

Arendas v Shiraz NYC Inc.

2024 NY Slip Op 32934(U)

August 19, 2024

Supreme Court, New York County

Docket Number: Index No. 655832/2023

Judge: Lyle E. Frank

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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. LYLE E. FRANK **PART** **11M**

Justice

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TOM ARENDAS,

Plaintiff,

- v -

SHIRAZ NYC INC., SHIRAZ CREATIVE OF NEW YORK,
LLC, CREATIVE SERVICES WORLDWIDE, LLC, SHAI
TERTNER, JASON HARDER, YANIV COHEN

Defendant.

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INDEX NO. 655832/2023

MOTION DATE 02/29/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for DISMISSAL.

This action arises out of an alleged breach of an employment agreement as well as various violations of the New York State Labor Law.

Defendants, Shiraz NYC Inc., (“Shiraz NYC”), Shiraz Creative of New York, LLC, Creative Services Worldwide, LLC (“CSW”), Shai Tertner, Jason Harder, and Yaniv Cohen, now move to dismiss to the complaint pursuant to CPLR §§ 327, 3211(a)(1) and (a)(7).

Background

Plaintiff, a citizen of the United Kingdom, alleges he was an employee for two of the U.S. based entities, Shiraz NYC, Inc. and Creative Services Worldwide, LLC. Plaintiff alleges that defendants Shiraz Creative of New York LLC and CSW are subsidiaries of and controlled by defendant Shiraz NYC Inc. Defendants Tertner, Harder and Cohen are officers of Shiraz NYC and CSW. Tertner and Cohen are residents of Florida and Harder is a resident of California.

In March 2014, plaintiff alleges that he executed an employment agreement, and was hired as a director by Shiraz NYC Inc. On or about March 10, 2014, plaintiff alleges he also executed a confidentiality agreement that provides for exclusive jurisdiction of any dispute in the state and federal courts of New York.

Plaintiff contends that during the first three months of his employment and continuing thereafter, defendants refused to pay him wages for the services he rendered, including but not limited to, his base salary.

Defendants now move to dismiss the complaint citing to plaintiff's failure to include a fully executed employment and the confidentiality agreement that plaintiff relies on. Defendants also submit affidavits and copies of correspondence between the parties.

Legal Standard

It is well-settled that on a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the pleading is to be liberally construed, accepting all the facts as alleged in the pleading to be true and giving the plaintiff the benefit of every possible inference. *See Avgush v Town of Yorktown*, 303 AD2d 340 [2d Dept 2003]; *Bernberg v Health Mgmt. Sys.*, 303 AD.2d 348 [2d Dept 2003]. Moreover, the Court must determine whether a cognizable cause of action can be discerned from the complaint rather than properly stated. *Matlin Patterson ATA Holdings LLC v Fed. Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]. "The complaint must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory." *Id.*

"In a motion to dismiss pursuant to CPLR § 3211 (a) (1), the defendant has the burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs., LLC v Fimat Futures USA*,

Inc., 290 AD2d 383, 383 [1st Dept 2002] internal quotations and citations omitted). Further, dismissal pursuant to CPLR § 3211(a)(1) is warranted where documentary evidence “conclusively establishes a defense to the asserted claims as a matter of law.” *Gottesman Co. v A.E.W, Inc.*, 190 AD3d 522, 24 [1st Dept 2021].

CPLR § 327 provides “[w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just.” CPLR § 327 (a). Further, CPLR § 327 (b) provides in pertinent part that “the court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract, agreement [...] applies, and the parties to the contract have agreed that the law of this state shall govern their rights or duties [...]” CPLR § 327 (b).

Discussion

Preliminarily defendants contend that the appropriate that this matter should be dismissed based on forum non conveniens and goes on to identify the factors this Court should analyze when making this determination. In so doing, defendants ignore CPLR § 327 (b), which is the basis for plaintiff’s initiation of this New York action. As the ultimate issue of whether there is an enforceable agreement between the parties that contains a forum selection clause is also in dispute in this motion and this action, the Court declines to perform the analysis of CPLR § 327 (a).

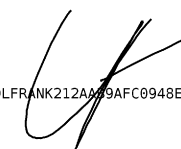
Defendants contend that the unsigned agreement is unenforceable thus should not be the basis for maintaining this action in New York. The Court notes that the cases cited by defendants to support this contention were in a summary judgment stage and rely on evidence submitted by the parties in determining the parties intent to be bound by the unexecuted

agreement (see *Flores v Lower E. Side Serv. Ct., Inc.*, 4 NY3d 363, 368 [2005]; *Ajche v Park Ave. Plaza Owner, LLC*, 171 AD3d 411, 414 [1st Dept 2019]; *Kowalchuk v Stroup*, 61 AD3d 118, 125 [1st Dept 2009])). Accordingly, the portion of defendants motion that seeks dismissal based on forum non conveniens is denied.

In support of the portion of the motion that seeks dismissal based upon documentary evidence, defendant submits email correspondences that purport to establish that the employment agreement annexed by plaintiff is not a valid agreement nor the operable agreement between the parties. Further, defendants attach a multitude of affidavits in support of its motion. Further, defendants contend that plaintiff's failure to attach the alleged confidentiality agreement that contains the forum selection clause is fatal to its claims. The Court does not agree, as it is well established that for the purposes of a motion to dismiss plaintiff receives all favorable inferences and the allegations in the complaint are deemed true.

The Court finds that the documents submitted, are insufficient to establish a defense as a matter of law. Defendant seeks to have the Court make assumptions and credit determinations based on the emails that are refuted by the allegations in the complaint as well as affidavits submitted in opposition to the underlying motion. The arguments and evidence submitted are more akin to a motion for summary judgment. Consequently, the Court finds that at this point, absent discovery, a motion to dismiss is inappropriate. It is hereby

ADJUDGED that the motion to dismiss is denied.


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LYLE E. FRANK, J.S.C.

8/19/2024
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE