

Alaina Simone Inc. v Madden
2019 NY Slip Op 32413(U)
August 13, 2019
Supreme Court, New York County
Docket Number: 158106/2018
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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INDEX NO. 158106/2018

ALAINA SIMONE INCORPORATED, and KRISTEN HILL, LEE HEIKKILA, JOSEPH MORESI, LINDSAY SMITH, BRIAN EGAN, SHAE EDMAN, RACHEL SALAY, CHRIS O'MCGRAFF, (individually), and MRS. ALAINA SIMONE THOMAS, individually,

MOTION DATE _____

MOTION SEQ. NO. 002

Plaintiffs,

- v -

DECISION AND ORDER

WAVERLY MADDEN, as Executor of the Estate of Tamara Natalie Madden, MAURICE EVANS, individually, and WAVERLY MADDEN individually,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 24-27, 32, 34-38, 40-44

were read on this motion to _____ dismiss _____.

By notice of motion, defendant Madden moves pursuant to CPLR 3211 for an order dismissing the complaint against her. Plaintiffs oppose. On February 4, 2019, plaintiffs agreed to discontinue the action against defendant Evans for lack of personal jurisdiction over him based on New York's long-arm statute. (NYSCEF 17).

I. COMPLAINT (NYSCEF 2)

In this action, plaintiffs sue Madden individually and as executor of the Estate of Tamara Natalie Madden (Estate), an artist who passed away in 2017, although they limit their claims against her individually to wrongful imprisonment.

Plaintiff Alaina Simone Incorporated (ASI) is a duly formed New York State corporation, with offices in Manhattan. Plaintiff Alaina Simone Thomas (Thomas) is a New York State

resident and sole owner of ASI. The other plaintiffs are ASI employees and Georgia residents. Madden is identified as an attorney admitted to practice in Pennsylvania with an office in Philadelphia, and the Executor of the Estate.

As the basis for jurisdiction and venue, plaintiffs allege that their claim arose in New York, that defendants contracted with ASI which is both incorporated and has its primary offices in New York, and that the contract contemplates the provision of significant services in New York and was negotiated in New York.

Plaintiffs contend that after Tamara's death, ASI had telephone conversations with defendants about providing services related to Tamara's artwork, including cataloging and preserving it and developing a market to sell it. On December 28, 2017, ASI emailed Madden a written proposal for the proposed services. (NYSCEF 3).

On January 2, 2018, Thomas met with Madden in Philadelphia to discuss the proposal. The following day, ASI added additional services to its proposal. (NYSCEF 4).

Plaintiffs contend that Madden engaged ASI to provide services, that it began informal consulting in December 2017, was officially hired in January 2018, and stopped work after receiving a termination letter from Madden.

Before its receipt of the letter of termination, when it had almost completed the proposed work, ASI asked defendants to pay its employees directly. When defendants failed to do so, ASI paid the employees and then sought reimbursement from defendants. ASI received only partial reimbursement from defendants for its employees' wages and expenses.

On February 19, 2018, Thomas was left inside a storage unit in Georgia controlled by defendant Evans and had not been given the code to allow her to leave. Thus, she was trapped inside until 9 am the next morning. She filed a police report about the incident. (NYSCEF 8).

Plaintiffs allege that they are owed approximately \$6,000 in unpaid wages, and assert claims on behalf of plaintiff ASI employees for unpaid wages and benefits, including overtime pay, under the Fair Labor Standards Act (FLSA) (first cause of action), and for liquidated damages under the FLSA (second cause of action), for breach of contract and services rendered on behalf of ASI (third cause of action), and for wrongful imprisonment by Thomas against Evans and Madden and the Estate as Evans's agents (fourth cause of action).

Plaintiffs served Madden with their summons and complaint at her office address in Philadelphia. (NYSCEF 7).

II. DEFENDANT'S MOTION

Madden moves to dismiss the complaint on the grounds of lack of personal and general jurisdiction, failure to state a claim upon which relief may be granted, *forum non conveniens*, and lack of standing. She denies that there is jurisdiction over her in New York, that there was a valid and enforceable contract between the parties, or that plaintiffs may sue her for wages.

Madden submits an affidavit in support of her motion, setting forth the following:

- (1) Although Thomas asked that Madden pay her employees directly (so as not to have to pay taxes), Madden never agreed to do so and was not involved in hiring ASI's employees;
- (2) While Madden repeatedly sought a contract from ASI, she instead received multiple proposals and then an invoice of \$8,500 as a flat fee for her services;
- (3) Tamara's best friend paid the \$8,500 fee to ASI and thus ASI has been paid in full;
- (4) Madden is a Canadian citizen and lives there permanently;
- (5) Madden spoke to Thomas several times by calling her from Madden's Canadian phone number;
- (6) Madden did not meet Thomas, or have any interactions with her, in New York; and
- (7) Thomas was not locked in the storage unit overnight, but rather chose to stay there overnight to work.

(NYSCEF 27). She offers no arguments related to personal jurisdiction or forum *non conveniens*.

In opposition, plaintiffs argue that Madden's motion is improper. While she may represent herself individually, only an attorney may appear on behalf of an Estate, and although Madden is an attorney, she is not licensed to practice law in New York. Plaintiffs also contend that Madden's contacts with New York State are sufficient to confer long-arm jurisdiction over her. In support, they offer copies of email correspondence between the parties, which allegedly establish that Madden contacted ASI in New York. For example, in a December 12, 2017 email, addressed to ASI, Madden writes that "you were referred to my office to request expert advice regarding the management of the Estate of Tamara Natalie Madden. Please call me at the coordinates below if you have an interest in discussing this matter." The coordinates are an address and telephone number in Philadelphia. (NYSCEF 35).

Thereafter, the parties communicated by email and by telephone to discuss the scope of ASI's proposed work for the Estate, and on December 28, 2017, ASI sent Madden its proposal. (NYSCEF 36). The parties discussed meeting and eventually met in Madden's Philadelphia office.

On January 7, 2018, Madden notified ASI that the Estate was ready to proceed with the inventory process, and asked that ASI forward its proposed agreement, which it did by reply email. (NYSCEF 36). On January 9, 2018, Madden asked for an invoice. (NYSCEF 37).

A. Representation

Plaintiffs submit no binding authority for the proposition that Madden may not represent herself both individually and as the Estate's executor.

B. Lack of jurisdiction

As plaintiffs submit proof that Madden, as the Estate's executor, solicited services from

ASI, a New York state corporation, and allegedly entered into and later breached an agreement for such services, they sufficiently establish that the court has long-arm jurisdiction over the Madden as the Estate's executor. (*See e.g., Paterno v Laser Spine Institute*, 24 NY3d 370, 377 [2014] ["where the non-domiciliary seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship, a non-domiciliary can be said to transact business within the meaning of CPLR 302(a)(1)"]. Thus, in *Grimaldi v Guin*, even though the non-domiciliary defendant never entered New York in relation to the single transaction at issue, the defendants' "purposeful creation of a continuing relationship" resulted in contact with New York sufficient to confer jurisdiction over the defendants in New York, where the defendants, through email and phone communications with the plaintiff, affirmatively attempted to establish and did establish a relationship with the plaintiff. (72 AD3d 37, 46, 51 [2d Dept 2010]).

C. Fair Labor Standards Act claims

There is no evidence that Madden, on behalf of the Estate, hired any of ASI's employees as her own employees. Rather, as described in the complaint, the employees were employed by ASI. Nor is there proof that Madden ever agreed to pay the employees directly, or that she supervised and controlled their work, or maintained any employment records as to them. Plaintiff employees thus have no cognizable claim against Madden and/or the Estate under the Fair Labor Standards Act, as neither Madden nor the Estate was their employer. (*See Carver v State*, 26 NY3d 272 [2015] [whether entity or person is "employer" under FLSA depends on whether it had power to hire and fire employees in question, supervised and controlled employee work schedules and employment conditions, determined rate and method of payment, and maintained employment records]).

D. Breach of contract claim

While Madden argues that ASI was paid in full based on the second proposal, and that any additional monies due were not agreed upon, she submits no proof in support thereof other than her own affidavit, and thus fails to establish, *prima facie*, her entitlement to dismissal of this claim against the Estate.

E. False imprisonment claim

As Thomas discontinued her false imprisonment claim against Evans, there is no remaining claim upon which Madden and/or the Estate may be held vicariously liable. (*See e.g., Moorhouse v Standard, New York*, 124 AD3d 1 [1st Dept 2014] [plaintiff could not prevail against defendants for respondeat superior as underlying torts against employee has been dismissed]; *Escobar v New York Hosp.*, 111 AD2d 128 [1st Dept 1985] [hospital could not be held vicariously liable for acts of defendants as to whom action had been discontinued]).

In any event, as it is undisputed that Thomas was alleged to have been falsely imprisoned in Georgia by a Georgia resident, plaintiffs fail to establish a basis for long-arm jurisdiction over Madden and/or the Estate for this claim. (CPLR 302[a][3] [court may exercise personal jurisdiction over nondomiciliary as to cause of action arising from enumerated acts who, among others, commits tortious act out of state causing injury to person within state, if he regularly does or solicits in state or expects act to have consequences in state and derives substantial revenue from interstate or international commerce]; *Bloomgarden v Lanza*, 143 AD3d 850 [2d Dept 2016] [no evidence of injury within New York State, as site of injury is location of event causing injury, not where resulting damages are felt by plaintiff]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Madden’s motion to dismiss is granted to the extent of dismissing: (1) plaintiff employees Fair Labor Standards Act claims (first and second causes of action), and (2) Thomas’s false imprisonment claim (fourth cause of action), and those claims are hereby severed and dismissed, and the motion is otherwise denied; it is further

ORDERED, that the parties appear for a preliminary conference on September 11, 2019 at 2:15 pm, at 60 Centre Street, New York, New York.

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BARBARA JAFFE, J.S.C.

8/13/2019
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE