

Llaguno v SyCip Gorres Velayo & Co.

2020 NY Slip Op 31470(U)

April 9, 2020

Supreme Court, New York County

Docket Number: 155989/2018

Judge: Melissa A. Crane

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

PRESENT: MELISSA A. CRANE
Justice

PART 15

LOVELY WISDOM M. LLAGUNO

INDEX NO. 155989/2018

MOTION DATE _____

v.

MOTION SEQ. NO. 001

SyCIP GORRES VELAYO & CO. a member
Practice of Ernst & Young Global Limited,

MOTION CAL. NO. _____

The following papers, numbered _ to _ were read on this motion to/for _____.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

CROSS-MOTION: YES NO

Plaintiff, Lovely Wisdom M. Llaguno (“Llaguno”), a citizen and resident of the Philippines, sued defendant SyCip Gorres Velayo & Co. a/k/a “Ernst & Young Philippines” (“EY Philippines”). Defendant is a large professional services firm in the Philippines, and a member firm of Ernst & Young Global Limited (“EY Global”).

In 2011 defendant, EY Philippines, hired plaintiff, Llaguno. For five years Llaguno worked for EY Philippines. Then, on September 15, 2016, as part of EY’s International Mobility Framework (“IMF”), Ernst & Young (“EY”) offered plaintiff employment in New York with Ernst & Young U.S., LLP (“EY US”) (Compl ¶ 6-7). On September 18, 2016, plaintiff entered into an employment contract with EY’s New York offices (“EY NY”) that provided plaintiff with a managerial position from October 10, 2016 to April 27, 2016 (Compl ¶ 8; *see also*, Villanueva Aff, dated March 22, 2019, ex. A, NYSCEF doc 16). Under the employment contract, the Fair Labor Standards Act classified plaintiff as an “exempt

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

employee” and “at-will” (Willemin Aff, dated July 29, 2019, ex. 4, NYSCEF doc no 36). EY had to delay Llaguno’s start date to January 9, 2017 because of visa issues.

Prior to Llaguno’s January 2017 start date, on December 19, 2016, plaintiff entered into a Return Transfer Agreement (the “Return Transfer Agreement”) with EY Philippines. EY IMF’s Return Transfer Policy required that plaintiff sign the Return Transfer Agreement so that plaintiff could work for EY NY (Compl ¶ 12). The Return Transfer Agreement required plaintiff return to the Philippines and work for EY Philippines for at least 15 months after she finished working at EY NY (Compl ¶ 18; Willemin Aff, dated July 29, 2019, ex. 3, p.4). The Agreement also required Llaguno pay a financial penalty of an unspecified amount if she did not return to the Philippines after the 15-month term (the “contract termination policy”) (Compl ¶ 18). Llaguno’s mother guaranteed the financial penalty under the Return Transfer Agreement, because the Agreement required Llaguno to “secure a guarantee from a financially responsible and capable person” (Compl ¶ 19). The Return Transfer Agreement also provided that plaintiff’s employment with EY US could be extended if all parties agreed (Compl ¶ 20). Plaintiff and EY Philippines signed the Agreement.

In December 2017, Llaguno decided she wanted to work past the end of her 15-month term at EY US. On December 11, 2017, she called Adeline Lumbres, a partner at EY Philippines to request a transfer to EY LLP (Compl ¶ 22). Ms. Lumbres said plaintiff would have to return to EY Philippines and work the full 15 months before she could transfer (Compl ¶ 23). On December 13, 2017, plaintiff and Ms. Lumbres spoke again. Ms. Lumbres told plaintiff that if she did not return to the Philippines to work for EY, she could not work for any EY affiliated firm again (Compl ¶ 24). On January 16, 2018, Ms. Lumbres and Ms. Go again denied plaintiff’s request to transfer to EY LLP (Compl ¶ 25). In February 2018, plaintiff

scheduled a conference call between partners at EY LLP and EY Philippines, to discuss the transfer request. Subsequently, EY Philippines cancelled the conference call (Compl ¶¶ 26-27).

In March 2018 and in April 2018, plaintiff again reached out to EY Philippines to discuss her transfer request. On April 11, 2018, plaintiff wrote to J. Carlitos G. Cruz, the Managing Partner of EY Philippines (Compl ¶ 30). She stated, “I deeply value the relationship I have built with EY Philippines over the past six years...I also understand and respect the commitment I made to EY Philippines prior to working in New York” (Villanueva Aff, dated March 22, 2019, ¶¶ 14-15, NYSCEF doc 16). Llaguno wrote further, “I’d like to honor my professional commitment to you while also honoring my personal commitment and future marriage” (*id.*). Despite plaintiff’s numerous efforts to reach out, each time EY Philippines rejected her transfer requests, or she received no response at all (Compl ¶¶ 29-33).

On April 26, 2018, EY Philippines sent plaintiff an email requesting that she book her return flight to the Philippines (Compl ¶ 39). EY Philippines also contacted plaintiff and several of her family members, threatening financial harm and serious legal consequences if plaintiff did not return to work (Compl ¶ 41, 47). Plaintiff’s mother, a 71-year-old woman suffering from hypertension, began to worry that she would have to pay a significant amount of money, if Llaguno did not return (Compl ¶ 44). On May 9, 2018, Mr. Cruz told Ms. Wolfe, an EY LLP Partner who handled human resources throughout Asia, that plaintiff’s “visa had been cancelled.” That statement led plaintiff to believe she had violated U.S. immigration laws and had to return to the Philippines immediately (Compl ¶ 50).

Despite this, Llaguno never booked a return flight, nor did she return to work for EY Philippines. Then, on May 21, 2018, plaintiff received an email from EY Philippines demanding a financial penalty of Php 948,859.00 (\$18,000.00 US dollars) for failing to return to work

(Compl ¶ 56). EY Philippines subsequently withdrew the financial penalty demand (Villanueva Aff, dated March 22, 2019, ¶ 22). On July 30, 2018, after numerous requests to bring plaintiff's disputes to mediation, plaintiff commenced this action.

Plaintiff seeks to recover under a theory of, *inter alia*, violations of the Trafficking Victims Protection Act (the "TVPA"), declaratory judgment declaring the contract termination penalty invalid, tortious interference with a business relationship and prospective economic advantage, defamation, breach of contract, and breach of the covenant of good faith and fair dealing. On March 25, 2019, defendant moved pursuant to CPLR 3211 to dismiss the complaint.

Discussion

A court must deny a motion to dismiss under CPLR 3211 (a)(2) "if from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 289 [1st Dept 2003] [internal quotation marks omitted], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002]). The court must afford the pleading a "liberal construction," and "the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). However, the court may disregard "bare legal conclusions" and "inherently incredible" facts. *Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). Moreover, "[w]hen the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether [he or] she has stated one" (*Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 [2d Dept 2000]).

Personal Jurisdiction

Defendant disputes that plaintiff has personal jurisdiction. In 2014, *Daimler AG v Bauman*, 571 US 117 [2014], the Supreme Court heightened the standard for general jurisdiction

over corporations. Under *Daimler*, a corporation is subject to general jurisdiction only where it was incorporated or maintains its principal place of business (571 US 117 [2014]). The inquiry becomes whether that corporation's affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State (*id.* at 139-140). After *Daimler*, plaintiffs are hard-pressed to obtain general jurisdiction over a foreign corporation in a forum that is neither the state of incorporation nor its principal place of business. In this case, defendant EY Philippines has an overwhelming foreign presence. EY Philippines is a large professional services firm organized and governed under Philippines law. Defendant has eight offices in the Philippines. It has no offices in New York. Further, plaintiff does not dispute the lack of general jurisdiction. Therefore, there is no general jurisdiction over defendant.

Turning to New York's Long Arm Statute, CPLR 302(a)(1) confers specific jurisdiction over claims arising from the "transaction of business" in New York. To establish jurisdiction under this provision, defendants must have: (1) transacted business within New York; and (2) the claims must arise from that business activity (*Aybar v US Tires and Wheels of Queens, LLC*, 65 Misc3d 932 [Sup Ct, Queens Co 2019]). Whether a defendant "transacted business" in New York requires a fact-intensive inquiry into whether the defendant has purposefully availed itself of the New York forum (*LaChapelle v Torres*, 1 FSupp3d 163, 175 [SDNY 2014]). Specific jurisdiction over a foreign defendant is appropriate where a defendant projects itself into the state to engage in a "sustained and substantial transaction of business" (*Fischbarg v Doucet*, 9 NY3d 375 [2007]). CPLR (a)(3) confers specific jurisdiction on a defendant who commits a tortious act outside of New York, causing injury to a person within the state.

Plaintiff's argument, that specific jurisdiction exists because she and EY Philippines contracted to provide services to New York *in the form* of Llaguno herself, is unavailing.

However, the parties do not dispute that EY Philippines and Llaguno had an Agreement that set forth plaintiff's secondment to EY New York for 15 months, and then for her return to EY Philippines to work for an additional 15 months. EY Philippines' secondment program is a development tool for its employees. Although the secondment may not, on its own, demonstrate that defendant projected itself into New York to transact business, it does suggest a close relationship between EY Philippines and EY NY. The close relationship raises an issue as to whether EY Philippines purposefully forged ties with New York, and thus, purposefully availed itself of the New York Forum (*see Hessel v Goldman*, 281 AD2d 247, 248 [1st Dept 2001] [defendant's training of employees in New York sufficient to suggest that defendant took purposeful actions to forge ties with New York and warranted denial of motion to dismiss based on lack of personal jurisdiction]). Further, the court finds that plaintiff has alleged tortious interference, thus conferring specific jurisdiction on defendant.

Forum Selection Clause

Defendant claims the forum selection clause in the Return Transfer Agreement applies to EY NY, not EY Philippines. The clause states:

This assignment letter will be governed by, and construed with, the laws of the Philippines under which **EY and you** agree to the exclusive jurisdiction of the New York Courts.
(Willemin Aff, dated July 29, 2019, ex. 3, p.4) (emphasis added).

Defendant reads "EY and you" to mean disputes between plaintiff and EY NY. Plaintiff asserts that the clause is not limited to any particular EY entity. Rather, it includes all of EY Global, and EY Philippines falls under EY Global's stretch. Yet only plaintiff and EY Philippines signed the Return Transfer Agreement. EY NY did not. The court permits jurisdictional discovery because it is not clear to whom the forum selection clause applies.

Violation of TVPA

To state a claim under the Trafficking Victims Protection Act (“TVPA”), plaintiff must show that defendant knowingly obtained the labor or services of a person through:

- (1) force
- (2) serious harm or threats of serious harm to that person or another person;
- (3) abuse or threatened abuse of law or legal process; or
- (4) any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint. (18 U.S.C. §1589[a][1]-[4]).

It is undisputed that plaintiff never returned to work for EY Philippines after her 15-month term at EY NY. Thus, defendant did not obtain plaintiff’s “labor or services” under the Work Transfer Agreement. Nor did defendant cause serious financial harm to plaintiff or her mother. EY Philippines withdrew the financial penalty demand for \$18,000. Even if defendant had applied the penalty, \$18,000 on plaintiff’s \$95,000 annual salary hardly constitutes “serious” harm. Defendant’s misrepresentation to plaintiff that her visa had been cancelled did not constitute a misuse of the law, but rather, a legal reality of plaintiff’s decision not to return to work (*Camayo v John Peroulis & Sons Sheep, Inc.*, 2012 WL 4359086 at *5 [D. Col. 2012]). Therefore, the court dismisses plaintiff’s TVPA violation claims.

Tortious Interference with Plaintiff’s Business Relationship and Prospective Economic Advantage

Defendant next argues that plaintiff cannot recover under tortious interference because defendant merely sought plaintiff’s compliance with the terms of the Return Transfer Agreement. To state a claim for tortious interference with a business relationship, plaintiff must establish: (1) a business relationship between plaintiff and a third party; (2) defendant, knowing of that relationship, intentionally interferes with it; (3) defendant acts with the sole purpose of

harming plaintiff or uses dishonest, unfair, or improper means to interfere with the relationship; and (4) injury to the relationship (*Marshall Broadcasting Group, Inc v Nexstar Broadcasting, Inc*, 2019 WL 559154 at *4 [Sup Ct, NY Co 2019]). To state a claim for tortious interference with prospective economic advantage, plaintiff must establish that defendant interfered with prospective business relations through wrongful means or for the sole purpose of harming plaintiff (*Moulton Paving LLC v Town of Poughkeepsie*, 98 AD3d 100 [2nd Dept 2012]).

The parties do not dispute that, on September 18, 2016, plaintiff and EY NY entered into a contract that provided for plaintiff's secondment to EY's New York offices (Willemin Aff, dated July 29, 2019, ex. 4). If all parties agreed, plaintiff could extend her term of employment with EY NY past 15-months. Plaintiff alleges that when she requested a transfer, in April 2018, EY Philippines purposefully lied to EY NY. Specifically, defendant told Ms. Wolf, an EY LLP partner, that plaintiff's visa had been cancelled. That statement caused both plaintiff and EY US to believe Llaguno would face immigration consequences, if she did not return to the Philippines. As a result of defendant's statement, EY NY did not to grant plaintiff's request to stay at EY NY. Had EY Philippines approved Llaguno's extended stay at EY NY, she would have received a significantly higher salary than her salary received in the Philippines.

That defendant made efforts to bring plaintiff back to the Philippines after her term of employment in New York expired does not alter defendant's dishonesty to plaintiff. Plaintiff's April 11, 2018 letter to EY Philippines' managing partner, acknowledging EY Philippines' business concerns for denying her transfer does not justify defendant's visa threats.

Wolf v Imus is inapposite, 170 AD3d 563, 564 [1st Dept 2019]). There, an employer declined to renew a terminated employee's contract for another year because the employer did not want to continue the employment relationship. In this case, multiple partners at EY NY stated that they

wanted to continue plaintiff's employment after the 15-month term expired (Llaguno Aff, unsworn, NYSCEF doc no 37). Accordingly, plaintiff's tortious interference claim with plaintiff's business relationship and economic advantage survives.

Defamation

To state a defamation claim, plaintiff must allege: (1) a false statement; (2) published without privilege or authorization to a third party; and (3) that causes harm to a person's reputation. Plaintiff argues that defendant's statement to EY NY that plaintiff's visa had been cancelled suggested she was unfit for her professional role. That defendant falsely said it revoked her visa did not result in specific harm to plaintiff's reputation. EY NY still wanted to extend her employment, but did not because defendant denied Llaguno's transfer request. Plaintiff does not refute this. Therefore, the court dismisses plaintiff's claim for defamation.

Breach of Contract

To state a claim for breach of contract, plaintiff must allege: (1) that the parties entered into a valid agreement; (2) plaintiff performed; (3) defendant failed to perform; and (4) damages (*RVW Productions Corp v Levin*, 2019 WL 4899056 at *3 [Sup Ct, NY Co 2019]). Plaintiff alleges defendant failed to engage in good faith efforts to plan plaintiff's repatriation and reintegration within seven to nine months before the end of her employment with EY US, thus breaching the contract. However, nothing in the Return Transfer Agreement requires defendant to plan for repatriation and reintegration. The IMF merely recommends a repatriation planning process, but does not require one (*Villanueva Aff*, dated March 22, 2019, ex B, 3.3). In addition, plaintiff refused reintegration and, instead, sought a transfer to EY NY. Accordingly, the court dismisses plaintiff's breach of contract claim.

Breach of Covenant of Good Faith and Fair Dealing

The court dismisses plaintiff's breach of the covenant of good faith and fair dealing claim as duplicative of its breach of contract claim.

Declaratory Judgment

Plaintiff seeks a declaratory judgment declaring that the contract termination penalty violates the TVPA, the 13th Amendment of the US Constitution, the Anti-Peonage Statute, and New York Law and Philippine Law, and, is therefore, unenforceable. Defendant withdrew the \$18,000 penalty (Villanueva Aff, dated March 22, 2019, ¶ 22). Therefore, plaintiff's claims for declaratory judgment relief are moot. To the extent plaintiff claims she signed the contract under duress, and thus, the Return Transfer Agreement is unenforceable, the court notes that nothing indicates duress. Plaintiff's consideration was a fifteen-month secondment with EY NY.

Accordingly, it is

ORDERED that the court grants defendant's motion to dismiss the complaint only to the extent that it dismisses the first, second, third, fourth, fifth, sixth, seventh, eighth, eleventh, twelfth, and thirteenth causes of action; and it is further

ORDERED that the court directs defendant to serve an answer to the complaint within 20 days after service of a copy of this order and decision with notice of entry; and it is further

ORDERED that counsel for the defendant, as well as counsel for the plaintiffs in each of the actions, are directed to appear for a status conference, by phone, on July 8, 2020 at 11:00 a.m.

Dated: April 9, 2020

ENTER:


HON. MELISSA A. CRANE, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
Check if appropriate: DO NOT POST REFERENCE SETTLE ORDER SUBMIT ORDER
 FIDUCIARY APPOINTMENT