SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMM. PART 8

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RAYLENE CHEW, STEPHEN SHAN, SIDDHANTA DANGE and EVAN KATZ,

Plaintiffs, Decision and order

- against - Index No. 527849/2022

JESSICA CHANG,

Defendant, May 5, 2023

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #3

The plaintiffs move pursuant to CPLR §3217(b) seeking to discontinue the action without prejudice. The defendant has opposed the motion and cross-moved seeking summary judgement pursuant to CPLR §3212 dismissing the lawsuit. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

The facts were adequately presented in a prior order dated January 4, 2023. In that order the court dismissed the breach of contract cause of action. The plaintiffs have now moved to discontinue the action without prejudice. As noted, that motion is opposed and the defendant seeks summary judgement dismissing the entire action.

Conclusions of Law

It is well settled that a plaintiff may discontinue an action against certain defendants where the substantial rights of other parties will not be prejudiced (Tucker v. Tucker, 55 NY2d 378, 449 NYS2d 683 [1982], Ruderman v. Brunn, 65 AD2d 771, 409 NYS2d 789 [2d Dept., 1978]). That discretion includes the determination whether

such discontinuance is granted 'without prejudice' (Valladares v. Valladares, 80 AD2d 244, 438 NYS2d 810 [2d Dept., 1981]). The decision whether to grant such discontinuance rests with the sound discretion of the court (Harper v. Jamaica Hospital, 239 AD2d 388, 658 NYS2d 883 [2d Dept., 1997]). Generally, such discontinuance should be granted unless valid reasons, such as prejudice to the defendant, warrant denial (Mathias v. Daily News L.P., 301 AD2d 503, 752 NYS2d 896 [2d Dept., 2003]). Prejudice means the discontinuance would prejudice a substantial right of a party, circumvent an order of the court, avoid the consequences of a potentially adverse determination or produce some other improper result (Marinelli v. Wimmer, 139 AD3d 914, 30 NYS3d 571 [2d Dept., 2016]). Thus, in Catherine Commons LLC v. Town of Orangetown, 157 AD3d 785, 69 NYS3d 662 [2d Dept., 2018] the court denied the request for voluntary discontinuance since such discontinuance would prejudice a party's ability to challenge an assessment. Again in Baez v. Parkway Mobile Homes Inc., 125 AD3d 905, 5 NYS3d 154 [2d Dept., 2015] the court held discontinuance was improper where it was only pursued to avoid the consequences of failing to respond to a 90 notice and an adverse determination of a summary judgement motion filed.

In this case the basis for the discontinuance is the desire of the plaintiff's "to retain counsel elsewhere" (see, Memorandum in Support, page 2 [NYSCEF Doc. No. 35]). The plaintiff elaborates

in a reply memorandum that "Plaintiffs have chosen to seek new counsel and sue Defendant in California with that new counsel" (see, Affirmation in Opposition to Defendant's Cross-Motion, page 1 [NYSCEF Doc. No. 44]).

In Urbonowicz v. Yarinsky, 290 AD2d 922, 737 NYS2d 398 [3rd Dept., 2002] the plaintiffs there sought to "commence a second action in Saratoga County, a proper venue where they believed a higher verdict could be obtained" (id). The court maintained there was nothing improper about such a request as long as it did not result in prejudice to the defendants. Moreover, concerning the allegation such a request is nothing more than impermissible forum shopping the court explained that "a court in granting discontinuance merely makes it possible for the action to be brought elsewhere. Absent compelling circumstances or particular prejudice to defendants, we decline to find that mere discontinuance of this action constitutes impermissible forum shopping" (id). Likewise, in Carter v. Howland Hook Housing Company Inc., 19 AD3d 146, 797 NYS2d 11 [2d Dept., 2005] the court allowed an action venued in New York County to be discontinued and brought in Kings County upon discovering the defendant maintained an office in Kings County and that venue was proper there.

However, a different rule applies where the second action is brought simply to avoid the consequences of adverse rulings taking place in the pending action. Thus, in DuBray v. Warner Brothers

Records, 236 AD2d 312, 653 NYS2d 592 [1st Dept., 1997] the court held it was improper to discontinue an action due to various rulings made with the hope to persuade another "court to reach precisely the opposite conclusion" (id). Indeed, it has been held proper to discontinue an action with prejudice where a discontinuance sought without prejudice is based upon expected adverse rulings foreclosing the possibility of commencing another action (see, NBN Broadcasting Inc., v. Sheridan Broadcasting Networks Inc., 240 AD2d 319, 659 NYS2d 262 [1st Dept., 1997]). Thus, pursuant to CPLR §3217(b) the court may set the "terms and conditions" of the discontinuance, "as the court deems proper" (id). In this case the plaintiff has all but admitted they are seeking to discontinue this action to pursue the same or similar claims in a different jurisdiction. That is an improper basis upon which to seek a discontinuance without prejudice. Therefore, the motion seeking to discontinue the action is granted. The action is discontinued with prejudice. The defendant's motion is now rendered moot.

So ordered.

ENTER:

DATED: May 5, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC