SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

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MORPLAY MANAGEMENT INC.,

Plaintiff,

- v -

NORMA CASTRO,

Defendant.

----------X

INDEX NO. 654566/2020

MOTION DATE 03/18/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, and 27

were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that defendant's motion to dismiss the complaint based on documentary evidence and for failure to state a cause of action pursuant to CPLR 3211(a)(7) is granted in part based on the following memorandum decision.

Background

In this action for breach of contract, defendant Norma Castro ("Castro") moves to dismiss the amended complaint of plaintiff Morplay Management, Inc. ("Morplay"). Morplay alleges three causes of action: declaratory judgment (first cause of action); breach of contract (second cause of action); and *quantum meruit* (third cause of action).

On September 19, 2018, in Miami, Florida, the parties entered into a Management Agreement, pursuant to which Morplay would "use its resources, contacts, expertise, and commercially reasonable efforts to promote, develop, enhance, and guide [Castro's] career . . . and to achieve [Castro's] career goals" (NYSCEF Doc. No. 21, Exhibit A, ¶ 1). In exchange, Castro, a wardrobe stylist, agreed to pay Morplay a 20% commission on any earnings derived

from Manager's services (i.e., Morplay's services) (*id.*, ¶ 3). The agreement was for an initial term of two years, automatically extended for an additional three years if Castro met certain monetary or social media goals during the initial term, and thereafter from month to month until one party gave notice that it was terminating the agreement (*id.*, ¶ 2). Further, Castro acknowledged that Morplay "is not an employment agent, theatrical agent, or licensed artists' manager, and that [Morplay] has not promised to procure employment or engagements for [Castro]" (*id.*, ¶ 4[c]). New York law would apply to govern any dispute under the terms of the contract (*id.*, ¶ 4[e]).

Morplay alleges that during the term of the agreement it introduced Castro to at least 20 potential new clients, many of whom retained Castro to provide stylist services (NYSCEF Doc. No. 21, ¶ 24). Morplay also provided a project manager for Castro, as well as other logistical and administrative support for her business (*id.*, ¶¶ 25-27). Morplay did not directly book clients for Castro; instead, making introductions to potential clients which Castro then engaged herself (*id.*, ¶ 30). Morplay contends that, thanks to its services, Castro now earns over $500,000 per year (*id.*, ¶ 29). In January 2020, Castro stopped paying commissions and, on May 7, 2020, repudiated the agreement, stating that it was unenforceable (*id.*, ¶ 34). Morplay contends that the agreement is still in effect and has continued promoting Castro as a wardrobe stylist (*id.*, ¶¶ 32, 35-36).

Morplay commenced this action by filing a summons and complaint on September 19, 2020 (NYSCEF Doc. Nos. 1-2). Morplay then amended its complaint on February 26, 2021 (NYSCEF Doc. No. 21). Defendant appeared and makes the instant pre-answer motion to dismiss the amended complaint.

Standard of Review

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*Id.* at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

Declaratory Judgment and Breach of Contract (First and Second Causes of Action)

Morplay alleges that Castro breached the agreement when she ceased paying commissions and seeks damages and a declaratory judgment that the agreement remains enforceable and in effect, and that Castro must specifically perform her obligations under the agreement. Both causes of action require the court to interpret the agreement, and the parties dispute which law should apply: New York law, as provided in the agreement, or Florida law, where the parties work and reside and where the contract was entered.

Generally, courts will enforce a choice-of-law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction" (*Welsbach Electric Corp. v MasTec*

North America, Inc., 7 NY3d 624, 629 [2006]). "[W]here parties include a New York choice-of-law clause in a contract, such a provision demonstrates the parties' intent that courts not conduct a conflict-of-laws analysis . . . unless the parties expressly indicate otherwise" (*Ministers & Missionaries Benefit Bd. v Snow*, 26 NY3d 466, 468 [2015], *rearg denied* 26 NY3d 1136 [2016]). An exception exists "where the chosen law violates some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal" (*Brown & Brown, Inc. v Johnson*, 25 NY3d 364, 368 [2015] [internal citations and quotation marks omitted]). "The party seeking to invoke the exception bears a heavy burden of proving that application of the chosen law would be offensive to a fundamental public policy of this State" (*id.*, [internal citations and quotation marks omitted]). "Although [courts] possess the power to set aside agreements on this basis, our usual and most important function is to enforce contracts rather than invalidate them on the pretext of public policy, unless they clearly contravene public right or the public welfare" (*159 MP Corp. v Redbridge Bedford, LLC*, 33 NY3d 353, 361 [internal quotation marks and citations omitted], *rearg denied* 33 NY3d 1136 [2019]).

Castro essentially argues that the Court should ignore or invalidate the choice of law provision in the agreement on the grounds that Morplay chose New York law to avoid application of Florida's prohibition on operating an unlicensed talent agency. However, according to the allegations of the complaint—which Castro does not dispute—Castro was represented by counsel in negotiating the agreement. In other words, this is not a contract of adhesion, involving "onerous contractual terms which one party is able to impose [upon] the other because of a significant disparity in bargaining power" (*159 MP Corp.*, 33 NY3d at 360).

It was entered into by "sophisticated parties negotiating at arm's length" (*id.* at 363). Castro freely chose to have New York law govern this dispute.

As the Court of Appeals recently reaffirmed "[f]reedom of contract is a deeply rooted public policy of this state," and "our courts have long deemed the enforcement of commercial contracts according to the terms adopted by the parties to be a pillar of the common law" (*id.* at 359). "Freedom of contract prevails in an arm's length transaction between sophisticated parties . . . and in the absence of countervailing public policy concerns there is no reason to relieve them of the consequences of their bargain" (*Oppenheimer & Co., Inc. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 695 [1995]; *see also J. Zeevi and Sons, Ltd. v Grindlays Bank (Uganda) Ltd.*, 37 NY2d 220, 227 ["it is important that the justified expectations of the parties to the contract be protected"], *cert denied* 423 US 866 [1975]). Moreover, insofar as both Florida and New York provide for statutory licensing schemes for management, talent, or employment agents (Fla. Stat. §§ 468.401, *et seq.*; General Business Law §§ 170, *et seq.*), and both states either refuse to enforce contracts or void contracts *ab initio* with unlicensed individuals or entities under certain circumstances (*159 MP Corp.*, 33 NY3d at 362; *Vista Designs, Inc. v Silverman*, 774 So 2d 884, 886 [Fla Dist Ct App 2001]), Castro does not identify a true conflict that would counter New York's strong interest in enforcing the choice of law provision (*New England Mut. Life Ins. Co. v Caruso*, 73 NY2d 74, 81 ["a decision to refrain from enforcing a particular agreement depends upon a balancing of the policy considerations against enforcement and those favoring the encouragement of transactions freely entered into by the parties"], *rearg denied* 74 NY2d 651 [1989]).

Having determined that New York law should apply to govern this dispute as provided in the agreement, the court next turns to Morplay's claims thereon. A breach of contract requires

allegations of "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). Morplay's request for a declaratory judgment that the contract is active and enforceable is encapsulated by the first element stated; namely, that there is an existing contract between the parties.

Morplay alleges in the amended complaint that the parties entered into the agreement, that Morplay provided substantial services to Castro under the agreement, and that Castro has failed to pay commissions owed under the agreement (NYSCEF Doc. No. 21, ¶¶ 46-50). Castro, in moving to dismiss the complaint, argues that the agreement is unenforceable because it violates New York law; namely, the statutory requirement that employment agencies be licensed (General Business Law §§ 170, *et seq.*).

Pursuant to General Business Law § 172, "[n]o person shall open, keep, maintain, own, operate or carry on any employment agency unless such person shall have first procured a license therefor as provided in this article." The statute defines an employment agency as "any person . . . who, for a fee, procures or attempts to procure employment or engagements for persons seeking employment or engagements" (General Business Law § 171[2][a][1]) or

> "who directly or indirectly:
>
> (1) procures or attempts to procure or represents that he can procure employment or engagements for persons seeking employment or engagements;
>
> (2) represents that he has access, or has the capacity to gain access, to jobs not otherwise available to those not purchasing his services; or
>
> (3) provides information or service of any kind purporting to promote, lead to or result in employment for the applicant with any employer other than himself."

(General Business Law § 171[2][c].) The statute also specifies as a "Theatrical employment agency" any person or entity "who procures or attempts to procure employment or engagements

for an artist, but such term does not include the business of managing entertainments, exhibitions or performances, or the artists or attractions constituting the same, where such business only incidentally involves the seeking of employment therefor" (General Business Law § 171[8]). "Artist," as defined by the statute, means "actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors . . . musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises" (General Business Law § 171[8-a]). Operating an agency without such a license is a misdemeanor (General Business Law § 190).

The record does not indicate that Morplay ever obtained a license as required by the statute. Morplay, however, asserts that it is not an agency covered by the above provisions, and, therefore, the agreement is valid. Castro acknowledged in the agreement that Morplay is not an "employment agent, theatrical agent, or licensed artists' manager" (NYSCEF Doc. No. 21, Exhibit A, ¶ 4[c]). The complaint, however, alleges that Morplay procured at least 20 new clients for Castro, including some of Morplay's other clients, which Castro would not otherwise have been able to procure for herself (NYSCEF Doc. No. 21, ¶¶ 23-24). Accordingly, a question of fact exists as to whether Morplay's services fall within the ambit of the statute or not, which cannot be resolved on a motion to dismiss (*Greenfield v Tripp*, 10 AD2d 638, 638 [2d Dept] ["Whether the relationship of respondent to appellant was that of a theatrical employment agency, in which event respondent required a license, or that of a manager, in which event he did not, was a question of fact to be resolved by the jury"], *rearg & lv denied* 10 AD2d 850 [2d Dept 1960]). Morplay's reliance on *Rhodes v Herz* (84 AD3d 1 [1st Dept], *appeal dismissed* 18 NY3d

838 [2011]) for the proposition that there is no private right of action to enforce Morplay's alleged failure to obtain a license is unavailing. Castro is not attempting to enforce the statute. She is simply arguing that Morplay's failure to obtain a license means that it cannot seek to enforce its contract.

***Quantum Meruit* (Third Cause of Action)**

To state a claim for *quantum meruit*, Morplay must show performance of services in good faith, acceptance of services by the person to whom they are rendered, expectation of compensation, and the reasonable value of the services rendered (*Fulbright & Jaworski, LLP v Carucci*, 63 AD3d 487 [1st Dept 2009]). The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]).

Here, the agreement between the parties covers the subject matter of Morplay's claims, and, therefore, Morplay cannot recover in *quantum meruit*. Morplay argues that this claim is pled in the alternative in case the agreement is later found invalid. While such claims are generally permitted in the alternative (*Henry Loheac, P.C. v Children's Corner Learning Ctr.*, 51 AD3d 476 [1st Dept 2008]), Castro alleges that the agreement must be voided as against public policy. An agreement void on that ground may not be enforced in quasi contract (*see Spivak v Sachs*, 16 NY2d 163, 168 [1965] ["This was an illegal transaction and under our settled rules we refuse to aid in it but leave the parties where they are"]; *Wings Assocs., Inc. v Warnaco, Inc.*, 269 AD2d 183, 184 [1st Dept] ["Since the alleged agreement is void by reason of the Statute of frauds, plaintiff cannot use the same alleged promise as a basis for a cause of action sounding in

quantum meruit"], *lv denied* 95 NY2d 759 [2000]). Thus, in either circumstance, Morplay's claim must fail.

Accordingly, it is hereby

ORDERED that defendant Norma Castro's motion to dismiss is granted in part and the third cause of action of the amended complaint is dismissed; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after the filing hereof; and it is further

ORDERED that counsel are directed to appear for a virtual preliminary conference via Microsoft Teams on March 9, 2022, at 10 AM.

This constitutes the decision and order of the court.

ENTER:

2/7/2022								
DATE					LOUIS L. NOCK, J.S.C.			
CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE