Paolitto v Ladders, Inc.
2022 NY Slip Op 30684(U)
February 28, 2022
Supreme Court, New York County
Docket Number: Index No. 655289/2020
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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KENDRA PAOLITTO (d/b/a COGNITIVE RECRUITING SOLUTIONS, LLC),

Plaintiff,

- v -

LADDERS, INC.,

Defendant.

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INDEX NO. 655289/2020

MOTION DATE 12/30/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is hereby ordered that defendant's motion to dismiss the complaint pursuant to CPLR 3211 is granted in part, based upon the following memorandum decision.

Background

In this action for breach of contract and violations of the Administrative Code of the City of New York §§ 20-927, *et seq.*, plaintiff Kendra Paolitto ("plaintiff") alleges three causes of action for breach of the Administrative Code provisions known as the Freelance Isn't Free Act ("FIFA"), breach of contract (fourth cause of action), and quantum meruit (fifth cause of action). Defendant Ladders, Inc. ("defendant") now moves to dismiss the complaint based on documentary evidence, lack of standing, and failure to state a cause of action pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7). Insofar as plaintiff does not oppose dismissal of the fifth cause of action for quantum meruit, and the parties had a written agreement which is the genesis of this dispute, the fifth cause of action is severed and dismissed.

Plaintiff is the sole employee and one of two members of nonparty Cognitive Recruiting Solutions, LLC a Connecticut limited liability company ("Cognitive") (NYSCEF Doc. Nos. 9-10). Pursuant to a contract dated April 10, 2019, defendant hired Cognitive to serve as a technical recruiter, at a rate of $80 per hour for 40 hours of work per week (NYSCEF Doc. No. 6). The contract was terminable upon 14 days written notice by either party (*id.*). Plaintiff alleges that she, acting through Cognitive, adequately performed all the defendant's requirement and invoiced defendant accordingly (NYSCEF Doc. No. 8, ¶ 15). Defendant refused to pay several of plaintiff's invoices (a total of $26,421.00) and, without the required written notice, terminated the contract on August 9, 2019 (*id.*, ¶¶ 16-17). Defendant later twice offered plaintiff less than what plaintiff claimed she was owed if she agreed to sign a release against defendant and give up certain other rights (*id.*, ¶¶ 18-21).

Plaintiff commenced this action by filing a summons and complaint on October 14, 2020 (NYSCEF Doc. No. 1). Defendant appeared and now makes the instant pre-answer motion to dismiss.

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

An issue common to both plaintiff's FIFA and breach of contract claims is whether they have been brought by the proper party. FIFA itself does not create a new form of agreement between employers and freelance workers, but instead provides a means of regulating that contractual relationship (Administrative Code of the City of New York § 20-927 [defining "freelance worker" and "hiring party" in contractual terms]; *id.*, § 20-928 [requiring a written contract for freelance engagements for more than $800]). Generally, only the parties to a contract can sue for a breach of its terms (*Parker & Waichman v. Napoli*, 29 AD3d 396, 399 [1st Dept 2006]).

Here, the relevant contract is between defendant and Cognitive rather than plaintiff (NYSCEF Doc. No. 6). Whether the working member of an entity who is not themselves a party to the contract between that entity and the hiring party may invoke the provisions of FIFA appears to be a question of first impression for the Court. Nevertheless, FIFA does distinguish, in defining a freelance worker, between "a natural person" and "any organization composed of no more than one natural person" (Administrative Code of the City of New York § 20-927). This suggests that, if the entity is the contracting party, then a member of that entity should not be able to invoke FIFA's provisions on their own behalf (*see Sealy v Clifton, LLC*, 68 AD3d 846, 847 [2d Dept 2009] ["Since the properties in question are owned by Clifton, the plaintiff cannot maintain a cause of action for partition in his individual capacity"]).

Plaintiff suggests that by listing Cognitive as her "d/b/a" she intended to add Cognitive as a separate plaintiff, thus preserving the claims under FIFA. Failing that, she asks for leave to amend the complaint so that Cognitive can be properly named as a party. Leave to amend would not alter the disposition of the FIFA claims, however, as plaintiff states in her affidavit opposing the motion that her husband is also a member of Cognitive, though not an employee thereof (NYSCEF Doc. No. 17). FIFA does not define an organization with only one employee as a freelance worker, but an organization "*composed* of no more than one natural person" (Administrative Code of the City of New York § 20-927). Thus, Cognitive is outside of the protections of FIFA because it has two members. Moreover, Cognitive is not a party to this action, as an LLC is not merely a trade name, which has no separate existence from its user, but a separate entity (Limited Liability Company Law § 610; *see also Perez v Garden Prop. Assoc., LLC*, 199 AD3d 475 [1st Dept 2021]).

The same is not true, however, of the breach of contract claim. Plaintiff is not a party to the contract, nor does she argue that she is a third-party beneficiary thereto. Absent that issue, however, the compliant sufficiently alleges that there was a contract, that plaintiff, through Cognitive, performed under the contract, and that defendant breached the contract by failing to pay certain of plaintiff's invoices (NYSCEF Doc. No. 8, ¶¶ 15-21; *Harris v. Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). Defendant does not dispute any of these facts in its opposition. As such, it is proper for the Court to grant leave for plaintiff to amend her complaint to add Cognitive as a party asserting the breach of contract claim.

"Leave [to amend] shall be freely given upon such terms as may be just" (CPLR 3025[b]; *Rabos v R & R Bagels & Bakery, Inc.*, 100 AD3d 849, 853 [2d Dept 2012], *as amended* [Apr. 15, 2013] [holding that requests to replead in opposition to a motion to dismiss are governed by the

same standard as motions for leave to amend under CPLR 3025(b)]). Absent undue delay, prejudice, or surprise, and provided the proposed amendment arises from the same transactions and occurrences as the original complaint, the motion should be granted (*Fellner v Morimoto*, 52 AD3d 352, 353 [1st Dept 2008]). "A party opposing leave to amend must overcome a heavy presumption of validity in favor of permitting amendment" (*McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012] [internal quotation marks and citations omitted]).

Here, defendant cannot claim any prejudice or surprise, as its contract was with Cognitive, and the complaint sufficiently alleges the claims against it such that it cannot say it was unaware of them. Contrary to defendant's argument, plaintiff was not required to submit a separate affidavit of merit to support her request for leave to amend (*St. Nicholas W. 126 L.P. v Republic Inv. Co., LLC*, 193 AD3d 488, 488-89 [1st Dept 2021]). Moreover, plaintiff's affidavit submitted in opposition to the motion sufficiently demonstrates the merit of the proposed amendment even absent a proposed amended complaint (NYSCEF Doc. No. 17; *Greene v Esplanade Venture Partnership*, 36 NY3d 513, 523 n 3 [2021]; *see also King v George Schonberg & Co.*, 233 AD2d 242, 243 [1st Dept 1996] ["Leave to replead this cause of action was properly denied for failure to submit the proposed pleading *or* set forth its merit"] [emphasis added]).

Accordingly, it is hereby

ORDERED that the defendant's motion to dismiss is granted and the complaint is dismissed; and it is further

ORDERED that plaintiff is granted leave to file an amended complaint to the extent set forth above within 20 days after the filing hereof; and it is further

ORDERED that, in the event that plaintiff fails to file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk of the Court, upon service upon him (60 Centre Street, Room 141B) of a copy of this order with notice of entry and an affirmation/affidavit by defendant's counsel attesting to such non-compliance, is directed to enter judgment dismissing the action, with prejudice, and with costs and disbursements to the defendant as taxed by the Clerk; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

This constitutes the Decision and Order of the Court.

Louis L. Nock

2/28/2022
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE