

CASE NO. A-25-429

IN THE NEBRASKA COURT OF APPEALS

-----o-----

Big Iron Auction Company, Plaintiff/Appellee

v.

Harder Capital, LLC and Ryan M. Harder, Defendants/Appellants

-----o-----

Appeal from the District Court of Hall County, Nebraska
Honorable Andrew C. Butler, District Judge

-----o-----

APPELLANTS' REPLY BRIEF

-----o-----

SUBMITTED BY:

Jared J, Krejci, #25785
SMITH, JOHNSON, ALLEN,
CONNICK & HANSEN
104 N. Wheeler Avenue
Grand Island, NE 68801
(308) 382-1930
jkrejci@gilawfirm.com
Attorney for Appellants, Harder Capital, LLC and Ryan M. Harder

Table of Contents

Table of Contents	2
Table of Authorities	2
Jurisdictional Statement	3
Statement of the Case.....	3
Propositions of Law	3
Statement of Facts	4
Argument.....	4
1. How is the Arbitrator’s Award Significant?	4
2. How is the Arbitration Clause Significant?.....	6
3. Harder Capital Did Not Waive Its Argument That the Arbitration Award Did Not Preclude Its Motion to Assess Damages, Costs, and Fees for Wrongful Injunction.....	8
4. Harder Capital’s Damages are Because of the Wrongful Injunction.....	9
Conclusion	9
Certificate of Compliance.....	10

Table of Authorities

Cases

<i>Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 910 F.2d 1049 (2d Cir. 1990).....	8
<i>Brass City Local, CACP v. City of Waterbury</i> , 337 Conn. 576, 254 A.3d 866, 872 (2020).....	6
<i>Boone River, LLC v. Miles</i> , 314 Neb. 889, 994 N.W.2d 35 (2023).....	3, 8
<i>Boyd v. Cook</i> , 298 Neb. 819, 906 N.W.2d 31 (2018).....	3, 6
<i>Cal Sierra Dev., Inc. v. George Reed, Inc.</i> , 14 Cal. App. 5th 663, 223 Cal. Rptr. 3d 506 (2017).....	6
<i>Good Samaritan Coffee Co. v. LaRue Distrib.</i> , 275 Neb. 674, 748 N.W.2d 367 (2008).....	3, 7
<i>Johnson v. Bouton</i> , 56 Neb. 626, 77 N.W. 57 (1898).....	3, 5
<i>Morgan v. Sundance, Inc.</i> , 596 U.S. 411, 142 S. Ct. 1708 (2022).....	7

State v. Johnson, 314 Neb. 20, 988 N.W.2d 159 (2023).....7

Other Authorities

Restat 2d of Judgments, § 84.....6

Jurisdictional Statement and Statement of the Case

Appellants, Harder Capital, LLC (“Harder Capital”) and Ryan M. Harder (“Mr. Harder”) (collectively referred to as “Harder Capital” unless the context indicates otherwise) reiterate their jurisdictional statement and statement of the case previously stated in their Appellants’ Brief.

Propositions of Law

1. An action on a temporary injunction bond will not lie until there has been a final adjudication of the injunction cause on its merits. *Johnson v. Bouton*, 56 Neb. 626, 626, 77 N.W. 57, 57 (1898).

2. Like other contractual rights, an agreement to arbitrate can be waived by the parties. Arbitration provisions are not self-executing. *Boyd v. Cook*, 298 Neb. 819, 832-33, 906 N.W.2d 31, 42 (2018).

3. A party acts inconsistently with its right to arbitrate if the party substantially invokes the litigation machinery before asserting its arbitration right by failing to request a stay and fully adjudicating its rights. *Good Samaritan Coffee Co. v. LaRue Distrib.*, 275 Neb. 674, 685, 748 N.W.2d 367, 376 (2008).

4. Claim preclusion is an affirmative defense which must ordinarily be pleaded to be available. *Boone River, LLC v. Miles*, 314 Neb. 889, 904, 994 N.W.2d 35, 46 (2023).

Statement of Facts

The only significant factual allegation made by Appellee, Big Iron Auction Company (“Big Iron”), that Harder Capital disagrees with is Big Iron’s allegation that Harder Capital submitted the same evidence at both the arbitration and the hearing on Harder Capital’s motion to assess damages, costs, and fees for wrongful injunction.

There is nothing in the record that shows all of the evidence submitted at the arbitration, and Harder Capital’s evidence submitted in support of its motion to assess damages, costs, and fees for wrongful injunction refers to events that occurred after the December 2, 2024 arbitration award was issued. (E14, p. 4) (“On December 6, 2024, this Court vacated the temporary injunction on the basis of the arbiter’s Final Decision and Order, and the purpose of this affidavit is to quantify Harder Capital, LLC’s damages as a result of being wrongfully enjoined from doing auction sales for its previous customers for one year.”).

Argument

How is the Arbiter’s Award Significant?

All of Big Iron’s arguments in support of its position on appeal stem from either the arbiter’s award or arbitration clause contained in the ISR Agreement. If neither of those two things existed, Big Iron would have no arguments on appeal. Big Iron puts too much weight on the significance of the arbiter’s award and the arbitration clause, because neither have the effect that Big Iron would like. Arbitration agreements and arbitration are not black magic. Arbitration agreements are merely contracts whereby parties agree to arbitrate disputes, and arbitration is merely a substitute for judicial proceedings that results in an award that is a substitute for a judgment. In almost all respects, arbitration awards and judgments have the same

preclusive effects. Arbitration is not supernatural. It just substitutes an arbiter for a court and an award for a judgment.

Since arbitration is just a substitute for judicial proceedings, it is instructive to view this case as if there was no arbitration clause or arbiter's award. Early in the proceeding, a temporary injunction would be entered against Harder Capital. The claims would proceed to trial where the filed claims would be decided. After trial, a judgment would be entered determining that the restrictive covenants enforced by the temporary injunction were unenforceable, and the temporary injunction would be vacated accordingly.

Once the merits of the filed claims were decided and the temporary injunction was vacated, then Harder Capital would have an opportunity to recover damages it sustained as a result of the wrongful injunction. "An action on a temporary injunction bond will not lie until there has been a final adjudication of the injunction cause on its merits." *Johnson v. Bouton*, 56 Neb. 626, 626, 77 N.W. 57, 57 (1898). Then those damages caused by the wrongful injunction would be determined by the district court. In this case, the arbiter's award should be viewed no differently than a hypothetical judgment on the merits of the filed claims entered by a court.

As stated previously, all of Big Iron's arguments on appeal depend on the existence of the arbiter's award and the arbitration clause. But why are either significant? The arbiter's award could only be significant to Big Iron's position if it precluded Harder Capital from recovering damages caused by the wrongful injunction because of issue or claim preclusion. Issue and claim preclusion are the only legal concepts that we have that allow a respondent to argue that the issue has already been finally decided or that the issue should have been decided in an earlier proceeding.

Instead of directly arguing that the arbiter's award precluded Harder Capital's motion to assess damages, costs, and fees for wrongful injunction based on claim or issue preclusion, Big Iron argues that the award has the same effect as issue or claim preclusion, but it isn't exactly issue or claim preclusion. Why doesn't Big Iron directly plead or argue that Harder Capital's motion is barred by issue or claim preclusion? Because the law applying issue and claim preclusion clearly indicates that they do not bar Harder Capital's motion. The issue of damages caused by the wrongful injunction was not raised or decided in the arbitration and was not ripe to have been decided.

Once it is determined that the arbiter's award does not preclude Harder Capital's motion to assess damages, costs, and fees for wrongful injunction, then Big Iron's lengthy discussion about vacating the award and confirming the award is irrelevant. The award does not need to be vacated if the award does not preclude Harder Capital's motion. Harder Capital moved to confirm the award so that the award could be enforced as a judgment. *Brass City Local, CACP v. City of Waterbury*, 337 Conn. 576, 585 n.10, 254 A.3d 866, 872 (2020) ("Once confirmed by a court, an arbitration award has the force and effect of a judgment."). Confirming the arbiter's award had no effect on the scope of the award's preclusive effect since arbitration awards are preclusive whether confirmed or not. Restat 2d of Judgments, § 84; *Cal Sierra Dev., Inc. v. George Reed, Inc.*, 14 Cal. App. 5th 663, 678, 223 Cal. Rptr. 3d 506, 519 (2017) ("For purposes of res judicata, even an unconfirmed arbitral award is the equivalent to a final judgment.").

How is the Arbitration Clause Significant?

Later, Big Iron argues, for the first time on appeal, that the issue of Harder Capital's damages caused by the wrongful injunction is committed to be decided in arbitration by virtue of the breadth of the arbitration clause. Harder Capital disagrees that the issue of its damages caused by the wrongful injunction is covered by the

arbitration clause which exempts “claims by the Company or by ISR for temporary or permanent restraining orders or preliminary or permanent injunctions (“equitable relief”),” but in any event Big Iron did not raise this issue in the district court.

The fact that a claim may be arbitrable is not a blanket defense to merits of the claim. Instead, if a claim is arbitrable, the party seeking to move the determination of that claim to arbitration must move to stay the judicial proceeding and compel arbitration. Big Iron never moved to stay judicial proceedings on Harder Capital’s motion to assess damages, costs, and fees for wrongful injunction and compel arbitration of this issue before the district court entered a final order on this subject. Therefore, Big Iron waived arbitration as to this issue.

[L]ike other contractual rights, an agreement to arbitrate can be waived by the parties. Arbitration provisions are not self-executing. It is improper for a court to try to enforce such a contractual right on behalf of the parties. We need not decide whether the extensive litigation that has occurred in this case constitutes a waiver of the arbitration agreement because neither party sought to enforce the arbitration agreement in the first place. Waiver of a contractual provision is a defense to enforcement of that provision, but a party must first seek to invoke the provision before it is necessary to consider the affirmative defense of waiver.

Boyd v. Cook, 298 Neb. 819, 832-33, 906 N.W.2d 31, 42 (2018). “A party... acts inconsistently with its right to arbitrate if the party ‘[s]ubstantially invoke[s] the litigation machinery’ before asserting its arbitration right’ by failing to request a stay and fully adjudicating its rights.” *Good Samaritan Coffee Co. v. LaRue Distrib.*, 275 Neb. 674, 685, 748 N.W.2d 367, 376 (2008).

Previously, the Nebraska Supreme Court held that under the Federal Arbitration Act a “party seeking arbitration may be found to have waived its right to arbitration if it (1) knew of an existing right to arbitration, (2) acted inconsistently with that right, and (3) prejudiced the other party by these inconsistent acts.” *Id.* 675, 369. The United States Supreme Court has now done away with the prejudice requirement to show waiver of a right to arbitrate. *Morgan v. Sundance, Inc.*, 596 U.S. 411, 412, 142 S. Ct. 1708, 1710 (2022).

Without moving to stay judicial proceedings and compel arbitration on the issue, Big Iron litigated the issue of Harder Capital’s motion to assess damages, costs, and fees for wrongful injunction to the point of a final judgment on the issue in its favor. Big Iron cannot now for the first time on appeal argue that the issue of damages caused by the wrongful injunction had to be decided by a new arbitration proceeding. In the district court, Big Iron has waived arbitration on the issue. Further, “[a]n appellate court will not consider an argument or theory that is raised for the first time on appeal.” *State v. Johnson*, 314 Neb. 20, 41, 988 N.W.2d 159, 175 (2023).

Harder Capital Did Not Waive Its Argument That the Arbitration Award Did Not Preclude Its Motion to Assess Damages, Costs, and Fees for Wrongful Injunction

Big Iron argues that these issues concerning claim and issue preclusion were waived by Harder Capital in the district court. This gets things turned around. For Big Iron to take advantage of claim or issue preclusion, Big Iron should ordinarily have raised the defense in a pleading, but it did not. “Claim preclusion is an affirmative defense which must ordinarily be pleaded to be available.” *Boone River, LLC v. Miles*, 314 Neb. 889, 904, 994 N.W.2d 35, 46 (2023). Harder Capital was not obligated to affirmatively argue that its motion was not precluded by claim or issue preclusion, but Harder Capital did so anyway while in the district court. (T265 citing to *Blumenthal v.*

Merrill Lynch, Pierce, Fenner & Smith, Inc., 910 F.2d 1049, 1055 (2d Cir. 1990) for discussion of inapplicability of res judicata and collateral estoppel.).

Harder Capital's Damages are Because of the Wrongful Injunction

Harder Capital's motion to assess damages, costs, and fees for wrongful injunction were for its damages caused by the wrongful injunction requested by Big Iron, not for damages caused by the invalidity of the restrictive covenants. These are separate issues that Big Iron attempts to conflate. Harder Capital would have none of these damages if Big Iron did not choose to request the wrongful temporary injunction. Big Iron deposited a \$300,000 cash bond with the district court to provide security in the event it was determined that the temporary injunction was wrongful. Big Iron would face no liability for Harder Capital's damages caused by the temporary injunction if Big Iron simply litigated the validity of the restrictive covenants without seeking the temporary injunction.

Conclusion

For the reasons stated herein, this Court should reverse and vacate the district court's order on motion to assess damages, costs, and fees for wrongful injunction and remand this case with instructions to enter judgment against Big Iron in the amount of \$587,104.68.

HARDER CAPITAL, LLC and RYAN
M. HARDER, Appellants

BY SMITH, JOHNSON, ALLEN,
CONNICK & HANSEN
104 N. Wheeler Avenue
Grand Island, NE 68801
Telephone: (308) 382-1930
jkrejci@gilawfirm.com

By s/ Jared J. Krejci
Jared J. Krejci, #25785

Certificate of Compliance

This submission complies with the requirements of Neb. Ct. R. § 2-103(C)(3), specifically its typeface and maximum word limits. Relying on the word-count function of Microsoft Word, Version 19 this document contains 2,331 words excluding this certificate.

By s/ Jared J. Krejci
Jared J. Krejci, #25785

Certificate of Service

I hereby certify that on Monday, November 03, 2025 I provided a true and correct copy of this *Reply Brief* to the following:

Big Iron Auction Company represented by Jeffrey Charles Jarecki (24411) service method: Electronic Service to **jeff@jymlawpc.com**

Big Iron Auction Company represented by Justin D Eichmann (22405) service method: Electronic Service to **jeichmann@houghtonbradford.com**

Big Iron Auction Company represented by Keith A Harvat (21008) service method: Electronic Service to **kharvat@houghtonbradford.com**

Signature: /s/ Jared J. Krejci (25785)