

Yoshida v PC Tech U.S.A.

2005 NY Slip Op 30400(U)

March 7, 2005

Supreme Court, New York County

Docket Number: 102252/04

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HERNAN CASH

PRESENT: _____
Justice

PART 49

102252-2004
MISAKO, YOSHIDA
- v -

PC TECH U.S.A. &
YOU-RT, INC

INDEX NO. _____
MOTION DATE 9/13/04
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

MAR - 9 2005

NEW YORK
COUNTY CLERK'S OFFICE

IN ACCORDANCE
WITH THE RULES OF COURTS
DECISION IN MOTION SEQUENCE.....

Dated: 3/7/05 [Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: IAS PART 49

-----X	:	
MISAKO YOSHIDA,	:	
	:	Index No. 102252/04
Plaintiff,	:	
- against -	:	
PC TECH U.S.A. & YOU-RI, INC.,	:	
	:	
Defendant.	:	
-----X	:	

Herman Cahn, J.

This is an action for breach of contract, fraud, and conversion, alleging that defendant induced plaintiff to pay tuition and other charges to it by misrepresenting itself as a licensed, accredited, educational institution. Defendant moves (seq. no. 01) to dismiss on grounds of inconvenient forum, lack of subject matter jurisdiction, and collateral estoppel, CPLR 327 (a), 3211 (a) (2), (5).

Relevant Facts:

Plaintiff is a Japanese national residing in New York since May 2002 (Yoshida Aff. ¶ 2; Sato Aff. ¶ 6). Defendant is a New York corporation organized in 1998, maintaining offices in New York City (Yoshida Aff. Ex. B).¹ Defendant has held itself out as a school offering adult educational programs in computer programming (*id.* ¶ 3; Sato Aff. Ex. B).

On December 24, 2001, the parties entered into an agreement in Japan, where plaintiff then resided, entitled "New York IT Certification Overseas Study Contract" (Yoshida

¹Defendant's CEO, Toshiyuki Sato, states that corporate governance is based in Japan (Sato Aff. ¶ 3). Records from the New York State Department of State, however, confirm that both defendant and Sato are domiciled in New York City (Yoshida Aff. Ex. B).

Aff. ¶ 4, Ex. C; Sato Aff. ¶¶ 13, 16, Ex. B).² The agreement provides that defendant will conduct an information technology course in New York in exchange for tuition and housing fees. In other words, plaintiff enrolled in defendant's computer school. The agreement did not guarantee plaintiff that she would earn a certification or obtain employment (Agreement art 2). The complaint alleges (¶ 3) that defendant "expressly represented to Ms. Yoshida that it was licensed by the State of New York. Absent such assurances, Ms. Yoshida would not have entered into an agreement with it."³

Plaintiff alleges that she paid defendant \$52,000.00 in tuition and housing charges, and commenced classes in May 2002. She alleges that she did not know that defendant and its instructors, in fact, were unlicensed to provide computer training in New York. She further alleges that, contrary to the reasonable import of defendant's representations, its curriculum was not approved by the New York State Commissioner of Education.

After learning of defendant's lack of licensure, and prior to commencing this action, plaintiff and eight other students filed complaints against defendant with the State Department of Education (Sato Aff. ¶ 27; Yoshida Aff. Ex. F). On March 4, 2002, the Department of Education commenced an administrative proceeding against defendant "for operating a computer training facility in violation of the provisions of the Education Law and Regulations of the Commissioner of Education" (Yoshida Aff. Ex. D). The five specific charges were: lack of licensure to operate (Educ. Law 5001 [1]; 8 NYCRR 126.10 [a]); lack of

²The parties have each submitted the same certified English translation of the Japanese language agreement (Yoshida Aff. Ex. C; Sato Aff. Ex. B).

³Section 5001 (1) of the Education Law mandates licensure for any "computer training facility which charges tuition or fees for instruction"

departmental approval of the curriculum (Educ. Law 5002 [4]; 8 NYCRR 126.4 [a]); lack of maintaining at least one employee holding an agent's certificate (Educ. Law 5004 [1]; 8 NYCRR 126.12 [f]); lack of licensure by any faculty member (Educ. Law 5002 [6]; 8 NYCRR 126.6); and lack of departmental approval of the facility site (Educ. Law 5002 [1]; 8 NYCRR 126.5). Plaintiff was not a party to the proceeding.

The proceeding was settled, as evidenced by a "Consent Agreement" entered into on January 22, 2003 (Yoshida Aff. Ex. F). In the agreement, defendant agreed to pay fines totaling \$58,000.00 into a tuition reimbursement account pursuant to Education Law §§ 5003 (6) (f) and 5007, to be paid to the Department. The Consent Agreement (¶ 4) states that the payment only forecloses the Department from taking further disciplinary action "based on those nine student complaints" It says nothing about the students' rights to pursue private causes of action. None of the students were signatories to the Consent Agreement.

The Department distributed the funds deposited in the tuition reimbursement account, to the students who filed the administrative charges, including plaintiff. She received \$4,225.00, despite the fact that she had paid \$52,000.00 in tuition and housing fees to defendant. She now seeks the balance of her payments in this action (\$47,775.00), plus punitive damages.

The parties' agreement contains a forum selection clause and a choice of law clause placing the venue of any litigation in Japan, for determination under Japanese law (Agreement arts 15, 16).

Collateral Estoppel:

Defendant argues that plaintiff is collaterally estopped from pursuing this action by virtue of the Consent Agreement and her receipt and acceptance of \$4,225.00 from the

Department of Education. This is incorrect.

“The doctrine of collateral estoppel, a narrower species of *res judicata*, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same” (*Ryan v New York Telephone Co.*, 62 NY2d 494, 500 [1984]). The prior action or proceeding had to have been one in which the plaintiff “had a fair opportunity to fully litigate the point” (*Liddle, Robinson & Shoemaker v Shoemaker*, 309 AD2d 688, 691 [1st Dept 2003]).

Plaintiff was neither a party to the administrative proceeding or the Consent Agreement. The Department of Education prosecuted the proceeding under its enforcement power granted in Article 101 of the Education Law (§§ 5001, *et seq.*) which allows for the institution of “[d]isciplinary actions, hearings and penalties” (Educ. Law 5003) upon the filing of an administrative complaint by an aggrieved student (*id.* 5003 [1] [c] [1]). Money paid by a respondent at the conclusion of such a proceeding is cast in punitive, not compensatory, terms (“penalties”), and is not paid directly to the aggrieved student; but rather, to the Department’s tuition reimbursement account (*id.* 5007).

Plaintiff’s receipt of \$4,225.00 from the Department’s tuition reimbursement account, standing alone, does not constitute a final settlement of her civil claims. Not having been a party to the administrative proceeding or the Consent Agreement between defendant and the Department, the principle of collateral estoppel cannot apply here, to bar her from obtaining full compensatory relief from defendant.

The notion cuts both ways. Just as defendant cannot use the Consent Agreement to

bar this action, plaintiff cannot use it to show any substantive liability on defendant's part, as it was careful to disclaim any admission of liability, and no administrative hearings were conducted (*Halyalkar v Board of Regents*, 72 NY2d 261 [1988]; *Becker v DeBuono*, 239 AD2d 664 [3d Dept 1997]).

Accordingly, the motion to dismiss due to collateral estoppel is denied.

Lack of Subject Matter Jurisdiction (the Forum Selection Clause):

Defendant argues that the court lacks subject matter jurisdiction over this controversy due to the forum selection clause of the parties' agreement.

A forum selection clause will not be enforced if it is invalid due to fraud or overreaching, or if enforcement would run counter to the public policy of this state (*M/S Bremen v Zapata Off-Shore Co.*, 407 US 1 [1972]; *Premium Risk Group, Inc. v Legion Ins. Co.*, 294 AD2d 345 [2d Dept 2002]).

The gravamen of this action is that defendant defrauded plaintiff into signing the agreement, and paying tuition and housing charges thereunder, based on false representations regarding its capacity to run the educational program it was marketing to plaintiff, and similarly situated students in New York. This claim, if proven, would nullify the forum selection clause, as it would have been agreed to under circumstances of fraud. At this pleading stage, the court will not nullify the clause on that allegation, which is denied by defendant.⁴

⁴Sato and his assistant, Sachiko Inoue, both attest that they did not discuss with plaintiff or other students whether the school was licensed (Sato Aff. ¶ 10; Inoue Aff. ¶¶ 5, 6). The lack of an overt misrepresentation does not necessarily vindicate defendant if it is later shown that it consciously concealed the school's lack of licensure from potential enrollees (*Swersky v Dreyer & Traub*, 219 AD2d 321 ["a duty to disclose arises 'where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair'"], *rearg denied* 232 AD2d 968 [1st Dept 1996], *appeal withdrawn* 89 NY2d 983 [1997]).

On the other hand, sufficient ground exists to deny enforceability of the forum selection clause as being contrary to our public policy. If defendant is not licensed as a computer training facility, then it has availed itself of the benefit of doing business in this State while disregarding its laws. As evident from the very statutory and regulatory scheme of Article 101 of the Education Law and Part 126 of the Regulations of the Commissioner of Education (Educ. Law §§ 5001, *et seq.*; 8 NYCRR 126.1, *et seq.*), those laws are designed to protect the public in general, and prospective students in particular, through the implementation of licensing procedures which ensure necessary standards of quality for the consumers of computer education. Defendant's alleged masquerade as an authorized educational institution in this state, while not being licensed, is a matter of public importance which merits review by the courts of this state. Relegating this matter to the courts of a foreign jurisdiction does injury to this state's ability to police violations of its own laws enacted for the public welfare (*e.g.*, *Red Bull Assocs. v Best Western Intl., Inc.*, 686 F Supp 447 [SD NY], *affd* 862 F2d 963 [2d Cir 1988]; *Matter of Betlem*, 300 AD2d 1026 [4th Dept 2002]).

The forum selection clause will not be enforced at this time, and, accordingly, the motion to dismiss for lack of subject matter jurisdiction is denied.

Inconvenient Forum:

"It is well established law that 'unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed'" (*Waterways Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327 [1st Dept 1991] [*quoting Gulf Oil Corp. v Gilbert*, 330 US 501, 508 [1947]]). The defendant bears the burden of demonstrating that the plaintiff's chosen forum should be changed (*Brodherson v V. Ponte & Sons*, 209 AD2d 276 [1st Dept 1994]).

Determination of a motion to dismiss for *forum non conveniens* is subject to the discretion of the court, and involves consideration of the following factors: potential hardship to the defendant in having to defend in this forum; the availability or adequacy of an alternative forum in which to litigate the dispute; the residency of the parties; and the jurisdiction in which the cause of action arose (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474 [1984], *cert denied* 469 US 1108 [1985]).

Plaintiff resides in New York, as well as defendant's CEO, Toshiyuki Sato (Yoshida Aff. Ex. B). Defendant is a New York corporation maintaining offices in New York (*id.*). Defendant asserts that witnesses are in Japan. One such purported witness is Sato's assistant, Sachiko Inoue, who submits an affidavit stating that she spends approximately half the year in Japan (¶ 3), without stating whether she is here during any other part of the year. In any event, Inoue acknowledges not having had direct contact with plaintiff (Inoue Aff. ¶¶ 4, 6); whereas Sato, a New York resident, specifically dealt with plaintiff in connection with the promotion of the New York PC Tech program, and signed the Consent Agreement on behalf of defendant (Sato Aff. ¶¶ 7-12; Yoshida Aff. Ex. F). Moreover, defendant does not refute that its director, Dhiren Trivedi, is present in New York (Yoshida Aff. ¶ 53 [note], Ex. E).

In addition, the parties are represented by New York counsel.

Sato further asserts that document translation costs will be too burdensome (Sato Aff. ¶ 19). Defendant does not explain the need for any substantial volume of documentary evidence. It is indisputable that defendant was not properly licensed at the time it entered into the agreement as evidenced by the Consent Agreement which provides that upon its execution, the Department "will issue a proprietary school license to PC Tech" (Yoshida Aff. Ex. F). The

discrete issue underlying this action is whether defendant misrepresented or concealed the status of its licensure, and if so, what damages plaintiff should recover. The Sato and Inoue affidavits make plain that defendant's primary method of promoting its New York program was through seminars (Sato Aff. ¶ 4; Inoue Aff. ¶ 4). Plaintiff attended Sato's October 2001 seminar. Defendant has not explained why Sato's testimony together with any written materials prepared for that seminar, would not constitute the bulk of its possible evidence in this action. The complaint alleges (¶ 20) that the misrepresentations were contained in "printed brochures that PC Tech distributed and in postings on PC Tech's website." Defendant has, similarly, not persuaded the court that translation of this category of material is so burdensome as to warrant dismissal of the action.

Defendant cannot credibly assert that the causes of action do not arise in New York. Defendant's program took place in New York and was the subject of New York administrative proceedings. Even though the contract was signed in Japan, it contemplated the delivery of services in New York. The entire gravamen of this action is that the school was unauthorized to operate *in New York*. Because of the strong nexus of this matter to New York, the causes of action must be deemed to arise here, the place of contractual performance (*Brodherson, supra*).

The possible need to apply Japanese law to this relatively straightforward action for reimbursement of tuition and housing costs, does not warrant dismissal on *forum non conveniens* grounds (*Yoshida Printing Co., Ltd. v Aiba*, 213 AD2d 275 [1st Dept 1995]).⁵

⁵Similar to the discussion concerning choice of forum, the choice of law clause would not be enforceable if New York's nexus to the case is substantial enough that application of the foreign law would "threaten" New York public policy (*Brink's Ltd. v South African Airways*, 93

Lastly, defendant does not refute plaintiff's counsel's advice that plaintiff would not be entitled to a jury trial in Japan (*Gyenes v Zionist Org. of America*, 169 AD2d 451 [1st Dept 1991]), while she might be entitled to one here.

The motion to dismiss on the ground of inconvenient forum is, therefore, denied.

Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is denied.

Dated: March 7, 2005

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J. S. C.

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F3d 1022, 1031 [2d Cir 1996], *cert denied* 519 US 1116 [1997]). This principle would apply if the choice of law provision of the Agreement would offend this state's statutory and regulatory control over entities operating within its borders without necessary licensure.