

**Sannon-Stamm Assoc., Inc. v Keefe, Bruyette &
Woods, Inc.**

2008 NY Slip Op 33263(U)

December 4, 2008

Supreme Court, New York County

Docket Number: 106510/2008

Judge: Jane S. Solomon

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SCANNED ON 12/8/2008
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JANE S. SOLOMON

PART 55

Index Number : 106510/2008

SANNON-STAMM ASSOCIATES, INC.

vs
KEEFE, BRUYETTE & WOODS, INC.

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 6/20/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

0

0

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the annexed Decision and Order.

FILED
NOV 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/4/08



JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
SANNON-STAMM ASSOCIATES, INC.,

Plaintiff

INDEX NO. 106510/2008

-against-

DECISION & ORDER

KEEFE, BRUYETTE & WOODS, INC.,

Defendant.

JANE S. SOLOMON, J.:

FILED
NOV 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff Sannon-Stamm Associates, Inc. ("Plaintiff"), an employee placement company, commenced suit against Defendant Keefe, Bruyette & Woods, Inc. ("Defendant"), an employer, to recover a referral fee which allegedly became due after Defendant hired an employee referred to it by Plaintiff. Defendant moves to dismiss the Complaint, pursuant to CPLR 3211(a)(5), on the ground that Plaintiff's action is barred by the doctrine of res judicata. As set forth below, Defendant's motion is granted.

Plaintiff alleges that it referred a Mr. Andrew Crossfield who began to work for Defendant on August 13, 2007. Defendant allegedly agreed to pay, as a referral fee, 10% of Mr. Crossfield's expected and actual gross billings. Plaintiff further alleges that it was agreed that the fee was to be paid over time, with an initial payment of \$25,000 to be made upon the hiring of Mr. Crossfield, and additional payments to be made thereafter.

On or about October 26, 2007, Plaintiff commenced an action against Defendant in New York City Civil Court under Index No. 061638/2007 (the "Civil Court Action") seeking the recovery of the initial \$25,000 payment, which Defendants had not timely paid. The complaint in that action has the following four causes of action: (a)breach of contract; (b)account stated; (c)quantum meruit; and (d)unjust enrichment. On or about April 16, 2008, Defendant served Plaintiff with an "Offer to Compromise Pursuant to CPLR 3221" proposing to "allow judgment to be taken against it in [the Civil Court Action] for the sum of \$25,000 with costs accrued to the date of this offer." On or about April 21, 2008, Plaintiff accepted Defendant's offer. Defendant made payment to Plaintiff in the amount of \$25,000 shortly thereafter.

On or about May 9, 2008, Plaintiff commenced the instant action seeking the recovery of an additional \$50,000 for two additional \$25,000 payments that it claims had subsequently come due under the very same alleged referral agreement that formed the basis for the Civil Court Action. The exact same four causes of action that were asserted in the Civil Court Action are also set forth in the Complaint in this case and the Complaint herein refers to the Civil Court Action.

Defendant's res judicata argument is premised on the ground that Plaintiff improperly has split a claim into two lawsuits in different courts. Defendant contends that the Civil

[*4]

Court judgement that arose from Plaintiff's acceptance of its "Offer to Compromise Pursuant to CPLR 3221" bars the present claims. Plaintiff responds that the two \$25,000 payments came due after the Civil Court Action was commenced, so that it was not required to assert those claims in the Civil Court and can do so now.

Under the transactional approach to *res judicata*, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." Q'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 (1981). A "facet of *res judicata*, referred to as splitting a cause of action, is found in the general rule that when a plaintiff brings an action for only part of his cause of action, the judgment obtained in that action precludes him from bringing a second action for the residue of the claim." Stoner v. Culligan, Inc., 32 A.D.2d 170, 171-72 (3rd Dept. 1969) (emphasis in original). Claim splitting is prohibited to "prevent harassment and vexatious litigation". Pfeiffer v. Allstate Ins. Co., 136 A.D.2d 532, 533 (2d Dept. 1988).

The claim-splitting doctrine is not applicable where a contract is divisible in the sense that "performance by one party of a particular division of the contract makes the other party liable for its performance of that division." Delson

Communications v. MTI/The Image Group, Inc., 11 Misc.3d 235, 237 (N.Y. City Civ. Ct., 2005), aff'd, 18 Misc.3d 114 (App. Term, 2007); see also 22 N.Y. Jur.2d Contracts §266; First Sav. & Loan Ass'n of Jersey City, N.J. v. American Home Assur. Co., 35 A.D.2d 344, 345 (1st Dept. 1970) ("A divisible contract is always one contract, not several contracts. However, there must either be successive divisions upon performance of which the other party becomes bound, or categories with such identifiable lines of demarcation that it becomes apparent the parties assented separately to several things").

If a contract is divisible, as in the case of a lease where monthly rental payments become due for each successive month, then a party may sue to recover installments due at the time of commencement of the action and then, in a later action, sue to recover sums that accrued after the first action was commenced. See Rocco v. Badalamente, 20 Misc.3d 130(A), 2008 WL 2763583, at *1 (App. Term, 2008); Delson Communications, 11 Misc.3d 235 at 237-38.

"In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference." EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 19 (2005). Applying this standard, Defendant's motion should be granted and Plaintiff's

[*6]
Complaint should be dismissed pursuant to CPLR 3211(a)(5).

Defendant correctly contends that Plaintiff has clearly not pled the terms of a divisible contract. Accordingly, Plaintiff's claims are barred under the claim splitting doctrine and should be dismissed under CPLR 3211(a)(5). The Complaint alleges that the fee arose from Plaintiff's single act of referring the employee to Defendant. Defendant was not required to perform any continuing obligations in successive divisions after the employee was hired. Plaintiff appears to argue that the Contract is divisible because Defendant was required to make a number of payments over a period of time. However, a contract is not divisible merely because payments are to be made over time. See Barden & Robeson Corp. V. Timmerman, 116 A.D.2d 814, 815-16 (3rd Dept. 1986).

Plaintiff does not contest that a judgment on consent, such as a judgment issued pursuant to CPLR 3221, is afforded the effect of claim preclusion. See Walston & Co. v. Klein, 44 Misc.2d 607 (Supreme Court N.Y. County, 1964), aff'd, 24 A.D.2d 559 (1st Dept. 1965); Siegel, N.Y. Practice § 451, at 759-60 (4th ed).

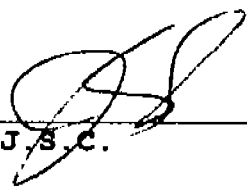
Based on the foregoing, it hereby is

ORDERED that Defendant's motion is granted and the Complaint is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly with costs and disbursements as taxed.

Dated: ~~November~~ *December 4,* 2008

ENTER:


J.S.C.

JAMES S. SOLOMON

FILED
NOV 08 2008
COUNTY CLERK'S OFFICE
NEW YORK