

Kim v When I Walk, Inc.
2010 NY Slip Op 33823(U)
September 3, 2010
Supreme Court, New York County
Docket Number: 107460/10
Judge: Melvin L. Schweitzer
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: Schweitzer
Justice

PART 45m

Susan Kim

INDEX NO. 107460/10

MOTION DATE _____

MOTION SEQ. NO. 0021

MOTION CAL. NO. _____

- v -

when I walk, Inc., et al

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 _____	_____
Repeating Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion ^① to dismiss copyright claims (cont'd fees and dues) is GRANTED;

All per the attached Decision and Order

② Motion to compel arbitration is granted

③ Motion to stay litigation pending resolution of arbitration is GRANTED

④ Motion to stay claims against individuals Jan and Leigh DeSilva is GRANTED

Dated: September 3, 2010

Walter R. Albert
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

which she has not been given, and she was not afforded reasonable living accommodations. Complaint, ¶¶ 6-7. Plaintiff also alleges that defendant Jason DaSilva (Mr. J. DaSilva) made sexual advances towards her and she was forced into a relationship with him even though she informed Mr. J. DaSilva that she was not interested. *Id.*, ¶ 8. Ms. Kim also alleges Mr. J. DaSilva requested that she perform a number of work requests which she did and for which she has not been compensated. *Id.*, ¶ 10. Ms. Kim also alleges defendants pressured her to change the terms of the Deal Agreement, that defendants withheld her paycheck when she refused to do so, and on June 15, 2009 she stopped working on the film. Ms. Kim alleges she was not given credit as production manager for the American PBS version or the Canadian version of the film. The complaint alleges nine causes of action: two counts of breach of contract against When I Walk, *quantum meruit* against When I Walk, two counts of copyright infringement against When I Walk, negligence against When I Walk, intentional infliction of emotional distress against Mr. J. DaSilva, sexual harassment against Mr. J. DaSilva and negligence against Mr. Leigh DaSilva.

Paragraph 16 of the Deal Contract contains the following:

Any action arising out of or relating to this agreement, its performance, enforcement or breach thereof shall be settled by arbitration in accordance with the rules of the American Arbitration Association: and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

Ex. B to DaSilva Affidavit, ¶ 16.

Invoking this paragraph, defendant When I Walk moves to stay the claims against it and compel arbitration with When I Walk. The court grants defendant's motion. Upon a motion to compel arbitration and stay litigation, the role of the court is to determine:

(1) whether the parties agreed to arbitrate; (2) whether the disputes fall within the scope of the arbitration clause; and (3) in the absence of any transcendent federal statutory claims, if some, but not all of the claims are arbitrable, whether to stay the balance of the proceedings pending arbitration.

See Conwill v Arthur Andersen LLP, 12 Misc 3d 1171 (A), 2006 WL 1703621, at *7 (Sup Ct NY County 2006).

All five claims Ms. Kim asserts against When I Walk arise from her employment: breach of her employment contract (first cause of action); breach of an oral contract with her employer (second cause of action); breach of an implied contract with her employer (third cause of action); copyright infringement of videos allegedly authored by plaintiff during her employment about the film production she was hired to work on (fourth cause of action); and breach of an unspecified duty of care owed by her employer (fifth cause of action).

Ms. Kim concedes that she agreed to binding arbitration in the Deal Contract but argues that the “totality of the present action is outside the scope of the arbitration cause.” (Pl. Br. 1). The court disagrees. The arbitration clause is very broad, requiring that any action “arising out of or relating to this agreement, its performance, enforcement or breach thereof shall be settled by arbitration.” (DaSilva Moving Affidavit Ex. B, ¶ 16). Because plaintiff’s claims are clearly within the arbitration clauses’s purview, the court need not proceed further:

Once the courts have determined that there is a reasonable relationship between the arbitration contract/clause and the subject matter of the dispute (as properly found here), the court’s inquiry ends. Arbitration should be directed, and the question of whether it covers the subject dispute, as well as the merits of the dispute, are questions for the arbitrators to decide.

Brown v V&R Advertising, Inc., 112 AD2d 856, 861 (1st Dept 1985), *affd*, 67 NY2d 772 (1986); *see also Olympia & York OLP Co. v Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 214 AD2d

509, 511-12 (1st Dept 1995) (“A party to a dispute governed by an arbitration agreement may not unilaterally evade the stipulated forum and litigate the controversy.”) Therefore, since all of the claims asserted against defendant are arbitrable, the court concludes arbitration is mandated, and it is appropriate to stay the action against When I Walk pending resolution of the arbitration proceeding.

Defendant also moves to stay the action against the DaSilvas pending resolution of the dispute between Ms. Kim and When I Walk. A stay is appropriate. The complaint alleges that the individual defendants are the owners of the corporate defendant and that defendant Jason DaSilva was plaintiff’s employer “for all intents and purposes.” (Complaint, ¶¶ 1, 9). Defendant cites *Gateson v Aslk-Bank, N.V.*, 1995 WL 387720 (SDNY June 29, 1995), where an employee sued her employer and her co-employees for discrimination. Plaintiff’s employment agreement contained an arbitration clause very similar to the one at issue here, requiring that “[a]ny controversy arising out of or relating to the Agreement or the breach thereof shall be settled by arbitration. . . .” *Id.*, at *2. The court held that this arbitration clause compelled arbitration of the discrimination claims not only against the employer, but also against the individual defendants:

Acts by employees of one of the parties to an agreement are equally arbitrable as acts of the principals as long as the challenged acts fall within the scope of the agreement.

Id. at *5.

The court finds Ms. Kim’s separate claims against the DaSilvas individually (DaSilva Affidavit, Ex. B, ¶¶ 59-81), like the plaintiff’s discrimination claim in *Gateson*, arose out of their actions as employees of When I Walk. The court, however, will not direct that Ms. Kim arbitrate her claims against the DaSilvas individually just because they are related to her dispute with

When I Walk. *See TNW Holdings v MKI Sec. Corp.*, 92 NY2d 335, 340 (1998). The court stays the action with respect Ms. Kim's claims against When I Walk pending resolution of her dispute in arbitration with When I Walk, and with respect to her claims against the DaSilvas pending resolution of the arbitration between plaintiff and defendant When I Walk or until February 15, 2011, whichever occurs first.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the copyright claims (counts four and seven) is granted; and it is further

ORDERED that defendant's motion to compel arbitration of all claims alleged by plaintiff against defendant When I Walk is granted; and it is further

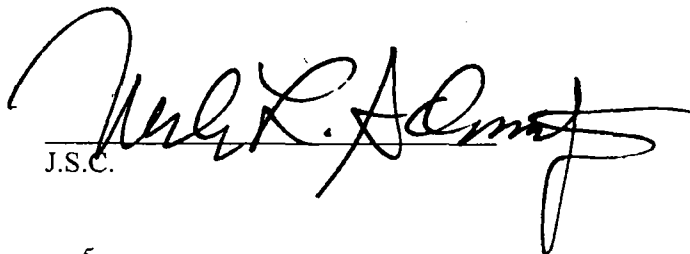
ORDERED that defendant's motion to stay the litigation as against defendant When I Walk pending resolution of the arbitration between plaintiff and defendant When I Walk is granted.; and is further

ORDERED that the action against defendants Jason DaSilva and Leigh DaSilva is stayed pending resolution of the arbitration between plaintiff and defendant When I Walk or until February 15, 2011, whichever occurs first; and it is further

ORDERED that the plaintiff and the DaSilva defendants shall appear for a preliminary conference on February 15, 2011 at 10:30 AM at 26 Broadway, 10th Floor.

Dated: September 3, 2010

ENTER:


J.S.C.