

Cofrancesco Chiropractic & Healing Arts v. Maciejewski, Not Reported in A.3d (2014)

2014 WL 5099200

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UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New Haven.

COFRANCESCO CHIROPRACTIC &
HEALING ARTS

v.

Elizabeth MACIEWJEWSKI dba Gold Star
Medical Business Service.

No. CV136042888S.

|

Sept. 4, 2014.

Attorneys and Law Firms

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WILSON, J.

FACTS

*1 The plaintiff, Cofrancesco Chiropractic & Healing Arts, commenced the present action by service of process on the defendant, Elizabeth Maciejewski d/b/a Gold Star Medical Business Service, on October 25, 2013. The plaintiff filed a two-count complaint, alleging breach of contract and violation of the Connecticut Unfair Trade Practices Act (CUTPA), on November 7, 2013. The complaint alleges the following facts. The complaint is prefaced as being filed pursuant to the accidental failure of suit statute, General Statutes § 52-592. The plaintiff is a provider of chiropractic

care in Woodbridge, Connecticut. The defendant was a sole proprietor doing business in Tom Green County, Texas. The plaintiff entered into a contract with the defendant on March 11, 2008, which was extended on September 30, 2009, for the performance of medical billing and processing, as well as account receivable collection services. The plaintiff alleges that the defendant breached the contract by, *inter alia*, failing to maintain adequate records, failing to prepare and issue routine statements to the plaintiff's patients, failing to file all insurance claims, failing to work reasonable and necessary hours, failing to compile routine reports, and failing to properly communicate with the plaintiff and the plaintiff's patients. A copy of the contract and the extension are attached to the complaint.

On December 30, 2013, the defendant filed a motion to dismiss the complaint on the grounds of res judicata, lack of personal jurisdiction, and improper venue. A memorandum of law and an affidavit from the defendant accompany the motion. In the affidavit, the defendant avers that, among other things, she is not and never has been a resident of Connecticut, has never transacted or engaged in business in Connecticut, and that all services performed under the contract were performed in Texas.

On February 10, 2014, the plaintiff filed a memorandum of law in opposition, accompanied by an affidavit from Louis Cofrancesco, a doctor of chiropractic medicine and the principal of the plaintiff. In his affidavit, Dr. Cofrancesco provides a brief history of the facts surrounding the formation and performance of the contract, stating, *inter alia*, that he and his office staff communicated with the defendant directly via telephone, email, and fax, including monthly conference calls, all from Connecticut. He also states that the defendant represented to him that she had other clients throughout the country, including in Connecticut. The court heard argument on the motion at short calendar on July 7, 2014.

DISCUSSION

Practice Book § 10-30(b) provides in relevant part: "Any defendant, wishing to contest the court's jurisdiction, shall do so by filing a motion to dismiss ..." Practice Book § 10-30(a)

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states: “A motion to dismiss shall be used to assert: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; [and] (3) improper venue ...” “[T]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised.” (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. New London*, 265 Conn. 423, 430 n. 12, 829 A.2d 801 (2003). Additionally, “[i]f the defendant challenging the court's personal jurisdiction is a foreign corporation or a nonresident individual, it is the plaintiff's burden to prove the court's jurisdiction.” *Cogswell v. American Transit Ins. Co.*, 282 Conn. 505, 515, 923 A.2d 638 (2007).

*2 “When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light ... In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader.” (Internal quotation marks omitted.) *Conboy v. State*, 292 Conn. 642, 651, 974 A.2d 669 (2009).

“In contrast, if the complaint is supplemented by *undisputed facts* established by affidavits submitted in support of the motion to dismiss ... other types of undisputed evidence ... and/or public records of which judicial notice may be taken ... the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint ... Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts] ... If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits ... or other evidence, the trial court may dismiss the action without further proceedings.” (Emphasis in original; internal quotation marks omitted.) *Conboy v. State*, *supra*, 292 Conn. at 651–52, 974 A.2d 669.

“Finally, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts ... Likewise, if the question of jurisdiction is intertwined with

the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits ... An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties.” (Citations omitted; footnote omitted; internal quotation marks omitted.) *Conboy v. State*, *supra*, 292 Conn. at 652–54, 974 A.2d 669.

The defendant argues (1) that the accidental failure of suit statute is inapplicable, (2) that the action is barred by the doctrine of *res judicata*, (3) that this court is an improper venue under the choice of law clause of the contract, and (4) that this court lacks personal jurisdiction under the longarm statute.

I

ACCIDENTAL FAILURE OF SUIT STATUTE

The defendant first argues that the accidental failure of suit statute is inapplicable because the statute only applies where a complaint is dismissed outside the statute of limitations, which the defendant claims is not the case here. More specifically, the defendant argues that the applicability of § 52–592 is that of a saving statute after the expiration of the applicable statute of limitations. The defendant further claims that the instant action arises out of an alleged contract for medical billing and processing services dated March 11, 2009 which was extended/modified on September 30, 2009. The defendant claims that since the present action is grounded in a breach of contract, the applicable statute of limitations is six years pursuant to General Statutes § 52–576(a), and assuming that the alleged breach occurred on the same day as the extension, September 30, 2009, the applicable statute of limitations would be September 30, 2015. The defendant therefore argues that § 52–592 is inapplicable. The plaintiff counters that the accidental failure of suit statute is properly pleaded as a special defense, not by way of a motion to dismiss.

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*3 “[A] motion to dismiss is not the appropriate procedural means to challenge an action commenced pursuant to the accidental failure of suit statute [General Statutes § 52–592]. The appropriate challenge is by way of a properly pleaded special defense; see Practice Book § 10–50 ... [A]lthough a motion to dismiss may not be the proper procedural vehicle for asserting that an action is not saved by ... § 52–592, our Supreme Court has held that a trial court may properly consider a motion to dismiss in such circumstances when the plaintiff does not object to the use of the motion to dismiss.” (Citation omitted; internal quotation marks omitted.) *Worth v. Commissioner of Transportation*, 135 Conn.App. 506, 515 n. 16, 43 A.3d 199, cert. denied, 305 Conn. 919, 47 A.3d 389 (2012). Here, the plaintiff expressly objects to the motion on procedural grounds. The court therefore denies the motion on procedural grounds.

II

RES JUDICATA AND COLLATERAL ESTOPPEL

The defendant next argues that res judicata bars the present action. Although the defendant uses the term res judicata, which is the doctrine of claim preclusion, her arguments center on issue preclusion, which falls under the doctrine of collateral estoppel. The defendant argues that the issues raised in the present motion to dismiss, namely, improper venue and lack of personal jurisdiction, were raised in a previous unopposed motion to dismiss in a previous action between the same parties that included the same claims. The defendant argues that because the court granted the unopposed motion, these issues are precluded from relitigation.

In response, the plaintiff argues that res judicata and collateral estoppel are not bases for a motion to dismiss but must be raised as special defenses. The plaintiff also argues that these doctrines do not preclude the present action because the prior action was dismissed on a motion to dismiss and, thus, not fully litigated.

“Res judicata with respect to a jurisdictional issue does not itself ... constitute a jurisdictional issue ... Res judicata does not provide the basis for a judgment of dismissal; it is a special defense that is considered after any jurisdictional thresholds are passed.” (Citations omitted.) *Labbe v. Pension Commission*, 229 Conn. 801, 816, 643 A.2d 1268 (1994); see also Practice Book § 10–50. In addition, “the doctrine of collateral estoppel does not implicate a court’s subject matter jurisdiction ... Even when applicable, therefore, collateral estoppel does not mandate dismissal of a case.” *Wilcox v. Webster Ins., Inc.*, 294 Conn. 206, 224, 982 A.2d 1053 (2009). Nevertheless, the Supreme Court has repeatedly stated the proposition that “[a]lthough most defenses cannot be considered on a motion to dismiss, a trial court can properly entertain a ... motion to dismiss that raises collateral estoppel grounds.” (Citation omitted; internal quotation marks omitted.) *Id.*¹

*4 “The doctrine of collateral estoppel is based on the public policy that a party should not be able to relitigate a matter which it already has had an *opportunity* to litigate.” (Emphasis in original; internal quotation marks omitted.) *Marques v. Allstate Ins. Co.*, 140 Conn.App. 335, 58 A.3d 393 (2013). “The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality ... Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim ... For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment.” (Emphasis omitted; internal quotation marks omitted.) *Henderson v. Lagoudis*, 148 Conn.App. 330, 338, 85 A.3d 53 (2014). “An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered.” (Internal quotation marks omitted.) *Doran v. First Connecticut Capital, LLC*, 143 Conn.App. 318, 321–22, 70 A.3d 1081, cert. denied, 310 Conn. 917 (2013).

The present case is the plaintiff’s third attempt to bring the same causes of action against the defendant. The first case (Docket No. NNH–CV–12–6034200–S), in which the

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defendant did not appear, was dismissed by the court, Robinson, J., pursuant to Practice Book § 14–3. In the second case (Docket No. NNH–CV–13–6039031–S), the court, B. Fischer, J., granted the unopposed motion to dismiss filed by the defendant. In her motion to dismiss in the second case the defendant raised three grounds: lack of personal jurisdiction, improper venue, and insufficient service of process. The plaintiff filed a document in which it informed the court of its intention not to oppose the motion to dismiss, but intended to recommence the action under the accidental failure of suit statute. In granting the motion to dismiss, the court did not issue a memorandum of decision, citing only the plaintiff's filing of a document stating its position that it did not oppose the motion.

Here, the defendant seeks to apply the doctrine of collateral estoppel to preclude the relitigation of the issues raised in her motion to dismiss, specifically lack of personal jurisdiction and improper venue. Applying the standard of collateral estoppel, the plaintiff had a full and fair opportunity to litigate the issues raised in the previous motion to dismiss, but chose not to do so. As a result, the first prong of the test of collateral estoppel is met. However, neither of the two remaining prongs are satisfied. First, neither issue was actually decided because the court granted the motion summarily without issuing a memorandum of decision stating on what grounds the motion was granted. Second, the prior motion to dismiss raised three grounds, two of which are repeated in the present motion to dismiss, and all of which could have been independently dispositive. Accordingly, the two repeated grounds for which the defendant currently seeks issue preclusion-improper venue and lack of personal jurisdiction-were not necessary to the previous judgment because the judgment could have been validly entered without a determination of these issues. The doctrine of collateral estoppel, therefore, cannot apply.

III

IMPROPER VENUE

*5 Next, the defendant argues that Connecticut is an improper venue under the choice of law clause of the contract, which expressly states that Texas law governs the contract. She argues further that Texas courts are best suited to interpret and apply Texas law, and that the plaintiff would not be prejudiced. In contrast, the plaintiff argues that the defendant confuses the contract's choice of law clause for a forum selection clause, which is distinguishable under Connecticut law. Additionally, the plaintiff argues that it would be prejudiced if it had to bring this action in Texas because, *inter alia*, the statutes of limitations for the equivalent causes of action are shorter.

“A forum selection clause is a contractual provision agreed to by private parties that constitutes the parties' agreement as to the place of the action where the parties will bring any litigation related to the contract ... [Connecticut courts] regard [such a] clause as merely designating the forum in which the parties agreed to litigate.” (Citations omitted; internal quotation marks omitted .) *Western Dermatology Consultants, P.C. v. Vital Works, Inc.*, 146 Conn.App. 169, 202, 78 A.3d 167 (2013). Forum selection clauses are, however, distinguishable from choice of law clauses. See, e.g., *id.* “[W]here the parties have unequivocally provided in their contract that the law of a particular state will apply, that court will proceed under the law of the chosen state.” *Amos Financial, LLC v. Center for Advanced Pediatrics, P.C.*, Superior Court, judicial district of Stamford–Norwalk, Docket No. CV–11–6011064–S (March 11, 2013, Tobin, J.T.R.); accord *Reichhold Chemicals, Inc. v. Hartford Accident and Indemnity Co.*, 252 Conn. 774, 781, 750 A.2d 1051 (2000). Connecticut courts regularly and competently apply the law of other jurisdictions. See, e.g., *People's United Bank v. Kudej*, 134 Conn.App. 432, 438, 39 A.3d 1139 (2012).

As attached to the complaint, the contract in the present case expressly states, “This agreement shall be interpreted, construed and governed according to the laws of the State of Texas.” This is demonstrably a choice of law clause. Conversely, the contract does not contain a forum selection clause. Accordingly, Connecticut is not an improper venue.

IV

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PERSONAL JURISDICTION UNDER THE LONGARM STATUTE

Finally, the defendant argues that this court lacks personal jurisdiction under the longarm statute, General Statutes § 52–59b. In support of her argument, the defendant provided an affidavit in which she states, among other things, that she is not nor has ever been a resident of Connecticut; that she has never transacted, engaged in, or entered into a contract in Connecticut; and that she performed all of her services under the contract in Texas. The plaintiff argues that the obligations and services performed under the contract, including communicating with the plaintiff and its patients within Connecticut, are sufficient to meet the standard found in § 52–59b. The plaintiff also submitted an affidavit that contradicts the statements made by the defendant in her affidavit. Because the affidavits are contradictory, the plaintiff requests that the court hold an evidentiary hearing concerning the matter of personal jurisdiction under § 52–59b.

***6** General Statutes § 52–59b(a) states: “(a) As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nonresident individual, foreign partnership or foreign voluntary association, or over the executor or administrator of such nonresident individual, foreign partnership or foreign voluntary association, who in person or through an agent: (1) Transacts any business within the state; (2) commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; (3) commits a tortious act outside the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if such person or agent (A) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (B) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; (4) owns, uses or possesses any real property situated within the state; or (5) uses a computer, as defined in subdivision (1) of subsection (a) of section 53–451, or a computer network, as defined in subdivision (3) of subsection (a) of said section, located within the state.”

“When a defendant challenges personal jurisdiction ... [t]he trial court must first decide whether the applicable state long-arm statute authorizes the assertion of jurisdiction over the [defendant].”² (Internal quotation marks omitted.) *Doyle Group v. Alaskans for Cuddy*, 146 Conn.App. 341, 346, 77 A.3d 880 (2013). “Section 52–59b grants jurisdiction to the Superior Court over nonresident individuals. Our Supreme Court has explained that § 52–59b(a)(1) authorizes jurisdiction over nonresidents who transact any business within the state provided that the cause of action arises out of such transaction ... [A]lthough the term ‘[t]ransacts any business’ is not defined by statute, [our Supreme Court has] construed the term to embrace a single purposeful business transaction.” (Citations omitted; internal quotation marks omitted.) *Id.*, at 347. “[A] nonresident individual who has not entered this state physically nevertheless may be subject to jurisdiction in this state under § 52–59b(a)(1) if that individual has invoked the benefits and protection of Connecticut’s laws by virtue of his or her purposeful Connecticut-related activity.” (Internal quotation marks omitted.) *Id.*, at 348. Examples of activities that are purposeful Connecticut related activities under this statute include the out-of-state execution of a warranty deed for the transfer of real property within Connecticut, an out-of-state party entering into a contract with a Connecticut company, and receiving the delivery of services from Connecticut in another state. *Id.*, at 349–50.

***7** “[A]ffidavits are insufficient to determine the facts unless ... they disclose that no genuine issue as to a material fact exists.” (Internal quotation marks omitted.) *Conboy v. State*, *supra*, 292 Conn. at 651 n. 14, 974 A.2d 669. “[W]here a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts ... An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties.” (Citations omitted; footnote omitted; internal quotation marks omitted.) *Id.*, at 652–54, 974 A.2d 669. “A preliminary evidentiary hearing ordinarily will suffice where the jurisdictional issue is distinct and severable from the merits of the action, for example, when personal jurisdiction is called into question.” *Id.*, at 653 n. 15, 974 A.2d 669.

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Here, the parties have submitted competing affidavits regarding the facts relating to personal jurisdiction over the defendant under § 52–59b. Because genuine issues of material fact exist and because a court cannot make a critical factual jurisdictional finding based solely on memoranda and documents submitted by the parties, a preliminary evidentiary hearing is required.

CONCLUSION

For the reasons provided herein, the court will hold a preliminary evidentiary hearing regarding whether the court has personal jurisdiction over the defendant under § 52–59b. The defendant's motion to dismiss as to all other grounds is denied. The clerk is hereby ordered to schedule an evidentiary hearing for Monday, September 29, 2014, at 9:30 a.m. in courtroom 4C. All documentary evidence shall be available, and all witnesses shall be present and ready to testify, on that day, on the issue of personal jurisdiction under § 52–59b. Any supplemental memoranda must be on file no later than the previous Thursday.

All Citations

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Footnotes

- ¹ When first allowing collateral estoppel on a motion to dismiss, however, the court was considering whether the issue of collateral estoppel could be raised by a motion to dismiss filed during a trial under Practice Book § 15–8, and not whether it could be raised in a pretrial motion to dismiss filed pursuant to Practice Book § 10–30 et seq. See *Sullivan v. Thorndike*, 104 Conn.App. 297, 311–12, 934 A.2d 827 (2007), cert. denied, 285 Conn. 907, 908, 942 A.2d 415, 416 (2008); see also *Wilcox v. Webster Ins., Inc.*, *supra*, 294 Conn. at 223, 982 A.2d 1053.
- ² “If the statutory requirements [are] met, [the trial court’s] second obligation [is] then to decide whether the exercise of jurisdiction over the [defendant] would violate constitutional principles of due process.” (Internal quotation marks omitted.) *Doyle Group v. Alaskans for Cuddy*, *supra*, 146 Conn.App. at 346 n. 3. If, however, a defendant raises only longarm statutory jurisdiction issues and not constitutional due process issues, then the reviewing court need only address the longarm statutory issues. *Id.* (“courts have a duty to eschew unnecessary determinations of constitutional questions”).

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