SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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DANIEL DEMBICKI, JOSEPH DUNHILL

Plaintiffs,

- v -

SYNERGY HEALTH NETWORK, INC., BRIAN WEINSTEIN,

Defendants.

INDEX NO. 159402/2023

MOTION DATE 12/12/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 11 were read on this motion to DISMISS.

Synergy Health Network, Inc., ("Synergy Health") and Brian Weinstein ("Weinstein") (collectively, "Defendants") move to dismiss the Complaint filed by Daniel Dembicki and Joseph Dunhill (collectively, "Plaintiffs") for lack of personal jurisdiction pursuant to CPLR 3211 (a) (8).

As relevant here, Plaintiffs commenced this action by filing a Summons and Complaint on September 25, 2023 (NYSCEF 1 ["Compl."]) alleging a claim for breach of contract, claims for retaliation in violation of New York Labor Law ("NYLL") § 740, and a claim for unlawful deductions from wages under NYLL § 193. According to the Complaint, Plaintiffs' Executive Employment Agreements with Synergy contained identical arbitration provisions requiring that "[a]ny controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association …." The Executive Employment Agreements further provide that they "shall be construed in accordance

with the laws of New York without regard to conflicts of law principles" and that "arbitration will be conducted in New York City, New York …" (Compl. ¶¶2–3).

The Complaint alleges that the parties had previously been engaged in arbitration proceedings for approximately one year, but due to Defendants' defaulting on their arbitration fees, the arbitrator terminated the arbitration with leave for Plaintiffs to pursue their claims "in another forum." (Compl. ¶¶ 9–10).

For the following reasons, Defendants' motion is granted.

DISCUSSION

Pursuant to CPLR 3211(a)(8), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "the court has not jurisdiction of the person of the defendant." "[T]he burden of establishing jurisdiction rests on the party asserting it" (*Cato Show Print. Co., Inc. v Lee*, 84 AD2d 947, 949 [4th Dept 1981]).

According to the Complaint, Plaintiffs are both Florida residents. The corporate defendant, Synergy Health Network, Inc. is incorporated in Delaware and is alleged to have offices in Sarasota, Florida. Weinstein is alleged to reside in Illinois. There are no allegations that either Plaintiffs or Defendants rendered any services in New York or that Defendants undertook any actions in New York.

The only basis asserted for personal jurisdiction is that the parties chose New York as the forum *for arbitration* in the Executive Employment Agreements and that New York law shall apply. This is not sufficient to confer personal jurisdiction over Defendants in this action.

First, "[t]he fact that the contract chooses New York law does not 'constitute a voluntary submission to personal jurisdiction in New York'" (*ABKCO Music, Inc. v McMahon as Tr. of Andrea Marless Cooke Family Tr.*, 175 AD3d 1201, 1201 [1st Dept 2019]). Second, although "it

is well-settled that an arbitration clause containing a forum selection will be upheld by courts," "it is equally well-settled that such a clause will be enforced only insofar as it applies to arbitration proceedings and will not be construed to mean consent to jurisdiction in the courts of New York State" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v East*, 121067/93, 1993 WL 764642, at *2 [Sup Ct, NY County 1993]; *see also Aero-Bocker Knitting Mills, Inc. v Allied Fabrics Corp.*, 54 AD2d 647, 648 [1st Dept 1976]).

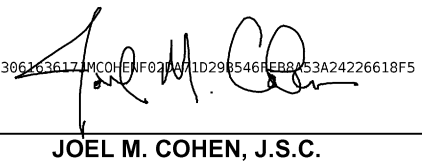
Plaintiffs' contention that declining to exercise personal jurisdiction in these circumstances will reward Defendants' defaults in the arbitration is unavailing. Even assuming that is so, the Court cannot simply create personal jurisdiction where none exists. The parties could have added a broader New York forum selection clause to the Executive Employment Agreements (*see ABKCO Music, Inc.*, 175 AD3d at 1202), but chose not to do so. Further, Plaintiff does not argue that there are no alternative forums in which to pursue its claims.

Thus, the Defendants have made a prima facie case that the Court lacks jurisdiction over them, and Plaintiffs have failed to meet their burden to present sufficient facts to demonstrate jurisdiction (*see ABKCO Music, Inc.*, 175 AD3d at 1202). Thus, the Court need not reach the "issues of whether this action arises out of defendant's alleged New York contacts and whether it would violate due process for New York to exercise jurisdiction" over the Defendants (*id.*).

Accordingly, it is

ORDERED that Defendants' motion to Dismiss the Complaint is **GRANTED**, and the Complaint is dismissed in its entirety against Defendants, and the Clerk is directed to enter judgment accordingly in favor of Defendants.

This constitutes the Decision and Order of the Court.



3/6/2024
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE