Hayashi v ATN Travel Mgt. Co., Ltd.
2018 NY Slip Op 30058(U)
January 11, 2018
Supreme Court, Queens County
Docket Number: 704485/2016
Judge: Robert J. McDonald
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[* 1]

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

MINORU HAYASHI and MAYUMI NAGASAKA,

Plaintiffs,

- against -

ATN TRAVEL MANAGEMENT CO., LTD., VAN CLUB INTERNATIONAL, INC., APPLE TRAVEL, INC., ATN USA INC., and YUTAKA MASAKI,

Defendants.

Index No.: 704485/2016

Motion Date: 12/19/17

Motion No.: 76

Motion Seq.: 2

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The following electronically filed documents read on this motion by defendants VAN CLUB INTERNATIONAL, INC., APPLE TRAVEL, INC., ATN USA INC., and YUTAKA MASAKI (collectively hereinafter defendants) for an Order pursuant to CPLR 3212, granting said defendants summary judgment and dismissing the complaint against said defendants; and on this cross-motion by plaintiffs for an Order pursuant to CPLR 3212, granting summary judgment to plaintiffs and granting dismissal of the affirmative defenses and counterclaims asserted against plaintiffs:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Memo. of Law.....	EF 26 - 30
Notice of Cross-Motion-Affirmation-Exhibits.....	EF 31 - 39
Aff. in Reply & in Opp. to Cross-Motion-Exhibits.....	EF 40 - 44
Reply Aff. in Further Support of Cross-Motion.....	EF 45

This is an action to recover damages for an alleged breach of a contract arising out of a Stock Sales Agreement (Agreement) between plaintiffs and defendant ATN Travel Management Co., Ltd. (ATN Travel). Plaintiffs were the owners of Van Club International, Inc. (Van Club) and Apple Travel Inc. (Apple Travel). Pursuant to the Agreement, defendants agreed to purchase the shares of Van Club and Apple Travel from plaintiffs. The

Agreement also provided that defendants utilize plaintiff Minoru Hayashi (Hayashi) as a part-time consultant for Van Club for a guaranteed period not less than three years from the date of the closing at an annual rate of $100,000. Defendants also agreed to utilize the services of plaintiff Mayumi Nagasaka (Nagasaka) as an employee of Van Club. About three months after the closing, defendants stopped paying Hayashi his consulting fees and terminated Nagasaka's employment.

Plaintiff commenced this action for breach of contract, conversion and unjust enrichment, and fraud and misrepresentation by filing a summons and complaint on March 10, 2016. Defendants moved to dismiss the second and third causes of action. By Short Form Order dated July 5, 2016 and entered on July 15, 2016, defendants' motion was granted. Accordingly, only the breach of contract claim remains. Defendants now move to dismiss the breach of contract claim on the grounds that there exists no contract between plaintiffs and the moving defendants. Plaintiff Hayashi cross-moves for an order holding all defendants liable for the remaining consulting fees under the terms of the contract in the amount of $252,000 plus interest and costs.

As is relevant to the motion, defendants submit an affidavit from Momoe Okuno (Okuno) dated September 12, 2017. Okuno states that she is the Vice President of ATN Travel and a 50% shareholder in ATN Travel. ATN Travel owns 100% of the stock of Van Club, Apple Travel, and ATN USA, Inc. (ATN USA). ATN Travel is in the business of organizing trips for Japanese visitors to the United States and other places. ATN Travel has been in business since 2012. On June 30, 2015, plaintiffs executed an Agreement with ATN Travel for the acquisition of plaintiffs' stock in Van Club. ATN USA and Apple Travel are sister companies of Van Club under the ATN Travel umbrella.

Based on Okuno's affidavit and a copy of the executed Agreement dated June 30, 2015, counsel for defendants contends that the moving defendants are entitled to summary judgment on the breach of contract claim as there is no evidence of any written agreement between plaintiffs and the moving defendants. As non-signatories to the Agreement, moving defendants cannot be bound by the Agreement.

In opposition, Hayashi submits an affidavit dated October 18, 2017. He affirms that he and plaintiff Mayumi Nagasaka (Nagasaka) were the owners of Van Club and Apple Travel prior to the subject transaction. On June 30, 2015, they entered into an Agreement with ATN Travel. Pursuant to the Agreement, he would be paid $100,000 per year for a minimum of three years. He received

only $48,000 of the minimum $300,000 that he was guaranteed as consulting fees. After three months, defendants terminated his employment, alleging that he knew Mr. Shibata was an illegal. It was unknown to him that Mr. Shibata's work permit was revoked or elapsed. Hayashi further affirms that while consulting for defendants, all of the businesses conducted by the defendants were conducted from the same office using the same workers. All the workers worked for each of the defendants, and the defendants conducted their business activities as if the businesses were one business from the same office space. Every employee performed services for all of the entities, including Van Club, Apple Travel, ATN USA, and were paid by each of the owners of ATN Travel. He believes that the monies were intermixed with each of the defendants. The payments made to him after the closing were made by Van Club. Lastly, he affirms that defendants are currently operating Van Club and Apple Travel under the d/b/a Aquestro, and thus, are treating them as if they are one business.

Based on Hayashi's affidavit, counsel for plaintiffs contends that even though the moving defendants were not parties to the Agreement, through their actions and/or inactions they are liable. In essence, plaintiffs seek to pierce the corporate veil based on Hayashi's statements that, inter alia, all of defendants' were treated as one business.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

"New York adheres to the traditional common-law rule that absent an agreement establishing a fixed duration, an employment relationship is presumed to be a hiring at will, terminable at any time by either party" (Monheit v Petrocelli Elec. Co., Inc., 73 AD3d 714, 715 [2d Dept. 2010]; see Black Car and Livery Ins., Inc. v H & W Brokerage, Inc., 28 AD3d 595 [2d Dept. 2006]; Blank v Noumair, 239 AD2d 534 [2d Dept. 1997]).

Here, defendants met their initial burden of demonstrating that there was no written contract between the moving defendants and plaintiffs. Thus, any employment relationship between moving defendants and plaintiffs was at will, and there was no duty to keep plaintiffs employed for any fixed duration.

In opposition, plaintiffs failed to raise a triable issue of fact. Plaintiffs concede that defendants were not parties to any employment agreement. To the extent plaintiffs seek to pierce the corporate veil, the complaint fails to contain any allegations sufficient to state a cause of action holding the moving defendants liable for ATN Travel's actions (see CPLR 3013). There are no allegations that the moving defendants either transferred assets to or received assets from their parent corporation, ATN Travel, or each other. Moreover, there is no allegation that ATN Travel is undercapitalized.

Accordingly, moving defendants are entitled to summary judgment.

Turning to the cross-motion, Hayashi met his burden by demonstrating that he did have a contract with ATN Travel, and he was not paid in accordance with the terms of the contract.

In opposition to the cross-motion, Okuno submits a second affidavit dated December 9, 2017, affirming that Hayashi breached the "Seller's Representations and Warranties" in Paragraph 4 of the Agreement. Specifically, Hayashi represented that "no circumstances exist which are reasonably likely to give rise in the future to any material litigation, arbitrations, prosecutions, investigations, or other legal or administrative proceedings involving VAN CLUB or APPLE TRAVEL as a party." Hayashi breached the Agreement since he employed a sales manager and tour operator, Mr. Shibata, who had no legal work status in the United States. Plaintiffs also represented that "from the time of their establishment until the Closing, VAN CLUB and APPLE TRAVEL has [sic] complied with all laws, regulations, licensing requirements, and other governmental requirements applicable to their business." However, Okuno affirms that Van Club did not comply with the overtime requirements of the federal Fair Labor Standards Act and the New York State Labor Law as driver Iwao Kato did not possess the correct New York Department of Transportation license for driving large passenger vans, Kato's Taxi & Limousines Commission license had lapsed prior to defendants' acquisition of Van Club, Nagasaka lied on Van Club's vehicle insurance applications about Kato's license status to obtain insurance of the vans, Nagasaka also misclassified drivers as office workers on Van Club's application for worker compensation insurance.

Based on Okuno's affidavit, ATN contends that it was relieved from further performance under the Agreement due to Hayashi's breach of the Agreement by, inter alia, exposing Van Club to significant civil and criminal penalties and thus,

violating the terms of the Agreement.

Viewing the evidence in the light most favorable to the non-moving parties, issues of fact preclude summary judgment, including, but not limited to, whether Hayashi breached the Agreement and whether that breach was so substantial that it defeated the object of the parties in making the Agreement (see RR Chester, LLC v Arlington Bldg. Corp., 22 AD3d 652, 654 [2d Dept. 2005][finding that rescission of a contract "is not permitted for a slight, casual, or technical breach . . . only for such as are material and willful, or, it not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract"]; Grace v Nappa, 46 NY2 560 [1979]; Fitzgerald v Hudson Natl. Golf Club, 11 AD3d 426 [2d Dept. 2004]). Additionally, "[a] court may not weigh the credibility of witnesses on a motion for summary judgment, unless it clearly appears that the issues are not genuine, but feigned" (Conciatori v Port Auth. of N. Y. & N. J., 46 AD3d 501 [2d Dept. 2007]).

Accordingly, and based on the above reasons, it is hereby

ORDERED, that the motion for summary judgment by defendants VAN CLUB INTERNATIONAL, INC., APPLE TRAVEL, INC., ATN USA INC., and YUTAKA MASAKI is granted, the complaint is dismissed as against defendants VAN CLUB INTERNATIONAL, INC., APPLE TRAVEL, INC., ATN USA INC., and YUTAKA MASAKI, only, and the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED, that the cross-motion for summary judgment by plaintiffs is denied.

Dated: January 11, 2018
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.