STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 273-8-20 Wncv
KATELAND KELLY, Plaintiff, v. CLEARCHOICEMD, PLLC, and MARCUS J. HAMPERS, Defendants.	

RULING ON MS. KELLY'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Kateland Kelly is a Physician Assistant and Vermont resident who was employed for a time at Vermont healthcare clinics owned and operated by her then-employer, Defendant ClearChoiceMD, PLLC, a New Hampshire company; Defendant Marcus J. Hampers is its CEO. Ms. Kelly asserts numerous claims, including several torts, arising out of that employment, most of which are not currently at issue. Among them, she alleges that her employment was subject to a bonus program and, throughout her employment, ClearChoice repeatedly changed the terms of that program in a manner unfavorable to her without providing advance, written notice that it had done so. She seeks damages for the more favorable bonuses she claims that she should have earned (count 1) and seeks to double those damages by operation of 21 V.S.A. § 347 (count 2). In her partial summary judgment motion, she asserts that the court should estop Defendants from denying liability on count 1 because the identical matters were resolved against ClearChoice in three separate New Hampshire cases involving three other provider–employees of ClearChoice, Drs. Henriques, Schroeter, and Baker (all providers in New Hampshire facilities), and then should automatically double that liability under count 2.

Liability for underpayment of wages under count 1 (breach of contract)

Ms. Kelly frames her argument under count 1 under the doctrine of collateral estoppel. Collateral estoppel is one of the two primary preclusion doctrines. The Vermont Supreme Court has summarized it succinctly as follows:

> The doctrine of collateral estoppel, also called issue preclusion, is similar in effect but more narrow in scope. It bars the relitigation of an issue, rather than a claim, that was actually litigated by the parties and decided in a prior case. The elements of collateral estoppel are: (1) preclusion is asserted against one who was a party in the prior action; (2) the same issue was raised in the prior action; (3) the issue was resolved by a final judgment on the merits; (4) there was a full and fair opportunity to litigate the issue in

the prior action; and (5) applying preclusion is fair.

In re Tariff Filing of C. Vermont Pub. Serv. Corp., 172 Vt. 14, 20 (2001) (citations omitted). Collateral estoppel does not necessarily require an identity of parties, so it can be viable here in relation to the New Hampshire cases. See *Trepanier v. Getting Organized, Inc.*, 155 Vt. 259, 264 (1990).

Collateral estoppel properly applies only to a "particular issue" of fact or law—not a legal claim, the province of res judicata. See Restatement (Second) of Judgments § 27 cmt. a. In her original motion, Ms. Kelly had not clearly identified the specific issue(s) subject to her assertion of collateral estoppel. Her argument, however, became much clearer in the course of oral argument on February 8, 2022.

The argument is as follows. In the three New Hampshire cases, three doctor–employees of ClearChoice were subject to the same bonus provision, which met the definition of a wage under New Hampshire law, experienced the same lack of advance, written notice as to changes in the bonus program, and that lack of notice triggered liability for underpayment of wages under a New Hampshire statute and regulation that require advance, written notice of changes in the rate of pay. N.H. Rev. Stat. Ann. §§ 275: 42, 49; N.H. Code Admin. R. Lab 803.03. According to Ms. Kelly, the material facts are the same here as in those cases, so the court, applying collateral estoppel, should apply the New Hampshire determinations concluding that this set of facts violates this statute and regulation, and hence liability is established.

ClearChoice objects that Vermont's, not New Hampshire's, labor statutes and regulations apply in this case. Ms. Kelly responds that the parties expressly chose New Hampshire law in the employment contract as follows: "This Agreement shall be construed and enforced under and in accordance with the laws of the State of New Hampshire." This provision is worded broadly enough to encompass the "local law" of New Hampshire, including its wage statutes and regulations, and Vermont has no relevant "anti-waiver" provision that might bar a choice of law provision like this. See Restatement (Second) of Conflict of Laws § 4(1) (defining "local law" to mean the "body of standards, principles and rules, exclusive of its rules of Conflict of Laws, which the courts of that state apply in the decision of controversies brought before them.").

Generally, contracting parties are free to choose the law of the state that will govern their contract rights. There are limits, including when "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which [otherwise] would be the state of the applicable law." Restatement (Second) of Conflict of Laws § 187(2)(b). In Vermont, the standard for making a public policy exception requires a showing that applying the chosen state's law would be "cruel or shocking to the average man's conception of justice." *Stamp Tech, Inc. ex rel. Blair v. Ludall/Thermal Acoustical, Inc.*, 2009 VT 91, ¶ 22, 186 Vt. 369 (2009) (citation omitted). Nothing like that has been shown here. To the contrary, the parties both represent that Vermont does not have a regulatory requirement analogous to the New Hampshire notice provision Ms. Kelly relies on. Thus, the choice of law provision in the parties' contract is sufficient to subject the issues in this case to New Hampshire law, and the written notice provision in particular.

The bonus program at issue here is the same one that was at issue in the New Hampshire cases. At oral argument, ClearChoice conceded that it did not provide advance, written notice of changes in the terms of the bonus program—as understood and applied by the New Hampshire Supreme Court and department of labor in the New Hampshire cases—to Ms. Kelly. The "issues" for collateral estoppel purposes, then, are whether the bonuses are wages under New Hampshire law and whether the lack of advance, written notice violates the New Hampshire notice provisions.

There is no basis for denying collateral estoppel on either issue. ClearChoice was a party in the New Hampshire cases, which involved the same issues as presented here. They were resolved by final judgments on the merits; there was a full and fair opportunity to litigate the issues; and there is no showing of unfairness. ClearChoice's liability under count 1 thus is established. See N.H. Rev. Stat. § 275:53.

Double damages under count 2

Liability for underpayment of wages having been established under count 1, Ms. Kelly seeks to automatically double those damages under a provision of Vermont law, 21 V.S.A. § 34. This claim must be denied, however. As explained above, the parties effectively chose New Hampshire law to govern this dispute. Section 34 thus is irrelevant here.

Order

For the foregoing reasons, Ms. Kelly's motion for partial summary judgment is granted in part and denied in part.

SO ORDERED this 10th day of February, 2022

Robert A. Mello
Superior Judge