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

APPELLEE TRANS EXPRESS INC.'S RESPONSE IN OPPOSITION TO MOTION TO CERTIFY QUESTIONS TO THE NEW YORK COURT OF APPEALS

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TABLE OF AUTHORITIES

Cases

Statutes

Appellant moves for certification of two issues to the New York Court of Appeals. Her motion should be denied on both.

Appellant's **first issue** does not warrant certification because there is no conflict within New York state courts. *See DiBella v. Hopkins*, 403 F.3d 102, 111 (2d Cir. 2005) (declining certification where the New York intermediate appellate courts were uniform). That limitation is founded on sound principle:

> The procedure must not be a device for shifting the burdens of this Court to those whose burdens are at least as great. Because it is our job to predict how the forum state's highest court would decide the issues before us, we will not certify questions of law where sufficient precedents exist for us to make this determination.

Elliott Assocs., L.P. v. Banco de la Nacion, 194 F.3d 363, 370 (2d Cir. 1999).

Here, New York's trial and intermediate appellate courts have spoken in unison: small claims actions do have *res judicata* effect, both with respect to the claims actually litigated and those that could have been so litigated. *Platon v. Linden-Marshall Contracting Inc.*, 176 A.D.3d 409, 109 N.Y.S.3d 41 (N.Y. App. Div. 2019) (rejecting the same argument and case law raised by Appellant here); *Davis v. Jarvis*, 44 Misc. 3d 1217(A), 997 N.Y.S.2d 98 (City Ct. 2014); *Feng Gao v. Jing Hong Li*, 31 Misc. 3d 1243(A), 932 N.Y.S.2d 760 (Sup. Ct. 2011); *Yarmosh v. Lohan*, 16 Misc. 3d 1119(A), 847 N.Y.S.2d 900 (Dist. Ct. 2007).

Contrary to Appellant's suggestion, there is no split of authority on this issue. Her three cases are offered to obfuscate but those cases do not, upon inspection, reveal anything but uniformity in current New York law.

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.

> 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.

N.Y. City Civ. Ct. Act § 1808. [1]

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

[1] Appellant also seeks a do-over of oral argument, challenging Appellee's illustration of the proper construction of the "reduction" portion of §1808 as unrealistic. Not so; in fact, it is an example from case law cited by Appellant in its merits briefs. *Weitz v. Wagner*, No. CV-07-1106(ERK)(ETB), 2008 WL 5605669, at *4 (E.D.N.Y. July 24, 2008), adopted (Aug. 11, 2008) (prior small claims action did not have *res judicata* effect to preclude subsequent action under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* because the FCRA case was exclusively within the jurisdiction of the federal courts and thus could not have been raised in the small claims action).

meaningless throwaway line, not a rejection of the *Platon* line of cases (as is confirmed by the fact that those cases go unmentioned).

McGee v J. Dunn Const. Corp., No. 7340/2006, 2007 WL 6179709 (N.Y. Sup. Ct. Sep. 24, 2007) involves the right result with an inaccurate label. There, the trial judge correctly states that neither "issue preclusion" or "collateral estoppel" is permitted under §1808 where the original judgment arose in small claims court. Here, however, the issue is "claim preclusion": specifically, the claim-splitting branch of the doctrine of *res judicata*, which is far different and which is not barred by §1808. Appellant seeks to suggest that the appearance of the phrase "res judicata" suggests that this trial court judge decided something else, but that is a complete misread of this case.

Appellant's **second issue** is frivolous. Appellant seeks certification regarding whether principles prohibiting private settlement of Fair Labor Standards Act ("FLSA") claims bar the application of *res judicata* to FLSA and New York Labor Law ("NYLL") claims. Critically, the FLSA is a federal statute, so there is zero basis for certifying any question concerning the FLSA. Further, there is no private settlement rule in the NYLL for the New York Court of Appeals to interpret. *Wright v. Brae Burn Country Club, Inc.*, No. 08 CIV.3172 (DC), 2009 WL 725012, at *4 (S.D.N.Y. Mar. 20, 2009).

There is, in short, nothing worthy of certifying in this case.

Dated: January 30, 2020

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this response complies with the type-volume limitations of Circuit Rule 27.1 because it contains 791 words. This response additionally complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(d).

Dated: January 30, 2020 /s/ *Emory D. Moore, Jr.*

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2020, the foregoing brief was served on all parties or their counsel of record through the CM/ECF system.

Dated: January 30, 2020 /s/ *Emory D. Moore, Jr.*