

Wright v Qianshan Liao
2019 NY Slip Op 33777(U)
December 23, 2019
Supreme Court, New York County
Docket Number: 157161/2017
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY****PRESENT: HON. MARGARET A. CHAN****PART****IAS MOTION 33EFM***Justice*

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INDEX NO.157161/2017

KEITH WRIGHT,

Plaintiff,

MOTION DATE05/07/2019,
05/07/2019

- v -

MOTION SEQ. NO.002QIANSHAN LIAO, RUOMING LIAO, GTM
INTERNATIONAL, INC., GTM PICTURES, INC., BEACH
PICTURES, INC.**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for

DISMISS

In this employment action to recover damages for alleged sexual harassment and retaliation, among other claims, defendants move for summary judgment pursuant to CPLR 3212 on plaintiff Keith Wright's causes of action brought under the New York State and the New York City Human Rights Law. Plaintiff opposes the motion.

FACTS

Plaintiff met Qianshan Liao and his daughter, Ruoming Liao (collectively, "the Liaos"), at an event that plaintiff hosted on May 12, 2016. The purpose of the event was for plaintiff to find investors for a forthcoming film project. Qianshan Liao ("Mr. Liao") was an investor and the founding and controlling owner of GTM International, GTM Pictures, and Beach Pictures. Mr. Liao was interested in investing in the creation of a motion picture. Plaintiff and Mr. Liao expressed an interest in working together in producing motion pictures and agreed to explore producing films together.

According to plaintiff, in August 2016, both Mr. Liao and Ruoming Liao ("Ruoming") asked plaintiff to create a business plan for a film production business that they could pursue together (NYSCEF # 1, Compl at ¶16). According to plaintiff, the goal was to produce films in the United States that could also be purposed for the China market (*id.*). Plaintiff alleges that Mr. Liao offered to commit \$10 million toward the business to finance the production of three feature films (*id.*). Plaintiff

thereafter presented his business plan to the Liaos, and the parties agreed to work together to build the business that would be known as GTM Pictures (*id.* at ¶18).

Plaintiff alleges that during his employment at GTM Pictures, he would report to Mr. Liao, as the owner of the GTM Pictures, and to Ruoming Liao, as the president of GTM Pictures (*id.*). As to plaintiff's compensation, the parties agreed that instead of a salary, plaintiff would receive a percentage of GTM's profits and an equity interest in the business (*id.* at ¶20). Plaintiff began to execute the business plan he developed for the Liaos. Plaintiff claims to have performed a number of services for GTM Pictures under the direction and approval of the Liaos, including branding, helping select computer equipment and infrastructure, and attending marketing related events (*id.* at ¶21).

On September 20, 2016, under the direction of Mr. Liao, plaintiff entered into negotiations with a production company named QC Entertainment for the purpose of investing into the creation of a film entitled *Time Freak*. Prior to the finalization of the deal to invest in the film, Mr. Liao decided to use Beach Pictures instead of GTM Pictures to finance the film.

On February 17, 2017, plaintiff and Beach Pictures entered into an "Executive Producer Agreement" ("Agreement") with respect to plaintiff's services in connection with *Time Freak* (NYSCEF # 29). According to the Agreement, plaintiff was to "render all services that are customarily rendered by producers of first-class feature-length motion pictures in the theatrical motion picture industry" (*id.* at ¶1). The Agreement further states that all of plaintiff's "services hereunder shall be rendered in accordance with the reasonable directions, requests, current rules and regulations of Company in connection therewith, including without limitation, those involving matters of artistic taste and/or judgment" (*id.*). In exchange, plaintiff was entitled to 15% of all money paid to Beach Pictures after recoupment of its initial investment (*id.* at ¶2).

Plaintiff claims that both the work he performed as an Executive Producer for *Time Freak*, and the work he performed during his employment with GTM Pictures, which were unrelated to the film, was performed under the direction and approval of the Liaos.

Plaintiff claims that a few months after he and the Liaos agreed to work together, Ruoming began to harass plaintiff (*id.* at ¶¶32-33). Plaintiff claims that between January and May 2017, Ruoming made sexually inappropriate comments to him in and outside of the workplace, bought him unsolicited gifts, stalked him, and threatened to terminate his employment if he did not take her out for dinner on her birthday (*id.* at ¶¶34-47). On May 17, 2017, as a result of these actions toward plaintiff, Ruoming was arrested and charged with aggravated harassment in the second degree (*id.* at ¶50).

After Ruoming was arrested, defendants ceased all communications with plaintiff, including shutting plaintiff out of the companies' computer and e-mail systems. Plaintiff further claims that on May 24, 2017, counsel for the Liaos informed plaintiff that he was terminated from the companies (*id.* at ¶52).

DISCUSSION

Summary Judgment

A party moving for summary judgment must make a *prima facie* showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1986]). Once a showing has been made, the burden shifts to the parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]).

NYSHRL and NYCHRL

In support of their motion to dismiss plaintiff's claims under the New York State Human Rights Law ("NYSHRL") and the New York City Human Rights Law ("NYCHRL"), defendants contend that plaintiff was not an employee but an agent providing brokerage services, and, as such, plaintiff is not entitled to the protections under those laws. Defendants add that they did not have control over plaintiff's work. Defendants point out that plaintiff was fully employed with another company during the same time plaintiff claims to have been employed by defendant companies, and thus could not have simultaneously been an employee of the defendant companies.

In opposition, plaintiff cites to numerous work activities he did at the direction and/or approval of the Liaos. For instance, plaintiff created a business plan for GTM Pictures; established GTM Pictures' information and technology system; branding for GTM Pictures, including designing a corporate logo and website; public relations; marketing, including attending film industry related events on behalf of GTM Pictures; engaged GTM Picture's lawyers, including for the development of contracts; oversaw GTM Pictures' staffing, including conducting interviews with prospective employees; and worked on producing a Chinese language remake of *Time Freak*, among other things (NYSCEF # 42 at ¶16). Plaintiff also affirms that he assisted in hiring an assistant who performed work for

GTM Pictures and GTM International (*id.* at ¶9). Defendants do not refute plaintiff's claims that he performed any of the aforesaid work.

In order to determine who is an employee under the both the NYSHRL and NYCHRL, the court looks to four relevant factors: (1) the selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and (4) the power of control of the servant's conduct (*Griffin v Sirva, Inc.*, 29 NY3d 174, 186 [2017], citing *State Div. of Human Rights on Complaint of Emrich v GTE Corp.*, 109 AD2d 1082 [4th Dept 1985]). The vital element in determining an employee-employer relationship is whether the employer exercises control over the performance over the work (*Griffin v Sirva Inc.*, 835 F3d 283, 291 [2d Cir 2016]; *Scott v Massachusetts Mut. Life Ins. Co.*, 86 NY2d 429 [1995]).

Under the NYCHRL, which affords more protection to employees than the NYSHRL, the definition of an "employee" encompasses independent contractors. "[N]atural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers shall be counted as persons in the employ of such employer." (Admin Code § 8-102[5].) Indeed, the NYCHRL does not distinguish between employees and independent contractors for purposes of prohibiting discriminatory actions (*see Sellers v Royal Bank of Can.*, US Dist Ct, [SDNY, 2014], *affd*, 592 Fed Appx 45 [2d Cir 2015] [unlike its state and federal counterparts, the NYCHRL protects independent contractors "if they are 'natural persons' who 'carry out work in furtherance of an employer's business enterprise'"]; *O'Neill v Atlantic Sec. Guards, Inc.*, 250 AD2d 493, 493 [1st Dept 1998]). As a general rule, control of the method and means by which work is to be performed is a critical factor in determining whether one is an independent contractor or an employee (*Quik Park W. 57, LLC v Bridgewater Operating Corp.*, 148 AD3d 444, 445 [1st Dept 2017]).

Here, an issue of fact exists as to whether plaintiff was an employee of GTM Pictures, GTM International, and Beach Pictures under the NYSHRL, and whether plaintiff was an employee of GTM Pictures and GTM International under the NYCHRL. The parties do not dispute that the trio of companies did not pay plaintiff a salary or wages. And, the only suggestion that defendants did not have control over plaintiff's work is contained in Mr. Liao's affidavit in support of the instant motion wherein he states, without any specificity, that plaintiff's "work hours and day-to-day routine were totally under [plaintiff's] control" (NYSCEF # 10). Mr. Liao also states in conclusory fashion that plaintiff only provided brokerage services on one occasion (*id.* at ¶10).

However, as to whether plaintiff was an employee of Beach Picture, there is no issue of fact under the NYCHRL. Defendants admit in their interrogatories that plaintiff was either an employee or an independent contractor of Beach Pictures (NYSCEF # 40 at ¶3). The court notes that under either scenario Beach Pictures

would be liable to plaintiff under the NYCHRL. Thus, defendants have conceded that plaintiff qualifies as an "employee" under the NYCHRL (NYSCEF # 48 at 10).

Further, whether plaintiff was as an employee or merely an independent contractor for Beach Picture under the NYSHRL is for the jury. Defendants did not address this question in their reply.

Be that as it may, plaintiff's request that the court search the record and grant plaintiff summary judgment on his NYCHRL claims against Beach Pictures and Mr. Liao is denied. The issue of whether those defendants are liable under the NYCHRL should be left for a jury to decide.

Defendants contend, through their attorney's unsupported assertions, that plaintiff was working for Beach Pictures on the roll-out of *Time Freak* at the time of the alleged harassment, and thus could not have also been an independent contractor for GTM Pictures. This contention, raised for the first time in the movants reply, is not considered by the court (*see Ambac Assur. Corp. v DLJ Mortg. Capital, Inc.*, 92 AD3d 451, 452 [1st Dept 2012]).

Accordingly, it is hereby

ORDERED that defendants' motion pursuant to CPLR 3212 to dismiss plaintiff's NYSHRL and NYCHRL claims is denied; it is further

ORDERED that counsel for defendants shall serve a copy of this order upon all parties with a notice of entry within 14 days of entry.

This constitutes the Decision and Order of the court.

12/23/2019

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

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DENIED

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NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

MARGARETA CHAN, J.S.C.