IN THE FLORIDA SUPREME COURT
STATE OF FLORIDA

CASE NO.: SC-06-1315

GEORGE ASSIFF,

Petitioner,

vs.

CARNIVAL CORPORATION d/b/a
CARNIVAL CRUISE LINES,

Respondent.
_____/

PETITIONER'S BRIEF ON JURISDICTION

On Appeal from the Circuit Court, Eleventh Judicial Circuit, Miami-Dade County, Florida, Peter R. Lopez, J., case no. 05-3255-CA-01, and from the Third District Court of Appeal, case no. 3D05-1457.

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STATEMENT OF THE CASE

This appeal seeks discretionary review of a decision of the Third District, rendered May 24, 2006. The notice to invoke discretionary jurisdiction was timely filed, June 23, 2006. Jurisdiction is sought because the decision expressly and directly conflicts with a decision of another district court of appeal on the same question of law. Fla.R.App.P. 9.030(a)(2)(A). A copy is attached as an appendix.

STATEMENT OF THE FACTS

GEORGE ASSIFF filed suit in State Court against CARNIVAL CORPORATION, seeking damages for injuries he sustained while on board CARNIVAL's cruise ship. Both parties are Florida residents. The passenger ticket contract contains a forum selection clause which states that disputes shall be litigated in the United States District Court for the Southern District of Florida, except for those cases to which the Federal Court's lack subject matter jurisdiction. In such case, suit must be filed before a court located in Miami-Dade County, Florida.

The sole issue before the lower court was whether the trial court erred in dismissing the complaint, instead of transferring it to Federal court.

SUMMARY OF ARGUMENT

ISSUE: WHETHER THE COURT SHOULD ACCEPT DISCRETIONARY JURISDICTION.

The sole issue in this is whether the case should have been *transferred* to the U.S. District Court, rather than simply *dismissed*. The Third District held that the case could not be transferred. This decision squarely conflicts with Aqua Sun Mgmt., Inc. v. Divi Time, Ltd., 797 So.2d 24 (Fla. 5th DCA 2001).

The Fifth District, in Aqua Sun, ordered a case, based on a forum selection clause, transferred to a U.S. District Court. Id., at 25. Assuming that CARNIVAL's forum selection clause is the same in all cases, the Second District also has ordered cases transferred to the Federal court. E.g,, Carnival Corp. v. Purdy, 842 So.2d 966 (Fla. 2d DCA 2003).

Transfer, as opposed to dismissal, makes all the difference in the world to a plaintiff, when the limitation of action period has run. CARNIVAL will use this provision to get the case dismissed in the U.S. District Court. E.g., Middleton v. Carnival Corp., case no. 04-22176-CIV-MARTINEZ-BANDSTRA (S.D.Fla. Sept. 9, 2005).

This case is therefore appropriate for this Court to take jurisdiction.

ARGUMENT

ISSUE: WHETHER THE COURT SHOULD ACCEPT DISCRETIONARY JURISDICTION.

The sole issue before the Third District was whether the case should have been *transferred* to the Federal court, rather than simply *dismissed*. The Third District held that the case could not be transferred. This decision squarely conflicts with Aqua Sun Mgmt., Inc. v. Divi Time, Ltd., 797 So.2d 24 (Fla. 5th DCA 2001).

In Aqua Sun, the parties had agreed to forum selection by an earlier stipulation filed in Federal court. Like ASSIFF, the plaintiff in Aqua Sun contended that the Federal court lacked subject matter jurisdiction, filing in State Court. The Fifth District found that contention to be both premature and a question to be determined by the Federal court. Id., at 24. The Fifth District held "as a general principle, a trial court must honor a mandatory forum selection clause in a contract in the absence of a showing that the clause is unreasonable or unjust." Id. at 24-25. Therefore, the cause was remanded with instructions to transfer the action to Federal court. Id., at 25.

A stipulation is a clearly a type of a contract. It should make no difference whether the forum selection clause is contained in a cruise

ticket or a stipulation. Jurisdiction may not be conferred merely by the consent of the parties. E.g. Holbrook v. Allen, 4 Fla. 96 (1851). If a court has the power to transfer a case by any means, based on a forum selection clause, it should not lose that power by simply labeling the document containing the forum selection clause, something else.

The Third District decision also directly conflicts with Carnival Corp. v. Purdy, 842 So.2d 966 (Fla. 2d DCA 2003) and Carnival Corp. v. Woerner, 843 So.2d 1047 (Fla. 2d DCA 2003). In both cases, the Second District reversed with instructions to transfer the case to the "venue specified in the cruise ticket contract." Candidly, **neither** of these cases specifically quote the forum selection clause or state that the court to which the cases were transferred was the Federal court. Both, however, were decided upon CARNIVAL's forum selection clause contained in its cruise ticket. Assuming that the clause was identical, the forum of transfer was the U.S. District Court. While these cases may not be sufficient in themselves to show conflict between the District Courts of Appeal, they support reliance upon Aqua Sun as a source of conflict jurisdiction

This Court should accept jurisdiction to resolve the issue of whether a Florida court can order the transfer of a case to the U.S.

District Court. This does not mean that the U.S. District Court would have to find jurisdiction or accept the transfer, if jurisdiction is discretionary. The question is whether the courts of Florida have the power to transmit a proper case to the appropriate forum.

This issue affects many litigants, not only in the context of contractual forum selection clauses, or in the analogous area of forum non conveniens, but in any action where the Federal and State Courts have concurrent jurisdiction when the forum selected by the Plaintiff declines to hear the case. Tricky contractual provisions creating arcane procedure should not deprive litigants of a day in an appropriate court.

Florida Courts have long stressed and favor deciding cases upon their merits. Colby Materials, Inc. v. Caldwell Constr., Inc., case no. SC-04-774, page 2 (Fla. March 16, 2006). Thus, when there is a choice between transferring a case and dismissing it, the former is favored, and the latter is not. See, Chase v. Jowdy Indus., Inc., 913, So.2d 1173, 1175 (Fla. 4th DCA 2005).

The issue of whether a case may be transferred is very important because of the affect of statutory and contractual periods for limitation of actions. For instance, when CARNIVAL obtains a dismissal based on its forum selection clause, the result is the Plaintiff losing his case. The

Federal court dismisses because the case was not filed within the one-year shortened statute of limitations of CARNIVAL's contract. E.g., Middleton v. Carnival Corp., ___ F.Supp.2d. ___, case no. 04-22176-CIV-MARTINEZ-BANDSTRA (S.D.Fla. September 9, 2005).

Additionally, §47.122 Fla. Stat., provides that "for the convenience of the parties or witnesses or in the interest of justice, any court of record may transfer any civil action to any other court of record in which it might have been brought." This statute preserves the filing date of the action. This statute does not contain a limitation to State courts in its language.

Florida courts follow the Federal preference for transferring cases based on forum selection clauses, as opposed to dismissals. E.g. Everett v. Carnival Cruise Lines, 912 F.2d 1355 (11th Cir. 1990). For example, in the analogous situation of dismissal for forum non conveniens, Fla.R.Civ.P. 1.061 provides that Plaintiffs' cases have the opportunity to be heard in the new forum. This rule ensures that any statute of limitations in the new forum is applied as though the action had been filed in that forum from the start.

CONCLUSION

Petitioner, GEORGE ASSIFF, requests this honorable Court accept discretionary jurisdiction of this action, to resolve the conflict between the District Courts of Appeal as to whether a proper case may be transferred to a Federal District Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Donnise A. DeSouza, Esq., Carnival Corp., 3655 Northwest 87th Avenue, Miami, Florida 33178-2428, this _____day of July, 2006.

George J.F. Werner, Esq.
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(727)442-0731
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CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P.. 9.210(a)(2)

I HEREBY CERTIFY that the type size used in this Brief is Times New Roman 14, as required by Fla. R. App. P. 9.210(a)(2),

George J.F. Werner, Esq.

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IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

JANUARY TERM, 2006

CASE NO. 3D05-1457

GEORGE ASSIFF,

Appellant

v.

CARNIVAL CORPORATION

d/b/a CARNIVAL CRUISE LINES,

Appellee.

_____/

Opinion filed May 24, 2006.

An Appeal from the Circuit Court for Miami-Dade County, Peter Lopez, Judge, Lower Tribunal No. 05—3255.

George J.F. Werner (Clearwater) , for appellant.

Donnise A. DeSouza, for appellee.

Before WELLS, CORTINAS, and ROTHENBERG, JJ.

ROTHENBERG, Judge.

The sole issue raised by the appellant is whether the trial court erred in dismissing his complaint, rather than transferring the action from the Eleventh Judicial Circuit Court in and for Miami-Dade County, Florida ("State Court") to the United States District Court for the Southern District of Florida in Miami ("Federal Court"). As we find no error in the trial court's ruling, we affirm.

On February 8, 2005, the plaintiff, George Assiff, filed a complaint in State Court against Carnival Corporation d/b/a Carnival Cruise Lines ("Carnival") . The plaintiff sought damages for injuries he allegedly sustained when he tripped and fell onboard a Carnival cruise ship and for injuries resulting from the ship's medical doctor's misdiagnosis. Attached to the complaint was the passenger ticket contract, which contains the following forum selection clause in Paragraph 15:

> It is agreed by and between the Guest and Carnival that all disputes and matters whatsoever arising under, in connection with or incident to this Contract or the Guest's cruise, including travel to and from the vessel, shall be litigated, if at all, before the United States District Court for the Southern District of Florida in Miami, or as to those lawsuits to which the Federal Courts of the United States lack subject matter jurisdiction, before a court located in Miami-Dade County, Florida, U.S.A.,

> to the exclusion of the Courts of any other county, state or country.

In addition, the complaint alleges that the plaintiff is a resident of Pinellas County, Florida, and Carnival is a foreign corporation authorized to do business in the State of Florida, with its principal office located in Miami, Florida.

Carnival filed a motion to dismiss the complaint, arguing that the State Court was the improper forum based on the forum selection clause contained in Paragraph 15 of the passenger ticket contract.[1] Following a hearing, the trial court granted the motion to dismiss without prejudice, based on the forum selection clause. This appeal follows.

The plaintiff contends that, pursuant to section 47.122, Florida Statutes (2005), the trial court was authorized to transfer the action from the State Court to the Federal Court, and therefore, the trial court erred when it dismissed the action. We conclude that the plaintiff's reliance on section

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[1] Carnival also argued that the action was time barred based on the one—year limitation period contained in Paragraph 14(a) of the passenger ticket contract. However, as the trial court specifically ruled that it was not deciding that issue, we do not address this argument, although Carnival also seeks affirmance arguing that the plaintiff's complaint was not timely filed in the State Court.

47.122 is, however, misplaced. Section 47.122 is Florida's forum non conveniens statute and the complaint in this case was dismissed based upon a forum selection clause contained in the passenger ticket contract, not forum non conveniens. Thus, section 47.122 is inapplicable.

The plaintiff also contends that the action was removable from State Court to Federal Court pursuant to 28U.S.C.1441 (2005). We disagree. 28U.S.C.1441 allows for the removal of a case from a state court to a federal court under specific circumstances, which we find are not present in this case. 28U.S.C.1441 provides in relevant part as follows:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to

the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

In the instant case, 28U.S.C.1441 is inapplicable for the following reasons: (1) the defendant did not seek removal; (2) the claim does not "aris[e] under the Constitution, treaties or laws of the United States," see Garcia v. Parker & Co. Worldwide, Civ.A. B—05—300, 2006 WL 197035 (S.D. Tex. Jan. 23, 2006) ("Maritime claims do not 'arise under the Constitution, treaties, or laws of the United States' for purposes of removal

jurisdiction.") (quoting Tennessee Gas Pipeline v. Houston Cas. Ins., 87F.3d150, 153 (5th Cir. 1996)); Auerbach v. Tow Boat U.S., 303 F. Supp. 2d 538, 542 (D.N.J. 2004) ("[A]dmiralty claim does not arise under the federal constitution, treaties, or laws, and cannot be removed freely to federal court under [28 U.S.C.] Section 1441."); and (3) there is no diversity of citizenship between the parties.

Thus, since there is no statutory mechanism to remove or transfer this matter to federal court, the trial court properly dismissed the complaint. We recognize that, as a result of the one-year statute of

limitations contained in Paragraph 14(a) of the passenger ticket contract, it appears that the plaintiff will be barred from filing his action in the Federal Court. Nonetheless, this alone is insufficient to warrant reversal of the trial court's order granting Carnival's motion to dismiss. See Continental Ins. Co. v. M/V Orsula, 354F.3d603, 608 (7th Cir. 2003) ("[T]he dismissal of a cause of action for
improper venue . . . after the statute of limitations has run does not, on its own, constitute an abuse of discretion."); Hapaniewski v. City of Chicago Heights, 883F.2d576 (7th Cir. 1989) . Therefore, the order under review is affirmed.

Affirmed.