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No. 75335-5-I

COURT OF APPEALS DIVISION I OF THE STATE OF
WASHINGTON

In the Matter of

KORTNEY SCHAAF

KORTNEY SCHAAF, a single woman,

Plaintiff - Appellant,

v.

RETRIEVER MEDICAL/DENTAL PAYMENTS INC,

Defendant - Respondent.

OPENING BRIEF OF APPELLANT

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COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

ORIGINAL

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I. ASSIGNMENTS OF ERROR

The Court committed error by granting the motion to dismiss pursuant to the priority of action rule when the identity of the parties, subject matter, and relief requested are not identical, the Court had the discretionary ability to refuse application of the priority of action rule, and Ms. Schaaf will be significantly prejudiced by litigating her Washington State causes of action in New York.

II. STATEMENT OF THE CASE

Kortney Schaaf signed a Representative Agreement on March 14, 2011, agreeing to work for Retriever Medical/Dental Payments Inc. (Retriever). This contract was negotiated between Ms. Schaaf and Frank Shiner, the CEO and founder of Retriever, while Ms. Schaaf was residing in Washington. Ms. Schaaf was contacted and solicited for this position by Ryan Kagay, Sales Director of Retriever. She entered into an agreement and signed the Representative Agreement while located in Washington. CP 82, Schaaf Dec. ¶ 2. Her signature was notarized by a Washington notary. CP 134, Feinberg Decl. Aff. of Schaff Ex. B. This contract did not contain either a choice of law or choice of venue clause.

On March 14, 2011, Ms. Schaaf also signed a Confidentiality and Non-Competition Agreement. This Agreement contained a choice of law clause, that being the substantive laws of the State of New York.

No choice of venue clause was included. CP 83, Schaaf Dec. ¶ 6, CP 57-62, Moody Dec. Ex. C.

The job responsibilities for a sales representative as outlined in the March 14, 2011, Representative Agreement included generating sales appointments as well as the requirement to follow up on all sales leads provided by Retriever. Retriever has a call center in New York which would contact potential customers in Washington, set a date and time for the local sales representative to make a presentation, and forward this information to Ms. Schaaf. She was expected to appear on the given date and time and make a sales presentation on behalf of Retriever. CP 84, Schaaf Dec. ¶ 9.

On April 1, 2011, Ms. Schaaf signed a second Confidentiality and Non-Competition Agreement which was substantially similar to the first Agreement signed. This Agreement did however contain both the choice of law clause, New York, and added a choice of venue clause being the State of New York as well. CP 83, Schaaf Dec. ¶ 7, CP 79-82, Moody Dec. Ex. E.

On April 1, 2011, Ms. Schaaf signed a new Independent Sales Representative Agreement. This agreement included a choice of law and venue clause which were both in the State of Texas. An attachment labeled Exhibit B was included with this Agreement which detailed the

duties of the sales representative. In addition to the marketing requirements the Sales Representative was to “provide all training, follow-up, support and service reasonably required by Merchants in the use of the Services, and shall perform such additional services as shall be set out from time to time in any service guidelines established by Company.” CP 84, Schaaf Dec. ¶ 10, CP 64-77, Moody Dec. Ex. D.

In April 2011, Ms. Schaaf traveled to New York for the purpose of attending training. While in New York Ms. Schaaf signed an Independent Sales Representative Agreement. This Agreement signed on April 1, 2011 contained both a choice of law and choice of venue clause. Both the choice of law and forum required any litigation over this agreement to occur in the State of Texas according to Texas law. CP 83, Schaaf Dec. ¶ 4, CP 64-77, Moody Dec. Ex. D.

On April 2, 2011, Ms. Schaaf was required to sign a second Representative Agreement which was substantially similar to the Agreement she signed on March 14, 2011. The April 2nd Agreement included an increase for the cost of a sale resulting from the program from \$34.00 to \$37.00. No choice of law or venue clause was included.

Finally on December 16, 2011, Ms. Schaaf signed a third Independent Sales Representative Agreement with Retriever. This agreement had a choice of law clause, that being New York, but there

was no choice of venue clause contained within that Agreement. CP 83, Schaaf Dec. ¶ 5, CP 146-143, Feinberg Decl. Aff. of Schaff Ex. A.

Ms. Schaaf had many responsibilities as part of her sales position. She was of course required to personally meet with all potential customers and make sales presentations. She was also required to provide training in the use of the equipment as well as in the use of the software including the “healthcare” program to all new customers. It was her responsibility to provide additional follow-up training to the individual customer as their personnel and/or equipment changes occurred. She provided ongoing technical assistance whenever an existing customer needed additional assistance. If an existing customer also made the decision to terminate the sales agreement with Retriever, Ms. Schaaf was directed to make contact with that customer and attempt to retain them as a Retriever customer. CP 84-85, Schaaf Dec. ¶ 12.

Ms. Schaaf’s witnesses are all located in Washington. These witnesses are necessary to establish the quality, nature, and extent of Retriever’s activities in Washington, as well as the job responsibilities of Ms. Schaaf. This is essential for her to establish her causes of action as outlined in the Complaint. These witnesses cannot be compelled to travel to New York for the purposes of presiding testimony. These

witnesses can be compelled to appear for depositions in Washington, but not to travel to New York for live testimony.

Ms. Schaaf's two immediate supervisors are both located in Texas, not New York. Those two individuals would provide key testimony regarding all of these activities and are going to need to travel regardless of whether the litigation occurs in New York or Washington.

After the exchange of multiple letters between Counsel on behalf of Ms. Schaaf and Counsel for Retriever in New York, Retriever filed a SUMMONS WITH NOTICE in New York on October 13, 2015. No actual Complaint was filed, just this two page Notice. Ms. Schaaf through Counsel filed her Complaint in Snohomish County Superior Court on December 18, 2015, Retriever then filed their New York Complaint five days later on December 23, 2015, in New York.

III. PRIORITY OF ACTION RULE

Retriever argues that the Priority of Action Rule mandates dismissal of Ms. Schaaf's litigation in Washington because it previously filed a Summons with Notice to pursue litigation in New York. In *Kerotest Mfg. Co. v. C-O Two Fire Equipment Co.*, 342 U.S. 180, 183, 72 S. Ct. 219, 96 L. Ed. 200, (1952). The Court has specifically found Federal authority to provide "useful guidance" regarding this rule. *American Mobile Homes v. Seattle-First National Bank*, 115 Wn.2d 307,

317, 796 P.2d 1276 (1990) This concept was fully discussed in *Pacesetter Systems v. Medtronic, Inc.*, 678 F.2d 93, 94–95, (9th Circuit 1982). The Court stated:

There is a generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district. *Church of Scientology of California v. United States Department of the Army*, 611 F.2d 738, 749 (9th Cir. 1979); *Great Northern Railway Co. v. National Railroad Adjustment Board*, 422 F.2d 1187, 1193 (7th Cir. 1970). Normally sound judicial administration would indicate that when two identical actions are filed in courts of concurrent jurisdiction, the court which first acquired jurisdiction should try the lawsuit and no purpose would be served by proceeding with a second action. However, this "first to file" rule is not a rigid or inflexible rule to be mechanically applied, but rather is to be applied with a view to the dictates of sound judicial administration. As we stated in *Church of Scientology*, (T)he "first to file" rule normally serves the purpose of promoting efficiency well and should not be disregarded lightly. Circumstances and modern judicial reality, however, may demand that we follow a different approach from time to time 611 F.2d at 750 (citation omitted).

The Court has emphasized that the solution of these problems involves determinations concerning wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, and that an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts. *Kerotest Supra* at 183-184.

Retriever did first file a Summons with Notice on October 13, 2015, but no Complaint was filed. Ms. Schaaf actually filed her Complaint first on December 18, 2015, five days prior to Retriever filing their actual Complaint. Ms. Schaaf had in fact filed her Complaint before Retriever and as such all litigation should occur in Washington.

In Washington the Courts have stated that the “priority rule” is generally only applicable when the cases involved are identical as to subject matter, parties and relief. *American Mobile*, Supra at 319. This identity must be such that a final adjudication of the case by the court in which it first became pending would, as res judicata, be a bar to further proceedings in a court of concurrent jurisdiction. *Id.* at 320. In this litigation the parties are identical, but the subject matter and relief requested are significantly different.

In New York Retriever has sought three causes of action alleging that Ms. Schaaf is in breach of the terms of “contractual agreement” which induced Retriever to make commission payments to her. Retriever does not specify which specific “agreement” they are referring to and six different agreements were signed in a ten month period of time. Each of these is different as to the choice of law and venue.

Retriever is seeking a determination that Ms. Schaaf provided false information intentionally and as a result received commissions to

which she was not entitled. For the second cause of action Retriever essentially restates the first cause of action and makes a demand for Ms. Schaaf to return compensation they claim she was not entitled to receive. These two causes of action are essentially the same thing. The third cause of action filed in New York by Retriever seeks a declaratory judgment that Ms. Schaaf was operating as an independent contractor, not an employee.

The Complaint for Damages filed by Ms. Schaaf in Snohomish County is significantly more extensive requesting vastly different relief. The first cause of action sought is a Retaliation cause of action based upon a claim that Ms. Schaaf was retaliated against, i.e. terminated, because she brought a written demand through Counsel that the requirements of RCW 49.48.210 be applied. CP 207. Her second cause of action deals with Equitable Estoppel which is a defense to Retriever's claim that she should be required to repay the \$46,072.40 in previously paid residuals. CP 208. The third cause of action addresses the actual violation of RCW 49.48.210. CP 208-209. Her fourth cause of action is admittedly substantially similar to the third cause of action filed by Retriever, seeking a declaratory Judgment pursuant to RCW 7.24 that Ms. Schaaf is in fact an employee, not an independent contractor. CP 209.

Ms. Schaaf's fifth cause of action is completely unrelated to the Complaint filed in New York by Retriever as it alleges a wrongful termination in violation of public policy. CP 209-210. The public policies at issue include the failure to comply with RCW 49.48.210 as it relates to Retriever's efforts to recover previously paid commissions, retaliation against Ms. Schaaf because she has brought into question the jurisdictional questions regarding Retriever's business activities in Washington State, as well as Retriever's actions that violate the Consumer Protection Act under RCW 19.86. These public policies are of course wholly different than those from the State of New York and demonstrate there is not identity of subject matter or relief requested. CP 211-212.

These causes of action are clearly not identical which in and of itself legally permit the priority rule to not be applied. As the Court in *American Mobile* noted, when the three identities of parties, subject matter, and relief are not present, "the priority rule should not be applied without consideration of other factors." Id at 320. Instead the trial court must take into account "countervailing equitable considerations." Id. at 321. Significant to the Court in *American Mobile* was the factual circumstance that a venue agreement requiring litigation to occur in King County had been entered. Id. at 321.

In the present case the original agreement signed by Ms. Schaaf with Retriever contained neither a choice of law nor choice of venue clause. The first agreement which did contain a choice of law was the March 14, 2011 Confidential Agreement stipulating to apply New York law, but no venue clause. The April 1, 2011, Independent Sales Representative Agreement then stipulated choice of law and venue in Texas. The final Independent Sales Representative Agreement as signed on December 16, 2011, had a choice of law clause stipulating New York, but no venue clause was included. Virtually no new consideration was granted to Ms. Schaaf, however, for entering into this third Independent Sales Representative Agreement and therefore this Agreement is not binding upon Ms. Schaaf and is of no force or effect. *Dragt v. Dragt/DeTray, LLC*, 139 Wn.App. 560, 572-73, 161 P.3d 473 (2007).

Other factors a court is to consider include the convenience of witnesses and the interests of justice. *American Mobile* Supra at 321–322. The convenience of witnesses clearly dictates that litigation occur in Washington. As outlined above, Retriever’s employees and Mr. Shiner clearly have an interest in this litigation and can easily be present in Washington for the purposes of testimony. Retriever’s significant witnesses include Mr. Shiner, located in New York, and Ms. Schaaf’s

two supervisors, both located in Texas. In effect Retriever would require Mr. Shiner to travel from New York to Washington, and both of Ms. Schaaf's former supervisors to travel either to Washington or New York.

Ms. Schaaf's witnesses are significantly more numerous as they would include all the office managers and personnel with whom Ms. Schaaf had contact in Washington while making sales presentations and providing follow-up support services. These witnesses are not employees of Retriever and have no personal interest in this litigation. While it is possible to compel these witnesses to attend depositions in Washington State, their attendance in New York cannot be compelled and as such the Ms. Schaaf's ability to successfully prosecute the various causes of action is significantly prejudiced. This is far more than mere inconvenience, Ms. Schaaf will be greatly prejudiced in her ability to successfully prosecute her case if forced to litigate the Washington-based causes of action in New York.

As stated by the Supreme Court in *Kerotest*, wise judicial administration gives regard to conservation of judicial resources and comprehensive disposition of litigation. *Id.* at 183. The conservation of judicial resources as well as comprehensive disposition of this litigation mandates that the litigation occur in Washington. The Complaint filed

by Retriever in New York is limited essentially to a demand for repayment of the \$46,000 in commissions they claim were wrongfully paid as well as the declaratory judgment regarding independent contractor status. This question concerns only a limited issue to be determined pursuant to New York contract law. These claims are easily addressed in Washington as counterclaims

The causes of action in Ms. Schaaf's Complaint in Washington, however, are far more extensive and involve consideration of Washington State public policy as well as consideration of several different statutory provisions, all in Washington. To ask the Court in New York to consider these causes of action when pled by Ms. Schaaf as a counterclaim will cause confusion and difficulty for the New York Court as it will then be required to interpret Washington's statutory law, Washington public policy, and the Consumer Protection Act. There is no similar consumer protection act in New York and this would be a wholly new concept for the courts in New York to consider.

IV. STATES INTEREST

One other issue which is directly applicable to this determination is which State, New York or Washington, has the greater interest in this matter. In New York of course this is simply a contractual dispute between two private parties. No state public policy, interest, or statutory

provision is at issue. Conversely, Washington State does have a significant interest in this litigation. Retriever is a business that is arguably availing itself of the opportunity to conduct business in this State, but as this business now candidly admits it has not sought authorization from the Secretary of State as required and does not pay any taxes to this State resulting from this business activity. This business activity as outlined above is both significant in terms of its quantity and qualitatively is directly impacting at least 60 new businesses each year.

V. CONCLUSION

The application of the priority of action rule requires this court to consider the identity of the parties, subject matter, and relief requested. While the identity of the parties is the same, the subject matter and relief requested is significantly different between the two complaints filed. As such the priority of action simply does not apply.

Further, in reality Ms. Schaaf actually filed her Complaint in Washington State five days prior to Retriever filing their Complaint in New York. It is not contested that Retriever filed a Summons with Notice prior to Ms. Schaaf's filing of the Complaint, but this was a simple two-page document that put Ms. Schaaf on notice that a

complaint would be filed. The actual filing of the Complaint occurred by Ms. Schaaf as noted five days prior to Retriever.

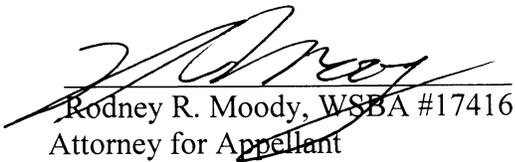
The Court in *American Mobile* noted that they considered of great significance the fact that a choice of venue clause was included. In the present case there are six separate agreements signed within a ten month timeframe. The initial Agreement had neither a choice of law nor choice of venue clause. The March 14th Confidentiality Agreement had a choice of law clause for New York, but no venue clause. The April 1st Confidentiality Agreement had both a choice of law and choice of venue clause, that being New York. The April 1st Independent Sales Representative Agreement also had a choice of law and venue clause, that being the State of Texas. The April 2nd Representative Agreement contained neither a choice of law nor venue clause. The final December 16th Representative Agreement had a choice of law clause, New York, but no choice of venue clause. The result is that there is a confusing set of “Contractual Agreements” which are utterly inconsistent. As such this Court should pay no regard to the inclusion of a choice of law or choice of venue clause as did the court in *American Mobile*.

Most importantly, is the significant prejudice which Ms. Schaaf will experience in attempting to prosecute the Washington-based causes

of action in New York. New York does not even have a similar body of law to the Washington State Consumer Protection Act.

The fact that Ms. Schaaf actually filed her Complaint in Washington prior to Retriever filing their Complaint in New York, the inconsistency between the six Contractual Agreements forced upon Ms. Schaaf by Retriever, the lack of consideration received by Ms. Schaaf when she was required to sign these six different Agreements, and the actual prejudice Ms. Schaaf will experience attempting to prosecute her causes of action in New York all dictate that the Court in Snohomish County committed legal error by dismissing the Washington Complaint filed by Ms. Schaaf. This decision granting the dismissal of Ms. Schaaf Complaint should be reversed and Ms. Schaaf should be permitted to pursue her Complaint in Washington State.

RESPECTFULLY SUBMITTED this 14th day of October 2016.


Rodney R. Moody, WSBA #17416
Attorney for Appellant

CERTIFICATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on October 14, 2016, I caused to be delivered via US Mail and Email Service the foregoing to:

Counsel for Defendant
Mr. Douglas M. Wartelle
Cogdill, Nichols, Rein, Wartelle, Andrews
232 Rockefeller Avenue
Everett, WA 98201

DATED this 14th day of October 2016.



John R. Catanzaro
Paralegal to Rodney R. Moody

APPENDIX A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

RETRIEVER MEDICAL/DENTAL PAYMENTS, INC.

Index No. 167850-2015

Plaintiff

- against -

KORTNEY SCHAAF

COMPLAINT

Defendant

Plaintiff, Retriever Medical/Dental Payments, Inc by its attorneys, the Law Offices of Gerry E. Feinberg, P.C., alleges as and for its complaint herein against defendant, Kortney Schaaf, alleges as follows:

1. Plaintiff, Retriever/Medical Dental Payments Inc. ("Retriever") is a domestic corporation with a place for the conduct of business in the County of Westchester, State of New York.

2. Upon information and belief, defendant Kortney Schaaf ("Schaaf") is a resident of the State of Washington.

3. In or about 2011 Schaaf entered into the State of New York during which time she executed contractual agreements with Retriever consisting of a non-competition and a representative agreement (the "Agreements") pursuant to which she would act as a sales representative in the described capacity of independent contractor.

4. At or about the same time, Schaaf trained in Retriever's offices located in New York with respect to the services she was to provide to Retriever pursuant to the Agreements.

5. The services Schaaf was to provide, within a territory in the State of Washington, consisted of soliciting medical/dental providers to enter into agreements

for the purposes of obtaining credit card processing for their respective medical/dental practices.

6. In accordance with the terms of the Agreements, Schaaf was obligated to meet certain criteria and standards in order to continue to act as an agent for Retriever and to receive the financial benefits as set forth in the Agreements.

7. The Agreements provide that if Schaaf meets certain criteria she will be entitled to use an "Appointment Setter" provided by Retriever, with Schaaf responsible for a portion of the costs incurred by Retriever for the "Appointment Setter".

8. In accordance with the terms of the Agreements, Schaaf was to generate sales appointments and attend the appointments for the purpose of having the prospective medical/dental provider enter into an agreements for credit card processing for which Schaaf would be paid a commission.

9. Subsequent to entering the Agreements, Schaaf received compensation from Retriever for the services she provided that resulted in fully commissioned sales (the "Compensation").

10. At the time Retriever paid the Compensation to Schaaf, Schaaf had provided data to Retriever which made it appear as though Schaaf had been complying with the standards and goals as set forth in the Agreements which were a predicate for her to remaining as an agent for Retriever, continue to receive commissions and to utilize the Appointment Setter.

11. Upon information and belief, during a timeframe Schaaf in fact had not been complying with the terms and conditions of the Agreements and made false

representations to Retriever for the purposes of having Retriever believe that she was in compliance with the Agreements.

12. As a result of the false representations Retriever was induced to make commission payments to Schaaf and allow her to use the Appointment Setter.

13. Upon information and belief at the time Schaaf provided the false data to Retriever, she did it intentionally for the purpose of inducing Retriever to allow her to continue to act as an agent and to receive compensation and any other benefits she would be entitled to under the Agreements.

14. Retriever reasonably relied upon the information Schaaf provided by allowing Schaaf to continue as an agent for Retriever and to receive the Compensation.

15. By reason of the foregoing, Schaaf was in breach of the terms of the Agreements resulting in damages to Retriever in an amount to be determined at the time of trial but in no event less than jurisdictional limit of this Court.

AS AND FOR A SECOND CAUSE OF ACTION

16. Repeats and realleges each and every allegation set forth in Paragraphs "1" through "15" as if fully set forth at length herein.

17. Retriever mistakenly paid Schaaf Compensation she was not entitled to by reason of her failing to meet in the standards set forth in the Agreements.

18. Retriever made a demand on Schaaf to return to Retriever the Compensation she had received which she was not entitled to .

19. Schaaf has refused to return the Compensation mistakenly paid by Retriever.

20. By reason of the forgoing Retriever has been damaged in an amount to be determined at the time of trial but in no event less than jurisdictional limit of this Court.

AS AND FOR A THIRD CAUSE OF ACTION

21. Repeats and realleges each and every allegation set forth in Paragraphs "1" through "19" hereof as if fully set forth at length herein.

22. Defendant has maintained that despite the terms of her Agreements she has been employed as an employee, not an independent contractor, and should be treated accordingly for State and Federal taxing regulation purposes.

23. Retriever maintains that in accordance with the terms of the Agreements, she has been retained as an independent contractor and the terms of the service are consistent with that determination.

24. A justiciable controversy exists.

25. Plaintiff does not have an adequate remedy of law.

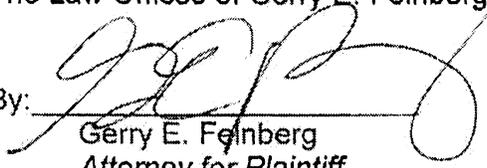
26. Based upon the foregoing, Retriever is entitled to a declaratory judgment that the retention and employment of the defendant is in the capacity as an independent contractor and not an employee of the plaintiff.

WHEREFORE, Retriever demands judgment against defendant (i) in respect of the first cause of action in an amount to be determined at the time of trial but in no event less than the jurisdictional limit of this Court; (ii) in respect of the second cause of action, in an amount to be determined at the time of trial but in no event less than the jurisdictional limit of this Court; and (iii) in respect of the third cause of action, a declaratory judgment that defendant is retained in the capacity of an independent contractor.

Together with interest thereon as allowed by law and the costs and disbursements incurred herein.

Dated: White Plains, New York
December 23, 2015

The Law Offices of Gerry E. Feinberg, P.C.

By: 

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