

Reliance First Capital LLC v Wagner

2023 NY Slip Op 30818(U)

March 16, 2023

Supreme Court, New York County

Docket Number: Index No. 655835/2021

Judge: Alexander M. Tisch

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. ALEXANDER M. TISCH PART **18**

Justice

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INDEX NO. 655835/2021

RELIANCE FIRST CAPITAL LLC,

Plaintiff,

MOTION DATE 11/23/2021

MOTION SEQ. NO. 002

- v -

AMY WAGNER, STEVEN DIOMATARIS, KAYLA VICINI,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 39, 40, 42, 43, 44, 45, 46

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant KAYLA VICINI moves to dismiss the complaint in its entirety pursuant to CPLR 3211 (a) (8) for the lack of jurisdiction over Vicini, CPLR 3211 (a) (1) to enforce the parties' agreement for arbitration, and CPLR 3211 (a) (7) for failing to state a cause of action.

This matter arises out of Vicini's previous employment as a mortgage analyst with plaintiff, Reliance First Capital LLC. Reliance is a mortgage lender with its principal offices in Melville, New York. On Vicini's first day of employment with Reliance, she executed an employment agreement that included promises not to solicit Reliance employees or certain customers, while also promising to maintain Reliance's confidential information for a period of twelve (12) months after the termination of her employment. Reliance brought this action because Vicini allegedly solicited two Reliance employees during the restricted 12-month period after she left and joined a competing agency, thereby allegedly breaking her employment agreement with Reliance. In support of the motion to dismiss, Vicini, who lived and worked exclusively in Pennsylvania during her employment with Reliance, argues that the complaint should be dismissed because this Court

lacks jurisdiction over her, that the documentary evidence submitted requires arbitration of plaintiff's claims, and that plaintiff fails to state a cause of action. In opposition, Reliance argues that Vicini signed documentation in which she agreed to adhere to certain promises, and that she consented to the jurisdiction of this Court and the application of New York law, and for these reasons the complaint should not be dismissed.

Paragraph twelve of Vicini's employment agreement with Reliance, titled "Construction and Enforcement" states that

"[t]his [a]greement shall be governed by and construed in accordance with the laws of the State of New York (without giving effect to the conflicts of laws principles thereof). Any action to enforce this Agreement may be brought in a federal or state court in New York, and the parties hereby consent to personal jurisdiction of said court in any such action" (NYSCEF Doc. No. 5, ¶ 12).

The New York General Obligations Law was created "to allow parties without New York contacts to choose New York law to govern their contracts" (IRB-Brasil Resseguros, S.A. v Inepar Invs., S.A., 20 NY3d 310 [2012]). It states that

"[t]he parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars...may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract, agreement or undertaking (a) for labor or personal services, (b) relating to any transaction for personal, family or household services" (NY Gen Oblig Law § 5-1401).

The key issue as it pertains to personal jurisdiction in this matter, is whether the forum selection clause within the Reliance employment agreement is enforceable or not. Vicini argues that the General Obligations Law does not apply "to [] contracts...[or], agreements...for labor or personal services", therefore, Vicini's employment contract with Reliance, and the forum selection clause within, cannot be enforced under that statute. Reliance argues that the forum selection clause should be enforced because New York substantive law determines whether a forum selection

clause is enforceable or not, and not the New York General Obligations Law. Moreover, Reliance argues that New York does not require every forum selection clause to comply with the General Obligations law. Reliance further argues that New York law provides that “[P]arties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract” (Somerset Fine Home Bldg., Inc. v Simplex Indus., Inc., 185 AD3d 752, 753 [2020] quoting Brooke Grp. Ltd. v JCH Syndicate 488, 87 NY2d 530, 534 [1996]). And that

“[a] contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court” (Somerset Fine Home Bldg., Inc. v Simplex Indus., Inc., 185 AD3d 752, 753 [2d Dept 2020] quoting Lifetime Brands, Inc. v Garden Ridge, L.P., 105 AD3d 1011, 1012 [2d Dept 2013]).

Reliance argues that the forum selection clause is prima facie valid and enforceable because Vicini failed to provide the requirements of unconscionability needed to avoid enforcement. That being “high pressure commercial tactics, inequality of bargaining power, deceptive practices and language in the contract, and an imbalance in the understanding and acumen of the parties” (Emigrant Mortg. Co. v Fitzpatrick, 95 AD3d 1169, 1170 [2d Dept 2012] quoting Simar Holding Corp. v GSC, 87 AD3d 688, 689 [2d Dept 2011]). However, the Court finds otherwise.

The Court agrees that the New York General Obligations law is inapplicable in this matter because Vicini’s contract with Reliance was for “labor,” which falls outside the scope of the provision (see Setter Cap., Inc. v Chateauvert, 69 Misc 3d 377, 380 [NY Sup Ct 2020] [“General Obligations Law § 5-1401 does not apply to contracts ‘for labor or personal services’”]). Furthermore, the Court finds that Reliance’s forum selection clause is invalid and unenforceable because Vicini demonstrated that the forum selection was “unreasonably favorable to [Reliance]...[and] was the result of ‘high pressure...[and that there was] an imbalance in the

understanding and acumen of the parties” (Somerset Fine Home Bldg., Inc. v Simplex Indus., Inc., 185 AD3d 752, 754 [2020] quoting Emigrant Mortg. Co. v Fitzpatrick, 95 AD3d 1169, 1170 [2012]). Vicini’s affidavit states that her highest degree of education is a “high school diploma” and that it would be a significant burden to litigate outside of Pennsylvania, as she cannot afford to miss time from her job or accrue additional travel costs (NYSCEF Doc. No. 36, Vicini Affidavit). Moreover, Vicini’s offer letter from Reliance “did not refer to an agreement permitting [her] to be sued in New York”, nor was she told that she would be expected to sign an agreement that allowed her to be sued in New York before she began her employment with Reliance (NYSCEF Doc. No. 36, Vicini Affidavit). Additionally, Vicini alleges that she was “[hurried] through signing many documents” during the Reliance orientation meeting, and that she was under the impression that if she did not sign the documents, she would not be able to work for Reliance, yet she had quit her previous job based on the offer letter she received from Reliance. Upholding Reliance’s New York forum selection clause would be to deny Vicini of her day in court, due to the grave challenge it would be for her to appear.

The circumstances leading to Vicini signing the contract agreement, coupled with the imbalance in understanding of what Vicini was signing and agreeing to, all weigh in favor of finding the forum selection clause invalid and unenforceable. Since this Court finds that the forum selection clause is unenforceable, the issue is then whether the Court would otherwise have personal jurisdiction over Vicini pursuant to CPLR 302.

CPLR 302 (a)(1) provides that “a court may exercise personal jurisdiction over any non-domiciliary...[who] transacts any business within the state or contracts anywhere to supply goods or services in the state” (NY CPLR. 302).

“[A] non-domiciliary transacts business when ‘on his [or her] own initiative ... [the non-domiciliary] project[s] himself [or herself]’ into this state to engage in a

‘sustained and substantial transaction of business’...Thus, where the non-domiciliary seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship, a non-domiciliary can be said to transact business within the meaning of CPLR 302(a)(1)” (Paterno v Laser Spine Inst., 24 NY3d 370, 377 [2014] quoting Fischbarg v Doucet, 9 NY3d 375, 382 [2007]).

Vicini sought an employment opportunity with Reliance, but she did not seek to solicit business within New York or to establish a continuing relationship with the state. “In order to satisfy ‘[t]he overriding criterion’ necessary to establish a transaction of business’ within the meaning of CPLR 302(a)(1), a non-domiciliary must commit an act by which it ‘purposefully avails itself of the privilege of conducting activities within [New York]’” (Id. quoting Ehrenfeld v Bin Mahfouz, 9 NY3d 501, 508 [2007]). Vicini committed no such act in which she purposefully availed herself of the privileges of conducting activities within New York. For as stated within her affidavit, Vicini has “never been employed in New York”, she is “not licensed to sell mortgages in New York”, she has “never been licensed to sell mortgages in New York”, none of her “clients or prospective clients are [] based in New York”, and she “did not do any business for Reliance in New York” or “travel to New York for business with Reliance” (NYSCEF Doc. No. 36, 4-9). Vicini’s only tie to New York is the forum selection clause located in her Reliance employment agreement which she was not aware of because she was hurried through the process of signing her employment documentation. “When a defendant engages in purposeful activity [within a state] personal jurisdiction is proper” (Ehrenfeld v Bin Mahfouz, at 508 [2007]). Since Vicini did not engage in purposeful activity in New York or “deliberately and affirmatively [seek] the protection of [New York’s laws, she is not] amenable to [its] long-arm jurisdiction...and should [not] expect to defend [an] action[] here” (Id.).

Thus, the Court does not have personal jurisdiction over Vicini pursuant to CPLR 302, and without proper jurisdiction, this Court will not address the remainder of defendant’s arguments.

Accordingly, it is hereby ORDERED that the motion of defendant KALYA VICINI to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further


ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk’s Office, who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that service of this order upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (see section J);¹ and it is further

ORDERED the parties shall appear for a preliminary conference virtually via Microsoft Teams on **April 19, 2023**.² This constitutes the decision and order of the Court.

<u>3/16/2023</u> DATE	 ALEXANDER M. TISCH, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE

¹ The *Protocol* is accessible at the “E-Filing” page on the court’s website: www.nycourts.gov/supctmanh.
² Calendar invitation containing Teams link with blank preliminary conference order to be sent by Part 18 Clerk (SFC-Part18-Clerk@nycourts.gov). Parties may submit the order on consent in lieu of appearing.