

**SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION  
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 9-3-09  
SUBMITTED: 10-8-09  
MOTION NO.: 008-MOT D

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x  
MARLA ADLER; STEPHEN BAUSENWEIN;  
AL DEICHLER; MIKE FROST; ED HALPIN;  
RICH HERBST; KEVIN KELLY; ARTHUR  
LANDSMAN; ERIK MALAGON; JOE  
O'BRIEN; and DAN WATTS,

THOMPSON WIGDOR & GILLY LLP  
Attorneys for Plaintiffs  
85 Fifth Avenue  
New York, New York 10003

Plaintiffs,

-against-

ZABELL & ASSOCIATES, PC  
Attorneys for Plaintiffs  
4875 Sunrise Hwy, Suite 300  
Bohemia, New York 11716

20/20 COMPANIES; 20/20  
COMMUNICATIONS, INC.; VERIZON  
COMMUNICATIONS, INC.; VERIZON  
SERVICES CORP.; TRG CUSTOMER  
SOLUTIONS; BARRY MILLAY, in his  
individual and official capacities; WILLIAM  
ROWLAND, JR., in his individual and official  
capacities; and JASON GREEN, in his individual  
and official capacities,

FARRELL FRITZ, P.C.  
Attorneys for Defendant 20/20 Communications Inc.  
1320 RXR Plaza  
Uniondale, New York 11556-1320

Defendants.

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Upon the following papers numbered 1 25 read on this motion to dismiss ; Notice of Motion and supporting papers 1-21 ; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 22-24 ; Replying Affidavits and supporting papers 25 ; it is,

**ORDERED** that this motion by the defendant 20/20 Communications, Inc., for an order dismissing the amended complaint insofar as asserted against it is determined as follows:

The plaintiffs allege that, in 2007 and 2008, the 20/20 defendants and the Verizon defendants jointly employed them as account executives and sales representatives to sell Verizon

FiOS internet and television services. The plaintiffs allege that, while so employed, the 20/20 and Verizon defendants engaged in unlawful practices in violation of the Labor Law. For example, they failed to pay the plaintiffs earned commissions and made unlawful deductions from their wages. The plaintiffs allege that they repeatedly complained about such practices, but to no avail. On December 24, 2008, the plaintiffs were advised that their office would be closing and that their employment would be terminated effective January 1, 2009. The plaintiffs subsequently applied for positions with the defendant TRG Customer Solutions (hereinafter “TRG”) selling Verizon FiOS internet and television services. The plaintiffs allege that they were not hired by TRG because they had been blacklisted by the Verizon defendants and placed on a do-not-hire list. The plaintiffs subsequently commenced this action alleging that the defendants had engaged in unlawful retaliation in violation of Labor Law § 215 and tortious interference with prospective economic or contractual relations. The defendant 20/20 Communications moves pursuant to CPLR 3211 (a) (1) and (7) to dismiss the amended complaint insofar as asserted against it.

Labor Law § 215 provides, in pertinent part, as follows:

No employer or his agent, or the officer or agent of any corporation, shall discharge, penalize, or in any other manner discriminate against any employee because such employee has made a complaint to his employer...that the employer has violated any provision of this chapter....

In order to state a claim under Labor Law § 215, a plaintiff must adequately plead that, while employed by the defendant, he or she made a complaint about the employer’s violation of the Labor Law and was terminated or otherwise penalized, discriminated against, or subjected to an adverse employment action as a result (**Higueros v New York State Catholic Health Plan**, 526 F Supp 2d 342, 347 [EDNY]). It is undisputed that the plaintiffs were employed by the defendant 20/20 Communications when they were discharged. 20/20 Communications moves to dismiss on the ground that its employment agreements with the plaintiffs contain forum-selection clauses which require any actions to be brought in Texas. The purported agreements provide, in pertinent part, as follows:

*Submission to Jurisdiction.* Any action, suit or proceeding seeking to enforce any provision of, or based on any matter arising out of or in connection with, this Agreement shall only be brought in any federal or state court located in Dallas or Tarrant County in the State of Texas, and each party consents to the exclusive jurisdiction and venue of such courts...in any such action, suit or proceeding and irrevocably waives, to the fullest extent permitted by law, any objection that it may now or hereafter have to the laying of the venue of any such action, suit or proceeding in any

such court or that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum.

It is well settled that, on a motion to dismiss pursuant to CPLR 3211, the court is to liberally construe the complaint, accept the alleged facts as true, give the plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (*see*, **Leon v Martinez**, 84 NY2d 83, 87-88; **Rovello v Orofino Realty Co.**, 40 NY2d 633, 634). In assessing a motion under CPLR 3211(a)(7), the court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*see*, **Leon v Martinez**, *supra* at 88; **Rovello v Orofino Realty Co.**, *supra* at 636). Under CPLR 3211(a)(1), dismissal is warranted only if the documentary evidence submitted utterly refutes the plaintiff's factual allegations, conclusively establishing a defense to the asserted claims as a matter of law (*see*, **Goshen v Mut. Life Ins. Co.**, 98 NY2d 314, 326; **Leon v Martinez**, *supra* at 88).

The court finds that the defendant 20/20 Communications has failed to establish as a matter of law that the plaintiffs Stephen Bausenwein, Arthur Landsman, Albert Deichler, Richard Herbst, Joseph O'Brien, and Daniel Watts executed the employment agreements submitted in support of the motion. Those agreements are unsigned and contain no handwritten initials or signatures indicating that the plaintiffs in question assented to their terms. Moreover, in their affidavits in opposition, the plaintiffs Albert Deichler and Richard Herbst raise serious questions regarding the manner in which those employment agreements were purportedly executed. Accordingly, the court declines to dismiss the amended complaint insofar as it is asserted by the plaintiffs Stephen Bausenwein, Arthur Landsman, Albert Deichler, Richard Herbst, Joseph O'Brien, and Daniel Watts against the defendant 20/20 Communications.

Although once disfavored by the courts, it is now recognized that parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract. Such clauses are prima facie valid and enforceable unless shown to be unreasonable (*see*, **Brooke Group JCH Syndicate**, 87 NY2d 530, 534). Absent a strong showing that they should be set aside, they will be upheld (*see*, **Bell Constructors v Evergreen Caisons**, 236 AD2d 859, 860). To set aside a forum-selection clause, the challenging party is required to show that enforcement would be unreasonable and unjust, that it would contravene public policy, or that it is invalid because of fraud or overreaching such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court (*see*, **D.O.T. Tiedown & Lifting Equip. v Wright**, 272 AD2d 290, 291; **Koko Contr. v Continental Env'tl. Asbestos Removal Corp.**, 272 AD2d 585, 586; **Bell Constructors v Evergreen Caisons**, *supra* at 860).

The employment agreements executed by Marla Adler, Erik Malagon, Edwin Halpin, Michael Frost, and Kevin Kelly are signed and bear the handwritten initials of such plaintiffs on each page. Contrary to the plaintiffs' contentions, enforcement of the forum-selection clause against these plaintiffs is not unconscionable. A determination of

unconscionability generally requires some showing of an absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party (**Gillman v Chase Manhattan Bank**, 73 NY2d 1, 10). The purpose of the doctrine is not to redress the inequality between the parties, but simply to ensure that the more powerful party cannot surprise the other party with some overly oppressive term (**Brower v Gateway 2000**, 246 AD2d 246, 253). The forum-selection clause in question is not hidden or tucked away within a complex document of inordinate length, and it appears in the same size print as the rest of the agreement (**Id.** at 253). The plaintiffs do not allege that the 20/20 defendants used high-pressure tactics to get them to sign the agreements. Rather, they allege that they were in a weaker bargaining position than the 20/20 defendants, that they had no choice, and that the 20/20 defendants inserted the forum-selection clauses into their employment agreements without any negotiation. However, the fact that the parties do not possess equal bargaining power alone does not invalidate a contract as one of adhesion (**Id.** at 252). Moreover, the plaintiffs' claims that they were unaware of the forum-selection clause, that they never read it, that it was not called to their attention or explained to them, and that they did not knowingly consent to it are unavailing, at least with respect to those plaintiffs who signed and initialed the employment agreements. A party who signs a document is presumed to have knowledge of its contents and is conclusively bound by its terms whether or not the document was read and understood (*see*, **Avanta Bus Servs. Corp. v Colon**, 4 Misc 3d 117, 119; *see also*, **Daniel Gale Assocs. v Hillcrest Estates**, 283 AD2d 386, 387; **Sofio v Hughes**, 162 AD2d 518, 519). Accordingly, the court finds that enforcement of the forum-selection clause against Marla Adler, Erik Malagon, Edwin Halpin, Michael Frost, and Kevin Kelly is not unreasonable or unjust, or the result of fraud or overreaching.

The court also finds that the forum selection clause is not against public policy and that a trial in Texas would not be so inconvenient as to deprive the plaintiffs of their day in court. In **Boss v American Express Fin. Advisors, Inc.** (15 AD3d 306, *aff'd* 6 NY3d 242), the New York courts upheld contractual language that unambiguously provided for any disputes to be decided by the courts of Minnesota and for Minnesota law to govern. In that case, as here, the plaintiffs argued that New York's employment law affords greater protection to its workers than Minnesota law. The New York courts rejected that argument and enforced the choice-of-law and forum-selection clauses even though the plaintiffs' claims were time-barred in Minnesota. In this case, there is no choice-of-law clause, so the Texas courts are free to apply New York law, and the plaintiffs' claims are not time-barred. As the Court of Appeals noted, if New York's interest in applying its own law to this transaction is as powerful as the plaintiffs contend, we cannot assume that Texas courts would ignore it, any more than we would ignore the interests or policies of the State of Texas were they implicated (6 NY3d at 247). The plaintiffs' claim that, because they are unemployed, the cost of litigating in Texas would be unduly burdensome to them is insufficient, standing alone, to demonstrate that enforcement of the forum-selection clause is unjust (*see*, **Horton v Concerns of Police Survivors, Inc.**, 62 AD3d 836, 837). The plaintiffs have offered no evidence that the cost of commencing an action in Texas would be so financially prohibitive that, for all practical purposes, they would be deprived of their day in court (**Id.** at

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837). In any event, if the plaintiffs prevail, their reasonable attorneys' fees are recoverable (*see*, Labor Law §215[2]). Accordingly, the complaint is dismissed insofar as asserted by the plaintiffs Marla Adler, Erik Malagon, Edwin Halpin, Michael Frost, and Kevin Kelly against the defendant 20/20 Communications.

The remaining parties are directed to appear for a preliminary conference which shall be held on February 1, 2010 at 10:00 a.m., DCM Part, Supreme Court Building, 1 Court Street, Riverhead, New York 11901.

**Dated:** January 5, 2010

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**J.S.C.**