2016 IL App (1st) 143830-U
No. 1-14-3830
March 15, 2016

SECOND DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

LIVE CURRENT MEDIA, INC., Plaintiff-Appellant, v. CORELINK DATA CENTERS, M/C VENTURE PARTNERS, L.L.C., M/C VENTURE PARTNERS, VI, L.P., M/C VP,VI, L.P., and M/C VENTURES INVESTORS, L.L.C., Defendants-Appellees.	)	Petition for Review of an Order of the Illinois Education Labor Relations Board No. 10 CH 20921 The Honorable John C. Griffin, Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Simon and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Corporations that did not participate in an arbitration proceeding could use the arbitrator's factual findings defensively to estop one of the parties to the arbitration from relitigating issues decided in the arbitration.

¶ 2 Live Current Media, Inc., filed a complaint against C. Geoffrey Hampson (a former Chief Executive Officer (CEO) of Live Current), and CoreLink Data Centers and M/C Venture

Partners, two corporations associated with Hampson. Live Current and Hampson agreed to arbitrate their dispute, but CoreLink and M/C did not participate in the arbitration. CoreLink and M/C later filed a motion to dismiss the counts against them, arguing that the arbitrator's award collaterally estopped Live Current from pursuing those claims. The circuit court dismissed all claims against M/C and three counts against CoreLink.

¶ 3 On appeal, Live Current argues that (1) CoreLink and M/C waived the defense of collateral estoppel, (2) the circuit court should not have applied collateral estoppel because Hampson concealed evidence, and (3) the arbitrator did not decide issues identical to those involved in Live Currrent's claims against CoreLink and M/C. We find no waiver, and collateral estoppel applies despite the spoliation because Live Current presented its evidence of spoliation to the arbitrator, and has no new evidence to present at a second trial. We also hold that the issues the arbitrator decided foreclose Live Current from recovering a judgment against CoreLink and M/C on the dismissed counts. Accordingly, we affirm the circuit court's judgment.

¶ 4 BACKGROUND

¶ 5 From 2002 until May 2007, David Jeffs served as CEO of Live Current, an e-commerce company incorporated in Nevada, with headquarters in Vancouver, British Columbia. David participated in the search for his successor. In 2007, Live Current hired Hampson to serve as its new CEO. In the employment agreement, Hampson promised to "devote all of his working time and attention to his employment hereunder and shall use his best efforts to promote the interests of [Live Current]." Live Current and Hampson agreed that "[a]ny dispute between the parties hereto *** arising under this Agreement *** will be determined by arbitration," and that the agreement "shall be governed by and construed in accordance with the laws of the Province of British Columbia and the laws of Canada applicable therein."

¶ 6 In 2007, Tim Doherty founded CoreLink to provide power and cooling and access to the internet for hundreds of servers. Doherty persuaded Hampson to invest in CoreLink and serve as one of CoreLink's directors. In October 2007, M/C, a private equity and investment firm, made a major investment in CoreLink. The following summer, Doherty resigned as CEO of CoreLink and Hampson became CoreLink's new CEO.

¶ 7 Live Current's shareholders voted Hampson out of his position as a director of Live Current in 2010, voting instead for a slate of candidates advanced by David and his father, Richard Jeffs. Hampson resigned from his position as Live Current's CEO shortly after the election.

¶ 8 The Jeffs filed this lawsuit against Hampson in 2010, alleging breach of contract, breach of fiduciary duties, and fraud. In amended complaints, the Jeffs added CoreLink, M/C, and others as defendants, and they changed the plaintiff from the Jeffs to Live Current.

¶ 9 Live Current alleged in count I of the fourth amended complaint that Hampson breached his fiduciary duties to Live Current by devoting time to CoreLink, an entity named Fibrox, and other business ventures; by "failing to present the CoreLink opportunity to Live Current and instead appropriating that business opportunity for himself;" by using Live Current's resources for CoreLink; and by obtaining reimbursement from Live Current for expenses not related to Live Current's business. In count II, Live Current alleged that Hampson committed fraud by failing to disclose to Live Current's board of directors his interests in other business ventures. Counts III and IV state claims against Hampson and CoreLink for unjust enrichment based on Hampson's use of Live Current resources to help CoreLink. Counts V and VI state claims against parties not involved in this appeal. In count VII, Live Current alleged that CoreLink and M/C tortiously interfered with the employment contract between Live Current and Hampson. In count VIII, Live Current alleged that CoreLink, M/C and Hampson conspired to breach Hampson's contract with and fiduciary duties to Live Current. Count IX states a claim that CoreLink and M/C aided and abetted Hampson's breach of his fiduciary duties to Live Current. In the final count, count X, Live Current alleged that Hampson breached his contract, and that as a result of the breach "Live Current has suffered damages as a result in the form of diminished stock value and corresponding market capitalization, damage to its reputation and goodwill, lost profits, and impairment to its ability to continue operating and earning profits."

¶ 10 Hampson filed a claim against Live Current in British Columbia, seeking to recover the severance pay promised in the employment agreement. In 2013, Hampson filed a shareholder's derivative action on behalf of Live Current against David in Cook County, and Hampson also filed a complaint against Live Current in Nevada, seeking to compel a new election of directors.

¶ 11 Arbitration

¶ 12 Hampson, Live Current and the Jeffs agreed to consolidate all the cases they had filed against each other, including all of the claims against Hampson in the Cook County litigation, and submit the entire matter to binding arbitration in Nevada. Hampson filed a motion to stay proceedings on Live Current's lawsuit against him in Cook County pending the arbitration. The circuit court granted the stay. However, Live Current, CoreLink and M/C all agreed not to stay proceedings on Live Current's counts against CoreLink and M/C.

¶ 13 The arbitrator heard evidence over the course of six days and admitted into evidence almost 500 documentary exhibits. The transcript of the arbitration proceedings ran nearly 1,900 pages. The arbitrator issued his final award on June 4, 2014.

¶ 14 The arbitrator made extensive specific findings of fact. He found that Hampson invested $1,000,000 of his own money into Live Current when he accepted the position as CEO. Hampson raised more than $5,000,000 in capital for Live Current, and he continued to increase his personal capital investment in Live Current throughout his tenure as its CEO. Hampson kept Live Current's board of directors apprised of all his business ventures, including his involvement with CoreLink and Fibrox.

¶ 15 The arbitrator found that Hampson made three critical decisions while acting as Live Current's CEO, and all three turned out badly. First, in 2008, Live Current bought Entity, Inc., a startup engineering and development company, so that Live Current would have the services of Entity's technical team. But Entity's software proved worthless, and all members of Entity's technical team left Live Current. Hampson wrote off the entire cost of the acquisition as a loss.

¶ 16 Second, Hampson sought to make Live Current's website named cricket.com a hub for information about the sport of cricket in India. Live Current made a substantial financial commitment to reach a deal with the Board of Cricket Control for India. When financial markets dried up in 2008, Live Current could no longer raise the capital needed to meet its financial obligations for the deal. Live Current eventually sold the domain name after suffering substantial losses.

¶ 17 Live Current also owned the domain name perfume.com, and used the website to sell perfume at discount prices. Before Hampson became CEO, perfume.com formed the primary source for Live Current's income. Live Current ran into difficulties with the perfume suppliers, and Hampson sought to have Live Current acquire its own source for perfume. He decided to rebrand perfume.com as a luxury website. The board supported his decision. Before he could implement the change, the Jeffs ousted him from his position as a director of Live Current, and he resigned from his post as CEO.

¶ 18 Hampson's employment contract with Live Current established his annual salary as $300,000. But when Live Current experienced a cash shortage in 2009, Hampson agreed to reduce his annual salary to $120,000 in cash plus $80,000 in Live Current stock. After the Jeffs filed their initial complaint against Hampson in 2010, Live Current's "board members confirmed that they had full knowledge of, accepted and agreed with Mr. Hampson's dual work activities on behalf of both Live Current and the outside companies." Hampson completed all tasks the board assigned to him.

¶ 19 The arbitrator found that Live Current "failed to meet its burden of proving that Mr. Hampson intentionally made a false representation of material fact upon which he intended that Mr. Jeffs would rely in agreeing to hire Mr. Hampson as Live Current's CEO." Thus, the arbitrator denied the fraud claim. With respect to the claim that Hampson breached his fiduciary duties by usurping a corporate opportunity, the arbitrator held that "Live Current, Fibrox and CoreLink were three distinct and unrelated business models in which none had an interest or expectancy in an opportunity that could be offered by the others. Serving the three companies did not create a conflict of interest for Mr. Hampson or undermine his loyalty to Live Current." Moreover, the arbitrator found that Hampson did not hide the opportunities from Live Current, as he always informed Live Current's board about the other business ventures. The arbitrator regarded the claim that Hampson failed to devote all his time to Live Current as a breach of contract claim, and the arbitrator treated the claim that Hampson used Live Current's assets for CoreLink business as a claim for unjust enrichment. The arbitrator concluded, "Live Current has not met its burden of proving that Mr. Hampson breached his fiduciary duties to the company." As to the conspiracy claim, the arbitrator said:

> "Here, Mr. Hampson's conduct in buying CoreLink stock and becoming its CEO was clearly lawful. To constitute the tort of civil conspiracy, therefore, Mr. Hampson, M/C Ventures and CoreLink must have combined together for the primary purpose of inflicting harm upon Live Current. Not only is there no evidence to support such a claim, the Arbitrator feels constrained to observe, especially in view of Mr. Hampson's investment of well over a million dollars in Live Current, that such an allegation strains to pass the straight-face test."

¶ 20 The arbitrator found that appropriate documents supported Live Current's claim that Hampson had obtained reimbursement from Live Current for expenses related to his work for CoreLink and Fibrox. The arbitrator awarded Live Current, on the claim for unjust enrichment, an order directing Hampson to pay Live Current $127,739.

¶ 21 The arbitrator also found that Hampson breached his contract with Live Current by failing to devote "all of his working time and attention" to Live Current. The arbitrator reasoned:

> "Live Current's damages claim is premised on the proposition that if Mr. Hampson had not devoted any of his working time and attention to matters unrelated to Live Current, Live Current would not have lost profits at perfume.com, would not have had unnecessary and wasteful expenses, and would not have lost market capitalization. Live Current carries the burden of proving that these damages were 'occasioned by' or were 'a direct consequence' of this breach. *Kirby* [*v. Amalgamated Income Ltd. Partnership*,] 2009 BCSC 1044, at ¶ 377. ***
>
> Live Current's losses are largely attributable to three unfortunate business decisions made by Mr. Hampson, his management team, and the Board of Directors: the [Entity] transaction, the Cricket deal, and the change in Perfume.com's business model, together with the severe downturn in the economy in late 2008. There is no evidence in this record that if Mr. Hampson had worked longer hours on Live Current matters, those business decisions would have been different or would not have been made. The record is clear that Mr. Hampson came to Live Current with a strong desire to pursue the company's growth aggressively and to put it on the international map in a big way. His own significant investment in the company loudly bespeaks his desire that the company succeed. ***

> Accordingly, the Arbitrator finds that Live Current has not met its burden of proving that damages were caused by Mr. Hampson's breach of the provision in the Employment Agreement requiring him to devote all of his working time and attention to the business of Live Current."

¶ 22 During arbitration proceedings, Live Current presented evidence that Hampson used computers Live Current supplied for his work for CoreLink and Fibrox, and that after Live Current demanded that he return the computers, Hampson, with help from CoreLink employees, wiped all files off the computers. Live Current asked the arbitrator to draw inferences adverse to Hampson due to his spoliation of the evidence. The arbitrator wrote:

> "When he received [Live Current's] litigation hold notice, Mr. Hampson requested *** that an IT person wipe the laptops clean, but not before Mr. Hampson copied and transferred their contents to a third computer that he controlled. He should not have done that. Whether the entire contents of the two laptops were preserved by Mr. Hampson is unknown. It is possible that some contents of the laptops that were relevant to this case were not preserved. Ultimately a copy of much of the contents of the laptops was provided to Live Current pursuant to Mr. Hampson's discovery obligations prior to the hearing.
>
> As a sanction for Mr. Hampson's violation of the litigation hold notice, Live Current invites the Arbitrator to invoke a broad brush adverse inference approach to the evaluation of Mr. Hampson's credibility. The Arbitrator declines the invitation. *** An adverse inference 'instruction' would be that to the extent relevant materials on the laptops were intentionally destroyed or otherwise not

preserved, the fact finder may infer that the destroyed or unpreserved materials would have been unfavorable to Mr. Hampson. In the context of this case, the inference would be that the unpreserved materials, whatever they may have been, contained evidence revealing that Mr. Hampson was performing work on behalf of CoreLink and/or Fibrox while he was the CEO of Li[v]e Current. In determining whether Live Current was prejudiced by not receiving unpreserved material, the question is whether Mr. Hampson's actions impaired Live Current's ability to proceed to the hearing in this case or threatened to interfere with the rightful decision of the case. [Citation.] Live Current has not been prejudiced from being without access to unpreserved materials, because there was ample evidence in the record, including many emails, testimony from Live Current directors, and Mr. Hampson's own admission, that Mr. Hampson was in fact performing a substantial amount of work for Fibrox and CoreLink while he was Live Current's CEO. Live Current's ability to 'go to trial' was not impaired. Consequently, the Arbitrator declines to impose a severe sanction. Mr. Hampson will, however, be required to pay to Live Current's counsel $10,000 as the reasonable attorney's fees incurred in litigating the spoliation issue prior to the hearing."

¶ 23 Motion to Dismiss

¶ 24 In the Cook County litigation, CoreLink and M/C filed a motion to dismiss the counts of the fourth amended complaint against them, arguing that the arbitrator's decision collaterally estopped Live Current from relitigating certain issues. The circuit court agreed that the arbitrator's findings resolved issues essential to Live Current's claims for tortious interference, civil conspiracy, and aiding a breach of fiduciary duties. Therefore, pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2014)), the circuit court dismissed with prejudice counts VII, VIII and IX of the fourth amended complaint. The circuit court did not dismiss the claim against CoreLink for unjust enrichment. The court found no just reason to delay appeal from the order dismissing counts VII, VIII and IX. Live Current filed a timely notice of appeal.

¶ 25 ANALYSIS

¶ 26 Supreme Court Rule 304(a) gives this court jurisdiction to consider the appeal. Ill. S. Ct. R. 304(a) (eff. Feb. 26, 2010). We review de novo the dismissal of counts VII, VIII and IX under section 2-619. *Neppl v. Murphy*, 316 Ill. App. 3d 581, 583 (2000). Live Current argues (1) CoreLink and M/C waived the collateral estoppel argument; (2) the circuit court should not have applied collateral estoppel because of Hampson's spoliation of the evidence; and (3) the arbitrator did not decide issues identical with the issues involved in the counts against CoreLink and M/C.

¶ 27 Waiver

¶ 28 Live Current argues that when CoreLink and M/C chose not to participate in the arbitration, they waived any argument that relied on the collateral estoppel effect of the arbitrator's decision. In support, Live Current cites *Stulberg v. Intermedics Orthopedics, Inc.*, 997 F. Supp. 1060 (N.D. Ill. 1998). In *Stulberg*, Stulberg began arbitrating a claim against Techmedica, and then he sued Techmedica and another party not involved in the arbitration. Stulberg filed a motion to stay the court proceedings pending arbitration, but Techmedica successfully opposed the motion. The court's decision favored Techmedica, and the arbitrator's decision favored Stulberg. Techmedica moved to vacate the arbitration award based on *res judicata*. The *Stulberg* court said:

> "Whenever parties simultaneously litigate two actions based on the same claim or issue, judgment in one action does not preclude a judgment in the other action if the defendant fails to object. [Citation.] Res judicata and collateral estoppel are intended to protect defendants from the harassment of multiple suits. [Citations.] However, by failing to timely object to separate actions, a defendant is deemed to acquiesce in the plaintiff's simultaneous suits and waives any res judicata or collateral estoppel defense ***.
>
> * * *
>
> In sum, defendants knew that both this lawsuit and the arbitration were progressing, each at its own pace. Defendants also knew that either this court or Judge McGarr would render some judgment at some point in time. Armed with this information, defendants not only allowed both actions to progress contemporaneously, but insisted that both actions proceed. The court will not permit defendants to pick and choose which judgments will bind them. Defendants knew the risk involved with progressing with two separate litigations and willingly accepted that risk. Now faced with an adverse arbitration judgment, defendants cannot raise preclusion defenses at this late stage to avoid the consequences of their own litigation strategy." *Stulberg*, 997 F. Supp. at 1064-65.

¶ 29 Here, CoreLink and M/C did not simultaneously litigate two separate actions. They litigated only in Cook County court and never participated in the arbitration. Thus, the principles stated in *Stulberg*, on their face, do not apply to CoreLink and M/C.

¶ 30 Live Current relies on section 29 of the Restatement (Second) of Judgments as a more complete explanation of the principles applied in *Stulberg*. Comment (e) to section 29 states:

> "A person in such a position that he might ordinarily have been expected to join as a plaintiff in the first action, but who did not do so, may be refused the benefits of 'offensive' issue preclusion where the circumstances suggest that he wished to avail himself of the benefits of a favorable outcome without incurring the risk of an unfavorable one. Such a refusal may be appropriate where the person could reasonably have been expected to intervene in the prior action, and ordinarily is appropriate where he withdrew from an action to which he had been a party." Restatement (Second) of Judgments, ¶ 29 cmt. e (1982).

¶ 31 CoreLink and M/C could have participated in the arbitration between Hampson and Live Current. The Restatement emphasizes the inequity of permitting a potential party to a proceeding to use the result of a favorable outcome of the proceeding without incurring the risk of a binding unfavorable outcome. However, we find no such inequity here. Due to the privity between Hampson and CoreLink, for whom Hampson served as director and CEO, an unfavorable outcome of the arbitration should have bound CoreLink just as much as a favorable outcome. See *Purmal v. Robert N. Wadington & Assocs.*, 354 Ill. App. 3d 715, 722-23 (2004); *Cabrera v. First National Bank of Wheaton*, 324 Ill. App. 3d 85, 92-93 (2001); *Marvel of Illinois, Inc. v. Marvel Contaminant Control Industries, Inc.*, 318 Ill. App.

3d 856, 864-65 (2001). Moreover, section 29 of the Restatement expressly limits the use of offensive collateral estoppel. The section does not apply to the defensive use of collateral estoppel. CoreLink and M/C here invoked collateral estoppel defensively. See *Talarico v. Dunlap*, 177 Ill. 2d 185, 191 (1997). (Defensive use of the collateral estoppel doctrine occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost.)

¶ 32 CoreLink and M/C could not avoid the preclusive effect of the arbitrator's decision on the issues before the arbitrator, which centered on Hampson's acts as CEO of Live Current. By refusing to participate in the arbitration, CoreLink and M/C protected their rights to a court's decision only on issues peculiar to CoreLink and M/C, such as whether their acts induced Hampson to breach his contract with or his fiduciary duties to Live Current, and whether Hampson's wrongful acts unjustly enriched CoreLink and M/C. CoreLink and M/C, unlike Techmedica, never sought a factual finding from the circuit court on the issues submitted to the arbitrator. We find that CoreLink and M/C did not waive their collateral estoppel argument by refusing to participate in the arbitration between Hampson and Live Current.

¶ 33 Spoliation

¶ 34 Next, Live Current argues that Hampson's spoliation of the evidence makes the application of collateral estoppel inequitable. Again, Live Current relies on the Restatement (Second) of Judgments, which advises that issue preclusion should not apply when one party "conceal[s] from the other information that would materially affect the outcome of the case." Restatement (Second) of Judgments, ¶ 28 cmt. j (1982). Here, Hampson wiped all files off the computers he used as CEO of Live Current. He asserted that he copied all files off the computers and provided copies to Live Current. However, Live Current's experts could not determine whether he copied all his files.

¶ 35 When one party conceals evidence prior to obtaining a favorable judgment, courts should not give the judgment preclusive effect because the other party "did not have an adequate opportunity *** to obtain a full and fair adjudication in the initial action." Restatement (Second) of Judgments, ¶ 28(5) (1982). A second proceeding, with the new evidence available for the court, allows the party its full and fair opportunity to litigate its claims. See *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 664 (S.D. Tex. 2010). As one court explained, "One of the factors that *** courts look to in determining whether to apply the doctrine of collateral estoppel is the presence of new evidence. [Citations.] If significant new evidence is uncovered subsequent to the proceeding said to result in an estoppel of the present action, then it cannot be found that a party was afforded a full and fair opportunity to present his case in the absence of that evidence." *Khandhar v. Elfenbein*, 943 F.2d 244 (2d Cir. 1991).

¶ 36 Live Current presented the evidence of spoliation to the arbitrator. The arbitrator considered the evidence and drew inferences somewhat adverse to Hampson due to the spoliation. The arbitrator also imposed a monetary sanction on Hampson for spoliation. Live Current admits that it has no new evidence to present against CoreLink and M/C concerning the contents of Hampson's files or his spoliation of that evidence. Thus, the arbitrator provided Live Current a full and fair opportunity to present all the evidence it now seeks to present against CoreLink and M/C on the issues of whether Hampson breached his contract with or his fiduciary duties to Live Current, whether any breach caused damages, and whether Hampson defrauded Live Current. Because Live Current has already had its full and fair opportunity to litigate those issues, the equitable considerations expressed in section 28(5) of the Restatement (Second) of Judgments do not provide grounds for denying collateral estoppel effect to the arbitrator's award.

¶ 37 Issues Precluded

¶ 38 The parties agree that the arbitrator's award has the same collateral estoppel effect as a judgment. See *Dearborn Maple Venture, LLC v. SCI Illinois Services, Inc.*, 2012 IL App (1st) 103513, ¶ 24. The parties also agree that the arbitration led to a final judgment on the merits, and that Live Current participated in the arbitration. Thus, for collateral estoppel to apply, CoreLink and M/C need to show only that the arbitrator decided issues identical to the issues before the court in Live Current's lawsuit against CoreLink and M/C. See *Dearborn*, 2012 IL App (1st) 103513, ¶ 24. The parties further agree that CoreLink and M/C "bear[] the 'heavy burden' of demonstrating with clarity and certainty what the prior judgment determined." *Peregrine Financial Group, Inc. v. Martinez*, 305 Ill. App. 3d 571, 581 (1999), *quoting People v. Zeigel*, 179 Ill. App. 3d 649, 651 (1989). The arbitrator found:

> "Live Current, Fibrox and CoreLink were three distinct and unrelated business models in which none had an interest or expectancy in an opportunity that could be offered by the others. Serving the three companies did not create a conflict of interest for Mr. Hampson or undermine his loyalty to Live Current.
>
> *** Live Current's Board of Directors was fully aware of Mr. Hampson's activities on behalf of Fibrox and CoreLink, and had no problem with it. ***

> Live Current has not met its burden of proving that Mr. Hampson breached his fiduciary duties to the company.
>
> * * *
>
> *** Mr. Hampson's conduct in buying CoreLink stock and becoming its CEO was clearly lawful. To constitute the tort of civil conspiracy, therefore, Mr. Hampson, M/C Ventures and CoreLink must have combined together for the primary purpose of inflicting harm upon Live Current. Not only is there no evidence to support such a claim, *** especially in view of Mr. Hampson's investment of well over a million dollars in Live Current, that such an allegation strains to pass the straight-face test."

¶ 39 Thus, the arbitrator rejected Live Current's claims for breach of fiduciary duties and civil conspiracy. The arbitrator held that Hampson breached his contract with Live Current by devoting some of his work time to CoreLink and Fibrox. The arbitrator said:

> "Live Current's damages claim is premised on the proposition that if Mr. Hampson had not devoted any of his working time and attention to matters unrelated to Live Current, Live Current would not have lost profits at perfume.com, would not have had unnecessary and wasteful expenses, and would not have lost market capitalization. Live Current carries the burden of proving that these damages were 'occasioned by' or were 'a direct consequence' of this breach. ***
>
> Live Current's losses are largely attributable to three unfortunate business decisions made by Mr. Hampson, his management team, and the Board of

> Directors: the [Entity] transaction, the Cricket deal, and the change in Perfume.com's business model, together with the severe downturn in the economy in late 2008. There is no evidence in this record that if Mr. Hampson had worked longer hours on Live Current matters, those business decisions would have been different or would not have been made. ***
>
> Accordingly, the Arbitrator finds that Live Current has not met its burden of proving that damages were caused by Mr. Hampson's breach of the provision in the Employment Agreement requiring him to devote all of his working time and attention to the business of Live Current."

¶ 40 Live Current claims that the arbitrator did not decide whether Hampson's breach of contract caused damages under Illinois law, because he applied Canadian case law, and not Illinois law, when he found no causal connection between the breach and the damages alleged. CoreLink and M/C point out that Illinois cases concerning proximate cause do not use standards noticeably different from the Canadian standards the arbitrator used. See *County of Cook v. Phillip Morris, Inc.*, 353 Ill. App. 3d 55, 60 (2004). In Illinois, as in Canada, "there must be 'some direct relation between the injury asserted and the injurious conduct alleged.' " *Phillip Morris, Inc.*, 353 Ill. App. 3d at 60, quoting *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268-69 (1992).

¶ 41 Live Current argues that in Illinois, a defendant may proximately cause an injury if his conduct was "a substantial factor" in bringing about the injury. See *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 455 (1992). Canadian courts also apply the substantial factor test for determining proximate cause. See *Bishop v. Blake*, 2003 NLSCTD 179, ¶34; A.M.

Linden, *Canadian Tort Law* 109 (6th Ed., 1997). The arbitrator specifically found no evidence to connect Hampson's breach of the contract with the alleged losses. Under Illinois law, the finding suffices to show that the breach of contract did not proximately cause any loss. See *Union Planters Bank, NA v. Thomspson Coburn LLP*, 402 Ill. App. 3d 317, 333-34 (2010).

¶ 42 In count VII, Live Current alleged that CoreLink and M/C induced Hampson to breach the employment contract with Live Current, and that "Live Current has suffered damages as a result in the form of diminished stock value and corresponding market capitalization, damage to its reputation and goodwill, lost profits, and impairment to its ability to continue operating and earning profits." The arbitrator's findings collaterally estop Live Current from relitigating the issue of whether Hampson's breach of contract caused the damages alleged. Because Live Current cannot show that the alleged damages resulted from the alleged tortious inducement to breach the contract, the circuit court correctly dismissed with prejudice count VII of the fourth amended complaint. See *Mineral Resources, Inc. v. Classic Coal Corp.*, 115 Ill. App. 3d 114, 125 (1983).

¶ 43 In count VIII, Live Current alleged a conspiracy to breach Hampson's contract with and fiduciary duties to Live Current. But the arbitrator found that Live Current failed to show that Hampson committed any unlawful act. To show a civil conspiracy, a plaintiff must prove a combination of two or more persons "for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by unlawful means." *Fritz v. Johnson*, 209 Ill. 2d 302, 317 (2004). The arbitrator's findings estop Live Current from relitigating the issue of whether Hampson committed an unlawful act (either pursuing an unlawful purpose or using unlawful means) when he worked for CoreLink in breach of his contract with Live Current. The circuit court correctly dismissed with prejudice count VIII of the fourth amended complaint.

¶ 44 Finally, the arbitrator found that Live Current failed to show that Hampson breached his fiduciary duties. Live Current has not challenged the circuit court's holding that the arbitrator's finding forecloses Live Current from proving that CoreLink and M/C aided and abetted Hampson's breach of his fiduciary duties. We affirm the dismissal with prejudice of count IX of the fourth amended complaint.

¶ 45 CONCLUSION

¶ 46 CoreLink and M/C did not waive the defense of collateral estoppel. Live Current has no new evidence to offer regarding spoliation, so the arbitrator's finding of spoliation does not require relitigation of the issues the arbitrator resolved after he gave Live Current a full and fair opportunity to present all of its evidence that Hampson breached his contract with and his fiduciary duties to Live Current. The arbitrator's award precludes Live Current from proving that Hampson breached his fiduciary duties to Live Current, thereby precluding Live Current from showing that CoreLink and M/C aided and abetted Hampson's breach of fiduciary duties. The award forecloses Live Current from proving that Hampson's breach of contract caused any of the damages Live Current alleged in the complaint, thereby precluding Live Current from proving that CoreLink's and M/C's alleged tortious interference with the contract caused any of the damages alleged. The arbitrator's specific finding that Hampson and his alleged co-conspirators did not act unlawfully in their dealings with Live Current forecloses Live Current from proving Hampson, CoreLink and M/C guilty of a civil conspiracy against Live Current. The circuit court correctly applied the doctrine of collateral estoppel when it dismissed with prejudice counts VII, VIII and IX of Live Current's fourth amended complaint. Accordingly, we affirm the circuit court's judgment.

¶ 47 Affirmed.