SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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LVH GLOBAL, INC.

Plaintiff,

- v -

AMIR BENESH,

Defendant.

INDEX NO. 652822/2023

MOTION DATE 08/31/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

----------X

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 22, 23, 24, 25, 26, 27, 28
were read on this motion to/for DISMISSAL.

Plaintiff LVH Global, Inc. (LVH) brings this action against defendant Amir Benesh alleging a claim for breach of an employment agreement between the parties and seeking declaratory judgment that it validly terminated Benesh's employment for cause (NYSCEF # 1 – compl or Complaint). Presently before the court is Benesh's motion to dismiss the complaint on the grounds of *forum non conveniens*, lack of personal jurisdiction, and failure to state a claim (NYSCEF # 9). For following reasons, Benesh's motion is denied.

Background

The Parties

LVH is a Delaware corporation with a principal place of business in New York that provides luxury rentals, experiences, and services worldwide (compl ¶¶ 5, 10, 17; NYSCEF # 23 – Barton aff ¶¶ 5-10).[1] LVH's primary clients are high-net-worth individuals and their families, and it has spent considerable effort cultivating and developing those relationships, as well as relationships with vacation property owners and transportation charter/rental providers (compl ¶¶ 11-12, 15-16). LVH's clients can book vacation rentals and charters through LVH, all while LVH arranges a full scope of services during the booking process, including in-home

[1] According to LVH's Chief Executive Officer, director, and shareholder, Hugh Barton, LVH's headquarters from 2018 through the commencement of this lawsuit was 505 5th Avenue, New York, NY 10017 (Barton aff ¶ 5).

services (housekeeping, spa, chefs, chauffeurs, security), transportation services, and experiential services (*id.* ¶¶ 14, 18). More recently, LVH has expanded its business to offer a full-service, luxury membership community (*id.* ¶ 18). LVH's customer and vendor relationships are valuable, proprietary, and serve as the "lifeblood" of its business, and it deems its customer list and prospective customer, property, and vendor leads as highly confidential (*id.* ¶¶ 15-16, 19).

Benesh is a shareholder and director of LVH who currently resides in Miami, Florida (compl ¶ 6; NYSCEF # 13 – Benesh aff ¶ 1). Benesh also previously served as LVH's president from July 28, 2020, to January 20, 2023 (compl ¶¶ 21, 58). As president, Benesh was responsible for promoting LVH's services and obtaining customers for LVH (*id.* ¶ 24). Benesh also frequently traveled to events and destinations around the world on behalf of LVH (*id.*). For his work, Benesh received an annual base salary of $160,000, with a 7.5% increase effective January 1, 2021, and January 1, 2022, and an annual discretionary bonus (*id.* ¶¶ 25-29).

The Employment Agreement

LVH employed Benesh as president pursuant to an Employment Agreement, dated as of July 28, 2020, by and between Benesh and LVH (compl ¶ 21; NYSCEF # 2 – Employment Agreement). Under the Employment Agreement, Benesh agreed to devote his full-time efforts to LVH's business and affairs (compl ¶ 23). Benesh further agreed to a confidentiality provision, as well as various restrictive covenants, including non-competition and non-solicitation agreements (*id.* ¶¶ 31-36, 38).[2] Pursuant to the Employment Agreement, LVH could immediately terminate Benesh's employment for cause in the event of, among other things, breaches of the confidentiality and restrictive covenants (*id.* ¶ 39).

As is relevant here, the Employment Agreement also included choice-of-law and forum-selection provisions (Employment Agreement § 11 [e]). Regarding choice-of-law, the parties agreed that the Employment Agreement "shall be governed by and interpreted and enforced in accordance with the internal laws of the State of New York, without regard to conflict of laws principles" (*id.*). As for jurisdiction and venue, the parties "consent[ed] to the exclusive jurisdiction in any state or federal court sitting in New York, New York" (*id.*). Notably, the parties "irrevocabl[y] waive[d] any objection, including without limitation any objection . . . based on the grounds of *forum non conveniens*, which [they] may now or hereafter have to the bringing of any action or proceeding in such jurisdiction" (*id.*).

Benesh's Alleged Employment Agreement Breaches and Subsequent Termination

According to the Complaint, Benesh repeatedly breached the terms of the Employment Agreement by competing with LVH for luxury rentals, soliciting

[2] The restrictive covenant provisions were in place during the term of the Employment Agreement and lasted a period of 12 months following a for-cause termination (compl ¶ 37).

customers for competing deals, misappropriating business opportunities, fees, and assets, and developing a competing membership-based business (compl ¶ 40). For example, in the summer of 2022, Benesh purportedly solicited an individual with which LVH had a pre-existing customer relationship to rent a villa on the island of St. Barth during the period of December 20, 2022, to January 3, 2023 (*id.* ¶¶ 41-42). That same summer, Benesh diverted a business opportunity away from LVH in Capri, Italy, which is a territory in which LVH has dozens of properties (*id.* ¶ 44). And at another point in 2022, LVH alleges upon information and belief, Benesh brokered a booking for a property in Miami, Florida, without disclosing the booking to LVH (*id.* ¶ 48). LVH claims that Benesh kept these bookings off LVH's books and records, failed to adhere to LVH's policies and procedures, and retained booking fees for himself (*id.* ¶¶ 42-43, 46-54). All the while, Benesh purportedly represented that he was acting on behalf of LVH (*id.* ¶¶ 43, 46, 51).

LVH uncovered Benesh's dealings in or around December 2022 (compl ¶ 50). Soon after, on January 20, 2023, LVH terminated Benesh's employment for cause (*id.* ¶ 58; NYSCEF # 3). Despite his termination, Benesh has purportedly continued to breach the Employment Agreement by developing and operating since 2022 a directly competing membership business named Kimani Life, which markets itself as a private membership club (compl ¶¶ 59-63; NYSCEF # 4). LVH alleges that, upon information and belief, Benesh misappropriated LVH's confidential and proprietary information and assets to develop and operate this new entity (*id.* ¶ 64).

The Instant Motion

On June 12, 2023, LVH commenced this action against Benesh asserting a claim for breach of the Employment Agreement, as well as seeking a declaration that it validly terminated Benesh's employment for cause (compl ¶¶ 67-83). Benesh moves to dismiss this motion arguing argues that, notwithstanding the Employment Agreement's forum selection clause, the Complaint should be dismissed under the doctrine of *forum non conveniens* and for lack of personal jurisdiction (NYSCEF # 12 – Deft MOL at 3-9; NYSCEF # 28 – Deft Reply at 2-5). (NYSCEF # 9).

At the outset, Benesh avers that dismissal under the doctrine of *forum non conveniens* is warranted because (a) none of the relevant events alleged in the Complaint occurred in New York and the Employment Agreement was executed in Florida, (b) Benesh performed his employment responsibilities in Florida, (c) most witnesses reside outside of New York and are purportedly located in Florida, (d) this court would be unable to compel out-of-state witness testimony at trial, (e) Benesh would be unable to pursue indemnification claims in New York, and (f) Florida is a readily available alternative forum (Deft MOL at 4-5; Deft Reply at 3-4). To address the parties' apparent consent to jurisdiction and venue in New York, Benesh contends that the forum selection clause is unenforceable because it does not meet the requirements of sections 5-1401 and 5-1402 of the General Obligations Law

(GOL) (Deft MOL at 7-8). And if the forum selection clause is unenforceable, Benesh argues, the court lacks personal jurisdiction over him (*id.* at 9-10; Deft Reply at 4-5).

Benesh separately challenges the enforceability of the Employment Agreement and the sufficiency of LVH's claims for breach of contract and declaratory relief (Deft MOL at 10-12). As to the enforceability of the Employment Agreement, Benesh argues that the Employment Agreement is unenforceable and void because it was executed under duress (*id.* at 10-11). In support of this defense, Benesh avers that, prior to executing the Employment Agreement, he was allegedly threatened by investors, intimidated by LVH's management and board members, and suffered health complications after contracting COVID-19 on or around March 2020 (NYSCEF #13, Benesh aff ¶¶ 5-17). Regarding the sufficiency of LVH's breach of contract and declaratory relief claims, Benesh argues that LVH's claims are pleaded in conclusory fashion and without a scintilla of supporting evidence (Deft MOL at 11-12). He also challenges the scope of remedies sought by LVH (*id.*).

In opposition, LVH argues that the Employment Agreement's forum selection clause is enforceable and, in any event, Benesh's *forum non conveniens* argument is meritless (NYSCEF # 22 – Pltf MOL at 8-14). To start, LVH avers that, under New York law, forum selection clauses are considered "prima facie valid," and Benesh has failed to overcome that presumption in his motion (*id.* at 9, citing Barton aff at NYSCEF 23, ¶¶ 4-12). LVH further argues that Benesh's reliance on GOL §§ 5-1401 and 5-1402 is misplaced; rather than limiting the use and effectiveness of a forum selection clause when the statutes' requirements are not otherwise met, the statute merely creates a threshold by which New York courts use to enforce forum selection clauses selecting New York as the forum (Pltf MOL at 8-9). LVH asserts that Benesh does not identify any compelling circumstances to disturb LVH's choice of forum to support Benesh's *forum non conveniens* contentions (*id.*).

LVH also challenges Benesh's contention that the Employment Agreement is void and unenforceable as a product of duress (Pltfs opp at 14-17). As a preliminary matter, LVH argues that the Benesh Affidavit is improper because it merely introduces a new, highly factual purported theory of "duress" and fails to show that how an undisputed material fact alleged in the Complaint is not a fact at all (*id.* at 14-15). LVH further argues that, even if Benesh's affidavit were considered, it fails to establish that he was compelled to agree to the Employment Agreement by means of a wrongful threat precluding the exercise of free will (*id.* at 15-16). Turning to the sufficiency of its claims, LVH contends that the Complaint contains a detailed set of allegations, and that Benesh's challenges to the sufficiency of the complaint are largely conclusory and deficient (*id.* at 17-20).

Legal Standards

Pursuant to CPLR 327, which codifies the common-law doctrine of *forum non conveniens*, a court may "stay or dismiss [an] action in whole or in part on any

conditions that may be just" if it finds that "in the interest of substantial justice the action should be heard in another forum" (CPLR 327 [a]). When addressing a motion to dismiss based on *forum non conveniens*, courts will consider "the burden on the New York courts, the potential hardship to the defendant, and the unavailability of an alternative forum in which plaintiff may bring suit," as well as whether "the transaction out of which the cause of action arose occurred primarily in a foreign jurisdiction" (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984]). No one factor is controlling, but it is the defendant's "heavy burden" to demonstrate that "relevant private or public interest factors [] militate against accepting the litigation" (*Bank Hapoalim (Switzerland) Ltd. v Banca Intesa S.p.A.*, 26 AD3d 286, 287 [1st Dept 2006]).

Meanwhile, CPLR 3211(a)(7) provides that a party may move for judgment dismissing one or more causes of action when a "pleading fails to state a cause of action." The court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]). Whether a plaintiff can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Finally, a motion to dismiss pursuant to CPLR 3211(a)(1) may be granted if "the documentary evidence 'utterly refutes plaintiff's factual allegations' and 'conclusively establishes a defense to the asserted claims as a matter of law'" (*Mill Fin., LLC v Gillett*, 122 AD3d 98, 103 [1st Dept 2014] [internal citations omitted]). In "those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference" (*Morgenthow & Latham v Bank of N.Y. Co., Inc.*, 305 AD2d 74, 78 [1st Dept 2003]).

Discussion

I. Forum Non Conveniens and the Forum Selection Clause

The primary basis under which Benesh seeks dismissal of the Complaint is that a court sitting in New York is an inconvenient forum for the parties' dispute (Deft MOL at 3-7). As Benesh necessarily acknowledges, however, the Employment Agreement contains a choice-of-forum provision under which the parties expressly consented to "the exclusive jurisdiction in any state or federal court sitting in New York, New York" and "irrevocabl[y] waive[d] any objection . . . based on the grounds of *forum non conveniens*" (Employment Agreement § 11 [e]). Benesh therefore attacks the forum selection clause as unenforceable under New York law (Deft MOL at 3-7). The court disagrees.

It is the "well-settled policy of the courts of this State to enforce forum selection clauses" (*Sydney Attractions Group Pty Ltd. v Schulman*, 74 AD3d 476, 476 [1st Dept 2010]). This policy is based on courts' recognition that such clauses "provide certainty and predictability in the resolution of disputes" (*Boss v Am. Express Fin. Advisors, Inc.*, 6 NY3d 242, 247 [2006]). Courts thus deem forum selection clauses as "prima facie valid and enforceable unless shown by the resisting party to be unreasonable" (*Brooke Group Ltd. v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]). Specifically, a party seeking to set aside a forum selection clause must establish that enforcement would be "unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court" (*British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234, 234 [1st Dept 1991]). In the absence of such a showing, the party challenging the validity of the forum selection clause will be "precluded from attacking the court's jurisdiction on forum non conveniens grounds" (*Express Trade Capital, Inc. v Horowitz*, 198 AD3d 529, 530 [1st Dept 2021], citing *Sterling Natl. Bank v E. Shipping Worldwide, Inc.*, 35 AD3d 222, 223 [1st Dept 2006]).

Here, Benesh fails to make any showing that enforcement of the Employment Agreement's forum selection clause would be unreasonable and unjust, such that he would be deprived of his day in court. At most, Benesh avers that Florida is a viable alternative forum, that he and certain witnesses live in Florida, that he would have to incur expenses to subpoena Florida witness for depositions, and that live witness testimony from unspecified witnesses is preferable to using deposition excerpts at a trial (*see* Deft MOL at 3-7; Deft Reply at 2-4).[3] But regardless of what merit (if any) these contentions may have in support of a *forum non conveniens* analysis, they are, standing alone, plainly insufficient to establish that enforcement of a forum selection clause is unreasonable and unjust (*see Matter of Fidelity & Deposit Co. of Md. v Altman*, 209 AD2d 195, 195 [1st Dept 1994] [holding that defendants failed to establish that enforcement of forum selection clause was unjust even though "most of the defendants neither reside nor work in New York"]; *Horton v Concerns of Police Survivors, Inc.*, 62 AD3d 836, 836-837 [2d Dept 2009] [concluding that plaintiff failed to "make the requisite 'strong showing' that the forum selection clause" designating Missouri as the selected forum of choice, even though plaintiff "[was] a single mother who reside[d] with her teenaged daughter in Dutchess County, New York"]).

Benesh's motion is also devoid of any argument that the forum selection clause was the product of fraud or overreach, or that it is otherwise unconscionable.

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[3] Benesh also speculates that he would not be able to pursue indemnification claims against "the real wrongdoers of the Hugh Barton entourage" (Deft MOL at 10). Yet he fails to identify any basis for indemnification in support of this position, including, but not limited to, potential indemnitors outside of Barton (who, in his own affidavit, avers he is a Canadian resident) (*see* Barton aff ¶ 3).

Insofar as Benesh is attempting to address this point by arguing that the forum selection clause was the product of duress because the Employment Agreement was purportedly executed under duress, he fails to establish any grounds to set aside the forum selection clause. To support his duress contentions, Benesh invokes claims of intimidation and threats by unspecified individuals, as well as provides details of his purported health complications stemming from COVID-19 (*see* Benesh aff ¶¶ 12, 14-16). Benesh's contentions are, however, often vague, conclusory and/or self-serving, and, more critically, they repeatedly fail to establish how, if at all, Benesh was rendered incapacitated or unable to exercise his free will when executing the Employment Agreement (*see generally Kranitz v Strober Org.*, 181 AD2d 441, 441 [1st Dept 1991] ["Duress requires a showing of both a wrongful threat and the effect of precluding the exercise of free will"]). Put simply, there is no showing—let alone a strong showing—from Benesh to set aside the forum selection clause as a product of duress.

The only explicit argument Benesh advances to challenge the validity of the forum selection clause is that it does not meet the requirements of GOL §§ 5-1401 and 5-1402 (Defts MOL at 7-8). Benesh's reliance on this statute, however, is misplaced. Under GOL § 5-1401, parties to a contract may agree that New York law will govern their rights and duties, "whether or not such contract . . . bears a reasonable relation to this state" (GOL § 5-1401 [1]). GOL § 5-1402, in turn, opens New York courts up to parties who lack New York contacts but who (1) engaged in a transaction involving $1 million or more, (2) agreed in their contract to submit to the jurisdiction of New York courts, and (3) chose to apply New York law pursuant to, and consistent with requirements set forth in, Section 5-1401 (*see* GOL § 5-1401 [2]; *IRB-Brasil Resseguros, S.A. v Inepar Invs., S.A.*, 20 NY3d 310, 315 [2012]).

Notably, neither nor GOL § 5-1401 nor GOL § 5-1402 function as a "limitation on the use and effectiveness of forum selection clauses" (*Natl. Union Fire Ins. Co. of Pittsburgh, Pa v Worley*, 257 AD2d 228, 230 [1st Dept 1999]). Rather, the statute merely "preclude[s] [] New York court[s] from declining jurisdiction even where the *only* nexus to [New York] is the contractual agreement" (*see id.* at 231, citing *Credit Francais Intern., S.A. v Sociedad Fin. De Comerico C.A.*, 128 Misc 2d 564, 568-569 [Sup Ct, NY County, 1985]; *accord Honeywell Intern. v ARC Energy Servs., Inc.*, 152 AD3d 444, 444 [1st Dept 2017] ["Moreover, the services agreement satisfied the requirements of New York General Obligations Law §§ 5-1401 and 5-1402, and therefore, the court did not have discretion under CPLR 327 (b) to consider the forum non conveniens argument"]; *Credit Suisse Intern. v Urbi, Desarrollos Urbanos, S.A.B. de C.V.*, 41 Misc 3d 601, 603-604 [Sup Ct, NY County, 2013] ["the operative effect of GOL § 5-1402 is to 'preclude a New York Court from declining jurisdiction even where the only nexus is the contractual agreement'"]. Put differently, even if, as is purportedly the case here, certain requirements of GOL § 5-1401 or GOL § 5-1402 are not met, the forum selection clause can still be enforced pursuant to its terms (*see Worley*, 257 AD2d at 231; *see also Beatie and Osborn LLP v Patriot Scientific Corp.*, 431 F Supp 2d 367, 391 n.13 [SD NY 2006]

["Under New York law, forum-selection clauses are [] enforceable in actions involving less than $1 million"]). Here, as a result, the fact that the Employment Agreement is related to labor or personal services and this action involves less than $1 million does not disturb the above conclusion that the forum selection clause is prima facie valid and enforceable and that Benesh has failed to make a showing that enforcement of it would be unreasonable or unjust.

At bottom, because Benesh fails to establish that the forum selection clause—which "irrevocabl[y] waive[d] any objection . . . based on the grounds of *forum non conveniens*" (Employment Agreement § 11 [e])—is unenforceable, his motion to dismiss on *forum non conveniens* grounds is denied.[4]

II. Enforceability of the Employment Agreement and Sufficiency of Pleadings

Benesh advances two additional grounds for dismissal. *First*, Benesh argues that dismissal is warranted because the Employment Agreement is void and unenforceable by virtue of being executed under duress (Deft MOL at 10-11). In support of this alleged defense, Benesh submits the Benesh Affidavit setting forth the purported circumstances preceding his signing of the Employment Agreement (Benesh aff ¶¶ 5-17). *Second*, Benesh contends that the Complaint fails to state causes of action for breach of contract and declaratory relief (Deft MOL at 11-12).

The court first turns to Benesh's claim that the Employment Agreement is void and unenforceable because it was executed under duress. Notably, this contention is entirely dependent on the factual assertions set forth in the Benesh Affidavit. But, as noted above, the Benesh Affidavit largely advances vague and self-serving assertions that, at best, raise questions of fact as to the issue of duress—including whether Benesh ratified the agreement by accepting its benefits for several years (*see Allen v Riese Org., Inc.*, 106 AD3d 514, 517 [1st Dept 2013] ["Ratification occurs when a party accepts the benefits of a contract and fails to act promptly to repudiate it"]). For this reason, the Benesh Affidavit plainly "does not conclusively establish a defense to the asserted claims as a matter of law" (*Asmar v 20th & Seventh Assoc., LLC*, 125 AD3d 563, 564 [1st Dept 2015]). And thus, the Affidavit cannot be relied upon by Benesh to the extent he is seeking dismissal pursuant to CPLR 3211(a)(1) (*see Lowenstein v Sherman Sq. Realty Corp.*, 143 AD3d 562, 562 [1st Dept 2016] [rejecting motion to dismiss on grounds that affidavit submitted in support of motion to dismiss was not documentary evidence and "does not conclusively establish a defense to the asserted claims as a matter of law"]; *see also Mamoon v Dot Net Inc.*, 135 AD3d 656, 657 [1st Dept 2016] ["an

[4] Given that the parties consented to exclusive jurisdiction in any state or federal court sitting in New York, New York, the court need not address Benesh's contention that the court lacks personal jurisdiction over him (*see Express Trade Capital*, 198 AD3d at 530 ["The forum selection clause in the settlement agreement between the parties is a sound basis for the exercise by the court of personal jurisdiction over defendants"]).

affidavit . . . is not documentary evidence"]).[5] Moreover, as the Benesh Affidavit does not otherwise indicate that any material fact in the Complaint is "not a fact at all," the Benesh Affidavit also fails to support dismissal of any of LVH's claims under CPLR 3211(a)(7) (*see High Definition MRI, P.C. v Travelers Cos., Inc.*, 137 AD3d 602, 603 [1st Dept 2016]; *Holmquist v Orphanides*, 219 AD3d 1415, 1416 [2d Dept 2023] [denying motion to dismiss where affidavit did not indicate that allegation was "not a fact at all"]).

Benesh's other bases to dismiss LVH's claims pursuant to CPLR 3211(a)(7) similarly fail. Regarding LVH's breach of contract claim, it is well settled that, to plead a cause of action for breach of contract, a plaintiff must allege that "(1) a contract exists; (2) plaintiff performed in accordance with the contract; (3) defendant breached its contractual obligations; and (4) defendant's breach resulted in damages" (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022] [internal citations omitted]). Here, the Complaint alleges that LVH and Benesh entered into the Employment Agreement on or around July 28, 2020, and that LVH performed under its terms by paying out both a base salary and bonuses to Benesh during the term of his employment (*see* compl ¶¶ 21-22, 25-29, 67-68). The Complaint then alleges the specific terms of Benesh's confidentiality, non-compete, and non-solicitation obligations under the Employment Agreement (*see id.* ¶¶ 23-24, 31-39, 70-74). Benesh, in turn, allegedly breached those obligations by, among other things, (1) soliciting, at various points in 2022, existing LVH customers to book rental properties in, for example, Capri, Italy, the island of St. Barth, and Miami, Florida, (2) failing to disclose his activities to LVH, record his activities in LVH's books and records, or share any collected booking fees with LVH, and (3) developing and operating a business that directly competes with LVH, named Kimani Life (*id.* ¶¶ 40-48, 60-62, 69-75). Because of Benesh's purported breaches, LVH avers damages by virtue of compensation it paid to Benesh, expenses it incurred on Benesh's behalf, and lost past and future revenues and funds (*id.* ¶¶ 4, 15-16, 28-30, 42-43, 45-46, 76). Contrary to Benesh's contention, these detailed allegations are far from conclusory and thus, when accepted as true (as this court must), they are plainly sufficient state a claim.

As for LVH's claim for declaratory relief, the essence of Benesh's challenge appears to be targeted at the purported remedies sought by Count II. But, as LVH observes, a review of the Complaint establishes that the requested remedies to which Benesh takes issue—such as "restraining Benesh from any further operation of or involvement with Kimani Life" and "an award of damages and disgorgement of Mr. Benesh's alleged 'ill-gotten gains'" (Deft MOL at 12)—are plainly tied to LVH's breach of contract claim, not his claim for declaratory relief (*compare* compl ¶ 76

[5] Although Benesh does not explicitly reference CPLR 3211(a)(1) in his notice of motion—or any provision of the CPLR for that matter (*see* NYSCEF # 9)—his duress argument is presented as a contract defense that is supported by the allegations set forth in his affidavit. Accordingly, Benesh appears to be seeking dismissal on the ground that "a defense is founded upon documentary evidence" under CPLR 3211(a)(1).

with id. ¶ 83).[6] Because Benesh does not argue that these remedies are improper in the context of his breach of contract claim, or that LVH's claim for declaratory relief is otherwise improperly pleaded, there is no basis to dismiss this claim.

In sum, because Benesh has failed to establish grounds dismissal of the Complaint under CPLR 3211(a)(1) or (a)(7), his motion to dismiss is denied.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that defendant's motion to dismiss is denied; and it is further

ORDERED that within 20 days of entry of this order, defendant shall file an answer to plaintiff's complaint.

This constitutes the Decision and Order of the court.

01/12/2024
DATE

MARGARET A. CHAN, J.S.C.

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

[6] In a single sentence, Benesh also contends that the "purported non-compete provision of Mr. Benesh's employment at LVH is completely unenforceable due to its overbreadth and incompatibility with New York law" (Deft MOL at 12). This argument, however, is conclusory and entirely unsupported by any citation to either the record or applicable law, and, as a result, it fails to provide any basis for dismissal of LVH's claims.