

Rates Tech. Inc. v Epstein Drangel LLP
2012 NY Slip Op 33512(U)
October 17, 2012
Sup Ct, NY County
Docket Number: 152833/2012
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. ELLEN M. COIN

PART 63

 RATES TECHNOLOGY INC., LCR
 TECHNOLOGIES, INC. and GERALD
 WEINBERGER,

Plaintiffs,

INDEX NO. 152833/2012
 MOTION DATE August 1, 2012
 MOTION SEQ. NO. 2
 E-FILED

-against-

EPSTEIN DRANGEL LLP,

Defendant.

The following papers, numbered 1, were read on this motion to dismiss

Papers

Notice of Motion-Affidavits-Exhibits

Answering Affidavits-Exhibits

Reply Affidavits

Cross-Motion **X No**

Papers Numbered

1

2

3

Defendant Epstein Drangel LLP moves for an order (1) transferring this action; (2) dismissing this action or ordering an immediate trial of the issues raised on the motion; (3) consolidating this action with Epstein Drangel LLP v Gerald J. Weinberger, et al., Index No. 151867/2012; and (4) awarding it legal fees. Plaintiffs oppose the motion.

Motion to Transfer

A prior action (New York County Supreme Court Index No. 651231/2011) in which Epstein Drangel was the plaintiff and plaintiffs herein (collectively, "the Rates group") were the defendants was settled and discontinued with prejudice. Thereafter Epstein Drangel sought by order to show cause to restore that case to the court's calendar to amend the settlement agreement and for an order finding that the Rates group was in breach of the agreement. By order dated April 11, 2012, the court (Singh, J.) denied Epstein Drangel's application. In the order embodying its ruling, the court noted "Final Disposition." (Exh. D to the Affirmation of Michael H. Maizes dated May 30, 2012).

Epstein Drangel now contends that the Rates group failed to

disclose to the Court in their subsequent Request for Judicial Intervention in the instant case dated May 14, 2012 that there had been a "related action" in this Court, i.e., the settled and discontinued action that had been assigned to Justice Singh. Thus, it argues that this action should be transferred to Justice Singh.

Under 22 NYCRR §202.3 when a proceeding is presented for judicial intervention via a motion or a request for a conference, it is assigned to a justice. The assigned judge is responsible to conduct "all further proceedings therein" (22 NYCRR §202.3(b)), handling the case "through to its conclusion." (Report on Comprehensive Civil Justice Program at 9 [Unified Court System 2005]).

The Uniform Civil Rules for the Supreme Court require that a party filing a Request for Judicial Intervention indicate any "related actions." "[T]he only rational purpose of requiring identification of related actions is to ensure that related proceedings are resolved most expeditiously by assignment to the justice most familiar with the proceedings." (*United Community Ins. Co. v State Farm Fire & Cas. Co.*, 143 Misc2d 954, 956 [Sup Ct, New York County 1989]).

Where, as here, a case has been discontinued with prejudice, the trial court in that action no longer retains its supervisory power over the action. (*Teitelbaum Holdings, Ltd. v Gold*, 48 NY2d 51, 53 [1979]). Thus, to the extent that this motion seeks to transfer this case to Justice Singh, it must be denied, as the earlier action requires no resolution, having been discontinued with prejudice.

Motion to Dismiss

Epstein Drangel also moves to dismiss the complaint pursuant to CPLR 3211 (a)(1), (4), (5) and (7). It predicates its motion solely on Justice Singh's comments during argument of its Order to Show Cause in the disposed action.

According to the transcript of the argument before Justice Singh (Exh. D to the Maizes Aff.) upon Epstein Drangel's motion to restore the settled case for purposes of amending the settlement agreement between the parties, the Rates group requested their attorney's fees, apparently for defense of that motion. Justice Singh denied the request, on procedural grounds, as the Rates group had not cross-moved for such relief. Since there was no cross-motion pending before Justice Singh and since the case before him had been discontinued with prejudice, his

remarks therein do not collaterally estop the Rates group from litigating their cause of action for legal fees in this action.

As the Rates group notes, they did not have a full and fair opportunity in the discontinued action to litigate the issue of their right to attorney's fees in defending Epstein Drangel's motion to restore that case to the court's calendar. (*Gilberg v Barbieri*, 53 NY2d 285, 291 [1981]). Therefore, Epstein Drangel cannot invoke the principle of collateral estoppel to obtain dismissal of this case. Thus, to the extent that it seeks dismissal pursuant to CPLR 3211(a)(5) (collateral estoppel), the motion must be denied.

To the extent that Epstein Drangel seeks dismissal pursuant to 3211(a)(1) (defense founded upon documentary evidence), the transcript of the proceedings before Justice Singh do not constitute such evidence, as the transcript fails to establish its defense as a matter of law. (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

Epstein Drangel fails to articulate any support for its contention that this case should be dismissed pursuant to CPLR 3211(a)(4), the ground of another action pending. In the absence of such detail, this portion of the motion must be denied.

Finally, Epstein Drangel fails to articulate any facts to support so much of its motion as seeks dismissal for failure to state a cause of action (CPLR 3211(a)(7)).

So much of Epstein Drangel's motion as seeks consolidation of this case with its action against the Rates group (New York County Supreme Court Index No. 151867/2012) (the "related action") is granted to the extent of ordering a joint trial of the cases. The Rates group has failed to demonstrate prejudice to a substantial right, such as the danger of jury confusion, upon such consolidation, and both actions rely on claims founded on the settlement agreement. However, consolidation is inappropriate, since in the related action Epstein Drangel (defendant here) is plaintiff and the Rates group (plaintiffs herein) are defendants. It is well settled that consolidation is improper where one party would end up as both plaintiff and defendant (*Geneva Temps, Inc. v New World Communities, Inc.*, 24 AD3d 332, 335 [1st Dept 2005]; *Bass v France*, 70 AD2d 849, 849-850 [1st Dept 1979]).

To the extent that Epstein Drangel seeks its legal fees in this action in accordance with the settlement agreement, the motion is denied without prejudice. Epstein Drangel predicates

its motion for fees on its need "to compel [the Rates group] to comply and perform and live up to their obligations contained within the settlement agreement." (Maizes Affirmation, para. 15 at 5). No part of the instant motion sought the relief on which the fee claim is based.

Accordingly, in light of the foregoing, it is

ORDERED that the motion to transfer this matter to Hon. Anil C. Singh is denied; and it is further

ORDERED that the motion to dismiss the action is denied; and it is further

ORDERED that defendant shall serve and file its answer to the complaint within twenty days of the docketing of this order; and it is further

ORDERED that the motion to consolidate is granted to the extent that the above captioned action shall be jointly tried with Epstein Drangel LLP v Gerald J. Weinberger, et al., New York County Supreme Court Index No. 151867/2012 and is otherwise denied; and it is further

ORDERED that within 30 days from entry of this order, counsel for the movant shall serve a copy of it with notice of entry upon the Clerk of the Trial Support Office; and it is further

ORDERED that upon payment of the appropriate calendar fees and the filing of notes of issue and statements of readiness in each of these actions, the Clerk of the Trial Support Office shall place the aforesaid actions upon the trial calendar for a joint trial; and it is further

ORDERED that at said joint trial plaintiff Epstein Drangel LLP in the action under Supreme Court Index No. 151867/2012 shall have the right to open and close before the jury; and it is further

ORDERED that the motion for legal fees is denied without prejudice; and it is further

ORDERED that counsel for all parties shall appear for a preliminary conference in Room 311, 71 Thomas Street on December 5, 2012 at 2:00 p.m.

This constitutes the decision and order of the Court.

Dated: October 17, 2012



AJSC

Non-final disposition

HON. ELLEN M. COIN