No. 19-438

In the
United States Court of Appeals
for the
Second Circuit

CHARLENE SIMMONS,
Plaintiff-Appellant,
v.
TRANS EXPRESS INC.,
Defendant-Appellee.

On Appeal from a final judgment of the United States District Court
for the Eastern District of New York

BRIEF OF APPELLEE TRANS EXPRESS INC.

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel certifies as follows: Trans Express Inc. is a wholly owned subsidiary of National Express Transit Corp., which is, in turn, a wholly owned subsidiary of National Express LLC, whose sole member is NE Durham UK Limited.

/s/ *Emory D. Moore, Jr.*

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INTRODUCTION

Charlene Simmons sued her former employer, Trans Express Inc, in small claims court and won. Then, she sued again in the Eastern District of New York where Judge Vitaliano held that her second suit was barred by the doctrine of *res judicata*.

Simmons' first suit arose out of her employment; so did her second suit. Her first suit sought unpaid wages; so did her second suit. Her first suit was filed after her employment with Trans Express Inc. had ended, so all claims raised in both the first and second suits had accrued before her first suit was filed.

Claims preclusion (*res judicata*) forbids bringing claims in a second suit that could have been pressed in the first. Simply stated, "a plaintiff cannot avoid the effects of res judicata by 'splitting' [her] claim into various suits, based on different legal theories." *Waldman v. Vill. of Kiryas Joel*, 207 F.3d 105, 110 (2d Cir. 2000).

Simmons' appeal challenging Judge Vitaliano's ruling is without merit.

STATEMENT OF THE CASE

Trans Express Inc. ("Trans Express") provides charter bus services. (J.A. at A5 ¶¶8 – 9). Charlene Simmons ("Simmons") worked for Trans Express as a bus driver from April 2012 to April 2013, and then again from June 2016 to June 2018. (*Id.* at A6 ¶12).

Post-employment, Simmons filed suit against Trans Express seeking "monies

arising out of nonpayment of wages" in the Queens County Civil Court, Small Claims Part 45. (*Id.* at A18). A trial was held. (*Id.* at A20). A judgment was entered awarding Simmons $1,020 for unpaid overtime, etc. (*Id.*) Trans Express paid the judgment in full. (*Id.* at A21).

Simmons then commenced this lawsuit in the United States District Court for the Eastern District of New York, again seeking unpaid wages. (*Id.* at A4 – A9). Her complaint seeks "unpaid overtime compensation" under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 203, *et. seq.* in her First Cause of Action (*Id.* at A9 ¶37); "unpaid overtime wages" under the New York Labor Law ("NYLL") § 650 *et seq.* in her Second Cause of Action (*Id.* at A9 ¶41); and additional relief in her Third Cause of Action for failing to pay those "unpaid overtime wages…within the time required under NY Labor Law." (*Id.* at A10 ¶45).

Judge Vitaliano dismissed Simmons' lawsuit pursuant to Fed. R. Civ. P. 12(b)(6). (*Id.* at A35; A22 – A34). He ruled in his thirteen page Memorandum & Order that Simmons' action is barred by the doctrine of *res judicata* because the same claims could have been raised in Simmons' prior action. (*Id.* at A29).

Simmons now appeals from that ruling.

SUMMARY OF ARGUMENT

Simmons seeks immunity from the preclusion on claim splitting. Her brief (App. Br. at p. 2) posits three issues. None offer any justification for her claimed immunity; each is one more wild goose chase.

Simmons' **Issue 1** is an assertion that New York law forbids granting *res judicata* effect to small claims court judgments. That is just not true; New York City Civil Court Act § 1808 permits *res judicata* on judgments emanating from small claims court while limiting only collateral estoppel from facts found there. Here, however, Judge Vitaliano did not apply collateral estoppel. Plus, his decision is well-grounded. *Tovar v. Tesoros Prop. Mgmt., LLC*, 119 A.D.3d 1127 (3d Dep't 2014) (granting claim preclusion in second suit seeking wages, based on judgment from small claims court in suit seeking wages).

With **Issue 2**, Simmons asserts that her current claims "were never raised in the prior action"; "are not based on the same harm/transaction"; and -- in any event -- were not within "the subject matter jurisdiction" of the small claims court. This is disingenuous. It is enough that Simmons had the option when filing her first suit to put all her claims together. *Chapman v. Faustin*, 150 A.D.3d 647 (N.Y. App. Div. 2017)(applying *res judicata* doctrine because plaintiff could have filed a single suit encompassing all claims rather than split some claims into small claims court).[1]

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[1] Simmons also argues in passing that the District Court could not grant

With **Issue 3**, Simmons suggests with zero authority that *res judicata* might not be applicable to FLSA cases because that statute has limits on contracting away its rights without judicial approval. That is not only a non sequitur but a complete failure to do even the most cursory research. *See, e.g.*, *Klein v. Ryan Beck Holdings, Inc.*, No. 063460, 2007 WL 2059828, *7 (S.D.N.Y. July 13, 2007), as amended (July 20, 2007)("No provision of the FLSA bars the application of res judicata. . .")

ARGUMENT

Claim preclusion bars "relitigating issues that were or could have been raised" in an earlier action between the parties. *Kremer*, 456 U.S. at 466 n.6. Simply stated, it prevents claim splitting or litigating claims piecemeal.

> When a plaintiff brings an action for only part of [her] cause of action, the judgment obtained in that action precludes [her] from bringing a second action for the residue of the claim.

Tovar, 119 A.D.3d at 1129.

Judge Vitaliano rightly dismissed Simmons' instant case for just that reason: "Because plaintiff's present claims, like her claims in small claims court, arise from her employment at Trans Express and had accrued prior to the small claims proceeding, they could have been raised in the prior proceeding and are barred by

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the motion to dismiss without engaging in a fact-intensive probe into what occurred during trial in the small claims court. (Appellant's. Br. at 5). Simmons is wrong. *Res judicata* only requires a judgment. Courts applying *res judicata* do not sit in judgment or review on the original court, but merely respond to the fact of a judgment.

res judicata." (J.A. at A29).

Each of the arguments that Simmons raises here was fully addressed (and correctly rejected) in Judge Vitaliano's thirteen pages of analysis in his Memorandum & Order. (J.A. at A22 – A34). Simmons' repetitions of her arguments before the district court merely confirm the correctness of its ruling: "the judgment of the small claims court for which Simmons opted and won precludes the present litigation…" (J.A. at A27).

I. SMALL CLAIMS COURT JUDGMENTS PERMIT *RES JUDICATA*

In her first issue (Appellant's Brief at p.2), Simmons asserts that New York City Civil Court Act § 1808 ("Section 1808") immunizes small claims court judgments from *res judicata*. Not so.

New York courts have repeatedly and consistently held that "New York City Civil Court Act § 1808 does not divest the small claims judgment of its res judicata, or claim preclusion, effect." *Cabrera v. Comas*, 62 Misc. 3d 1207(A) (N.Y. Civ. Ct. 2019) (collecting cases).

And, there is even case law directly on point: *Tovar*, 119 A.D.3d 1127 (granting claim preclusion based on judgment from small claims court). *Tovar* holds that wage-related claims arising out employment must be brought in a single action: an ex-employee – like Simmons – is "not entitled to split [her] claim for unpaid wages into separate actions." 119 A.D.3d at 1129.

Simmons – here, as below – attempts to cast shade on that case law by relying on the pre-2005 version of Section 1808 while ignoring the current version that applies to her suit. Contrary to her contentions, Section 1808 does not limit *res judicata*:

> [T]he language of [Section 1808], as amended in 2005, only prevents small claims judgments from having issue preclusion effect (collateral estoppel), but not from having claim preclusion effect (res judicata), in subsequent actions.

Tovar, 119 A.D.3d at 1129 (collecting cases).

Simply stated, Section 1808 only limits collateral estoppel; it does not limit *res judicata* and, thus, has zero relevance to this case. A side-by-side comparison of pre- and post-amendment versions of Section 1808 demonstrates that Simmons' reliance on Section 1808 to avoid the impact of her claim splitting is meritless:

Section 1808 prior to 2005 amendment	**Section 1808 as amended in 2005**
"A judgment obtained under this article may be pleaded as res judicata only as to the amount involved in the particular action and shall not otherwise be deemed an adjudication of any fact at issue or found therein in any other action or court."	"A judgment obtained under this article shall not be deemed an adjudication of any fact at issue or found therein in any other action or court; except that a subsequent judgment obtained in another action or court involving the same facts, issues and parties shall be reduced by the amount of a judgment awarded under this article."

That, of course, is why Simmons centers her argument on a pre-2005 case: *Farbstein v. Hicksville Pub. Library*, 323 F. Supp. 2d 414 (E.D.N.Y. 2004). Such pre-

amendment authority is just disingenuous.[2]

II. SIMMONS' LAWSUIT IS BARRED BY *RES JUDICATA*

Simmons asserts a trio of lame excuses seeking to avoid the inescapable fact that *res judicata* bars her instant lawsuit: (1) her instant claims were never asserted in her prior lawsuit; (2) her prior lawsuit did not arise out of related circumstances; and (3) her instant claims could not have been raised in small claims court due to its dollar limits. Each of those excuses is devoid of merit.

1. <u>NEVER ASSERTED</u>

This is just a fundamental misapprehension of the doctrine of *res judicata*.

Res judicata (i.e., claim preclusion) applies to two categories of claims: (i) any claim that was actually brought and (ii) any claim that could have been brought. *Weinberg v. Picker*, 172 A.D.3d 784, 787 (N.Y. App. Div. 2019) (dismissing claim that could have been litigated in prior small claims court proceedings).

Res judicata bars claims that were never asserted because reserving claims is the claim-splitting forbidden by that doctrine: "[i]f the plaintiff has a money claim

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[2] Simmons' brief name-checks one post-amendment case, but in vain. *Walters v. T&D Towing Corp.*, No. 17-681, 2018 WL 1525696 (E.D.N.Y. Mar. 28, 2018) adds nothing. That case is distinguishable on three levels. First, the federal court plaintiff (Walters) did not choose small claims court but merely filed a counterclaim there. Second, the federal court plaintiff attempted (albeit without success) to consolidate both cases before judgment in the small claims court to avoid claim splitting. Third, the federal court plaintiff sought relief in federal court – a declaration that a New York statute was unconstitutional – that was unavailable in his small claims court counterclaim. Beyond those distinctions, that decision mistakenly relied only on cases predating the amendment of § 1808 to reinforce its otherwise proper decision to deny *res judicata* effect in that far different context.

against the defendant in a small claims proceeding, and sues for only part of what is presently due, the plaintiff forfeits the rest under the splitting rule." *Yarmosh v. Lohan*, 16 Misc.3d 1119(A), 847 N.Y.S.2d 900 (Dist. Ct. 2007).

Simmons' focus on what claims were actually brought is baseless.[3]

2. NOT RELATED

Simmons interposes a polite fiction in her appellate brief, claiming that her prior lawsuit was "in essence a wrongful termination claim." (Appellant's Br. at 30). That is more poetic license than the record will bear; it is also legally meaningless.

It is legally meaningless because "employment-related" is all that is required to apply *res judicata*. The rule against claim splitting bars her instant claims for overtime even if her small claims judgment was based exclusively on her termination. *Cieszkowska v. Gray Line New York*, 295 F.3d 204, 206 (2d Cir. 2002 (affirming dismissal of national origin discrimination claim; *res judicata* barred the action even though prior action only involved claims of FLSA violations, wrongful discharge, and defamation); *Mpoyo v. Litton Electro-Optical Sys.,* 430 F.3d 985 (9th Cir. 2005) (FLSA claims barred by *res judicata* based on judgment in employee's

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[3] This is also an argument that Simmons' waived by her failure to argue this to Judge Vitaliano. *Spinelli v. Nat'l Football League*, 903 F.3d 185, 198–99 (2d Cir. 2018)("The well-established general rule is that an appellate court will not consider an issue raised for the first time on appeal").

prior Title VII action against employer). Indeed, Judge Vitaliano rightly ruled that this was enough: "Because plaintiff's present claims, like her claims in small claims court, arise from her employment at Trans Express and had accrued prior to the small claims proceeding, they could have been raised in the prior proceeding and are barred by res judicata."[4] (J.A. at A29).

But, as the record confirms, the relationship here was more than just employment. Her small claims court Notice of Claims and Summons to Appear states in unequivocal terms that she sought unpaid wages:

> [Appellant] … asks judgment in this Court against you … upon the following claims: ACTION TO RECOVER MONIES ARISING OUT OF NONPAYMENT OF WAGES (OVER $300).

(*Id.* at A18) (emphasis original).[5] Simmons' instant action mirrors that small claims summons, restating she is "entitled to unpaid wages" (*Id.* at A4 ¶1), "unpaid

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[4] Simmons chastises the District Court for daring to cite a dissenting opinion to support the fact that *res judicata* applies regardless of whether the claims are brought under the same or different statutes. (Appellant's Br. at 17 – 18). This is yet another misplaced argument. The court cited the dissenting opinion by Justices Souter and Stevens in *Mayle v. Felix*, 545 U.S. 644, 665 (2005) for its quotation of *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 481 (1982). *Kremer* is still good law.

[5] Simmons claims that the District Court acted outside the scope of Fed. R. Civ. P. 12(b)(6) by interpreting the meaning of the abbreviation "unpd. OT" in the small claims judgment to conclude that she had brought claims for unpaid overtime. (Appellant's Br. at 7 – 8). This is a red herring. Dismissal of Simmons' claims was based on what claims could have been brought. The court held that the claims could have been brought because they arose from Simmons' employment, not because she had actually brought unpaid

overtime wages" (*Id.* at A4 ¶2), and "unpaid wages, and wage deductions" (*Id.* at A4 ¶3).

Simmons' first and second suits are indeed related for *res judicata* purposes.

3. NOT WITHIN JURISDICTION OF SMALL CLAIMS COURT

Simmons asserts *res judicata* does not apply to her instant claims because she seeks more than the maximum $5,000 which the small claims court was empowered to award. (Appellant's Br. at 25). This too is baseless.

Chapman, 150 A.D.3d 647, unanimously affirmed dismissal on *res judicata* of a subsequent action where, as here, the original action had been pressed to judgment in small claims court. There, as here, the dollar jurisdiction of small claims court was no impediment to applying *res judicata*:

> … plaintiffs could have pursued all relief in a single action in the Supreme Court, but opted instead to pursue the claim in the Small Claims Part of the Civil Court, where any recovery would be capped at $5,000 … [P]laintiff's Small Claims Court judgment against defendant … bars the instant action, even though, were plaintiff to have brought and proven his claims in Supreme Court in the first instance, he could have sought a larger award.

Chapman, 150 A.D.3d 647.

There is indeed a limit on applying *res judicata* where a party faces unavoidable constraints on bringing all claims in a single action. But, that just does not apply when a plaintiff, like Simmons, makes a tactical choice among available

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overtime claims. (J.A. at A29).

forums. *Cabrera*, 62 Misc. 3d 1207(A) ("her decision to bring the action in Small Claims Court, where it was resolved on the merits as opposed to this Court where she could have been awarded all sums alleged, does not obviate the preclusive effects of res judicata").[6]

Simmons's choice of small claims was a deliberate choice to split her claims.

III. FLSA CASES FULLY PERMIT *RES JUDICATA*

Simmons asserts that claim preclusion doctrine does not apply with respect to the FLSA. (Appellant's Br. at 31). That is totally frivolous, a contention that Judge Vitaliano rightly labelled a "straw man." (J.A. at A32).

Simmons seeks to put a round peg in square hole by applying the requirements under the FLSA for settlement to judgments. The requirements for settlement approval are distinct. When judgment has been entered, there is no separate rule for FLSA claims: "**No provision of the FLSA bars the application of res judicata**." *Klein*, 2007 WL 2059828, *7 (emphasis added). Not a single case exists supporting this theory.[7]

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[6] Simmons' cases confirm this. Neither involved her self-inflicted limitation. For example, in *Parker v. Blauvelt Volunteer Fire Co*, 93 N.Y.S. 2d 343 (1999), the first suit was an Article 78 proceeding by a government employee seeking reinstatement; he had no ability to bring his Section 1983 claim and his Article 78 claim in a single proceeding in any court and, thus, was not subject to *res judicata*. Similarly, *Pike v. Freeman*, 266 F. 3d 78 (2d Cir. 2001) is equally inapposite; there, the claim for indemnification did not arise in time for it to be asserted in the original proceeding and, thus, could not have been brought there so it was not properly barred by *res judicata*.

[7] Her brief references only inapposite cases that address an employer's inability to

Quite the contrary, court after court has applied the claim preclusion doctrine to FLSA claims. *See*, *e.g.*, *Sullivan v. DaVita Healthcare Partners, Inc.*, No. 18-1399, 2019 WL 2756447, at *1 (10th Cir. July 2, 2019) (affirming dismissal of FLSA claims as barred by *res judicata*); *McKoy v. Henderson*, No. 05 CIV. 1535 DAB, 2007 WL 678727, at *7 (S.D.N.Y. Mar. 5, 2007) (applying the doctrine of *res judicata* to bar FLSA claims); *Cichocki v. Massachusetts Bay Cmty.Coll.*, 199 F. Supp. 3d 431, 441 (D. Mass. 2016) (same); *McKinnon v. SC Dep't of Health & Envtl. Control*, 2008 WL 2066408, *1 (D.S.C. May 13, 2008) (same); *Molina v. Sea-Land Servs., Inc.*, 2 F. Supp. 2d 180 (D.P.R. 1997) (same).

Here again, Judge Vitaliano's analysis is pitch perfect:

> Simmons argues next that federal wage and hour policy neutralizes any res judicata effect of the prior small claims judgment….Simmons's decision to bring her wage and hour claims in small claims court merely capped her remedies; it did not alter her claims or defendant's liability under the law…. Simmons cannot, therefore, invoke these unfounded policy considerations to evade the consequences of her decision to sue initially in small claims court.

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discharge its FLSA duties by private agreement without court approval. *Caserta v. Home Lines Agency, Inc.*, 273 F.2d 943 (2d Cir. 1959)(holding that "[t]he obligation [under the FLSA] is the employer's and it is absolute. He cannot discharge it by attempting to transfer his statutory burdens of accurate record keeping…"); *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199 (2d Cir. 2015)("The current appeal raises the issue of determining whether parties may settle FLSA claims with prejudice, without court approval …"). Her peroration is even further afield: a case that does not involve the FLSA or anything else relevant – just a soundbite out of context: *Landau v. LaRoss, Mithcell & Ross*, 11 N.Y.S. 2d (2008)("In this appeal, we are asked to determine whether a judgment dismissing a complaint 'without prejudice,' on the basis of a corporation's lack of capacity, has res judicata effect on a subsequent action brought by the corporation's successor").

(J.A. at A31-32).

CONCLUSION

Judge Vitaliano got it right in his carefully measured decision (J.A. A22 – A34): Simmons is not entitled to split her claims and litigate more than once. "Confronted with the unintended consequences of her decision to pursue expedited relief in small claims court" (J.A. at A29), Simmons asks for an exception to the claim splitting rule that does not exist and cannot be justified.

This Court, accordingly, should affirm the judgment below.

Dated: September 3, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief complies with the type-volume limitations of Circuit Rule 32.1 because it contains 3,254 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). This brief additionally complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6).

Dated: September 3, 2019 /s/ *Emory D. Moore, Jr.*

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2019, the foregoing brief was served on all parties or their counsel of record through the CM/ECF system.

Dated: September 3, 2019 /s/ *Emory D. Moore, Jr.*