SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

SENTOSA CARE, LLC, AVALON GARDENS REHABILITATION AND HEALTH CARE CENTER, LLC, BROOKHAVEN REHABILITATION AND HEALTH CARE CENTER, LLC, BAYVIEW MANOR, LLC, SPLIT ROCK REHABILITATION AND HEALTH CARE CENTER, LLC, NEW FRANKLIN REHABILITATION AND HEALTH CARE CENTER, LLC, GARDEN CARE CENTER, INC., GOLDEN GATE REHABILITATION AND HEALTH CARE CENTER, LLC, NEW SURFSIDE NURSING HOME, LLC, TOWNHOUSE OPERATING CO., LLC, WOODMERE REHABILITATION AND HEALTH CARE CENTER, INC., PINEGROVE MANOR II, LLC and PROMPT NURSING EMPLOYMENT AGENCY, LLC,

Plaintiffs,

-against-

JULIET ANILAO, HARRIETT AVILA, MARK DELA CRUZ, CLAUDINE GAMAIO, ELMER JACINTO, JENNIFER LAMPA, RIZZA MAULION, JAMES MILENA, THERESA RAMOS, RAINER SICHON, ARLYN TORRENA, DON DON PARUNGAO, DULCE BAYOT, ARCHIEL BUAGAS, ANNABELLE CAPULONG, MARICELLE DEALO, CARLO CONRAD GARCIA, EDUARDO ILAGAN, RHEAN MONTECILLO, MITZI ONG, LOUELLA

INDEX NO. 006079/06

MOTION DATE: April 7, 2010
Motion Sequence # 022, 023, 024, 025

SENTOSA CARE, LLC, et al v ANILAO, et al **Index no. 006079/06**

PAGLLINAWAN, RITCHEL SALVE, EILEEN MAGNAYE, NORALYN ORTEGA, MARITONI DELA ROSA, CECILLE JAYO, ALIPIO ESGUERRA, JR., DINAH CALUYA, ERLINDA CASTRO, MARITES CHAN, FE CINCO, MARIA GONZALES, ROSINA MEDEL, RHODALYN SAN JOSE, RACHELLE MANUGAS, ANNE ALMENDRALA, ROWENA LOZADA, CRISELDA C. IGNACIO and FELIX Q. VINLUAN,

Defendants.

CRISELDA C. IGNACIO,

Plaintiff in Counterclaim,

-against-

PROMPT NURSING EMPLOYMENT AGENCY, LLC, BERISH RUBENSTEIN, FRANCRIS LUYUN, SENTOSA RECRUITMENT AGENCY and BENT PHILIPSON,

Additional Defendants in Counterclaim.

The following papers read on this motion:

Notice of Motion..... XX
Cross-Motion..... XX
Affirmation in Opposition..... X
Reply Affidavit/Affirmation..... XXX
Memorandum of Law..... XXXX
Reply Memorandum of Law..... XXXX

Motion by plaintiffs pursuant to CPLR 3212 for summary judgment against all defendants, other than defendant Felix Vinluan, (thirty-five nurses and one physical therapist, collectively the Nurses), is **denied**.

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Motion by defendant Felix Q. Vinluan pursuant to CPLR 3212 dismissing the complaint as to said defendant is **granted** and the complaint is **dismissed** as to Felix Q. Vinluan.

Companion cross motions (sequence numbers 24 and 25)by two different groups of defendant Nurses pursuant to CPLR 3212 to dismiss the action as to said defendants are **denied**.

This is an action for breach of certain employment contracts. Plaintiffs are nursing facilities, which operate as limited liability companies and have members in common. Defendants are nurses who entered into employment agreements with plaintiffs and resigned from their positions before the expiration of the three-year term provided in their individual contracts. In addition to the three-year commitment, each of the employment contracts provides for liquidated damages in the amount of $25,000 as follows:

> Both the employer and Employee agree that the Employer has or will incur substantial expenses and has or will expend enormous resources and time in recruiting the Employee for employment as contemplated herein, sponsoring the Employee for an Immigrant Visa, training the Employee in practice and procedures, orienting the Employee to living in the New York area, and if necessary, recruiting a new nurse as contemplated herein to replace the employee should this contract be breached. Accordingly, the Employee agrees that if he or she willfully and voluntarily resigns, abandons, or terminates employment with Employer before the completion of at least a three (3) year term, other than for extraordinary circumstances, which would include but not be limited to incapacitation, terminal illness, or other similarly extraordinary circumstances, Employee's act shall result in an obligation by the Employee to pay the Employer Twenty Five Thousand Dollars ($25,000.00 as actual damages. Employee understand and agrees that the amount of $25,000 represents Employer's actual damages in the loss of the value of the recruitment fee Employer paid that would result from a breach of this contract. Employee therefore agrees that if he/she were to terminate this agreement before three (3) years

> of full time employment is completed as discussed in this Paragraph and Paragraph 18, then Employee shall pay, to Employer, Employer's actual damages in the agreed amount of Twenty Five Thousand Dollars ($25,000). This amount shall become due and owing to Employer immediately upon such resignation, abandonment, or termination of employment, unless Employer and Employee agree upon an installment payment plan on mutually acceptable terms in writing.

Plaintiff Sentosa Care, LLC provided administrative services for the other plaintiffs. Plaintiffs allege that the defendant nurses coordinated their resignations upon insufficient notice to Sentosa and the facilities at which they were employed. Plaintiffs claim that defendants' resignations constitute professional misconduct, violation of plaintiffs' employment policies, and breach of defendants' respective contracts with the various facilities.

Plaintiffs move for summary judgment against each of the defendant nurses in the amount of $25,000, the amount of liquidated damages in the employment contracts. Defendant nurses cross move for summary judgment dismissing the amended complaint, contending that the liquidated damages clause is an unenforceable penalty. Defendants further argue that they were discharged from performance based on plaintiffs' multiple breaches of the contract. The alleged violations are, *inter alia*:

> failure to pay proper night shift differentials;
> failure to pay for all hours worked;
> failure to provide promised dental insurance;
> failure to provide promised malpractice insurance;
> failure to provide sick days, vacation days, personal days;
> failure to provide adequate training;
> reduction in hours of work depriving nurses of benefits of higher hourly wage.

In order to obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court's directing judgment in movant's favor as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. ***Zuckerman v City of New York***, 49 NY2d 557, 562 [1980]. Failure to make such a *prima facie* showing requires denial of the motion regardless of the sufficiency of the opposing papers. ***Winegrad v New York University Medical Center***, 64 NY2d 851, 853 [1985]. Where the proponent makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324 [1986]. The parties' competing contentions must be viewed in the light most favorable to the party opposing the motion. ***People ex***

rel. Spitzer v Grasso, 50 AD3d 535, 544 [1st Dept. 2008].

Viewed in light of these principles, neither the employers, nor the nurses, have met their respective burdens. In this action, which may be characterized as a "battle of the breaches," the parties have submitted conflicting affidavits and arguments to cast their adversary in the role of the primary contract offender. A substantial question of fact is presented, regarding the nature and extent of the breaches alleged, which cannot be determined in advance of trial and precludes an award of summary judgment in favor of either side. The present record, laden with contradiction and hotly contested allegations of fact, does not lend itself to summary disposition.

The elements of a cause of action for breach of contract are: (1) the existence of a contract between plaintiff and defendant; (2) performance by one party; (3) the other party's failure to perform; and (4) damages resulting from such failure to perform. ***JP Morgan Chase v J.H. Elec. of New York, Inc.***, 69 AD3d 802, 803 [2nd Dept. 2010]. When a party breaches a contract, that breach may excuse the non-breaching party from further performance if the breach is so substantial that it defeats the parties' objective in making the contract. ***Robert Cohn Associates, Inc. v Kosich***, 63 AD3d 1388, 1389 [3rd Dept. 2009]. In such a case, the non-breaching party is discharged from performing any further obligations under the contract and may elect to terminate the contract and sue for damages. ***Casita, LP v Maplewood Equity Partners (Offshore) Ltd.***, 17 Misc 3d 1137(A), [N.Y. Sup. 2007].

On the issue of plaintiffs' claim for liquidated damages, the court notes the well settled principle that parties to a contract may validly agree in advance that should either party breach the contract between them, a sum of money representing the anticipatory damages is to be paid to the non-breaching party. A liquidated damages provision is an estimate made by the parties at the time of contract regarding the extent of damages that would be sustained in the event the contract is breached. ***Crown It Services, Inc. v Koval-Olsen***, 11 AD3d 263, 265 [1st Dept. 2004]. Such agreements regarding liquidated damages are generally valid, unless the anticipated damages are plainly or grossly disproportionate to the probable loss resulting from the breach. ***Central Irr. Supply v Putnam Country Club Associates, LLC***, 57 AD3d 934, 935 [2nd Dept. 2008]. Under such circumstances, the liquidated damages clause is deemed to be a penalty designed to secure performance by compulsion and is, therefore, unenforceable. ***Benjamin Partners, LLC v 583-587 Broadway Condominium***, 34 AD3d 311 [1st Dept. 2006].

A party requesting that a liquidated damages provision be stricken as an unenforceable penalty must demonstrate that the damages are not a reasonable measure of the actual loss resulting from the breach, and the actual loss was readily ascertainable at the time the parties entered the agreement or that the liquidated damages are conspicuously disproportionate to these foreseeable losses. ***Jackson Heights Care***

Center, LLC v Bloch, 39 AD3d 477, 479 [2nd Dept. 2007]. Where a liquidated damages provision is deemed enforceable, the measure of damages for a breach will be the sum stated in the clause, no more, no less. If the clause is rejected as being a penalty, the recovery is limited to the actual damages proven. ***Zeer v Azulay***, 50 AD3d 781, 786 [2nd Dept. 2008].

It is well established that whether a clause represents an enforceable liquidation of damages, or an unenforceable penalty, is a question of law, giving due consideration to the nature of the contract and the circumstances. ***Jackson Heights Care Center, LLC v Bloch, supra*** at p. 479). In making its determination, the court will examine the contract prospectively from the parties' point of view at the time the contract was performed, not retrospectively from the time the contract was breached. ***X.L.O. Concrete Corp. v John T. Brady and Co.***, 104 AD2d 181, 183-184 [1st Dept. 1984] affirmed 66 NY2d 970 [1985]. In this case, the liquidated damages provision at issue is unenforceable as plaintiffs' damages flowing from any proven breach by defendant Nurses will be easily ascertained at trial. Moreover, the employment agreements between plaintiffs and defendant nurses, parties of unequal bargaining power, were not achieved through arms length negotiation. Rather, the standard contracts were offered on a take it or leave it basis.

Accordingly, the motion by plaintiffs for summary judgment against defendant Nurses pursuant to CPLR 3212 is **denied**. Companion cross motions (sequence numbers 24 and 25) by two different groups of defendant Nurses pursuant to CPLR 3212 to dismiss the amended complaint as to said defendant Nurse are also **denied**.

The decision of the administrative law judge in a proceeding brought before the Department of Justice, Office of the Chief Administrative Hearing Officer [OCAHO], by sixteen Nurses pursuant to 8 U.S.C. § 1324(b) [case no. 07B00024] dismissing their complaints does not compel a different result (Plaintiffs' ex. 7). The issue in that proceeding was whether Ben (or Bent) Philipson and Francis Lujun (or Luyun), doing business as a number of affiliated skilled nursing facilities (plaintiffs herein) discriminated against them by failing to hire them on the basis of citizenship status and retaliated against them because they filed charges with the Office of Special Counsel for Immigration-Related Unfair Employment. While the administrative law judge held that the Nurses failed to show they were rejected for employment, or discriminated against in hiring because of their citizenship, and failed to establish a case of retaliation, she specifically stated that whether the Nurses' employment was "at will", an issue in the instant breach of contract action, had no bearing on the case before her and complaints *vis a vis* the terms and conditions of the Nurses' employment were beyond the reach of the OCAHO forum.

The court turns next to the motion by defendant Vinluan for summary judgment

dismissing the tortious interference with contract claim asserted against him. Vinluan is an attorney who represented ten of the nurses. It bears noting that such a cause of action requires that plaintiff establish the existence of a valid contract between plaintiffs and a third party (or parties), the defendant's intentional and unjustified procurement of the third party's breach, the actual breach and resulting damages. ***Anesthesia Associates of Mount Kisco, LLP v Northern Westchester Hosp. Center***, 59 AD3d 473, 475-476 [2nd Dept. 2009]. The element lacking from this case is defendant Vinluan's intentional and unjustified procurement of defendant Nurses' breach of their respective employment contracts with plaintiffs. Under the facts at bar, summary judgment dismissing the claim asserted against defendant Vinluan is warranted. Plaintiffs have failed to raise any legitimate questions of fact in opposition to defendant Vinluan's motion for summary judgment.

Defendant Vinluan is immunized from liability under the shield afforded attorneys in advising their clients, even when such advice is erroneous, in the absence of fraud, collusion, malice or bad faith. Despite plaintiffs' assertions to the contrary, there is no support in the record for the proposition that defendant Vinluan acted in bad faith, with the requisite degree of malice, fraud, collusion, to sustain a viable claim against him for tortious interference with defendant Nurses' contracts with plaintiffs. ***Art Capital Group, LLC v Neuhaus***, 70 AD3d 605, 606 [1st Dept .2010]; ***Purvi Enterprises, LLC. v City of New York***, 62 AD3d 508, 509-510 [1st Dept. 2009]; ***Beatie v De Long***, 164 AD2d 104, 109 [1st Dept. 1990].

Felix Vinluan and a group of ten nurses were prosecuted in criminal court based upon the attorney's advice to the nurses and their simultaneous resignations from the nursing home where they were employed. Vinluan and the nurses brought an Article 78 proceeding, and the petition was granted prohibiting the prosecution (***Vinluan v Doyle***, 60 AD3d 237, 251 [2nd Dept. 2009]). The court noted the attorney's constitutional right to provide legal advice to his clients within the bounds of the law and further states that:

> "regardless of whether Vinluan's legal assessment was accurate, it is objectively reasonable. We cannot conclude that an attorney who advises a client to take an action that he or she, in good faith, believes to be legal loses the protection of the First Amendment if his or her advice is later determined to be incorrect."

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Accordingly, the motion by defendant Felix Q. Vinluan pursuant to CPLR 3212 to dismiss the amended complaint as to said defendant is **granted**.

The request by defendant Nurses in motion sequence number 25 for leave to file an amended counterclaim is **denied** without prejudice as movants have failed to provide a copy of the proposed amended pleading.

Dated MAY 20 2010

J.S.C.

ENTERED
MAY 24 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE