SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LYLE E. FRANK** **PART** **11M**

Justice

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MELISSA MCNAMARA

Plaintiff,

- v -

NEGATIVE, INC.,

Defendant.

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INDEX NO. 651709/2024

MOTION DATE 05/17/2024

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, 15, 16, 17

were read on this motion to/for DISMISS.

Upon the foregoing documents, defendant's motion to dismiss is granted in part and denied in part.

Background

Defendant Negative, Inc. ("Defendant"), a women's fashion company, utilized plaintiff Melissa McNamara's ("Plaintiff") services as a demand planner from 2019 to 2023. Payments to Plaintiff were made based on a pay period starting on the first day of a month and ending on the final day of that month. Plaintiff would submit an invoice for her work performed during that month to Defendant at the end of the pay period. Plaintiff alleges that Defendant was late in paying 12 of the invoices and that Defendant still owes Plaintiff a sum of more than $6,000 dollars.

Plaintiff filed the underlying suit alleging violations of three sections of the Freelance Isn't Free Act ("FIFA") found in the New York City Administrative Code ("NYCAC"). Defendant opposes and brings the present motion, seeking to dismiss the complaint under CPLR § 3211(a)(1) and (7).

Standard of Review

It is well settled that when considering a motion to dismiss pursuant to CPLR § 3211, "the pleading is to be liberally construed, accepting all the facts alleged in the pleading to be true and according the plaintiff the benefit of every possible inference." *Avgush v. Town of Yorktown*, 303 A.D.2d 340 (2d Dept. 2003). Dismissal of the complaint is warranted "if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc*, 29 N.Y.3d 137, 142 (2017).

CPLR § 3211(a)(1) allows for a complaint to be dismissed if there is a "defense founded upon documentary evidence." Dismissal is only warranted under this provision if "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez,* 84 N.Y.2d 83, 88 (1994).

A party may move for a judgment from the court dismissing causes of action asserted against them based on the fact that the pleading fails to state a cause of action. CPLR § 3211(a)(7). For motions to dismiss under this provision, "[i]nitially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *Guggenheimer v. Ginzburg*, 43 N.Y. 2d 268, 275 (1977).

Discussion

Defendant is moving to dismiss the complaint for three reasons: 1) that the claim is time-barred under the FIFA two-year statute of limitations; 2) that the monthly invoices Plaintiff provided to Defendant constitute a written contract; and 3) that documentary evidence refutes the claims that the invoices were paid within 30 days of Plaintiff tendering them to Defendant. For

the reasons that follow, the motion is granted as to any FIFA § 20-928(a) claims before April 3, 2022, and denied as to the first cause of action.

Statute of Limitations for the NYCAC § 20-928 Claim Began to Run on April 3, 2022

Under NYCAC § 20-933(a)(2), any action alleging a violation of NYCAC § 20-928 (as the complaint here does in the second cause of action) must be brought "within two years after the acts alleged to have violated this chapter occurred." Defendant argues that the second cause of action fails as time-barred under this section, because Plaintiff would have been required to have brought her case within two years of being retained by Defendant. But Plaintiff contends that she worked for Defendant on a month-to-month basis and submits as sworn affirmation to that effect. She argues that this makes the Complaint timely under FIFA as the time should run from the "final day that she began to provide monthly services as a freelancer with defendant."

There has been sparse judicial interpretation of NYCAC § 20-933(a)(2). The words of the statute states that the time runs when "the acts alleged to have violated this chapter occurred." One trial court applied the statute and held that work performed more than two years before filing suit was barred as untimely, but the rest could continue. *Tan v. Breathing.AI LLC*, 2023 N.Y. Misc. LEXIS 2963 *6 (Sup. Ct. June 20, 2023). The continuing wrong doctrine is an exception to the general statute of limitations rule and is "usually employed where there is a series of continuing wrongs and serves to toll the running of a period of limitations to the date of the commission of the last wrongful act." *Henry v. Bank of Am.*, 147 A.D.3d 599, 600 (1st Dept. 2017). The crucial distinction for this doctrine is "between a single wrong that has continuing effects and a series of independent, distinct wrongs." *Id.*, at 601.

Here, each invoice was separate and each month that Plaintiff performed services without a contract would constitute an independent wrong. The language of NYCAC § 20-928(a), which

forms the basis for the second cause of action, states that a written contract is required "[w]henever a hiring party retains the services of freelance worker." While Defendant did first retain Plaintiff's services in approximately January 2019, more than two years before the complaint's date of April 3, 2024, not all of the work Plaintiff performed without a written contract took place outside the relevant time period. Each month that Plaintiff performed work for Defendant was a month that she was retained. Therefore, Plaintiff's second cause of action is dismissed as time-barred to the extent that it covers work performed without a valid written contract prior to April 3, 2022. To the extent that Plaintiff's services were retained on a monthly basis for the time between April 3, 2022, and the final work date of May 2023, the motion to dismiss the second cause of action is denied.

The Monthly Invoices Were Not Written Contracts Under NYCAC § 20-928

Defendant argues that the entirety of Plaintiff's claim under NYCAC § 20-928 must be dismissed because the monthly invoices constituted a written contract under New York law. But the terms of NYCAC § 20-928(b) are clearly forward looking, as the statute requires that the written contract contain "[a]n itemization of all services to be provided by the freelance worker, the value of the services to be provided pursuant to the contract." Even if the invoices were a form of contract, they would not qualify under FIFA. Therefore, the motion to dismiss the second cause of action in its entirety is denied, but any month-long instance of performing services without a contract that occurred more than two years before Plaintiff filed this suit is time-barred, as indicated above

The First Cause of Action Does State a Claim under NYCAC § 20-929

Plaintiff alleges that 13 invoices were paid late during the working relationship between the parties and that therefore under NYCAC § 20-929, Plaintiff is entitled to damages. This

section of FIFA states that if there is no contractual specification as to payment date, "the hiring party must pay the contracted compensation or the mechanism by which such date will be determined, no later than 30 days after the completion of the freelance worker's services under the contract." NYCAC § 20-929(a)(2). Defendant argues that some of the invoices at issue in this case were not paid late because they were paid within 30 days of the submission of the invoice, and that the remaining late payments were only "trivially" late, thus justifying the dismissal of the first cause of action.

But the statute is clear that the relevant date is the completion of the services, not the submission of an invoice detailing such services. Here, Plaintiff performed work on a month-to-month basis with the pay period ending on the final day of the month. Therefore, any invoice due that was paid more than 30 days from the final day of the month in which services were performed is late under the statute. The statute is silent as to any "trivial" or *de minimis* violations, and the Court will not read such a relaxation of the requirements into the statute. Therefore, the motion to dismiss the first cause of action is denied.

Finally, any argument as to improper amount of damages sought under the statute is a calculation of damages issue, and not the proper basis for a motion to dismiss. The Court has considered the defendant's remaining arguments and found them unavailing. Accordingly, it is hereby

ADJUDGED that the motion to dismiss plaintiff's second cause of action for violations of NYCAC § 20-928 is granted only as to events prior to April 3, 2022; and it is further

ADJUDGED that the motion to dismiss the rest of plaintiff's complaint is denied.

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11/18/2024
DATE

LYLE E. FRANK, J.S.C.

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