Entech Eng'g, P.C. v Khamcy
2016 NY Slip Op 30585(U)
April 8, 2016
Supreme Court, New York County
Docket Number: 650572/2014
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ENTECH ENGINEERING, P.C.,

Plaintiff,

-against-

HOSSEIN KHAMCY,

Defendant.

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Index No.: 650572/2014

DECISION AND ORDER

Motion #001

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this action alleging breach of an employment agreement, Defendant Hossein Khamcy ("Khamcy") moves to dismiss the complaint pursuant to CPLR 3211(a)(5) on *res judicata* and collateral estoppel grounds, and for sanctions against Entech for vexatious litigation.

Factual Background

Plaintiff Entech Engineering, P.C. ("Entech") alleges that it hired Khamcy as Vice President of Construction to grow Entech's engineering company in Long Island pursuant to a November 4, 2008 employment contract (the "Contract"). In exchange, the Contract offered Khamcy various compensation and benefits, including a "year-end bonus plan" based on the company's gross income, as well as $400 per month in car expenses, plus on-the-job mileage reimbursement. According to Entech, Khamcy indicated "in his deposition" that he failed to "perform any of the activities or responsibilities as Vice President of [ ] Construction" despite receiving payments under the Contract. Khamcy's failure to perform under the Contract allegedly caused Entech to suffer loss of opportunities and resulting income in the amount of $500,000.

Now in support of dismissal, Khamcy argues that Entech's instant action is barred because Entech's claims and issues herein were (or could have been) fully litigated and resolved at a 2014 bench trial of Khamcy's previous action against Entech for unpaid wages (*Khamcy v. Entech Engineering, P.C.*, Sup Ct, NY County, August 21, 2014, Index No. 105886/10, hereinafter, the "First Action"). In the First Action, Entech argued (in defense to Khamcy's wage claims), that Entech did not pay Khamcy his "year-end bonus" because Khamcy "did not do anything as Vice President of Construction" to market or develop the business as required under the Contract. Thus, whether Khamcy was entitled to the bonus he sought was the subject matter of the First Action. Likewise here, the Complaint, filed on the eve of the trial of the First Action, alleges that Khamcy failed to perform his duties under the Contract. Therefore, final decision concerning the claims in the First Action should result in dismissal of this action based on *res judicata* and collateral estoppel

Further, Khamcy seeks sanctions, arguing that this retaliatory action is the latest in a pattern of vexatious litigation, demonstrated further by Entech's pursuit of litigation against another individual who previously occupied Khamcy's position.

In opposition, Entech argues that it is entitled to pursue this action because the First Action involved whether Khamcy was entitled to the bonus under the contract pursuant to, *inter alia*, Labor Law 198(1-a), attorneys' fees, and liquidated damages, whereas in this action, Entech claims that Khamcy is entitled to reimbursement of the car allowance payments made to him during the 13-month period of employment. Entech instant action is not seeking to re-litigate the prior issues. While the First Action "litigated the subject matter of whether or not Khamcy was entitled to his bonus or wage" under the Contract (Khamcy Opposition, p. 4), there was no final

determination on the issue of Khamcy's entitlement to retain the car allowance payments, or Entech's claims for loss opportunity and resultant loss revenue based his failure to perform his duties, so as to trigger *res judicata* or collateral estoppel. As this action was filed while the First Action was pending, Khamcy's failure to seek consolidation of both matter indicates that both actions are different.

In reply, Khamcy argues that his alleged failure to work as a business developer for Entech's business was previously advanced and expressly rejected by the Court in the First Action, and the cases cited by Entech are factually distinguishable. Further, the string of cases Entech brought against another former employee demonstrates Entech's misuse of the legal system to harass former employees.

Discussion

Pursuant to CPLR 3211(a)(5), "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the cause of action may not be maintained" because of collateral estoppel or *res judicata*.

Res judicata, or claim preclusion, is invoked when parties seek to relitigate entire causes of action between them and applies to matters which were actually litigated *or could have been litigated* in the earlier action (*DaimlerChrysler*, 6 Misc 3d at 235; *see Hyman v Hillelson*, 79 AD2d 725, 726 [3d Dept 1980] *affd*, 55 NY2d 624 [1981]). *Res judicata* is intended to ensure finality, prevent vexatious litigation, and promote judicial economy (*Xiao Yang Chen v Fischer*, 6 NY3d 94, 100 [2005]). "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" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357; *see*

also, Smith v Russell Sage Coll., 54 NY2d 185; *Matter of Reilly v Reid*, 45 NY2d 24; *Feigen v Advance Capital Mgt. Corp.*, 146 AD2d 556, 558 [1st Dept 1989]; Restatement [Second] of Judgments § 24).

A "pragmatic" test has been applied to aid in determining whether claims are part of the same transaction. The test analyzes "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage" (*Xiao Yang Chen,* 6 NY3d at 100-01; *see also Jefferson Towers v Public Serv. Mut. Ins. Co.* 195 AD2d 311 [1st Dept 1993] [holding that a second action may not be barred even if both actions arise from an identical course of dealing, if the elements of proof and evidence required to sustain recovery vary materially, and creating exception for declaratory judgments]). Dismissal under this doctrine is harsh, and thus "[i]n properly seeking to deny a litigant two 'days in court', courts must be careful not to deprive [the litigant] of one" (*Reilly*, 45 NY2d at 28).

The doctrine of collateral estoppel, also known as issue preclusion, is a "narrower species of *res judicata*" (*Keeler v W. Mtn. Corp.*, 105 AD2d 953, 954 [3d Dept 1984]). The doctrine precludes a party from relitigating an identical issue decided against that party in a prior proceeding where there was a full and fair opportunity to litigate that issue (*CIBC Mellon Trust Co. v Samuel Montagu & Co.*, Ltd., 25 AD3d 492, 492 [1st Dept 2006]). Unlike *res judicata*, collateral estoppel is confined to the issues which were actually litigated, not to those which could have been litigated (*DaimlerChrysler Corp. v Spitzer*, 6 Misc 3d 228, 234 [Sup Ct Albany County 2004] *affd*, 26 AD3d 88 [3d Dept 2005] *affd*, 7 NY3d 653 [2006]).

"Collateral estoppel applies when (1) the issues in both proceedings are identical; (2) the

issue in the prior proceeding was actually litigated and decided; (3) there was a full and fair opportunity to litigate in the prior proceeding; and (4) the issue previously litigated was necessary to support a valid and *final judgment on the merits* (*Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 928 NYS2d 515 [1st Dept 2011] *citing Ryan v New York Tel. Co.*, 62 NY2d 494, 500–501, 478 NYS2d 823, 467 N.E.2d 487 [1984] (emphasis added)).

In each instance, the prior issue must have been decided (*see NAMA Holdings, LLC v Greenberg Traurig, LLP*, 62 AD3d 578, 880 NYS2d 34 [1st Dept 2009]).

Here, Khamcy's First Action against Entech sought to recover his "year-end bonus plan for 2009" based on the Contract, liquidated damages pursuant to the Labor Law for failure to pay such bonus, attorneys' fees under the Labor Law, double recovery under Federal law, and attorneys' fees under Federal law.

Entech's Answer denied the allegations, but stated that ". . . [Entech] did not pay the alleged year end bonus . . . because [Khamcy] was not entitled to same" (Answer, Third Paragraph). In further defense of Khamcy's bonus claim, and at the bench trial before Justice Barbara Jaffe, Entech's principal Soudabeh Bayat ("Bayat") elaborated upon the Answer as to Khamcy's failure to perform under the Contract so as to merit any bonus:

> ". . . I started talking to him about, what about the office? Have you seen any places? We can – it was a very good time for real estate. . . . I wanted him to go and see the places that are suitable for office and meeting with the people, because at 3:30 he would go home – nothing else. He had the whole day for himself. . . . So, he had his day is done by 3:30 or something, you know, maybe he worked one hour overtime, which he get paid for it, and *he did not do anything as Vice President of Construction and he accepted the title*."
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> . . . .there was *no effort on doing marketing and business development and, you know, like bringing new business, meeting people*. . . . Your title Vice President of Construction. This is a managerial position. It's not just working from 7 to 3 and then going home and

do nothing for the company.
(Pages 74-75).

* * * * *

. . . We were paying him a lot of salary, we were subsidizing his salary, we were paying him a lot of bonus. He also argued for medical insurance . . . to pay only 25 percent, so we agreed to everything that he said and *he delivered nothing.*
(Page 78) (Emphasis added)

It is also noted that Entech's principal also testified concerning the car expenses for which it now seeks reimbursement in this action:

"We also give him car, which we never had that before. In addition to the mileage that he had to spend on the job, which we, it was paid, we also give him $600 car allowance. That would be for him going to different places and meet different people and expand business" (*Khamcy Exh D*, 69:15-19).

* * * * *

Q: Now, Ms. Bayat, you were saying that one of the items that you were giving Ms. Khamcy is a car expense; is that correct?

A: Yes, car allowance.

* * * * *

Q: What was the purpose of the car allowance?

A: It was for him to reach out to go places after the work was finished, and meet with the people and develop the business – you know, whatever is needed to start the office in long Island.
(*id.* at 69:24-70:9).

* * * * *

"So, it was the understanding, the car allowance, no one is here like 400 a month, and he argued with me for 600, so he got 600 a month during the entire year. Okay. And, he was also getting paid for the mileage that he had on the job. So that was separate. So, if he had to drive during the project, he was getting a separate mileage expense. But, then again, another expense 600 per month, *to just do his responsibilities as Vice President of Construction and he got this and he never did it"*
(*id.* at 72:24-73:6).
(Emphasis added).

And, Entech's principal further testified about the lost business opportunity as a result of Khamcy's alleged failure to perform under the Contract, for which it now seeks damages herein:

> "So, he never did any marketing, he never went out after 3:30. He was home. *He didn't [do] nothing for the EnTech and it was absolutely disappointing, and we lost a lot of money because we didn't get an opportunity to have an office* in Long Island. That was a very good time to have that"
> (*id.* at 78:7-11) (Emphasis added)

As noted in the Trial Decision, Entech argued that "the sole issue to be decided at trial is whether [Khamcy] tried to develop [Entech's] business" and that only upon such a showing would Khamcy be entitled to the bonus sought. (Decision, p. 5). The Decision also noted that "Alternatively, [Entech] argues that having failed to perform the services to which he was contractually obligated, [Khamcy] is not entitled to the bonus." (*Id.*) Khamcy argued that the bonus was not discretionary, but a wage to which he was entitled under the Labor Law.

The Court concluded that the Contract lacked any language that rendered the "payment of bonus [] discretionary or contingent on [Khamcy] assisting" Entech "with expanding its business" (Decision, p. 7). Continuing, the Court stated, that had Entech "intended to retain the ability to withhold the bonus for plaintiff's failure to perform in that regard, [Entech] could have done so and offers no explanation for failing to do so." Thus, the Court held that the "facially unambiguous contract" "must be enforced according to its terms which require that defendant pay plaintiff pursuant to the bonus plan" and awarded Khamcy $36,195.58.

Inasmuch as the instant action alleges that Khamcy did not perform his duties under the Contract, such issue was raised, albeit as a defense to a bonus claim, and the parties had a full and fair opportunity to litigate this discrete issue. The Court found that the plain terms of the

Contract pertaining to the bonus was not contingent on Khamcy's performance under the Contract.

The issue of whether Khamcy's entitlement to car expenses (for which Entech seeks reimbursement) was likewise contingent on Khamcy's performance under the Contract was testified to at the trial, but no final determination was made on such issue. Likewise, whether Khamcy's alleged inadequate performance under the Contract resulted in Entech's loss opportunities was also testified to at the trial, but no final determination was made on such issue.[1]

Nevertheless, dismissal is justified here under the doctrine of *res judicata*. The parties and underlying facts in each action are identical, and the underlying facts and requested relief (Khamcy suing for his bonus and now, Entech seeking reimbursement of car expenses and damages for lost profits), revolve around the same central issues: Whether Khamcy was required under the Contract to develop Entech's business, and if so, whether Khamcy's entitlement to payment under the Contract was contingent on Khamcy's performance of those duties. Entech's instant claims arise out of the same Contract and employment period, and Entech's claims for reimbursement and loss opportunity stem from Entech's defense to the First Action, *to wit*: that Khamcy underperformed under the Contract. The extensive testimony in the First Action demonstrates that Entech had a full and fair opportunity to address in the First Action Khamcy's purported obligation to undertake business development activities and, Entech declined to assert

[1] Consequently, collateral estoppel does not apply to these claims. It is further noted that although Entech contends that the "sole issue" was "whether plaintiff tried to develop [Entech]'s business" (*Khamcy Exh A* at 5), Justice Jaffe held that the Contract did not condition Khamcy's bonus upon his business networking activities. Thus, though Khamcy testified that he had never agreed to undertake business development (and though Bayat testified to the contrary), there was no finding as to whether Khamcy had an obligation under the Contract and if so, whether he complied therewith.

counterclaims in the First Action. Therefore, given that Entech could have counterclaimed for damages based on the same allegation that formed its defense, the instant action is barred by *res judicata*.

Sanctions

22 NYCR § 130-1.1 allows a court to exercise discretion to impose sanctions and costs for frivolous conduct. Conduct is considered frivolous if it is: without legal merit; or is undertaken primarily to delay or prolong the litigation, or to harass or maliciously injure another; or asserts material factual statements that are false (*Tavella v Tavella*, 25 AD3d 523, 524 [1st Dept 2006]). Additionally, "the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party" (*id.* at 524-525).

Entech's lawsuits against a different former employee, Ahmad Zubair and dismissal of Entech's latest claim pursuant to Zubair's bankruptcy proceedings are insufficient to establish a pattern of meritless, vexatious litigation. *Thompson v. The Andy Warhol Foundation for the Visual Arts*, on which Khamcy relies, is distinguishable because that case discusses a pattern of repeated litigation – nine *pro se* lawsuits in five venues – that can more fairly be described as vexatious (2015 WL 4641587 [Sup Ct NY County]). Because Khamcy does not introduce any other evidence that sufficiently demonstrates that Entech's actions were frivolous, Khamcy is not entitled to sanctions.

Conclusion

For the reasons set forth above, it is hereby

ORDERED that the branch of Hossein Khamcy's motion to dismiss the complaint pursuant to CPLR 3211(a)(5) on *res judicata* and collateral estoppel grounds, is granted solely as to dismissal of the complaint on the ground of *res judicata*; and it is further

ORDERED that the Complaint is hereby dismissed, with prejudice; and it is further

ORDERED that the branch of Khamcy's motion for sanctions is hereby denied; and it is further

ORDERED that on Khamcy's counterclaim is severed and the parties shall appear for a preliminary conference on May 3, 2016, at 2:30 p.m.

This constitutes the decision and order of the Court.

Dated: April 8, 2016

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.