UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Charlene Simmons, Plaintiff-Appellant, -v- Trans Express Inc., Defendant-Appellee.	**REPLY - MOTION TO CERTIFY QUESTIONS TO NY COURT OF APPEALS** 2d Cir. Case No.: 19 -438 EDNY Case No.: 18-CV-5938 (ENV)(RLM)

I. PRELIMINARY STATEMENT

Plaintiff-Appellant Charlene Simmons respectfully submits this Reply to Defendant's opposition and in further support of her motion to certify questions to the New York Court of Appeals.

II. ARGUMENT

1. DEFENDANT'S OPPOSITION COMPELLINGLY CONFIRMS THE NEED FOR CERTIFICATION AND GUIDANCE FROM THE NY COURT OF APPEALS

At the outset, while opposing certification on other grounds, Defendant appear not to contest certain important points. First, Defendant does not challenge the formulation of the questions presented for certification – for example, that the statutory claims in this action are not the same as in the small claims action and that the claims in this action were not part of the small claims action. Second, Defendant does not dispute that the issues are sufficiently important to warrant

certification and that a ruling from the New York Court of Appeals on the questions presented would dispose of this appeal.

Third, Defendant does not appear to dispute that its position is contrary to the plain language of NYCCCA § 1808 and that interpretations that are contrary to statutory language have a much higher rate of rejection at the NY Court of Appeals.

Fourth, Defendant does not appear to dispute that the example it put forth at oral argument is based on a legally erroneous premise that FCRP cases cannot be filed in state court – thus leaving us without any example of when the statutory language will have meaning and application if Defendant's position is correct. (Pl. Cert. Mot. 11). Instead, Defendant in footnote 1 of it opposition tries to blame its error on its reading of a district court case, but when read in context, the subject decision appear to state that the small claims court could not afford the *relief requested* because of jurisdictional limits and not that claims could not be brought in state court – especially if the plaintiff had waived certain items of relief such as amount of damages beyond limit of small claims court and non-monetary relief, as Defendant's view of res judicata would require.

Fifth, Defendant does not appear to genuinely dispute that the many and extensive arguments made herein – especially arguments in the context of the uniquely protective framework of the FLSA and NYLL, were never addressed or

directly addressed in the New York Appellate Division decisions. See i.e. *Waters v. Churchill*, 511 U.S. 661, 678 (1994), ("cases cannot be read as foreclosing an argument that they never dealt with").

Sixth, in incorrectly accusing the Appellate division in *McGee* of using an "inaccurate label," (Def. Opp. 5), Defendant nonetheless appear to finally recognize a point made by Plaintiff as well as the U.S. Supreme Court in *Allen v. McCurry*, 449 U.S. 90, 94, FN 5 (1980), that courts tend to conflate and use the terms res judicata and collateral estoppel interchangeably – thus creating uncertainty and confusion in the jurisprudence that requires higher court review and clarification, especially in a case like this where the distinction is material in light of NYCCCA § 1808.

Defendant opposes certification of the first issue because it argues that "there is no conflict within New York state courts." (Def. Opp. 3). However, to the extent "New York's trial and intermediate appellate courts have spoken in unison" (Def. Opp. 3), it is in agreeing with Plaintiff that res judicata under NYCCCA § 1808 only applies if the claims in the subsequent action and the prior small claims action are the *same* – a situation not present here.

However, Defendant does not dispute that several Appellate Division cases cited by Plaintiff conflict with Defendant's position in this case and its interpretation of other NY Appellate Division cases on the res judicata issue. For

example, Defendant does not dispute that under the Appellate Division decision in *Katzab v. Chaudhry*, 48 A.D.3d 428, 849 N.Y.S.2d 804 (2d Dep't, 2008), its res judicata affirmative defense in this action would fail. Instead, Defendant attacks *Katzab* as incorrectly decided – further highlighting the need for certification.

Nonetheless, contrary to Defendant's position, Katzab was correctly decided. In attacking *Katzab* as incorrectly decided, Defendant argues as follows (Def. Opp. Memo pg. 4):

> *Katzab v. Chaudhry*, 48 A.D.3d 428, 849 N.Y.S.2d 804 (2008) is inapposite. The court in *Katzab* relied exclusively on case law based on the pre-2005 version of §1808. The 2005 amendment (which applies here) was designed to allow res judicata to apply to judgments from small claims court.

By way of clarification, *Katzab* did not hold that res judicata does not apply under NYCCCA § 1808 – it held that res judicata applies under NYCCCA § 1808 but only where the same claim is brought in the small claims action and the subsequent action – a situation not present here. In terms of the 2005 amendment to NYCCCA § 1808, Defendant neglects to mention that the Appellate Division in *Katzab*, actually quoted from the current version of NYCCCA § 1808 that it was applying in *Katzab* – the same version as in this case. Moreover, as to the reliance in *Katzab* on some pre-2005 cases, as we pointed out in the opening brief (Pl. Br. 15-16), the 2005 amendment in NYCCCA § 1808 was intended to conform the statute to then existing case law that interpreted NYCCCA § 1808 as allowing res

judicata but only as to the *same* claim. Unfortunately for Defendant, no one else including the Appellate Division believes that *Katzab* was incorrectly decided, as the Appellate Division has subsequently cited to and specifically reaffirmed the holding in *Katzab* in cases such as *McGee v. J. Dunn Const. Corp.*, 54 A.D.3d 1010, 1010, 864 N.Y.S.2d 553, 553–54 (2d Dep't, 2008) and *Merrimack Mut. Fire Ins. Co. v. Alan Feldman Plumbing & Heating Corp.*, 102 A.D.3d 754, 961 N.Y.S.2d 183 (2d Dep't, 2013).

In response to *Merrimack*, Defendant states in relevant part as follows:

> Merrimack Mut. Fire Ins. Co. v. Alan Feldman Plumbing & Heating Corp., 102 A.D.3d 754, 961 N.Y.S.2d 183 (2013) actually granted res judicata to a small claims court judgment and, thus, disproves Appellant's point of a conflict in New York state courts. In dicta, Merrimack name-checks Katzab, but this is a meaningless throwaway line, not a rejection of the Platon line of cases (as is confirmed by the fact that those cases go unmentioned).

It is not clear what Defendant means by "name-checks" in the context of briefing – the Appellate Division in *Merrimack* cited to and specifically reaffirmed *Katzab* and its holding that res judicata under NYCCCA § 1808 only applies to the *same* claim. The fact that *Merrimack* upheld the application of res judicata under NYCCCA § 1808 is not inconsistent with Plaintiff's position herein because the *Merrimack* court applied the *same claim* standard – we cannot get more "same" than an insurer standing in the shoes of its insured as was the situation in *Merrimack*.

Significantly, however, based on Defendant's argument, if the *same claim* language and standard in *Merrimack* is not "a meaningless throwaway line," then *Merrimack* is a "rejection of the Platon line of cases" (Def. Opp. 5), as Defendant purports to interpret those cases. Obviously, as a matter of law, we cannot assume or conclude that a judicial decision is meaningless especially when it affirms and is consistent with other judicial decisions as well as the plain text of the subject statute. Moreover, if Defendant is correct that the Appellate Division decisions have now become "a meaningless throwaway line" then intervention by the New York Court of Appeals is not only warranted, it is urgently needed.

Defendant does not appear to dispute that if the Appellate Division ruling in *McGee v. J. Dunn Const. Corp.,* 54 A.D.3d 1010, 1010, 864 N.Y.S.2d 553, 553–54 (2008), means what it says, then Defendant's res judicata affirmative defense in this case would fail under *McGee*. Instead, Defendant claims that the Appellate Division in *McGee* used an "inaccurate label" (Def. Opp. 5) – that the Appellate Division in *McGee* confused res judicata with collateral estoppel. However, if Defendant is correct that the Appellate Division confused or conflated res judicata with collateral estoppel, this alone is a sufficient reason to seek guidance from the New York Court of Appeals so the confusion in the Appellate Division can be sorted out and corrected and it would mean that we cannot reliably rely on any

Appellate Division to accurately predict how the NY Court of Appeals would rule on this issue.

However, it appears that it is Defendant who is confused and not the Appellate Division. In this regard, the trial court in *McGee* specifically noted that it was denying the motion to dismiss which was based on "res judicata." See *McGee v J. Dunn Const. Corp.,* No. 7340/2006, 2007 WL 6179709 (N.Y. Sup. Ct. Sep. 24, 2007) ("Plaintiffs' motion to dismiss defendants' First, Second and Third Counterclaims *pursuant to the doctrine of* ***res judicata*** [CPLR Rule 3211(a)(5)] is denied."). Similarly, the Appellate Division in *McGee*, 54 A.D.3d 1010, held that "The Supreme Court correctly concluded that the determination of the Justice Court was not entitled to ***res judicata*** effect." In *Merrimack* which dealt with the res judicata affirmative defense, the Appellate Division interpreted *McGee* as rejecting res judicata under the *same claim* standard.

Very significantly, *McGee* tends to reflect an important point made by Plaintiff – that whether we use the label collateral estoppel or limited res judicata or some other label, NYCCCA § 1808 would permit Plaintiff to bring in a subsequent action, "separate claims arising from the same transactions between the parties" that the claims in small claims court arose from – a result that would be barred by Defendant's res judicata arguments and the decision of the lower court in this action, but which is allowed by the New York Appellate Division.

It is especially significant that Second Department cases like *Katzab*, *Merrimack* and *McGee* adopted the *same claim* standard, given that Plaintiff worked for Defendant within the Second Department and the fact that the small claims action here as well as this case were both filed within the geographic area covered by the Second Department.

Finally, Defendant argues that "the FLSA is a federal statute, so there is zero basis for certifying any question concerning the FLSA." (Def. Opp. 5). Defendant misses the mark. By way of clarification, the second question calls upon the NY Court of Appeals to decide whether to limit New York's doctrine of res judicata in light of the FLSA – this is not the same as certifying a federal question to the New York Court of Appeals. Notably, a state such as New York State can give its citizens more rights than required by the FLSA but not less. In other words, New York can choose to limit its doctrine of res judicata in order to further the remedial goals of the FLSA even if such a limitation is not required or mandated by the FLSA or a federal court's interpretation of the FLSA. The NY Court of Appeals can also conclude the FLSA requires a limitation on NY res judicata. This Court can clarify the second question as it thinks necessary.

In addition, the second question allows the NY Court of Appeals to answer this question under the New York Labor Law ("NYLL") instead of under the FLSA – both laws have similar restrictions on waiver of wage rights.

III. CONCLUSION

Based on the foregoing, Plaintiff kindly requests that this Honorable Court grant this motion and certify the questions to the New York Court of Appeals.

Dated: Queens Village, New York
February 2, 2020

Respectfully submitted,

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