*, 302 AD2d at 123 (1st Dept 2002), *quoting Matter of Siegel v. 141 Bowery Corp.*, 51 AD2d 209, 212 (1st Dept 1976).

The narrow language of this arbitration clause is specific in that it only permits arbitration for work performed and invoiced by Bovis and disputed by the petitioner as improperly performed. The lengthy correspondence between the parties, the papers submitted in connection with the petition, and respondent's Statement of Claim supporting the Demand for Arbitration

clearly show that petitioner's grievances stem from his disapproval of the invoices for work performed by Bovis and the quality of such work. Throughout the parties' email and letter correspondence, petitioner detailed his objections to the Bovis invoices, including allegedly improper overtime charges and general dissatisfaction with the quality of the construction performed. Based on a review of this correspondence, it can be readily concluded that the dispute for which arbitration is sought encompasses multiple construction line items invoiced by Bovis to the petitioner beginning on or around July 15, 2008.

Although petitioner may not have stated each specific line item he was objecting to, his own failure to itemize those objections cannot be a basis to remove the dispute from the scope of the arbitration clause of the Fourth Rider. It is a well-established principle of contract law "that a party cannot insist upon a condition precedent, when its non-performance has been caused by himself." *Wagner v. Derecktor*, 306 NY 386, 391 (1954), *quoting Young v. Hunter*, 6 NY 203 (1852). Petitioner's refusal or failure to specify the particular line item in dispute, therefore, does not bar respondent's demand to invoke the arbitration clause. Having found that the current dispute concerning the invoiced fees and construction work performed falls within the scope of the arbitration clause, the court must end its inquiry and require that the underlying dispute proceed to arbitration. *State v. Philip Morris Inc.*, 30 AD3d 26, 31 (1st Dept 2006), *quoting Sisters of St. John the Baptist,* 67 NY2d at 998 (the role of the court is "to determine whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement. The court's inquiry ends, however, where the requisite relationship is established between the subject matter of the dispute and the subject matter of the underlying agreement to arbitrate"). All other claims arising under

the Purchase Agreement, including the impact of the letters of the cancellation and recision, are not within the scope of this arbitration clause.

ii. Cancellation of the Purchase Agreement

It is undisputed that the respondent sent a letter of cancellation to the petitioner on October 10, 2008, and that under the Purchase Agreement, such election to cancel results in the parties' "release and discharge of all further liabilities and obligations" arising under the contract. In contention, however, is whether the cancellation of the agreement had the effect of releasing the petitioner from the obligation to arbitrate those disputes that fall within the limited scope of the arbitration clause. Petitioner asserts that his default and respondent's cancellation of the Purchase Agreement released the parties from all future liabilities and obligations arising under the agreement and that respondent's sole remedy is to retain petitioner's deposit as liquidated damages.

For the purposes of the enforcement of the arbitration provision, it is immaterial that the Purchase Agreement, to which the arbitration clause was added as part of the Fourth Rider, was canceled and is no longer in existence. *Lane v. Endicott Johnson Corp.*, 274 AD 833, 834 (3d Dept 1948) (expiration of contract did not release employer from obligation to arbitrate). Even if the October 10, 2008, letters had the effect of canceling or rescinding the Purchase Agreement and releasing the parties from further duties and obligations arising under the agreement, those arbitrable claims which arose prior to the cancellation of the contract are still ripe for arbitration. *Id.*; *Ferran Concrete Co., Inc. v. Commerce Elec., Inc.*, 118 AD2d 619, 620 (2d Dept 1986); *NEC America, Inc. v. Northeastern Office Equipment, Inc.*, 274 AD2d 339 (1st Dept 2000). Because the parties clearly indicated their intent to arbitrate disputes concerning the amount and

quality of work invoiced by Bovis, and the current dispute arose prior to the cancellation and recision letters, the parties are not released from their obligation to arbitrate those claims within the arbitration clause arising prior to cancellation.

The petitioner improperly relies on the *Matter of Minkin*, 279 AD 226 (2d Dept 1951), to bolster his contention that the cancellation of the agreement also canceled the arbitration clause. Unlike the situation here, the parties in *Minkin* initially entered into a contract containing an arbitration clause and subsequently entered into an unambiguous and mutual agreement to cancel the prior contract. The court in *Minkin* concluded that arbitration for a dispute arising under the first agreement was improper as the contract was unambiguously canceled by the mutual agreement of both parties. Here, there was neither a subsequent nor mutual agreement to cancel the Purchase Agreement or the Fourth Rider. That unilateral letters of cancellation and rescission were sent do not impact those claims for arbitration which originated prior to the cancellation. *Ferran Concrete Co., Inc.*, 118 AD2d at 620.

Petitioner's argument that liquidated damages are the proper and sole remedy for his refusal to pay the invoices is also misplaced. The language of the Purchase Agreement provides that should the petitioner default on the agreement, respondent may elect to cancel the contract and retain the initial deposit as liquidated damages. However, as the above cited case law demonstrates, arbitration is still appropriate for those disputes arising prior to cancellation and within the limited scope of the arbitration clause. Respondent might very well be entitled to retain the deposit as liquidated damages if it is established that the petitioner defaulted on the agreement. That issue, however, is not before the court at this time and has no bearing on respondent's right to seek payment for the "upgrades" separately contracted for in the Fourth

Rider.

Conclusion

The court finds that petitioner is collaterally estopped from arguing anew the scope of the arbitration clause. It further determines that even if collateral estoppel was not applicable, it must still be found that the subject matter of the arbitration clause encompasses and bears a reasonable relationship to the subject matter of the current dispute. As a result, petitioner is not entitled to either an order vacating the demand for arbitration or an order imposing a stay of arbitration.

In light of the foregoing, it is

ORDERED that petitioner's motion is denied in all respects.

This constitutes the decision and order of the court.

Dated: June 2, 2009

ENTER:

Matthew F. Cooper, J.S.C.