

Porzio v Active Health Mgt., Inc.
2016 NY Slip Op 30785(U)
April 26, 2016
Supreme Court, New York County
Docket Number: 651838/2015
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
JOHN PORZIO and RPFL CONSULTING, L.L.C.,

Index No.: 651838/2015

Plaintiffs,

DECISION & ORDER

-against-

ACTIVE HEALTH MANAGEMENT, INC., AETNA
LIFE INSURANCE COMPANY, and RANDSTAD
TECHNOLOGIES, L.P. f/k/a SAPPHIRE
TECHNOLOGIES, L.P.,

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 001 and 003 are consolidated for disposition.

Defendants Randstad Technologies, L.P. (Randstad)¹ and Aetna Life Insurance Company (Aetna) separately move, pursuant to CPLR 3211, to dismiss the complaint. Plaintiffs John Porzio and RPFL Consulting, L.L.C. (RPFL) oppose the motions. The motions are granted for the reasons that follow.

I. Factual Background & Procedural History

As this is a motion to dismiss, the facts recited are taken from the complaint and the documentary evidence submitted by the parties.

Randstad is a staffing organization that provides placement services for companies in various industries. Randstad and Aetna are parties to a Master Professional Service Agreement dated November 13, 2000 (the Master Agreement). *See* Dkt. 10.² Section 1(A) of the Master

¹ Until October 1, 2011, Randstad was known as Sapphire Technologies, L.P. and is referred to as such in many of the subject contracts.

² References to “Dkt.” followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

Agreement sets forth the scope of services Randstad (referred to as “Supplier”) provides to

Aetna:

Subject to the terms and provisions of this Agreement, Supplier agrees to perform for Aetna and/or its affiliates or subsidiaries, and Aetna agrees to purchase from Supplier, services consisting of information resource management, applications development, desktop operations, information technology (“I/T”) customer service, networking, system engineering and/or other associated services (the “Services”). On each occasion when Aetna desires to obtain Services from Supplier, Aetna will prepare a letter (“Letter”), substantially similar to that attached hereto as Exhibit A, which shall include a detailed description of the Services, the name of the individuals and/or consultants retained or employed by Supplier to provide the Services (“Supplier Employee(s)”), the dates and sites for performance of the Services, the name of the Aetna Coordinator and a signature block for Supplier. Once signed by Supplier, each Letter shall be incorporated into this Agreement and shall be subject to the terms of this Agreement.

See Dkt. 10 at 2.

When servicing Aetna, Randstad would invoice Aetna; Aetna would pay Randstad; and Randstad would pay the Supplier Employee, withholding the amounts the Supplier Employee owed Randstad under a separate agreement between Randstad and the Supplier Employee. *See id.* at 3. Aetna has the right to terminate the Master Agreement with or without cause. *See id.* The Master Agreement is governed by Connecticut law. *See id.* at 10. Importantly, the Master Agreement expressly disclaims the existence of any third-party beneficiaries. *See id.* at 18-19 (section 8(e) of 12/1/02 Amendment to the Master Agreement) (“Nothing express or implied in this Amendment or in the [Master] Agreement is intended to confer, nor shall anything herein confer, upon any person other than the parties [i.e., Randstad and Aetna] ... any rights remedies, obligations, or liabilities whatsoever.”).³

³ The most recent amendment to the Master Agreement submitted to the court purports to be effective as of January 1, 2014, but was executed on June 4, 2014. *See* Dkt. 42 at 2, 4. It states that it is governed by the Master Agreement. *See id.* at 2. The terms of this amendment do not appear to be relevant to plaintiffs’ claims.

In 2011, Porzio and his company, RPFL, became Supplier Employees of Randstad. Porzio, RPFL, and Randstad executed an Independent Contractor Agreement dated September 9, 2011 (the Contractor Agreement). *See* Dkt. 9. The Contractor Agreement governs the work plaintiffs would perform for defendant Active Health Management, Inc. (AHM), an affiliate of Aetna. *See id.* at 9. Plaintiffs were to commence their work on September 14, 2011, and it was anticipated that the work would be completed by December 31, 2012. *See id.* If the work continued past December 31, 2012, the termination date would be the last date that services were provided by plaintiffs. *See id.* However, section 17.2 of the Contractor Agreement provides that the Contractor Agreement terminates if AHM requests termination of plaintiffs “for any reason”. *See id.* at 6. Section 14 prohibits plaintiffs from entering into any contractual or consulting agreement directly with AHM while the Contractor Agreement is in effect and for six months after termination. *See id.* at 5. If plaintiffs breach this restrictive covenant, section 14 entitles Randstad to “the payment of a finders’ fee equal to [20%] of all fees or other compensation paid or to be paid to [plaintiffs] during the (6) month period following the date [plaintiffs are] hired by or contracted with the Customer. *See id.* Section 22 provides that the Contractor Agreement is governed by the law of the state where plaintiffs’ work is performed. *See id.* at 7. Section 23 contains a merger and integration clause and prohibits oral modifications. *See id.*

In August 2014, plaintiffs were still performing work for AHM under the Contractor Agreement. That work occurred in New York. However, AHM requested that Porzio relocate to Arizona, where the individuals Porzio was working with were located. Porzio and his wife had always lived in New York and owned a home in Dix Hills; his wife owned her own business on Long Island. Porzio had reservations about relocating to Arizona, and discussed the terms necessary to induce him to move. Porzio claims that Aetna “was aware and/or participated in

these negotiations.” Porzio discussed his concerns about moving across the country, selling his home, and having his wife give up her business. Porzio claims AHM agreed to pay for his moving expenses. Additionally, Porzio and AHM executed a letter agreement dated August 9, 2014 (the Letter Agreement), which provides:

As per our discussion and in the business interest of AHM and I [sic], we have a mutual agreement to retain my services currently through Randstad Technologies until the end of 2015 at the current rate of \$123 per hour.

The hours required for completion of the project will be two thousand six hundred hours, **and a one year of guaranteed employment as a consultant**. If the contract is terminated prior to 8/9/2015 the consultant will be paid out until the end of the current contract term based on the number of contracted hours **and also receive an additional full year based on two thousand six hundred hours and the current hourly rate in this agreement**. Due to the high business risk to AHM book of business for the projects John will be engaged in, AHM needs to retain his services at a [sic] until December 2015. Active Health, an Aetna affiliate has the right to convert John to an FTE [presumably, full time employee] starting August 1st 2015 without incurring any conversion fees.

See Dkt. 27 at 2 (emphasis added). Porzio moved to Arizona and was paid for his work through Randstad, just as he was while working in New York. On November 25, 2014, mere months after relocating to Arizona, AHM terminated him and his company.

On May 27, 2015, plaintiffs commenced this action by filing a complaint with two causes of action: (1) breach of the Letter Agreement, asserted against AHM; and (2) breach of a Statement of Work dated August 9, 2014 (the SOW) (*see* Dkt. 26), asserted against Randstad and Aetna. The SOW is a “Letter” invoice required by section 1(A) of the Master Agreement and purports to be governed by the Master Agreement. While the SOW indicates that the work was to be performed in New York (*see* Dkt. 26 at 3), that appears to be a scrivener’s error. The rate of \$123 aligns with the Letter Agreement, and the listed starting date (August 9, 2014) and ending date (December 31, 2015) correspond to the anticipated term of the Letter Agreement,

which governs the work plaintiffs were to perform in Arizona. *See* Dkt. 26 at 3. Both the Letter Agreement and the SOW are dated August 9, 2014.

AHM filed an answer to the complaint. *See* Dkt. 19. Randstad and Aetna moved to dismiss. The court reserved on the motions after oral argument [*see* Dkt. 54 (1/12/16 Tr.)], pending submission of supplemental briefing. *See* Dkt. 45, 46, 48.

II. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames, id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. “However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.” *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

III. Discussion⁴

The moving defendants – Randstad and Aetna – seek dismissal of the only claim asserted against them, the second cause of action. AHM did not move to dismiss the first cause of action, and it answered the complaint. Hence, regardless of the disposition of the instant motions, plaintiffs will proceed on their claim that AHM breached the Letter Agreement by terminating plaintiffs on November 25, 2014 and failing to pay them their guaranteed compensation.

Randstad and Aetna argue that they have no further monetary liability to plaintiffs. They are correct. Plaintiffs, admittedly, did not plead a breach of any contract to which Randstad and Aetna are in privity with plaintiffs. Ordinarily, this would be fatal to a breach of contract claim. *See Leonard v Gateway II, LLC*, 68 AD3d 408 (1st Dept 2009) (“The court properly dismissed the breach of contract claims against all defendants except Gateway II, since plaintiff was not in privity with any of the other defendants”). Indeed, Aetna was never in privity with plaintiffs. Plaintiffs, however, were in privity with Randstad on the Contractor Agreement, but plaintiffs do not allege a breach of that agreement. In fact, the Contractor Agreement permitted Randstad to terminate if, as occurred here, AHM terminated plaintiffs.

Nonetheless, plaintiffs claim to have third-party beneficiary rights under the SOW, and seek to enforce the SOW against Randstad and Aetna. Plaintiffs contend they have the right to compel Randstad to seek collection from Aetna under the SOW for the amounts promised by AHM in the Letter Agreement. Plaintiffs are wrong. The SOW is the Letter that Randstad and

⁴ While the Master Agreement is governed by Connecticut law and the Contractor Agreement is governed by the law of the states in which plaintiffs performed work (New York and Arizona), the parties’ supplemental briefs take the position that there are no dispositive differences in the applicable contract law in these jurisdictions – Connecticut, Arizona, and New York. The court, therefore, applies New York law. *See TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 (1st Dept 2014). The court will not opine on any possible differences between New York and Arizona law on issues not raised by plaintiffs, such as estoppel.

Aetna were required to execute under section 1(A) of the Master Agreement. The SOW was signed by Randstad (*see* Dkt. 26 at 4), and, thus, under section 1(A) of the Master Agreement, it was “incorporated into [the Master] Agreement and [is] subject to the terms of [the Master] Agreement.” *See* Dkt. 10 at 2. The Master Agreement expressly disavows the existence of third-party beneficiaries. *See id.* at 18-19. This is fatal to plaintiffs’ claim.

“A party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost.” *State of California Pub. Employees’ Ret. Sys. v Shearman & Sterling*, 95 NY2d 427, 434-35 (2000), quoting *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336 (1983). Moreover, “[t]he parties’ intent to benefit the third party must be apparent from the face of the contract.” *LaSalle Nat’l Bank v Ernst & Young LLP*, 285 AD2d 101, 108 (1st Dept 2001); *see U.S. Bank N.A. v GreenPoint Mortg. Funding, Inc.*, 105 AD3d 639, 640 (1st Dept 2013) (dismissing third-party beneficiary claim because of “the absence of any clear language on the face of the [contracts]”). Here, not only does the SOW lack clear language indicating the intent to make plaintiffs a third-party beneficiary, the Master Agreement, into which the SOW is incorporated, expressly disclaims such intent. Plaintiffs, therefore, have no third-party beneficiary rights under the SOW.

That said, even if plaintiffs had rights under the SOW, they still have no cognizable claim. “A third-party beneficiary has no greater right to enforce a contract than the contracting parties themselves.” *Renaissance Hous. Dev. Fund Corp. v Phoenix Const., Inc.*, 136 AD3d 605 (1st Dept 2016). Here, neither the SOW nor the Master Agreement permits Randstad to seek

collection from Aetna for monies *not* owed to plaintiffs under the Contractor Agreement. Randstad is only obligated to collect plaintiffs' compensation from Aetna while the Contractor Agreement is in effect. The Contractor Agreement was terminated when AHM terminated plaintiffs. Such termination extinguished any contractual obligation between plaintiffs and Randstad and any obligation by Aetna to pay Randstad for further work performed by plaintiffs. Plaintiffs cannot assert a right to compel Randstad to perform under the SOW – a contract to which plaintiffs are not parties – when doing so is inconsistent with the Contractor Agreement.

However, this does not mean plaintiffs are without recourse. Plaintiffs, in the Letter Agreement, directly contracted with AHM for the right to guaranteed payments even if AHM terminated plaintiffs in November 2014. Hence, plaintiffs have a direct claim for collection against AHM. That being said, Randstad might have a claim to a portion of that money under section 14 of the Contractor Agreement. If so, Randstad may assert its own claim against plaintiffs, for instance, with an interpleader action.⁵ But, there is no basis for Aetna's involvement in this action. It was never in privity with plaintiffs and owes them no money.

Nor is there merit to the suggestion that the only way for plaintiffs to get paid is by compelling Randstad to collect the monies owed to plaintiffs from AHM. The Letter Agreement contains no such limitation. Rather, it contains a promise by AHM to guarantee plaintiffs' retention through 2015 at a fixed rate. By terminating plaintiffs in November 2014, AHM is alleged to have breached that promise. If AHM is held liable for this alleged breach, there is no reason why AHM cannot pay plaintiffs directly. While the Letter Agreement mentions the fact that plaintiffs are being retained through Randstad, the Letter Agreement does not condition

⁵ While Randstad is being dismissed as a defendant in this action, it may attend the preliminary conference directed below to discuss the logistics of it asserting a claim against plaintiffs under section 14 in this action.

AHM's obligation to pay the promised guaranteed compensation upon the Contractor Agreement being operative and does not indicate that AHM's payment obligations are only collectible by Randstad. While plaintiffs' compensation was collectible through Randstad during plaintiffs' retention, the Letter Agreement does not preclude plaintiffs from seeking a post-termination monetary judgment against AHM for its breach. The Contractor Agreement has been terminated, and the pre-termination arrangement whereby plaintiffs were paid through Randstad is no longer operative. Randstad cannot contend that plaintiffs may not seek payment directly from AHM. Randstad's recourse, if any, is limited to asserting a claim for compensation under section 14 of the Contractor Agreement.

Finally, Randstad's argument that the Letter Agreement allegedly breached section 14 of the Contractor Agreement has no bearing on the instant motions, where the viability of the claims against AHM are not at issue. That said, it bears mentioning that plaintiffs allege that Randstad knew about the Letter Agreement and consented to it. Of course, whether this allegation is true is a question of fact that can be probed in discovery if Randstad asserts claims against plaintiffs. AHM's obligation to pay plaintiffs is not impacted by section 14 because AHM is not a party to the Contractor Agreement, and nothing in the Letter Agreement makes AHM's obligation to plaintiffs contingent on the terms of the Contractor Agreement. Simply put, the question of whether Randstad is entitled to a finder's fee under section 14 is a matter purely between plaintiffs and Randstad. AHM has no stake in that dispute.⁶ Accordingly, it is

ORDERED that the motion by defendants Randstad Technologies, L.P. and Aetna Life Insurance Company to dismiss the second cause of action in the complaint is granted, the Clerk is directed to enter judgment dismissing the second cause of action against said moving

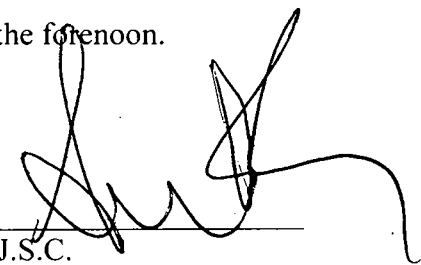
⁶ The court expresses no opinion on whether, with respect to the obligations between Randstad and Aetna, the Letter Agreement was permissible under the Master Agreement.

defendants, and the first cause of action is hereby severed and shall continue against defendant Active Health Management, Inc.; and it is further

ORDERED that the remaining parties (and, if it wishes, Randstad) are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a preliminary conference on May 12, 2016, at 11:30 in the forenoon.

Dated: April 26, 2016

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C