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

PRESENT: Cahn PART 49

Index Number : 100875/2006
NAQVI, LAEEQ
vs
COMPUTER ASSOCIATES
Sequence Number : 001
DISMISS ACTION

C

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

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

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

FILED
JAN 12 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/31/08

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

IN THIS CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

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LAEEQ NAQVI, :

Plaintiff, :

-against- : Index No. 100875/06

COMPUTERS ASSOCIATES INTERNATIONAL, INC. :

Defendant. :

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HERMAN CAHN, J:

Defendant Computer Associates International, Inc. ("CA-I") moves to dismiss the amended complaint, CPLR 3211(a) (1),(5), (7). Plaintiff, Laeeq Naqvi cross moves to amend the complaint to add a cause of action for commissions due and owing, CPLR 3025.

Background

Naqvi is a New York resident.

Defendant CA-I is incorporated in the state of Delaware and its headquarters are located in Islandia, New York. It is alleged to be a leading worldwide provider of solutions and services in information technology infrastructure, business information and application development, operating in more than 100 countries with approximately 16,000 employees. CA-I entered into a a joint venture with Computer Associates Saudi Arabia ("CA-SA"), to create Computer Associates Middle East ("CA-ME"). Plaintiff alleges that CA-I is the parent company of both CA-ME and CA-SA, and owned 99.5% of the share capital in CA-ME[1].

[1] The documentary evidence (Davi Aff, Ex. F) establishes that CA-I is a member of the joint venture that established CA-ME and the court's analysis of the issue of whether CA-I is a proper party to this law suit is based on CA-I's status as a joint venturer.

Naqvi began working for CA-I in 1997. In May, 2000, he was offered work in the Riyadh, Saudi Arabia field office of CA-ME. Plaintiff alleges that, pursuant to his employment contract with CA-I, he was to receive specified levels of salary, commissions and bonuses, as well as reimbursement for travel, housing, medical and relocation expenses. He accepted the offer in June, 2000. He relocated to Saudi Arabia for the work, with his wife and family remaining in the United States. He alleges that, as a condition of employment, he was required to surrender his visa and passport to CA-ME.

In August, 2004 CA-I decided to dissolve CA-ME and, accordingly, Plaintiff's employment was terminated effective September 30, 2004. Pursuant to the dissolution plan, commission-earning employees, including Naqvi, were to be paid income on certain net amounts generated by direct and indirect sales, service, training and maintenance through March 31, 2005.

According to Naqvi, CA-I improperly calculated the amount he was owed, proposing to pay him less than 25% of the monies he was owed under his contract. When he objected, CA-I allegedly threatened to sue him in the Saudi Arabian courts and, until resolution of the controversy, withhold his salary, commissions, passport and exit visa. He alleges that he contacted the US Embassy in Riyadh and the consular staff confirmed that his passport and exit visa could be retained pending the resolution of the dispute. He signed a release on October 17, 2004.

Plaintiff argues that he signed the release under duress. He brings claims for breach of contract and rescission of the release.[2]

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[2] In the Complaint, Plaintiff also seeks recovery under New York Labor Law and seeks punitive damage. In his proposed amended complaint, attached as Exhibit A to his cross motion, he has dropped New York Labor Law claim and his demand for punitive damages. In addition,

Defendant moves to dismiss the Complaint, arguing that CA-I is the wrong party. It contends that the claims must be brought, if at all, against CA-ME. In its reply brief, CA-I also advances an additional argument, claiming that Saudi Arabian law applies to this dispute and that under its law, Naqvi's claims for unpaid wages and commissions are time barred.

Discussion

On a motion to dismiss, the Court must accept every factual allegation as true, and liberally construe the allegations in a light most favorable to the non-moving party. *Guggenheimer v Ginzburg,* 43 NY2d 268 (1977). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez,* 84 NY2d 83, 87-88 (1994). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" *511 West 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 151-52 (2002) (internal citations omitted). The Court is not, however, required to accept factual allegations plainly contradicted by the documentary evidence. *Bishop v Maurer,* 33 AD3d 497 (1st Dep't. 2006).

The Proper Party:

CA-I argues that Naqvi sued the wrong party. This argument is without merit.

Members of joint ventures may be held liable, in their individual capacity, for obligations incurred by another member. Similar to partnerships, the individual members of a joint venture are responsible for the conduct of the joint venture and other joint venturers. *Najar Industries, Inc. v City of New York*, 87 AD2d 329, 333 (1st Dep't 1982), *aff'd,* 68 NY2d 943 (1982).

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plaintiff does not proffer any arguments in opposition to that branch of defendants motion seeking to dismiss the Labor Law and punitive damages claims.

In the instant action, the CA-ME joint venture agreement clearly states that CA-I is a member of the joint venture. Davi Aff, Exh F. Thus, even if, as CA-I contends, Naqvi was employed by CA-ME, CA-I may be held liable in its individual capacity for the obligations of the CA-ME. Accordingly, CA-I is a proper defendant in this action.

Statute of Limitations:

CA-I argues that the employment contract at issue is governed by the laws of Saudi Arabia, and its statute of limitations period precludes this action.

This argument was improperly raised for the first time in its reply brief. *Markowitz v Markowitz*, 29 AD3d 460, 461 (1st Dep't 2006). As such, dismissal on this basis is denied.

However, the Court notes that this argument is misplaced in any event. The New York courts have long used a "center of gravity" or "grouping of contacts" approach, which gives controlling effect to the law of the state that has "the most significant relationship to the transaction and the parties." *Auten v Auten,* 308 NY155, 160-61 (1954). In making that determination, courts consider, *inter alia*, the place the contract was negotiated and signed, the residence of the parties and the place of performance of the contract. *Zurich Ins. Co. v Shearson Lehman Hutton, Inc.*, 84 NY2d 309 (1994).

In this case, Plaintiff is a resident of New York and Defendant has its headquarters in New York. Additionally, Plaintiff alleges that the employment agreement at issue was signed in New York. Further, the joint venture agreement that established CA-ME is governed by New York law. Davi Aff, Exh F, ¶ 6.12. Accordingly, although performance under the contract was in Saudi Arabia and that is the situs of the alleged breach, under an application of the "center of

gravity" analysis, New York has the most significant relationship to the transaction and the parties and that New York law controls this action.

Release of Claims:

Defendant argues that Plaintiff's claims are barred because he has already released CA-ME from any and all claims. This is, again, without merit.

Certainly, a release "is a jural act of high significance without which the settlement of disputes would be rendered all but impossible" and releases should not be permitted "except under circumstances and under rules which would render any other result a grave injustice." *Mangini v McClurg*, 24 NY2d 556, 563 (1969); *see also Gibli v Kadosh,* 279 AD2d 35 (1st Dep't 2000). However, duress is one of "the traditional bases for setting aside written agreements." *Mangini*, 24 NY2d at 563.

To state a claim for duress, plaintiff must allege that "he was compelled to agree to the release by means of a wrongful threat that precluded the exercise of his free will." *Fruchthandler v Green*, 233 AD2d 214, 214 (1st Dep't 1996); *see also Restatement Second of Contracts*, § 175 (under general principles of contract law, duress exists where one party involuntarily accepts the terms of another, and his assent was induced by an improper threat by defendant that left him no reasonable alternative). In determining the gravity of the threat, and whether it is sufficient to constitute duress, the standard is whether the threat left the particular victim "no reasonable alternative." *Restatement Second of Contracts*, § 175[1]. Moreover, what constitutes a reasonable alternative is a question of fact, depending on the circumstances of each case. *Id.* at Comment.

Here, Plaintiff alleges that he was threatened with the withholding of his passport, exit visa, working papers and any money due him until the controversy regarding his compensation was resolved. Most importantly, as a consequence, this would have prevented him from leaving Saudi Arabia. In looking at these allegations in the light most favorable to the non-moving party, as one must on a motion to dismiss, this is more than sufficient to state a claim for duress.

Defendant also argues that the duress is inapplicable, asserting that Plaintiff ratified the release by accepting and retaining the benefit he received for having executed it. This, too, is without merit. Indeed, the law is clear:

> A party who has received benefits by reason of a transaction that is void or voidable because of . . . duress . . . and who, in an action . . . seeks recission . . . or other relief, whether formerly denominated legal or equitable, dependent upon a determination that such transaction was void or voidable shall not be denied relief because of a failure to tender before judgment restoration of such benefits.

CPLR § 3004. In addition, Defendant's claim that Naqvi ratified the release because he failed to repudiate it within a reasonable period of time presents a question of fact. Whether the time between his signing the release and serving his complaint was reasonable under the circumstances is fact specific and will not be determined on a motion to dismiss.

Amending the Complaint:

Plaintiff cross moves to amend the complaint. He seeks to assert a claim for commissions owed on revenue collected between October 1, 2004 and March 31, 2005.

In the absence of prejudice or unfair surprise, leave to amend is freely granted. *NM IQ, LLC v OmniSky Corp.*, 31 AD3d 315 (1st Dep't 2006). The burden to show prejudice is upon the party opposing a motion to amend the pleading. *Leslie v Hymes*, 60 AD2d 564 (1st Dep't 1977).

Defendant has failed to demonstrate that it would be prejudiced or surprised by the amendment.

Additionally, although in no way dispositive, actual notice could inferred against Defendant as the release specifically stated that he did not have any other claims, "except [for] sales commission due on the new collections made on my deals from October 1, 2004 until March 31, 2005." Diamond Aff, Exh H.

Accordingly, it is

ORDERED that Defendants's motion to dismiss the complaint is denied in its entirety; and it is further

ORDERED that Plaintiff's cross motion to amend the complaint is granted; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

Dated: December 31, 2008

ENTER:

J.S.C.