Frankel v Best Physical Therapy
2015 NY Slip Op 31990(U)
July 24, 2015
City Court of Rye, Westchester County
Docket Number: 14/226
Judge: Joseph L. Latwin

CITY COURT : CITY OF RYE
WESTCHESTER COUNTY
---------- File No. 14/226

ROBERT FRANKEL,

Plaintiff

-against- DECISION AND ORDER

BEST PHYSICAL THERAPY,

Defendant.

Appearances:
Plaintiff- *Pro Se*
Defendant by Linda Redlisky, Esq., Rafferty & Redlisky, LLP, Pelham, NY

This is an action for breach of contract. Robert Frankel ("Frankel") filed a small claims proceeding in the Rye City Court seeking recovery for services performed. Thereafter, Best Physical Therapy ("BPT"), reportedly filed a separate civil action in the City Court of White Plains, in the nature of a counterclaim, based on Frankel's alleged breach of contract and malpractice purportedly resulted in damages in an amount in excess of the jurisdiction limit of the small claims part of the City Court. BPT indicated it would move to dismiss the Rye action as it believed having both the Rye and White Plains actions occur might bring about multiple or inconsistent judgments, and increase expenses and time spent on this matter.

BPT could not have filed its "counterclaim" in the Rye action since it seeks an amount in excess of the small claims jurisdiction. UCCA § 1805(c) states, "No counterclaim shall be permitted in a small claims action, unless the court would have had monetary jurisdiction over the counterclaim if it had been filed as a small claim. Any other claim sought to be maintained against the claimant may be filed in any court of competent jurisdiction." UCCA § 208 says, "The court shall have jurisdiction of counterclaims as follows: (a) Of any

counterclaim the subject matter of which would be within the jurisdiction of the court if sued upon separately." The City Court small claims jurisdiction is currently $5,000. UCCA § 1801.

BPT could not have filed their counterclaim as a separate claim in Rye since neither party resided here, nor did the action arise here. UCCA § 213(a) says, "In an action described in § 202, either a plaintiff or a defendant must:

1. be a resident of the city . . . or

2. have a regular employment within the city; or

3. have a place for the regular transaction of business within the city."

Under UCCA § 202 the City Court has jurisdiction over actions for money damages not in excess of $15,000. Defendant correctly determined that under UCCA § 213(a), it could not file that action in Rye City Court since neither party resided there, nor did the action arise there. Frankel resides in Mamaroneck while BPT resides in White Plains. However, since BPT resides in White Plains, it could chose to file its "counterclaim" in White Plains City Court.

From this exercise in jurisdictional gymnastics, there are two separate, but very interrelated cases in different courts.

Preliminarily, one might ask why there simply could not be a change of venue. Venue means the geographical subdivision in which an action may be brought. Venue rules are needed only for courts with territorial subdivisions, such as the Supreme Court. County, City, town and village courts are independent in their municipalities and have no venue provisions. Siegel, *New York Practice* § 116 (4th ed.). Not being a court with subdivisions, City courts cannot change venue to another City Court. See, *Idrobo v. Martin*, n.o.r., 2003 WL 22517744 [Nassau County Dist Ct 2003].

This Court looked to see if the cases could be consolidated. CPLR 602(b) says, "Cases pending in different courts. Where an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court. Where an action is pending in the county court, it may, upon motion, remove to itself an action pending in a city, municipal, district or justice court in the county and consolidate it or have it tried together with that in the county court.

Thus, CPLR 602 by its terms is inapplicable to City Courts and gives them no power to consolidate cases between them. There is no parallel provision in the UCCA.

CPLR 3211(a) is designed to avoid multiple litigation, the exact issue in this case. The statute allows a court to dismiss an action, if it can be shown another action with the same parties is pending in another court. But, the court does not have to necessarily dismiss the action, and only may do so if it feels necessary. The general rule, is that in order for the case at hand to be dismissed, the other case must have been commenced first. Here, Frankel filed his action first, in Rye, while Best filed their counterclaim in White Plains after the Rye case had already been filed. Accordingly, if BPT had made a motion to dismiss, it would not be granted because their action was filed second, not first. The case filed by Frankel in Rye takes priority, therefore it would not be dismissed.

Moise v. Brown is strikingly similar. *Moise v Brown*, 26 Misc. 3d 1224(A), 1224(A) [Sup. Ct., Kings County 2010]. The defendant, ("Car 2") in that case, filed an action in a small claims part before a second case was filed. Plaintiff ("Car 1") moved for an order seeking to transfer Car 2's small claims case to the civil part of the court, and, after transfer, consolidating the Small Claims action for joint trial. The Court denied the motion saying, "Small claims matters are subject to informal procedures which are designed to facilitate the handling of minor claims and grievances without resort to the use of counsel." "The governing statute provides that "the court shall conduct hearings upon small claims in such a manner as to do substantial justice between the parties according to the rules of substantive law and shall not be bound by statutory provisions or rules of practice, procedure, pleading or evidence." The small claims action should not be removed due to the lack of fairness, by putting a bigger burden on the defendant when the case is removed from small claims court to civil part. With this would come higher burdens of proof and evidence, something that the individual or party did not expect when first filing in small claims court. According to Professor Siegel, "The simple relatedness of claims simultaneously pending in the regular and small claims parts of a court is never a ground for the removal of the small claim, else many a property damage aspect of a tort--such as an automobile accident claim--would be impeded for years by being transferred for consolidation to the regular part of the court, or to some other court, in which the personal injury aspect is pending. Hence, where P sued D for personal injuries in the regular part of the court and moved to have D's small claim against P for property damage

consolidated, the motion was denied. Res judicata, as we shall see, is not the problem: no part of the adjudication made on the property damage small claim is binding on the personal injury claim, despite potentially inconsistent findings. Delay of the small claim is the problem, and the courts are sensitive to it." Siegel, New York Practice, § 582 at 1011 [4th Ed]. The *Moise* court concludes, "Transfer and consolidation here, therefore, would prejudice a substantial right of the defendant, that is, the right to have his claim resolved according to the standard and rules applicable in the Small Claims Part of Civil Court, whereas allowing the Small Claims action to proceed would not prejudice Plaintiff in this action."

A person commencing an action upon a small claim . . . shall be deemed to have waived a trial by jury, but if said action shall be removed to a regular part of the court, the plaintiff shall have the same right to demand a trial by jury as if such action had originally been begun in such part. UCCA § 1806.

The two different types of actions also differ in the standards on any appeal of a judgment. A person commencing an action upon a small claim under this article shall be deemed to have waived all right to appeal, except that either party may appeal on the sole grounds that substantial justice has not been done between the parties according to the rules and principles of substantive law. NY CLS UCCA § 1807. In the civil part, the right to appeal is not automatically waived. CPLR § 5501.

Another difference is the relaxed standards in a small claims court compared to a civil court. The [small claims] court shall conduct hearings upon small claims in such manner as to do substantial justice between the parties according to the rules of substantive law and shall not be bound by statutory provisions or rules of practice, procedure, pleading or evidence, except statutory provisions relating to privileged communications and personal transactions or communications with a decedent or mentally ill person. An itemized bill or invoice, receipted or marked paid, or two itemized estimates for services or repairs, are admissible in evidence and are prima facie evidence of the reasonable value and necessity of such services and repairs. Disclosure shall be unavailable in small claims procedure except upon order of the court on showing of proper circumstances. In every small claims action, where the claim arises out of the conduct of the defendant's business at the hearing on the matter, the judge or arbitrator shall determine the appropriate state or local licensing or certifying authority and any business or professional association of which the defendant is a

member. The provisions of this act and the rules of this court, together with the statutes and rules governing supreme court practice, shall apply to claims brought under this article so far as the same can be made applicable and are not in conflict with the provisions of this article; in case of conflict, the provisions of this article shall control. UCCA § 1804.

Disclosure is much different in the civil court. In a civil action, there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof. CPLR § 3101.

The rules of evidence are also much more stringent and much more in depth in the civil action. NY CPLR § 4512.

Any argument that this court dismiss or remove this case to the White Plains Court must fail. Under CPLR 3211(a), this action was filed first, meaning it holds priority. Under NY CLS CPLR § 602, the two cases cannot be consolidated. According to *Moise v. Brown*, there is authority on this issue that favors continuing the Rye case.

Accordingly, it is,

ORDERED and ADJUDGED that the case be set down for trial before the Court on October 28, 2015 at 900 a.m. The parties shall bring their evidence and witness at that time and be ready to proceed to trial

July 24, 2015

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JOSEPH L. LATWIN
Rye City Court Judge

ENTERED

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