SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT:	**HON. BARRY R. OSTRAGER**	**PART**	**IAS MOTION 61EFM**
	Justice		

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HARRISON HINES and ARGONAUTIC VENTURES MASTER SPC, Plaintiffs,	**INDEX NO.**	656361/2021
	MOTION DATE	
- v -	**MOTION SEQ. NO.**	001
AZOTH INVESTMENT SPC LTD., YUCHEN SHI a/k/a CASSANDA SHI and TAMARA FRANKEL, Defendants.	**DECISION + ORDER ON MOTION**	

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HON. BARRY R. OSTRAGER

Presently before the Court is defendants Azoth Investment SPC Ltd., Cassandra Shi, and Tamara Frankel's motion for an order compelling arbitration pursuant to CPLR § 7503 and dismissing certain claims contained in plaintiff's Complaint pursuant to CPLR § 3211(a)(7) and (8). For the reasons established herein, the motion is resolved as follows.

Plaintiff Argonautic Ventures Master SPC ("Argonautic") alleges that on March 2, 2021, it entered into a Purchase and Sale Agreement with defendant Azoth Investment SPC Ltd. ("Azoth") for the purchase and sale of 50,000 cryptocurrency tokens for the price of $700,000.00. Plaintiff Hines alleges that on March 18, 2021, he entered into a separate Purchase and Sale Agreement with defendant Azoth for the purchase and sale of 25,000 tokens for the price of $450,000.00 (together, the "Contracts"). Both Argonautic and Hines' Contracts with Azoth are identical except for the named purchasers and the token and dollar amounts thereunder.

Plaintiffs allege that defendants failed to comply with §2(a) of the Contracts, which required delivery of the Tokens within twenty-four hours of Azoth actually receiving the tokens.

Plaintiffs further allege that the individual defendants Shi (Azoth's CEO) and Frankel made a series of knowingly false statements regarding the delivery of the tokens. Defendants claim that the dispute between plaintiffs and Azoth must be arbitrated pursuant to § 6(f) of the Contracts, and that the claims concerning individual defendants Shi and Frankel should be dismissed for lack of jurisdiction, or else for failure to state a claim.

Defendants' motion to dismiss plaintiffs' second, third, and fourth causes of action is granted without prejudice as to defendants Shi and Frankel for lack of personal jurisdiction. Plaintiffs bear the burden of a *prima facie* showing of jurisdiction upon a motion to dismiss pursuant to CPLR 3211(a)(8). *See Wang v. LSUC*, 137 A.D.3d 520, 521 (1st Dept. 2016). Plaintiffs claim that personal jurisdiction exists as to the two individual defendants pursuant to CPLR §§ 301, 302(a)(1), and 302(a)(3)(i), (ii).

Defendants Shi and Frankel are non-domiciliaries of New York and apparently reside in California. NYSCEF Doc. Nos. 22, 23. CPLR § 302(a)(1) provides that a Court may exercise personal jurisdiction over any non-domiciliary of New York state if that person transacts any business within the state. Whether a non-domiciliary is "transacting business" within the meaning of §302(a)(1) requires a finding that the non-domiciliaries conducted purposeful activities; in other words, that the non-domiciliary availed itself of the privilege of conducting activities within the forum state. *See Paterno v. Laser Spine Inst.*, 24 N.Y.3d 370, 376 (2014) (citations omitted).

Plaintiffs make no allegations in the Complaint as to any nexus between defendants Shi and Frankel and the state of New York. There is no allegation that any of the communications referenced in the Complaint were sent or received by either individual defendant in the state of New York. There are no allegations that the individual defendants visited New York for the

purposes of engaging in the related transactions. Further, defendants Shi and Frankel deny any such contacts in their affidavits submitted in support of the motion to dismiss. NYSCEF Doc. Nos. 22, 23. Plaintiffs did not submit any affidavit in connection with their opposition to the motion.

The only allegations connecting the individual defendants to New York is the jurisdiction clause contained in §6(f) of the Contracts, which Shi signed in her capacity as CEO of defendant Azoth, and which Frankel did not sign. NYSCEF Doc. Nos. 2, 3. The allegations are insufficient to establish that the jurisdiction clause applies to the individual defendants. The fact that defendant Shi signed the Contracts in her official capacity as CEO is insufficient on its own to establish personal jurisdiction. See *SNS Bank v. Citibank*, 7 A.D.3d 352, 353–54 (1st Dept. 2004) (finding that personal jurisdiction was never acquired over directors of a defendant corporation because they were non-domiciliaries who submitted affidavits stating that they conducted their directorial duties outside of New York); *see also CutCo Indus. v. Naughton*, 806 F.2d 361, 365–66 (2d Cir. 1986) ("[T]he totality of all defendant's contacts with the forum state must indicate that exercise of jurisdiction would be proper.")

Plaintiffs claim they have met their burden to make a *prima facie* showing that personal jurisdiction exists under CPLR § 302(a)(1) as to the two individual defendants, based on the single conclusory allegation that "Azoth is the alter-ego entity of defendants Shi and Frankel." *Cmplt*. ¶ 11; NYSCEF Doc. No. 25. This allegation on its own is insufficient. The Complaint does not even contain allegations of defendant Frankel's role within Azoth, much less that Frankel or Shi exercised any dominion or control over the company, as is required to sufficiently allege liability predicated on an alter-ego theory. *See Baby Phat Holding Co., LLC v. Kellwood Co.*, 123 A.D.3d 405, 407 (1st Dept. 2014).

Under CPLR 302(a)(3)(i) and (ii), jurisdiction may be exercised against a non-domiciliary of New York who "commits a tortious act without the state causing injury to a person or property within the state…." Even assuming *arguendo* that plaintiff has sufficiently alleged an injury that occurred within New York, plaintiffs still failed to meet the requirements of CPLR § 302(a)(3)(i) and (ii). Plaintiffs have failed to show that defendants Shi or Frankel engaged in a persistent course of conduct in the state of New York. Plaintiffs also failed to show that defendants Shi or Frankel expected or reasonably should have expected the allegedly tortious acts to have consequences in New York, or that Shi or Frankel individually derive substantial revenue from interstate or international commerce.

Defendants' motion to compel the arbitration pursuant to CPLR § 7503 is granted as to defendant Azoth. Though it is a well-settled proposition that the question of arbitrability is generally an issue for judicial determination, *see Primex Intl. Corp. v. Wal-Mart Stores*, 89 N.Y.2d 594, 598 (1997), an exception exists allowing the parties to arbitrate even the issue of arbitrability when they "clearly and unmistakably" so agree. *See Life Receivables Trust v. Goshawk Syndicate 102 at Lloyd's*, 66 A.D.3d 495, 499 (1st Dept. 2009), *aff'd*, 14 N.Y.3d 850 (2010) (internal citations omitted).

Here, defendants have shown that the plaintiffs unambiguously agreed to permit the arbitrators to decide the issue of arbitrability regarding disputes between plaintiffs and defendant Azoth. Section 6(f) of the Contracts provides that: "[i]f any dispute should arise between the parties that cannot be resolved informally, it shall be settled by arbitration in [the] New York … Office of the American Arbitration Association before a panel of three arbitrators … in accordance with the rules of the American Arbitration Association…." NYSCEF Doc. Nos. 2, 3. Section 6(f) is a broad arbitration provision applying to "any dispute" between the parties,

including disputes related to the Contracts. Further, the AAA rules are expressly incorporated in the Contract. The AAA rules provide that a tribunal may have the power to rule on its own jurisdiction. Thus, the question of arbitrability falls to the arbitrators. *See id.* at 496. Plaintiffs' attempts to contest this, by citing to various other provisions contained in the Contracts such as the Attorney's fees provision found in §6(h), are unavailing.

Defendant Azoth's request for attorney's fees is denied as premature.

The present action is stayed for a duration of 9 months, pending the outcome of the arbitration between plaintiffs and defendant Azoth. *See Princeton Information, Ltd. v. Marcus*, 235 A.D.2d 234 (1st Dept. 1997). A status conference is scheduled for March 21, 2023, at 10:00 a.m., at which time the parties will provide an update as to the arbitration. The parties are directed to submit a revised Joint Appearance Sheet for the conference no later than March 10, 2023.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendants is granted in part to the extent provided herein as to Counts 2 and 3, and granted as to Count 4, and those claims are severed and dismissed;

ORDERED that defendants' motion to compel arbitration and to stay this action is granted; and it is further

ORDERED that plaintiffs Harrison Hines and Argonautic Ventures Master SPC shall arbitrate their claims against defendant Azoth Investment SPC Ltd. in accordance with the Purchase and Sale Agreements; and it is further

ORDERED that all proceedings in this action are hereby stayed until March 24, 2023.

Dated: June 24, 2022

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